

(2016) 01 OHC CK 0071

In the Orissa High Court

Case No : Second Appeal No. 28 of 1991

Niranjan Moharana and another

APPELLANT

Vs

State of Orissa and others

RESPONDENT

Date of Decision : 14-01-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Specific Relief Act, 1963 — Section 37, 38, 6

Citation : (2016) 162 AIC 433 : (2016) 121 CutLT 1032

Hon'ble Judges : D. Dash, J.

Bench : Single Bench

Advocate : Sujata Dash, Advocate, for the Appellant; M.K. Mohanty, P. Misra, S. Misra-2, S. Mantry, R.C. Rath, A.K. Misra, J. Das, B.S. Tripathy, B.K. Sahoo, S. Mallik, K.P. Misra, B.B. Rath, B. Rath, B. Senapati, S.N. Mohapatra, K.R. Mohapatra, S. Ghose, J. Rath, M

Final Decision : Dismissed

Judgement

D. Dash, J.—The appellants have called in question the judgment and decree passed by the learned 1st Additional District Judge, Berhampur in Title Appeal No.16 of 1990 confirming the judgment and decree passed by the learned Additional Subordinate Judge, Berhampur in Title Suit No.13 of 1981.

It is worthwhile to mention here that Ishwar Maharana had filed the suit and was the original plaintiff and he having died during pendency of the appeal in the lower appellate court, the present appellants have been substituted in his place along with the present respondent no.5.

2. For the sake of convenience, in order to bring in clarity and avoid confusion, the parties hereinafter have been referred to as they have been arraigned in the trial court.

3. The case of the plaintiff is that he was in possession of land measuring Ac.0.50 dec. as described in the schedule of the plaint having a house partly

thatched and partly tin roofed since the year 1947. It is stated that while he was so possessing, the land was leased out to him by the Berhampur Municipality, the defendant no.2 in the year 1949 for a period of three years. The defendant no.3 sometime in the year 1970 interfered with such peaceful possession of the suit land by the plaintiff. So, he had filed Title Suit No.44 of 1970 for permanent injunction. That suit was partly decreed in respect of an area of Ac.0.23 cents out of the total land of Ac.0.50 cents. Being aggrieved by the refusal of the prayer in respect of Ac.0.27 dec., an appeal was filed and that having been dismissed, this Court was earlier moved in second appeal, i.e., in S.A. No.357 of 1974. When the said appeal was pending, the plaintiff came to learn that defendant no.3 as the Secretary of Lok Sebak Mandal, Berhampur has obtained a registered lease deed from defendant no.1 though the possession of the suit land was still with the plaintiff. The plaintiff thereafter filed a petition to implead defendant no.1 as party by serving required notice under section 80 of the Code of Civil Procedure. Be that as it may, finally the said second appeal was withdrawn and the suit from which the present appeal has arisen was filed.

It is stated that the suit land along with other lands was acquired by the defendant no.1 in the year 1917-18 and those were vested with the defendant no.2. So, Berhampur Municipality (defendant no.2) being the owner of the suit land leased out the same in favour of the plaintiff for establishing an industry and accordingly the plaintiff made necessary improvements over the same incurring huge expenditure. It is next stated that having continued to remain in possession of the same all along openly, peacefully and without any interruption, the plaintiff has perfected his title over the suit land by adverse possession and the defendants have no such right over the same. It is specifically stated that defendant no.3 has acquired no right on the basis of purported lease being granted by defendant no.1. During pendency of the suit, the plaintiff got a notice from defendant no.2 to vacate the land. So, being apprehensive of dispossession, he filed Title Suit No.94 of 1992 in the Court of the Munsif for permanent injunction. That suit was dismissed and an appeal being filed a decree for permanent injunction was granted against the defendant no.2. The defendant no.2 in his written statement has asserted his claim of ownership and it has admitted to have leased out the suit land to the plaintiff by registered deed dated 21.06.1949 for a period of three years on payment of rent @ Rs.75/- per annum. It is stated that the plaintiff after expiry of the period of lease continued to remain over the same as a tenant holding over. The suit land is said to have been wrongly recorded in the name of State. Nonetheless, the claim of the plaintiff that he has perfected title over the suit land by adverse possession has been vehemently resisted. It is stated that after the expiry of the lease and sometime thereafter, the defendant no.2 has taken over possession of the suit land.

