

IN THE HIGH COURT OF ORISSA AT CUTTACK

RSA No.229 of 2010

AND

RSA No.254 of 2010

In the matter of an appeal under section 100 of the Code of Civil Procedure assailing the judgment and decree dated 15.02.2010 and 02.03.2010 respectively passed by the learned Ad hoc Additional District Judge, FTC-I, Cuttack in RFA Nos.84 & 85 of 2007.

IN RSA No.229 of 2010

Ashok Kumar Mitra (Since Dead) Appellants
through his LRs & Others

-versus-

Kailash Chandra Behera Respondent

IN RSA No.254 of 2010

Kailash Chandra Behera Appellant

-versus-

Ashok Kumar Mitra (Since Dead) Respondents
Through his LRs & Others

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

In RSA No.229/2010

For Appellants - M/s.A.K. Mishra-2, U.N. Sahoo,
U.K. Sahoo, B. Mohapatra
M/s.A.K. Tripathy, P.K. Nayak,
P.Kar, P.K. Mohanty,
S.Mohanty

For Respondent - M/s.D.H. Dhal K. Dhal, A. Das
M.K. Sahoo

In RSA No.254/2010

For Appellant - M/s.D.H.Dhal, K.M. Dhal,
M.K. Sahoo

For Respondents - Mr.A.K. Tripathy

**CORAM:
MR. JUSTICE D.DASH**

Date of Hearing : 14.02.2022 : Date of Judgment:14.03.2022

Since both the above noted Appeals arise out of final decision recorded in T.S. No.267 of 1991 in the Court of the learned Civil Judge, Junior Division, 1st Court, Cuttack; those had been heard together and this common judgment is passed.

It be stated here that Kailash Behera (Appellant No.1 in RSA No.254 of 2010 and Respondent in RSA No.299 of 2010) as the Plaintiff had filed the suit seeking permanent injunction against Ashok Kumar Mitra, Ajit Kumar Mitra, Aparna Mitra, Ansu Kumar Mitra and Swapna Mitra arraigning them as the Defendants. During pendency of the suit, Ajit Kumar Mitra, who had been arraigned as Defendant No.2, having expired, his legal representatives have come on record.

All those Defendants are now the Respondents in RSA No.254 of 2010 and Appellants in RSA No.229 of 2010.

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. It would be appropriate at this stage to mention that in the suit, the Defendants had filed a counter claim with a prayer to pass a decree of eviction of the Plaintiff from the southern portion of the suit property better shown in the sketch map so provided in the pleading. The Trial Court decreed the suit and thereby the Defendants were permanently restrained to evict the Plaintiff and his family members from the suit premises without taking recourse to law. The counter claim of the Defendants for eviction of the Plaintiff, was, however, dismissed.

The Defendants thus having suffered from the judgment and decree passed in the suit as well as the counter claim preferred two Appeals, i.e., RFA No.84 of 2007 and RFA No.85 of 2007 under section 96 of the Code of the Civil of Procedure (for short, 'the Code') which have been heard and disposed of by learned Ad hoc Additional District Judge, FTC-I, Cuttack by the common judgment.

The First Appellate Court has set aside the judgment and decree of permanent injunction passed by the Trial Court in the suit in favour of the Plaintiff. It has, however, confirmed the judgment and decree in respect of dismissal of the counter claim advanced by the Defendants seeking the relief of eviction of the Plaintiff.

In view of the above, the Plaintiff thus having been non-suited has filed RSA No.254 of 2010 whereas the Defendants being unsuccessful in obtaining the relief of eviction of the Plaintiff as advanced in the counter claim have filed RSA No.229 of 2010. The Plaintiff in this Appeal filed by him under section 100 of the code claims that his suit be decreed granting the reliefs as prayed for.

The Defendants, while supporting the judgment and decree passed by the First Appellate Court in dismissing the suit; in their Appeal under section 100 of the Code pray that the judgment and decree passed by the First Appellate Court in the counter claim be set aside and in turn, the same be decreed granting them the relief of eviction against the Plaintiff as prayed for.

