

(2019) 01 OHC CK 0041

In the Orissa High Court

Case No : S.A. No.43 Of 1995 & Second Appeal No. 43 Of 1995

Nimai Charan Purohit

APPELLANT

Vs

State Of Orissa And Others

RESPONDENT

Date of Decision : 03-01-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Section 96

Citation : (2019) 127 CLT 675

Hon'ble Judges : A.K. Rath, J

Bench : Single Bench

Advocate : A.P. Bose, R.P. Mohapatra

Final Decision : Disposed Of

Judgement

A.K. Rath, J

1. This appeal at the plaintiff's instance assails reversing the first appellate judgment of learned District Judge, Ganjam-Gajapati, Berhampur in a

suit for declaration that L.E.C. Case No. 1372/85 is illegal, without jurisdiction, mandatory and permanent injunction.

2. The case of the plaintiff is that he was the owner in possession of the suit land. A footpath was adjoining to the south of the suit land. In the year

1985, the Tahasildar, Chikiti, defendant no. 2, at the instance of defendant nos. 3 to 5, initiated Land Encroachment Case No. 1372/85 against

him. He filed objection to the said case. The case was allowed. He challenged the order in appeal, which met the same fate. Thereafter, he

preferred R.C. No. 17/90 before the Revenue Divisional Commissioner, Southern Division, Berhampur. The revisional authority held that it had no

jurisdiction to entertain the revision and dropped the case. He also prayed for demarcation of the suit land. An Amin was deputed by the defendant

no. 2 to demarcate the suit land. The Amin found that an area Ac.0.01 dec. as described in schedule-B of the plaint had been amalgamated with

the path. After the revision was dropped by the R.D.C., the defendant nos. 3 to 5 put earth on the suit land in spite of his protest. With this factual

scenario, he instituted the suit seeking the reliefs mentioned supra after issuance notice under Sec.80, C.P.C. to the defendant nos. 1 and 2.

3. The defendant nos. 1 and 2 filed written statement denying the assertions made in the plaint. The case of the defendant nos. 1 and 2 was that

initiation of L.E. Case No. 1372/85 by the defendant no. 2 was legal and valid. There was no encroachment of any portion of the plaintiff's land

amalgamated with the village path. Defendant nos. 3 to 5 also filed their written statement denying the assertions made in the plaint.

4. On the interse pleadings of the parties, learned trial court struck five issues. Parties led evidence, oral and documentary, to substantiate their

cases. Learned trial court came to hold that initiation of encroachment case by the Tahasildar, Chikiti under the Orissa Prevention of Land

Encroachment Act, 1972 (â??Actâ??) is vitiated, since notice was issued under the Orissa Prevention of Land Encroachment Act, 1954 (Repealed

Act). In the ROR, Ext.2, the name of the plaintiff finds place. It held that the plaintiff is the absolute owner in respect of the lands described in

schedule-A and schedule-B of the plaint. The defendant nos. 3 to 5 have not put any earth on schedule-B land converting the same a part of the

road. Held so, it decreed the suit. Felt aggrieved, the defendant nos. 1 and 2 filed T.A. No. 43 of 1993 before the learned District Judge, Ganjam-

Gajapati, Berhampur. Learned appellate court came to hold that issuance of notice under the Repealed Act is mere an irregularity and will not

vitate the proceeding under the Act. Held so, it allowed the appeal.

5. The second appeal was admitted on the following substantial question of law.

â??Whether the lower appellate court was correct in reversing the finding of the lower court that the plaintiff was owner in possession of the land

in question without any reason and without considering the evidence on record?
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6. Heard Mr. A.P. Bose, learned Advocate on behalf of Mr. P.C. Panda, learned Advocate for the appellant and Mr. R.P. Mohapatra, learned

Additional Government Advocate for the respondent nos. 1 and 2.

7. Mr. Bose, learned Advocate for the appellant, submits that issuance of notice under the Repealed Act is bad in law. Thus initiation of proceeding under the Act is vitiated. He further submits that the learned trial court came to hold that the plaintiff is the owner of the land in question. But then, the learned appellate court did not render any finding on the said issue. On this score, the matter may be remitted back to the learned appellate court.

8. Per contra, Mr. Mohapatra, learned A.G.A. for the respondent nos. 1 and 2, submits that issuance of notice is a mere irregularity. It does not prejudice to the plaintiff. Since the appellant had encroached upon a portion of the Govt. land, proceeding under the Act was initiated against him. Learned appellate court has rightly held that the proceeding has not been initiated.

9. In *State of Orissa v. Bhanu Mali (Dead) Nurpa Bewa*, AIR 1996 ORISSA 199, a question arose that whether the decision of the Revenue Officer in the proceeding under the Orissa Prevention of Land Encroachment Act will operate as *res judicata* in the subsequent suit filed by the plaintiff for declaration of title and recovery of possession. This Court held that the decision of the Revenue Officer in the proceeding under the Orissa Prevention of Land Encroachment Act can neither operate as *res judicata* nor Sec.16 thereof can stand as a bar relating to the question of title in the subsequent civil suit by the plaintiffs.

