
(2000) 12 OHC CK 0012
In the Orissa High Court
Case No : Misc. Appeal No. 772 of 1999

State of Orissa and other	Vs	APPELLANT
Janaki Sahoo and others		RESPONDENT

Date of Decision : 04-12-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2

Citation : AIR 2001 Ori 112 : (2001) 91 CLT 113

Hon'ble Judges : B.P. Das, J

Bench : Single Bench

Advocate : Mr. Sisir Das, for the Appellant; M/s B.N. Rath, J. Rath, S.K. Jethy, P.S. Samantra, S.B. Mohanty, K.R. Mohapatra, M/s S.P. Mishra, S. Mishra, D. Chatterji and S. Das, for the Respondent

Judgement

B. P. Das, J.—The State of Orissa represented by the Collector and the Tahasildar of Puri have preferred this appeal being aggrieved by the order dated 15-5-1999 passed by the Civil Judge (Senior, Division), Puri on an application filed under Order 39, Rules 1 and 2 of the Code of Civil Procedure, in short "C. P. C." registered as Misc. Case No. 292 of 1998 arising out of T. S. No. 220 of 1997, inter alia directing them to restore back the possession of the suit land to the respondents and further restraining them not to interfere with the possession of the respondents over the suit land and not to change the nature and character of the same during the pendency of the suit.

The brief facts leading to this appeal are as follows .--Respondent Nos. 1 to 57 are the plaintiffs in Title Suit No. 220 of 1997 before the learned Civil Judge (Senior Division), Puri and the aforesaid suit has been filed, inter alia, for a declaration that the plaintiffs have acquired title to the suit property by way of adverse possession and right of the defendants or any of them to recover the property is lost; for confirmation of possession, and if they are found to have been dispossessed during the pendency of the suit, for restoration of possession in their favour; and for permanent injunction restraining the defendants from

interfering with their possession and enjoyment over the suit land.

3. The case of the plaintiffs, as it reveals from the plaint, is that some of the residents of Visakhapatnam in the State of Andhra Pradesh, who are primarily fishermen, came to Puri in search of better livelihood and found that Puri shore is situated at a short distance and suitable for sea-fishing by boat and otherwise, and settled in a place known as Penthakata situated within Puri town. A few thousand of such persons initially settled at Penthakata and started living there under temporary sheds or improvised structures. These persons migrated from Visakhapatnam around 1952-53. As there were no shops worth the name in Penthakata area to cater to the needs of such persons and as the area was 5 to 6 Kms. away from the heart of Puri town, generally these persons used to come to the town once a week to collect their rations. It is further stated in the plaint that the plaintiffs and their predecessors realising the difficulties faced by the migrated population of Andhra Pradesh and in order to cater to the needs of those people decided to settle together and opened shops to provide the day to day need of such persons. Accordingly, they set up their shops and the business of the plaintiffs grew up in the area and in course of time this area was found to be an ideal place for residential and business purposes. Later on, the plaintiff and their predecessors formed an association in the name and style "Daria Harabandi Byabasi Sangha". The averment of the plaintiffs is that they continued to possess the land peacefully without any interruption since 1954 and acquired the same by adverse possession. The plaintiffs further pleaded that the suit land originally belonged to the State and since the plaintiffs by their long and uninterrupted possession have acquired title to the same by prescription, the State has lost its right to take possession of the same and/or to evict the plaintiffs. It is further alleged that the present appellants, who are the defendants in the suit, without any prior notice to the said plaintiffs-respondents and in collusion with each other, demolished the structures of the plaintiffs both on the front side, namely, southern side; and back side, i. e., northern side, and tried to demolish the entire constructions made with the help of their men and machineries including bulldozers. Accordingly, with the aforesaid pleadings, the plaintiffs have tried to make out a case that since they have perfected their title by adverse possession over the suit land, the defendants have got no right to evict them by force and have otherwise lost their right to evict the plaintiffs.

