

IN THE HIGH COURT OF ORISSA AT CUTTACK

S.A. NO.454 OF 2001

In the matter of an Appeal under section 100 of the Code of Civil Procedure assailing the judgment and decree dated 27.08.2001 and 12.09.2001 respectively passed by the learned 2nd Additional District Judge, Cuttack in Title Appeal No.53 of 1994 by setting aside the judgment and decree dated 21.02.1994 and 07.03.1994 respectively passed by the learned 2nd Additional Sub-Judge Cuttack, in Title Suit No.206 of 1978.

Pramod @ Pramath Kumar ***Appellants.***
Bhuyan & Another

-versus-

Sankar Lal & Others ***Respondents.***

**(Appeared in this case by Hybrid Arrangement
(Virtual/Physical) Mode:**

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For Appellants - M/s. S.P. Misra, Sr. Advocate,
S.K. Mishra, S. Misra, S. Dash,
Advocates.

For Respondents - M/s. B.K. Dagara,
N.P. Patra, Advocates.

CORAM:
MR. JUSTICE D.DASH

DATE OF HEARING:: 21.10.2022, DATE OF JUDGMENT::23.12.2022

D. Dash, J. The Appellants in this Appeal under Section 100 of the Code of Civil Procedure 1908 (for short, 'the Code') have assailed the judgment and decree dated 27.08.2001 and 12.09.2001 respectively passed by the learned 2nd Additional District Judge, Cuttack in Title Appeal No.53 of 1994.

By the same, the Appeal filed by the Respondent Nos. 1 to 4 and Respondent No.5 who is dead under Section-96 of the Code has been allowed. The learned 2nd Additional Sub-Judge, Cuttack having dismissed the suit filed by the Respondents along with the mother of Respondent Nos. 3 to 4 i.e. Title Suit No.206 of 1978, the First Appellate Court being moved by these Respondents except the mother of Respondent Nos. 3 & 4 who died during the suit has decreed the suit by setting aside the order of dismissal of the suit passed by the Trial Court. The suit was for eviction of the Appellants (Defendants) and for arrear rent. The First Appellate Court has passed the following orders:-

“The respondent-defendants are liable to be evicted from the suit premises. Accordingly, the defendants have to give vacant delivery of possession of the suit premises to the plaintiffs within one month from the date of passing of this judgment, failing which the plaintiff-appellants may take steps in accordance with law for the eviction of the defendants from the suit premises.”

2. For the sake of convenience, in order to avoid confusion and bring in clarity, the parties hereinafter have been referred to, as they have been arraigned in the Suit.

3. Case of the Plaintiffs:-

The subject matter of the suit is the property described in Schedule-B of the plaint which is a tin roofed room with verandah on either side and situated by the side of National Highway, which stands

recorded under Sabik Khata No.384, Plot No.2509 corresponding to Hal Khata No.2287/3922. One Bishnu Dayal had a son named Inder Chand, who died in the year 1966. Shankar Lal, Niranjana Lal and Ghanashyam are the three sons of Inder Chand. Plaintiff No.1 is Shankar Lal and whereas Plaintiff No.2 is Ghanashyam. Niranjana Lal is dead since 1960, his widow has joined as the Plaintiff No.3 and having died during the suit, her name has been expunged in presence of her sons namely, Binod Kumar, Mahesh Kumar and Ratan Kumar, who are Plaintiff Nos. 4, 5 and 6 respectively. It is stated that the Plaintiffs are the members of the joint family. On 15.09.1953, the property in suit was purchased by the Plaintiff No.1, Plaintiff No.2 and Niranjana Lal jointly under a registered sale-deed from M/s. Utkal Laxmi Corporation Limited and that had been subsequently mutated in their name, they are also paying rent to the Anchal. The Plaintiffs were running their joint business in the name and style 'Bishnu Dayal's and Sons'

Defendant No.1 was running his business in the name and style as Highway Engineering Works in the suit premises as a tenant under the Plaintiffs with monthly rent fixed at Rs.100/-. It is stated that the Defendants defaulted in paying monthly rent from 01.12.1975 to 30.06.1978. So, a Money Suit bearing M.S. No.232 of 1977 had been instituted in the Court of Sub-Judge, Cuttack for recovery of the arrear rent. The Defendant No.1 has illegally and contrary to the terms of the

tenancy, made structure adjoining the tenanted premises for which the Plaintiffs filed Title Suit No.235 of 1976 in the Court of Sub-Judge, Cuttack which was decreed directing the Defendant No.1 to deliver vacant possession of the said land to the Plaintiffs.

The Plaintiffs stated to have the requirement to use suit premises for extension of their business. So they approached Defendant No.1 to deliver possession of the same, but he did not accede to the said request. So, on 04.04.1978, the Plaintiffs sent notice to the Defendant No.1 by registered post. The Defendant No. 1 refused to accept the same. The Plaintiffs again sent a notice on 17.05.1978 which too were refused by the Defendants.

