
(2012) 03 OHC CK 0009
In the Orissa High Court
Case No : S.A. No. 126 of 1987

Raj Kishore Prasad and Others	Vs	APPELLANT
State of Orissa and Others		RESPONDENT

Date of Decision : 14-03-2012

Acts Referred:

Contract Act, 1872 — Section 10, 9
Orissa Prevention of Land Encroachment Act, 1972 — Section 2
Registration Act, 1908 — Section 17, 49
Transfer of Property Act, 1882 — Section 106, 107

Citation : AIR 2013 Ori 98

Hon'ble Judges : M.M. Das, J

Bench : Single Bench

Advocate : B. Routray, P.K. Dash, D.K. Mohapatra, B.B. Routray, D. Routray and K. Sukla, for the Appellant; Dayananda Mohapatra, D.K. Sahoo, M. Mohapatra, B.B. Dash, B. Rath, K.M. Mishra and N. Panda, A.S.C., for the Respondent

Final Decision : Allowed

Judgement

M.M. Das, J.—This appeal has been filed by the unsuccessful plaintiffs in T.S. No. 25 of 1979 against a reversing judgment in T.A. No. 9/22 of 1982/1985. During the pendency of this Second Appeal, the original plaintiff Nos. 3, 4 and 5 having expired, their legal heirs have been substituted in their place. The Second Appeal has been admitted on the following substantial questions of law:

(i) When the father of the plaintiff was admittedly a temporary lessee and was a tenant holding over after expiry of the period of temporary lease and subsequently accepted the offer for a permanent lease made by the defendant No. 1 in pursuance of the Ext. 1 by depositing the requisite amount of arrear rent and salami, the father of the plaintiff was a permanent lessee and after his death in 1966, the plaintiff being in possession over the suit land continued to be a permanent lessee and whether such lease can be terminated without a notice u/s 106 of the Transfer of Property Act ?

(ii) Whether the learned lower appellate court is justified in holding that the plaintiff's father was a tenant at will in the absence of any execution and registration of a lease deed and no formal notice u/s 106 of the T.P. Act was required for termination of the same inasmuch as, on the death of the father of the plaintiff in July, 1966, his tenancy is automatically terminated ?

(iii) Whether in view of the admitted facts that there was an offer on the part of the defendant No. 3 and acceptance on the part of the father of the plaintiff in compliance of which the requisite salami along with the arrear rent has been deposited as per Ext.-2, the learned lower appellate court should have held that the contract was complete and there was no necessity for filing a suit for specific performance of contract ?

(iv) Whether in view of the admitted fact that there was an offer under Ext. 1 and acceptance under Ext. 2 regarding creation of a permanent lease, the learned lower appellate court should have held that a substantial right of a permanent lessee has already been created and accrued in favour of the plaintiff's father and thereafter, the plaintiffs, even in absence of a formal deed of lease, the defendant No. 3 is estopped to challenge the same and is to abide by it ?

(v) Whether in view of the oral and documentary evidence regarding the fact of physical possession of the plaintiff over the suit land uninterruptedly from the time of their father and the fact of such physical possession having been specifically established by the report of the Commissioner inasmuch as the defendants having failed to show the dispossession of the plaintiffs in 1975, the finding of the learned lower appellate court that the plaintiffs being trespassers have no right to maintain the suit for permanent injunction after their eviction in 1974 is perverse and based on no evidence ?

2. The plaintiffs filed the suit praying for a decree for permanent injunction by restraining the defendants from interfering with their possession in any manner whatsoever and further from restraining them not to come over the land or change the nature thereof. The plaintiffs' case was that the disputed property belongs to a trust known as "The Jagannath Road Fund" Trust, which is under the administration of the Collector/Deputy Collector, Cuttack. The lands under the said trust were being leased out periodically every year to various persons and the income thereof was applied for the object of the trust. The lessees under the trust were being permitted to make permanent construction on the lease hold portion, which were being renewed from time to time as a matter of course. The father of the original plaintiffs was a lessee in respect of the suit properties under the Jagannath Road Fund Trust, which was being renewed from time to time. The said trust decided to lease out its lands including the suit land for a period of 90 years to the respective lessees, as renewal of the lease from year to year was found to be highly inconvenience and cumbersome and collection of heavy sums at the time of grant of permanent lease by way of premium would be beneficial to the interest of the trust. Accordingly, applications were invited from intending

lessees and the father of the plaintiffs made an application for grant of such a lease for 90 years in respect of the suit land.

