

(2024) 05 OHC CK 0202
In the Orissa High Court
Case No : R.S.A. No.552 Of 2023

Sanjukta Swain

APPELLANT

Vs

Kusum Manjari Rana And Another

RESPONDENT

Date of Decision : 17-05-2024

Acts Referred:

Code of Criminal Procedure, 1973 — Section 144
Orissa Land Reforms Act, 1960 — Section 8A
Transfer of Property Act 1882 — Section 48
Easement Act, 1882 — Section 41
Specific Relief Act, 1963 — Section 34

Citation : (2024) 05 OHC CK 0202

Hon'ble Judges : Sashikanta Mishra, J

Bench : Single Bench

Advocate : Soumya Mishra, Subrat Mishra

Final Decision : Dismissed

Judgement

Sashikanta Mishra, J.

1.The Plaintiff is the Appellant against the reversing judgment passed by learned 1st Addl. Sessions Judge, Cuttack on 29.11.2023 followed by decree on 11.12.2023 in R.F.A. No.37/2020 whereby the judgment dated 30.11.2019 followed by decree dated 05.12.2019 passed by learned 4th Addl. Civil Judge (Sr. Division), Cuttack, in C.S. No.553/2017 was set aside and the appeal was allowed.

2. For convenience, the parties are referred to as per their respective status in the trial Court.

3. The Plaintiff filed the suit for declaration that the Sale Deed No.121 dated 05.1.2013 executed by Defendant No.2 in favour of Defendant No.1 is illegal, void, inoperative and not binding on her and that no right had accrued to Defendant No.1 thereby, permanent injunction against Defendant No.1 restraining him from creating any disturbance over 'B' Schedule property and

from obstructing the use of the Plaintiff over the same and other reliefs. The case of the Plaintiff as set out in the plaint, briefly stated, is that she is the owner in possession of suit Schedule 'A' land. The property described in Schedule 'B' is a road for ingress and egress of the Plaintiff to her residential house situate over 'A' Schedule property. The Schedule 'A' land comprising an area of Ac.0.70 dec. was recorded in the name of the Plaintiff as per order passed in Mutation Case No.1307/1996 and thereafter on the application of the Appellant under Section 8-A of the O.L.R Act filed before the Tahasildar, Cuttack, the nature (kisam) of the land was converted to homestead (Gharabari). The Plaintiff thereafter constructed her residential house over the suit land and has been residing therein without any dispute. It is her further case that her vendor left the Schedule 'B' property to be used by her as road for ingress and egress to her residential house over Schedule 'A' land. Said road was also used by adjoining neighbours and as such, it has become the common road of the Plaintiff and Defendant No.1 along with other persons of the area. Defendant No.2 being the owner of 'B' schedule property has thus granted the right of easement to the Plaintiff and Defendant No.1. The Plaintiff by filing Title Suit No.160/1994 got an award in her favour on the basis of a village Panchayatnama, which was reduced to writing along with a sketch map appended thereto wherein 'B' schedule property was shown as road over Plot No.426 connecting to the Plaintiff's land over Schedule 'A'. Said award was made rule of the Court and a decree was passed granting absolute right to the Plaintiff over 'A' Schedule property. Further, a unregistered agreement was also executed between the Plaintiff and Defendant No.1 on 19.3.1994 granting right of easement in respect of 'B' schedule property. Thus, the Defendant No.1 having no manner of right to make any construction over the 'B' schedule land (road) stocked building materials with the intent of making construction. The Plaintiff objected to the same and also initiated proceeding under Section 144 of Cr.P.C. wherein a preliminary order was passed restraining Defendant No.1 from making any obstruction over Schedule 'B' property. In course of such proceeding, it came to light that Defendant No.1 has alienated 'B' schedule property in favour of Defendant No.1 vide R.S.D. No.121 dated 05.1.2013 despite not having any alienable right and ignoring the right of easement granted by him earlier to the plaintiff and other persons. It is also stated that the right, title and interest of Defendant No.1 has been declared in T.S. No.429/1995 in respect of an area of Ac.0.20 decs. under Hal Plot No.426. In the said suit, 'B' schedule property was also described as road meant for the use of Defendant No.1 as well as the Plaintiff. Defendant No.1, by producing the sale deed dated 5.1.2013 has managed to record her name in the R.O.R. Since the sale deed executed by Defendant No.2 in favour of Defendant No.1 seriously affects the right of easement of the Plaintiff and other adjoining land owners is contrary to the findings in T.S. No.160/1994 and T.S. No.429/1995, same is therefore, illegal. Since Defendant No.1 caused obstruction over 'B' schedule property, the drain water and foul water of the Plaintiff was blocked for which she was constrained to file the suit.

