
(2011) 07 OHC CK 0041
In the Orissa High Court
Case No : Second Appeal No. 138 of 1988

Lakshmikant Maharana

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 29-07-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Specific Relief Act, 1963 — Section 38, 38(3), 41, 41J

Citation : AIR 2012 Ori 4(1)

Hon'ble Judges : V. Gopala Gowda, C.J

Bench : Single Bench

Final Decision : Dismissed

Judgement

V. Gopala Gowda, C.J.—This second appeal is directed against the judgment dated 1-2-1988 and decree dated 11-2-1988 passed by the learned Addl. District Judge, Bhubaneswar in T.A. No. 13/10 of 1987/86 affirming the judgment dated 11-4-1986 passed by the learned Munsif, Bhubaneswar in O.S. No. 106 of 1982 by framing the ground Nos. 4 and 7 as substantial questions of law urging various grounds in support of the same.

2. The relevant brief facts are stated for the purpose of answering the substantial questions of law framed at the time of admission. The rank of the parties is referred to in this judgment as per the ranking assigned in the plaint presented before the trial Court for the sake of brevity. The plaintiff filed the suit for permanent injunction in respect of the suit schedule property restraining the Defendant Nos. 1 and 2 from leasing out any portion of the plaintiff's land and restraining Defendant No. 3 from taking out lease of any portion of the land of the plaintiff with other consequential reliefs.

3. The case of the plaintiff is that he had taken the suit land bearing plot No. 23 measuring 90" x 30" in Bapuji Nagar, Bhubaneswar as per Government drawing No. C-1823 on lease for a term of 90 years and necessary lease deed bearing No. 232 of 1958 had been executed and registered on 2-8-1958 which is marked as

Ext. 1. Subsequently, in 1960, the leasehold area was enlarged to 110" x 32" and a second deed was executed in favour of the plaintiff by Defendant No. 2 and delivered possession of the lease plot to him as per the boundaries given in the lease deed which is marked as Ext. 3. The plot No. 23 measuring 110" x 32" has the following boundaries :--

North

Plot No. 24

South

Open space

East

Road

West

Open space and road

4. According to the plaintiff, after taking possession of the plot, he has constructed a building on the leasehold land covering almost its entire area after obtaining proper approval from the Notified Area Council, Bhubaneswar and Defendant No. 2. The sewerage line and the water pipe main are situated by the side of the road lying to the east of the lease-hold plot of the plaintiff. It is his case that he has taken water pipe connection from the said main line and has also connected his sanitary latrines to the sewerage line being approved by the proper authorities. It is his case that the sanitary latrines have been constructed on the east corner of his plot and his man hole tank is situated on the north east corner of his plot. He has also constructed his garage on the eastern extremity of his plot in the middle and two doors of his house are also opened towards the eastern road adjacent to his plot. It is further alleged in the plaint by the plaintiff that defendant No. 3 in collusion with Defendant Nos. 1 and 2 is planning to take a piece of plot on lease from Defendant No. 1 and 2 by carving out a portion of land from the plaintiff's land. Since the Defendant Nos.1 and 2 are going to lease out a plot to Defendant No. 3 by taking away some portion of his alleged land, cause of action arose for institution of the suit with the prayers sought for against the defendants.

5. Defendant Nos. 1 and 2 have filed their written statement denying the various allegations made in the plaint. However, they have admitted that plaintiff is the leaseholder of plot No. 23 measuring an area of 110" x 32" and accordingly he was given possession of the same, but they have specifically stated that the possession was not delivered to the plaintiff as per the boundary of the lease deed as claimed by him. They have also challenged the maintainability of the suit on the ground of non-service of notice u/s 80, C.P.C. on them. According to them, no area has been carved out from the land of the plaintiff to make a plot bearing plot No. 23/ A measuring 43" x 32". But on the other hand, plot No. 23/

A is a distinct plot existing on the eastern side of plot No. 23 which has nothing to do with plot No. 23. No area of the leasehold plot No. 23 of the plaintiff is carved out or encroached for the purpose of leasing out the plot No. 23-A to Defendant No. 3. Therefore, they have denied the allegations made against them in this regard. Further it is specifically pleaded that the plaintiff has no right, title or interest over plot No. 23-A. Hence, they prayed for dismissal of the suit.

The following five issues were framed by the trial Court for its consideration.

