
(1992) 06 OHC CK 0006
In the Orissa High Court
Case No : Second Appeal No. 151 of 1985

Lucy Naronah

APPELLANT

Vs

Raghunath Jew Bijie

RESPONDENT

Date of Decision : 29-06-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 9, Order 6 Rule 17
Specific Relief Act, 1963 — Section 38

Citation : AIR 1993 Ori 153 : (1992) 74 CLT 463

Hon'ble Judges : P.C. Misra, J

Bench : Single Bench

Advocate : R.K. Mohapatra, B. Routray, K.B. Kar, S.S. Das and S.K. Swain, for the Appellant; G.H. Panda, P.K. Parida, R.C. Rath and S. Panda, for the Respondent

Final Decision : Allowed

Judgement

P.C. Misra, J.—The defendant in O.S. No. 85 of 1980-1 of the Court of Additional Subordinate Judge, Puri is the appellant in this appeal against the reversing judgment passed by the second Addl. District Judge, Puri in Title Appeal No. 74/83 of 1983/82. The suit is one for permanent injunction restraining the present appellant from dispossessing the plaintiffs from the suit land and from cutting and removing the trees standing thereon.

2. The case of the plaintiffs is that plaintiff No. 1 is a deity and plaintiff No. 2 is the head of the institution and marfatdar of the deity. The suit properties are said to be originally belonging to L. G. Naronah who acquired the same by permanent lease on 5-1-1950 from one Durga Charan Jagdevray and thereafter he sold the property to plaintiff No. 1 through plaintiff No. 2 as its marfatdar by a registered sale deed dated 18-10-1965 on receipt of proper consideration pursuant to which the plaintiff was put in possession and he has been possessing the same all through. The disputed plot according to the plaintiffs was a vast sandy area near the sea and was lying waste. After purchase plaintiff No. 2 claims to have

reclaimed the said area by raising casuarina and cashew nut plantation as a result of which it became highly productive giving good profits. Alternatively the plaintiffs have claimed that in the event it is found that the suit land does not appertain to their purchased area, they having been in possession thereof for more than the statutory period, have acquired valid title by adverse possession. It has been further alleged that the defendant is the daughter of the said L. G. Naronah who had gifted a portion of the suit plot No. 15 to her in the year 1961. According to the plaintiffs the said area gifted to the defendant was away from the land sold to the plaintiffs which is completely separate having no connection whatsoever with the suit land. It has, therefore, been claimed that the defendant has no manner of right, title and interest in respect of the suit land or the trees standing thereon. The plaintiffs have alleged that the defendant has been laying false claim over the suit land being instigated by some persons against whom the plaintiffs had filed O.S. No. 164/79 in the Court of Subordinate Judge, Puri.

3. The defendant filed a written statement denying all the plaintiff allegations. She claims to have got Ac. 75.00 acres of land from her late father by a registered deed of gift dated 20-12-61 and continued to possess the same. She has mutated her name in the Mutation Case No. 55/ 77 and subsequently she has also been recorded in the record of rights in respect of the gifted properties. In a ceiling proceeding 30 acres out of the aforesaid area of 75 acres were vested in the State Government as ceiling surplus and the defendant was allowed to possess the balance 45 acres of land. Out of the said 45 acres, the defendant has sold away 10 acres each, to one Subash Chandra Samantray and Biswanath Prusty under two separate sale deeds dated 25-3-75 and 31-3-76 respectively. The balance 25 acres of land has been gifted by her to the minor daughter of her brother. Thus the case of the defendant is that she has no subsisting right, title and interest in the suit property and has been unnecessarily impleaded in the suit. On these allegations she prays for dismissal of the suit.