4. The defendants entered appearance in the suit and have filed their written statement denying the averments made in the plaint and have averred that the suit is not maintainable in any manner and in the collective way it is filed, without indicating as to the specific possession of each of the plaintiffs,

5. The plaintiffs along with the plaint initially filed Misc. Case No. 157 of 1997 under Order 39, Rules 1 and 2, C.P.C. with a prayer to restrain the defendants not to come over the suit property and demolish the existing structures over the suit land. Though the defendants filed their counter denying the allegations made therein, final hearing on the misc. case was yet to be taken up and no interim

order has been passed thereon. During the pendency of the aforesaid Misc. Case, the plaintiffs filed another application under Order 39, Rules 1 and 2, C. P. C., which was registered as Misc. Case No. 292 of 1998, with a prayer to pass an order of mandatory injunction directing the defendants to abstain from doing any harm to the plaintiffs in carrying on their business on the suit land so as to earn their livelihood and direct reconstruction of the plaintiffs structures as existed on the suit land before demolition. In the said application it was alleged that the defendants in collusion with each other demolished a portion of their house both at the back side as well as on the front side and have built up the stadium-wall measuring 8 to 15 feet height to the back side of the area occupied by the plaintiffs. The present appellants who are defendants in the trial court filed objection to the aforesaid misc. case denying the allegations made therein. The matter was taken up by the learned Civil Judge (Sr. Division), Puti and after hearing both the sides, the trial court has allowed the misc. case by order dated 15-5-1999. In the ordering portion, the trial court directed as follows :

"The Misc. Case be and the same is hereby allowed on contest against the ops. but in the circumstances without any cost. The o; p. Nos. 1 to 5 are directed to restore back the possession of the suit land to the petitioners. The petitioners shall continue in possession and deal with the suit property as they were dealing before as on the date of the institution of the suit. The o. p. Nos. 1 to 5 are further restrained not to interfere with the possession of the petitioners over the suit land and they are directed not to change the nature and character of the suit land during the pendency of the suit. "

6. The case of the defendants/appellants is that on 12-1-1973 the State Government in the Department of Revenue sanctioned lease of Ac. 8.580 of land in Khata No. 93, Plot No. 10 of mouza-Balukhanda in favour of the District Athletic Association, Puri, for construction of an utility stadium and play ground for public purpose. Accordingly, on 20-8-1988, the Tahasildar. Puri, recorded the said land in favour of the District Athletic Association in Balukhanda lease Case No. 40 of 1970 and directed the Revenue Inspector to correct the records and to collect rent and accordingly, the Revenue Inspector opened the tenants ledger in favour of the District Athletic Association, Puri and collected rent. In the year 1989 the settlement R. O. R. was published by the settlement authorities wherein it has been described that the said land stands in the name of Sarakari Khata with a noting that it is under the control of the Puri Municipality. A title suit was filed in the year 1994 by the District Athletic Association, Puri, which ended with compromise in which the title of the District Athletic Association was declared to the extent of Ac, 8.580 out of Sabik Plot No. 1201. On 17-11-1996 the respondents were evicted from the case land by the Municipal authorities, Puri and after eviction, some of the respondents, namely respondent Nos. 5, 6, 11, 18, 19, 20, 22, 29, 30, 51, 54 and 55 filed applications before the authorities for allotment of said land on licence basis. The Collector, forwarded these applications to the General Secretary, District Athletic Association, Puri, who received security money from the said respondents.

7. After the unauthorised persons including the respondents were evicted by the Collector in 1996, the District Athletic Association constructed 30 Nos of shop rooms and proposed to construct further 30 shop rooms facing Chakratirtha Road. Hence, it is argued by the learned counsel for the appellant that from the very facts and circumstances, it is clear that from 1973 till 1996 neither the plaintiff-respondents nor any outsiders were in possession of the suit land nor has anybody claimed the right, title and possession over the same. It is further argued that during the settlement operation in the year 1989, when the R. O. R. was finally published by the Govt. indicating therein that the said plot of land was under the control of Puri Municipality, there was nothing to indicate that the present respondents who were claiming title over the said property by way of adverse possession, made any claim before the settlement authorities for inclusion of their names in the R. O. R. . It is further stated that the suit was instituted on 14-5-1997, i.e. six months after eviction from the suit land. Hence, the claim that they were in possession of the suit land at the time of institution of the suit, is false, and fabricated.

8. Shri S, Das, learned Addl. Government Advocate submits that though along with the suit, an application for interim injunction under Order 39, Rules 1 and 2, registered as Misc. Case No. 157 of 1997 was filed, the said misc case is yet to be disposed of and during the pendency of the aforesaid misc. case, another application under Order 39 Rules 1 and 2 C. P. C. bearing Misc. Case No. 292 of 1998, was filed with the selfsame prayers as made in the previous application and on the second application the trial court has passed restraint order on 15-5-1999 which is the subject matter of challenge in the present appeal.