4. Defendant No.1 contested the suit by filing written statement. Her case is that she has been possessing an area of Ac.0.027 decs. 6 kadi of land from Plot No.426. She acquired title over the property by way of adverse possession as per decree passed on 18.12.1995 by the Civil Judge (Sr. Division) 1st Court, Cuttack in C.S. No.429/1995 whereby she got an area of Ac.0.20 Decs. Defendant No.2 thereafter, for his legal necessity sold an area of Ac.0.007 decs. 6 kadi to Defendant No.1 vide R.S.D. No.121 dtd.5.1.2013. Thereafter, she mutated the land in her name and also converted the kism of the land to homestead as per Section 8-A of the OLR Act. It is the further case of Defendant No.1 that the Plaintiff has a separate road i.e., Municipality road adjacent to the western side of her residential plot for ingress and egress which she has been using since long. The Plaintiff has not used Schedule 'B' land as road at any point of time as it is not a road. Further, nothing has been expressly mentioned regarding easementary right of way over Schedule 'B' property in the judgments passed in T.S. No.160/1994 and T.S. No.429/1995.

5. On the rival pleadings, the trial Court framed the following issues for determination;

“(1) Whether the suit is maintainable?

(2) Whether there is any cause of action on the part of the plaintiff to file the present suit?

(3) Whether the sale deed bearing No.121 dtd.5.1.2013 executed by defendant no.2 in favour of defendant no.1 is illegal, void or inoperative or not?

(4) Whether a decree can be passed restraining the defendant no.1 permanently for causing any disturbance over Schedule B property?

(5) Whether the plaintiffs are entitled to cost of the suit?

(6) Whether the plaintiffs are entitled to any other reliefs?”

6. Both parties adduced oral and documentary evidence in support of their respective cases.

7. The trial court took up Issue Nos.3,4,5 and 6 together for consideration. In this regard, the endeavour of the trial court was to determine whether Schedule 'B' land is/was a road or not. Reliance was placed on the agreement styled as Pathway Agreement executed by Defendant No.2 with the Plaintiff, which was marked Ext.3. Considering the sketch map attached to Ext.3 it was held that the same showed the existence of a road over 'B' Schedule property. The trial court also relied upon the oral evidence of the parties. Further, relying on a judgment rendered by the Patna High Court reported in AIR 1958 Patna 571 and on consideration of the earlier judgments passed in favour of the Plaintiff, Defendant No.1, Defendant No.2 and two other boundary tenants, the trial court held that the road mentioned in Schedule 'B' land is used by the Plaintiff as easementary right of way for which the sale deed executed by Defendant No.2 in favour of

Defendant No.1 is void and illegal and that no right has accrued to Defendant No.1 thereby. Further, the land being used as easementary right of way by the Plaintiff, Defendant No.1 was permanently restrained from making any constriction or obstruction thereon. With the above findings on the main issues, the remaining issues were also decided in favour of the Plaintiff and the suit was decreed accordingly.

8. Defendant No.1 carried the matter in appeal to the District Judge, which was heard and disposed of by learned 1st Addl. District Judge. After considering the grounds raised, the 1st Appellate Court formulated the following points for determination;

"A. Whether learned court below decreed the suit illegally in favour of the plaintiff without considering the evidence on record ?

(B) Whether the learned court below committed error by declaring the sale deed executed by defendant no.1 in favour of defendant no.2 relating to suit schedule B property on 5.1.2013 as illegal, void and inoperative and by awarding the relief of permanent injunction in favour of plaintiff?

