

(1999) 11 OHC CK 0027

In the Orissa High Court

Case No : Miscellaneous Appeal No. 658 of 1993

Smt. Kamal Kumari Dei alias Das

APPELLANT

Vs

Smt. Rajani Routray

RESPONDENT

Date of Decision : 29-11-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 99

Citation : (2000) 1 OLR 106

Hon'ble Judges : P.K. Misra, J

Bench : Single Bench

Advocate : R.C. Mohanty, R. Mohanty, D.K. Mohanty and N. Behuria, for the Appellant; G. Mukherji and P. Mukherji, for the Respondent

Final Decision : Allowed

Judgement

P.K. Misra, J.—The facts giving rise to the present Miscellaneous (Second) Appeal under Order 21, Rule 103, CPC (in short, the "C.P.C.") are as follows :

The present respondent as plaintiff filed O.S. No. 1 16 of 1982 in the Court of the Munsif, Bhubaneswar, against the present appellant and her husband for permanent injunction in respect of plot No. 195 of the Settlement Record-of-Rights of the year 1962 with an area of Ac.0.115 decimals. The said plot corresponds to a portion of plot No. 221 of 1929- 1930 Settlement. In the said suit, written statement was filed by the two defendants denying the right, title and interest of the plaintiff. During pendency of the said suit, the present respondent filed H.R.C. Case No. 24/83 for eviction of tenant allegedly occupying the disputed house said to be standing on plot No. 195. An ex parte order of eviction was passed in the said House Rent Control proceeding. The present respondent levied Execution Case No. 5/84 and purported to obtain possession and forcibly dispossessed the present appellant. In view of the forcible dispossession, the present appellant filed Misc. Case No. 67/84 under Order 21, Rule 99, C.P.C. In the said application the appellant's case is as follows :-

She is owner of plot No. 1.96 and plot No. 195 is to the adjacent South of plot No. 196. The house was, in fact, constructed on plot No. 196 by the appellant and her husband. In the suit filed in respect of plot No. 195, interim injunction prayed for by the present respondent (who was the plaintiff in the said suit) had been refused on the ground that the house stood on plot No. 196 and not plot No. 195. The right of the present respondent over plot No. 195 was also denied. It was stated that initially one Souri Devi had purchased Ac.0.220 decimals out of Ac.0.590 decimals appertaining to plot No. 222 and Ac.0.242 decimals out of plot No. 251 by registered sale deed dated 28.9.1951. Subsequently, the said Souri Devi mortgaged the said purchased property in favour of one Lava Dei alias Nava Dei. Lava Dei filed mortgage suit No. 88/479 of 1956/54 and in execution of the mortgage decree, Lava Dei purchased the mortgaged property in Court auction. However, while filing the mortgage suit, in place of plot No. 251, plot No. 221 was wrongly mentioned as the suit property along with the undisputed plot No. 222 and accordingly in the Sale Certificate by mistake plot No. 221 was mentioned in place of plot No. 251. In spite of such wrong description of plot number, actually possession of Ac.0.242 decimals from plot No. 251 had been delivered. Subsequently, on 4.4.1959, Lava Dei sold the property purchased by her to the husband of the present respondent again wrongly mentioning the plot number as 221. However, possession was delivered in respect of plot No. 251 and not plot No. 221. It is stated that the total area of plot No. 221 in the sale deed was indicated to be Ac.0.624 decimals, whereas actually the total area of plot No. 221 was Ac.0.812 decimals and the total area of plot No. 251 was Ac.0.624 decimals. Similarly, in the sale deed, the western boundary of the purchased portion was shown to be "public road". As a matter of fact, to the immediate west of plot No. 251 is the public road, whereas, the said public road is to the east of plot No. 221. It was further stated that the husband of the present respondent had sold Ac.0.126 decimals from the purchased property to one Bhabagrahi Jena and Nanda Kishore Jena, wherein again "public road" was shown to the west of the land sold. In other words, it was claimed that though in the mortgage suit and the decree, plot No. 221 was shown to be the property mortgaged, the boundaries given relate to plot No. 251 which was the property initially purchased by Souri Devi and mortgaged to Lava Dei.

2. It is to be noted that the aforesaid plea was also the specific plea of the present appellant and her husband in the written statement filed in O.S. No. 116/82 filed by the present respondent. Thus, from a reading of the objection under Order 21, Rule 99, C.P.C., it is apparent that the Objector was raising two objections : firstly, the disputed house was on plot No. 196 belonging to her and secondly, the respondent in the appeal who had obtained the ex parte decree in the House Rent Control Proceeding in respect of plot No. 195 had, in fact, no right over plot No. 195 and the said plot No. 195 belonged to the husband of the present appellant.

3. During the pendency of the proceeding, a Survey-knowing Commissioner had been deputed who reported that the disputed house stood on plot No. 195 and

not on plot No. 196. Both the Courts below have negated the contention of the present appellant on the ground that she was claiming right over plot No. 196, but the disputed house stood on plot No. 195. It is to be noticed that in the connected suit which was earlier filed by the present respondent, wherein the present appellant and her husband were parties, the claim of title of the present respondent in respect of plot No. 195 was concurrently negated by both the Courts below. It was found in the said suit that as a matter of fact, originally Souri Devi had purchased Ac.0.242 decimals from plot No. 251 and the said property had been mortgaged to Lava Dei. It was further found in the said suit that as a matter of fact, a wrong plot number had been indicated in the mortgage suit filed by Lava Dei, but the boundaries given in the said suit clearly relate to plot No. 251 and not plot No. 221.