(i) Is the suit maintainable?

(ii) Is there any cause of action to file the suit?

(iii) Is the suit bad for defect of notice u/S. 80 C.P.C?

(iv) Is the plot No. 23 of Bapuji Nagar bounded as per the lease Deed described in para 2 of the plaint has been given possession to the plaintiff for the suit plot with an area of 110" x 32" was given possession?

(v) Is the plot No. 23-A proposed to be leased out to Defendant No. 3, carved out from the plot No. 23 the leasehold plot of plaintiff?

6. The suit went for trial. On behalf of the plaintiff, he himself was examined as P. W. 1. On behalf of the Defendants, D. W.1 was examined. On behalf of the plaintiff, Exts. 1 to 4 and Exts. 4/a and 4/b were marked. On behalf of the Defendants, Ext. A i.e. copy of the plan No. DRG No. C-5569 (part plan of the Bapuji Nagar shop-cum-residence area) has been marked. The trial Court on appreciation of the pleadings and evidence on record, answered issue Nos. 2,4 and 5 against the plaintiff by recording its reasons holding that plot No. 23 was leased out by executing lease deed by defendant No. 2 and possession of the same has been given to the plaintiff of the suit plot with an area of 110" x 32" and plot No. 23-A proposed to be leased out to Defendant No. 3 is not carved out from plot No. 23 of the leasehold plot of the plaintiff. It further held that there is no cause of action for him to institute the suit against the defendants as the possession of the plot No. 23 measuring 110" x 32" was given as per the drawing No. C-1823 and not as per the boundaries given in the lease deed Ext. 3 as claimed by the plaintiff and plot No. 23-A was not carved out of plot No. 23 and therefore held that Defendant Nos. 1 and 2 cannot be restrained permanently from leasing out a portion of the land as per the boundaries mentioned in the Ext. 3 as the plaintiff has no right in respect of the area other than the area of 110" x 32" as mentioned in the lease deed Ext. 3. Accordingly, having answered the issue Nos. 2, 4 and 5, learned trial Court has held that issue Nos. 1, 3 and 6 are not required to be answered.

7. Being aggrieved by such judgment and decree, the appeal was preferred by the plaintiff before the first appellate Court urging various legal contentions by placing reliance upon Ext. 3 and also upon the plan of the residence of the plaintiff sanctioned by the Notified Area Council, Bhubaneswar contending that it is a well settled position of law that if there is a dispute between the area and

the boundaries description, the boundaries as mentioned in the lease deed must prevail so far as the area of the plot is concerned. The First Appellate Court on re-appreciation of the evidence on record has confirmed the judgment and decree passed by the learned trial Court by recording reasons in the impugned judgment. Further, the appellate Court recorded a finding of fact holding that plot No. 23-A is a distinct plot from plot No. 23 and it is not carved out from plot No. 23. The plaintiff could have title and interest in respect of measurement of the plot as mentioned in Ext. 3 for grant of decree of perpetual injunction. The principles of law for grant of perpetual injunction derived in Sections 38 and 41 of the Specific Relief Act, 1963 are not in favour of the plaintiff. Section 41 of the Specific Relief Act prohibits issue of perpetual injunction when the plaintiff has no personal interest in the subject matter. Sub-section (3) of Section 38 of the Specific Relief Act stands in the way of granting perpetual injunction in favour of the plaintiff and dismissed the appeal confirming the judgment of the trial Court by its judgment dated 1st February, 1988 which is impugned in the appeal.

8. The correctness of the findings recorded on the contentious issues in the said judgment is challenged by filing the second appeal by the plaintiff by framing ground Nos. 4 and 7 urged in the memorandum of appeal as the substantial questions of law. It is worthwhile to extract the ground No. 4 in this judgment.

(4) Whether the finding of the First Appellate Court in holding that the plaintiff is not entitled to any area beyond 110" x 32" in plot No. 23 of which possession was delivered to the plaintiff and not as per the description mentioned in the lease deed wherein in eastern side of plot No. 23 is shown as road?

Since the ground No, 7 does not relate to any substantial question of law, it is not necessary to extract the same here.