3. A notice under Ext. 1 was issued to the father of the plaintiffs to deposit a sum of Rs. 22,590/- i.e., Rs. 19,238/- towards the market value of the land and Rs. 3,152/- towards the arrear rent from 1.4.1955 to 31.3.1963. The said offer by way of notice was accepted by the father of the plaintiffs in pursuance whereof, he deposited the aforesaid amount under challan No. 54 dated 26.3.1963 (Ext. 2) and intimated the concerned authorities accordingly. The concerned authorities of the trust were repeatedly insisted upon for execution of a formal deed of lease, but the Deputy Collector in-charge of the Collector, administering the affairs of the Jagannath Road Fund Trust, deferred the matter from time to time and the plaintiffs were given to understand that the same would be done in due course and the plaintiffs can continue to possess the property as permanent lessee without any let or hindrance. Irrespective of non-execution of such a lease deed, the father of the plaintiffs and the plaintiffs were recognized as lessees and continued to be in possession of the lease hold property in the said capacity. The plaintiffs specifically pleaded that the State Government, the Collector and the Cuttack Municipality (as it then was) have no semblance of right, title and interest and possession in respect of the disputed property or any portion thereof. The said lands are not Government lands as defined under the O.R.L.E. Act and there was no question of any encroachment by the plaintiffs with regard to the said lands, as they were in possession thereof having lawful title as lessees. During the period when internal emergency was declared in the country, all of a sudden, some of the officers of the State Government and Municipality with police force and labourers along with heavy machineries came upon the suit land on 30.6.1975 without any prior notice and demolished the permanent structures existing on the disputed property in spite of protest and the plaintiffs were threatened to be detained under the provisions of Maintenance of Internal Security Act, Defence of India Rules and such other detention laws, under the colour of declaration of Emergency by the Central Government. Similar other constructions in the locality were also pulled down by bull dozer and such other heavy machineries, creating a panic in the minds of the public, in particular, the inhabitants of the locality, so much so, that, none ventured to seek redress against the said demolitions. Besides, the demolition work was carried on so abruptly and promptly that there was little time for anybody to seek redress against such demolition before any competent court of law. Upon such demolition being completed in the locality in question, the same was spread over to other parts of the city of Cuttack. Several writ petitions were filed before this Court challenging such illegal high handed action of the authorities and this Court by a blanket order directed the authorities concerned to stop such demolition. The plaintiff No. 1 also filed O.J.C. No. 1528 of 1975 before this Court apprehending further demolition and this Court passed an order of injunction not to carry on further demolition or interfere with the peaceful possession of the plaintiffs in respect of the suit land.

4. The Collector, Cuttack in the counter-affidavit filed in O.J.C. No. 1528 of 1975 took a plea that the demolition is made under the provisions of O.P.L.E. Act which according to the plaintiffs is totally misconceived as no proceeding, in fact, could have been started nor was started against the plaintiffs and, in fact, records were manipulated, fabricated and forged by the State Authorities to save their skin. According to the plaintiffs, in the writ petition, various inconsistent untenable pleas were taken by the State Authorities. Since disputed question of facts arose in the writ petition, the plaintiff No. 1 withdrew the writ petition reserving their right to claim compensation/damages and such other reliefs.

5. As the defendants threatened the plaintiffs to dispossess them from the suit land, by taking pipelines, laying road and making other constructions, for which they were carrying out measurements etc., the plaintiffs apprehending that such attempts are being made by the defendants to wipe out the evidence of illegal demolition available at the spot so as to nullify the claim for compensation, they filed the present suit.