10. Notwithstanding the bar contained in Sec.16 of the O.P.L.E. Act, the civil court has jurisdiction to entertain the suit.

11. The next point survives for consideration as to whether the learned appellate court is justified in reversing the decree on the ground that the proceeding initiated under the O.P.L.E. Act is illegal?

12. Learned trial court on a vivid analysis of record and document came to hold that the ROR, Ext.2, has been published in the name of the plaintiff. He is the owner of the land. But no finding has been rendered by the learned appellate court on the said issue.

13. The powers of the first appellate court while deciding the first appeal is well-known. After survey of earlier decisions, the apex Court in the case of *Sudarsan Puhan v. Jayanta Ku. Mohanty*, AIR 2018 SC 4662 held:

â??22. As far back in 1969, the learned Judgeâ??V. R. Krishna Iyer, J. (as His

Lordship then was the judge of Kerala High Court) while deciding the first appeal under Section 96 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code")K urian

Chacko v. Varkey Ouseph, AIR 1969 Kerala 316, reminded the first appellate court of its duty to decide the first appeal. In his distinctive style of writing with subtle power of expression, the learned judge held as under:

1. The plaintiff, unsuccessful in two Courts, has come up here aggrieved by the dismissal of his suit which was one for declaration of title and recovery of possession. The defendant disputed the plaintiff's title to the property as also his possession and claimed both in himself. The learned Munsif, who tried the suit, recorded findings against the plaintiff both on title and possession. But, in appeal, the learned Subordinate Judge disposed of the whole matter glibly and briefly, in a few sentences.

2. An appellate court is the final Court of fact ordinarily and therefore a litigant is entitled to a full and fair and independent consideration of the evidence at the appellate stage. Anything less than this is unjust to him and I have no doubt that in the present case the learned Subordinate Judge has fallen far short of what is expected of him as an appellate Court. Although there is furious contest between the counsel for the appellant and for the respondent, they appear to agree with me in this observationâ..â

(Emphasis supplied)

23. This Court also in various cases reiterated the aforesaid principle and laid down the powers of the Appellate Court under Section 96 of the Code while deciding the first appeal.

24. We consider it apposite to refer to some of the decisions.

25. In Santosh Hazari v. Purushottam Tiwari (Deceased) by L.Rs., (2001) 3 SCC 179, this Court held (at pages 188-189) as under:

âââthe appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is herein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate

court while reversing a finding of fact the appellate

court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding.

This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.

26. The above view was followed by a three-Judge Bench decision of this Court in *Madhukar v. Sangaram*, (2001) 4 SCC 756, wherein it was

reiterated that sitting as a court of first appeal, it is the duty of the High Court to deal with all the issues and the evidence led by the parties before

recording its findings.

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29. Again in *B.V. Nagesh v. H.V. Sreenivasa Murthy*, (2010) 13 SCC 530, this Court taking note of all the earlier judgments of this court

reiterated the aforementioned principle with these words:

3. How the regular first appeal is to be disposed of by the appellate court/ High Court has been considered by this Court in various decisions.

Order 41 CPC deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate court shall

state:

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

4. The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless

restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must,

therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put

forth, and pressed by the parties for decision of the appellate court. Sitting as a court of first appeal, it was the duty of the High Court to deal with

all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be

heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by

giving reasons in support of the findings.

5. In view of the above salutary principles, on going through the impugned judgment, we feel that the High Court has failed to discharge the

obligation placed on it as a first appellate court. In our view, the judgment under appeal is cryptic and none of the relevant aspects have even been

noticed. The appeal has been decided in an unsatisfactory manner. Our careful perusal of the judgment in the regular first appeal shows that it falls

short of considerations which are expected from the court of first appeal. Accordingly, without going into the merits of the claim of both parties, we

set aside the impugned judgment and decree of the High Court and remand the regular first appeal to the High Court for its fresh disposal in

accordance with law.â??

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14. Learned appellate court proceeded on the premises that the proceeding initiated under the O.P.L.E. Act is illegal, but did not delve into the

matter as to whether the plaintiff is the owner of the land and entitled to permanent injunction.

15. In view of the discussions made in foregoing paragraphs, the impugned judgment is set aside. The matter is remitted back to the learned

District Judge, Ganjam, Berhampur for de novo hearing. In order to avoid further delay, the parties shall appear before the learned appellate court

on 28th January, 2019, on which date learned appellate court shall fix a date of hearing and dispose of the appeal within a period of two months

thereafter. Since the appeal is remitted back to the learned appellate court, this Court refrains from answering the substantial question of law.