9. The 1st Appellate Court referred to the judgments passed in the previous suits namely, T.S. No.160/1994, T.S. No.429/1995, T.S. No.14/1995 and C.S. No.491/2002, all of which were decreed on the basis of the awards of the Arbitrator (Panchayat Faisalanama), which formed part of the decrees passed therein. It was found from examination of the award sheets of T.S. Nos.160/1994 and 429/1995 that there is no mention about grant of Schedule 'B' property to the Plaintiff for use of passage. Further, said road was shown as

'Gharoi Rasta'. The agreement vide Ext.3 was also considered and it was held that same having been executed on 19.3.1994 i.e. prior to passing of the decree in T.S. No.160/1994, there was no reason why the same was withheld before the Court. It was therefore, held that the plaintiff's claim of acquiring easementary right of way over 'B' schedule property is not tenable. It was also held that both the Plaintiff and her husband admitted that they have been discharging foul water over the suit property and therefore, it cannot be said that the Plaintiff is using it as her path way. A survey knowing Commissioner was deputed to the property, who submitted a report, which was also considered by the 1st Appellate Court along with the sketch map, marked Ext.C-1. It was found that a Government land adjoins the suit Schedule 'A' property on its western side which was also admitted by the Plaintiff and her husband in their evidence. It was therefore, held that the plaintiff cannot be said to have easementary right of necessity over the 'B' schedule property.

The 1st Appellate Court further held that the Plaintiff not having sought for any relief of declaration of her right of easement over the suit schedule 'B' property, the suit is hit by Section 34 of the Specific Relief Act and therefore, not maintainable. On the above findings, the judgment and decree of the trial Court was set aside and the appeal was allowed.

10. Feeling aggrieved, the Plaintiff has filed the present appeal, which was admitted on the following substantial question of law;

"Whether on the face of the decree passed in T.S. No.160 of 1994 as also the document which has been admitted in evidence and marked Ext.3 and other evidence on the user in support of the claim of the Plaintiff that he has the right of easement over the property in Schedule 'B', the First Appellate Court is right in reversing the finding of the Trial Court and holding that the Plaintiff has failed to prove his case/claim so as to get the reliefs claimed therein.?"

11. Heard Mr. Soumya Mishra, learned counsel for the Appellant and Mr. Subrat Mishra, learned counsel for the Respondent No.1.

12. Mr. Soumya Mishra would assail the impugned judgment by arguing that the 1st Appellate Court completely misdirected itself in holding that the Plaintiff was claiming easementary right of necessity ignoring the evidence on record to suggest that her claim was based on easement of grant. Mr. Mishra further submits that the finding of the 1st Appellate Court that the date of execution of the Pathway Agreement between Defendant No.2 and the Plaintiff is 19.3.1994, is factually incorrect and hence, vitiated in view of the fact that the document itself mentions the date as 19.3.1997. Therefore, any typographical error that may have been made by the Plaintiff in her plaint cannot override the actual date of the document mentioned therein. Mr. Soumya Mishra further argues that the Plaintiff's claim is based on the agreement marked Ext.3, which was never challenged by the executant, Defendant No.2. As such, there was no necessity for the Plaintiff to seek any declaration of easementary right. With regard to the permissibility of Defendant No.1 of opposing the Plaintiff's claim, Mr. Mishra would argue that once an easement of grant is made by the owner of the property, it cannot be revoked subsequently in view of the provision under Section 48 of the T.P. Act. On the same analogy, Defendant No.2 could not have executed a sale deed in favour of Defendant No.1 ignoring his own grant of easement to the Plaintiff vide Ext.3. The 1st Appellate Court also, according to Mr. Mishra, did not appreciate the fact that in all the previous suits based on Panchayat Faisalanamas including the suit between the Plaintiff and Defendant No.2, 'B' schedule land was described as Gharoi Rasta, which substantiates the Plaintiff's claim. Finally, Mr. Mishra would argue that the findings of the 1st Appellate Court that the Plaintiff constructed her house over the property after its Kisam was changed into homestead land is perverse.

