

(1984) 01 OHC CK 0005

In the Orissa High Court

Case No : Second Appeal No's. 316 and 317 of 1978

Smt. Usarani Das

APPELLANT

Vs

Bhaktahari Mohanty and Others

RESPONDENT

Date of Decision : 09-01-1984

Acts Referred:

Easements Act, 1882 — Section 13
Orissa Estates Abolition Act, 1951 — Section 6, 7

Citation : AIR 1984 Ori 97 : (1984) 1 OLR 547

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

Bench : Single Bench

Advocate : S.K. Mohanty and M. Patra, for the Appellant; R. Ch. Mohanty, J.P. Das and Smt. Rati Mohanty, for the Respondent

Final Decision : Allowed

Judgement

P.C. Misra, J.—The plaintiff in O. S. No. 216 of 1968 who is defendant No. 2 in O. S. No. 6 of 1969 is appellant in both these appeals. Both the aforesaid suits were heard analogously and were disposed of by a common judgment by the Munsif, Bhadrak in his judgment dated 25-2-1975. The defendants in O. S. No. 6 of 1969 preferred T. A. No. 10 of 1975 and the plaintiff in O. S. No. 216 of 1968 preferred T. A. No. 11 of 1975 and both the appeals were disposed of by the Subordinate Judge, Bhadrak by a common judgment. The plaintiff in O. S. No. 216 of 1968 has filed both these Second Appeals against the judgment of the Subordinate Judge, Badrak passed in both the appeals.

2. In O. S. No. 216 of 1968, the plaintiff's suit was for a declaration of title, confirmation of possession, demarcation of the northern boundary line and for permanent injunction against the defendants in respect of a strip of land measuring Ac. 0.255 decimals appertaining to northern portion of Plot No. 76 under Khate No. 152/1 situated in village Banka. The plaintiff's case, in short, is that the suit plot No. 76 belongs to her as she purchased the same by a registered sale deed dated 3-6-1955 (Ext. 2). She claims to have possessed the

same in one enclosure and constructed two quarters thereon and let out the same to the tenants. She claims to have paid rent for the land, holding tax etc., and has been in possession thereof exclusively both before and after the vesting of the estate in pursuance of the operation of the notification under the Orissa Estates Abolition Act. Her further case is that the defendants have no right, title and interest or possession over the suit land. Defendants have got their homestead to the adjoining north of the suit land separated by a fence belonging to the plaintiff which is repaired by her every year. The plaintiff alleges that the defendant No. 1 who was not pulling on well with the plaintiff's husband cut a portion of the northern boundary fence of the plaintiff on 4-12-1968 and disputed the title of the plaintiff over the suit, land. She was also threatened to be dispossessed from the suit land for which she has taken shelter of the Court in O. S. No. 216 of 1968.

3. The defendants in their joint written statement while denying the plaintiff's title and possession, alleged that the suit land vested in the Government in the year 1962 by virtue of the notification made under the Orissa Estates Abolition Act (hereinafter called "the Act"). There having been no settlement of the suit land in favour of the plaintiff, no relief was available as prayed for by the plaintiff. It was further alleged that the suit was incompetent in the absence of the State of Orissa as a party- and that the suit was barred by limitation. According to the defendants, suit plot No. 76 belonged to the plaintiff's husband, Gopal Prasad Das and his co-sharers. The said Gopal Prasad Das was the Dewan under the Raja of Kanika and was looking after the joint family properties. In the record-of-rights the suit plot was wrongly recorded in the name of the Raja of Kanika though he had no title and possession over the suit plot. It was further alleged that the sale deed executed in favour of the plaintiff was fraudulent and was brought into existence at the connivance of plaintiff's husband which was never acted upon. They had also pleaded that the suit land did not appertain to plot No. 76, but was a part and parcel of their plots Nos. 74 and 75 which they have been possessing as of right for more than the statutory period. They also claimed that even if the suit plot appertained to plot No. 76, they had acquired title thereto by way of adverse possession. Simultaneously, they had challenged the settlement records if the suit land was found to be appertaining to plot No. 76. At the same time, the defendants alleged that they had acquired easementary right of way over the suit land and Plot No. 78 to go the village road appertaining to plot No. 249. According to them the plaintiff's husband and his co-sharers constructed two quarters over the suit plot five to six years back and this suit has been filed to harass the defendants. It was also pleaded that the suit was not maintainable in view of the pendency of rent fixation case No. 314 of 1962-63 in respect of the suit Khata filed by the father of defendant No. 1 under the provisions of the Act. On the aforesaid allegations, they claimed for dismissal of the suit with costs.

