

(2007) 09 OHC CK 0011

In the Orissa High Court

Duryodhan Das (dead) after him Janaki Das and Another

APPELLANT

Vs

Prafulla Kumar Das and Others

RESPONDENT

Date of Decision : 19-09-2007

Acts Referred:

Citation : (2007) CLT 840 Supp : (2007) 2 OLR 664 : (2007) OLR 840 Supp

Hon'ble Judges : A.K. Parichha, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

A.K. Parichha, J.—This appeal is directed against the judgment and decree passed by the learned Additional District Judge, Jajpur in Title Appeal No. 8 of 1980 (93 of 1987).

2. The original appellant, Duryodhan Das, the plaintiff filed T.S.No. 94 of 1975 in the Court of Munsif, Jajpur praying for a decree of injunction restraining the defendants (who are the present respondents) from entering into the suit land and disturbing his possession. The case of the plaintiff in essence was that one Kartika Das had three sons, namely, Indra, Mandara and Sundara and these sons inherited the properties of Kartika. Mandara separated himself from other two brothers and got his five annas and four paise share, while the other two brothers remained joint. Sundara died in such state of jointness without leaving any male heir. Sabi, the widow of Sundara also executed a gift deed in favour of the plaintiff. So, the plaintiff as the sole surviving heir inherited the entire ten annas and eight paise share of Sundara and Indra and remained in possession of the same. Suryamani, the son of Mandara, being the elder-member was looking after the settlement operation and he got the suit lands recorded in his name fraudulently. The plaintiff filed Title Suit No. 119/1943 in the Court of Munsif, Jajpur for declaring his right title over the suit land and for setting aside the entry in the R.O.R. The suit ended in compromise and the right of Suryamani over plot No. 2130 and part of plot No. 2131 and the right title of plaintiff over plot No. 2132 and the remaining part 2131 was acknowledged. In the said

decree recording of Suryamani's name in respect of the suit holding in the R.O.R. was held to be erroneous and plaintiff's absolute right, title and possession over the suit properties were declared. When the matter stood thus, defendant Nos. 1 to 3 claiming to have purchased the share of late Sundara from Hara, the daughter of Sundara (defendant No. 4) threatened the plaintiff with dispossession from the suit land, as a result there were some criminal proceedings between the parties. With no result coming from such proceedings, the plaintiff filed the suit for permanent injunction against the defendant-respondents.

3. The defendants contested the suit and pleaded in the written statement that defendant No. 4-Hara is the daughter of Sundara and his wife-Janjali; that Sabi was only maidservant in the house of Sundara. They claimed that Sundara was in possession of the suit property during his life time and after his death Hara continued such possession till she sold the lands to the defendant Nos. 2 and 3. They claim that" defendant No. 4 was possessing the disputed land through bhag chasies and after the sale transaction, defendant Nos. 2 and 3 are in possession of the same. From the pleadings learned trial Court framed three issues and on consideration of the evidence adduced by the parties learned trial Court held that Sundara was separated from Indra, plaintiff was in possession of the disputed land to the complete exclusion of defendant No. 4 and had acquired title over the same by adverse possession. It, accordingly, decreed the suit. Defendant Nos. 3 and 4 challenged the said judgment and decree in Title Appeal No. 1980 of the Court of learned Subordinate Judge, Jajpur. The said appeal was allowed. The plaintiff then preferred S.A. No. 162 of 1982 against the judgment and decree of the first appellate Court. The said appeal was allowed and the matter was remanded to the first appellate Court for fresh adjudication oh the question of actual possession of the suit land. There was also an observation that the compromise decree passed in T.S.No. 119 of 1943 was binding on defendant No. 4. After remand learned first appellate Court re-heard the matter and by the impugned judgment allowed the appeal and set aside the judgment and decree of the learned trial Court. The said judgment is now under challenge in this appeal.

4. While admitting this appeal, the following substantial questions of law were accepted for consideration:

(i) Whether learned first appellate Court failed to consider the material aspect of Ext. A which was a document coming into existence much before the initiation of the present dispute between the parties ?

(ii) Whether learned first appellate Court failed to take note of the contents of the plaint (Ext. 5) and written statement (Ext. 5/a) while considering the evidenciary value of Ext. 7 and in result arrived at wrong conclusion ?

