

(1995) 08 OHC CK 0015

In the Orissa High Court

Case No : Second Appeal No. 256 of 1983

Braja Kishore Sahu and Others

APPELLANT

Vs

Smt. Sailabala Sahu and Others

RESPONDENT

Date of Decision : 11-08-1995

Acts Referred:

Citation : (1995) 2 OLR 348

Hon'ble Judges : R.K. Dash, J

Bench : Single Bench

Advocate : S.K. Nayak 1, S.N. Nayak 2, B. Dash and R.K. Kar, for the Appellant;
R.C. Rath, R. Rath and P.K. Parida, for the Respondent

Final Decision : Dismissed

Judgement

R.K. Dash, J.—Plaintiffs are in appeal against the reversing judgment of the learned Additional District Judge, Cuttack, in Title Appeal No. 95 of 1980 wherein he set aside the judgment and decree of permanent injunction of the learned Munisif, Cuttack, passed in Title Suit No. 71 of 1977.

2. Plaintiffs' father Paramananda Sahu had his residential house over plot Nos. 317, 317/2156 and 317/2157 having an area of Ac.0.42 dec. in Mouza Makhanpur in the town of Cuttack as described in schedule "A" of the plaint. On his death in 1958, the plaintiffs, being his sons succeeded to the suit lands and have been possessing the same as owners. Defendant No. 1, a relation of the plaintiffs, was staying in a rented house along with her husband and when the house owner tried to evict them from the house, the plaintiffs permitted them temporary residence in the house standing on the suit land described in schedule "B" of the plaint. In 1976 plaintiffs intending to make some new construction on schedule "A" land asked the defendants to vacate the "B" schedule land, but defendant No. 1 asserted her title and in collusion with the settlement authorities got her possession recorded in the remarks column of the draft record-of-rights. This led the plaintiffs to file the present suit seeking for permanent injunction restraining the defendants from entering upon the schedule "A" land and

interfering with their possession and for mandatory injunction to recover possession of schedule "B" land.

3. The case of the defendants is that the suit lands were "Khasmahal" lands which originally belonged to Fakir Sahu, paternal grand-father of defendant No. 1. Fakir Sahu died leaving two sons, namely, Dharmananda and Paramanandas. The two brothers lived for some time in joint mess and property and in 1940 they got themselves separated. Dharmananda died in 1949 leaving behind his daughter, defendant No. V. who succeeded to his half interest in the suit lands. It is therefore, urged that defendant No. 1 has title to half of the suit lands described in schedule. "A" of the plaint. Alternatively it is pleaded that by being in possession for more than twelve years defendant No. 1 has acquired title by adverse possession.

4. There were in all eight issues framed by the trial Court. Both the parties led evidence in support of their case and the learned trial Court on appreciation of the evidence held that the plaintiffs and not defendant No. 1, have title to the suit lands and having so held, it decreed the plaintiffs' suit.

On appeal, the learned Additional District Judge having scrutinised the evidence came to hold that defendant No.1's father while living in separate mess and property from his brother died leaving her as only heir and so, on his half interest in the suit lands devolved upon her and not upon his brother. On such conclusion he allowed the appeal and set aside the judgment and decree of the trial Court.

5. Before delving into the merit of the case, it is necessary to state how the question of maintainability of the present suit for permanent injunction simplicitor lost sight of both the Courts below. It is fundamental that a true owner or a person having possessory title can maintain a suit for injunction against a trespasser. But if the defendant refutes his claim and asserts his own title, then determination of the question of title becomes necessary and in that case plaintiff may amend his pleading and seek for a declaration of title or else the Court will have no other alternative but to dismiss the suit, the reason being that in a suit for injunction question of title cannot be gone into and decided. Needless to say that in a suit for declaration with consequential relief, plaintiff is required to pay ad valorem court-fee as provided in Section 7(iv)(c) of the Court-fees Act, but in an injunction suit, court-fee is paid on the value of relief sought. Trial Court should keep itself alive of these legal aspects even if the defendant has not raised the question of maintainability of the suit either in the pleading or during trial.

