
(1971) 11 OHC CK 0018
In the Orissa High Court
Case No : Second Appeal No. 170 of 1968

Balakrishna Sahu

APPELLANT

Vs

Radha Gobind Das and Others

RESPONDENT

Date of Decision : 19-11-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2

Citation : AIR 1972 Ori 211 : (1972) 38 CLT 95

Hon'ble Judges : S.K. Ray, J

Bench : Single Bench

Advocate : B.K. Pal, A. Mohanty and B. Pal, for the Appellant; N. Mukherjee, for the Respondent

Judgement

S.K. Ray, J.—Defendant 1 is the appellant. The appeal arises out of a suit for declaration of plaintiffs' title to the suit land containing a house, for recovery of arrears of rent of Rs. 190/- for a period of one year and seven months, at the rate of Rs. 10/- a month, and for eviction of defendant 1 from the suit house.

2. The disputed land relates to a part of plot No. 159 appertaining to khata No. 66 and a part of plot No. 160 appertaining to tohata No. 59. Both these plots lie in mouza Suasuni in the district of Balasore.

With regard to the plaintiffs' title to part of plot No. 159. they trace it in the following manner. This plot originally belonged to Kandarpa Patra and Kartik Patra whose total area was four decimals. The original owners sold two decimals to one Ambika and two decimals to one Haradwar. Ambika in his turn sold one decimal to Iswar Chandra Pal and Iswar Chandra Pal sold that to the plaintiffs. Hardwar the second purchaser of two decimals from the original owner sold it to Raghubir and Raghubir sold his share to the plaintiffs. Thus the plaintiffs acquired three decimals out of the total area of four decimals comprised in plot No. 159.

With regard to plot No. 160, it originally belonged to Bihari Patra and others, The total area of this plot is six decimals. Bihari sold three decimals to Hardwar and

three decimals to Ambika. Hard-war sold his three decimals to Raghubir, and the latter sold it to the plaintiffs under Ext. 6. Ambika sold 1.1/2 decimals to Iswar Chandra Pal under Ext. 5, and Iswar sold the same to the plaintiffs under Ext. 7. Thus, the plaintiffs acquired 0.4 1/2 decimals in plot No. 160 out of its total area of six decimals.

3. The plaintiff's case is that the land purchased by them which appertains to plot No. 160 contained a residential house. The defendant was inducted as a tenant in respect thereof by Iswar Chandra Pal, the plaintiffs' vendor and after transfer of the land to the plaintiffs, the defendant continued as a tenant under the plaintiffs over 0.2 1/2 decimals of plot No. 160. Under the agreement of tenancy with Iswar Chandra Pal the defendant was to pay Rs. 10/- per month as rent for the house. This, in short, is the plaintiffs' case for the aforesaid reliefs.

4. Defendant No. 1's case is that the suit-house stands on plot No. 31 which he had obtained by an oral lease on payment of salami of Rs. 25/- from Purna Das, Nalini Das and Sarat Das. This plot No. 31 is to the east adjoining of plot No. 160. The plaintiffs, therefore, are not entitled to the decree for eviction or for arrears of rent. In other words, the case of the defendant is a denial of his tenancy and denial of plaintiffs' title to the house. In view of this case the defendant can have no quarrel with the plaintiffs' claim for relief for declaration of their title to the land they purchased from plot Nos, 159 and 160.

5. Both the courts below have dismissed the suit for eviction on the ground that notice u/s 106 of the T. P. Act was defective; but they decreed the suit for declaration of title and recovery of arrears of rent as claimed.

6. The crucial points arising for adjudication are: (a) whether the suit-house and the house-site is part of plot No. 160 and whether the part of plot No. 160 on which the suit-house stands was purchased by the plaintiffs; and (b) whether the monthly rate of rent claimed was stipulated to be Paid by the defendant.

