
(1991) 10 OHC CK 0015
In the Orissa High Court
Case No : S.A. No. 125 of 1982

Chennaru Naghbhusan Rao	Vs	APPELLANT
M. Rama Rao and Others		RESPONDENT

Date of Decision : 04-10-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 2A, Order 6 Rule 2, Order 7 Rule 7, 100, 75

Citation : AIR 1992 Ori 76 : (1992) 73 CLT 329

Hon'ble Judges : K.C. Jagadeb Roy, J

Bench : Single Bench

Advocate : S.S. Basu and S.S. Rao, for the Appellant; R. Mohanty, P.V. Ramdas, R.K. Mohapatra, N.C. Naik, B. Routray, K.B. Kar, S.S. Das and P.C. Rout, for the Respondent

Final Decision : Dismissed

Judgement

K.C. Jagadeb Roy, J.—The appellant is the defendant who has filed the Second Appeal against the concurrent judgment and decree directing him by way of mandatory injunction to demolish the structure illegally constructed by the defendant encroaching the lane of the plaintiff to the extent of 4 1/4" in width and up to 41" in length and to restore possession of the lane to the plaintiff within the stipulated period, failing which the plaintiff is to recover the vacant possession of the lane through the process of the court at the cost of the defendant and also directing the defendant by way of perpetual injunction not to make any construction or to interfere in the lane of the plaintiff in any manner.

2. The plaintiff preferred Title Suit No. 87/72 alleging that she along with one Shyamsundaramma, the widow of her husband's brother jointly purchased the house described in Schedule "A" of the plaint by means of a registered sale deed dated 30-10-1943 from one P. Rajeswar Rao, the width of which was 45 cubits. There were open spaces on the east and west of this house as corridors for free passage to the backyard of the house. This document had been marked as Ext. 1

in the suit. That there was subsequently a partition between the present plaintiff and Shyamsundaramma as per Ext. 2 in which the eastern half portion fell to the share of the plaintiff and the Western half fell to the share of Shyamasundaramma and both the shares were demarcated by a dividing wall. The defendant after 27 years of the plaintiffs purchase however, purchased his house in 1970 to the east of the eastern portion of the plaintiff and since encroached upon the vacant space of the plaintiff on the extreme east to an extent of 2".9" x 40"6" x 7"09" in the space covered by EBCF indicated in the plan appended to the plaint schedule and constructed a brick wall of 26" in length and made a projection of its terraced building overhanging the vacant space of the plaintiff and constructed a stair case at the foot of the vacant space leading to the upstairs opening ventilators in newly constructed walls and window. The plaintiff therefore had no other alternative but to file the suit with the prayer as indicated above.

The further case of the plaintiff in the plaint was that since she was bed-ridden and being treated in the hospital as an indoor patient and there was nobody left in the house, the defendant took advantage of her absence in making such construction encroaching upon her land. She after coming to know of this illegal construction made protests and sent a telegraphic notice to the defendant on 8-7-1972 and another registered notice on the same day but both were returned as refused, after which she sent another letter by certificate of posting which she believes had been received by the defendant. The plaintiff had further averred in the plaint that she had given the approximate but nearly correct dimension while giving the details of the encroachment which of course is subject to corrections and verification by appointment of a commissioner for the purpose later. In para 6 of the plaint, the plaintiff had submitted that unless the encroachments are immediately removed and demolished and the vacant space is restored to its former position and the defendant is forbidden urgently by an injunction not to proceed with the construction and trespassing into plaintiff's property he would suffer irreparable injury and damage which cannot be compensated by money if awarded by way of damage and the plaintiff accordingly prayed in the suit:

- (i) forbidding the defendant by a perpetual injunction from trespassing into the plaintiff's property as described in the suit plaint Schedule "A" and making constructions or otherwise interfering with her property; and
- (ii) issue mandatory injunction against the defendant compelling him to remove and demolish the encroachments made by constructions or otherwise made, on plaintiff's property, at his expense, and on his failing to do so, through this Court, and award such costs for such removal.
- (iii) Cost of the suit and any other relief in the circumstances of the case.

