

(1991) 10 OHC CK 0012

In the Orissa High Court

Case No : Civil Revision No. 759 of 1988

K. Duriyendra and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 09-10-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 151
Specific Relief Act, 1963 — Section 41

Citation : AIR 1992 Ori 297

Hon'ble Judges : S.K. Mohanty, J

Bench : Single Bench

Advocate : A.K. Sahoo, P.K. Misra, H.C. Pati, S.K. Swain and B.K. Nayak, for the Appellant; Addl. Standing Counsel, for the Respondent

Judgement

S.K. Mohanty, J.—The petitioners who are widow and descendants of one Koteswar Pao, brought title suit No. 126 of 1984 in the court of Subordinate Judge, Puri for declaration of their title in respect of a house property within Puri Municipality and for permanent injunction restraining the defendants (State of Orissa and Tahsildar, Puri) from dispossessing them therefrom or demolishing the structure standing thereon. In the suit, the plaintiffs prayed for a temporary injunction, which was allowed in the trial court but disallowed by Additional District Judge in appeal. Hence the revision by the plaintiffs.

2. The plaintiffs' case, in brief, was that Koteiwar entered the suit site which was part of a vast sandy patch near the sea shore more than 30 years back, constructed permanent structure thereon, got it electrified, brought telephone connection thereto, paid the municipal taxes and has acquired title over the same by adverse possession against the state.

3. State of Orissa in their written statement did not deny the construction of permanent structure on the suit site, telephone and electric connections thereto and payment of municipal taxes by the plaintiffs. They however denied that possession of Koteswar was open, peaceful and uninterrupted for the statutory

period; that the plaintiffs had acquired title by adverse possessions; and claims that two encroachment cases were started against the plaintiffs in the year 1980 culminating in passing of orders of eviction on 20-4-1984.

4. Referring to the decisions in K.V. Narayan Vs. S. Sharana Gowda and Another, and Sheik Khalilur Raheman Vs. Estate Officer and Others, the learned Additional District Judge has reversed the order of the trial court on the ground that the petitioners are rank trespassers and therefore they cannot maintain a suit under Order 39 Rules 1 and 2, C.P.C. and the purpose of the suit being to restrain the Tahsildar to proceed with the encroachment proceeding, it is not permissible in view of Section 41(b) of the Specific Relief Act, 1963.

5. The learned counsel for the petitioners urged that the suit in question was not by a rank trespasser but by persons who had acquired valid title by adverse possession and Section 41(b) of the said Act has no application to the facts of the case.

6. In the case of K.V. Narayan Vs. S. Sharana Gowda and Another, , it has been held that a trespasser in possession is not entitled to temporary injunction as against true owner. In that case the suit was one not for title but for permanent injunction only and the defendants had better title than that of plaintiff who had none at all. Thus the rendering being in a different background cannot be applied to the facts of the case at hand.

In the case of Sheik Khalilur Raheman Vs. Estate Officer and Others, , it has been laid down that a person in possession can resist dispossession even by the rightful owner unless it is in due course of law. In this case writ petitioner challenged order of eviction passed under Orissa Public Premises (Eviction of Unauthorised Occupants) Act 1972 on the ground that it was vitiated for want of statutory notice under the Act. Therefore this decision also is of no application to the facts before me.

7. The learned Additional District Judge has mentioned that two eviction proceedings were pending in the court of the Tahsildar, Puri to evict the plaintiffs -- petitioners and the Tahsildar being a court not subordinate to the Civil Court, issue of injunction against him is hit by Section 41(b) of the Specific Relief Act, 1963. The learned Additional District Judge has committed an error. The proceedings before the Tahsildar have already been finalised as revealed from para 7 of the written statement, wherein it has been stated that after following required procedures, orders for vacating the suit land u/s 7(1) of the Orissa Prevention of Land Encroachment Act, 1972 were passed on 20-4-1984.

8. Now the crux of the question is whether Section 41(b) of the Specific Relief Act, 1963 which corresponds to Section 56(b) of the Specific Relief Act, 1877 bars issue of temporary injunction in favour of the petitioners.

Section 56(b) of the old Act prohibited grant of injunction "to stay proceedings in a court not subordinate to that from which the injunction is sought". Section

41(b) of the new Act prohibited grant of injunction "to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought".

