
(2014) 02 OHC CK 0032
In the Orissa High Court
Case No : First Appeal No. 11 of 1995

Durgadevi Agarwalla

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 21-02-2014

Acts Referred:

Orissa Prevention of Land Encroachment Act, 1972 — Section 16, 17, 8(A), 8A

Citation : AIR 2014 Ori 140 : (2014) 1 OLR 930 Suppl.

Hon'ble Judges : D. Dash, J

Bench : Single Bench

Judgement

D. Dash, J.—Being aggrieved by the judgment and decree passed by the Learned Subordinate Judge, Bargarh (as it was then) in Title Suit No. 1/1992 dismissing the Suit by rendering a decision on preliminary issue as regards the jurisdiction of the Civil Court in view of the bar contained u/S. 16 of the Orissa Prevention of Land Encroachment Act, 1972, the present appeal has been filed by the unsuccessful plaintiffs. For the sake of convenience, to avoid confusion and for proper appreciation, the parties hereinafter are being referred to as they have been arrayed in the trial court.

Plaintiffs as legal representatives of one Late-Jagannath Agrawalla have presented the plaint seeking the relief of declaration of their right, title and interest over the land described in "Schedule-A" of the plaint(suit land) and for confirmation of possession. Also a permanent injunction sought for restraining the Defendants from going over the suit land and creating any disturbance therein. On account of damage said to have been caused by the Defendants, compensation of Rs. 1.5 lakhs is claimed. It is pertinent to state here that during pendency of this appeal, original plaintiff No. 1 died on 19.04.2006 leaving plaintiff No. 2 as sole legal representative who is now prosecuting the appeal.

2. Case of the plaintiffs is that:--

The suit land was owned and possessed by one Ramesh Agrawalla and he was

inducted into possession by the landlord Laskhpati Das, Maufidar who had also executed a registered deed for permanent lease in favour of Ramesh Agrawalla on 30.6.1948. So, Ramesh Agrawalla continued to possess the suit land with his other brothers and they executed the registered sale-deed on 16.1.1959 in favour of Sri Keshari Bai and she was delivered with the possession of the same and continued to possess thereafter. Said Keshari Bai then applied for permission to build a residential house and Bargarh Municipality duly accorded the permission for the same on 27.2.1963 in the name of the husband of said Keshari Bai. The construction work began and continued up to plinth area or little more when two rooms were completed in one portion. At that time she faced financial constraints and so had to sale the suit land along with the construction in favour of original plaintiff No. 1 and her husband Jagannath Agrawalla by registered sale-deed dtd. 4.6.1969 for a consideration of Rs. 8000/-. The above purchasers being delivered with the possession of the suit land together with the construction by Keshari Bai, the vendor continued as such. Thereafter, original Plaintiff No. 1 again made an application to the Bargarh Municipality for permission to complete the construction as there was delay in completion which was also accorded on 19.2.1970 and during that year the construction of the ground floor was completed and so also the first floor. It is stated that a sum of Rs. 5 lakh was spent after the said construction of 6th floors.

3. It is stated by the Plaintiffs that in the year 1971 the land acquisition authority notified for acquisition of land measuring Ac 0.020 Dec out of the Western portion of the schedule plot No. 3568. So, the Plaintiff No. 1 filed a representation which was accepted by the Government and acquisition was made to the extent of land measuring Ac 0.03 dec. out of that Ac 0.20 dec. as over the said portion the plaintiff No. 1 had already made construction spending huge sum. So, ultimately the State Government withdrew from acquisition of said portion of land and accordingly published the notifications in the official gazette on 1.12.1978 and on 2.12.1978. The Plaintiffs claimed their right, title and possession on the basis of above by constructing house over the suit land continuously without any interruption and all along in a peaceful manner. It is also stated that the land has been mutated to the extent of AC.0.08 decimal in her name and the land was surrounded by road on all sides. When such state was continuing, as per the case of the plaintiff, the District Administration with a view to set up a park over the suit land and its adjoining lands, initiated an encroachment case under the provision of Odisha Prevention of Land Encroachment Act, 1972 (hereinafter referred to as "the Act") against the plaintiff No. 2 and simultaneously the mutation appeal has been filed by State bearing No. 16 of 1988 five years after the disposal of the original mutation case challenging the recording of the suit land in favour of the plaintiff No. 1. The said Encroachment Case No. 368/1982 ended against the Plaintiffs by passing of an order of the vacation of the encroachment and imposition of penalty. The appeal carried against the said order was also dismissed by the Sub Collector, Bargarh. So, the District Administration remained bent upon to pull down the two storied

