

(2010) 05 OHC CK 0021

In the Orissa High Court

Case No : Writ Petition (C) No. 16717 of 2007

Dusmanta Kumar Sahoo and Others

APPELLANT

Vs

Raj Kishore Sahoo and Others

RESPONDENT

Date of Decision : 05-05-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 4, 151

Constitution of India, 1950 — Article 227

Citation : (2010) 110 CLT 619 : (2010) 2 ILR (Ori) 900 : (2010) 2 OLR 737

Hon'ble Judges : Sanju Panda, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Sanju Panda, J.—In this writ application, the Petitioners have challenged the order dated 31.10.2007 passed by the learned Ad hoc Addl. District Judge, Fast Track Court No. I, Cuttack in F.A.O. No. 98 of 2007 confirming the order dated 27.8.2007 passed by the learned Civil Judge (Junior Division), 1st Court, Cuttack in C.M.A. No. 92 of 2007 (arising out of T.S. No. 187 of 2001).

2. The facts as narrated in the writ application are as follows:

The Petitioners as Plaintiffs filed T.S. No. 187 of 2007 before the learned Civil Judge (Junior Division) 1st Court, Cuttack seeking permanent injunction and mandatory injunction in respect of "B" schedule property, its demarcation declaration of their title by way of prescription in respect of "C" schedule property and other consequential relief against the Defendants-opposite parties. "A" schedule property Consists of Hal Plot No. 844 measuring Ac.0.047 decs, Hal Plot No. 842 measuring Ac.0.026 decs., Hal Plot No. 841 measuring Ac.0.020 decs. and Hal Plot No. 911 measuring Ac.0.005 decs, in total measuring Ac.0.098 decs. under Hal Khata No. 640 had been recorded in the name of the Plaintiffs in the ROR published in the year 1991. Plot No. 841 had been recorded as private road whereas other three plots were recorded as homestead of the Plaintiffs out

of "A" schedule property. Plot No. 841 measuring Ac.0.020 decs. Had been described in the Schedule "B" in respect of which the relief of permanent injunction and mandatory injunction were sought by the Plaintiffs. The said plot corresponds to Sabik Plot No. 207 (Part) belonging to the Plaintiffs and an area measuring Ac.0.006.5 kadi out of Sabik Plot No. 208 belonging to the Defendants. The Plaintiffs had been using the road from the time of their ancestors including the Defendants and their neighbours continuously, openly and peacefully more than the statutory period with the knowledge of the Defendants and acquired right of easement by prescription over the aforesaid Ac.0.006.5 kadi of land which was described in Schedule "C". As such, the Plaintiffs sought relief of declaration over the same. The dwelling house of the Defendants situated over Hal Plot No. 846 adjoins to Hal Plot No. 841. The Defendants having no title over Hal Plot No. 841, tried to raise forcible construction by encroaching a portion. Therefore, the Plaintiffs filed the suit for the aforesaid relief.

3. The Defendants filed their written statement traversing the allegations made by the Plaintiffs and stated that in the Hal Settlement, the recorded area of the Plaintiffs had been enhanced by Ac.0.018 decs. However, the Plaintiffs were only entitled to Ac.0.080 decs, as per Sabik R.O.R. The excess land belonged to the Defendants and the same had been amalgamated in the suit plot of the Plaintiffs and other plots for which the Defendants preferred Revision Petition for correction of ROR in respect of the aforesaid Ac.0.018 decs. which was pending before the Commissioner, Settlement & Land Records, Cuttack. Therefore, they prayed for dismissal of the suit.

4. The Petitioners filed Misc. Case No. 148 of 2001 under Order 39, Rules 1 and 2 for temporary injunction against the opposite parties to restrain them from making any construction over the suit land, i.e., Hal Plot No. 841 till disposal of the suit.

5. After hearing both the parties, on 12.8.2002 the learned Civil Judge (Senior Division) directed the parties to maintain status quo in respect of "B" schedule property till disposal of the suit. Thereafter, being desirous of taking water connection to their house from public water connection, the Plaintiffs filed CMA No. 92 of 2007 under Order 39, Rule 4 read with Section 151, CPC for necessary variation in the order dated 12.8.2002. They specifically stated that the only approachable way to take water connection was through the disputed land, i.e., Hal Plot No. 841. As they were facing difficulties in their day-to-day life without water supply to their house and to save them from acute shortage of drinking water, they applied to the authority for water connection to their house. The authority sanctioned water supply from public water connection and also the Municipal Corporation granted permission to take the said connection by cutting the road.