4. As already stated the defendants in O. S. No. 216 of 1968 are the plaintiffs in O. S. No. 6 of 1969 and the plaintiff in O. S. No. 216 of 1968 is defendant No. 2

in the latter suit. In O. S. No. 6 of 1969 the plaintiff's case, in short, is that C. S. Plots Nos. 74 and 75 under khata No. 144 of village Banka are their ancestral homestead which they have been possessing from the time of their forefathers in one enclosure having a Tati door in the southern fence. They have got their house, Bari and thrashing floor inside the said enclosure which has been existing for the last 60 years. Their further case is that the defendants belonged to one family and the suit Plots Nos. 76 and 78 belonged to them jointly and the same situated to the adjoining south of their homestead Plots Nos. 74 and 75. According to the plaintiffs of this suit, the sale deed in favour of defendant No. 2 is not backed by consideration and has been obtained by defendant No. 1, her husband, fraudulently. According to these plaintiffs, there had been wrong recording in the C. S. record-of-rights with respect to suit Plots Nos. 76 and 78. According to them, the disputed land situates at the southern-most side of Plot No. 78 and westernmost part of Plot No. 7G. Plot No. 77 is a road which connects the disputed land in Plots Nos. 76 and 78. It is further alleged that the disputed land in Plot No. 78 joins the public road appertaining to Plot No. 249. The suit land in Plot number 76 touches their Tati door in the southern fence and the plaintiffs approach the public road using the suit land as their passage. Their such user is said to be for more than 20 years and thus they claimed to have acquired easementary right by prescription. They also claimed the right of easement as of necessity as, according to them, there is no other approach to the public road from their premises. Defendants 1 and 2 having threatened to obstruct their passage, they have filed the suit for declaration of their easementary right and for permanent injunction restraining the defendants from obstructing their user of the suit land as passage.

5. Defendants 1 and 2 filed their joint written statement in O. S. No. 6 of 1960, denying all the plaint allegations. They have averred that the plaintiffs have not acquired easementary right of way over the suit land and they have no manner of right, title, interest or possession over the suit pints. Their case is that the suit Plot No. 76 belongs to defendant No. 2 who purchased the same by a registered sale deed and has been possessing the said plot by constructing two pucca quarters in one enclosure. She has also let out the said quarters on monthly rent and has been paying the rent and Municipal tax as owner thereof. She claims to have acquired rayati right over the suit land after vesting in which the defendants have no title and possession. According to these defendants, the plaintiffs have constructed a house recently over plots Nos. 74 and 75 and their ancestral house is still standing over Plots Nos. 92, 93 and 94. The defendants further pleaded that the plaintiffs and their ancestors were approaching to the O. T. Road by passing over the northern portion of Plot No, 73 and to the public road of the village by using Plots Nos. 80 and 81 which belonged to their agnates. The claim of the plaintiffs that they have been repairing the fence in question lying to the south of their homestead is denied by the defendants. It is stated that defendant No. 2 used to repair this fence and the claim of easementary right is absolutely false and fabricated. The suit is alleged to be not maintainable on various other

technical points and they prayed for dismissal of the suit with costs.

Defendants 3 to 17 and 19 have been set ex parte and defendant No. 13 has been expunged from the records.

6. The learned Munsif heard both the aforesaid suits analogously and recorded the following findings:--

(i) The suit land is a part of C. S. Plot No. 75 (sic) and is not a part of Plots Nos. 74" and 75.

(ii) The C. S. in respect of suit Plot No. 76 is correct and the same does not belong to the co-sharers of defendant No. 1 as claimed by the plaintiffs in O.S. No. 6 of 1969.