building standing over the suit land and to, occupy the same in order to set up the park. The demolition work is said to have started with effect from 4.2.1989 and it continued till 13.2.1989 when the construction was raised to the ground level. The building was thus demolished to a considerable extent causing huge loss. As against the order in the encroachment appeal, revision was filed before the A.D.M., Sambalpur but during pendency of said revision the demolition was over. The said revision being also dismissed the plaintiff had to approach the Hon'ble High Court invoking the Writ jurisdiction in OJC No. 1680/1989. The Writ being allowed, orders of the encroachment authorities were set aside and the matter was remitted back for fresh disposal in accordance with the law only in respect of area Ac. 0.03 dec. from out of the suit land which was claimed by the plaintiffs as part of Plot No. 3520 and 3522 corresponding to Hamid Settlement Plot No. 3568 and counter claimed by defendants as framing part of Plot No. 3525. It was directed for fresh survey to ascertain whether the plot of land over which the plaintiffs possession stood of is on M.S. Plot No. 3525 or on Plot Nos. 3520 and 3522 without expressing any opinion on the contention in the alternative advanced from the side of the plaintiff that their occupation of the land upon construction of building as over 30 years entitling them the protection u/S. 8-A of the Act.. Therefore, the plaintiffs claiming the aforesaid reliefs filed the suit.

4. The defendants in their written statement while traversing their plaint averments further pleaded that encroachment case was not initiated against Ac.0.08 Dec out of MS Plot No. 3525 corresponding to H.S. Plot No. 1109/3569 i.e. in respect of the suit land but its in respect of Ac0.02 dec. out of M.S. Plot No. 3521 and Ac0.03 dec. of land out of M.S. Plot No. 3525 it is stated that the plaintiffs attempt to give an impression that the portion of the structure demolished by the order in the encroachment case was from the suit land is not correct. It is also asserted that the Plaintiffs have absolutely, no title over the land covered under the encroachment proceeding and it is the defendant No. 1, State which has the title. It is also the case of the defendants that such demolition of structure standing over the encroached land is in accordance with law and the procedure as established which can not now be questioned and it is also stated that the suit is barred in view of the Provision of Section 16 & 17 of the Act. They further have refuted the claim of compensation on account of damage as advanced.

5. On such rival pleadings, the trial court framed as many as seven issues and then when a petition was filed by the defendants to take up the issue of jurisdiction in view of legal bar created under the Act for decision as preliminary issue, ultimately the same having been taken up has been answered against the plaintiffs.

6. Learned Counsel for the Appellants submits that in view of the facts narrated in the plaint in respect of the relief's claimed therein, the trial court ought not to have gone to decide the issue as regards the suit being barred u/S. 16 of the Act

as a preliminary issue. According to him it is not a pure question of law and here rather it is a mixed question of law and fact. He further contends that some factual findings on the rival pleadings and evidence are first of all required to be decided before taking up that issue regarding the bar of jurisdiction created under the law. Therefore, he contends that on these grounds the judgment and decree are liable to be set aside and the matter has to be remitted back for rendering decision on all the issues and decide the Us for all times to come. In this light, he has elaborated the provision of Order-14, Rule-2 of the Code of Civil Procedure while placing reliance on the decisions of this Court in cases reported in case of Ganta Swain and Others Vs. Kandhuni Gouduni and Others, and in case of Bypothee S. Sammi v. P. Khageswar Rao Naidu (Dead) and after him Sri P.S. Deekhitalu and others, 71 (1991) CLT- 519 besides other decisions which I have carefully gone through. It is his next submission that on merit also the finding is erroneous.

Learned Additional Government Advocate submits that here in the present case when it is stated by the Defendants that the encroachment proceeding is being initiated only with respect to Ac.0.03 Dec of land which was earlier acquired by the State, the trial court did commit no error in law in holding the suit to be barred under the provision of Section 16 of the Act.

7. In view of the rival submission, in this appeal, the consideration remains confined to the aspects firstly as to whether the trial court on the rival case of the parties has rightly taken up the issue that the suit is barred under Section 16 of the Act as preliminary issue or not and if the answer comes in affirmative that the court did not commit any mistake in going ahead for a decision on that preliminary issue then next would arise the consideration as to whether such decision on the issue is sustainable in the eye of law or not.

