

(2002) 12 OHC CK 0024

In the Orissa High Court

Case No : Second Appeal No. 107 of 2002

Raghunath Dey alias Ray (dead) after him Smt. Puspa Dutta
and Others

APPELLANT

Vs

Mahammad Usman Khan

RESPONDENT

Date of Decision : 06-12-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 4(2), 100

Citation : (2003) 95 CLT 26

Hon'ble Judges : L. Mohapatra, J

Bench : Single Bench

Advocate : Karunakar Rath, S.N. Sahoo, B. Routray and Rajshree Mishra, for the Appellant; Srinivas Misra (2), S. Mantry, A.K. Mishra, A.K. Sharma, M.K. Dash, R.N. Prusty and P.K. Dash, for the Respondent

Final Decision : Dismissed

Judgement

L. Mohapatra, J.—Legal representatives of the original defendant No, 1 and the defendant No. 2 are the appellants before this Court against a confirming judgment.

The suit was filed by the respondent for declaration of title recovery of possession and for compensation.

2. The case of the plaintiff-respondent is that the suit land was recorded in the name of Haji Sk. Nasiruddin in 1930 settlement record and while in possession he sold the same to his daughter Haziani Amina Khatun on 14.11.1923. The said Amina Khatun again sold the property to one Saheb Begum under a registered sale deed dated 19.7.1953 and Saheb Begum became the owner in possession of the Suit land. After remaining in possession for about five years the said Saheb Begum sold the property to the father of the plaintiff by a registered sale deed dated 20th January, 1958 and after death of his father the plaintiff is in possession of the suit property which he got by way of partition despite the fact that the same stands recorded in the names of his brothers and s"ister in the

Major Settlement. Further the case of the plaintiff is that the hotel which was being run on the suit land was closed down with a concrete wall and a cloth shop was opened to the west side of the said land. The house standing on the suit plot was used as godown. The defendants-appellants have a hotel in front of the suit house and they attempted to utilise the suit house for sale of country, liquor and run a hotel. When the plaintiff refused, they forcibly entered into the suit house on 1.2.1992 violating an order of injunction passed by a competent court during pendency of the suit. Accordingly, as it appears the plaint was also amended praying for compensation.

3. Originally the defendant No. 1 filed his written statement denying the plaint allegations and his specific case is that Sk. Haji Nasiruddin gifted the suit property to his wife Rusida Bibi and after her expiry the same devolved upon her only son Makiuddin and daughter Hajiani Amina Begum. While in possession, Amina sold away the same under a registered sale deed dated 20.7.1953 to one Saheba Begum. The defendants were admitted as tenants in the suit house and were in possession of the same as the tenants and it was also averred that the decree passed in O.S. No. 86 of 1983 which was a suit for partition between the plaintiff and his co-sharers is void as the defendants were not impleaded as party to that suit. The plea of title by way of adverse possession was also raised.

4. After death of the original defendant No. 1 his legal heirs who were substituted in his place have filed a separate written statement taking a different plea. It is the case of the legal heirs that the suit property had been recorded in the name of Sk. Nasiruddin in the current settlement record as Stitiban tenant and he had put in possession one Nira Ghosh mother of D-1 (ka) over the suit land on the basis of a gift (Heba Nama) and the said Nira Ghosh remained in possession of the suit house and paid rent to the Ex-Zamindar. After death of Nira Ghosh defendant No. 1 (Kha) as the only daughter inherited the property and remained in possession. It was further pleaded by the legal heirs that the plaintiff obtained an erroneous R.O.R. in the Major Settlement in his name. Plea of title by way of adverse possession was also raised by the legal heirs.

5. On consideration of the pleadings, the learned Sub-judge (Junior Division) Balasore framed five issues and decreed the suit on the following findings :

(1) The substituted legal heirs of the original defendant No. 1 cannot take a new plea which was not available to the deceased-defendant.

(2) The plaintiff has right title and interest over the suit property which he had acquired through a compromise decree and the deceased-defendant No. 1 forcibly took possession of the suit house on 1.2.1992.

(3) The suit was also decreed for recovery of possession.

The appeal filed by the present appellants was also dismissed on similar findings giving rise to the present appeal.

6. This Court by order dated 19.4.2002 issued notice on admission and the

respondents has entered appearance in the appeal. The learned counsel appearing for both the parties agreed that the matter can be disposed of at the stage of admission on merits if any substantial question of law is available and accordingly, the learned counsel for both the parties were heard.

Shri Routray the learned counsel appearing for the appellants challenged the findings of both the courts below basically on two grounds :

(1) The written statement filed by the legal heirs of original defendant No. 1 was illegally rejected by the courts below and had the same been taken into consideration, the result of the suit would have been otherwise.

