

A.F.R

ORISSA HIGH COURT : C U T T A C K

C.M.P. No.406 of 2022

*An application under Article 227 of
the Constitution of India, 1950*

Parbati Dei & Ors.

: Petitioners

-Versus-

Sukanti Pattnaik & Ors.

: Opposite Parties

For Petitioners

: M/s. D.P. Mohanty,
T. Mohanty, M. Pal,
R. Mohanty

For Opposite Party Nos.1 & 2

: M/s. P.K. Swain,
M. Subudhi Ray.

J U D G M E N T

CORAM :

JUSTICE BISWANATH RATH

Date of hearing & judgement : 11.05.2022

1. This C.M.P. involves a challenge to the impugned order dated 25.04.2022 passed by the learned Civil Judge (Jr. Divn.), 2nd Court, Cuttack in T.S .No.150 of 1996 thereby partially allowing an application U/o.7 Rule 11 (B) read with Section 151 of C.P.C. and in declining to dismiss the suit U/o.7 Rule 11(B) of the C.P.C, directed the plaintiffs to correct the valuation of the suit land as per the market value in the plaint

and supply the Court fee accordingly, further also thereby directing for placing the case record to 4.05.2022.

2. Mr. Mohanty, learned counsel for the Petitioners taking this Court to the plaint pleadings through paragraph nos.8, 9 & 10 and further to the plaint prayer contended that in whole reading of the pleadings in the above paragraph and the prayer, the plaintiff-Petitioners even though did not mention anywhere that the suit is for declaration of easementary right, but for the clear pleadings and the nature of relief sought for, it appears, the plaintiffs' prayer is in the nature of easementary right and it is also made clear that in addition to claiming an easementary right the plaintiff-Petitioners have also sought for injunction relief involved therein.

It is, in the above circumstance, Mr. Mohanty, learned counsel for the Petitioners submitted that looking to the nature of the suit, the pleadings as well as prayer made therein, there is no possibility of thinking relief otherwise and under no stretch of imagination the suit involves declaration of title. Taking this Court to the discussions and the observation of the trial court in the impugned order, Mr. Mohanty, learned counsel for the Petitioners submitted that there has been absolutely wrong reading of the pleadings as well as the prayer and on the other hand the trial court has attempted to make out a 3rd case of the plaintiffs, which is nowhere available in the plaint. Further taking this Court to the decisions relied on by the trial court in giving his such judgment Mr. Mohanty, learned counsel for the Petitioners taking this Court to the decisions such as AIR1987(SC)2085 contended that for the clear difference in the facts and reliefs involving the suit involved therein, this decision has absolutely no application to the case at hand. Mr. Mohanty, learned counsel for the Petitioners also raised similar

allegation so far as reference vide 2011(II)OLR 40 is concerned and claimed that this decision has also no application to the case at hand. Further so far as reliance of the 3rd decision by the trial court involving the impugned order vide 2013(I) OLR 34 similar to 32(1990)OJD 69 (Civil) is concerned, taking this Court to the relief sought for in the suit involved Mr. Mohanty, learned counsel for the Petitioners contended that decision vide 32(1990) OJD 69 even has no application to the case at hand. So far as the decision vide 2013(I) OLR 34 is concerned, Mr. Mohanty, learned counsel for the Petitioner alleged that first of all decision vide 2013(I) OLR 34 cannot be equated to the decision vide 32(1990) OJD 69. Further the decision in 2013 (I) OLR 34 is a middle page of some judgment. It is, in this view of the matter, Mr. Mohanty, learned counsel for the Petitioners contended that for wrong understanding on the nature of the suit involved herein and wrong application of the decisions, the trial court has arrived at the wrong impugned order and unless the same is interfered with and set aside, there may be leading to wrong precedent. Mr. Mohanty, learned counsel for the Petitioners taking resort to the provision at Clause 'd' & 'e' of (iv) of Section 7 of the Court-fees Act, 1870 (hereinafter in short be reflected as "the Act, 1870") attempted to bring the suit within the purview of the Clause 'd' & 'e' of the Act, 1870, thus while contending that there has been right valuation in filing the suit, Mr. Mohanty, learned counsel for the Petitioners claimed that there is wrong decision involving an application U/o.7 Rule 11 (B) of C.P.C. which needs to be set aside.

3. Mr. Swain, learned counsel for the defendant-Opposite Party Nos.1 & 2 appearing through caveat, in his submission taking this Court to the plaint pleadings, prayer and the scheduled of property contended that

under no stretch of imagination the suit cannot be limited to a suit requiring declaration of easementary right, as there also involves other declaration and for there is possibility of declaration of title of the parties involved Mr. Swain, learned counsel for the Opposite Party Nos.1 & 2 contended that there has been consideration of submission of the defendants by the trial court appropriately and therefore, there has been right decision requiring no interference therein. So far as reliance of decisions are concerned, Mr. Swain, learned counsel for the Opposite Party Nos.1 & 2 took support of all such decisions again in an attempt to justify his submission in support of the impugned order. Mr. Swain, learned counsel for the Opposite Party Nos.1 & 2 further also referring to the provisions at Section 7 of the Act, 1870 contended that the case at hand does not fall within the parameters of Clause 'd' & 'e' and on the other hand it falls within the parameters of Section 7(iv)(c) of the Act, 1870. In the process Mr. Swain, learned counsel for the Opposite Party Nos.1 & 2 prayed for dismissal of the C.M.P.