(iii) The suit (O. S. No. 216 of 1968) is not bad for defect of parties,

(iv) The sale deed in favour of the plaintiffs is genuine, valid and for consideration. It has also been acted upon.

(v) The plaintiff in O. S. No. 216 of 1968 was in possession of the suit land on the date of vesting having exclusive title thereto.

(vi) Suit Plot No. 76 vested in the State by virtue of the vesting notification under the Orissa Estates Abolition Act and there having been no settlement, in favour of the plaintiff in O.S. No. 216 of 1968, she cannot be said to have acquired title to the said plot after vesting. But she has been in possession of the suit land even after the vesting.

(vii) The plaintiff in O. S. No. 216 of 1968 had been in possession of the suit land by the time the suit was filed and the suit is not barred by limitation.

(viii) The plaintiff in O. S. No. 216 of 1968 having been in possession of the suit land in one enclosure, the defendants in the said suit have not acquired any right of easement over the suit land by prescription.

(ix) The claim of the plaintiffs in O. S. No. 6/69 that they have acquired the right as an easement of necessity is untenable.

(x) The story that defendants 1 and 2 in O. S. No. 6/69 have put a new fence in between Plot No. 76 is not proved.

With the aforesaid findings, the learned Munsif dismissed both the sides.

7. The plaintiffs in O. S. No. 6/69 preferred T. A. No. to of 1975 and the plaintiff in O. S. No. 216 of 1968 preferred I. A. No. 11 of 1975 and both the appeals were heard analogously by the learned Subordinate Judge of Bhadrak. During the pendency of these appeals, Rent Fixation Case No. 314 of 1962-63 along with Rent Fixation Case No. 244 of 1975 were finally disposed of by the Tahasildar of Bhadrak and it appears that the same was adduced as additional evidence before the lower appellate Court. After disposal of Rent Fixation Case No. 314 of

1962-63 and Rent Fixation Case No. 244 of 1975 of 26-2-1976 a petition was filed by Nilamani Mohanty (defendant No. 1 in O. S. No. 216/68 and plaintiff No. 2 in O. S. No. 6 of 1969) which was rejected by the Tahasildar and the order passed by the Tahasildar has been quoted in para 10 of the judgment of the lower appellate Court. The said quotation is extracted below which reads as follows :--

"On verification of relevant papers, it is found that rent fixation has also been done in favour of Ushamani Das w/o Gopal Prasad Das of village Banka in respect of the case land (Plot No. 76) only vide R. F. Case No. 224/75 finally, disposed of on 26-2-1976. The petition filed today by the petitioner Nilamani Mohanty is rejected as Plot No, 76 measuring an area of A. O. 355 has already been settled by this Court vide the above R. F. Case No. 244/75.

As regards Plots Nos. 77, 78 and 249, it is found that Plots Nos. 77 and 249 are recorded as rasta and Plot No. 78 is recorded as Purunapadia which cannot be settled either with the petitioner or with any other person as it will effect common interest of the public. Though Plot No. 78 is recorded as Purunapadia, still then a portion of it as per case map furnished by R. I. along with his report dated 29-4-1975 is being used as rasta,

XX XX XX XX"

The lower appellate Court, after referring to the aforesaid order of the Tahasildar quoted above, came to a conclusion that in view of the additional evidence available before the Court, the finding of the learned Munsif cannot be sustained. Without assigning any reason whatsoever it came to the further conclusion that in view of the additional evidence before it, and the facts conceded by the learned counsel on either side, the title in respect of the suit Plot number 76 is to be declared in favour of the plaintiff Ushamani Das and her possession in respect of the said plot should be confirmed, but leaving aside 20 links of land on western extremity of Plot No. 76 for the use of the respondents starting from their Tati door on the north till it touches Plot No. 77 which has been recorded as Rasta and Plot No. 78 which has been recorded as Furuna Padia as the respondents have got no convenient and permanent passage for their egress and ingress from their homestead located in Plots Nos. 74 and 75. Accepting the possession of the plaintiff in O. S". No. 216/68 over the disputed strip of land appertaining to Plot number 76, the learned lower appellate Judge observed that she should not use the said strip of land exclusively in view of the fact that the defendants in the said suit would experience difficulty for their passage as they have no other convenient permanent usable passage connecting their homestead with the public road in Plot No. 249. The learned lower appellate Court has clearly stated in the judgment as follows:

".....Of course the appellants (in T. A. No. 10/75) have claimed their prescriptive right of easement of necessity over the said strip of land but in the strict sense of the term they may not have such an acquisition by prescription or

by necessity for want of their prescriptive period of enjoyment as conceded by the learned counsel on either side. But the appellants cannot be prevented in using the aforesaid strip of land in the absence of any other passage as pointed out by the respondent....."

