

(1999) 11 OHC CK 0015
In the Orissa High Court
Case No : Second Appeal No. 356 of 1989

Smt. Rajani Routray

APPELLANT

Vs

Smt. Kamal Kumari Dei and Another

RESPONDENT

Date of Decision : 29-11-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2000) 1 OLR 147

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

Bench : Single Bench

Advocate : A. Mukherjee and S.C. Das, for the Appellant; R.C. Mohanty, R.K. Mohanty, G.B. Jena, N. Behuria, D.K. Mohanty and R. Meher, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Misra, J.—Plaintiff is the appellant against a confirming decision. Plaintiff filed the suit for injunction restraining the defendants from dispossessing the plaintiff from the disputed land. The disputed land is recorded as plot No. 195 in 1962 Settlement with an area of Ac 0.115 decimals. It corresponds to a portion of plot No. 221 of 1929-30 Settlement. It is claimed by the plaintiff that the disputed plot originally belonged to Lava Dei who sold the same to plaintiff's husband by a registered sale deed dated 4.4.1959 and delivered possession thereof. At the time of the sale, the disputed plot has been recorded as plot No. 221 of in Sabik Khata No. 57 of Current Settlement Record- of-Rights (i.e. 1929-30). The disputed plot was recorded in the name of the husband of the plaintiff in the year 1962. After death of plaintiff's husband in the year 1972, the plaintiff and her two daughters became the owners of the property and subsequently the two daughters relinquished their claim over the disputed property in favour of the plaintiff who became the sole owner of the same. The plaintiff has constructed a pucca house consisting of two rooms over the disputed land. The defendants who are the owners of adjacent Plot No. 196 were creating disturbance in the possession of the plaintiff with the help of the local police forcing the plaintiff to

file the suit for injunction.

During pendency of the suit, the plaintiff filed H.R.C. Case No. 24 of 1 983 against the tenants and obtained an order for eviction on 26.11.1 983 and thereafter delivery of possession of the property was given to the plaintiff through Court. The aforesaid assertion was incorporated in the plaint by way of amendment. By amendment the plaintiff also introduced an alternative case of acquisition of right and title through adverse possession, as Lava Dei, the vendor of plaintiff's husband, has remained in possession of the disputed plot after taking possession through Court in 1956.

2. The defendants who are wife and husband respectively, filed joint written statement denying the allegations in the plaint. It was pleaded by the defendants that by registered sale deed dated 28.9.1951, one Souri Devi had purchased Ac. 0.220 decimals from plot No. 222 measuring Ac. 0.590 decimals and Ac. 0.242 decimals from plot No. 25 1 Ac. 0.624 decimals from the original owner's Ganesh Jena and his co-sharers. Subsequently, Souri Devi mortgaged her above purchased property in favour of one Lava Dei and the latter filed a suit in the year 1954 for foreclosure. At the time of filing the suit, instead of mentioning plot No. 251, by mistake plot No. 221 was mentioned in the plaint, and the said mistake was continued in the decree and the sale certificate. However, the boundaries give in the plaint and decree clearly indicated that the property related to purchased portion of plot No. 222 and plot No. 251. In spite of aforesaid wrong description in the plaint and the sale certificate relating to plot No. 221 instead of 251. Lava Dei actually got possession of plot No. 251. Subsequently she sold the property to plaintiff's husband wherein plot No. 221 had been included by mistake, but actually possession of plot No. 251 had been delivered. The husband of the plaintiff had sold Ac. 0.126 decimals out of plot No. 221 to Bhabagrahi Jena. In the said sale deed it had been shown that the public road was to the west of the land sold which clearly indicated that the property sold related to plot No. 251, as the road is actually to the east of plot No. 221 and not to west of plot No. 221. It was further pleaded that admittedly plot No. 1 96 belongs to defendant No. 1 and a building has been constructed on it with boundary walls on all sides except to the adjoining south where plot No. 1 95 is situate. It was further claimed that plot No. 195 actually belongs to defendant No. 2 who has purchased Ac. 0.72 decimals from the previous owner. It is claimed that the defendants have been in possession of the purchased portion of plot No. 195 as well as entire plot No. 196.

