
(2008) 07 OHC CK 0012

In the Orissa High Court

Case No : Writ Petition (C) No. 8331 of 2006

Smt. Aratibala Dash and Another

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 22-07-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 151

Citation : (2008) CLT 37 Supp

Hon'ble Judges : Indrajit Mahanty, J

Bench : Single Bench

Advocate : Dibakar Bhuyan, B. Bhuyan, B.N. Mishra, C.R. Swain and P. Mohanty, for the Appellant;

Final Decision : Dismissed

Judgement

Indrajit Mahanty, J.—In this writ petition, the Petitioner Smt. Aratibala Das has sought to challenge the order dated 03.02.2006 passed in F.A.O. No. 224 of 2005 by the Second Additional District Judge, Cuttack in refusing to pass an order of temporary injunction. It appears that the Petitioners, as Plaintiffs filed C.S. No. 72 of 2004 before the learned Civil Judge, Sr. Division, 2nd Court, Cuttack for a declaration of their right of user over the suit schedule "B" property as their approach road from their house to National Highway No. 5 and for permanent injunction restraining the Defendants from interfering in Plaintiff Petitioners right to use over the suit property. It is submitted by the learned Counsel for the Petitioners that they are the owners of certain plots as mentioned in the schedule of the plaint, on which they are residing other constructing a residential house and claim that since the date of purchase of the aforesaid land, the Plaintiffs have also been using the schedule "B" property as their only (passage) approach road to N.H.5. It is averred by the Petitioners that there is no other approach road for access to their residential house except the land described in Schedule "B" property of the plaint. Along with the plaint, the Petitioners filed a petition under Order 39 Rules 1 and 2, CPC with a prayer to grant temporary injunction

against the Defendants from obstructing the passage and the said application came to be dismissed by order dated 8.6.2004 with the finding that the Plaintiff-petitioners do not have a prima facie case for granting injunction against the opposite parties.

2. Challenging the aforesaid order, petitioners-petitioners filed FAG No. 87 of 2004 before the learned District Judge, Cuttack and in the said case also filed an application under Order 39 Rule 1 & 2 CPC which was numbered as C.M.A. No. 89 of 2004. That matter was taken up by the learned Additional District Judge 1st. Court, Cuttack and by order dated 2.7.2004 the Additional District Judge was pleased to direct both the parties to maintain status quo over the suit schedule land till disposal of the appeal. The learned Counsel for the Plaintiff petitioners further asserted that the learned District Judge by order dated 30.8.2004 remanded the case for afresh adjudication after disposal of the petition dated 7.6.2004 for appointment of Commissioner.

3. After the order of remand passed by the learned Lower Appellate Court, a pleader Commissioner was deputed to the spot for inspection and the said pleader Commissioner visited the suit land and also submitted his report. The said pleader commissioner was examined by the Court below in support of his report and in his report he has stated that the Petitioners have no other road having access to the suit land. But the learned Civil Judge (Sr. Division), 2nd Court, Cuttack heard the, application order 39, Rule 1 & 2 read with Section 151, CPC and dismissed the same on contest by order dated 26.9.2005. The Petitioners thereafter, being aggrieved by the said order filed FAO No. 224 of 2006 before the learned District Judge, Cuttack and the appeal was also dismissed by the learned Additional District Judge by his order dated 3.2.2006 with the finding that no injunction can be granted since the Petitioners are not able to establish their prima facie case and with the further finding that plot No. 2265 has since been allotted to the opposite party Nos. 2 to 4 for setting up Government Offices.

4. Being aggrieved by the order of the learned Additional District Judge in FAO No. 224 of 2005 dated 3.2.2006 the present writ application has been filed Mr. Bhuyan, learned Counsel appearing for the Petitioner, inter alia, contended that the learned Additional District Judge has failed to consider the materials on record and has also failed to consider the report of the pleader Commissioner while rejecting the application for grant of injunction. He asserted that all three necessary ingredients for grant of temporary injunction, i.e., prima facie case, balance of convenience and irreparable injury were pleaded by the Petitioner and, therefore, the learned Lower Appellate Court ought to have granted temporary injunction as prayed for by petitioners-petitioners.

5. Learned Additional Standing Counsel as well as the Standing Counsel (Transport) appearing of the Opp. Parties, on the other hand, strenuously opposed the application of the Petitioner and placed reliance upon the impugned order as well as counter affidavit filed by the opposite party 1 to 3.

6. Learned Counsel submits that the registered sale deed of petitioners-petitioners does not disclose as to whether they ever used any portion of Plot No. 2265 for the purpose of their ingress and egress to their residential plot. It is submitted that on the contrary the registered sale deed itself indicates that there is a "joint passage on the Southern side" of their purchased area, which was given by their vendors. The learned Counsel further asserted that plot No. 2265 is a vast area of about 3 acres and there is no documentary evidence in support of petitioners-petitioners that schedule "B" property was ever used as a public road. It is submitted that the Schedule "B" property appertaining to Plot Nos. 52 to 65, under Khata 953 Ac.225 dec. in Mouza Nimpur was allotted for construction of the Sub-Registrar office building and its quarters, at Jagatpur, Cuttack by the Collector, after making deservation of the lands. It is submitted that Collector, Cuttack has allotted part of the land for construction of the Jagatpur Tahasil Office, District Industry Centre, Cuttack and RTO Office, Cuttack and all the concerned offices have taken over possession of the said land, from the Tahasildar, Tangi, Choudwar pursuant to an order passed by the Hon'ble High Court on 13.3.2007.

7. The learned Counsel for the State was also directed to produce a sketch map of the disputed land before the Court and in terms of the said direction, the learned Additional Government Advocate on 29.1.2008 submitted a sketch map, received from the Sub-Registrar, Jagatpur, and copy of the same has duly been served on the counsel appearing for the Petitioner. From the Map it is clearly apparent that there is an alternative passage from the Plaintiff petitioners plot towards the south side for their use. Although the learned Counsel for the Petitioner strenuously contended that the Map submitted by the Sub-Registrar is incorrect, yet when both the trial Court as well as the lower Appellate Court have given concurrent finding of facts to the extent of holding that the Petitioners have got alternative passage to the suit land and the sketch map provided by the Sub-Registrar also confirm the same, there is no plausible reason to accept that plea of the Petitioner to the contrary. Accordingly, the judgment of the trial Court is affirmed for the reason quoted hereinabove.

8. The writ application stands dismissed.