3. In the written statement filed by the defendant, the plaintiffs case was denied and the defendant urged that the constructions were made on his own land and not on the land of the plaintiff. The defendant denied the claim of the plaintiff

that the width of the purchased land is 45 cubits. The defendant had asserted that he had received no notice from the plaintiff challenging the construction.

The defendant in the written-statement has not asserted specifically that the plaintiff had purchased the property in the year 1943 whose width was 40" and not 45 cubits as claimed. He simply made an assertion that the plaintiff had purchased the property in 1943 whose width was not 45 cubits and that there was no loss of privacy of the plaintiff by such construction. The western portion of the old house on the first floor had windows with ventilators for over a century. In essence there was strong dispute between the parties both of whom claim the alleged encroached portion to be part of their own land.

During the trial, a survey knowing Commissioner "was deputed to the site of the disputed property who submitted his report (Ext. V) and the sketch map (Ext. IV) prepared by him. The learned Munsif, Berhampur had framed three issues which are as follows:

1. Whether the plaintiff had right, title and interest over the suit property?
2. Whether the Plaintiff is entitled to the relief for permanent injunction as prayed for?
3. To what relief?
4. The learned Munsif came to a finding that there was a lane intervening between the house of the plaintiff and that of the Defendant which was on the east of the plaintiff's house and was in existence when the defendant purchased a house, and the defendant had encroached upon a space of 4".3" from the land of the plaintiff at the time of construction of his house and the grant of injunction being an equitable relief the plaintiff is entitled to such relief against the defendant which the Court allowed and directed the defendant to dempish the portion of the house constructed on the lane of the plaintiff having width of 4".3" up to length of 41" towards the backyard and answered this issue in favour of the plaintiff.
5. The appellate court, namely, the Addl. Subordinate Judge, Berhampur, Ganjan in Title Appeal No. 6/81 preferred by the defendant against the judgment and decree passed in T.S. No. 87/72 upheld the judgment and decree passed by the learned Munsif and dismissed the defendant's appeal.
6. In the present second appeal, learned counsel for the appellant strongly urged the following points:
 - (i) That even though the sale deed as per Ext. C under which the defendant had purchased the property in 1970 shows that the western boundary of it was a lane belonging to the plaintiff and another co-owner in reality it was a mistake.
 - (ii) Even though he had not categorically stated in his written statement that the width of the house which was purchased jointly by plaintiff and Shyamsundaramma in 1943 was shown to be 45 cubits in the sale deed it was

actually 40 cubits and if the sale deed as per Ext. 1 under which the plaintiff and Shyamsundaramma purchased the land would be 40 cubits instead of 45 cubits the only inference that can reasonably be drawn is that no land of the plaintiff was encroached by the defendant,

(iii) Even though an application was made by the defendant before the lower appellate court with a prayer that he should be allowed to file some additional evidence in court by filing certified copies of some sale deed showing that earlier the property which is now purchased by the plaintiff under Ext. 1 was transacted by the previous owners under those documents showing it to be 40 cubits and this application having been rejected, it has vitiated the proceeding and injustice has followed since in the absence of this evidence, the Court has come to a wrong conclusion on facts.

The defendant-appellant also tried to prove from the fact that adjoining to the eastern boundary wall of the house of the plaintiff, at a distance of three feet of the wall, the Commissioner had found some old pipe lines and an old broken foundation which would suggest that beyond this three feet the plaintiff could not have any of his land. Therefore, the staircase and other construction made by the defendant were not on the land of the plaintiff and the suit should have been dismissed.

I have given a good deal of hearing to both the sides on these points. In a second appeal, the jurisdiction of this court is limited as per the amended provision of Section 100 of the CPC and unless the finding is perverse or based on no evidence in a second appeal, this court is not required to interfere with the finding of facts given by the courts below. The question, therefore, arises if in the present case the finding that the plaintiff had a lane which was to the western boundary of the defendant's house and a portion of it measuring the space 4'3" in width up to a length of 41 feet was encroached upon by the defendant by illegal constructions is based on some cogent evidence or is perverse so as to invite interference by this Court.

