
(2007) 09 OHC CK 0038
In the Orissa High Court

Sri Tapan Kumar Mohanty

APPELLANT

Vs

Smt. Sudhansubala Sahu and Another

RESPONDENT

Date of Decision : 07-09-2007

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2007) CLT 200 Supp : (2007) 2 OLR 548

Hon'ble Judges : L. Mohapatra, J

Bench : Single Bench

Final Decision : Allowed

Judgement

L. Mohapatra, J.—This writ application is directed against the order 9.8.2007 passed by the learned District Judge, Khurda at Bhubaneswar in F.A.O. No. 60 of 2007 dismissing the same and confirming the order dated 30.6.2007 passed by the learned Civil Judge (Senior Division), Bhubaneswar in Misc. Case No. 30 of 2002 (arising out of Title Suit No. 29 of 2002) in an application filed under Order 39 Rules 1 and 2 of the CPC directing the parties to maintain status quo over the suit land till disposal of the suit.

2. Opposite party No. 1, Smt. Sudhansubala Sahu, had initially filed the aforesaid suit against the opposite party No. 2 Soubhagya Kumar Mishra for declaration of right, title and interest over the B-Schedule property and also for confirmation of possession and permanent injunction. Case of the plaintiff-opposite party No. 1 is that one Tilatama Samal was the rightful owner in respect of the suit Schedule property who derived her title by virtue of the order passed in O.E.A. Case No. 75 of 1959-60 and Revision Case No. 3178 of 1973-74 and Record-of-Right has been published in her name. The said Tilatama Samal expired leaving behind Alekha Sasmal " Samal, Gurei Sasmal " Samal and Rabindra Sasmal " Samal as her legal heirs who succeeded to the suit property. The aforesaid three legal heirs sold the suit property to Jayant Kumar Jena and Kailash Chandra Mishra under two registered sale deeds dated 9.10.1995, whole in turn sold the same to the plaintiff-opposite party No. 1 under two sale deeds dated 7.3.2001 through

their power of attorney Sasanka Sekhar Sahu. It is further case of the plaintiff-opposite party No. 1 that while he was continuing in possession of the aforesaid suit property, the opposite party No. 2 created disturbance in her possession and accordingly the suit was filed. In the said suit an application was filed under Order 39, Rules 1 and 2 of the C.P.C. vide M.J.C. No. 30 of 2002 to grant temporary injunction restraining the opposite party No. 2 from demolishing the boundary wall and from evicting the opposite party No. 1 from the suit schedule property. An application under Order 30, Rule 3 C.P.C. was also filed vide Misc. Case No. 30 of 2002 for grant of ex parte ad-interim injunction and by order dated 15.1.2002 the Court passed an ex parte order of status quo, whereafter notice was served on the opposite party No. 2 sometime in December, 2006 and the said order was extended from time to time by the trial Court.

3. Case of the present petitioner, who was not originally a party to the suit, is that the suit schedule property and some other undisputed properties belonged to one Tilatama Samal, who derived her title by virtue of O.E.A. Vesting Case No. 75 of 1059-60 and Revision case No. 3178 of 1973-74, pursuant to which R.O.R. had been published in the favour of said Tilatama Samal in the year 1989. According to the present petitioner, said Tilatama Samal is a resident of Dihabalarampur in the district of Kendrapara and while in possession of the disputed property she sold the same to one Siprarani Jena through her power of attorney under registered sale deed dated 11.10.1985. Said Siprarani Jena after her purchase got the land mutated and accordingly mutated R.O.R. was issued in favour of said Siprarani Jena and while she was continuing in possession of the suit property by paying rent, she sold the same to the company of the present petitioner under registered sale deed No. 956 dated 26.2.2004 and delivered possession thereof to the petitioner. After purchasing the land from Siprarani Jena the petitioner filed an application before the Revenue Officer, Bhubaneswar under the provisions of the Orissa Land Reforms Act for conversion of the same to homestead land and the Tahasildar, Bhubaneswar in O.L.R. Case No. 1275 of 2004 allowed conversion of the land on payment of conversion fees of Rs. 84,000/- and Rs. 10,430/- for the suit schedule land and other undisputed lands and thereafter registered lease deed was executed on 12.10.2004 by the Tahasildar, Bhubaneswar in favour of the petitioner in respect of the suit schedule lands and other undisputed lands and thereafter mutated R.O.R. was also published and issued to the petitioner. While in possession of the suit property the petitioner after conversion of the same to homestead land filed an application for approval of plan for construction of multistoried building and the plan has been approved by the Bhubaneswar Development Authority. After the petitioner constructed a major part of the multistoried building, he came to know about the pendency of the suit as well as the order of status quo passed by the learned Civil Judge. Thereafter he filed an application under Order 1, Rule 10 C.P.C. for being impleaded as a defendant in the suit and similar application was filed for being impleaded in the petition filed for injunction. Both the applications have been allowed and the petitioner and the B.D.A. were impleaded as defendants 2