After amendment of the plaint, additional written statement was filed denying the averments therein. It was stated that H.R.C. case No. 24/83 had been collusively filed against a close relation of the plaintiff and an ex pane order was obtained and subsequently, plaintiff manipulated to take forcible possession of the two rooms standing on plot No. 1 96 by evicting defendant No. 1 therefrom. It was further stated that defendant No. 1 had filed Misc. case No. 67 of 1984 complaining about the illegal dispossession.

3. Though the suit was one for injunction, keeping in view the allegations made in the plaint and the written statement the trial Court framed an issue relating to title of the plaintiff over the disputed land and also framed issues relating to acquisition of title over the disputed property by way of adverse possession. The trial Court found that the reference to plot No. 221 in the earlier mortgage suit filed by Lava Dei was, in fact a mistake as plot No. 251 had been mortgaged, and not plot No. 211. It was concluded that the plaintiff had failed to establish that Lava Dei had right, title and interest and possession over plot No. 221 corresponding to Hal plot No. 195 and further that the plaintiff had failed to prove that her husband had taken physical possession of the disputed land from Lava Dei. The plea of adverse possession was also negatived. The trial Court also disbelieved the case of the plaintiff that the house consisting of two rooms stood on plot No. 195. On these findings, the suit was dismissed.

4. The lower appellate Court on independent consideration of the materials on record has confirmed the findings of the trial Court. Hence, the Second Appeal.

5. It is contended by the counsel for the plaintiff-appellant that the mortgage decree clearly related to plot No. 221 which corresponds to plot No. 195 and since possession was delivered through Court, it must be presumed that official act had been done properly and possession of plot No. 221 had been delivered to Lava Dei in the year 1956. It is, therefore, contended that whatever might have been the defect in title of the earlier owner, a valid title was passed on to Lava Dei by virtue of the decree and the consequent sale. It is further contended that it is the specific case of the defendants that the house consisting of two rooms stands on plot No. 196 and plot No. 195. Relying upon the Commissioner's report in the Misc. Case under Order 21, Rule 100, CPC, which has been sought to be adduced as additional evidence, it is contended that since the house admittedly stood on plot No. 195 and not on plot No. 196 as claimed by the present defendants, it must be taken that the plaintiff had obtained possession validly through Court and the decree for injunction against the defendants should be passed. It is further contended by the appellant that the specific case of the defendants is that the house is constructed on plot No. 196 and not on plot No. 195 and since the plaintiff had proved her right over the house and had got possession through execution, the possession of defendants should have been disbelieved and, at any rate, plaintiff's title by adverse possession should have been accepted.

6. Though the findings recorded by the Courts below are apparently findings of fact, in view of the serious contentions raised by counsels for both parties, it is necessary to refer to some of the important materials afresh. The plaintiff is relying upon the decree in the mortgage suit which was filed by Lava Dei. In the said suit, plot No. 221 had been described to be one of the disputed plots along with plot No. 222. It was claimed that the suit properties had been mortgaged by Souri Devi. From the sale deed in favour of Souri Devi it is apparent that, in fact, she had purchased Ac. 0.220 decimals from the southern side of plot No. 222