7. In the suit, both parties led oral evidence apart from the documentary evidence. The plaintiff examined five witnesses including P.W. 5 who was the vendor of the land in Ext. 1 in favour of plaintiff and one Shyamsundaramma. P.W. 5 in his evidence has stated that before the document of sale as per Ext. 1, the land was measured and the correct measurements have been reflected in the sale deed and thereby corroborating the claim of the plaintiff that the width of the property sold under Ext. 1 was 45 cubits. The defendant in his term has examined three witnesses of which the defendant himself is examined as D.W. 3. The allegation of the plaintiff about the various constructions made by the defendant in connection with his new building referred to in para 3 of the plaint are admitted the defendant in the written-statement in material particulars but the only point of controversy was that both the parties were claiming the disputed portion to be part of their own property. The defendant admittedly in his deed of sale of the year 1970 (Ext. C) purchased the house whose width was

31"6". The Commissioner was deputed by the court to the spot to measure the house and submit his map and report. The said map and report are marked as Exts. IV and V respectively. In his map, the Commissioner has shown the measurements of the width of the house of the plaintiff to be 24"7". From the western wall of the house of the plaintiff the width of the lane which includes the alleged encroached portion by the defendant is shown to be 6"3", in width and taken together comes to 30"10" in width whereas the width of the total area purchased by the plaintiff and Shyamsundaramma was 45 cubits which is equivalent to 77"6" and the share of the plaintiff accordingly comes to 38".9". Now if the entire portion is included in the lane still the plaintiffs share falls short of 7".11". Admittedly the defendant was a subsequent purchaser who purchased his house 27 years after the purchase of the plaintiff under Ext. 1. The sale deed under which the vendor of the plaintiff had purchased the same from his vender shows the width to be 45 feet. In view of this, it cannot be said that the finding of the courts below that the entire lane to the east of the plaintiff including the portion of 4"3" in width up to a length of 41" to the south to north is part of the plaintiffs land cannot be said to be without any basis so as to require any interference by the High Court.

It has been held in a decision of the Division Bench of Patna High Court, reported in Bansi Singh and Others Vs. Chakradhar Prasad and Others, that the Commissioner's report is nothing more than the evidence in a case and if a judge does not accept the evidence of a Commissioner and report made by him it is not incumbent on him to call for another Commissioner's report and failure on his part to do so does not amount to an error of law specially when both the parties had adduced evidence on the point. In this case, the court has accepted the Commissioner's report and did not consider of taking out another survey knowing commissioner for the purpose. This did not constitute any illegality raising a substantial question of law for consideration in this Second Appeal,

The learned counsel for the respondent has drawn the attention of the court to the fact that the appellant has least regard for the orders of the court and had violated the orders of this court. According to the respondent-plaintiff, during the pendency of the suit, the defendant raised construction over the encroached portion of the lane for which the plaintiff-petitioner had no other option but to file a petition under Order 39, Rules 1 and 2, CPC with a prayer for injunction to restrain the defendant from raising any such construction. On 22-7-1972 the trial court passed an order of injunction against the defendant restraining him from raising any construction but notwithstanding the order of injunction the defendant began to interfere with the suit land and raised a wall over the plaintiff's land and opened a door. The plaintiff was forced to file an application under Order 39, rule 2-A of the CPC before the trial court against the defendant for contempt for disobeying the orders of injunction and the trial court after hearing the parties was pleased to pass an order of attachment of properties of the defendant against which order of defendant preferred a Civil Revision No. 354/76 before this Court which had been rejected and the order of the trial court

was upheld. This fact is not controverted by the other side and from the record, it is evident that because there were some constructions over the land alleged to be that of the plaintiff, the plaintiff filed the suit but the defendant ignoring the order of the trial court had made further construction for which the property of the defendant was attached. The mandatory injunction being a discretionary one should be used in favour of the plaintiff and against the defendant. I accordingly consider that mere payment of any money as damage and compensation to the plaintiff for such construction would not have been adequate and the court below was justified in directing the demolition of wall unauthorisedly constructed over the land of the plaintiff.

