

(1995) 08 OHC CK 0017

In the Orissa High Court

Case No : Second Appeal No. 98 of 1985

Narasingha Padhi (dead) and after him Rangabati Padhi and
Others

APPELLANT

Vs

Sasibhusan Tripathy and Another

RESPONDENT

Date of Decision : 11-08-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 100(4), 100(5)
Specific Relief Act, 1963 — Section 34, 42

Citation : (1995) 2 OLR 497

Hon'ble Judges : R.K. Dash, J

Bench : Single Bench

Advocate : B. Senapati, S.N. Rath, S.N. Mohapatra, B.N. Mishra and S.K. Jethi,
for the Appellant; A.K. Misra, B. Pal, B. Baug and G.N. Ghosh, for the Respondent

Final Decision : Dismissed

Judgement

R.K. Dash, J.—Unsuccessful defendants are in appeal against confirming judgment and decree of the learned Subordinate Judge passed in Title Appeal No. 10 of 1982.

2. Plaintiff's case, briefly stated, is that his father acquired the suit house by virtue of a registered sale deed dated 8-11-1934 from one Smt. Budhi Sahuani and since purchase, he possessed the same as owner thereof. Deceased defendant No. 1 a relation of the plaintiff through his paternal grand-mother lost all his properties during) his father's life-time. So plaintiff's father took pity on him and gave him shelter in the suit house. But in the year 1874, defendant No. 1 asserted his title over the suit house and approached the local Police for help. Consequently, the Police initiated a 145 proceeding between the parties which is still subjudice in the Court. In the said proceeding, house was attached and kept under a receiver. Since deceased defendant No.1 claimed the suit house as his own, the plaintiff filed the present suit for declaration of his title without praying for recovery of possession since the house is under attachment.

3. Defendant No. 2 is the wife and defendants 3 and 4 are the sons of deceased defendant No. 1. All the defendants filed joint written statement and asserted that the suit house being their ancestral property, they are possessing the same as owners. Alternatively they have claimed to have acquired title by adverse possession. Learned trial Court framed six issues and on consideration of both oral and documentary evidence of the parties, decreed the plaintiff's suit negating the claim of title of the defendants. On appeal, the learned Subordinate Judge affirmed the judgment and decree of the trial Court. Hence the present appeal.

5. Substantial questions of law which need scrutiny have been formulated as under:

(a) Is the suit for declaration of title maintainable in the facts and circumstances without there being a prayer for recovery of possession, and

(b) whether the Courts below were right in acting on the sale-deed Ext. 1 by presuming the correctness of the contents thereof.

6. Section 34 (old Section 42) of the Specific Relief Act. 1963 provides for seeking declaratory relief in certain circumstances. A plain reading of the section indicates that a person who has right to any legal character, that is, statue or to any property, may bring a declaratory action against one who actually denies, or is interested on behalf of others to deny his title to such character or right to any such property. If such a declaration is sought for, the Court may in exercise of its discretion to grant the relief, even though there is no prayer for any further relief. But as provided in the Proviso to the said section, the Court shall refuse to make declaration asked for, if it finds that the plaintiff being able to seek further relief than mere declaration has omitted to do so. The object of having such a provision is to prevent multiplicity of suits and to put a finality to the dispute once for all. Question then arises whether a suit for declaration of title without there being any prayer for either confirmation of possession or recovery of possession, can be entertained when the property in question has been attached by the Magistrate in a proceeding u/s 145, Code of Criminal Procedure. Law is well settled by the apex Court in the case of Deo Kuor and Anr. v. Shed Prasad Singh and Ors. : AIR 1966 SC 309 that if the property is in "custodia legis" a suit for declaration of title simplisiter is competent. For better appreciation the relevant observation of the Hon''ble Court is reproduced thereunder :

"The authorities clearly show that where the defendant is not in possession and not in a position to deliver possession to the plaintiff, it is not necessary for the plaintiff in a suit for a declaration of title to property to claim possession : See Sunder Singh Mallah Singh Sanatan Dharsu High School Trust v. Managing Committee, Sundar Singh Mallah Singh Rajput High School : AIR 1988 PC 73. Now it is obvious that in the present case, the respondents were not in possession after the attachment and were not in a position to deliver possession to the appellants. The Magistrate was in possession, for whomsoever, it does not

matter, and he was not of course a party to the suit. It is pertinent to observe that in AIR 1943 94 (Privy Council) , it has been held that the further relief contemplated by the proviso to Section 42 of the Specific Relief Act is relief against the defendant only. We may add that in K. Sundarasa Iyer v. Sarvajana Sowkiabi Virdhi Nidhi Ltd. : AIR 1939 Mad. 986. It was held that it was not necessary to ask for possession when property was in custodia legis. There is no doubt that property under attachment u/s 145 of the Code is in custodia legis. These cases clearly establish that it was not necessary for the appellants to have asked for possession."