8. Order -14 Rule-2 of the Code of Civil Procedure provides that; where issue both of law and fact arise in the same suit and the court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue relating to a)- Jurisdiction of the court or b) a bar to the suit created by any law for the time being in force and for that purpose may if it thinks fit for postponing the settlement of other issues until after that issue has been determined and may deal with said suit in accordance with the decision on that issue. The provision undoubtedly vests power on the trial court to take up certain issue as preliminary issue before proceeding to consider other issues in the suit. At the same time, the general provision contained in Order-14, Rules 1 and 2 of the Code rules that the judgment should be pronounced by the trial Court on all issues. So, considering some issue of the issues as preliminary issues ones is an exception. In order to satisfy as to whether an issue/can be taken up as preliminary issue for the decision as laid down in sub-rule (2), the Court has to satisfy itself that the issue is one of law only, that is it requires no evidence or a little to be laid down and that decision on the issue would be sufficient for disposal of entire case or a part of the case besides the issues must be touching

the jurisdiction of the court or concerning the bar to the suit created any law for the time being of any force. Once these pre-conditions are satisfied the court would be justified in trying an issue as a preliminary one postponing consideration of other issues. It is therefore, incumbent on the part of the trial court to carefully consider the pleadings, the nature of issue which is proposed to be decided as a preliminary issue, the evidence that may be necessary to determine the said issue and whether the whole case or part of the case can be disposed of on the decision on said issue on the question and this has to be done before allowing the prayer of the application to exercise the jurisdiction vested in Order -14, Rule-2 of the Code to try an issue as preliminary one. A comparative reading of Order-14, Rule-2 as it existed earlier to the Code of Civil Procedure (Amendment) Act, 1976 and the one after amendment would clearly indicate that the consideration of any suit and its disposal as a preliminary issue has after the 1976 amendment been made permissible only in a limited case and those are issues of law relating to jurisdiction and bar under any law. Apart from these no issue can be tried as a preliminary issue. The jurisdiction to try issues of law apart from the issues of the fact may be exercised only where in the opinion of the court, the whole case may be disposed of on the issues of law alone but, the Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in the suit should be tried by the court; not to do so especially when the decision on issues even of law depend upon the decisions of issues of fact, would result in lopsided trial of the suit. It therefore follows that where on issue of fact is necessary to be decided before on issue of law comes up for consideration, such issue cannot be taken up as a preliminary issue within the meaning of Order 14, Rule 2 of the Code under the amended provision it is not obligatory on the Court to decide issues relating to jurisdiction or legal bar to limits as preliminary issues. The words "it may try" in Rule 2(2) are clearly indicative of the fact that discretion is given to the Court and no duty is cast upon the court to decide any issue as preliminary issue. Though, there has been a slight amendment in the Order-14, Rule 2 of C.P.C. by Amending Act, 1976 but the principle has not been given a departure that the Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as preliminary issue and where the decision on the issues of law depends upon the decision of fact, it can't be tried as a preliminary issue. This view derives justification from the employment of the words "it may try" i.e. to exercise the discretion in the rival case of the parties looking at the same side by side viewing the provision of law holding the field.

9. Adverting to the case in hand, the trial Court receiving an application from the Defendants that the issue relating to the bar created under Section 16 of the Act for the suit, be decided as a preliminary issue as the decision on the said issue can dispose of the suit in its entirety which is also a pure question of law, invited objection from the plaintiffs. Objection having been filed, the matter came to be finally taken up for hearing and the decision has been rendered on that issue against the plaintiff's and they have been non-suited. The course adopted by the

trial Court appears to be not in consonance with law. In such state of affair, the Court below first to have gone to hold as to whether on the rival pleadings and nature of issues, the issue pressed by the defendants to be decided as a preliminary issue satisfies all the preconditions to be taken up for decision as such for disposal of the whole case or part of it. This exercise being over, the said issue would only stand for decision touching the root of the suit. This having not been done in the case, the final decision on this technical point is rendered valuable. However, as it is seen that parties without even that have submitted for decision on that issue as preliminary issue, I proceed to examine the said decision on both the grounds and from both the angles. Now, therefore, in the facts and circumstances of the case, it calls for examination as to whether this issue is a pure question of law and if so, next whether the decision rendered that the suit is barred in view of Section 16 of the Act is sustainable in the eye of law.

10. At the risk of repetition, it may be stated that the plaintiff's suit is in respect of the land described in "Schedule-A" of the plaint which for proper appreciation is stated hereunder:--

House site with two storied building standing Ac 0.08 dec. out of H.S. Plot No. 3568 appertaining to HS holding No. 242 situated at Mouza-Bargarh, Dist: Sambalpur as shown in the red and blue colour map attested.