4. Considering the rival contentions of the parties and for a serious question involving consideration of an application U/o.7 Rule 11 (B) of C.P.C and looking to the attempt of the defendants through such application to bring the suit to the fold of Section 7(iv)(c) of the Act, 1870, this Court in an attempt to see; whether the suit falls within the purview of Section 7(iv)(b) or (d) or (e) of the Act, 1870, takes note of the plaint pleadings more particularly at paragraph nos.8, 9 & 10, which reads as follows:-

“8. That as indicated earlier, the plaintiff has purchased from the Rani the portion marked ‘A’ in the rough sketch map. This portion adjoins the main Tulasipur road on the south and the disputed land on the east. On the southern part of the plaintiff’s land adjoining the road there is a row of shop house. Behind the shop house there are number of

residential house, let out to different tenants. On the Northern side also there are a numbr of residential house let out to different monthly tenants by the plaintiff. There is a small court yard in the middle. The tenants from both the blocks come to the court yard and then go to the main Tulasipur Road, through the disputed land. There is a door in the compound wall separating the disputed land and the purchased land of the plaintiff. Though this door, the inmates of the plaintiff's complex come to the disputed land and then to the main road. Except this, there is no other way to which the inmates can go to and come from the public road. This right of way has been allowed by the Rani Late Puspendra Kumari. It is agreed that if under any circumstances the Rani does not sell the disputed land to the plaintiff, she shall allow 6' wife passage along with her western boundary in order to allow the access to the plaintiff's premises from the main Tulasipur Road.

9. That thus the plaintiff has a right of way on the land of Late Puspendra Kumari. He also acts as an Agent of the Rani Late Puspendra Kumari to look after the properties and the suits now pending. Presently the Rani and her son are out of Orissa. Her advocate Sri Bhupendra Kumar Bose is also absent. Defendant No.2 who is a sitting Magistrate of Cuttack wants to take full advantage of this. But he cannot do anything forcible because of the plaintiff. He has therefore taken resort to Section 144 Cr.P.C. and under the guise of an ordrof restrain the defendants want to raise a wall so as to close the plaintiff's passage. By this plaintiff will be immediately affected as he will loose his passage to his house. The inmates cannot come out or go in.

10. That the main gate existing on the Southern Boundary wall of the disputed land is not used by the defendant No.1 and 2. The house under the forcible occupation has its entrance on the North. Late Puspendra Kumari and her son who is her power of attorney holder ordinarily stay at Bhubaneswar and the plaintiff stays at a distance from the disputed land in his own house. As such, the land near the disputed land is occupied by monthly tenant. Taking advantage of this, defendants-1 and 2 occasionally come to the disputed land through their back door and create nuisance by throwing rubbish and allowing their dogs to pass stool on the disputed land. This sporadic act of possession no more give a right especially in case of absence of land owner."

5. It is, at this stage of the matter, this Court also takes into account the relief sought for in the suit involved here and finds, the following prayer is made in the suit:

"18. That the plaintiff therefore prays:-

i) A decree be passed in favour of the Plaintiffs declaring their right of way over the suit property i.e. in respect of A0.060 decimals of land as described in yellow colour with red dotted lines in Schedule – A and C of the Plaint.

ii) The defendant Nos.1 and 2 be restrained by a decree of permanent injunction from interfering with the plaintiff possession of the suit land as the owner of part of it to the extent of A0.020 dec. as described in Red colour and the user as passage in respect of the A0.060 dec. as described in yellow colour with red dotted lines of land as described in Schedule-A & C of the plaint by raising any boundary wall in front of the door of the purchased land of the plaintiff or otherwise.

iii) The defendant Nos. 1 and 2 be directed by a decree of mandatory injunction to remove the construction including the boundary wall, if made during pendency of the suit from the suit land.

iv) Cost of the suit be decreed in favour of the plaintiff and against the Defendant Nos. 1 and 2.

v) The plaintiff be given such other relief or reliefs as he may be found entitled to.”

6. Here it is keeping in mind the claim and counter claim of the parties and reading the plaint pleadings as well as the prayer involved herein, this Court finds, there remains no doubt that the suit is simplicitor for a declaration of passage right and accordingly the same is construed to be a suit for declaration of easementary right. It is now taking into account the provision of law relied on by both the parties, this Court takes note of the provision at Section 7 (iv)(c)(d) (e) of the Act, 1870 which reads as follows:

“7. Computation of fees payable in certain suits.-The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:-

(iv) In suits-

for a declaratory decree and consequential relief.- (c) to obtain a declaratory decree or order, where consequential relief is prayed,

for an injunction.- (d) to obtain an injunction,

for easements.-(e) for a right to some benefit (not herein otherwise provided for) to arise out of land, and

7. In comparison of the pleadings reading together with the provision at Section 7 (iv)(c)(d) & (e) of the Act, 1870, this Court finds, there should not be any doubt that the suit falls within the ambit of Section 7(iv)(d) & (e) of the Act, 1870 and in no circumstance, it can be treated as a suit under the provision at Section 7(iv)(c) of the Act, 1870.