9. Learned counsel for the plaintiff has invited my attention by placing reliance upon the decision of this Court in the case of Babaji Dehuri and Others Vs. Biranchi Ananta and Others, in the case of Nathu Lal and Others Vs. Ram Swaroop and Others,) and Ext. 3 to the lease deed wherein description of the boundaries towards east is road, up till that road, the entire area comes within plot No. 23 though the measurement is mentioned as 110" x 32". Therefore, the grounds urged on behalf of the plaintiff questioning the correctness of the finding of fact in answering the issue Nos. 4 and 5 and the contentious points framed by the First Appellate Court is contrary to the decision of the aforesaid High Courts and documentary evidence Ext. 3. Hence the finding recorded on contentious points is not only erroneous but also suffers from error in law. Therefore, the learned counsel for the plaintiff submits that substantial question of law would arise for consideration of this Court to be answered in favour of the plaintiff and grant the relief as prayed in the suit. He has placed reliance upon the decision reported in AIR 1930 57 (Privy Council) and the decision in the case of Kattinokkula Murali Krishna Vs. Veeramalla Koteswara Rao and Others, in support of the proposition of law that the Court cannot look to the evidence adduced by the parties in the absence of the pleadings which has never been put forward in

the written statement. Therefore, the findings and reasons recorded on the contentious points by the First Appellate Court are error in law in the absence of the pleadings and placing reliance on the evidence on record upon D. W. 1 with regard to the possession was delivered with reference to measurement of 110" x 32" in plot No. 23 lease out in favour of the plaintiff, but not with reference to the boundaries described in Ext. 3 the lease deed. Therefore, the learned counsel for the plaintiff submits that the impugned judgment is liable to be set aside by answering the substantial question of law in his favour by allowing the Second Appeal and grant the relief.

10. Mr. R. K. Mohapatra, learned Government Advocate sought to justify the concurrent findings recorded on the contentious point in the judgment by the First Appellate Court contending that the suit for grant of perpetual injunction is not maintainable as the leasehold rights in favour of the plaintiff is specifically mentioned with regard to the measurement of the area as 110" x 32". Further it is contended that nowhere in the plaint it is mentioned that measurement of the plot in respect of the leasehold rights is reduced deliberately by carving out plot No. 23-A by averring specific pleadings in the plaint. Further by placing strong reliance on the averments made at paragraphs 6 and 8 of the written statement of Defendant Nos. 1 and 2, it has been specifically pleaded that plot Nos. 23 and 23-A are distinct and separate. Therefore, it is contended that the finding of fact recorded by the First Appellate Court that of plot No. 23-A is not carved out from plot No. 23 is erroneous in law. In respect of the area mentioned in plot No. 23 alone, the plaintiff has got interest and title for grant of perpetual injunction as required u/s 38 sub-section (3) read with Section 41 (J) of the Specific Relief Act, 1963. In view of the same, the suit is not maintainable as the plaintiff was required to file the suit for declaration, that has not been done. Therefore, the concurrent findings recorded on the contentious points by the First Appellate Court is based on proper appreciation of pleadings and legal evidence on record. Hence, he submits that there is no substantial question of law that would arise for consideration in this case. Hence, he prayed for dismissal of the Second appeal.

11. With reference to the above said rival legal contentions, this Court is required to answer the same and also to find out as to whether the substantial question of law as framed in this appeal would arise in this case and is required to be answered in favour of the plaintiff. The answer to the substantial question of law framed in this appeal must be answered by me in the negative for the following reasons.

12. The parties went for trial before the trial Court. The trial Court has answered issue Nos. 4, 5 and 2 against the plaintiffs by the recording valid and cogent reasons on proper appreciation of pleadings and evidence on record holding that measurement of the plot leased out as per lease deed Ext. 3 in favour of the plaintiff is 110" x 32" and further the evidence of D. W. 1 is that possession of the plot No. 23 with reference to measurement of the leased area i.e. 110" x 32"