and 3 in the suit and the petitioner was added as opposite party No. 2 in the Misc. Case for injunction. Since the order of status quo was being extended from time to time, the petitioner filed W.P.(C) No. 5643 of 2007 before this Court praying for early disposal of the injunction application as well as the suit. This Court by order dated 7.5.2007 disposed of the writ application directing the learned Civil Judge to dispose of the Misc. Case for injunction by end of June, 2007 and the suit by end of October, 2007. Pursuant to the said order the trial Court took the injunction matter and disposed of the same by order dated 30.6.2007.

4. The trial Court while disposing of the application for injunction recorded contention of the parties in paragraphs 1 to 8 and dealt with the documents filed by the parties in para-9 of the order. Upon analysis of the documents produced on behalf of both the parties, the trial Court came to conclusion that prima facie it was not able to ascertain as to who is the real owner. However, in the very same paragraph trial Court holding that the plaintiff has an arguable point came to a conclusion that prima facie the plaintiff has title over the property. The Court also held that the present petitioner will not suffer irreparable loss and will not be inconvenienced if an order of status quo is passed specifically on the ground that this Court having targeted the suit to be disposed of by end of October, 2007, and status quo order if allowed to continue for a period of four months will not cause any irreparable loss to the present petitioner. The appellate Court, as it appears from the judgment, has only repeated whatever stated by the trial Court and dismissed the appeal.

5. Shri Baug, learned Counsel appearing for the petitioner challenges both the orders on the ground that the plaintiff-opposite party No. 1 failed to establish a prima facie case and there being no finding regarding possession, both the orders are liable to be set aside. According to Sri Baug, learned Counsel for the petitioner, the petitioner as well as the Opposite party No. 1 claim to have derived their respective title from one source i.e. Tilatama Samal. Both of them referred to the vesting case number and the order passed by the Member, Board of Revenue by virtue of which the land had been recorded in the name of Tilatama Samal. The dispute is with regard to identity of the said Tilatama Samal. If the Court accepts the case of the petitioner that Tilatama is the same person, who was resident of Dihabalarampur in the district of Kendrapara, the case of the plaintiff-opposite party No. 1 has to be entirely disbelieved. In order to support such a stand, learned Counsel drew attention of the Court to several documents to show that the land was recorded in the name of Tilatama Samal, a resident of Dihabalarampur in the district of Kendrapara and not Damana as claimed by the plaintiff-opposite party No. 1. Learned Counsel also referred to the documents to show that the vender of the petitioner was in possession of the suit property after the same was purchased by her and thereafter the petitioner is in possession of the suit property by virtue of the sale deed executed by Siprarani Jena in favour of the company of the petitioner. On the above basis, it is contended by the learned Counsel that the petitioner having been in

possession from 2004 the Court below could not have passed the order of status quo thereby restraining the petitioner from the proceeding with construction of a multistoried building which has practically been half-constructed.

6. Shri B.H.Mohanty, learned Counsel appearing for the plaintiff-opposite party No. 1 also submitted that Tilatama Samal in whose favour the land had been recorded was the resident of Damana and therefore reference made by the petitioner to the original owner Tilatama Samal is a different person and accordingly the petitioner cannot derive title from a source in whose favour the land had never been settled or recorded. Learned Counsel also submitted that there is no material to show that the petitioner is in possession of the suit property.