After recording the above, the learned appellate Judge has discussed that a grant can be presumed in favour of the defendants 1 to 4 and has confused himself, in comparing the easementary right claimed in the suit with the customary right of way. In the ultimate conclusion he has allowed both the appeals in part and the ordering portion of the judgment is quoted below:--

"That both the appeals are allowed in part on contest, but in the circumstances without costs. The judgments and decrees of the learned lower Court are hereby set aside and O. S. No. 212 of 1968-I is decreed in part on contest but in the circumstances without costs. The plaintiff Ushamani Dei alias Das's title in respect of the suit Plot No. 76 is to be declared in her favour and her possession be confirmed except the portion in front of the Tati gate of the defendants i.e. 20 links of land on the western extremity of Plot No. 70 for the use of the defendants starting from their Tati gate on the north till it touches Plot No. 77 i.e., 240 links in length, which has been recorded as rasta and Plot No. 78 which has been recorded as Purunapadia as the defendants have got no convenient and permanent passage for the egress and ingress from their homestead located in Plots Nos. 74 and 75. The O. S. No. 6 of 1909-I is decreed in part on contest but in the circumstances without costs. The plaintiff's right of passage over 20 links of land on the western extremity of Plot No. 76 starting from their Tati gate on the north till it touches Plot No. 77 i.e., 210 links in length which has been recorded as rasta and Plot number 78 which has been recorded as Purunapadia connecting to the adjoining public rasta over Plot No. 249 is declared and they cannot, be prevented from using the said path way of course not over the entire Plot No. 76 but over a restricted passage which they have claimed in the plaint. The appellants in appeal No. 11/75 are also directed for all the times not to prevent the respondents at any time from using the said way. So also the respondents therein must bear in mind that they should not cause any injury or harm to the appellants during the course of use of this strip of land as their passage and this passage is not only meant for the respondents but also it is essential for the appellants. In both the suits the prayer for permanent injunction is disallowed as it may give rise to some other trouble in future as discussed in the judgment. Advocate's fee at contested scale."

8. The judgment of the lower appellate Court cannot be supported as it is self-contradictory and there is no basis whatsoever for the ultimate conclusion reached by the learned lower appellate Court. In the written statement of the respondents-defendants in the trial court in O. S. No. 216/68 they claimed that the suit lands appertain to their Plots Nos. 74 and 75 and their alternative case is that in the event it is found to be a part of the plaintiff's Plot No. 78 they have acquired prescriptive title for their long uninterrupted possession for more than

the statutory period. The aforesaid plea of the respondents-defendants has been negated by the trial Court and appears to have been abandoned in the lower appellate Court. The next plea of the respondents-defendants was that they have acquired the right of easement by prescription and also as an easement of necessity in respect of the suit land. The trial Court also recorded a finding that they have not acquired the right of easement by prescription or as of necessity. The learned lower appellate Court has been thoroughly confused in not maintaining distinction between acquisition of easement by prescription and the easement of necessity. In para 11 of his judgment it has been clearly stated as follows :--

".....Of course the appellants have claimed their prescriptive right of easement, of necessity over the said strip of land but in the strict sense of the term they may not have such an acquisition by prescription or by necessity for want of their prescriptive period of enjoyment as conceded by the learned counsel on either side."

Thereafter the learned Judge has proceeded to the respective conveniences of the parties in the matter of enjoyment of a right of passage and has also ultimately concluded that the respondents-defendants cannot be prevented to enjoy the said right which can be presumed to be arising out of an implied grant by operation of law.