(2) After amendment of the plaint, the first witness examined on behalf of the plaintiff was not recalled for further cross-examination and accordingly the legal representatives who were substituted later on had no occasion to cross-examine the said witness on recall and were deprived of the said opportunity.

7. So far as the first point is concerned admittedly the original defendant No. 1 had filed a written statement taking the plea that he had taken the suit house on rent and was a tenant in respect of the same whereas in the written statement filed by the legal representatives of deceased-defendant No. 1 a different plea was taken and it was contended that the mother of defendant No. 1 (Kha) received the property by way of Heba Nama and after her death the defendant No. 1 (Kha) succeeded to the property. Under these circumstances the question that arises for consideration is as to whether the legal heirs of the defendant No. 1 could take a different plea. In this connection a decision of the Apex Court in the case of Vidyawati Vs. Man Mohan and others, may be referred to. The Apex Court referring to earlier decisions of the same Court observed as follows :

"It is seen that the petitioners claim of right title and interest entirely rest on the will said to have been executed by Champawati in favour of the first defendant and herself. It is now admitted across the Bar that the first defendant had life interest created under the will executed by Champawati. Therefore, the said interest is conterminous with his demise. Whether the petitioner has independent right, title and interest dehors the claim of the first defendant is a matter to be gone into at a later proceedings. It is true that when the petitioner was impleaded as a party-defendant, all right under Order 22, Rule 4(2) and defences available to the deceased defendant become available to her. In addition if the petitioner had any independent right title or interest in the property then she had to get herself impleaded in the suit as a party defendant in which event she could set up her own independent right, title and interest to resist the claim made by the plaintiff or challenge the decree that may be passed in the suit. This is the view the Court below has taken rightly."

The aforesaid view was reiterated in a decision of the same Court in the Case of Jagdish Chander Chatterjee and Others Vs. Shri Kishan and Another, where the Apex Court observed as follows :

"The legal representative of the deceased respondent was entitled to make any defence appropriate to his character as legal representative of the deceased respondent. In other words the heirs and the legal representatives could urge all contentions which the deceased could have urged except only those which were personal to the deceased. Indeed this does not prevent the legal representative from setting up also their own independent title in which case there could be no objection to the Court impleading them not merely as the L.Rs. of the deceased but also in their personal capacity avoiding thereby a separate suit for a decision on the title.

In the case of Bal Kishan Vs. Om Parkash and Another, the Apex Court has also observed :

"The sub-rule (2) of Rule 4 of Order 22 authorised the legal representative of a deceased defendant to file an additional written statement or statement of objections raising all pleas which the deceased-defendant had or could have raised except those which were personal to the deceased-defendant or respondent."

8. From the ratio laid down by the Apex Court in the aforesaid decisions it is clear that the legal representatives of deceased defendant are entitled to take any defence appropriate to their character as legal representatives and can put all contentions which the deceased-defendant could have urged except only those which were personal to the deceased. The Apex Court further observed that the legal representatives are not prevented from setting up also their own independent title in which case there could be no objection to the Court impleading them not merely as the L.Rs. of the deceased but also in their personal capacity avoiding thereby a separate suit for a decision on the title.

9. So far as the present case is concerned, the legal representatives filed the written statement as legal representatives and not in their personal capacity. Therefore, the aforesaid decisions relied upon by the learned counsel for the appellants have no application to the present facts of the case.

10. So far as the second point is concerned, it appears from the order-sheet as well as the discussions made by the lower appellate Court that the amendment to the plaint was filed by the plaintiff on 11.2.1999 and it was allowed on 17.2.1999. The amendment was carried out in the plaint on 18.2.1999. Referring to the above Shri Routray, the learned counsel submitted that there was no scope for the defendants to cross-examine P.W. 1 on the amended portion of the plaint since after 11.2.1999 P.W. 1 was never recalled for further cross-examination by the defendants. From the order-sheet and the discussions made by both the Courts it appears that on 11.2.1999 the plaintiff filed the amendment petition and on the very same day P.W. 1 was recalled for examination by the plaintiff on the amended plaint. It also appears that the defendants cross-examined the said witness in relation to the amended portion of the plaint and, therefore in my view no prejudice is caused to the defendants by not recalling

the P.W. 1 again to the dock for further cross-examination.

11. Accordingly, this ground of challenge raised by the learned counsel for the appellants also fails. On perusal of discussions made by both the courts below as well as the record. I do not find any substantial question of law being involved in the appeal and accordingly the same stands dismissed.