4. Defendant no.1 in the written statement has asserted that they have leased out the land to defendant no.3. It is also stated that defendant no.2 might have leased out the land believing the same to be belonging to it but such lease is invalid and the land had never vested in defendant no.2. It has been stated that

the lease has been granted for the purpose of construction of Gopabandhu Bhawan at Berhampur and that has been made in favour of Servant of People Society of India after observing all formalities including invitation of objections from all concerned. The defendant no.1 has denied the plaintiff to be having any right, title, interest and possession over the said suit land. The defendant no.4 in his written statement has denied the claim of title of the plaintiff over the suit land by adverse possession. It is stated that they have taken possession of the land after the lease and have made improvements over that extent of leased land. They assert to have got right, title, interest and possession over the land from out of the suit land leased out to them.

5. The trial court on such rival pleadings framed in total eight issues. Out of those, it appears that rightly the issue nos.1, 3 and 7 have been taken up for decision together with issue no.4 as regards cause of action as those are the important issues for decision first. Upon threadbare analysis of evidence as it appears from the judgment of the trial court, the findings have been rendered on all these issues against the plaintiff and, therefore, ultimately the suit has been dismissed. Next coming to other issues relating to the lease given by defendant no.1 to defendant no.4, the trial court having held the land to be belonging to defendant no.2, in view of the evidence on record has held the lease in favour of defendant no.4 to be valid since after the consent of the Collector the Council intimated to the Tahasildar through its Executive Officer and then S.D.O. has executed the lease deed in favour of defendant no.4. Thus, it is stated that the lease in favour of the defendant no.4 is valid since it had the approval of the Council.

With all these findings the suit being dismissed, the unsuccessful appellants had carried the appeal under section 96 of the Code of Civil Procedure. The lower appellate court going to examine the sustainability of the findings of the trial court on those crucial issues as is seen has gone to analyse the evidence on record, both oral and documentary, in the touchstone of the rival pleadings. On an independent assessment of evidence, it has finally arrived at the same findings as those recorded by the trial court and, thus, has finally confirmed the judgment and decree, which are now under challenge in this second appeal.

6. The second appeal has been admitted on the following substantial question of law:

(i) "Whether the courts below have erred in recording the finding of possession of the suit land by the plaintiff as against the claimed plaintiff?"

(ii) "The plaintiff having claimed their possessory title over the land by virtue of their holding over in respect of the suit property, it was incumbent on the courts below to give a finding of possession over the suit land before passing the impugned order evicting the plaintiffs from the suit property particularly when with regard to a part of the lease-hold premises, even though the tenancy was terminated by notice by the Municipality, plaintiffs? right for injunction against

the present defendant no.3 as well as other two defendants, State of Orissa and the Berhampur Municipality was finally passed in T.S. No.44/80 and is still operative. Without finding the possession against the plaintiffs, the finding of the appellate court dismissing the suit and directing defendant no.3 to take over possession from the plaintiffs, in respect of the suit land is therefore bad and illegal."

7. Learned counsel for the appellants submits that the courts below have erred in law in not considering the admission of the defendant no.2 that the plaintiff after expiry of the period of lease has been holding the same as a tenant holding over as well as in view of the order of injunction dated 22.02.1985 as also the admission of the defendant no.3. The courts below thus according to her ought to have decreed the suit of the plaintiff as laid. It is her submission that evidence on record is overwhelming to show that the plaintiff is in possession of the suit land and, therefore, the suit for permanent injunction ought to have been decreed.

8. Learned counsel for the respondent nos.1 and 2 submits in support of the judgments and decrees passed by the courts below.

According to him, the plaintiff has miserably failed to prove his case of possession of the suit land.