The Plaintiffs stated that the suit Plot No.2509 has been erroneously recorded in the name of the State for which the Plaintiffs had moved the Board of Revenue Orissa under section-50 of the Orissa Survey and Settlement Act by filing R.P. Case No.2447 of 1975 for correction of the entries in the hal record of right published in the year 1973. It is stated that the Defendant No.1 taking advantage of such position had been avoiding to vacate the suit premises which is under his unauthorized occupation. The tenancy of the Defendants having been terminated by due valid notice as required under law, the Plaintiffs claim & eviction of the Defendants with payment of the arrear rent.

4. The Defendants in their written statement denied the fact that the Plaintiff had ever issued any notice to Defendant No.1 and they state to have never refused to accept any such notice. It is further stated that Encroachment Case No.236/3 of 1977 having been initiated against the Defendants for being in unauthorized occupation of Government land, they have paid fine of Rs.565.50 towards such unauthorized occupation. They state that the State of Orissa is the owner of the suit land and the Plaintiffs have nothing to do with the said property.

At the same time, in their written statement, the Defendants admit that the Plaintiffs had let out small tin roofed room to the Defendants which was approximately covering the space of 14" X 18" and over the same the Defendants claim to have acquired right, title, interest and aver possession.

5. On the above rival pleadings, the Trial Court has framed in total six (6) issues.

The findings of the Trial Court are that the description of the property in Schedule-B of the plaint is not specific and rather misleading. The next finding is that the notice under section-106 of the Transfer of Property Act has not been served upon the Defendants and as such there has been no termination of tenancy which is the base of the suit filed by the Plaintiffs and the condition precedent for entertainment. The Trial Court has disbelieved the fact pleaded by the Plaintiffs that the

Defendants had refused to receive the said notice. Lastly, the Trial Court has held that the Defendants have proved their title over the suit land adverse to the interest of the State for having remained in possession for more than the prescribed period when the Plaintiffs have failed to establish their title over the suit land. With the above findings, the suit was dismissed.

6. The First Appellate Court being moved by the unsuccessful Plaintiffs has come to their rescue in decreeing the suit by the order as aforeindicated.

7. The present Appeal had been admitted to answer the following substantial questions of law as mentioned in ground Nos. (A), (B) and (D) of the Memorandum of Appeal which read as under:-

“When Sec. 106 of the T.P. act mandates that the Monthly tenancy is terminable on the part of either the lessor or lessee, by fifteen days notice expiring with the end of monthly tenancy, and further when notices vide Exts.3 and 4 would show that none of the said notices seek to terminate the tenancy by fifteen days notice expiring with the end of the month of tenancy;

Whether the finding of the learned lower appellate court that there has been compliance of notice under sec. 106 of T.P. act is sustainable in law?

(B) When the learned lower appellate court has not touched / noticed the finding of the learned trial court that Bishan Dayal

and sons can be said to be the landlords and not the plaintiffs and the plaintiffs are not entitled to maintain the suit;

Whether the impugned judgment and decree of the learned appellate court directing eviction of the appellant and the findings thereon are vitiated?

(D) In the absence of any pleading to in the plaint to the effect that the tenancy was a monthly basis;

Whether the learned lower appellate court erred in law in holding that the tenancy is from month to month and not from year to year?"

8. Learned Counsel for the Appellants submitted that the Courts below ought to have held that the suit at the instance of the Plaintiffs is not maintainable since as per the case of the plaintiffs and evidence on record, Bishan Dayal and sons are the landlords and not the Plaintiffs. He further submitted that when the Plaintiffs are not showing to have inducted the Defendants in their individual capacity and jointly, this suit at their instance is liable to be dismissed. He further submitted that even accepting the case of the Plaintiffs that they were the landlords when it is not pleaded in the plaint that the tenancy was on monthly basis and moreover, when said tenancy has not been terminated as mandated under the provisions of section-106 of the Transfer of Property Act, the First Appellate Court ought not to have decreed the suit.

9. Learned Counsel for the Respondents while supporting the findings of the Courts below before responding to the submission of the

learned Counsel for the Appellants; first of all raised an objection that in view of the dismissal of the Appeal as against Plaintiff No.5 (Respondent No.5), the judgment and decree passed by the First Appellate Court in which the judgment and decree of the Trial Court have merged have attained finality in so far as the legal representatives of said Plaintiff No.5 (Respondent No.5) is concerned. For the purpose, he has invited the attention of this Court to the order dated 15.10.2015. He submitted that this Court has dismissed this Appeal as against Plaintiff No.5 (Respondent No.5) and no such steps having been taken as yet for recall of that order or for any rectification; now in view of the nature of the decree either Plaintiff No.5 (Respondent No.5) or in case of his death; his legal representatives can very well execute the same as the decree holder as the case may be which too would enure to the benefit of all other decree holders who were the co-Plaintiffs (the Respondent Nos. 1 to 4). He therefore, contended that this Appeal be dismissed without proceeding to answer the substantial questions of law as formulated.