9. There can be no doubt that the respondents have not acquired any right of easement of passage by prescription. The learned trial Court has discussed the evidence on record and has come to the conclusion that no prescriptive right of easement can be said to have been acquired by the defendants in O. S. No. 216 of 1960. The learned lower appellate Court apart from what has been quoted above in para 11 of his judgment, after discussing the ingredients required for acquisition of easement by prescription has also stated that all the ingredients are available in favour of the appellants (defendants in O. S. No. 216 of 1968) except the last clause (that it has been enjoyed for 20 years) to which the learned counsel for the respondents has conceded. I have checked up the evidence and come to an independent conclusion that the defendants in O. S. No. 210 of 1968 have failed to establish that they have acquired the right of easement by prescription. 10. The only question that remains for consideration is as to whether the defendants in O. S. No. 216 of 1968 can be said to have acquired the said easement as an easement of necessity. An easement has been defined in the Indian Easements Act, 1882 and according to the said definition it is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of certain other land not his own. It is thus clear that for acquisition of an easement, there must be two tenements--a dominant and a servient. I need not discuss the ingredients necessary to establish acquisition of an easement by prescription inasmuch as I have already held that such acquisition has not been

established and the materials on record fall far short of the requirements of law. Easement of necessity according to Section 13 of the Indian Easements Act arises only where by a transfer, bequest or partition, a single tenement is divided into distinct and separate tenements and any of the separate tenements is so situated that it cannot be used at all without enjoying an easement over the other such tenement or tenements. There is no pleading to the effect that the servient and dominant tenement constituted a single unit and as a result of subsequent transfer, bequest or partition of the said unit the portion of the said unit which has come to the hands of the defendants in O. S. No. 216 of 1968 cannot be at all used on account of its situation without enjoying a right of passage over a suit land.

11. Mr. R.C. Mohanty appearing for the respondents strenuously urged that the suit land and the land of the respondents at one point of time, belonged to the same person and that plea of easement of necessity would arise on the severance of ownership. It is an established proposition of law that the mere fact that the servient and dominant tenements belong to a common owner does not give rise to an easement of necessity. It must be established that both the tenements had constituted a single unit and after the severance, the situation of a dominant tenement became such that it cannot be used at all without the easement claimed in the suit over the servient tenement. None of the said elements have been pleaded or proved in this case and thus no easement of necessity can be found in favour of the defendants in O. S. No. 216 of 1968.

12. Mr. Mohanty appearing for the respondents had filed an application under Order 41, Rule 27, C. P. C. for admitting the certified copy of the order dated 25-11-78 passed in R. F. Appeal No. 3/77 by the S. D. O. Bhadrak as additional evidence in this appeal. The averments made in the said application are to the effect that the R. F. A. No. 3/77 was disposed of during the pendency of these Second Appeals and could not be produced in evidence earlier. An objection by the appellants by way of counter affidavit has been filed on the ground that the said document is irrelevant and the adjudication made there in so far as right of passage is concerned is without jurisdiction. After going through the application and counter-affidavit, I am satisfied that it satisfies the requirements of Order 41, Rule 27, C. P. C. and accordingly I allow the application and admit the said document in evidence.

13. Mr. Mohanty relying upon the order of the S. D. 6. passed in R. K. Appeal No. 3/77, the certified copy of which is admitted in these appeals as additional evidence, contends that the appellate court has found the right of passage over the suit plot No. 76, the extent of which is 240 ft. x 20ft. over the western extremity of the plot and therefore on the basis of the said judgment, right of passage of defendants in O. S. No. 216/68 should be found by this Court.