Learned counsel for the respondent no.4 submits that in a suit for permanent injunction restraining the defendants from interfering with the possession of the land in dispute the plaintiff can only succeed in proving that he is in possession and in case of his failure to do so, the suit is just liable to be dismissed on that ground alone. Referring to the judgments of the trial court as well as the lower appellate court with vehemence he contends that the courts below having concurrently found the failure on the part of the plaintiff in proving his possession over the suit land by detail examination of the evidence both oral and documentary on record and upon their due weightment, this Court sitting in a second appeal should not interfere with the same as no such infirmity in the appreciation of evidence by the courts below has been shown so as to arrive at a conclusion that such finding of possession of the suit land against the plaintiff suffers from the vice of perversity. In support of his submission, he has placed reliance upon the decision of the Apex Court in case of Ramji Rai and Anr v. Jagdish Mallah (Dead) through L.Rs. and Anr, A.I.R. 2007 S.C. 900.

9. In order to address the rival submission and in so far as the substantial questions of law are concerned, it is felt apt and proper to take note of the ratio of the decision cited by the learned counsel for the respondent no.4 as supra.

It has been held therein that under section 38 of the Specific Relief Act, 1963 an injunction restraining the disturbance of the possession will not be granted in favour of the plaintiff, who is not found to be in possession. In case of a suit based on possessory title in which the plaintiff claims that he is in possession, and alleges that his possession is being threatened by the defendant, the plaintiff

is entitled to sue for mere injunction without seeking for the relief of declaration of his rights.

In that cited case, the lower appellate court as well as the High Court had held the appellants to be not in possession of the suit land. The Apex Court did not wish to interfere with said finding of facts finding no reason to be surfacing to reverse the concurring finding and in view of that it was held that the lower appellate court should have dismissed the suit filed by the appellants only on the ground that the appellants failed to prove that they are in possession of the disputed land.

10. In the instant case, the trial court as is seen from its judgment at para-6 onwards have gone to discuss the evidence keeping in mind the rival case of the parties on the factum of possession of the suit land.

The case of the plaintiff is that since 1947 he has been in possession of the suit land. The trial court has not found any such oral or documentary evidence in support of it. In the subsequent correspondence made by the plaintiff such possession since the year 1947 has not been indicated. The trial court has of course found that the plaintiff came into possession since 21.06.1949 in view of the lease granted by the defendant no.2 for a period of three years. At this stage one significant fact intervenes that during the period of lease, the plaintiff received a notice from the Revenue Inspector to vacate the suit land. So, he immediately disowned the title of the defendant no.2 and refuted it and on that ground the renewal of the lease under application (Ext.D) was thus rejected on 05.03.1954. So vide Ext.E, he applied before defendant no.2 to get back the materials lying over there and asked that those be made over to him as those were then in custody of the defendant no.2. Therefore, on his own showing the plaintiffs' dispossession from the suit land is found to have been well established. Next there remains no such pleading or evidence as to on which date thereafter the plaintiff if at all made fresh entry into the suit land and began to possess and continued as such. In this connection, the trial court has rightly refused to take note of the recording during the settlement operation as it was prepared during the lis and, therefore, has rightly held it to be of no help to the plaintiff. Going to examine the oral evidence major discrepancies have further been noticed. Then trial court has next taken note of the admission by the plaintiff that defendant no.4 has constructed a house over the suit land. Interestingly, in the suit there has been no prayer for recovery of possession of that portion of the suit land over which the house is said to have been constructed by the defendant no.4. This again shows that though the plaintiff claims to have acquired title by adverse possession over the entire area of land, yet he has remained content in not taking any step for restoring the possession of the land over which the defendant no.4 has constructed the house.

Thus, when there is no resistance for that occupation and construction, that conduct itself heavily stands in the way of acceptance of the factum of possession of the entire suit land by the plaintiff.

The trial court's finding as regards of factum of possession of the suit land against the plaintiff is thus found to have been recorded on just and proper appreciation of evidence on record. The lower appellate court has accepted the fact that Tahasildar, Berhampur had given delivery of possession of Ac.0.27 cents of land to defendant no.4 on 31.01.1970. Next it has also made an independent assessment of evidence on record in agreeing with the finding of the trial court on the question of possession. This Court does not wish to interfere as it finds no such justifiable reason to reverse the concurring findings. The answers to the substantial questions of law accordingly emerge out. The present suit being only for permanent injunction and the appellants having failed to show that they were in possession, the dismissal of the suit on that ground alone is held to be justified and thus the appeal has to fail.

11. In the result, the appeal stands dismissed and in the facts and circumstances without cost.