9. The provisions of Section 56(b) of the old Act stood attracted to a case of temporary injunction under Order 39, Rule 1, C.P.C. by virtue of an Orissa amendment to said Rule. It has been held by this Court in *Smt. Nalinibala Das v. Smt. Geeta Bose* 50 (1980) CLT 63 that with the amendment of the CPC in 1976, the Patna amendment (Same as in Orissa) of Order 39, Rule 1 of the 1908 Code running counter to the terms of the amended Code has been deleted. In this case order of refusal of grant of temporary injunction against the principal defendant in the matter of execution of a decree for eviction obtained from the House Rent Controller was under challenge. It has been held that the restrictions contemplated u/s 41 of the Specific Relief Act (new) appearing in Chapter VIII dealing with perpetual injunction have no application to a case under Order 39, Rule 1, CPC and at present there is no impediment for the subordinate Judge to grant such injunction against the plaintiff.

10. Section 41(b) of the Specific Relief Act, 1963 came up for interpretation in the apex Court in the case of *Cotton Corporation of India Limited Vs. United Industrial Bank Limited and Others*, and it has been held in paragraph 10 :

Expression "injunction" in Section 41(b) is not qualified by an adjective and, therefore, it would comprehend both interim and perpetual injunction. It is, however, true that Section 37 specifically provides that temporary injunctions which have to continue until a specified time or until further order of the court are regulated by the Code of Civil Procedure. But if a dichotomy is introduced by confining Section 41 to perpetual injunction only and Section 37 read with Order 39 of the CPC being confined to temporary injunction, an unnecessary grey area will develop.

11. In view of the aforesaid pronouncement by the apex Court, the present legal position is quite clear that temporary injunction cannot be granted in contravention of Section 41(b) of the new Act.

12. In the case at hand, Tahsildar exercising powers under Orissa prevention of Land Encroachment Act, 1972 is sought to be restrained by a prohibitory injunction from dispossessing the plaintiffs. The Tahsildar is empowered u/s 7 of this Act to summarily evict any person unauthorisedly occupying Government land, after giving reasonable notice. The court of Tahsildar is certainly not subordinate to the civil court. Consequently it has been rightly held by the learned Additional District Judge that Section 41(b) stood as a bar for grant of the injunction sought. Such conclusion is supported by the decision in the case of *Udyogsilpa Pvt. Ltd. Vs. State of Orissa and Others*,

13. In the trial court the defendants took the plea that the suit was barred u/s 16 of the O.P.L.E. Act. For proper appreciation the said section is quoted below :

Bar of suits and proceedings -- No suit or other legal proceeding in respect of the matters of dispute for determining or deciding which provision is made in this Act shall be instituted in any Court of law except under and in conformity with the provisions of this Act.

14. In the case of *Ghasi Khamari v. State of Orissa* ILR (1980) ori 582 it has been held that an order of eviction passed under the provisions of the O.P.L.E. Act is final, provided the Act applied to the facts of the particular case. In this case the petitioners mainly contended that they had been in possession of the property for more than thirty years prior to initiation of the proceeding under the O.P.L.E. Act. It was held that the civil court would have jurisdiction to examine the jurisdiction of the Tribunal in question and if the petitioners are able to show that they had been in unauthorised occupation for more than thirty years before the proceeding commenced, the proceeding under the Act would not be maintainable and therefore the direction impugned (order of eviction) would be without jurisdiction. Applying this position of law to the facts of the case at hand, it can rightly be said that the suit as framed was prima facie maintainable in law.

15. In the facts of the case, a question may arise if in exercise of inherent powers u/s 151 of the CPC the temporary injunction sought could be granted. In my view, since there is a clear statutory bar, in the guise of ends of justice the powers u/s 151 cannot be invoked.

16. There are, however, special facts in this case. Koteswar, the predecessor-in-interest of the petitioners, constructed permanent structure, got it electrified, and brought telephone connection also. Petitioner No. 1 is his widow and petitioners 3 to 6 are his minor sons. Admittedly they have been staying in this house since long, paying municipal taxes for a considerable number of years. The civil court is in seisin of the matter where the petitioners' claim of title to the land in question will be finally decided. In these facts, if advised, petitioners may file an application before opposite party No. 2 for deferring taking over possession of the land in question till adjudication of the civil suit. If such an application is filed, opposite party No. 1 would do well to consider the same and defer taking over possession of the land in question till the decision in the civil suit.

17. With the above observations the Civil Revision is dismissed. There shall be no order as to costs.