

IN THE HIGH COURT OF ORISSA AT CUTTACK

RSA No.239 of 2009

In the matter of an appeal under section 100 of the Code of Civil Procedure assailing the judgment and decree passed by the learned 2ND Additional District Judge, Cuttack in R.F.A. No.50 of 2006 confirming the judgment and decree dated 28.02.2003 and 10.03.2006 respectively passed by the learned 2nd Additional Civil Judge, Senior Division, Cuttack in T.S. No.412 of 1999.

Kailash Chandra Das (Since Dead) Appellants
through his L.Rs

-versus-

Minu Agarwal Respondent

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

For Appellants - Mr.D.P. Mohanty, P.K. Swain
M.Pal

For Respondent - Mr.S.S. Das, Sr. Advocate
K. Behera, P.K. Ghosh
S.N. Mishra

CORAM:
MR. JUSTICE D.DASH

Date of Hearing : 16.03.2022 : Date of Judgment:29.03.2022

The Appellant, by filing this Appeal under Section 100 of the Code of Civil Procedure (for short, 'the Code') has assailed the judgment and decree passed by the learned 2ND Additional District Judge, Cuttack in R.F.A. No.50 of 2006.

By the same, the first Appeal filed by present Appellant (Defendant) under section 96 of the Code has been dismissed and thereby the judgment and decree dated 28.02.2003 and 10.03.2006

respectively passed by the learned 2nd Additional Civil Judge, Senior Division, Cuttack in T.S. No.412 of 1999 have been confirmed.

The Respondent, as the Plaintiff, has filed the suit for eviction of the present Appellant (Defendant) and with permanent injunction and delivery of the movables described in Schedule-C of the Plaintiff or to in lieu thereof pay a sum of Rs.8000/-. That suit having been decreed by the Trial Court; the same has been confirmed in the first Appeal.

During pendency of the Appeal, the original Appellant (Plaintiff) having died, his legal representatives, being substituted, have come on record and are now pursuing the 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. The Plaintiff's case is that she is the owner in possession of Schedule-A property over which one three storied building stands. The land in question pertains to Sabik Plot No.2556 and 2556/2914 corresponding to Hal Plot No.1107 and 1108 respectively and each one comprises of Ac.0.22 decimals. It is stated hat out of these two plots, an area of Ac.0.222 decimals under Sabik Plot No.2556 had been leased out by the State in favour of Parameswar Lal and Bajrang Lal way back in the year 1928. In the year 1952, the lease again stood renewed in favour of Parameswar Lal and Puni Dei, the wife of Bajrang Lal as Bajrang Lal by then was dead. It was further renewed in favour of Puni and Subash Chandra Podar in the year 1980 vide order passed in Khasmahal Lease Case No.187 of 1976. The lease was renewed in favour of Puni Dei and Subash Ch. Podar as during the pendency of Khasmahal Lease Case, Parameswar Lal died and Subash was

substituted as legal heir of Parameswar. Upon the death of Puni Dei, Subash Podar; the mother of the Plaintiff, the Plaintiff got settled with the land in Settlement Appeal Case No.825 of 1999 as per order dated 22.01.2001. The Plaintiff states to have been paying rent and holding tax in respect of the suit house. She was staying therein with her husband. After the death of her mother, the Plaintiff decided to stay at her husband's house at Chandinichowk. She used to come to the house standing over the suit land during day time. It is stated that all of a sudden, on 20.01.1999, the Defendant made forcible entry into the suit building by breaking open the lock and accordingly occupied one room in the second floor and kept his servants therein. The Defendant then broke open the lock of another adjoining room and removed brass utensils and took the same under his possession. Steps for settlement of the matter when failed, ultimately the Plaintiff filed the suit. It is stated that after institution of the suit, the Defendant sold a portion of the building to his son and then threatened other tenants inducted by the Plaintiff in respect of other rooms of the building of being driven out.

4. The Defendant, in his written statement, denied the claim of the Plaintiff as the exclusive owner in possession of the suit property. It is stated that the renewal of lease made finally in the year 1980 was without any enquiry. It is said by the Defendant that Parameswar Lal although had a daughter, namely, Gita, in Khasmahal Lease Case No.187 of 1976, she was not brought into picture and erroneously the land has been leased out in favour of Puni Dei and Subash Chandra Podar. This Defendant asserts himself to be the Power of Attorney Holder of Gita and based on that Power of Attorney, he says to have validly executed the sale deed in favour of his son. In this way, the

Defendant justifies his possession over the suit property and his son to have acquired interest over the same by way of his purchase.