4. In the present proceeding, the present respondent had filed an application for stay of the proceeding u/s 10, C.P.C. on the ground that the question of title in respect of plot No. 195 was already subject-matter of O.S. No. 116/82 and the findings in the said suit would govern in the present case. In other words, there is no dispute between the parties that the question of title in respect of plot No. 195 was to be decided in the presence of the present respondent who was the plaintiff and the present appellant and her husband who were the defendants. Moreover, in the present proceeding also no other evidence has been adduced relating to title of the decree holder in respect of plot No. 195 obviously because, the parties were conscious that the entire evidence relating to title over plot No. 195 had been adduced in the suit. It is, of course, true that the husband of the present appellant, who was defendant No. 2 in the suit, was not one of the applicants in the present proceeding, but from the records of the present proceeding, it is apparent that it is the husband of the present appellant who was taking all steps. Having regard to the facts and circumstances of the case and particularly keeping in view the fact that the husband of the present appellant was taking all steps in the present proceeding as well as the connected O.S. No. 116/82, to avoid multiplicity of proceeding and in the interest of justice, the husband of the appellant who was defendant No. 2 in the connected suit (O.S.No.116 of 1982) is impleaded as co-petitioner in the Misc. Case No. 67 of 1984 in exercise of power u/s 151, read with Order 1, Rule 10(2), C.P.C. Implemen of such new party would not necessitate a new trial as the entire materials are available on record in O.S. No. 116 of 1982 where the questions raised in the present proceeding have been specifically raised and answered.

5. The present appeal and Second Appeal No. 356/89 were taken up for hearing at the same time. The main point canvassed in the present appeal on behalf of the appellant is that if the title of the decree holder would be negated in Second Appeal No. 356/89, the same should be considered to be binding in the present case also and the proceeding being one under Order 21, Rule 99, C.P.C, where question of title is the main question to be decided, the decision in the present case should be governed by the decision in Second Appeal No. 356/89 particularly when entire evidence-oral and documentary - is available in the said

case.

6. At this stage, the relevant provisions contained in Order 21, C.P.C. relating to dispossession of a party other than a judgment-debtor may be noticed. Rule 99 (1) lays down:

"Where any person other than the judgment debtor is dispossessed of immovable property by the holder of a decree for the possession of such property.....he may make an application to the Court complaining of such dispossession."

Sub-rule (2) provides :

"Where any such application is made, the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained."

Rule 101 envisages,:

"All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under Rule 99 or their representatives and relevant to the adjudication of the application, shall be determined by the Court dealing with the application and not by a separate suit....."

Rule 100 contemplates :

"Upon the determination of the questions referred to in Rule 101, the Court shall, in accordance with such determination,

(a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or

(b) pass such other order as, in the circumstances of the case, it may deem fit."

Rule 104 provides :

"Every order made under Rule 101 or Rule 103 shall be subject to the result of any suit that may be pending on the date of commencement of the proceeding in which such order is made, if in such suit the party against whom the order under Rule 101 or Rule 103 is made has sought to establish a right which he claims to the present possession of the property."

A perusal of the aforesaid provisions leaves no room for doubt that if a third party other than the judgment-debtor is dispossessed, on the basis of his application, the question has to be decided by the executing Court and while deciding the questions raised, all questions relating to right, title and interest in the property arising between the parties to the proceeding are to be decided by the very same Court and not by a separate suit. Where, however, a suit is already pending relating to the right claimed in the proceeding, such order in the proceeding under Order 21, Rule 99 shall be subject to the result of such pending suit.

7. Applying the above principles, it is apparent that ultimately the decision is the pending suit has to prevail upon any order passed under Rule 101 or Rule 103 of Order 21, C.P.C. In the connected suit, the present respondent has claimed right and possession over plot No. 195 and the present appellant and her husband have set up their own independent right. It is, of course, true that the Commissioner in the proceeding has reported that the house stood on plot No. 195, but in the suit it was found that the house was on plot No. 196 and not on plot No. 195. Be that as it may, it is the case of the defendants in the suit that the house stood on plot No. 196 and plot No. 195 was Vacant, whereas it is the case of the present respondent that the house stood on plot No. 195 and plot No. 196 was vacant. Though the defendants have taken the specific plea that the house is on plot No. 196, it is apparent that they have also claimed title over plot No. 195, which was the subject matter in Second Appeal No. 356/89. By separate judgment, delivered today, the said appeal has been dismissed after a re-discussion of the entire materials on record, particularly the various documentary evidence on record. In view of the decision in the suit, as confirmed in the appeal, there cannot be any doubt that the present respondent did not have any title in respect of plot No. 195 corresponding to portion of earlier plot No. 221 and, in fact, her purchased portion, as apparent from the boundaries, must be taken to be relatable to plot No. 251. In view of the findings of the two Courts below, as confirmed in Second Appeal No. 356/89 to the effect that plaintiff does not have title over plot No. 195, nor she had acquired any right by adverse possession, and having regard to the facts and circumstances of the case, it must be held that the present respondent has no right over plot No. 195 and the appellant and her husband are entitled to recover possession of plot No. 195 corresponding to plot No. 221 purchased by defendant No. 2.

8. For the aforesaid reasons, the Misc. Appeal is allowed. There will, however, be no order as to costs.