having an area of Ac. 0.590 decimals and Ac. 0.242 decimals from the southern side of plot No. 251 having an area of Ac. 0.624 decimals. The boundary of the entire purchased portions of A. 0.462 decimals had been given as : East-Uchhab Martha; West-Public Road; North - Ganesh Jena (vendor himself) and South-Water Channel. In the said sale deed (Ext. E), there is no mention relating to purchase of plot No. 221. From Ext. 9, the certified copy of the Settlement Map of 1929-30, it is apparent that plot Nos. 222 and 251 are adjoining plots and to the south of both these plots there is a water channel bearing plot No. 223 as apparent from Ext. AB. It is not disputed, and it is apparent from Ext. 9 that western side of plot No. 222 has been acquired for Cuttack-Puri Road and a portion of plot No. 222 is still existing to the East of the road. From the very same map it is further apparent that major portion of plot No. 221 is towards the west of the road. In other words, the road is towards the east of plot No. 221. Moreover, from the Record-of-Rights (Ext. R) it is clear that the area of plot No. 221 is Ac. 0.812 decimals, whereas the area of plot No. 251 was 0.642 decimals. In the sale deed in favour of Souri Devi and the deed of mortgage in favour of Lava Dei, the plot numbers mentioned were 25 1 and 222 and it was indicated that Ac. 0.242 decimals from plot No. 251 with an area of Ac. 0.624 decimals had been sold/mortgaged. Thus on a reference to the sale deed and the deed of mortgage and a comparison of the boundaries given in those sale deed and deed of mortgage as well as in the plaint, there is no doubt that, in fact, plot No. 251 was the subject-matter of the mortgage suit and by mistake, plot No. 221 had been indicated. A perusal of the map indicates that the water channel is definitely not to the South of plot No. 221. Law is well settled that if there is conflict between plot number and boundary and the boundaries given are definite and firm, the boundary should prevail and the land indicated within the boundaries should be considered to be the subject- matter of the deed. In the present case, an unfortunate error relating to plot number has crept into the plaint (Ext. T) which was again reflected in the decree and the sale certificate. Even in the preliminary decree also the boundaries given are relatable to plot No. 251 and not plot No. 221. Such conclusion is inevitable on a reference to the various sale deeds, deed of mortgage and other materials on record such as the Map and the Record-of-Rights. As such the conclusion of the Courts below cannot be said to be erroneous in any manner.

7. The learned counsel for the appellant submitted in the alternative that in case title of the plaintiff in respect of the disputed land is negatived, her right by way of adverse possession should be recognised. This plea had been raised before the trial Court by way of amendment. The trial Court on discussion of the relevant materials on record negatived such plea of the appellant in the present appeal. The said decision has been confirmed by the lower appellate Court. Both the Courts below have referred to various materials on record in arriving at the conclusion that the plaintiff in O.S. No. 116/82 had failed to prove adverse possession. Such finding being essentially a finding of fact is not available to be challenged in Second Appeal.

8. The learned counsel for the appellant in the Second Appeal also contended that the decision in Misc. Appeal No. 1/92 confirming the order of the Munsif in Misc. Case No. 67 of 1984 arising out of Execution Case No. 5/84 should be considered as an additional evidence and since it has been found in the said appeal that the disputed house had not been constructed on plot No. 196 as claimed by defendant No. 1 but on plot No. 195, as claimed by the plaintiff in the suit, the suit should be decreed. The decision in Misc. Appeal No. 1/92 is also under challenge in Misc. Appeal No. 658/93 which has been heard along with the present Second Appeal. The decision in the said case appears to be based solely on the report of the Commissioner that the house stood on plot No. 195. The question of title of the plaintiff relating to plot No. 195 had not been specifically gone into. Since in the suit all the materials have been adduced and the finding in the suit based on discussion of evidence appears to be reasonable, and in the absence of proof of title of the plaintiff in respect of plot No. 195, the contention of the appellant cannot be accepted. On the other hand, the decision in Misc. Case No. 67/84 arising out of Execution Case No. 5/84, as confirmed in Misc. Appeal No. 1/92 being subsequent, must be held to be subject to the decision in the Second Appeal itself. Since the plaintiff in O.S. No. 116/82 has failed to prove her title as well as possession in respect of plot No. 195, the ex parte decree obtained in House Rent Control Proceeding to which the defendants in the suit were not parties cannot be held to be binding.

9. For the aforesaid reasons, this Second Appeal No. 356/89 is dismissed. There will be no order as to costs.