6. On 23.6.2007, the Petitioners filed a memo supported by an affidavit inter alia stating therein that they undertook to remove the water pipe connection from

the suit land at their own cost and should not claim any equity over the same, if permission for such connection was accorded in their favour.

7. However, the Defendants opposed the plea of the order of status quo. They also filed an application before the trial Court alleging that the Plaintiffs violated the status order by digging pit in the suit land to take water connection and electric connection. The said application was also pending.

8. After hearing the parties, on 27.6.2007 the trial Court rejected C.M.A. No. 92 of 2007. Being aggrieved by the said order, the Petitioners preferred F.A.O. No. 98 of 2007 before the learned District Judge, Cuttack which was transferred to the Court of the learned Ad hoc Addl. District Judge, FTC-I, Cuttack. The appellate Court on 31.10.2007 dismissed the appeal by confirming the order of the trial Court on the ground that the Appellants had moved the Court below seeking interference of the Court for a preventive order as to the change in the status of the suit land and any variation in the order by according permission even accepting the undertaking filed by the Appellants would change the nature and status of the suit property.

9. Learned Counsel for the Petitioners submitted that in view of the undertaking given by the Petitioners, the Petitioners will not claim any equity if permission is accorded in their favour. The appellate Court should not have recorded the above finding that it would change the nature and status of the suit property, In case the Plaintiffs fail in the suit, they will not claim any equity and they will leave the water connection, if the Court will permit them to proceed with the said purpose. He further submitted that while drinking water supply is a bare necessity in the Summer Season throughout the world the Plaintiffs are being deprived of taking pure and fresh drinking water and the Courts below should have considered the same.

10. Learned Counsel for the opposite parties supported the impugned order and submitted that since the nature and status of the suit property is going to be changed, the order of status quo needs no variation.

11. Considering the urgency and necessity of the matter, this Court on 21.8.2009 appointed Mr. Biswanath Rath, an Advocate of this Court as Advocate Commissioner to visit the spot and submit a report as to whether water connection can be taken by the Petitioners to their house through any plot other than the disputed plot. A report along with a sketch map has been submitted by Mr. Rath on 2.9.2009 in presence of the learned Counsel for both the parties. The said report reveals that water line is available in front of Hal Plot No. 835. There is already a Municipal approach road and drain passes in between Hal Plot Nos. 835 and 847 beyond Hal Plot No. 842 and this is the only way through which the water line can pass till Plot No. 842 including the plot of the Plaintiffs and as all other plots except Hal Plot No. 841 a road area already fully utilized, there is absolutely no other chance of drawing the water line connection. It goes without saying that Plot No. 841 is a new plot created under Hal Khata carving out from

Sabik Plot Nos. 209/Hal Plot No. 847, Sabik 208/Hal 846, Sabik 206 and 207 now under Hal Plot No. 842 the drawal of water line connection will be in the interest of all the residents residing over Hal Plot Nos. 847,846,148 and 843 and as it can run over Municipal drain already constructed it will not affect neither of the parties. In the report, he has also made it clear that there is no other way left for drawing water line to the Plaintiffs Hal Plot No. 842 and 844 except over Plot No. 841 presently a road.

12. In view of the above report submitted by the Advocate Commissioner which was not objected by the parties, there is no doubt that water connection can be taken over Plot No. 841. This Court in a decision Smt. Padmini Sekhar Deo and Others Vs. Pankajini Thakur and Another, wherein this Court held as under:

The Defendants shall give a written undertaking before the trial Court that they will give vacant delivery of possession of the land or land along with the structure to the Plaintiffs in the event of eventual success of the Plaintiffs in the suit as per the wishes of the Plaintiffs without claiming any equity. If such an undertaking is given within a period of three weeks from today, the Respondents would be permitted to complete the structure on the disputed land thereafter and till such undertaking is given the order of injunction passed by this Court shall continue.

13. Therefore, taking into consideration the above decision, the submission made by the parties and the fact that drinking water is a bare necessity for sustenance of life, this Court in exercise of its jurisdiction under Article 227 of the Constitution of India, sets aside the impugned order passed by the appellate Court. As the trial Court had passed the impugned order mechanically without any application of mind, this Court also sets aside the trial Court's order and allows the Petitioners to take water connection to their house, but they will not claim any equity for the same if they fail in the suit.

14. The writ application is allowed. No costs.