8. The defendant for his case depends on the single fact that the plaintiff along with Shyamsundaramma had not purchased the house property which was 45 feet in width as is described in Ext.1 and that he had purchased the house whose width was only 40 feet. If this was the material fact on which the defendant relied, Order 6, Rule 2, C.P.C. required that his written-statement should have contained in the concise form specifically mentioning that the plaintiff jointly with Shyamsundaramma had purchased a house property which was only 40 cubits in width and therefore had no right or claim over the land over which he was making his construction. This having not been done, his written statement being very evasive on the point by merely mentioning that the plaintiff did not purchase 45 cubits of land, it was not open to the defendant in the trial to lead evidence on the point that the width of the house was only 40 cubits and not more. This would be beyond his pleadings.

The defendant's further evidence is that his petition for adducing additional evidence to bring some sale deeds to prove the width of the house of the plaintiff and her co-sharer to be only 40 feet having been rejected by the trial court, he has been greatly prejudiced and the finding of the lower court is vitiated in absence of the evidence. The lower appellate court had found that the defendant had failed to establish that notwithstanding his due diligence such documents were not within his knowledge and could not, after exercise of due diligence have been produced by him at any time during the trial. As such, I do not find that the defendant has a case on this point.

Another point has been raised by the appellant in this case which is of considerable importance and needs a thorough scrutiny. The appellant here raised a point that since the plaintiff was not in possession of the property in question, he was not entitled to the relief of mandatory injunction without claiming recovery of possession and as such the trial court had no jurisdiction and authority to grant the order of injunction as prayed for and directing recovery of possession when there was no such a prayer for recovery of possession in the plaint.

In a case reported in Jemma Vs. Raghu, , this court had decided that when the plaintiff was not in possession on the date of the suit, was certainly not entitled to the relief of injunction without claiming recovery of possession. There is

dispute on this proposition of law.

In this case, the plaintiff had prayed for a decree to be passed against the defendant:

(1) forbidding the defendant by a perpetual injunction from trespassing into the plaintiff's property as described in the suit plan Schedule-A and making constructions or otherwise interfering with her property;

(2) and issue a mandatory injunction against the defendant and compel him to remove and demolish the encroachments by constructions or otherwise made, on plaintiff's property, at his expense, and on his failing to do so, through this court, and award such costs for removal, and costs of suit and grant any such other appropriate relief in the circumstances of the case.

However, in para 6 of the plaint, the averments are as follows:

The plaintiff submits that unless the encroachments are immediately removed and demolished and the vacant space is restored to its former condition, and the defendant is forbidden urgently by an injunction not to proceed with constructions, and from trespassing into the plaintiff's property, there will occur further more irreparable injury and damage to the property.

The finding of the learned Munsif in para 6 of the judgment is to the effect that the plaintiff is the owner of the lane lying to the east of her house and a portion 4 feet and 3 inches have been encroached by the defendant at the time of construction of the house.

Order 7, Rule 7 of the C.P.C. reads as follows:

"Order 7, Rule 7: Relief to be specifically stated: Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement."

(The underlining is made under the words for emphasis).

In a suit praying for declaration of title and confirmation of possession, it is within the competency and jurisdiction of the Court to order recovery of possession though there was no specific prayer for the same provided necessary court-fee had been paid and on a reading of the plaint as a whole, it can be interpreted that possession was also prayed for in the suit. In a case reported in Jagabandhu Naik and Another Vs. Gouri Bandha and Others, , this court held thus (at p. 128 of AIR):

"It was then contended by the learned counsel for the respondents that the suit must fail as there had been no prayer for recovery of possession. In para 9 of the plaint, it has been specifically prayed that plaintiffs' title over "Ka" and "Kha"

schedule lands may be declared and possession be confirmed and the defendants be directed to fill up the portion which they have dug at their expenses. The plaint read as a whole must be interpreted that possession was also prayed for in the suit. In the case of V. Krishna Rao Dora v. Kotini Sitaram Dora reported in (1973) 39 CLT 975 this court has held that the court can order recovery of possession though not specifically asked for and though only confirmation of possession was sought for if necessary court-fee on the plaint had been paid....."

