

(1981) 08 OHC CK 0012
In the Orissa High Court
Case No : Second Appeal No. 343 of 1977

Bijli alias Pundhini Luhara and Others	Vs	APPELLANT
Gouri Sankar Misra and Others		RESPONDENT

Date of Decision : 26-08-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Transfer of Property Act, 1882 — Section 106, 114

Citation : (1981) 52 CLT 389

Hon'ble Judges : R.N. Misra, C.J

Bench : Single Bench

Advocate : S.S. Basu and R.K. Das, for the Appellant; S.N. Sinha and C. Pani, for the Respondent

Final Decision : Dismissed

Judgement

R.N. Misra, C.J.—This appeal u/s 100 of the CPC is directed against the affirming judgment and decree of the learned District Judge of Sambalpur by the Defendants in a suit for declaration of title and eviction of the Defendants from a plot of land with a house standing thereon as described in Schedule B of the plaint and for a mandatory injunction against the Defendants 1 to 3 for removing the encroachment. Plaintiff had also sued for damages.

2. Plaintiff alleged that the land on which the suit house stands was allotted to him in a family partition. One Ratan Luhura, father of original Defendant No. 1, was in forcible occupation of the land appertaining to Bunglow Site Plot No. 71 described in Schedule-A. Plaintiffs father brought Title Suit No. 45 of 1933 in the Court of the Munsif, Sambalpur, for declaration of title and eviction of Ratan and the suit was compromised on 15-3-1944 according to the terms whereof Ratan gave up possession of the site and rooms but was allowed to continue in occupation of rooms described in Schedule-B of the plaint on condition of payment of annual rent of Rs. 250/-. It was a further term of the compromise that on failure to pay the rent, Plaintiffs father had the right to evict Ratan. Ratan

continued to pay the rent till 1952, but when he died, original Defendants 1 to 3 failed to pay the rent and stated setting up a claim of title by adverse possession and even changed the construction by making extensions and encroachments. Plaintiff had started a proceeding under the Orissa House Rent Control Act, but having failed to get relief in such proceeding ultimately filed the suit on 18-4-1963.

3. Original Defendant No. 1 was the son of Ratan while original Defendant No. 2 was the widow of said Ratan. Both the Defendants died during the pendency of the suit, and their legal representatives were brought on record. The Defendant's case was that Ratan had acquired non-evictable right to the property and his heirs had succeeded to the same right. It was further pleaded that the suit land belonged to one Harihar Pujhari, a Sebait of the Deity Budharaja who settled the property with Ratan in 1924. After Harihar, his son Sambhunath ratified the same by executing a document vide Ext. G. Defendants also alternately pleaded title by adverse possession. It was contended that the Civil Court had no jurisdiction to entertain the suit.

4. On the basis of evidence led before him, the learned Munsif came to hold that the Defendants had no title through Ext. G for the suit property and the Plaintiff was entitled to evict them. He held that the provisions of the Orissa Land Reforms Act were not applicable and the Civil Court had jurisdiction to entertain the suit. Accordingly, the suit was decreed. The learned Munsif, however, dismissed the claim for damages.

5. In appeal, four grounds were raised as would appear from paragraph 7 of the appellate judgment. The lower appellate Court examined all the points, dealt with the evidence on record afresh and came to the self-same conclusion. The Plaintiff had preferred a cross-objection for damages which, however, was dismissed. The second appeal is thus directed against the affirming decree of the lower appellate Court.

6. The appeal was presented with a set of grounds, but as would appear from order No. 7 dated 20th of January, 1978, the appeal was admitted to consider two additional grounds raised with leave of the Court, being grounds Nos. 17 and 19. These additional ground are to the following effect:

17. For that according to the finding of the learned lower appellate Court that the rooms in question from which eviction was sought for were constructed by the ancestors of the Defendants and the lands on which they stand belong to the Plaintiff, it does not absolve the Plaintiff from giving statutory notice under Sections 106 and 114(g) of the Transfer of Property Act even if the title of the Plaintiff as to the rooms has been denied.

19. For that the further substantial questions of law involved in the appeal are as follows:

(a) Whether notice under Sections 106 and 114(g) of T.P. Act is required to be

served on the Defendants in a suit for eviction when the Defendants denied the title of the Plaintiff in respect of the rooms from which eviction is sought for, constructed by the Defendants ancestor according to the finding of the learned lower Court.

(b) Denial of title of the Plaintiff in the instant case in Respondent of the room is not a fake claim since they were construed by the ancestors of Defendants and it has been found as such by lower Court, can a decree for eviction be passed without a notice under Sections 106 and 114(g) of the T.P. Act?

The learned Appellate Judge recorded a clear finding in paragraph 13 of his judgment on the basis of series of authorities that want of notice had to be pleaded and in the absence of such plea in the written statement, the question could not be permitted to be raised at a later stage. Admittedly, no such plea was taken in the written statement. Therefore maintainability of the suit without notice for determination of the tenancy was not an issue framed by the trial Court. If the question of notice had been pleaded, the Plaintiff could have proved notice. The plea of want of notice is available to be waived and where such a plea has not been taken on the basis of general title, Plaintiff can succeed in his action. The facts of the present case are somewhat peculiar and in the absence of a specific plea of want of notice, the learned Appellate Judge had rightly refused to entertain the question raised for the first time before him in appeal relating to want of notice. I do not think, on the basis of these grounds referred to above, the second appeal can succeed.

The appeal has no merit and is dismissed. In the peculiar facts of the case, I think it appropriate that parties should bear their own costs throughout.