4. The subject matter of the suit is the land covering an area of Ac.0.187 appertaining to Hal Plot No.1899 under Sikkimi Khata No.47 assigned with holding No.235 of Cuttack Municipality. This has been described in the Schedule of the plaint. It is stated that the land originally belonged to Hemanta Kumar Mitra and Sarat Chandra Mitra,

who are the predecessors-in-interest of the Defendants and they had inducted the Plaintiff over the suit property as a permanent tenant under an oral agreement coupled with delivery of possession. It was then agreed that the Plaintiff would provide seven (7) liters of milk per day to Hemanta and Sarat towards the ground rent and pay the municipal holding tax for the suit property. The Plaintiff accordingly constructed pucca as well as kachha houses over the suit land as also cow-shed, well etc. He resided in the said house with his family since the year 1970 and went on carrying out the milk business by delivering the milk every day to Mitra brothers, the landlords. He constructed a residential house over the suit land, repaired the same at his cost as and when required. In the super-cyclone in the year 1999, the house standing over the suit land got damaged. So, the Plaintiff, spending a sum of Rs.14,500/- brought those to order.

Sarat Ch. Mitra died in the year 1985 and two years thereafter, Hemanta died. The Defendants inherited the suit property being their legal heirs and successors. The Plaintiff, however, in obedience to the agreement with Hemanta and Sarata went on delivering the milk as fixed towards the ground rent while paying the municipal holding tax. In the year 1990, some outsiders proposed to purchase the land. So, the Defendants wanted to forcibly evict the Plaintiff and in that direction, on 29.10.1990 an attempt had been made. But the attempt could not be succeed due to intervention of the local gentries. On 10.10.1991, the Defendants, taking advantage of the absence of the Plaintiff entered into the suit premises and applied criminal force on his family members with a bid to oust them. However, then again local people intervened and the mischievous mission became futile. There was a proceeding under section 144 Cr.P.C. and thereafter the Plaintiff filed the suit.

5. The Defendants, in their written statement, refuted the factum of creation of permanent tenancy in respect of the suit land in favour of the Plaintiff at any time by the predecessors-in-interest as averred by the Plaintiff. It is stated that the Plaintiff and Defendant No.4 were friends from their high school days. The Plaintiff was residing in a rented house at Kathagada Sahi. Being a friend, sometime in the year 1970, he approached the Defendant No.4 providing temporary accommodation in their house situated over the suit land and permit him to stay therein till an alternative accommodation was arranged. Accordingly, the Defendants permitted the Plaintiff to occupy the houses on the southern side of the suit land on the condition that he would vacate the same, the moment he would be finding an alternative accommodation. The Plaintiff although purchased the house site at different places on Cuttack town, yet he did not vacate the suit property and on the contrary, filed the suit advancing a false claim. The Defendants with all the above prayed to non-suit the Plaintiff.

They have also advanced a counter claim seeking eviction of the Plaintiff from the portion of the suit land.

6. The Plaintiffs having filed their written statement to the counter claim have reiterated the averments taken in the plaint.

7. The Trial Court, on the above rival pleadings, in total has framed nine issues. Out of those, issue nos.5 to 8 appear to be the crucial as answers to those have the final say on the fate of the suit. The Trial Court has concluded as under:-

(a) The Plaintiff's possession of the suit property is as a tenant since the time of the ancestors of the Defendants and after expiry of the period of one year from the inception, he

has become a monthly tenant by holding over in so far as the suit land is concerned;

(b) the Plaintiff has not occupied the suit premises as a licensee on permission of the Defendant:

(c) the Plaintiff's possession of the suit land is thus to be perfected as against his dispossession without following the due process of law; and

(d) the counter claim is not maintainable.