5. Faced with above rival pleadings, the Trial Court has famed in as many as fifteen (15) issues. Answering the issues related to the death of Parameswar Lal Podar @ Agarwal without any issue; status of Gita Devi Agarwal vis-à-vis Parameswar Lal Podar, status of Subash Ch. Agarwal vis-à-vis Parameswar Lal @ Podar Agarwal as also qua Puni Dei; upon examination of the evidence and their evaluation, answers have been rendered that Parameswar Lal had no daughter named Gita. It has next been said that Subash is the son of Puni. The Trial Court has further arrived at the conclusion that as there was none to represent the deceased-Parameswar Lal, Subash Ch. Podar was substituted as he was the son of Bajrang Lal, who is none other than the brother of Parameswar Lal.

Since Gita is held as not the daughter of Parameswar, the Power of Attorney said to have been executed by said Gita in respect of the suit property has been held to be of no value in the eye of law in so far as the suit property is concerned.

Lastly, coming to decide the other issues as to the possession of the suit house by the Defendant; the ownership of the Plaintiff and her possession over Schedule-A land as well as her possession over Schedule-B land, the evidence being gone through and appreciated at its level, it has been concluded that the possession of the Defendant in so far as the suit rooms are concerned is illegal and unauthorized in further saying that he has taken the possession by dispossessing the Plaintiff therefrom. The other issue relating to removal of the movables has been answered in favour of the Plaintiff holding her to be entitled to recover the movables as stated in Schedule-C.

The Defendant having suffered from the judgment and decree passed by the Trial Court having filed the Appeal, has been unsuccessful.

The First Appellate Court, upon independent assessment of the evidence on record at its level, finding no such good reason to differ with the conclusions arrived at by the Trial Court on all those issues, has finally dismissed the Appeal.

6. The present Appeal has been admitted on the following substantial question of law-

“(a) Whether the learned courts below are correct in decreeing the plaintiff’s suit in full without recording any finding as to how the interest of Parameswar Lal came to the hands of Bajarang Lal or his heirs?;

(b) Whether the learned courts below are correct in finding that Gita is not the daughter of Parameswar, without Gita being impleaded as a party to the suit?”

7. Mr.D.P. Mohanty, learned counsel for the Appellant submitted that the Courts below in recording a finding that Gita is not the daughter of Parameswar Lal have not taken into account the ground reality that the parties belong to Orthodox Marwari family, members of which community observe strict purdah and therefore, it is difficult to procure witness from their family to prove the relationship and in that view of the matter, the evidence adduced from the side of the Defendant through D.Ws.2 and 3 even though they are not the relations ought to have been accepted in support of their conduct vis-à-vis the members of the family and association. He thus submitted that the Courts below are not correct in drawing adverse inference against the case of the Defendant that he has not examined any relation of Parameswar Lal in support of his stand that Gita is the daughter of Parameswar Lal. It was submitted that such

finding of the Courts below that Gita is not the daughter of Parameswar Lal is thus based on perverse appreciation of evidence, without taking into account the circumstances surrounding the parties. He next submitted that admittedly antecedent title holders of the property in question are Parameswra Lal and Bajrang Lal and the Plaintiff claims to be the daughter of Subash, who, has, however, been held so by the Trial Court as not the son of Puni, the wife of Bajrang. He, therefore, contended that the conclusion drawn by the Trial Court that Subash was substituted as the son of Bajrang Lal, who was the brother of Parameswar Lal is not correct and therefore, Plaintiff's claim to the property in which he admittedly had half interest does not merit acceptance. He submitted that with the available evidence, the Courts below ought to have held Gita to be the daughter of Parameswar Lal. He also submitted no finding against the status of Gita as pleaded by the Defendant could have been given the absence of said Gita.

8. Mr.S.S. Das, learned Senior Counsel for the Respondent (Plaintiff) submitted all in favour of the conclusions arrived at by the Trial Court. According to him, in view of the renewal of lease of the land in question in the year 1980 in Khasmahal Lease Case No.187 of 1976 in favour of Puni and Subash Chandra Podar and subsequent settlement of the land in favour of the Plaintiff which is after the death of Puni, Subash and mother of the Plaintiff by the order passed in Appeal Case No.825 of 1999, the Defendant's claim over the property through Gita, projecting her to be the daughter of Parameswar Lal, is not only baseless but also non-cognizable. He further submitted that the Courts below, on assessment of evidence on record when have concurrently found that Gita is not the daughter of Parameswar Lal and when fact remains that said Gita has nowhere claimed any right over the

property at any prior point of time even in the present proceeding, rightly the claim of the Defendant in that regard has been negated.

