

IN THE HIGH COURT OF ORISSA AT CUTTACK

R.S.A. NO.38 OF 2019

In the matter of an Appeal under Section-100 of the Code of Civil Procedure assailed the judgment and decree dated 17.12.2018 & 26.12.2018 respectively passed by the learned District Judge, Jajpur in RFA No. 16 of 2017 confirming the judgment and decree dated 24.10.2016 & 04.11.2016 respectively passed by the learned Civil Judge (Junior Division), Jajpur in Civil Suit No.174 of 1983.

Jhumuri Nayak (Since Dead) by ::: ***Appellants***
her LRs and Others

-versus-

Bhabagrahi Behera ::: ***Respondent***

**Appeared in this case by Hybrid Arrangement
(virtual/physical mode)**

<i>For Appellants</i>	-	M/s.G. Mukherjee, Sr.Advocate, P.K. Rout, K.K. Gaya, S. Sahoo, Advocates.
<i>For Respondent</i>	-	M/s.S.P. Swain, B.D. Biswal, P. Patnaik, B.K.Rath, Advocates.

CORAM:
MR. JUSTICE D.DASH

DATE OF HEARING::06.12.2022, DATE OF JUDGMENT::23.12.2022

These Appellants, in this Appeal under Section-100 of the Code of Civil Procedure 1908 (for short, 'the Code') assail the judgment and decree dated 17.12.2018 & 26.12.2018, respectively passed by the learned District Judge, Jajpur in RFA No. 16 of 2017.

By the same, the Appeal filed by the predecessor of these Appellants being aggrieved Defendant in Title Suit No.174 of 1983 of the Court of learned Civil Judge (Junior Division), Jajpur under Section-96 of the Code has been dismissed.

The Respondent as the Plaintiff had filed the suit for permanent injunction as against the original Appellants (Defendant) so as to restrain him from interfering with the peaceful possession of the suit land by the Plaintiffs. The suit having been decreed the Defendant aggrieved by the same had carried the Appeal under Section-96 of the Code which too has been dismissed. The original Appellant having died during pendency of First Appeal, his legal representatives are pursued the Appeal and they now have filed this Second Appeal.

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. Plaintiffs case is that one Uma Bewa was the original owner of the suit land and she has sold the suit land to Bai Behera, the father of the Plaintiff by registered sale-deed dated 24.12.1958 for consideration of Rs.600/- with a condition that if she would repay the consideration amount within a period of five (5) years to the Plaintiff, she would be

entitled to repurchase the suit land. It is stated that pursuant to the execution of said registered sale-deed, possession of the suit land had been delivered to that Bai Behera. Since Uma did not exercise her right to repurchase the suit property within the stipulated time period term of five years or even thereafter during her lifetime, the said right stood extinguished. Bai Behera thus possessed the suit openly, peacefully and uninterruptedly to the knowledge of Uma Bewa and Nityananda Naik, the original Defendant. It is further stated that Bai Behera having possessed the suit land openly, peacefully and continuously without any interruption had perfected the title over the suit land by way of adverse of possession and the Defendant had no manner of right, title, interest and possession over the suit land. Since the Defendant then created disturbance in the possession of the suit land by the Plaintiff over the land in question, the suit was filed.

4. The Defendant in his written statement while denying the plaint averments has stated that Uma was an illiterate and pardanashin lady and taking advantage of that Bai Behera had created the deed dated 12.11.1983 by practising fraud. Uma in face had mortgaged the suit land for a loan of Rs.600/- in order to clear up her debt, for her maintenance and to meet the expenses for a pilgrimage with a condition that on repayment of the principal with interest @ 9% per annum within five

years, she would get back the property. The amount being repaid in the year 1962, the deed in question was not returned on some pretext or other. She later on has executed a deed of gift in favour of the Defendant and delivered possession of the said land. The Defendant claims to be in possession of the said land since then having so mutated the land, has been paying the rent. It is further stated that only after the suit, the Defendant could know that the Plaintiff fraudulently obtained Sarti Kabala on 24.12.1958 from Uma, who was old, illiterate and pardanashin widow and had no understanding of the contents of the documents. Said document is said to be obtained by fraud and thus invalid one. . It is stated that Bai had never derived any right over the property under that deed.

5. The Trial Court on the above rival pleadings framed six (6) issues. Upon examination of evidence and their evaluation, it held the transaction to be a out and out sale with a condition to repurchase. The Plaintiff has been found to be having the title and possession over the suit land. The suit having been decreed, the Defendant carried the First Appeal, which too has been dismissed. The First Appellate Court addressing the important contention raised as to maintainability of the suit for permanent injunction simpliciter without seeking any declaration of right, title and interest has held the same in favour of the Plaintiff. It

has further held the deed, Ext.1 to be a sale-deed and then having gone to say that the Defendant has not established his case that it had been fraudulently obtained, the result of the suit as returned by the Trial Court has been confirmed.