8. The Trial Court, upon examination of evidence and their evaluation, has found the Plaintiffs to be a monthly tenant holding over in respect of the suit property. The counter claim has been found to be not maintainable for want of notice under section 106 of the T.P. Act terminating the tenancy of the Plaintiff. The ultimate result in the suit has thus been recorded in restraining the Defendants from evicting the Plaintiff and his family members from the suit premises by any such means other than as provided and known to law.

9. The First Appellate Court has formulated the points for determination as required under Order 41 Rule 33(a) of the Code. The points are as under:-

“(a) Whether the Plaintiff-Respondent is in possession of the suit property as a permanent tenant/lessee or he is in permissive possession under the Defendants as a licensee?

(b) Whether an executable decree could be passed in respect of property involved in counter claim vis-à-vis the suit property?; and

(c) Whether the counter claim has been valued properly and if upon determination of the proper valuation, it would be beyond the pecuniary jurisdiction of the Trial court creating a bar as to its entertainment for decision in the suit.”

10. Coming to answer the first point, in the facts and circumstances of the case as those emanate from the evidence on record, upon their proper analysis; further keeping in view the legal provisions, it has been held that the possession of the Plaintiff over the suit premises is that of a licensee and as such permissive.

So far the second point is concerned, the counter claim has been held to be incompetent for insufficient description of the property from which the eviction of the Defendants has been sought for and accordingly, the First Appellate Court being of the view holding that no executable decree can be passed thereof; the prayer advanced in the counter claim has been held to be not allowable.

In respect of the third point, the answer has been rendered that the counter claim has not been properly valued.

11. The Appeals have been admitted on the following substantial questions of law:-

“(a)The plea taken by the Defendants that the Plaintiff was inducted into the suit land not as tenant but as licensee having not been accepted; are the findings of the lower Appellate Court that the Plaintiff having failed to discharge the burden of proving permanent tenancy cannot take advantage of any weakness of the defence evidence is sustainable in the eye of law and in taking such a view whether the lower Appellate Court has committed an error by losing sight of the settled position of law that when both sides adduce evidence on contentious issue, the burden of proof loses its significance;

(b) Whether the defendant admittedly being the holder, claiming recovery of possession in a counter claim filed in a suit over the said property, as described in the plaint by the plaintiff, the learned courts below could have said that the description of the property in the counter claim was vague and could have dismissed the counter claim on that ground?; and

(c) Whether the learned courts below have erred in law in holding that the appellant should have paid the advo term court fees on the counter claim in which, he claimed recovery of possession from the plaintiff in the suit, as it was admitted by the plaintiff that the appellant-defendant was the title holder over the suit property?”

12. Learned counsel for the Plaintiff submitted that the Courts below ought to have held that predecessors-in-interest of the Defendants had inducted the Plaintiff as a permanent tenant under an agreement coupled with delivery of possession on the agreed conditions as deposed to. He further submitted that when the Plaintiff has established his case as to the permanent tenancy over the suit land, the Courts below, without proper appreciation of evidence on record, have gone to record different findings, i.e., the Trial Court holding the Plaintiff to be a monthly tenant and then the First Appellate Court that the Defendant is a licensee. He further submitted that under any circumstance, the Plaintiff could not have been held as a licensee in respect of the suit land and his possession to be as such and he should have at least been held to be a lessee from month to month.

13. Learned counsel for the Defendants, while supporting the finding of the First Appellate Court that the Plaintiff is a licensee in respect of the suit, submitted that with the said finding, the First Appellate Court ought not to have refused to pass a decree in the counter claim directing eviction of the Defendants from the suit premises. He submitted that the conclusion of the First Appellate Court that the property described in the counter claim is not identifiable is wholly untenable on the face of the case of the Plaintiff as to his possession. He submitted that when the Plaintiff has filed the suit asserting his possession over the property as described in the plaint and the relationship of the Defendants and

Plaintiff are found to be as that of a licensor and licensee, there is no impediment on the way of passing a decree for eviction of the Plaintiff from the property in his possession, as stated by him in the plaint when he has no more the right to possess the same.

