

(2000) 04 OHC CK 0035

In the Orissa High Court

Case No : Second Appeal No. 12 of 1985

Bancha Padhan and Another

APPELLANT

Vs

Loka Pandi (having died) Surukha Pandi and Others

RESPONDENT

Date of Decision : 20-04-2000

Acts Referred:

Specific Relief Act, 1877 — Section 38, 54
Specific Relief Act, 1963 — Section 38

Citation : (2000) 90 CLT 234

Hon'ble Judges : P.K. Misra, J

Bench : Single Bench

Advocate : S.N. Sathapathy, for the Appellant; J.K. Misra, N.C. Misra and S.K. Mohapatra, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Misra, J.—Plaintiffs are the Appellants against a confirming decision. The suit was filed for permanent injunction on the footing that the Plaintiffs had purchased the disputed property admittedly from the predecessors-in-interest of the Defendants. The Defendants filed written statement challenging the averments made in the plaint. It was specifically pleaded that the Defendants are in possession and as such prayer for injunction is not maintainable.

2. The trial court found that the sale in favour of the Plaintiffs was genuine and for consideration. However, the trial court dismissed the suit on the finding that at the time of filing of the suit, the Plaintiffs were not in possession.

3. In appeal, the findings of the trial court having been confirmed, the present Second Appeal has been filed.

4. At the time of admitting the Second Appeal, the following substantial question of law had been framed:

...The substantial question of law involved in this case is if in the facts and circumstances, a decree for permanent injunction can be granted having regard

to the principles contained in Illustration-(o) to Section 38 of the Specific Relief Act. 1877.

Section 38 of the Specific Relief Act, 1877, does not relate to question of injunction and relates to question of rescission of contracts as contained in Chapter-IV of the Specific Relief Act, 1877. It also does not contain any Illustration-(o),. On the other hand, Section 54 of the Specific Relief Act, 1877, which corresponds to Section 38 of the Specific Relief Act 1963, relates to question of perpetual injunctions, as contained in Chapter-X of the old Act corresponding to Chapter-VIII of the Specific Relief Act,1963. In Section 54 of the Specific Relief Act, 1877, Illustration-(o) is available. It is, thus, obvious that the learned Judge intended to refer to Section 54, Illustration-(o) of the Specific Relief Act, 1877, while framing substantial question of law. In the Specific Relief Act, 1963, though Section 54 of the Specific Relief Act, 1877 has been re-enacted as Section 38, the illustrations given in Section 54 of the Specific Relief Act, 1877, have been omitted. Since the suit has been filed after the new Specific Relief Act, 1963 came into force, the question of applying the principles envisaged in Illustration (o) may not arise. However, even assuming that the court can refer to such illustration as contained in Specific Relief Act, 1877, in the facts and circumstances of the present case, the principles envisaged in Illustration (o) to Section 54 of the Specific Relief Act, 1877, can have no application. For convenience, Illustration (o) is extracted hereunder:

54.

xx xx xx

Illustration:

(a) to (n),.....

(o) A, the owner of certain houses in Calcutta, becomes insolvent. B buys them from the official assignee, and enters into possession. A persists in trespassing on and damaging the houses and B is thereby compelled at considerable expense to employ men to protect the possession. B may sue for an injunction to restrain further acts of trespass.

A bare perusal of the aforesaid illustration makes it clear that it has got no application to the facts and circumstances of the present case.

5. Law is now well-settled that in order to obtain a decree for permanent injunction, it has to be proved that the Plaintiff is in possession. In view of the concurrent findings that the Plaintiffs are not in possession, the suit for permanent injunction has been rightly rejected.

6. The learned Counsel for the Appellants, however, submitted that in order to avoid further litigation in the matter, the Plaintiff-appellants may be permitted to amend the plaint appropriately by incorporating a prayer for recovery of possession. The learned Counsel appearing for the Defendant-respondents, on

the other hand, submitted that such an amendment should not be entertained in second appellate stage and, at any rate, the Defendants had claimed adverse possession over the disputed property which had not been determined by both the courts below in view of the findings of the courts below that the suit for injunction simpliciter was not maintainable. He has, therefore, submitted that in case Plaintiffs are allowed to amend the plaint by incorporating prayer for recovery of possession, the claim of the Defendants relating to adverse possession should also be determined. He has also submitted that the finding to the effect that the Defendants are in possession being concurrent finding of fact should not be disturbed.

7. Having regard to the facts and circumstances of the case, while affirming the findings of the courts below that the sale deed in favour of the Plaintiffs was genuine and supported by consideration, I remand the matter to the trial court to enable the Plaintiffs to file a petition for amendment of the plaint by incorporating appropriate prayer for recovery of possession. The findings of the court below relating to possession of the Defendants are also confirmed. If the plaint is amended to incorporate the prayer for recovery of possession, the further question to be decided by the trial court would be relating to the plea of adverse possession of the Defendants which had been raised in paragraph 4 of the written statement. An appropriate issue to that effect shall be framed and the parties shall be given opportunity of adducing evidence on that aspect. This order is subject to the condition that the Plaintiffs shall pay cost of Rs. 300/- (rupees three hundred) which should be paid to Mr. J.K. Misra, counsel appearing for the Defendant-respondents in this Court, on or before 26th June, 2000. If the cost is not paid, this direction giving permission to the Plaintiffs to file petition for amendment shall be deemed to have been recalled and the suit shall be deemed to have been dismissed. The L.C. R. shall be sent to the courts below after 26th June, 2000 after recording the factum of payment or non-payment of cost, as the case may be. Plaintiffs shall be given one month's time after receipt of the L.C.R. for filing the petition for amendment. Thereafter, the matter should be disposed of as expeditiously as possible preferably within a period of four months. If prayer for recovery of possession is made, the Plaintiffs should be required to pay the ad valorem court-fee on the plaint.

8. Second Appeal disposed of, case remanded.

Revision dismissed.