

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP No. 984 OF 2019

Radhamani Dei @ Choudhury and others ***Petitioners***

Mr. K.K. Mishra, Advocate
on behalf of Mr. H.M. Dhal, Advocate

-versus-

Sanjukta Ojha ***Opp. Party***
Mr. Gopinath Mishra, Advocate

CORAM:
JUSTICE K.R. MOHAPATRA

ORDER
12.08.2022

Order No.

6. 1. This matter is taken up through hybrid mode.
2. This CMP has been filed assailing the order dated 19th March, 2019 (Annexure-3) passed by learned District Judge, Cuttack in F.A.O. NO.107 of 2017, whereby reversing the order dated 1st October, 2017 passed by learned Senior Civil Judge, 1st Court, Cuttack in I.A. No.1 of 2015 (arising out of C.S. No.787 of 2015) directed the parties to maintain status quo over the Schedule-B land of the Plaintiff till disposal of the suit.
3. Mr. Mishra, learned counsel appearing for the Petitioner contends that the C.S. No.787 of 2015 has been filed for decree of partition defining 1/6th share in the Schedule-A land and for declaration of right, title and interest of Schedule-B land as well as for permanent injunction. It is his submission that admittedly Schedule-A land is ancestral property of the parties to the suit. Schedule-B land has been recorded in favour of the

Defendant No.1, the mother of the Plaintiff and Defendant Nos.2 to 5 in the consolidation R.O.R. Claiming that in the 7th death anniversary, Schedule-B property was allotted in favour of the Plaintiff in lieu of her share in the ancestral property, the Plaintiff claimed declaration of right, title and interest in respect of the Schedule land. Along with the plaint, the Plaintiff also filed an application under Order XXXIX Rules 1 and 2 C.P.C. in I.A. No.1 of 2015, which was dismissed vide order dated 1st November, 2017 holding that although the Plaintiff has prima facie case in the suit, but she could not establish the balance of convenience in her favour as well as irreparable loss to be sustained to her in the event the injunction is not granted in favour of her. Learned trial Court came to such finding that on the basis that the suit land is exclusively recorded in the name of Defendant No.1, mother of the Plaintiff and other Defendants. Assailing the same, the Plaintiff filed F.A.O. NO.107 of 2017, which was allowed on a flimsy ground without discussing the ingredients of Order XXXIX Rules 1 and 2 C.P.C.. On a probable plea that the Plaintiff is in possession over Schedule-B land by constructing a kitchen over Ac.0.03 decimals and using rest of the land as her kitchen garden, the impugned order has been passed. Relying the decision in the case of *Wander Ltd. and another –v- Antox India P. Ltd.*, reported in 1990 Supp (1) SCC 727, Mr. Mishra, learned counsel for the Petitioner submits that an order of injunction granted by learned trial Court should not be interfered with likely by the appellate Court unless the same

has been passed in exercise of discretion arbitrarily or capriciously or perversely and where the Court had ignored the settled principles of law regulating grant or refusal of interlocutory injunction. In the instances case, learned appellate Court has not recorded any finding with regard to the aforesaid requirement. He has not also discussed as to how the trial Court has exercised the discretion arbitrarily, capriciously or perversely. He has also not recorded any finding that how settled position of law has been ignored while deciding the application under Order XXXIX Rules 1 and 2 C.P.C. He further submits that since the land in question is exclusively recorded in the name of the Defendant No.1, no order of injunction can be granted against her. He, therefore, prays for setting aside the impugned order.

4. Mr. Mishra, learned counsel for the Plaintiff-Opposite Party objecting to the same submits that although learned appellate Court has not expressed in too many words regarding ingredients of order XXXIX Rules 1 and 2, but impliedly he has applied the same and has passed the impugned order of status quo. While adjudicating the matter, the appellate Court has taken into consideration that the Plaintiff-Opposite Party has probably case that is prima facie case for consideration, which has also been held by the trial Court. Taking into consideration that the status of the suit property should be maintained during pendency of the suit, learned appellate Court directed the parties to maintain status quo over the suit land. Law is well settled that in order to evict a trespasser the true

owner has followed the procedure of law. In support of his case of relies upon the case of *Nabakishore Sahu and another –v- East India Arms Company*, reported in 85 (1998) C.L.T. 164. In the said case while reversing the order passed by both the Courts refusing injunction, this Court directed the parties to maintain status quo to preserve the property during pendency of the suit. It is his submission that the Petitioners are always at liberty to move for variation of the order in the change circumstance. Taking into consideration the facts and circumstances of the case prevailing them the impugned order has been passed, which requires no interference.

5. Upon hearing learned counsel for the parties and on perusal of the record, it is apparent that the Schedule-B property has been recorded exclusively in the name of Defendant No.1, the mother of the Plaintiff and other Defendants. Schedule-A property is their ancestral property, which is being occupied by the Defendants. The Plaintiff has her self-acquired property adjacent to the Schedule-A property. It is her case that she is using her property by constructing Ac.0.03 decimals of land and rest of the land is being used as her kitchen garden. It is her case that in the 7th death anniversary of her father, the Schedule-B property was allotted in her favour in lieu of her share in Schedule-A property. The veracity of such averments can only be proved by leading cogent evidence while adjudication of the suit. Both the Courts have held that the Plaintiff has a prima facie case in her favour. Although the Defendants strictly denial that the Plaintiff is not

in possession over Schedule-B property by the Plaintiff claims that she is in possession over Schedule-B property by constructing kitchen and is using rest of the land as her kitchen garden. Law is well settled that the subject matter of dispute should be preserved during pendency of the suit. In that view of the matter, the balance of convenience lings in favour of the plaintiff and she will suffer irreparable loss, if any construction over the Schedule-B is demolished during pendency of the suit. It is more so because of the settled position of law that a trespasser cannot evicted without following due procedure of law. Although the factum of possession of the Plaintiff has not yet been proved, but taking into consideration that the subject matter of dispute should be preserved during pendency of the suit, I find no infirmity in the impugned order.

6. It is, however, made clear that in the change circumstances, the Defendants will be at liberty to file an application for variation of the order and in that event learned Court shall consider the same on its own merit.

7. Accordingly, this writ petition is disposed of.

Urgent certified copy of this order be granted on proper application.

(K.R. Mohapatra)
Judge