9. In the exercise to find out the answer to the substantial questions of law in addressing the rival submission of the parties, as above, it would be apt and proper to first note that the original lessees were Bajrang Lal and Parameswar Lal. One Jayanarayn had two sons, namely, Bhikraj and Parameswar Lal Podar. Bajrang Lal is the son of Bhikraj. Bhikraj died leaving behind his son Bajranj when Parameswra Lal died issueless and his wife had predeceased him. The lease in the year 1928 stood in the name of Bajranjg Lal and Parameswra Lal standing renewed in the year 1952 in the name of Parameswar Lal and wife of Bajrang (Puni Devi) which again came to be granted in favour of Puni Devi and Subash, by order dated 09.01.1980 in Khasmahal Lease Case No.187 of 1976 for a period of thirty (30) years. The Plaintiff has also mutated the leased land in her name on 22.01.2001. Thus, she is the recorded tenant at present.

The Defendant when claims that Gita is the daughter of Parameswar Lal, the Plaintiff states that Parameswar died in the year 1979 without any issue. The courts below have concurrently held that Parameswar was having no daughter as 'Gita Devi'. Admittedly no one named Gita Devi has ever laid any claim over the property in question before any Authority claiming her status as the daughter of Parameswar Lal. Moreover, when the Defendant claims herself to be Power of Attorney Holder of that Gita Devi Agarwal and it is said by him that he under that authority had sold the portion of the suit land to his son; in the present suit, Gita Devi has not been brought to the picture and it is being argued that the suit, in the absence of Gita, is not maintainable especially when the Court is required to answer the status of Gita vis-à-

vis Parameswar Lal in view of the asserted fact that Parameswar Lal had a daughter named Gita. From the side of the Defendant, none of the relations of Parameswar Lal has been brought to the witness box. No such documentary evidence of clinching nature is forthcoming. On the other hand, the Defendant examined as D.W.1 having deposed that Puni had kept Subash, he is unable to say as to if that Subash is son of Puni. He further states that Subash married while staying in that suit house and after his marriage with Sakuntala to the wedlock of which, the Plaintiff was born. Basing upon said state of affair in the evidence and again taking into account the evidence of D.W.1 that Puni died in the year 1993 and Subash committed suicide in the year 1980, the First Appellate Court's view that Subash is the son of Puni and Plaintiff thus is the legal heir of Puni and Subash cannot found fault with when it also receives support from the evidence of D.W.2 that he has seen Subash who is the son of Puni who is the wife of Bajrang and that Plaintiff is the daughter of Subash and Sakuntala.

10. Coming to the next question raised by the Defendant that Gita Devi is the daughter of Parameswar Lal which is denied by the Plaintiff; the First Appellate Court, discussing the evidence of the Plaintiff and the documents on record coupled with the fact that at no point of time anyone named Gita had ever lodged any claim any where nor has demanded any such right over the property as being the daughter of Parameswar Lal has rightly held that the onus of proof has shifted upon the Defendant to establish that factual aspect. Having said so, the First Appellate Court then has rightly proceeded gone to examine the evidence of the Defendants. At paragraph-9 of the judgment, the discussion of the evidence of DWs is seen to have been made exhaustively. The First Appellate Court having critically examined the

evidence has found the same to be far from the satisfaction that the Defendant has a case on that score. This Court having carefully gone through the same finds nothing wrong with the conclusion of the First Appellate Court that too when in that exercise, it has not left any material evidence from being taken into consideration nor has taken such materials not appearing in evidence into consideration.

In that view of the matter, the Defendant in this suit having just projected a case that Parameswar Lal was not issueless but had a daughter to succeed who has succeeded to half of the property having interest of as that of Parameswar Lal and more so when he claims to be the Power of Attorney Holder of Gita Devi Agarwal has not taken any step in that regard too; said move to defeat the suit as laid and for the reliefs claimed at his instance has to be whittled down which has rightly been done by the Courts below.

When the above stands the conclusion; the claim of the Defendant that his son has acquired title over the property by way of purchase of Gita's interest falls flat and the Defendant's possession has to be termed to as that of a trespasser liable to be evicted.

For all the aforesaid discussion and reasons; the substantial questions of law stand answered in favour of the Respondent's case and claim which in turn leads to confirm the judgment and decree passed by the Courts below.

11. In the result, the Appeal is hereby dismissed with cost throughout.

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