Later, in another case reported in Managobinda and Others Vs. Brajabandhu Misra, this Court held thus (at p. 284 of AIR):

"The court has thus inherent power to grant either general relief or other relief which appears to it to be legitimate and proper in any case even though such reliefs have not been specifically asked for....."

The para 10 of the judgment, this court further held:

"Thus the substance of the question is that when the question relates to the title of both the parties and evidence has been led about it and both the parties are aware of the same, the more technicality that the issue was not expressed in the pleadings is of formal nature and should not be allowed to preclude the court from granting the relief. The real question for consideration is to consider whether by such process one party is allowed to spring a surprise on the other party inasmuch as the other party had no notice and had no opportunity to lead evidence at the trial. Such a case may arise where the plea raised by either of the parties is wholly inconsistent and can by no reasonings co-exist with the original plea taken."

Further in para 12 of the judgment, this court held thus:

"xx xx Of course, in granting reliefs which have not been specifically asked for, the powers of the court under Order 7, Rule 7, Civil P.C. are circumscribed by the necessity that larger reliefs than what has been claimed by the plaintiff cannot obviously be granted. But where the plaintiff has come with a claim of larger relief but is found entitled to a lesser one, in appropriate case the suit need not be dismissed and such lesser relief may be granted to him if it is found to be just and proper and further such reliefs are not wholly inconsistent with the original claim nor takes the defendant by surprise so as to deprive him of the opportunity to lead any evidence to the contrary....."

In another case bearing Second Appeal No. 167 of 1983 (Keshab Jena alias Keshaba Charan Jena v. Gelei Dei) decided on 17-6-1991, this court came to hold that:

" xx xx The court under Order 7, Rule 7 C.P.C. would be also competent to grant such relief provided court-fee for such declaration has been paid, In such event, it may be open to the court to call upon the plaintiffs to pay the court-fee. Also the court can always direct the appellants to pay the court-fee if it is found necessary to pay the same."

In the present case, though the plaintiff did not specifically ask for the recovery of possession in the prayer, the plaint read as a whole, particularly in view of the pleadings in para 6 of the plaint, there is no doubt that the plaintiff desired that unauthorised construction be removed and the land be put back to his possession in the former condition and the parties were quite aware of their respective cases. Therefore, such a prayer for recovery of possession which could have been made in the prayer of the suit, but having not been made in view of the evidence led before the court in the suit, there is no iota of doubt that the defendant had known clearly that the plaintiff desired to have the recovery of the land and the defendant would not in any way suffer if such relief is granted. By this claim the defendant is not to be taken by surprise because both the parties have led evidence in respect of their possession and title. In view of this, the recovery of possession can be brought within the expression of other relief as contained in Order 7, Rule 7, C.P.C. and the court is competent to grant such relief to the plaintiff even though there was no specific prayer for such relief in the prayer portion of the plaint. But it appears that the plaint was only valued keeping in view the prayer for mandatory injunction and not for the prayer for recovery of possession which ultimately granted by the trial court and was confirmed by the lower appellate court which court-fee the plaintiff was required to pay and as such it is directed that the plaintiff shall pay the same within one month from the date of the judgment in the Second Appeal. Unless such court-fee is paid within one month from the date of signing of this judgment, this judgment will not be operative. In the event the court-fee is paid within the time indicated in this court and a memo is filed by the learned counsel for the appellant within the said time, the decree shall be drawn.

9. In the result, the Second Appeal is dismissed but the parties are directed to bear their own costs of this Second Appeal.