So, the extent of the suit land is Ac 0.08 decimal. The defendants in the suit claimed that they have no intention nor do they have taken any step in respect of the suit land other than the land covered under an Encroachment Case No. 368/1982. It is also their case that the encroachment case concerns with Ac 0.02 Decimal out of MS Plot No. 3521 and Ac 0.03 decimal of land from out of MS Plot No. 3525 and not in respect of the suit land. It is also their case that the MS plot No. 3528 corresponds to HS Plot No. 1109/3569. It has been pleaded that the suit land adjoins to the North-Eastern boundary of MS Plot No. 3525 and South-Eastern boundary of said plot adjoins the public road under Plot No. 3527. So, they assert that no portion of the building standing over the suit land has ever been demolished and the plaintiffs are trying to give an impression that the portion of the structure demolished in the said encroachment case was on the suit land which is not at all a fact. When the plaintiffs made an allegation in Para-19 of the plaint that they including their vendors were in possession of the same plot in which they are presently constructing their residential building and that in the major settlement operation the settlement authority have wrongly recorded the suit land as MS Plot No. 3520 and 3522 and therefore, the same has been wrongly recorded in the name of the State. Therefore, that aspect was required to be decided. As to whether the title of the plaintiffs can be traced to the suit land as described under plot No. 3520 and 3522(portions). The assertion is also that the building was there and the plaintiffs since the time of their predecessors in interest have been in continuous, interrupted and open possession in respect of the suit land for upward of 30 years and thereby have acquired title by advance possession. This of course has been set up as an

alternative case by the plaintiffs but that in the facts and circumstances appears to be a mixed question of law and fact.

As already stated the defendants denied the title of the plaintiffs in respect of those portions of the suit land by further stating that since there was an encroachment by the plaintiffs over the suit land by constructing unauthorized structure the eviction proceeding under the Act has rightly been initiated and eviction having been ordered the structure has been rightly demolished. The case of adverse possession as set up by the plaintiff also stands denied.

11. The Learned Civil Judge, Senior Division on such rival pleadings without recording even any satisfaction that the issue stand for decision as a preliminary issue in accordance with the provision of Order 14, Rule 2 of the Code has abruptly jumped to a conclusion that the suit land belongs to Government and then having said that the plaintiffs have claimed their right by the adverse possession, it has been concluded that the subject-matter of dispute is within the purview of the statutory authorities created under the Act and appropriate relief can only be given u/S. 8(A) of the Act. So, it has been said that the same can't be agitated in the Civil Court and the suit filed by the plaintiffs for declaration of right, title, permanent injunction, compensation towards demolition of structure has been held to be barred under the provision of Section 16 of the Act. The reason assigned by the trial Court upon discussion as made does not at all stand to reason on the rival pleadings that the issue relating to bar of suit in view of provision of Section 16 of the Act stands as a preliminary issue for decision as factual issues stated above are first of all required to be decided on rival pleadings and evidence and during then this issue would stand for being answered. Thus the judgment consequential to the finding on the issue of bar of jurisdiction for the Court to entertain the suit is unsustainable and is liable to be set aside. However, instead of putting a stop here, for further clarification, I propose to discuss further as regards the bar to suit as contained in Section 16 of the Act also with reference to the alternative case as I set up by the plaintiff in the suit.

12. Section 16 of the Orissa Prevention of Land Encroachment Act reads that "No suit or other legal proceeding in respect of the matters of dispute for determining or deciding for which provision is made in the suit shall be instituted in any court of law except under and in conformity with the provisions of the Act.

13. In the case in hand, the title of the State in respect of the land even covered under the encroachment case has been disputed on the ground that the said land falls within the described (sic), the recording of the land in question challenged in the State Khata is as wrong and then also alternatively a claim is staked as regards acquisition of title by adverse possession claiming that by virtue of their long, continuous, open and interrupted possession with necessary hostile animus.

14. It has been held in case of State of Orissa Vs. Bhanu Mali (Dead) Nurpa Bewa and Others, that suit for declaration of title by land owner is maintainable

in the civil court which has the jurisdiction to decide such question. Applying therefore, the principles of law enunciated therein upon discussion of various other decisions of our Hon''ble Court and Apex Court it is also found that the decision as rendered in this case by the court below holding the suit to be barred u/S. 16 of the Act is vulnerable. The Court below is called upon to decide the factual aspects that, if the plaintiffs or their predecessors-in-interest were ever in possession of that patch of land from over which they have been evicted/driven out and if it was an encroachment of recent origin without conferment of any sort of right and that they had antecedent title over it and also if they have acquired title by adverse possession by satisfying all the ingredients required for the purpose. In case of findings on the basis of pleadings and evidence are rendered in the negative and against the plaintiffs, permissible to hold the bar under Section 16 of the Act gets attracted. In the result, the appeal stands allowed and in the circumstances without cost. The judgment and decree passed by the trial court are hereby set aside. The suit is remitted back to the court below for its disposal in accordance with law by rendering findings on all the issues framed after affording due opportunities to the parties. Keeping in view the observations made hereinabove.

The suit being of the year 1992 and in view of the short campus of the same as discussed, it is directed that the court below would dispose of the same within a period of three months from the date of receipt of case record. In order to save time, parties are directed to appear on 15.3.2014 in the court below to receive further instruction and to co-operate for disposal of the suit within above time frame. The lower court record be sent back immediately for the purpose as indicated above.