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

15. In order to find out the answer to the substantial questions of law by addressing the rival contentions, first some admitted facts need be stated.

The property in question belonged to Hemanta Mitra and Sarat Mitra, who have died in the year 1987 and 1985 respectively. These Defendants are the successors-in-interest of Mitra brothers. The Plaintiff has been staying in the pucca and kacha houses standing on the suit land. When the Plaintiff claims that he is a permanent lessee in respect of the suit land; the Defendants' case is that their possession is permissive as that of a licensee in view of their relationship as he was so permitted.

16. Section 105 of the Transfer of Property Act defines "lease" as under:-

"A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms."

Section 52 of the Easement Act defines a "Licensee".

“Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license.”

A lease thus creates an interest in the property demised whereas licence confers a right to do or continue to do something in or upon immovable property or grantor which but for the grant of the right may be unlawful, but creates no estate or interest in the immovable property of the grantor. In our given case, there is no instrument. It is not the case here that the lease was for any agriculture purpose. In view of the above, even though the Plaintiff has let in oral evidence in support of the fact that he has permanent tenant and as such inducted, said plea of the Plaintiff as to permanent lease/tenancy is not acceptable in the eye of law. Now to find out the relationship, the circumstance and conduct of the parties as those emanate from the evidence on record are to be looked into. The First Appellate Court appears to have made a detail discussion of the evidence on the score and upon threadbare analysis of the same, the conclusion arrived at is that the Plaintiff's possession over the suit property is permissive in nature as a licensee. This Court bestowing due attention to the pleadings and evidence on record; further giving anxious and thoughtful consideration over the same is of the view that said conclusion is well in order.

17. With the finding that the Plaintiff is in possession of the suit property as a licensee, the question now arises as to whether the Defendants' prayer in the counter claim to pass a decree of eviction of the Plaintiffs can be allowed or not.

The Plaintiff, in the suit, has prayed for a decree in restraining the Defendants to evict him and his family from the suit premises without taking recourse to law. The suit property has been better described in the schedule of the plaint by specifically giving the boundary. The Defendants in the counter claim, while seeking delivery of possession of the premises, have shown the portions in occupation of the Plaintiff. So, the Plaintiff when has claimed to be in possession of the property described in the schedule of the plaint and the First Appellate Court has held that the said possession of the Plaintiff is as that of a licensee, the finding that the property from which the Defendants seek for eviction of the Plaintiff is not identifiable and its description does not run in consonance with the provision of Order 7 Rule 3 of the Code cannot be sustained.

The position being that in such a case of advancement of counter claim seeking the relief, it is open for the Defendants to value the relief sought for, for the purpose of jurisdiction, the First Appellate Court, in my considered view is not at all right in saying that the valuation of the counter claim being not proper and rather low, the same is incompetent.

All the aforesaid thus provide the answers to the substantial questions of law for dismissal of the suit filed by the Plaintiff and passing a decree granting the relief as prayed for by the Defendants in the counter claim.

In the result, RSA No.229 of 2010 is allowed and RSA No.254 of 2010 stands dismissed.

The suit filed by the Plaintiff (Appellant of RSA No.254 of 2010) being dismissed; he stands non-suited. The counter claim filed by the Defendants (Appellant of RSA No.229 of 2010) is hereby decreed. However, taking into account the long pendency of this litigation and

other surrounding circumstances in the prevailing situation, the Plaintiff is directed to give delivery of vacant possession of the suit premises on or before the expiry of October, 2022. It is further stated that in the event, the Plaintiff fails to give the delivery of vacant possession of the suit premises to the Defendants within the period, as stipulated above, the Plaintiff would be at liberty to levy the execution proceeding for fruitful execution of the decree of eviction granted in the counter claim.

The parties are, however, directed to bear their respective cost of litigation all throughout.



(D.Dash)
Judge

Basu