7. This writ application having been filed under Articles 226 and 227 of the Constitution of India, it is required for the Court to see as to whether the orders passed by both the Courts below could be interfered with in exercise of jurisdiction under the said Article. The Supreme Court in the case of Surya Dev Rai Vs. Ram Chander Rai and Others, examined several aspects of writ of certiorari. In para-38 of the judgment the principles have been laid down in this regard. The Supreme Court in the said case held that certiorari under Article 226 of the Constitution of India is issued only for correcting gross error of jurisdiction, namely when a subordinate Court is found to have acted without jurisdiction or in excess of its jurisdiction or has acted in flagrant disregard of law or the procedure or acted in violation of principles of natural justice. The Court further held that the supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate Courts within the bounds of their jurisdiction, namely when the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned. It was also held that neither a writ of certiorari or the exercise of supervisory jurisdiction is available to correct mere errors of fact or of law unless the error appears to be manifest and apparent on the face of the proceedings and when such principle is based on clear ignorance or utter disregard of the provisions of law as a result whereof grave injustice or gross failure of justice has taken place. The said decision of the Apex Court was followed by this Court in case of Natabar Mohanty Vs. Union of India (UOI) and Others, . Keeping the above observations made by the Supreme Court in the aforesaid case followed by this Court as stated above, the Court is called upon now to examine the present case to find out as to whether the grounds taken are within the parameters laid down by the Apex Court in the aforesaid case or not.

8. Undisputedly, this writ application arises out of an application for injunction filed under Order 39, Rules 1 and 2 C.P.C. in which the trial Court passed an order of status quo to be maintained by the parties and confirmed in appeal by the learned District Judge, Bhubaneswar. In the case of Shyama Kishore Bal v. Kishore Talkies at Nanpur and Ors. reported in Vol. 79 (1995) CLT 252, this Court

laid down the scope, meaning, nature, feature and ingredients of injunction as provided under Order 39, Rule 1 C.P.C. It is a form of equitable relief and they have to be adjusted in aid of equity and justice to the facts of each particular case. It is not a violation of every legal right which justifies the grant of an injunctive remedy. Injunction can be issued where the right which is sought to be protected is clear and unquestioned and not where the right is doubtful and there is no emergency and further where the injury threatened is positive and substantial and is otherwise irremediable. The conduct of the person seeking injunction must be free from the shadow of unfairness. The principles on which grant of injunction rests are; (1) in the facts and circumstances of each individual case there must exist a strong probability that the petitioner has an ultimate chance of success in the suit, which is otherwise known as *prima facie* case. (2) As the injunction is granted during the pendency of the suit, the Court will interfere to protect the plaintiff from injuries which are irreparable. This otherwise means that it must be material one which cannot be adequately compensated for in damages. The injury need not be actual, but may be apprehended. (3) The Court is to balance and weight the mischief or inconvenience to either side before issuing or withholding the injunction.

In the case of *Dalpat Kumar and another Vs. Prahlad Singh and others*, , the Supreme Court laid down that the phrases "*prima facie* case", "balance of convenience" and "irreparable loss" are not rhetoric phrases for incantation, but words of width and elasticity, to meet myriad situations presented by man's ingenuity in given facts and circumstances, but always hedged with sound exercise of judicial discretion to meet the ends of justice. The Supreme Court in the aforesaid case gave much emphasis on the question of possession while deciding an application for injunction. Similar emphasis on the question of possession was also given by the Supreme Court in the case of injunction, in the case of *Terene Traders v. Rameshchandra Jamnadas and Co. and Anr.* reported in AIR 1987 SC 1492.

9. Keeping the above principles in view, if the case of the parties are examined, it will be seen that both the Courts below have not followed the law regarding injunction while passing orders. The trial Court in the impugned order held that it is not in a position to ascertain as to who was the real owner, even *prima facie*, to the satisfaction of the Court. In the very next line the Court again observed that the documents relied on by the petitioner create doubt on the genuineness of the order passed on 17.7.1962 in Vesting Case No. 75/59-60 and therefore the petitioner has an arguable point in his favour and accordingly *prima facie* case tilts in his favour. This finding of the trial Court was confirmed in appeal. Law is well settled that the person who seeks injunction must establish that he has *prima facie* title over the property. The Court having not found title with either party on the existing materials, which was difficult for it to ascertain, could not have held that the opposite party No. 1 has *prima facie* title over the property merely because he has an arguable case. In absence of any finding by the trial Court as well as the lower appellate Court with regard to possession, I

fail to understand as to how the trial Court directed for maintaining status quo by the parties and how it escaped the notice of the lower appellate Court. Law is well settled that even if a party seeking injunction is capable to establish a prima facie case, unless he is in possession of the disputed property, the Court may refuse to grant injunction considering other ingredients such as irreparable loss and balance of convenience. Here is a case where both the Courts have held that there is doubt with regard to ownership of the property by either party. Under these circumstances, the trial Court could not have held that the opposite party No. 2, who is the plaintiff before the trial Court, has a prima facie title. On this ground this Court could have remanded the matter back to the trial Court for reconsideration. The suit having been targeted for disposal by end of this year, I am of the view that no fruitful purpose would be served by remanding back the case to the trial Court and the matter should be decided here to save the parties from unnecessary expenses and trouble.