6. Separate written statements were filed by the defendant Nos. 1, 2, 4, 5 and 6 respectively. Defendant Nos. 1 to 4, who are the State, the Collector and the Tahasildar, Cuttack, were representing the State of Odisha and the Collector was also representing defendant No. 3, the Jagannath Road Fund Trust as its administrator. Defendant No. 5 is the Cuttack Municipality (as it then was) and the defendant No. 6 was the Greater Cuttack Improvement Trust, which was a body corporate under the Improvement Trust Act and has subsequently merged with the Cuttack Development Authority after the said authority was constituted under the Development Authority Act.

7. In the joint written statement filed on behalf of the State Authorities and the Jagannath Road Fund Trust, while denying the plaint allegations in paragraph - 6 of the written statement, the assertions of the plaintiffs that the suit land belongs to the Jagannath Road Fund Trust was specifically denied as not true. Defendant No. 5 - Cuttack Municipality in its written statement, while denying the allegations made by the plaintiffs, categorically pleaded that the disputed property does not belong to the Municipality and it belongs to Jagannath Road Fund Trust and that the Jagannath Road Fund Trust removed the encroachments by taking resort to the provisions of OPLE Act. The Greater Cuttack Improvement Trust-defendant No. 6, in its written statement also denied the plaint allegations and pleaded that the State Government decided to lease out the disputed lands to the Greater Cuttack Improvement Trust and possession of the said land has been given to them on 14.10.1977.

8. The learned trial court, on the above pleadings, framed as many as seven issues and came to the following findings:--

I. In view of Exts. A/1, B/1 and C/1, which are lease agreements containing different terms executed from year to year, there is relationship of lessor and lessee in between the defendants and the plaintiffs and the suit is maintainable;

II. It is not disputed that the father of the plaintiffs was granted permission to raise construction over the disputed property and there is substantial evidence and documents, which point out that the plaintiffs have been duly authorized to occupy the disputed property and at no point of time, they can be termed to be unauthorized occupants without any valid interest thereof. The plaintiffs have been regularly paying rent. Hence, they being authorized persons to occupy the disputed land, the provisions of the Orissa Prevention of Land Encroachment Act is not applicable to the plaintiffs and hence, the proceeding under the said Act is neither valid nor binding on them;

III. The Jagannath Road Fund Trust might have been managed by the administrator/ Collector or an officer of the State Government, but the said Trust and the State are not one and the same, as the Trust is a separately constituted body;

IV. From the evidence, it is found that the plaintiffs and their predecessors are and were in possession of the suit property. Ext. 1 was an offer and the plaintiffs having acted in accordance with the said offer by way of acceptance of the same, there is a completed contract between the father of the plaintiffs and the defendants-Jagannath Road Fund Trust for grant of a long term lease.

V. The defendant No. 6 - Greater Cuttack Improvement Trust has not taken possession of the suit land on 14.10.1977 nor at any time and the plaintiffs are in possession over the said land.

9. Finding thus, the learned trial court decreed the suit of the plaintiffs on contest. The defendants 1 to 4 being granted by the judgment and decree passed by the learned trial court, preferred Title Appeal No. 9/22 of 1982/85, which was heard and disposed of by the learned 1st Additional District Judge, Cuttack on 28.01.1987. The learned lower appellate court concurred the finding of the learned trial court that the suit land belongs to Jagannath Road Fund Trust, being administered by the Collector of the district, but it does not come within the definition of the property of the Government as defined u/s 2 of the Orissa Prevention of Land Encroachment Act. The learned lower appellate court, however, referring to the provisions of the Transfer of Property Act as well as the Indian Registration Act, came to the conclusion that as per Section 49 of the Indian Registration Act, if a document is compulsorily registerable and is not registered, it shall not affect the immovable property comprised therein, but the unregistered documents may be received as evidence in a suit for specific performance or as evidence of part performance of contract or for collateral purposes. Thus holding, the learned lower appellate court concluded that the doctrine of part performance can be invoked only in a suit for specific performance of contract and it cannot override the provisions of Section 107 of the Transfer of Property Act or Section 17 of the Indian Registration Act. As regards registration, where lease, which ought to be registered, has not been registered, it cannot be used on the basis of the doctrine of part performance. Thereafter, the learned lower appellate court referring to Sections - 9 & 10 of the