14. Mr. Patra appearing for the appellants has argued that the S. D. O. who is appellate authority had been exercising jurisdiction under the Orissa Estates Abolition Act and he had no authority to adjudicate the alleged claim of easement

by private individuals. I am of the opinion that the authority, whether the original or appellate, under Estates Abolition Act exercising jurisdiction for fixation of rent under Sections 6 and 7 of the Act cannot be said to be clothed with any right to adjudicate the disputed questions relating to the claim of an easement. The right to adjudicate the said question which is a civil dispute is within the jurisdiction of the civil court. The authorities exercising powers under Sections 6 and 7 of the O. E. A. Act have not been conferred with the jurisdiction to decide the said dispute relating to easement either expressly or by necessary implication. The civil court as well as the E. A. authorities cannot have simultaneous jurisdiction to entertain and adjudicate the said question. It, therefore, follows that the civil court's jurisdiction to entertain or decide a disputed question relating to easement can-not be taken to have been ousted by the O. E. A. Act. In this view of the matters, the finding of the S. D. O., Bhadrak in R. F. A. No. 3/77 that the appellant in the said appeal has got the right of use over the strip of passage (meaning the suit land) must be taken to be without jurisdiction and cannot override the finding of the civil court negating the claim of the defendants in O. S. No. 216/ 1968. The learned S. D. O. Bhadrak in the aforesaid appellate judgment has relied upon the memorandum prepared by the Revenue Supervisor who conducted the spot visit and has come to a conclusion that the appellant before him has got the right of use over the suit strip of passage for continuous use over the years. The said appellate authority appears to have taken the view that the right of use of the suit land has matured to a right without indication as to what was the period for which the said right was being exercised. I have already stated that the question of the alleged easementary right by prescription has been negated by both the courts below and for good reasons. Mr. Mohanty appearing for the respondents did not challenge the said findings of the learned courts below rightly as the evidence available on record would not satisfy the requirement of a prescriptive easement. In these circumstances, the appellate order in R. F. A. No. 3/77 would not establish an easement by prescription.

15. Mr. Mohanty then rolled upon Section 3 of the Government Land Settlement Act, 1962 for the proposition that since the land had vested in the Estate in pursuance of the notification u/s 3 of the O. E. A. Act and had been resettled under Sections 6 and 7 of the said Act, the Government could reserve any right to itself and settle rest of the rights in the land which has been done in the judgment of the S. D. O. in R. F. A. No. 3/77. The said argument is thoroughly misconceived. The settlement of the suit plot No. 70 was under the provisions of Sections 6 and 7 of the O. E. A. Act and it was not a settlement under the Orissa Government Land Settlement Act, 1962. As a matter of fact, the order of the S. D. O., Bhadrak in R. F. A. No. 3/77 does not spell out reservation of any right in pursuance of Section 3 of the Government Land Settlement Act, 1962. Thus, I have no, hesitation to observe that the judgment in R. F. A. No. 3/77 has not conferred any right whatsoever on the defendants in O. S. No. 216/68 to use the suit land for passage by way of easement.

16. Mr. R. C. Mohanty next contended that apart from the easement of necessity

claimed by the defendants in O. S. No. 216/68, they can rely upon natural right arising out of the relative location of their land and the public road. He had relied upon the Bench decision of this Court reported in AIR 1978 Orissa 211, *Girish Chandra Sahu v. Nagendranath Mitra*. The facts of the said case are entirely different from the facts of this case. In that case the Government acquired some land for widening of the Cuttack-Paradeep road. The lands of the plaintiffs in that suit were adjacent to the Cuttack-Paradeep road. After acquisition, the Tahasildar granted a temporary lease of a portion of the acquired lands upon which the defendants in that suit raised some structures which obstructed the passage of the plaintiffs to approach the highway. This Court in the said case came to the conclusion that the owner of the land adjoining the highway has a right of access to the highway from any part of his premises and such a right is not regulated by the Indian Easements Act. In the facts of this case the said principle is not attracted.

17. The learned lower appellate court has found the right of way in favour of the defendants in O. S. No. 216/1968 more or less on the ground that it is convenient for them. As has been already stated, in order to find an easement of necessity, the necessity must be absolute necessity and not merely a convenient mode of enjoyment of the property. In other words, an easement of necessity is an easement without which the property cannot be used at all and not merely for reasonable and convenient enjoyment of the property.

18. The disputed land having been already settled with the plaintiff, O. S. No. 216/86 should be decreed in full and O. S. No. 6/69 is to be dismissed.

19. In the result, both the appeals are allowed. The judgment of the courts below is set aside. But in the peculiar facts and circumstances of the case, there would be no order as to costs of this Court.