6. Now coming to the case in hand, there is no dispute that the suit lands are town "Khasmahal" lands which had been taken on lease by Dharmananda and Paramananda for a period of 15 years as evident from the record-of-rights, Ext. A. This is a material piece of evidence and if the same had been taken note of and considered, the ultimate conclusion of the trial Court would have been

otherwise. The Court proceeded with a wrong notion that the suit lands are the ancestral properties of Dharmananda and Paramananda and then by applying the principle of law of inheritance that was in force prior to Hindu Succession Act, 1983, held that since Dharmananda died in jointness in 1944, his interest devolved upon his brother and not upon his daughter, defendant No. 1. The relevant observation of the trial Court in paragraph-10 of the judgment is reproduced hereunder :

"Since Dharmananda died in 1944 his interest in the joint family property devolved upon his brother Paramananda and after his death on his sons, i. e., plaintiffs (who ?) succeeded to the suit land by way of succession. Therefore, the D. 1 had no right over the suit land."

The appellate Court also equally fell into error. It did not look to the nature of the properties to find as to whether it devolved upon Dharmananda's brother by survivorship or upon defendant No. 1 by succession. On re-appraisal of the evidence it held that both the brothers Dharmananda and Paramananda were separated and on Dharmananda's death, his daughter defendant No. 1 succeeded to his interest in the suit lands. On this finding, it allowed the appeal and set aside the judgment of the trial Court.

7. In course of hearing of the appeal when sustainability of the trial Court's judgment was questioned in view of the nature of the properties, as mentioned in Ext. A, the plaintiffs came up with two petitions--one for amendment of the pleadings and Anr. under Order 41, Rule 27, CPC for admitting certain documents as additional evidence. In the proposed amendment they have taken altogether a different stand giving go-by to their earlier pleadings. Admitting that the suit lands were "Khasmahal" leasehold properties of Dharmananda and Paramananda, the plaintiffs have urged that after, the expiry of the lease in 1943 when the Khasmahal authorities proposed to increase the rent, the lessees did not agree for which the authorities on their consent resumed the lands. Subsequently plaintiffs' father Paramananda obtained a fresh lease in his name from the authorities. On his death the plaintiffs also applied in 1973 for settlement in the favour and according the Khasmahal authorities leased out to them for a period of thirty years. This plea of the plaintiffs, in my opinion is after-thought and if the same is accepted, it would altogether change the nature and character of the suit and therefore. I am not inclined to allow the amendment of the pleadings as sought for. So far the prayer for admitting certain documents as additional evidence is concerned, the same merits no consideration, and hence is rejected.

8. Next, the moot point for determination is whether on the death of the lessee the Government Khasmahal land reverts back to the lessor or it devolves by succession upon the lessor's heirs. As has been stated earlier, the suit lands described in schedule "A" of the plaint are town "Khasmahal" lands which had been taken on lease by the predecessors of plaintiffs and defendant No. 1. It is settled law that such land shall be treated as the lessor's own private land which

is both heritable and transferable, In this connection, reference may be made to a decision of this Court in the case of Republic of India v. Prafulla Kumar Samal and Anr. : ILR 1976 Cut 1392, where in paragraph 4 of the judgment it is observed thus :

".....Rights of a lessee in Khasmahal lands are in no way different from those which one has in his, own private land. the lessor's right in the Khasmahal land being heritable and transferable the lessor can create a permanent right of tenancy in his holding. Thus, in all respects the rights of a lessee are just similar to those of an owner of a private land. (See 1935 CLT 34--Munshi Abdul Kadir Khan v. Munshi Abdul Latif Khan and 1937 CLT 67--Madhusudan Swain v. Durga Prasad Bhagat)."

The above being the position of law, Dharmananda and Paramananda, the two lessors were tenants-in-record in respect of the suit lands and on the death of Dharmananda, defendant No. 1 being his only heir succeeded to his half interest therein. Since the lands were the private lands of both the brothers, the question whether Dharmananda died in-jointness before coming into force of the Hindu Succession Act, 1966 is of no consequence, because on Dharmananda's death his half interest passed-to his daughter-defendant No. 1 by succession. Accordingly I would hold that in the "A" schedule lands plaintiffs have half share and the defendant No. 1 has half share. In view of such finding plaintiffs are not legally entitled to a decree for injunction.

9. In the result, the appeal fails and the same is dismissed with costs throughout.