Contract Act held that, since the plaintiffs claim permanent tenancy on the basis of the contract, which was neither registered nor reduced to writing, though is compulsorily registerable, there was no valid and enforceable contract of permanent lease in respect of the suit land between the plaintiffs' father and the defendants. The finding of the learned trial court that Ext. 1 prima facie creates title, was held to be wrong by the learned lower appellate court. The lower appellate court further came to the conclusion that by efflux of time, the yearly lease, which was renewed from time to time in favour of the plaintiffs' father, was determined on 31.03.1955, but the plaintiffs' father continued to possess the suit land as a tenant holding over on the consent of the defendant No. 3, i.e., the Administrator, Jagannath Road Fund Trust, which is evident from Ext. 1, the proposal advanced by defendant No. 3 to the plaintiffs' father for grant of permanent lease of the suit land.

10. With regard to Ext. 1, the offer made by the defendant No. 3 and Ext. 2 showing the acceptance thereof by the plaintiffs' father, who deposited the arrear rent and salami within the time stipulated in Ext. 1, the learned lower appellate court came to the conclusion that in spite of the same, the defendants 2 and 3 did not execute the permanent lease deed. Hence, the father of the plaintiffs' having performed his part of contract, his remedy lay only by filing a suit for damages or specific performance of contract, but not a suit for permanent injunction simpliciter. Holding that a suit for specific performance of contract, which is to be filed within three years from the date fixed for the performance or if no such date is fixed, when the plaintiffs have noticed that the performance is refused and noting that Ext. 1 was dated 13.08.1963 and the suit was filed in 1978, the learned lower appellate court concluded that suit for specific performance of contract has been hopelessly barred by law of limitation. It held that the plaintiffs' father having expired in July, 1966, by which time no permanent lease deed was executed, the present plaintiffs were trespassers and they cannot have the status of a lessee unless a new tenancy is created by consent of the parties. The learned lower appellate court, therefore, concluded that the plaintiffs' were tenants at Will and mere demand for possession is sufficient to determine the lease and no notice u/s 106 of the Transfer of Property Act is necessary. Consequently, they have no right to possess the suit land and, as such, the suit for permanent injunction is not maintainable. Finding thus, the learned lower appellate court reversed the judgment and decree passed by the learned trial court and allowed the appeal.

11. The learned lower appellate court, nowhere in its judgment, has come to the conclusion that the finding of the learned trial court that the plaintiffs are in possession over the disputed property is not correct. The learned lower appellate court also has failed to notice that no document was produced on behalf of the defendants showing the order of the Government to the effect that the Government, as a matter of policy, has decided not to give lease for 90 years and to return the money to the depositors. It is also not disputed that the father of the plaintiffs' late Laxman Ram was granted permission to construct

structures on the suit land and was residing there along with the plaintiffs. Thus, it is clear that the plaintiffs were duly authorized to occupy the suit land and there was a proposal for granting permanent lease for 90 years on the terms and conditions as mentioned in Ext. 1, which was duly performed by the late father of the plaintiffs, but no lease deed was executed and registered. In such circumstances, it is clear that the finding of the learned lower appellate court that the plaintiffs' father, being the tenant, holding over without a registered deed of permanent lease was a mere tenant at will and demand for possession is sufficient to determine the lease without any notice u/s 106 of the Transfer of Property Act and on his death in July, 1966, his tenancy at Will is determined and the plaintiffs have no right to possess the suit land and, as such, the suit for permanent injunction is not maintainable, cannot be sustained, when the Collector, as the administrator of the Jagannath Road Fund Trust has never taken any steps to evict the plaintiffs in due process of law.

