

(2019) 03 OHC CK 0060
In the Orissa High Court
Case No : R.S.A. No.133 Of 2007

State Of Orissa and Others		APPELLANT
	Vs	
Bhagirathi Mishra And Others		RESPONDENT

Date of Decision : 29-03-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Order 8 Rule 1, Order 8 Rule 1(2)

Citation : (2019) 03 OHC CK 0060

Hon'ble Judges : Dr. A. K. Rath, J

Bench : Single Bench

Advocate : Samapika Mishra, Manoj Kumar Mishra, Jyotsnamayee Sahoo, Anup Mishra

Final Decision : Dismissed

Judgement

Dr. A.K. Rath, J

1. This appeal at the instance of the defendant nos.1, 2 and 4 assails the reversing judgment of learned District Judge, Cuttack in R.F.A. No.72 of 2004.

2. Plaintiff-respondent no.1 instituted the suit for permanent injunction restraining the defendants from interfering with his peaceful possession and mandatory injunction directing the defendants to remove the structure over the suit land. The case of the plaintiff is that he is the owner in possession

of the land appertaining to Khata No.370, Hal Plot No.528, Ac.0.20 dec. of village-Paikapadapatna, Dist.-Cuttack. The land is recorded in his name

along with his mother. He has been cultivating the land by using a public road appertaining to Hal Plot No.526, admeasuring Ac.0.18 dec. The

same is adjacent to his land and recorded as public road. The length of the road is about 600 kadi in East-West direction and about 30 kadi in South-

North direction. The public road is being used by him as well as the public to enter into their own land since more than 30 years. When the defendant

nos.1 to 3 constructed a pucca building encroaching upon the said road covering the entrance of the plaintiff and others by closing the only way to his

land, he instituted the suit seeking the reliefs mentioned supra.

3. The defendant nos.1, 2 and 4 filed written statement denying the assertions made in the plaint. Case of the defendant nos.1, 2 and 4 is that the suit

is barred by misjoinder and non-joinder of necessary parties. Since the year 1959, Narasinghpur Block Colony was established over Plot No.526. The

Block Colony has been surrounded by a compound wall with one iron gate in front of it towards East. The said gate is locked at night in order to

prohibit the general public from entering into the colony. The plaintiff has never used the said road. The suit land is the approach road from Block

Office to Block Colony. The Block officials are using the said road from time to time. The suit plot is in exclusive possession of the Block staff. The

plaintiff and the public are using a separate road to enter into their paddy field. The defendant no.3 was set exparte.

4. On the interse pleadings of the parties, learned trial court framed eight issues. Parties led evidence, oral and documentary. Learned trial court

dismissed the suit holding inter alia that the State Government is the owner of the suit land. The plaintiff has no access to the suit land due to the

existence of the boundary wall. The plaintiff has no right, title and interest or possession over the suit land. The plaintiff appealed before learned

District Judge, Cuttack. Learned appellate court came to hold that the suit for injunction is maintainable without prayer for declaration of title. The suit

plot has been described as public road. The plaintiff has claimed his access to the same. The same was obstructed by the State. The plaintiff has

suffered inconvenience. The State Government cannot restrict the right of the plaintiff to confine himself to a part of the street of the choice of the

plaintiff. The plaintiff is entitled to permanent and mandatory injunction. Held so, it allowed the appeal.

5. This appeal was admitted on the following substantial questions of law.

â??(1) Whether in the absence of any prayer for plaintiffâ??s easementary right over the suit land, the lower appellate court was justified in decreeing the suit ?

(2) Whether the judgment of the lower appellate court suffers from perversity of

non-consideration of materials on record indicating that the suit land situated inside

boundary wall of the block colony ?

(3) Whether the suit for permanent injunction is maintainable when the plaintiff has no title over the suit land ?â??

6. Heard Miss Samapika Mishra, learned A.S.C. for the appellant, Mr. Manoj Kumar Mishra, learned Senior Advocate along with Mrs. Jyotsnamayee

Sahoo and Mr. Anup Mishra, learned Advocates for the respondent no.1. None appeared for the respondent no.2.

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7. Miss Mishra, learned A.S.C. for the appellant argued with vehemence that the State of Orissa, defendant no.4, is the paramount owner of the suit

plot. The plaintiff has no semblance of right, title and interest over the same. The suit for permanent injunction simpliciter without any prayer for

declaration is not maintainable. Mandatory injunction is granted in rare and exceptional cases. No case is made out for grant of mandatory injunction.

Plaintiff has pleaded that he and the general public are using the suit plot as passage. But then, the suit has been filed in the individual capacity. No

leave of the court was taken under Order 1 Rule 8 CPC to represent the villagers. Non-compliance of the provision contemplated under Order 1 Rule

8 CPC entails dismissal of the suit. She further submitted that a party, who is not in possession of a property, is not entitled to get relief of permanent

injunction. To buttress the submission, she placed reliance on the decisions in the cases of Kumaravelu Chettiar and others vs. T.P. Ramaswami

Ayyar and others, AIR 1933 PC 183, Dorab Cawasji Warden vs. Coomi Sorab Warden and others, (1990) 2 SCC 117, Mahadeo Savlaram Shelke and

others vs. Pune Municipal Corporation and others, (1995) 3 SCC 33, Metro Marins and another vs. Bonus Watch Co. Pvt. Ltd. and others, AIR 2005

SC 1444, Anathula Sudhakar vs. P. Buchi Reddy (Dead) by LRs. and others, (2008) 4 SCC 594 and this Court in the case of Jemma vs. Raghu, AIR

1977 Ori.12, Lakhana Nayak and another vs. Basudev Swamy and others, AIR 1991 Ori.33 and Kusasan Samal and others vs. Chandramani Pradhan

(dead) after him Panchei Bewa and others, AIR 2003 Ori.157.