10. Learned Counsel for both the parties argued at length with regard to their respective title over the suit property. As stated earlier, the entire case depends on whether Tilatama Samal of Dihabalarampur in the district of Kendrapara is the owner of the property or Tilalatama Samal of Damana is the owner of the property. Large number of documents have been produced before the trial Court, copies whereof were produced before this Court by the learned Counsel appearing for the parties. After going through all the documents produced by both the parties. I feel that the question so far as title is concerned, can only be decided at the conclusion of the suit, after the parties adduce evidence, both oral and documentary, in support of their respective claims. As observed by the trial Court, at this stage it is very difficult to discard the documents produced by either party in order to arrive at a conclusion with regard to prima facie title in respect of either Tilatama Samal of Dihabalarampur or Tilatama Samal of Damana. Though documents produced by the parties before the trial Court to some extent indicate that Tilatama Samal of Dihabalarampur may be the real owner, in absence of a full fledged trial, it will not be safe to give a positive finding in this regard. The Court has to now back upon other two ingredients, such as balance of convenience and irreparable loss. In order to see whether the opposite party No. 1 will sustain irreparable loss if injunction is not granted and as to whether balance of convenience lies in her favour or not, it is required to see as to whether the plaintiff-opposite party No. 1 is in possession of the suit property or not. Admittedly, both the Courts below have not given any finding whatsoever with regard to possession while deciding the application for injunction. Learned Counsel appearing for the opposite party No. 1 has produced copies of the documents relied upon by the plaintiff in the trial Court. From the documents produced, it appears that most of the documents relate to the question of title and the only sale deed on the basis of which the plaintiff claims title speaks about possession in her favour. There is no other document filed before the Court by the plaintiff-opposite party No. 1 to show that the plaintiff was in possession of the suit property even on the date the suit was filed. There

is no rent receipt indicating her possession over the suit property till the date of filing of the suit, whereas the petitioner has produced copies of all documents relied upon by him before the trial Court and many of the documents indicate that the vendor of the plaintiff was paying rent and thereafter the plaintiff has taken possession of the suit property, converted it from agricultural land to homestead, obtained permission from the B.D.A. for construction of a multistoried building and as stated by the learned Counsel for the petitioner, construction of the multistoried building has been done to a large extent. Apart from the above, the disputed land has been mutated in favour of the vender of the petitioner and after purchase, the same has been mutated in favour of the petitioner. These documents clearly prove that the petitioner is in possession of the suit property and not the plaintiff-opposite party No. 1. Since the petitioner is in possession of the suit property and has constructed major part of the multistoried building, balance of convenience lies in his favour and if an order of injunction or status quo is passed, the same shall cause irreparable loss to the petitioner. This Court in the case of *Sita Sethy v. Ghan Sethy and two Ors.* reported in 2005 (Supp.) OLR 865 under similar circumstances held that an order of injunction shall cause prejudice and the constructions made will be misutilised and accordingly refused injunction, but at the same time observed that the defendant constructing the building shall not claim equity and in the event the plaintiff succeeds the suit, either the construction shall be demolished at the cost of the said defendant or the same shall enure to the benefit of the plaintiff. Similar view was also expressed under similar circumstances by this Court in the case of *Graftek Pvt. Ltd., and Ors. v. Sri Lord Lingaraj Mahaprabhu Bije, Bhubaneswar* reported in 1998 (2) OLR 404 and in the case of *Smt. Padmini Sekhar Deo and Ors. v. Pankajini Thakur and Anr.* reported in Vol. 88 (1999) CLT 297. As is evident from the discussions made above, both the Courts below having not been able to arrive at a conclusion with regard to prima facie title and in absence of any finding with regard to possession, could not have passed an order of status quo to be maintained by the parties. Such errors have been committed by both the Courts below on the face of the records and such error is based on clear ignorance and utter disregard to the principles of law, as a result of which gross injustice has been taken place. In other words, granting an order of status quo in absence of finding with regard to title, possession etc. has resulted in gross failure of justice.

11. I, therefore, allow the writ application and set aside the orders impugned before this Court passed by both the Courts below. The orders of status quo passed by the Courts below is vacated.