Relying upon the aforesaid authoritative pronouncement, this Court in the case of Nidra Rajhansa and Ors v. Lord Ram-Laxman Sita and Ors. : 42 (1976) CLT 1185, held that where the land is under attachment in a 145 proceeding it is not necessary for the plaintiff to ask for consequential relief of delivery of possession.

The same view has been reiterated in a later decision in Bansidhar Patel v. Anuchhaya Patel and Ors. : 32 (1990) OJD 634 (Civil).

7. Coming to the case in hand, undisputedly there is a proceeding u/s 146, Cr PC in which the suit house has been attached u/s 146(1). Deference in this context may be made to the orders of the Executive Magistrate (Ext. 9). Since the house is in the custody of the Court in the possession of the defendants, the plaintiff could not have prayed for consequential relief, that is, recovery of possession. In this view of the matter, I would hold that the present suit for declaration without there being prayer for recovery of possession is maintainable.

8. The next question for consideration is whether both the Courts below were right in relying upon the sale deed, Ext. 1 for declaring plaintiff's title to the suit house. It may be reiterated that the plaintiff's case is that his father acquired the suit house from Smt. Budhi Sahuani under a registered sale deed dated 8-11-1934. That sale deed has been brought in evidence and marked Ext. 1 without any objection. True it is, there is no mention of Khata number and plot number of the house sold under the sale deed, but however, its identity has been described by boundaries. The same description finds mention in the schedule of the plaint which has not been controverted or challenged by the defendants. Added to it, the Assistant Settlement Officer who decided the Objection Case or the plaintiff relating to the suit house observed vide order Ext. 2 that the house which is correctly identifiable by boundaries belonged to one Laxman Sahu, on whose death his sister Budhi Sahuani transferred in favour of the plaintiff's father by a deed of sale. In this view of the matter and on consideration of the pleadings of the parties, it can unhesitatingly be held that both the Courts below were in relying upon Ext. 1 to declare plaintiff's title to the suit house.

9. Another question of law challenging the lower Court's judgment was raised that since the suit had been dismissed against defendant No. 3 due to non-prosecution, no decree could have been passed by the trial Court against the remaining defendants. As contended by the learned counsel for defendants this is

a substantial question of law which needs adjudication, although it was not so considered at the time when the appeal was admitted.

10. It is needless to mention that scope of second appeal to the High Court is limited. Reference in this context may be made to Sub-section (4) of Section 100, CPC which says that if the Court is satisfied that substantial questions of law are involved which need determination, in that case it shall formulate the questions and allow the parties to advance argument. However, Proviso to Sub-section (5) is an exception to the general rule. It lays down that the Court is also empowered to hear the appeal on any other substantial question of law not so formulated. This being the position of law, I allowed the parties to have their submissions on the question raised by the defendants as aforesaid, since in my opinion, it is a substantial question of law which needs to be answered by this Court.

11. To repeat with, plaintiff's suit is one for declaration of title based on the sale deed, Ext. 1. It was only when defendant No. 1 being in permissive possession claiming the house as a part of his ancestral property, the plaintiff filed the present suit. In such a situation, the suit should have been filed against defendant No. 1 only and not against his wife and sons, since they are neither necessary parties nor proper parties. Added to it, the defendants in their written statement have not advanced independent title to the suit house. If such a plea had been taken and evidence adduced, in that case they should have urged to dismiss the whole suit because in absence of any of them no effective decree could have been passed. Order 1, Rule 3 of the CPC provides that all persons may be joined as defendants in a suit where any right to relief in respect of or arising out of same act or transaction is alleged to exist against such persons. In the case in hand when the plaintiff did not claim any relief independently against defendant No. 3 against whom the suit has been dismissed due to non-prosecution, there was no legal bar to hear the suit on merit and decide the question of title.

12. In the result, the appeal fails and the same is dismissed. In the circumstances there shall be no order as to costs throughout.