
(2008) 08 OHC CK 0087
In the Orissa High Court
Case No : Writ Petition (C) No. 11610 of 2003

Smt. Shantilata Giri

APPELLANT

Vs

Laxmikanta Barik and Others

RESPONDENT

Date of Decision : 27-08-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 147

Citation : (2009) 1 CLR 59

Hon'ble Judges : Sanju Panda, J

Bench : Single Bench

Advocate : S.P. Mishra, S.K. Mishra, S.S. Satpathy, M.R. Dash, S. Mishra, N. Roy and B. Mohanty, for the Appellant; A.R. Dash, R.N. Behera, M.C.S. wain, S.K. Nanda(I), B. Mohapatra and R.K. Behera Advs. for Opp. Party Nos. 1 to 8, for the Respondent

Final Decision : Allowed

Judgement

Sanju Panda, J.—Plaintiff is the Petitioner who has filed this writ petition challenging the order dated 29.8.2002 passed by the learned Civil Judge (Senior Division), Udala in Title Suit No. 2 of 2000 rejecting the application for amendment of the plaint.

2. From the impugned order, it appears that the Plaintiff earlier filed an application for amendment of the plaint which was rejected on 5.8.2002 as not moved. So, she filed a petition to recall the order dated 5.8.2002 which was also rejected by order dated 14.8.2002. Thereafter, on 19.8.2002 she filed the application for amendment of the plaint. As the learned Civil Judge was of the view that the proposed amendment would change the nature and character of the suit, he rejected the amendment petition of the Plaintiff on 29.8.2002.

3. The facts of the case are as follows:

The Petitioner-Plaintiff filed the Title Suit No. 2 of 2000 for declaration of right, title, interest and confirmation of possession and permanent injunction along

with other ancillary relief. Her case is that late Baidyanath Barik, the common ancestor of the Plaintiff and Defendant Nos. 1 to 7, was the owner of the land as per the details given in Schedule "B" of the plaint. He sold Ac.0.080 decs. of land to Kamal Kumar Mishra and Ac.0.090 decs. of land to one Harshamani, Defendant No. 9. Both the sale deeds were executed at the instance of one Surendra Panda who wanted to purchase the entire Ac.0.170 decs. of land. However, he purchased the front portion adjoining to the road in the name of his wife, Kamal Kumari. Harshamani purchased the back portion of Kamal Kumar's land. There was an understanding between them that the excess Ac.0.010 decs. of land purchased by Harshamani would be used as a feeder road of Harshamani to the main road. Kamal Kumari sold her purchased land to one Biswanath Behera, Defendant No. 10 who constructed his house over the same and stayed there by raising boundary wall closing the feeder road of Harshamani Defendant No. 9. The husband of Defendant No. 9 purchased another plot of land from one Maheswar Mahallik to the north of the land of Defendant No. 9 with a view to have a feeder road to the NAC road on the north. The Plaintiff pleaded that all the transactions area of Ac.0.22 1/2 decs. of land was left out of Plot No. 485 and detailed descriptions of the said land were given in Schedule "A" of the plaint. The said land was given to her by her father at the time of her marriage. She was in possession of the said land by raising boundary wall. But there was No. document relating to such transaction. Therefore, the land could not be recorded in the name of the Plaintiff during the settlement operation and it was recorded in the name of Baidyanath. Defendant No. 8, the husband of the Plaintiff, purchased Schedule "c" land which is adjoining to Schedule "A" land to make it a compact land and constructed residential building over the same. Defendant No. 9 initiated a proceeding u/s 147 of the Code of Criminal Procedure and got an order for removal of the boundary wall of the Petitioner without impleading her as a party. Against the said order, the Plaintiff preferred a revision before the Sessions Judge, Mayurbhanj which is subjudice. The Plaintiff stated that after taking an Amin for demarcation she came to know that Defendant Nos. 9 and 10 encroached a strip of land measuring 18 links x 200 links from Schedule "A" land and they did not agree to vacate the same. Hence she filed the suit.