13. Mr. Subrat Mishra, learned counsel for the Defendant No.1-Respondent would argue that firstly, what the Plaintiff claims is nothing but an easementary right of necessity, which as per settled position of law gets extinguished if alternative passage is available. Further, the Plaintiff not being a co-owner or co-sharer of the 'B' schedule property is a complete stranger to the suit property for which the suit to declare the sale deed as void and illegal is not maintainable at her instance particularly, in the absence of any declaration being sought for regarding easementary right of passage over 'B' schedule property. As regards,

the Panchayat Faisalanamas made rule of the Court, Mr. Subrat Mishra would contend that they reflect existence of a Gharoi Rasta to the eastern side of the Schedule 'A' land and western side is Municipality road. Further, it is also mentioned that in the decree passed in T.S. No.429/1995 the northern portion is disowned as Ananta Sahoo lane, which corresponds to 'B' schedule property, but it is nowhere mentioned in the award that said lane was granted to the Plaintiff for her ingress and egress. The agreement vide Exct.3, according to Mr. Subrat Mishra, cannot be treated as a genuine document for the reason that it does not contain any date below the signatures of Defendant No.2 and the Plaintiff on each page nor in the last page. The attesting witnesses were also not examined. On the contrary, Defendant No.2 being examined as D.W.3 clearly stated that he had not given 'B' schedule land to anybody to use the same as road. Mr. Mishra has also referred to the evidence of the Plaintiff who denied knowledge about the suit land. She also denied knowledge about the Ext.3, which is highly significant in the context of the case. The husband of the plaintiff being examined as P.W.2 admitted that in none of the judgments passed in the previous suits any right of passage had been given to him and also admitted that he was discharging drain water as well as foul water of his house into the 'B' schedule land.

14. From the rival contentions noted above vis-a-vis the substantial question framed by this Court at the time of admission of this appeal, it is evident that the dispute between the parties is limited to the narrow strip of land described as 'B' schedule land to the plaintiff measuring Ac.0.0076 kadi. Admittedly, 'B' schedule land lies to the adjoining east of Schedule 'A' land belonging to the Plaintiff and the adjoining northern side of land belonging to Defendant No.1. There is no dispute that a Municipality road exists to the adjoining west of Schedule 'A' land. The plaintiff's claim of easementary right over 'B' schedule land is based on firstly, the description of the passage in the Panchayat Faisalanamas made part of the decrees passed in 4 earlier civil suits and secondly, on the agreement executed by Defendant No.1 with her on 19.3.1997 (19.3.1994 according to the 1st Appellate Court). As it appears, the original Plot No.426 belonging to Defendant No.2-Ajay Kumar Sahoo was the subject matter of 5 different suits, which are as follows;

- (1) C.S. No. 491/2002 filed by Judhistir Basa against Ajay Kumar Sahoo;
- (2) C.S. No.14/1995 filed by Raghunath Sahoo against Ajay Kumar Sahoo;
- (3) C.S. No.94/2003 filed by Bansidhar Sahoo against Ajay Kumar Sahoo.
- (4) T.S. No.160/1994 filed by Sanjukta Swain (Plaintiff-Appellant) against Ajay Kumar Sahoo; and
- (5) T.S. No.429/1995 filed by Kusum Manjari Rana (Defendant No.1-Respondent) against Ajay Kumar Sahoo.

These suits were decreed on the basis of reports of the Arbitrators (Panchayat Faisalanamas), which were made rule of the Court. The subject matters of the

suits were regarding title of the Plaintiffs of the said suits over different portions of land belonging to Ajay Kumar Sahoo. Incidentally, in the description of the suit properties, there is mention of a land described as Gharoi Rasta, which corresponds to suit schedule 'B' property. The certified copies of the judgment passed in the said suits have been admitted into evidence as Ext.1 (T.S. No.160/94), Ext.2 (T.S. No.429/1995), Ext.8 (T.S. No.14/1995) and Ext.9 (C.S. No.491/2002). The sketch map has also been appended to the decrees passed in the said suits. Having perused the said exhibits this Court does not find any right being granted to any person much less the present Plaintiff over the 'B' Schedule land to be used as a passage for ingress and egress. Therefore, mere description of the land as Gharoi Rasta and Ananta Sahoo lane in some awards/decrees cannot ipso facto lead to the conclusion that any right of assessment was granted to any person over the same. The 1st Appellate Court therefore, appears to have very rightly taken the above view.