8. Per contra, Mr. Mishra, learned Senior Advocate and Mrs. Sahoo, learned Advocate for the respondent no.1 submitted that learned appellate court

held that the suit plot has been described as public road. Access to road had been obstructed by the defendants, who had raised a construction over a portion thereof. The plaintiff had suffered inconvenience and therefore entitled to the reliefs claimed in the suit. The right of the public to pass extends over every inch of the street. The defendants cannot in any manner restrict the right and compel the plaintiff to confine himself to a part of the street of the choice of the defendants. Therefore, the plaintiff is entitled to mandatory and permanent injunction. Mandatory injunction is granted to preserve or restore the status quo. The facts clearly establish that the plaintiff has a strong prima facie case, balance of convenience tilts in his favour and he will suffer irreparable injury if mandatory injunction is not granted. Reliance has been placed on the decision of the apex Court in the case of Kalyan Singh vs. Smt. Chhoti and others, AIR 1990 SC 396.

9. Before proceeding further, it is apt to refer to the decisions cited at the Bar. In Anathula Sudhakar (supra), the apex court to summarise the position in regard to suits for prohibitory injunction relating to immovable property held where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

10. This Court in M/s.Torrent Advertisers vs. M/s.OPPO Mobiles, Orissa Private Ltd., 2018 (II) ILR-CUT-728 held:

“10. Mandatory injunction is granted in rarest of rare cases, as it amounts to granting the final relief. In Dorab Cawasji Warden vs. Coomi Sorab Warden and others, AIR 1990 SC 867, the apex Court held thus:

“The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested-status which preceded

the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration

of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his

right at

the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm.

(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above

guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as a pre-requisite for the

grant or refusal of such injunctions would be a sound exercise of a judicial discretion.â??

It is settled law that even if all the necessary ingredients are established, the court may refuse to grant an interim injunction.

11. On a survey of the decisions of the apex Court, a Division Bench of this Court in the case of Maa Sarala Distributor vrs. Hindustan C. Beverages Pvt. Ltd., CLT

(2008) Supplement 832 held that mandatory injunction should be granted in rarest of the rare cases as it amounts to granting the final relief. It can be passed only to

restore status quo and not to establish a new state of things, differing from the state which existed at the date, when the suit was instituted.â??

The same view is reiterated in Metro Marins and another.

11. In Mahadeo Savlaram Shelke and others, the apex Court held that in a suit for perpetual injunction, the court should enquire on affidavit evidence

and other material placed before the court to find strong prima facie case and balance of convenience in favour of granting injunction otherwise

irreparable damage or damage would ensue to the plaintiff. The court should also find whether the plaintiff could adequately be compensated by

damages if injunction is not granted. It is common experience that injunction

normally is asked for and granted to prevent the public authorities or the respondents to proceed with execution of or implementing scheme of public utility or granted contracts for execution thereof. Public interest is, therefore, one of the material and relevant considerations in either exercising or refusing to grant ad interim injunction.

12. In *Jemma*, a Division Bench of this Court held that a plaintiff not in possession is certainly not entitled to the relief of injunction without claiming recovery of possession.

13. Reverting to the facts of the case and keeping in view the enunciation of law cited *supra*, the instant case may be examined.

14. Admittedly, the State of Orissa, defendant no.4, is the paramount owner of the suit land. The Block Colony situates over the suit land. There is a

boundary wall. Plaintiff is not in possession over the suit land. In view of the same, the suit for permanent injunction simpliciter is not maintainable in

the absence of declaratory relief. Mandatory injunction is granted in rare and exceptional cases. Plaintiff has no right to use the passage of the road

inside the colony meant for the employees of the Block. The same will violate the privacy of the employees. The finding of the learned appellate court

that the suit for permanent injunction is maintainable without declaration of title runs contrary to the decision of the apex Court in the case of *Anathula*

Sudhakar. When the plaintiff's title is in cloud of suspicion, the simple suit for permanent injunction is not maintainable.

15. In *Lakhana Nayak and another*, a suit for partition was filed in respect of the trust properties by the President of the Trust. This Court held that

notice to all persons interested is necessary. Since no notice was issued under Order 1 Rule 8(2) CPC, the suit is bad in law.

16. In *Kalyan Singh*, the apex Court held that any member of a community may successfully bring a suit to assert his right in the community property

or for protecting such property by seeking removal of encroachments therefrom. Such a suit need comply with the requirements of Order 1, Rule 8. In

view of the same, notice under Order 1 Rule 8 CPC in the instant case is not a *sine qua non*.

17. In view of the foregoing discussions, the appeal succeeds and is allowed. The judgment of learned appellate court is set aside. Consequently, the

suit is dismissed. There shall be no order as to costs.

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