4. In the suit Defendant Nos. 1 to 8 filed their written statement supporting the case of the Plaintiff. Defendant No. 9 filed a separate written statement denying the plaint statement and raised a counter claim by way of right of easement to use the encroached land out of Schedule "A" as a road and prayed for a declaration to that effect. Defendant No. 10 supported the stand of Defendant No. 9 by filing a separate written statement.

5. After closure of evidence, the Plaintiff filed a petition for deputation of a survey knowing commissioner to ascertain as to whether there is any alternative way for Defendant No. 9 to have egress and ingress to the NAC road apart from the disputed road. Her application was allowed by the trial court. The Commissioner filed his report indicating therein that there is No. existence of any

such alternative passage which was accepted. The Plaintiff filed her objection to the said report of the Commissioner specifically pointing out that the parties were not noticed during investigation and the same was done behind her back. The Commissioner suppressed the fact that Plot No. 158/942 belongs to the husband of Defendant No. 9 and Plot No. 4851753 adjoining to each other and are in one enclose touching Plot No. 943 which is a common road and leads to Plot No. 160, the northern side of the NAC road. The said report did not contain any field book and spot map indicating chain lines. As the report was accepted by the trial court, the Plaintiff filed an application for amendment stating that it was necessary for just decision of the dispute taking into consideration the claim and counter claim of the parties. To the counter claim, the Plaintiff also filed a written statement denying the claim of Defendant No. 9 that the encroached area out of the suit Schedule "A" land is used as a passage. In view of the aforesaid position, he filed an application for amendment of the plaint by incorporating that there existed an alternative passage to be used by Defendant No. 9 which is connected to NAC road and such amendment was necessary, in view of the fact" that the Commissioner did not submit the report after proper enquiry and the specific stand of Defendant No. 9 that there was No. specific passage to NAC road. However, the amendment application was rejected by the trial court on 29.9.2002 as already stated above.

6. The Learned Counsel appearing for the Plaintiff-Petitioner submits that the proposed amendment would not change the nature and character of the suit and for proper adjudication of the dispute, the amendment is necessary.

7. The Learned Counsel appearing for the opposite parties submits that if the amendment is allowed, it would linger the dispute since the hearing of the suit has been closed. He submits that the Defendants would be highly prejudiced if the amendment would be allowed as it would change the nature and character of the suit. He further submits that the civil court commissioner has already submitted his report and the court below accepted the same. Therefore, the impugned order should not be interfered with.

8. Law is well settled that amendment can be allowed at any stage if the same does not change the nature and character of the suit and is necessary for proper adjudication of the real dispute between the parties and the prejudice caused to the other side can be compensated by awarding cost.

9. It reveals that the disputes between the parties are regarding encroachment by Defendant Nos. 9 and 10 and their easementary right over the disputed area. Therefore, the proposed amendment regarding availability of alternative passage for Defendants 9 and 10, is necessary for proper adjudication of the dispute. The Code of Civil Procedure. Amendment Act 2002 is not applicable to the present case.

10. In view of the aforesaid principles, this Court sets aside the impugned order dated 29.8.2002 passed by the learned Civil Judge (Senior Division), Udala in

Title Suit No. 2 of 2000 subject to payment of cost of Rs. 1500 (rupees one thousand five hundred) by the Plaintiff-Petitioner to the Defendants 9 and 10 in the court below within four weeks from today. It is open to the Plaintiff to adduce rebuttal evidence in support of her pleadings with regard to the availability of alternative passage. It is also open to the Defendants to adduce counter-evidence to the same. The entire exercise shall be completed within a period of one month from today and after closure of the evidence the trial court will hear the suit and dispose of the same as expeditiously as possible, preferably within a period of two months thereafter.

11. The writ application is accordingly allowed.