7. It is argued that the mere finding that the suit-house stands on a portion of plot No. 160 would not entitle the plaintiffs to the decree for eviction or rent until it is further established that part of plot No. 160 which constitutes the house-site was purchased by the plaintiffs. In reply the plaintiffs' counsel contends that the defendant never raised the plea that the suit-house did not stand on that part of plot No. 160 which was purchased by the plaintiffs and since his only defence was that it appertains to his plot No. 31 he should not be permitted to launch this additional attack on plaintiff's title and that the plaintiffs' suit must succeed as soon as it is found that the suit-house appertains to plot No. 160. I think this contention of the plaintiffs cannot be countenanced. Where in a suit for ejectment the defendant denies the title of the plaintiff he can under that plea, when the plaintiff discloses his title, raise other defects of title, which might be disclosed. It has been laid down by the Privy Council in the case of Jagdish Narain v. Nawab Said Ahmed Khan. AIR 1948 PC 59:

"Where a plaintiff sues in ejectment, he can succeed on the strength of his own

title. There is no obligation upon the defendant to plead possible defects in the plaintiff's title which might manifest themselves when the title is disclosed. It is sufficient that in the written statement the defendant denies the plaintiff's title, and under this plea he can avail himself of any defect which, such title discloses,"

8. A Civil Court Commissioner had been taken out to identify the suit-house and he has submitted a report saying that the suit-house mainly stands on plot No. 160 and every little portion of it stands on plot No. 31. The Commissioner does not appear to have stated that the portion of plot No. 160 on which the major part of the suit-house stands was the portion purchased by the plaintiffs. There is accordingly no finding rendered by the lower appellate court that the suit-house stands on that portion of plot No. 160 which the plaintiffs had purchased from Iswar Chandra Pal. It will be remembered that the plaintiffs' case is that the suit-house stands on that portion of plot No. 160 which they purchased from Iswar Chandra Pal and that the defendant was a tenant under that Iswar Chandra Pal. That being the positive case of the plaintiffs, it is the clear duty of the court-of-fact to find out if the suit-house stands on that part of plot No. 160 which the plaintiffs purchased from Iswar Chandra Pal.

If the Commissioner's report is inadequate to prove or contains no sufficient materials to establish this fact alleged by the plaintiffs and this deficiency in evidence prevented the lower appellate court to render this essential finding, it was open to it to direct another survey-knowing commissioner to identify the land purchased by the plaintiffs from Iswar Chandra Pal and then to pin-point the suit-house with reference to that area. In absence of such finding as indicated above, it is impossible to decree the suit for declaration of title to the land on which the suit-house stands.

9. There is also no finding by the courts below of any tenancy agreement between the plaintiffs and defendant 1, or between defendant 1 and the vendor of the plaintiffs stipulating for payment of monthly rent of Rs. 10/-. It appears that the lower appellate court after finding plaintiffs' title to the land containing the suit-house assumed, that the rate of rent payable was Rs. 10/- per month. It was incumbent upon the final court-of-fact to reach a conclusion as to whether there was any tenancy subsisting between defendant 1 and the plaintiffs, and that the former was liable to pay rent at the rate of Rs. 10/- per month and that there were arrears for the period indicated in the plaint.

10. For the aforesaid reasons I must set aside the judgment and decree of the lower appellate court and send the case back to him for a fresh disposal. He must find if the suit-house stands on the land purchased by the plaintiffs from Iswar Chandra Pal. Even if the house does not appertain to the land purchased from Iswar Chandra Pal, but appertains to the other portion of plot No. 160 purchased by them then also the plaintiffs suit shall succeed. The plaintiffs have stated in the plaint that they purchased 0.4 1/2 decimals out of plot No. 160 and even though they have stated that the suit-house appertains to the land purchased from Iswar Chandra Pal. they must, nevertheless succeed if ultimately

it is found that the suit-house instead of appertaining to the portion purchased under the sale-deed from Iswar appertains to the other portion of the land purchased under the other sale-deed.

The lower appellate court must also record a finding as to the rate of rent payable by defendant 1 in respect of the suit-house before he decrees the claim for arrears of rent.

In the result, the judgment and decree of the lower appellate court are set aside, and the case is remanded to the lower appellate court for a fresh disposal according to law keeping in mind the observations made above.

Costs will abide the result.