15. Coming to the so-called Pathway Agreement described in Odia as 'Patha Satwa Rajinama' executed between Defendant No.2 and the Plaintiff, marked Ext.3, it is seen that the same is an unregistered document purporting to grant right of passage to the Plaintiff over Schedule 'B' land along with right to have it recorded as common road in future. Surprisingly and as pointed out by Mr. Subrat Mishra, no date has been endorsed under the signatures of the parties in each of the pages of the document. Thus is contrary to what is usually seen in all such documents. That apart, no date is also mentioned under the signature of parties and their witnesses in the last page of the document, which is even more surprising. One Harekrushna Behera of Chauliaganj, Cuttack, has signed obliquely on the bottom left of the document by endorsing the date '19.3.1997'. The identity of said Harekrushna Behera is not forthcoming from the record nor disclosed by the Plaintiff. That apart, 3 other witnesses namely, Santosh Kumar Bhala, Manorama Mohanty and Chandramani Barik have signed on the document, but none of them was examined to prove execution of the document. Interestingly, the agreement has been written on a non-judicial stamp paper worth Rs.5 said to have been purchased by Ajay Kumar Sahoo, but the stamp vendor has also not mentioned the date of sale, which makes the document all the more doubtful. All these raise considerable doubts as regards authenticity of the document.

16. Much argument has been made as regards the date of the agreement. Relying on the plaint averments, the 1st Appellate Court has treated the date as 19.3.1994 whereas referring to the date mentioned in the document, learned counsel for the Plaintiff has tried to persuade this Court to treat it as 19.3.1997. In view of what has been stated in the preceding paragraph, it is difficult for this Court to place any reliance whatsoever on the document. Therefore, the claim of the plaintiff of easement of grant based on Ext.3 can have no legs to stand.

17. Faced with such a situation, the only way by which the Plaintiff can raise a claim, if at all, of easement is of necessity in view of her specific pleadings that

she had been using the passage for ingress and egress to her residential house over the Schedule 'A' land. However, in view of the clear evidence through the report of the Civil Court Commissioner that a municipality road situates to the adjoining west of Schedule 'A' property, which the plaintiff also admits to be using, the right of easement by necessity also falls to the ground in view of the provision of Section 41 of the Easements Act. That apart, the admission in the plaint as well as by P.W.2 that they are discharging drain water and foul water into the Schedule 'B' land militates against their claim of using it as a passage for ingress and egress to their residential house. The 1st Appellate Court has taken note of the above aspects to hold, and rightly so, that the Plaintiff cannot be said to be using the suit Schedule 'B' property as her pathway.

18. On the question of maintainability of the suit in view of the provision under Section 34 of the Specific Relief Act, this Court also holds that admittedly the Plaintiff has no manner of right, title or interest over 'B' Schedule land but only claimed easementary right of way over the same. As such, she being neither a co-owner nor a co-sharer cannot be allowed to challenge the alienation of the land by its lawful owner in favour of Defendant No.1 vide R.S.D. No.121 dated 5.1.2013 without any declaration being sought for by her regarding easementary right of way over 'B' Schedule property. The suit therefore, cannot be held to be maintainable in view of the provision under Section 34 of the Specific Relief Act, which is quoted herein below;

"34. Discretion of court as to declaration of status or right.— Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

19. Once this Court holds that the claim of easement by grant based on the so-called agreement marked Ext.3 falls to the ground and in the absence of any declaration being sought for regarding easementary right of way over 'B' Schedule land, the suit has to be held as not maintainable in law.

20. Thus, from a conspectus of the analysis of the facts, evidence on record vis-à-vis the substantial question of law framed, this Court does not find any infirmity much less illegality in the findings of the 1st Appellate Court so as to be persuaded to interfere therewith.

21. In the result, the appeal fails and is therefore dismissed, but in the circumstances without any cost.

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