

(1975) 07 OHC CK 0017
In the Orissa High Court
Case No : A.H.O. No. 2 of 1972

Dayalu Narayan Swamy

APPELLANT

Vs

Kanika Ramaswamy Dora and Others

RESPONDENT

Date of Decision : 11-07-1975

Acts Referred:

Orissa Money Lenders Act, 1939 — Section 17
Specific Relief Act, 1963 — Section 38

Citation : AIR 1976 Ori 31 : (1975) 41 CLT 1127

Hon'ble Judges : G.K. Misra, C.J.; K.B. Panda, J

Bench : Division Bench

Advocate : B.K. Pal, for the Appellant; S.N. Sinha and S.S. Mohanty, for the Respondent

Final Decision : Allowed

Judgement

G.K. Misra, C.J.—The disputed land belonged to one Ram Chandra Dora. His son Balaram Dora executed a registered usufructuary mortgage bond (Ext. A) in favour of the father of defendants 1 to 3 and 5 and grandfather of defendant No. 4 on 4-1-1916. The widow of Balaram Dora executed an unregistered agreement for sale (Exit. 2) on 21-1-1965 in favour of the plaintiff and thereafter she executed the registered deed of sale (Ext. 1) on 14-5-1965 for Rs. 500/-. On the basis of the title under the registered sale deed the plaintiff filed the suit for permanent injunction. The contesting defendants assailed the suit alleging that the vendor was not the wife of Balaram Dora and that the defendants purchased the disputed property by an oral sale about 8 months after the mortgage. All the courts have concurrently rejected the defence story and have held that the vendor is the wife of Balaram Dora and transmitted a valid title in favour of the plaintiff by the registered sale deed, They also discarded the story of oral sale. The trial and the lower appellate courts decreed the plaintiffs suit for permanent injunction. In second appeal our learned brother S. K. Ray, J held that as the defendants were in actual possession of the disputed property a suit for permanent injunction does not lie. He accordingly allowed the second appeal

after reversing the judgments of the courts below. This A. H. O. has been filed by the plaintiff against the judgment of the learned single Judge.

2. The only contention urged by Mr. Pal is that after the usufructuary mortgage was extinguished by operation of law u/s 17 of the Orissa Money Lenders Act, the defendants were in permissive possession and a suit for permanent injunction lies against the defendants who were not in possession in their own right, title and interest. The contention is wholly misconceived and is concluded by a Full Bench decision of this Court in Jayagopal Mundra Vs. Gulab Chand Agarwalla and Others, . In paragraph 16 their Lordships made the following observation:--

"The section (Section 17 of the Orissa Money Lenders Act) itself clearly says that the mortgagee shall put the mortgagor, in possession of the property on discharge of the mortgage. Until the mortgagee puts the mortgagor in possession he continues in possession of the property on behalf of the mortgagor and not in derogation of his right, title and interest. Though no express permission has been granted by the mortgagor to the mortgagee to continue the possession, on discharge of the mortgage, the nature of the possession is permissive and not hostile until by any express act the mortgagee exercises his hostile animus. On the discharge of the mortgage the mortgagor will only sue for possession and not file a suit for redemption as the mortgage has been discharged but the mortgagee continues in possession on behalf of the mortgagor as before."

Thus the defendants were in permissive possession on behalf of the mortgagors. It is well settled that the relief of injunction, is available only to a person who is in possession. Even though the defendants were in permissive possession on behalf of the plaintiff still the actual physical possession was with the defendants. The plaintiff cannot oust them unless he gets recovery of possession. Permanent injunction is not an appropriate relief even in the case of a permissive possession, The learned single Judge arrived at the correct conclusion and rightly dismissed the plaintiff's suit on this sole ground despite his recording the other findings in favour of the plaintiff.

3. In this appeal the plaintiff has filed an application for amendment of the plaint. The following are the essential features of the amendment sought:--

- (1) The suit is to be valued at Rupees 500/-, the amount for which the plaintiff purchased the disputed property.
- (2) Recovery of possession of the disputed land is sought.
- (3) The prayer for permanent injunction has been deleted.

We have heard Mr. Sinha, appearing for the contesting defendants on the question of amendment. On the findings recorded that the plaintiff is the rightful owner and the defendants are in permissive possession and have not acquired any title by adverse possession, the amendment is a necessary logical corollary

of the averments made in the plaint. We accordingly allow the amendment of the plaint as prayed for.

The suit was originally valued at Rs. 100/- and court-fee had been paid on such valuation in respect of the relief of permanent injunction. As this relief, has been deleted, the plaintiff would now pay ad valorem court-fee on Rs. 500/- on the plaint minus the court-fee already paid on Rupees 100/-. The defendants were to pay court-fee in the first appeal and in the second appeal. But as the plaintiff was responsible for the suit being badly framed he would pay the deficit court-fee due on the memorandum of appeal in the first appeal as well as in the second appeal. The plaintiff is to pay also ad valorem court-fee in the memorandum of appeal in the A. H. O. The court-fee already paid in all the four courts comes to Rs. 42,00. Court-fee payable in all the four courts would be Rs. 282.00. So the balance court-fee payable by the plaintiff would be Rs. 240.00.

4. On the aforesaid analysis the plaintiff's suit be decreed for declaration of title and recovery of possession subject to the condition that the plaintiff would pay the deficit court-fee of Rs. 240.00 for all the four courts. If the plaintiff fails to pay the deficit court-fee as directed above within six weeks from today the A. H. O. would stand dismissed without further reference to the Bench.

5. The judgment of the learned single Judge is set aside and the A. H. O. is allowed. In the circumstances parties would bear their own costs throughout. In case the plaintiff does not pay the court-fee as directed above, the A. H. O. would stand dismissed without further reference to the Bench.

Panda, J.

6. I agree.