6. The Appeal has been admitted to answer the following substantial questions of law:-

- (i) Whether on the rival case of the parties giving rise to involvement of complicated question of title as also competing claim in respect of the suit property covered under the deed which is being differently projected by the parties, the Courts below have erred in law by decreeing the suit for permanent injunction simpliciter without the prayer of the declaration of the title and possession?
- (ii) Whether the Courts below are right in construing Ext.1 as out and out deed of sale by ignoring the evidence on record as to the surrounding circumstances and the settled law in the field for construction of the document when one side projects it to be out and out sale and other claims it to be a mortgage by conditional sale?

7. Learned Senior Counsel for the Appellants submitted that when as per the rival case of the parties, there is involvement of complicated question of title as also competing claim in respect of the suit property covered under the deed, which is differently stated by the parties; the

Courts below ought to have held that the suit as framed for the relief of injunction simpliciter is not maintainable. He further submitted that the First Appellate Court on the basis of evidence on record is not right in holding at the end of paragraph-9 of the judgment that Ext.1 is a sale-deed, by which the title and possession of the suit land has been duly transferred to the Plaintiff.

8. Learned Counsel for the Respondent whiling supporting the findings of the First Appellate Court submitted that when the Courts below have come to clear finding with regard to the title and, there was no cloud on the title of the Plaintiff and the title only incidentally or ancilliarily stands for consideration in the suit, there is no need to seeking declaration of title and the suit is thus maintainable and the Courts below are right in passing the decree for permanent injunction. He further submitted that the First Appellate Court on detail discussion of the evidence on record in the backdrop of the pleadings did not commit no mistake in holding Ext.1 to be a sale-deed and that is not liable to be inferred with.

9. 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 statement and perused evidence including the

important document, Ext.1, which is the basis of the claim of the Plaintiff.

10. Since, the substantial question as at (i) of law touches the very root of the matter, this Court feels it proper to answer the same first in addressing the rival contentions.

Reverting to the pleadings in the plaint, it is seen that the Plaintiff has asserted that Uma Behera, the original owner in possession of the suit land had sold the same by registered sale-deed dated 24.12.1958 for consideration of Rs.600/-. It has been stated that there was a condition in the said deed that if Uma would repay the consideration amount within five years to the Plaintiff, she would be entitled to repurchase the suit land. It has been further pleaded that pursuant to the said deed, there was a settled possession of the suit land in favour of Bai Behera and as Uma did not exercise the right to repurchase within time stipulated or even her lifetime; her right to repurchase stood extinguished. Then in the alternative, a claim has also been advanced that by such long possession of the suit land in open and peaceful manner without any interruption from any quarter, there has been perfection of title over the suit land by way of adverse possession.

11. The Defendant has attacked this deed in saying that by that there had been no transfer of title in respect of suit land as it has been categorically pleaded that Uma was an old illiterate pardanashin lady and taking advantage of that as also the relationship, Bai Behera had obtained the said deed when it was in fact a deed of mortgage in securing the payment of loan of Rs.600/- with the condition that on repayment of principal and the interest within five years, that Uma would get back the property. It is seen that the deed in question, Ext.1 has been the nomenclatured as “□□□□□ □□□□□ □□□□□ □□□□□” (Five years Conditional Deed). It has been pleaded in the written statement that although Uma subsequently had paid amount of Rs.600/- with interest to the Plaintiff in the year 1962 and had asked Bai Behera to return the original sale-deed, Bai Behera did not do so on various pretext and while Uma continued to be in possession of the suit land. Then she is said to have gifted away the suit land and other lands by registered deed of gift and the land has been mutated in the name of the Defendant who is paying rent and possessing the same.

12. The instant suit is for permanent injunction simpliciter without any other prayer relating to declaration etc. In case of *Anathula Sudhakar Vrs. P. Buchu Reddy (Dead)*; AIR 2008 SC 2033 in summarizing the position with regard to the suit permanent injunction

simpliciter relating to immovable property, the Hon'ble Apex Court has held as under:-

(a) 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.;

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.;

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title either specific, or implied. Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law

relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.; and

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straight-forward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.”

13. Keeping in mind the principles as set out; when the afore-discussed facts and circumstances as emerge from the rival pleadings are viewed; this Court is not in a position to subscribe to the view taken by the First Appellate Court that there was no need for seeking declaration of right, title and interest by the Plaintiff as there was no cloud on the title. The First Appellate Court in the facts and circumstances of the case is also not right in saying that the title here is incidentally or co-laterally

stands for consideration. Therefore, this Court is of the considered view that the suit for permanent injunction as instituted simpliciter is not maintainable and the Courts below ought to have held the said suit with the relief claimed as not maintainable.

The first substantial question being answered as above, there arises no further need to find out the answer to the next substantial question of law since that answer is enough to dispose of this Appeal.

14. Resultantly, the Appeal stands allowed. The judgments and decrees passed by the Courts below are set aside and the Plaintiff's suit thus stands dismissed. There shall, however, be no order as to cost.

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

True Copy

P.A

Narayan