ORISSA HIGH COURT, CUTTACK

FAO NO. 326 OF 2004

From the order dated 18.08.2004 passed by Sri N. Sahoo, Civil Judge (Senior Division), First Court, Cuttack in C.M.A. No.224 of 2004 (arising out of Civil Suit No. 285 of 2004).

———

Pawan Kumar Bhawsinka …… Appellant

-Versus-

Santosh Kumar Bhawsinka
and others …… Respondents

For Appellant - M/s D.P.Mohanty and
P.K.Mohanty

For Respondents - M/s P.K.Pattnaik, A.K.Dwivedy,
M.K.Mishra, G.M.Rath and
S.K. Pattnaik.

PRESENT:-

THE HON'BLE MR. JUSTICE PRADIP MOHANTY

Date of hearing : 30.03.2005 Date of judgment : 20. 05.2005

PRADIP MOHANTY, J. This is an appeal against the order dated 18.08.2004 passed by the Civil Judge (Senior Division), 1st Court, Cuttack in C.M.A. No.224 of 2004 arising out of Civil Suit No.285 of 2004 directing both the parties to maintain status quo in respect of the suit schedule property till disposal of the suit.

2. Respondents are the plaintiffs and appellant is defendant no.1 in the aforesaid civil suit. In the said suit, the plaintiffs filed an application vide C.M.A. No.224 of 2004 praying for injunction as against defendant no.1. The case of the plaintiffs is that the suit land is the joint family property and the same has not been partitioned by metes and bounds. During the life time of the father of the parties, there was a family arrangement allotting separate portions of the property to different co-sharers. The father himself had kept some property with him and it was decided that partition shall come into effect after preparation of

allotment map containing the signature of the parties. After the death of the father, the appellant-defendant no.1, even without preparation of the allotment map, created disturbance in the peaceful possession of the co-sharers and forcibly occupied the portion kept by the father. He also arbitrarily entered into an agreement with some outsiders and is going to construct a tower in the open terrace of the first floor, which is in common use of the parties. He has also constructed pillars over the passage in order to support the proposed tower to the detriment and prejudice of all other co-sharers. The further assertion of the plaintiffs is that the proposed construction of the tower would damage the old building.

3. The appellant-defendant no.1 filed his objection challenging the maintainability of the case. His specific case is that he is exclusively occupying Holding No.728, which is the second floor of the building constructed by him after obtaining necessary permission and sanction from the Cuttack Development Authority. Before letting out the roof to 'Airtel', he obtained written consent from respondents 3 and 4. So the question of forcible construction without the consent of other co-sharers does not arise. Moreover, the respondents are estopped from raising objection to the erection of the tower as the tower has been set up on the roof of the second floor, which he himself has constructed by spending substantial amount.

4. After hearing the parties, the learned Civil Judge (Senior Division), by order dated 18.08.2004 came to hold that the suit property is joint family property and parties are in separate possession of different portions by amicable arrangement and passed the order of status quo. Against the said order, the appellant has preferred the present appeal.

5. Mr. Mohanty, learned Senior Advocate, appearing for the appellant, submitted that there was a family arrangement allotting separate portions of the property to different co-sharers. The appellant is exclusively occupying plot no.728, which is the second floor of the building constructed by him after obtaining necessary permission and sanction from the Cuttack Development Authority. Therefore, the balance of convenience is in favour of the appellant. He further submitted that the trial court committed an error of fact that the tower is being erected over the terrace of the second floor constructed by the appellant, but not over the first floor. By the memorandum of settlement dated 01.06.1996, the father of the parties had divided the property among his

sons and had kept one share with him. There was severance of status irrespective of the fact whether any of the co-sharers signed the memorandum of family settlement. The first floor was allotted to the appellant and he acquired a separate holding number in respect of the portion of the property allotted to him as per the Orissa Municipal Act, 1950. The other co-sharers, i.e., the plaintiff-respondents, had also got separate holding numbers. According to the learned counsel for the appellant, the order of status quo passed by the learned Civil Judge (Senior Division) is non est in the eye of law and beyond the power of the trial court inasmuch as the order of status quo is not the creature of any statute. He contended that when the application was confined to grant of injunction, the learned Civil Judge (Senior Division) could have either granted or rejected the said prayer.