5. Learned Counsel for the appellants submits that Sabi, the wife of Sundara, gifted away the share of Sundara in favour of the plaintiff and, therefore, the

plaintiff acquired title over the share of Sundara and his title was also declared in T.S.No. 119 of 1943; so there was no scope for the learned first appellate Court to conclude that Ext. A did not convey any title in favour of the plaintiff-appellant. He further contends that Ext. 7, the compromise petition, clearly shows that Suryamani, who is the predecessor-in-interest of defendant Nos. 1 to 3 admitted the right of the plaintiff over the suit property and the plaintiff also got possession of the said property through Civil Court in execution proceeding and in such backdrop, there was hardly any scope for the learned first appellate Court to say that the plaintiff-appellant was not in possession of the suit property. He states that the learned first appellate Court misdirected itself because it did not consider the contents of Ext. 7 along with the plaint - Ext. 5 and written statement Exts. 5/a.

6. Learned Counsel for the respondents argues that defendant No. 4 was never a party in T.S.No. 119 of 1943 or the execution proceeding and therefore, the compromise decree or the subsequent delivery of possession was not binding on her. He contends that even otherwise the decree and execution proceeding was only in respect of a portion of the plot No. 2131 and was never for the entire share of Sundara. His further contention is that the Courts below have successively held that Sabi is not the wife of Sundara and therefore, any gift deed by Sabi in respect of the properties of Sundara could not convey any right title in favour of the plaintiff-appellant. According to him, when there was ample evidence on record to show that defendant No. 4 was possessing the land of Sundara through her agents and when she sold that property to defendant Nos. 2 and 3 title of the suit property passed to defendant Nos. 2 and 3. Learned Counsel indicates that Ext. 7 was duly considered by learned first appellate Court along with the contents of Exts. 5 and 5/a. In essence, he supports the judgment and decree of the learned first appellate Court.

7. Learned Courts below-have successively held from the evidence on record that Sabi was not the wife of Sundara. There was a claim by the plaintiff during evidence that Sabi and Janjali are one and the same person, but there was no evidence and the plaintiff also never pleaded so in the plaint. On the other hand, there was evidence of some of the relatives that Sabi was kept as a servant in the house of Sundara after the death of Janjali. Law is settled that concurrent finding of Courts below on factual issue is not to be disturbed by the second appellate Court unless, the conclusion is perverse or same mistake is apparent on the face of the record. As has been indicated above, there was no pleadings from the side of the plaintiff that Sabi and Janjali are one and same person and positive evidence of the witnesses were there that Sabi was only a servant in the house of Sundara. So, the conclusion of Courts below cannot be termed as perverse or contrary to the record. Once Sabi is found not to be the legal heir of Sundara, she could not convey the property of Sundara in favour of the plaintiff through a gift deed. Learned first appellate Court, therefore, properly appreciated the situation and concluded that Ext. A did not convey any title in favour of the plaintiff.

8. Ext. 7 is the compromise decree of T.S.No. 119 of 1943. Admittedly, defendant No. 4 was not a party to that suit. The process server-P.W.2, who executed the writ of delivery of possession, admitted in his evidence that defendant No. 4 was not informed about such delivery of possession. On the contrary, defendant No. 4 and her witnesses including some relatives stated that defendant No. 4 used to possess the share of Sundara through plaintiff and others on bhag chas basis. Considering these evidence, learned first appellate Court said that Ext. 7 did not establish the possession of the plaintiff over the suit land and also did not prompt an inference that plaintiff acquired title over the properties of Sundara. In paragraph-9 of the impugned judgment, learned first appellate Court clearly discussed the contents of Ext. 7 alongwith the contents of Exts. 5 and 5/a. So, there is no scope to say that Ext. 7 was considered without taking note of Exts. 5 and 5/a. In the impugned judgment the learned first appellate Court has clearly mentioned that since the delivery of possession was in respect of only a portion of a plot out of the compact area standing on several plots, it never established the possession of the plaintiff over the entire suit land. Such conclusion is very much reasonable and in tune with the evidence on record.

9. Both the substantial questions of law are thus answered against the appellant. The appeal is accordingly found to be without any merit and is dismissed on contest, but without any cost.