On merit he contended that such a plea questioning the maintainability of the suit at the instance of the Plaintiffs by saying that it should have been at the instance of M/s. Bishan Dayal and Sons without even stating that whether that was a Company or Partnership either registered or unregistered and being taken for the first time in the

Second Appeal without raised at the earliest opportunities before the Trial Court either at the written statement taking such a plea or at any time during the suit or even during the First Appeal which was the continuation of the suit, is not permissible to be raised in the Second Appeal. He next submitted that the First Appellate Court has rightly recorded the findings on detail examination of the evidence and their analysis that there has been due termination of pendency as required under section-106 of the T.P. act by issuance of the notice which the Defendants have refused to accept. He also submitted that the relationship between the Plaintiffs and Defendants having been established and evidence being there that the Defendants are occupying the said tin house by paying monthly rent; it being not specifically pleaded in the plaint that it was on monthly basis, the same is of no legal significance so as to adversely impact the decision under the challenge.

10. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below. I have also gone through the plaint and written statements and have perused the evidence both oral and documentary let in by the parties.

11. Before undertaking the exercise to ascertain answers to the substantial questions of law by addressing the rival submissions, it is felt apposite to deal with the objection raised by the learned Counsel for the Respondents as to further progress of this Appeal for its disposal on

merit. The Plaintiff No.5 (Respondent No.5) is one of the sons of Niranjana Lal. He being the co-Plaintiff had pursued the suit as well as the First Appeal. The First Appellate Court has decreed the suit directing the eviction of the Defendants (Appellants). In view of the dismissal of this Appeal against Plaintiff No.5 (Respondent No.5); said judgment and decree passed by the First Appellate Court have attained finality and fully stand to the benefit of the Plaintiff No.5 (Respondent No.5) if he is still alive or in the event of his death, it would certainly benefit the legal representatives of Plaintiff No.5 (Respondent No.5). In view of the nature of the suit and the decree which has been passed, for the dismissal of the Appeal against Plaintiff No.5 (Respondent No.5), he or his legal representatives as the case may be would stand as the decree holders and the decree under challenge in this Appeal can be executed either by the Plaintiff No.5 (Respondent No.5) or his legal representatives claiming through him as the case may be. Record reveals that the specific order having been passed by dismissing this Appeal against Plaintiff No.5 (Respondent No.5) way back of 15.10.2015, the same has been noted everywhere as such.

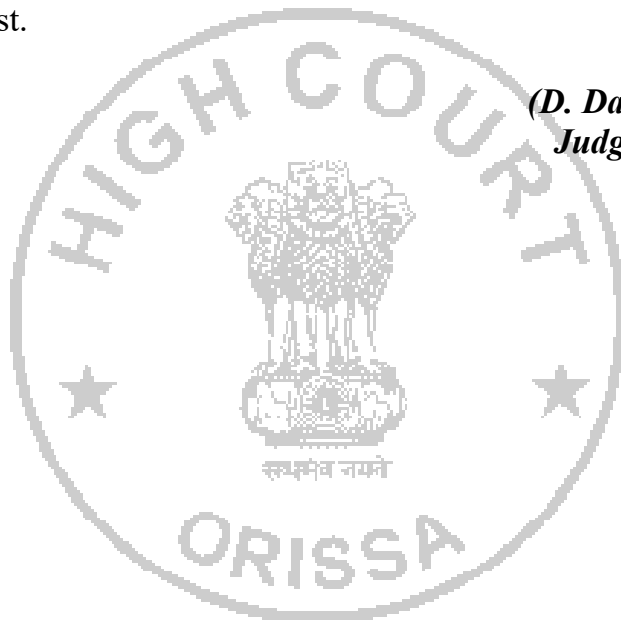
For the aforesaid, I am of the considered view that since the Second Appeal has been dismissed as against Plaintiff No.5 (Respondent No.5) further progress for disposal of the Appeal on merit by answering the substantial questions of law would be impermissible.

Thus the dismissal of the Appeal against Plaintiff No.5 (Respondent No.5), in my considered view would stand as the legal bar to further proceed to dispose of this Appeal on merit as there remains all the likelihood that it may give rise to conflicting finding and when the risk remains for the same. The Appeal thus is liable to be dismissed in entirety.

12. In the result, the Appeal stands dismissed. There shall however no order as to cost.

True Copy

Narayan



***(D. Dash),
Judge.***