6. Mr. Patnaik, learned counsel for the respondents, on the other hand, contended that the appellant and the respondents are the co-sharers being the legal heirs of late Shyamsundar, who had made a family arrangement and prepared a memorandum of settlement allotting different portions of the suit property to each of his sons and keeping one portion for himself on a plain paper in which all of them put their signature except one son Surendra and daughter Manju, who were not present at that time. It was decided among the parties that the memorandum of settlement would be given effect to after preparation of a partition map as per scale. But due to the death of Shyamsundar, Surendra and Manju, the partition map could not be drawn up. Therefore, the partition suit has been filed. After the death of his father, the appellant acted in an illegal manner by misappropriating the rent of the premises allotted in favour of Shyamsundar. He even went to the extent of blocking the common passage and the terrace of the first floor by erecting the tower without the consent of the other co-sharers. Mr. Patnaik further submitted that the documents with regard to separate holding numbers granted by the Municipality and permission of the Cuttack Development Authority for making construction were not filed before the trial court. The principles of prima facie case, balance of convenience and irreparable loss are all in favour of the respondents. He also submitted that the meaning of the term ‘status quo’, as per the Black’s Law Dictionary, is “the situation that currently exists”. Therefore, the trial court has rightly directed the parties to maintain status quo and there is absolutely no infirmity in the impugned order.

7. In the midst of hearing, learned counsel for the appellant filed some documents relating to grant of separate holding number by the Municipality, permission of the Cuttack Development Authority and the lease agreement between the appellant and the 'Airtel' company along with an affidavit.

8. Heard the rival contentions of the parties. At the outset, it is necessary to determine whether at this stage this Court can accept the aforesaid documents as additional evidence and consider the same for the purpose of vacating the status quo order. For this purpose, the provisions of Order-XLI and Rule-27 of the C.P.C. dealing with production of additional evidence are quoted hereunder :-

> " **R-27. Production of additional evidence in Appellate Court**-(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if-
>
> (a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or
>
> (aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or
>
> (b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.
>
> (2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."

From a bare reading of the aforesaid provisions, it is clear that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate court. But under special circumstance, the appellate Court can allow production of additional evidence, and whenever additional evidence is allowed to be produced by the appellate court, the said

court shall record reasons for its admission.. As it appears, the above provision is applicable to the appeals from the original decrees and not to the appeals filed against the interlocutory orders including those passed under Order XXXIX Rule 1 C.P.C. In the instant case, admittedly the documents in question were not filed before the trial court by the appellant. For the first time, those have been filed in this Court with an affidavit without the requisite application for production of additional evidence. In the circumstances, this Court is not inclined to accept the documents in question as additional evidence.

9. In support of his contentions, Mr. Mohanty relied upon the decisions reported in *A. Raghavamma and another –v- A. Chenchamma and another*, AIR 1964 SC 136; *Sumi Debi –v- Pranakrushna Panda*, AIR 1956 Orissa 68; *K.G.Shivalingappa (D) by L.Rs. and others –v- G.S.Eswarappa and others*, AIR 2004 SC 4130; and *Patel Rahnikant Dhulabhai and another –v- Patel Chandrakant Dhulabhai and others*, AIR 2004 Gujarat 300. On a careful reading of these decisions, this Court finds that none of them is applicable to the facts and circumstances of the present case.

10. Mr. Patnaik appearing for the respondents drew the attention of this Court to the decisions reported in *Bhagwant P. Suslakhe –v- Digambhar Gopal Sulakhe*, AIR 1986 SC 79; *Narayan Bisoi and another –v- Raghunath Bisoi*,1986(II) OLR 145; and *Maharwal Khewaji Trust (Regd.), Faridkote –v- Baldev Dass*, 2005(1) CLR 88;.

11. The application in which the impugned order was passed arose out of a suit for partition. So, at this stage it cannot be pre-judged that there was a complete partition and parties are in separate possession of their respective shares. The house and homestead are to be treated as joint family property unless and until it is proved that by the memorandum of settlement dated 01.06.1996, there was a complete partition, which is to be decided in the suit. Accordingly, there appears to be a prima facie case for partition. With regard to irreparable loss and balance of convenience, it may be observed that during the pendency of a suit for partition, it is desirable that the parties should maintain status quo. A party makes valuable construction by spending huge amount naturally claims the constructed portion to his share, and thereby, the other co-sharers are put to difficulty in the sense that their shares are truncated or they have to remain satisfied by getting some compensation, which may not be adequate. In any case, while a suit for partition is pending no permanent

construction should be made or permitted on the suit homestead. This view finds support from the ratio decided in Narayan Bisoi's case (supra). In the event ultimately the appellant succeeds in the suit, he shall be entitled to claim damages as per the ratio decided in Maharwal Khewaji's case (supra). It is fallacious to contend that the trial court can only grant injunction or refuse the same and cannot pass an order of status quo. Law is well settled that the trial court can pass an order of status quo, particularly when the suit is for partition. Therefore, the learned Civil Judge (Senior Division) has rightly passed the impugned order directing both the parties to maintain status quo.

12. In the result, the appeal being devoid of any merit is dismissed. The trial court is directed to conclude the suit by the end of December, 2005. The LCR be sent back forthwith.

.....
Pradip Mohanty, J.

Orissa High Court, Cuttack
The 20th May, 2005 / *Samal*