4. The learned trial Court framed the issues which arise out of the pleadings and after considering the evidence adduced by the parties came to the conclusion that the plaintiffs have failed to prove the location of the suit land and that it is a part and parcel of their purchased land. Consequently the Court found that the plaintiffs have not been able to prove their title and possession over the suit lands. Having so found, the Court dismissed the suit as not maintainable and held that the plaintiffs are not entitled to any of the reliefs claimed. The plaintiffs thereafter carried up the matter in appeal which was heard by the Second Additional District Judge, Puri, who disposed of the same by the impugned judgment. The learned lower appellate Court allowed the appeal mainly on the ground that the defendant having stated in her written statement that she had transferred her gifted land in favour of different persons and that she has no subsisting title in the disputed plot, there can be no objection to restrain her from coming over the suit land as she admittedly has lost all her interest therein. In the aforesaid context it was also observed by the learned appellate Court that the location of the suit plot was irrelevant and for that reason he rejected an

application filed by the plaintiffs in the lower appellate Court for demarcation of the suit land by a Civil Court Commissioner.

5. In this appeal the learned counsel appearing for the defendant-appellant has submitted that none of the aforesaid finding of the learned lower appellate Court is sustainable. He has argued that the defendant-appellant got 75 acres of land under Ext. D, the deed of gift dated 30-12-1961 is not disputed. Having acquired the said area out of the suit plot No. 15 from her father, the defendant sold away 10 acres of land to one Subash Chandra Samantray by a registered sale deed dated 25-3-75 marked as Ext. 1 and another 10 acres of land to one Biswanath Prusty by a registered sale deed dated 31-3-1976 marked as Ext. 3. Subsequently an area of 30 acres of land vested in the Government in 1975 as ceiling surplus land after which the defendant was left with 25 acres of land. She gifted this entire 25 acres of land to her mother's daughter by a registered deed of gift dated 23-2-77 marked as Ext. 2. Thus all these transfers were effected much prior to the filing of the suit. By the date of the suit the transferees from the defendant were owners in respect of the transferred land and, therefore, the transferees were the necessary parties to the suit. Any finding as to the location of the suit land would not bind the transferees. It is not correct to say as observed by the learned lower appellate Court that the transferor could be restrained as she had no subsisting title to the suit land because even after the transfer, the transferor has always the legal obligation to see that the transferee exercises all rights of ownership including possession in respect of the transferred land. In the event the transferee becomes unable to possess the transferred land on account of any defect in the title and possession of the transferor, the transferor may be made liable to compensate the transferee. The question that arose for consideration in the suit was whether the land acquired by the defendant by way of gift from her father is separate from the land in respect of which the plaintiffs claim title, In other words as per the pleadings 6f the plaintiffs the suit land is not a part and parcel of the land which the defendant got by way of gift from her father whereas the defendant claimed that the suit and appertains to her gifted land. Any decision on this point is likely to affect the interest of the transferee for which reason the suit will not be maintainable in the absence of the transferees who were necessary parties to the suit.

6. Another aspect which arises for consideration in the suit is equally important. The plaint as amended described the suit land as follows:

"District-Puri, P. S. Brahmagiri, Houze-Arakhakuda, Sabik Khata No. 1, Plot No. 15 from its western side area A.72.15 decimals indicated in red dots. From out of this an area of 45 acres is in suit as per the sketch map given below indicated by "X" marks corresponding to southern portion of Hal Settlement Plot No. 19. (plot No. 19/71) as illegally numbered in Mutation Case No. 55/ 77 (in Puri Tahasil) as per sketch map."

From the description as reproduced from the plaint the measurement of the

disputed land in relation to the settlement map has not been given nor the sketch map has been drawn to scale. The boundaries of the disputed land have not been mentioned. The defendant in the written statement took a specific objection that the suit is bad for lack of identification of the suit land. Order 7, Rule 3 of the CPC requires that where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers.