9. The submission of Mr. 8. N. Rath, learned counsel for respondents 1 to 57 that the respondents were in possession of the suit land has been categorically disputed by the appellants. It will not be proper at this stage while deciding the legality of order passed by the trial court under Order 39, Rules 1 and 2, C P. C. to decide regarding the factum of possession or eviction. The aforesaid aspect can be looked into by the trial court while deciding the suit. But it is incumbent on the part of this Court to look into the question whether the impugned order has been passed by taking the respective submissions of the parties into consideration and by looking into the records and documents so produced by the parties. In order to ascertain whether the respondents had prima facie case and the balance of convenience was in their favour, I have delved into the record and perused the plaint which is the primary document disclosing the claim of the respondents. The prayer in the plaint will definitely throw some light on the nature of the claim of the respondents. Admittedly, the suit was filed on 14th May, 1997. The prayers so made in the plaint are re-produced below :

(a) plaintiffs have acquired title to the suit property by adverse possession and right of the defendant or any of them to recover the property is lost,

(b) possession of the plaintiffs over the suit property may be confirmed and in case of dispossession during the suit as aforesaid they may be restored to

possession through court.

(c) a decree for damages as scheduled below may be passed against the defendants for having damaged about 100 rooms both from backside and front side of the existing structures as per sketch below.

(d) the defendants may be restrained by a decree of permanent injunction against the defendants from interfering in the possession and enjoyment of the plaintiffs over the suit land.

(e) court may be pleased to pass a decree of mandatory injunction directing the defendants 1 to 6 to restore the plaintiffs to the position they held before demolition and pass other ancillary orders in mandatory form to meet the situation.

(f) cost of the suit may be decreed against the defendants.

(g) plaintiffs may be given such other reliefs to which they may be entitled to under law and circumstances of the case.

10. A conjoint reading of the relief sought for in the plaint and the prayer made in the application under Order 39 Rules 1 and 2, in Misc. Case No. 292 of 1998 tends to reveal that the respondents who were petitioners in the court below claim that were jointly proclaimed and possessed the suit land and the present appellants, who were opposite parties, in a high-handed manner with the help of bulldozers demolished the structures over the suit land on 11-10-1998. It may be remembered here that the suit was tiled in the year 1997 and the prayer in the suit was for recovery of possession. In the impugned order while dealing with the aforesaid application, there is a direction to restore back possession of the suit land to the petitioners and further direction to allow the respondents-petitioners to continue in possession and deal with the suit property as they were dealing before from the date of institution of the suit. The first and foremost thing before this Court is to see whether by the time the suit was filed, the respondents 1 to 57 were dispossessed.

11. Learned counsel for the appellants strenuously argues that after the Title Suit bearing No. 177 of 1994, which was filed by the District Athletic Association challenging the claim of Puri Municipality over the possession of the suit land ended in a compromise, the Puri Municipality relinquished its right over the land and the same was settled favour of the District Athletic Association. In 1996, the Collector, Puri while acting as the Chairman-in-charge of the Puri Municipality, evicted such unauthorised persons who had constructed sheds by the side of the main road encroaching a portion of the suit land, and the land in question was given to the possession of the District Athletic Association, Puri, over which the District Athletic Association has already constructed a Stadium by raising a boundary wall. The Association has also developed the land and has already constructed 30 Nos. of shop rooms and further proposed to construct another 30 Nos. of shop rooms therein. So, as per the learned counsel for the appellants as

well as the proforma respondent Nos. 59 and 60, from 1973 till 1996 neither the plaintiffs nor any outsiders were in "possession of the suit land and the suit was instituted on 14-5-1997 i. e. six months after the eviction was executed on the suit land. So, the claim of the respondents 1 to 57 that they were in possession of the suit land absolutely holds no water. It is further submitted that though the application for interim injunction bearing No. 157 of 1997 was filed with the selfsame prayers as made in Misc. Case No. 292 of 1998, the said Misc. Case is till now kept in cold storage. But the order has been passed in Misc. Case No. 292 of 1998 which was filed afresh. The sum and substance of the argument of learned counsel for the appellants is that there was nothing before the trial court to indicate that respondent Nos. 1 to 57 were in possession of the suit land. Therefore, the trial court has committed a gross error by entertaining the application under Order 39, Rules 1 and 2, C. P. C. and further passing an order for restoration of possession of the land.