was given to the plaintiff. The same is on the basis of Drawing No. C-1823. The categorical finding on the contentious issue as recorded by the trial Court is on the basis of appreciation of evidence of D. W. 1 that the plaintiff was not given possession of the said land as per the boundaries description given in the lease deed Ext. 3. Further issue No. 5 has been answered against the plaintiff on appreciation of evidence of P. W. 1, who has stated in his examination in chief that public road is also adjoining just to the east of his plot No. 23. He has admitted in his cross-examination that the distance between the eastern boundary line of his plot and the road is 10 to 12 cubits. D. W. 1 has stated that an open space was lying between plot No. 23 and the road situated on the east of plot No. 23. Further the trial Court has made observation that admittedly, the defendant Nos. 1 and 2 have not pleaded in their written statement that vacant space was lying between the plot No. 23 and the road situated on the east of this plot. Having made such observation, further with reference to the Exts. 1 to 3, learned trial Judge has rightly made observation that the said documents gives presumption that a road existed just on the east of the suit plot after vacant land in respect of which plot 23 A is carved out. Further the Defendants have also filed a revised plan of the area marked as Ext. A, the new deed. Considering the evidence of P. W. 1. and D. W. 1, who have deposed before the trial Court in the case in support of their respective case, the trial Court has held that it is the duty of the plaintiff to prove that newly leasehold plot No. 23-A was a part and parcel of his leasehold plot No. 23. The plaintiff has not got measured the land through surveyor knowing commissioner to establish the fact that some portion of his plot No. 23 was carved out by defendant No. 2 for making new lease plot No. 23-A. Therefore, the trial Court has rightly held that the evidence adduced on behalf of the plaintiff is not sufficient to hold that the plot No. 23-A is carved out from plot No. 23. The finding of fact recorded by the trial Court on the contentious issues along with the reasons recorded was examined by the First Appellate Court with reference to the rival legal contentions urged on behalf of the parties before the said Court. The First Appellate Court on re-appreciation of the pleadings and evidence on record, held that the area covered by Exts. 1 and 3 is the plot for which plan was submitted by the plaintiff as per Ext. 4 which has received approval of the authorities as borne out from Exts. 4/a and 4/b. Therefore, the First Appellate Court has rightly held that the area of plot No. 23 which was delivered to him was 110" x 32". Plot No. 23-A intervenes plot No. 23 and to the eastern side road is lying vacant space and there is description of the land showing that a road lies to the east of plot No. 23 and the plaintiff cannot take advantage of not making mention about the existence of vacant space in between plot No. 23 and road to its east well describing the boundaries in the lease deed and further rightly recorded a finding of fact about the ownership of plot No. 23-A with D. Ws. 1 and 2 and their right to lease out the same undisputedly and if it is disputed, the same is not tenable. Ext. A and evidence of D. W. 1 makes it clear that plot No. 23-A is a distinct plot which is situated on the east of plot No. 23 intervening by the road. Further the evidence of D. W. 1 reveals that he is a disinterested witness and there is no reason to disbelieve his

evidence. Therefore, the trial Court exercising its original jurisdiction has rightly accepted his testimony and arrived at a finding that the plot No. 23-A is not carved out from plot No. 23 and therefore, the First Appellate Court has held that the plaintiff has no right, title and interest over the same. Further, the trial Court has rightly made observation with reference to Section 38, sub-sections (3) and 41(J) of Specific Relief Act, 1963, which prohibits issue of permanent injunction and the plaintiff has no interest in the subject matter as plot No. 23 -A is a distinct plot and not carved out of plot No. 23. Therefore, the plaintiff has no interest therein. Further trial Court held that Section 38 and Section 41 (J) stand in the way of granting perpetual injunction in favour of the plaintiff. The said finding and reasons recorded by the trial Court cannot be termed as error in law.

13. In view of the aforesaid reasons, I am of the view that the concurrent findings recorded by the trial Court on the contentious issues are unassailable, and based on proper appreciation of pleadings and legal evidence on record by the first appellate Court applying its mind consciously. Therefore, the grounds urged in the Second Appeal placing reliance upon the decisions of this Court, Rajasthan High Court, Privy Council and the Supreme Court with reference to boundaries and pleadings respectively are wholly inapplicable to the fact situation and findings of fact recorded on the basis of pleadings and evidence on record. Therefore, in my view, the reliance placed upon the aforesaid decisions by the learned counsel for the plaintiff are misplaced and they do not support the case of the plaintiff. Therefore, I am of the view that the concurrent findings of fact have been recorded by the First Appellate Court agreeing with the findings of the trial Court on the contentious issues after proper re-appreciation of pleadings and evidence on record and there is no reason to interfere with the same by this Court in this Appeal as the substantial question of law framed does not arise at all. Therefore, the appeal is devoid of any merit and is liable to be dismissed and accordingly dismissed, but without costs.