7. If the suit properly is the whole of the plot in the settlement map, mere mention of the survey number and the khata and mouza to which it appertains would be sufficient for its identification. But where the suit is in respect of a portion of a plot further particulars are necessary for its proper identification. It is not correct to say that a portion of a plot can always be identified by giving boundaries thereof. From a given boundary, lines making different angles can be drawn in which event the situation of the plot may still remain uncertain. In the present case some attempts were made by the plaintiffs to bring on record the proper identification of the suit land, by examining P.W. 2 who proved two maps, Exts. 5/a and 5/b said to have been prepared in a demarcation case. Out of the said maps Ext. 5/a is said to have been prepared under his supervision. The learned trial Court having discussed the evidence on record with reference to the said maps, concluded that the location of the suit land has not been proved. P.W. 4 is a private Amin, who claimed to have prepared a map being engaged by the plaintiffs for the purpose of demarcation and the said map has been marked as Ext. 7. The learned trial Court did not rely on the same as it was neither drawn to scale nor it was signed by the maker. It wanted to be explained during the course of argument as to how the aforesaid maps can be relied upon for demarcation of the suit land, but the materials on record were not sufficient to demarcate the suit land with reference to those maps". Learned counsel for the plaintiff-respondents thereafter filed an application for amendment of the plaint by substituting the plaint schedule giving fresh description of the suit property along with a rough sketch map which gives the length of different boundary lines. This amendment application has been objected to by the defendant-appellate. In the objection, she has alleged that the amendments liable to be rejected not only on the ground of delay, but also on the ground that the sketch map now sought to be introduced is totally a new one which will destroy the effect of admission brought out in the cross-examination of the plaintiffs and their witnesses. She also alleges that allowing the amendment would lead to a de novo trial from the trial stage as the measurement given in the sketch map is open to be challenged which can effectively be done in the trial Court.

8. The provisions contained in Order 6, Rule 17 of the CPC permit amendment of pleadings at any stage of the proceeding which includes the first and second appellate stages and the law is also well settled that the discretion of the courts in the matter of amendment of pleadings are to be liberally exercised. The

principle derived from a large number of decisions on the subject governing the exercise of discretion of the Court in the matter of amendment is that the amendment should not be allowed which would result in injustice to the other side. As already stated in the written statement itself a plea was taken by the defendant that the description of the suit property as given in the plaint is not sufficient for its identification. The peculiar fact of this case is that the plaintiffs admit that the defendant has acquired title in respect of a portion of the same plot out of which they claim title and possession. The plaint allegation itself shows that the defendant's portion of the plot is away from that of the plaintiffs. It was, therefore, all the more necessary that the portion of the plot which the plaintiffs claim should be described with certainty. Even if the Court passes a decree in favour of the plaintiffs, the same cannot be enforced against the defendant as its identification is not possible from the description of the suit properly given in the original plaint. The learned trial court dismissed the plaintiffs' suit on the ground that they have failed to prove the location of the suit land. In spite of the aforesaid finding the plaintiffs did not think of amending the plaint in the lower appellate court and remained satisfied by filing an application for deputation of a civil court Commissioner to demarcate the suit land. If the description given in the plaint is not sufficient for its identification, the civil court commissioner would fail to demarcate the same as the basis of demarcation is bound to be the description of the property in the plaint. The wide discretion vested on the courts in the matter of amendment of pleadings has to be exercised according to judicial principles and not in an arbitrary, vague or fanciful manner. In the facts of this case, I am not inclined to allow the amendment. At the stage of considering the merits of an amendment application the court is not justified to go into the truth or falsity of the averments sought to be introduced by way of amendment. But where the effect of amendment is to allow the parties to fight out the litigation from the initial stage of the suit, the amendment deserves to be rejected. It is not a case where the amendment is intended for clarification nor it is a case of clerical error inadvertently committed. Though as observed in AIR 1922 249 (Privy Council) that all rules or procedures are nothing but provisions intended to secure the proper administration of justice and it is essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised. But nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another nor to change by means of amendment the subject matter of the suit. Where as a result of the amendment the parties are to litigate afresh with reference to the subject matter of the suit, as substituted by the amendment from the stage of filing of a written statement and which evidently would require fresh set of evidence to be adduced by both parties, the amendment cannot be allowed to the prejudice of the other side, I refrain from going into the merits of the other points urged in this appeal, in view of the findings already recorded by me that the suit is incompetent for want of necessary parties and no effective decree can be passed, in respect of the suit property the description of which as given in the plaint is not sufficient

for its identification.

9. In the result, I allow this appeal, set aside the judgment of the lower appellate court and hold that the suit is liable to be dismissed for the reasons indicated above. For the purpose of clarification, it may be stated that all observations recorded by the learned courts below as regards the respective title and possession of either of the parties, would not operate as res judicata as between the parties in any future litigation, if any.

10. There shall be no order as to costs.