8. This Court here also likes to take into account the applicability of the judgments relied on by the trial court and in considering the decisions, this Court observes as follows:-

Reading the first decision relied on by the learned trial court in the case of *Smt. Tara Devi vs. Sri Thakur Rada Krishna Maharaj through Sebait* A.I.R. 1987 S.C. 2085 and examining the same this Court finds, paragraph '2' therein discloses the fact involving the case involved therein also involving a dispute under the provisions of Section 7 of the Act, 1870. The paragraph no.2 reads as follows:

"2. The plaintiff-respondent filed a suit for declaration that pattas dated 15-12-1948, 1-7-1950, 24-4-1951 and 26-11-1952 executed by Nagendra Prasad Bhagat in the name of defendant No.1 were illegal, ineffective and not bind on the plaintiff. There was also a prayer for recovery of possession with mesne profits. The suit was valued on the basis of the rent payable for the land. The defendant filed a written statement and thereafter raised a preliminary objection that the plaintiff has undervalued the suit and also challenged the jurisdiction of the Court to entertain the suit. The Trial Court has held that the suit is governed by Sec. 7(iv)(c) of the Court-fees Act, 1870 and the plaintiff has rightly valued the lease hold interest created by the lessee. The plaintiff is entitled to put his own valuation of the reliefs claimed. The valuation, it has been held, was not arbitrary and unreasonable and as such it was held that the plaintiff has rightly valued the suit and proper court-fee has been paid thereon."

9. Reading the whole paragraphs taken note hereinabove, this Court finds, the suit involved therein was for declaration that the Pattas dated 15.12.1948, 1.07.1950, 24.04.1951 and 26.11.1952 executed by one

Nagendra Prasad Bhagat in the name of the defendant no.1 are illegal, ineffective and not binding on the plaintiff along with further relief by way of recovery of possession with mesne profit in the particular dispute involved therein. This Court finds, there is absolutely no application of such decision and there is completely non-application of judicious mind by the Civil Judge (Jr. Divn.) 2nd Court, Cuttack in taking into account such decision to support his own view. Now coming to the second decision relied on by the Civil Judge (Jr. Divn.), 2nd Court, Cuttack, this Court looking to the decision vide 2013(I) OLR 34 finds, page-34 involving a mid page of a decision, further finds, the decision involved therein is not only of a Division Bench, but is also in criminal appeal. This Court here again finds, there is mechanical approach and the Civil Court should be careful enough at least to give a correct reference in support of his finding in the orders and judgments. Further looking to this particular decision, this Court here in whole search of the decisions in book vide 2013(I) OLR, nowhere finds, this book at least contains any decision on Section 7 of the Act, 1870 and there is absolutely non-application of judicious mind, but clearly mechanical approach by a civil court. Of course going through the decision in 32 (1990) OJD 69 (Civil) to find, if such decision has any bearing on the case at hand, this Court to find-out whether fact involved here is similar to the fact involved therein, reading the decision, finds, the facts involved therein are completely different. This Court here looking to the paragraph no.3 of the decision vide 1990(I) OLR 34, finds, facts involved therein runs as follows:

“3. The plaintiff has filed the suit for a declaration that the compromise decree in Title Suit No.1 of 1983 is fraudulent and illegal and does not bind the plaintiff and, therefore, the plaintiff and defendants 1, 2 and 3 and their ancestors are the legal owners of the disputed land. In the body of the plaint several averments have been made indicating the grounds on which the compromise decree does not bind the plaintiff.”

10. Reading through the aforesaid judgment particularly the factual aspect, this Court finds, the suit involved in the reported case was for a declaration that the compromise decree in T.S. No.1 of 1983 is fraudulent, illegal and does not bind the plaintiffs and therefore, the plaintiffs and defendants 1 to 3 and their ancestors are legal owners of the disputed land. This Court here again finds, the fact involving the reported case does not fit to the case at hand and the nature of the suit involving the case at hand and therefore, there is wrong application of the decisions to the case at hand.

11. For the observations made hereinabove on the fact position involving the suit, the position of law through the Section 7 (iv) (d) & (e) of the Act, 1870, this Court while observing that there was no occasion for bringing an application U/o.7 Rule 11 of C.P.C., declares the order involved herein as bad. This Court reads the application U/o.7 Rule 11 (b) at the instance of the defendants and for the clear finding on mechanical exercise of mind by the trial court in relying on absolutely wrong decisions to support its observation and not even taking care of indication of citations in appropriate matter, this Court directs the Registry to send a copy of this judgment to the Civil Judge (Jr. Divn.), 2nd Court, Cuttack for his own perusal and finding no recurring of such glaring mistakes.

12. In the result the C.M.P. succeeds, but there is, however, no order as to costs.

(.....)
Biswanath Rath
Judge

Orissa High Court, Cuttack.
 The 11th day of May, 2022//
 Ayaskanta Jena,
 Senior Stenographer