12. It is naive to state that even, in case of a trespasser, once the act of trespass has been completed, the true owner cannot take law into his own hands and forcibly evict the trespasser without due process of law, i.e., without initiating a proceeding for evicting the trespasser.

13. Judicial notice can be taken of the fact that, at the time, when internal emergency was declared in the country and the structures over the adjacent plots of the suit land were also forcibly demolished, many cases were filed before this Court against such high handed action of the authorities of the State, even though the land, over which the constructions existed belong to Jagannath Road Fund Trust and were not Government lands.

14. Under similar circumstances, one of the occupants of an adjacent land belonging to the Jagannath Road Fund Trust, initially though approached this Court in a writ application, but withdrew the same and filed a suit for permanent injunction akin to the present suit. The said suit was decreed by the learned trial court against which, an appeal was carried by the State Authorities and Jagannath Road Fund Trust, in which, the judgment of the learned trial court was confirmed. Against the said confirming judgment, the State as well as the Jagannath Road Fund Trust preferred Second Appeal No. 284 of 1985 before this Court. This Court, after considering the facts of the case and the substantial questions of law involved in the said Second Appeal, i.e., (State of Odisha and others v. Krushna Chandra Sahu), categorically laid down that law is well settled that even the trespasser in possession of a property is entitled to maintain his possession unless evicted in due course of law and no person can evict a person forcibly without the authority of law. This Court, considering the facts of the said case, endorsed the finding of the learned lower appellate court that in a suit for permanent injunction, it was not necessary for the trial court to decide about the right, title and interest of the plaintiff and, as such, there was no necessity for declaring the title of the plaintiff. This Court finding, as in the instant case, the plaintiff therein being in possession over the suit property, held that, his

possession was to be protected under law and modified the decree for permanent injunction to the extent that the defendants shall not forcibly interfere with the possession of the plaintiff and should not forcibly dispossess him without taking recourse to appropriate legal proceeding. In other words, until the plaintiff is evicted in due course of law by taking recourse to appropriate legal proceeding, his possession shall not be interfered with by the defendants.

15. In view of the above, this Court finds that though the plaintiffs are not continuing over the suit land as permanent lessees, but are in possession over the suit property from the time of their father, they having come into possession over the suit property from the time of their father and their father having raised a construction thereon with permission of the lesser on the basis of temporary lease granted in his favour from year to year. This Court further finds that the judgment of the learned lower appellate court is unsustainable and in any event, the plaintiffs being in possession over the disputed property, they cannot be dispossessed forcibly by the defendants without taking recourse to due process of law. Moreover, it being found that the suit land is not Government land, but belongs to the Jagannath Road Fund Trust, the State has absolutely no authority to evict the appellants from the disputed land. Further, in the instant case, in view of the offer made under Ext. 1 to the late father of the plaintiffs and his acceptance thereof under Ext. 2 clearly indicates the intention of the parties that Jagannath Road Fund Trust intended to grant permanent lease over the suit land in favour of the father of the plaintiffs, but as stated by the defendant-Jagannath Road Fund Trust that due to an order passed by the Revenue Divisional Commissioner in another case not to grant permanent lease, such permanent lease was not granted in favour of the deceased-father of the plaintiffs. It is made clear that if the plaintiffs make an application for grant of permanent lease in their names, the Collector, who is the administrator of the Jagannath Road Fund Trust, shall take into consideration the offer made earlier to the father of the plaintiffs under Ext. 1 and his acceptance under Ext. 2 and if there is no other impediment under law, may grant permanent lease in favour of the plaintiffs.

16. In view of the above findings, the judgment and decree of the learned lower appellate court is set aside and that of the learned trial court is restored subject to the observations made above. The Second Appeal is accordingly allowed, but in the circumstances, however, there shall not be any order as to costs in respect of this Second Appeal.