12. Learned counsel for respondents 1 to 57 on the other hand submits that Misc. Case No 157 of 1997 under Order 39 Rules 1 and 2 C. P. C., was filed for interim injunction directing the opposite parties not to come over the suit land and not to demolish the structures. On 12-10-1998 Misc. Case No 292 of 1998 under Order 39, Rules 1 and 2, C. P. C. was filed with a prayer for mandatory injunction. So, no foul has been played by the plaintiffs/respondents in filing the second application as the same was filed in order to avoid impending danger which was about to come by way of demolition of their premises. Further, it is submitted that they are in possession of the suit land and the impugned order so passed by the trial court is correct, legal and befitting the claim made in the plaint,

13. On perusal of the impugned order, I find that the trial court has ultimately come to the following conclusion ".

"To quote them specifically, it is averred in the said memo that "possession of the suit land has been taken over by the o. ps. on 11-10-93 in order to beautify the said area and to rehabilitate the shop keepers those who were possession Government land". This memo impliedly suggest that the petitioners were in possession of the suit land as on the date of filing of the suit and they were dispossessed by the o. ps. during the pendency of the suit x x x"

14. If this finding of the learned trial court is accepted, then nothing remains to be decided in the suit itself, when the prayer in the suit is for recovery of the property lost. In view of the specific assertion in the plaint that the cause of action arose in the suit on 17-11-1996 when the defendants with their men and - machineries reached the spot without prior notice and demolished the structures of the plaintiffs both on the front side and backside, the question whether it is a partial demolition or full demolition can only be decided in the suit after evidence is adduced from both the sides. But the fact remains that there was an attempt of eviction in the year 1996 and the question whether the same was done full-fledgedly or haphazardly is yet to be decided. Hence the conclusion of the trial

court that the plaintiffs were in possession, in my opinion, is based on no evidence. That apart, in para 11 of the impugned order, the trial court has recorded a finding that respondents 1 to 57 were in possession of the suit property since long and has opined that they had a strong prima facie case in their favour. Further the trial court has observed that the respondents being in possession of the suit property particularly as on the date of filing of the suit, the balance of convenience was in their favour to retain such possession till disposal of the suit. Such finding of the trial court is a travesty of truth because of the fact that there is no evidence on record to come to such conclusion. This finding in my opinion is an effort of the trial court to pre-judge the issue. Further the finding of the trial court, is that the appellants have not stated that they have initiated encroachment proceeding against the respondents for which the trial court has disbelieved the story of taking over possession of the suit land on 10-11-1998 and further relying on a decision of the Supreme Court reported in AIR 1994 SC 1081 (Government of Andhra Pradesh v. Thummalla Krishna Rao and another) has held that long possession over the disposed plot would raise a genuine dispute between the person in possession and the Government on the question of title. In the said paragraph 11, the trial court observed as follows :

"x x x The question as to whether the petitioner who is in long possession of the Government has perfected his title by adverse possession had to be decided in a properly constituted suit and until the Government succeed in establishing its title to the property the respondents who are in occupation of the Government land could not be vacated summarily. In the instant case since the petitioners have filed the suit claiming adverse possession over the suit land and their long possession has been admitted by the Puri Municipality who is the care taker of the suit property it was not open for the Collector and Tahasildar to evict them from the suit property during the pendency of the suit. x x x"

15. The aforesaid observation of the trial court, in my opinion, is nothing but pre-judging the issue which he should not have done. The only thing which the trial court is to see whether on the date of passing the order of injunction, the plaintiffs-respondents were in possession of the suit property or not. On scanning the materials available on record, I do not find anything which supports the case of the plaintiffs/respondents that they were in possession, basing on which the trial court has passed the aforesaid order of injunction.

16. Learned counsel for the plaintiffs/respondents draws my attention to various decisions. Firstly *Yar Muhammad and Another Vs. Lakshmi Das and Others*, wherein it has been held that "Law respects possession even if there is no title to support it. It will not permit any person to take the law in his own hands and to dispossess a person in actual possession without having recourse to a court. No person can be allowed to become a judge in his own cause. Likewise, by referring to the decision reported in *Haradhan Changdar Vs. Jitendranath Hambir*, learned counsel for the respondents 1 to 57, submits that granting of an injunction does not mean a final adjudication of the dispute nor is the plaintiff required to

establish his injunction in his favour. In order to succeed on an application for temporary injunction all that he needs to show is a prima facie case as to the existence of the right alleged and it is but fair that when such prima facie case is made out the property should be preserved in status quo. Similarly, the learned counsel draws my attention to a decision of this Court reported in Paidiseti Bhankaranarayana Vs. Paidiseti Rajeswar Rao and Others, wherein it has been held that there can be no dispute as to the legal proposition that the interlocutory relief by way of temporary injunction cannot be granted as a matter of course and that the court is required to exercise judicial discretion in granting the relief only when the three essential conditions are satisfied by the party praying for injunction.

17. Here is a case where admittedly an application for injunction is pending and that has not at all been dealt with. Another application was filed in the year 1998 and while dealing with the said application, order was passed directing restoration of possession to the plaintiffs/respondents. Learned counsel for the appellants submits that plaintiffs/respondents have been evicted by due process of law. In support of his claim, my attention was drawn to the petition filed by the appellants being Misc. Case No. 144 of 2000 wherein a prayer has been made for incorporation of further facts and grounds in the memo of appeal and it is stated therein that on 17-11-1996 the encroachers were removed from the disputed strip of land appertaining to plot No. 10 and the plaintiffs again entered into the said strip of Government land and started business in an injured fashion which was detected by the R. I. on 27-5-1997. The R. I, filed requisition in the prescribed proforma on 29-5-1997 with a request to evict Biswanath Sahoo, son of Raghunath Sahoo and 53 others from the Government land. Accordingly Encroachment Proceeding registered as E.C. No. 273 of 1997 was started on 16-10-1997 and notice was issued to the encroachers to show cause by 28-11-1997, The encroachers did not receive notice, for which it was served by affixure in the locality. Since the encroachers did not choose to contest the said notice, on 17-1-1998 order of eviction was passed by the Tahasildar u/s 7(1) of the O.P.L.E. Act and such order was served on the encroachers. On 23-8-1998 the R. J. submitted a report stating that he failed to evict the encroachers and prayed for police assistance. After the said notice was served on the encroachers by drum beating, on 11-10-1998 the encroachers were finally evicted from the strip of Government land with the help of police force. Some of the encroachers pelted stone and injured the drozer driver for which F.I.R. was lodged in Sea Beach P. S. beating No. 133 dated 11-10-1998. The petition for incorporation of further facts also reveal that the possession of the suit land has been taken over by the defendants/opposite parties on 11-10-1998 when there was no order of injunction by any court against the authorities.

18. From this, it is clear that the aforesaid aspects were not brought to the notice of the trial court while disposing of the application for mandatory injunction.

19. On perusal of the impugned order, it clearly reveals that the learned Civil Judge (Senior Division) has transgressed his jurisdiction under Order 39, Rules 1 and 2, C. P. C. by passing the impugned order without properly considering the three ingredients required for granting an order of injunction i. e. prima facie case, balance of convenience and irreparable loss. That apart, the trial court has lost sight of the fact that the property belongs to the State and its functionaries and the construction over the suit property is going on in the interest of public at large. Added to this, assertions have been made by the State in its application for incorporation of further facts and grounds in the memo of appeal indicating therein that OPLE proceeding had been initiated against the plaintiff/respondents, the fact of which was not brought to the notice of the trial court and the trial court has proceeded on the assumption that there was no order of eviction, as per law.

20. In my opinion, it is a fit case where the trial court should hear the matter afresh and pass necessary orders in accordance with law.

21. Therefore, the impugned order is set aside and the trial court is directed to hear the matter afresh and pass necessary order in accordance matter afresh and pass necessary order in accordance with law. The parties are at liberty to file necessary" documents in support of their respective claims, if they so like. As an interim measure, I direct that till disposal of Misc. Case No. 292 of 1998 afresh, the respondents/plaintiffs are restrained to come over the suit property. Accordingly, the Misc. Appeal is disposed of.

22. Misc. appeal disposed of.