

M.M.DAS, J.

S.A.O. NO.4 OF 2011 (Decided on 29.08.2011)

BALARAM BEHERA

..... Appellant.

.Vrs.

RAMA CHANDRA KAR

..... Respondent.

CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – ORDER 41, RULE 23-A & 24.

For Appellant - M/s. S.K.Mishra, J.Pradhan, P.Prusty,
D.K.Pradhan & D.Samal.

For Respondent - M/s. A.P.Bose, P.S.Nayak, R.K.Mahanta,
N.Hota & N.Pradhan.

M. M. DAS, J. This appeal has been filed under the provision of Order-XLIII Rule-1 Sub-rule-(u) of the Code of Civil Procedure against the judgment passed by the learned Civil Judge (Sr. Division), Kamakhyanagar in R.F.A. No.1 of 2010 dated 24.02.2011. The learned Civil Judge (Sr. Division) by the impugned judgment set aside the judgment and decree passed by the learned trial court and remanded the suit to the trial court for fresh disposal in accordance with law with a further direction that the trial court shall frame the seven issues framed by the first appellate court in the impugned judgment as issue numbers 4 to 10 after issue no.3, which was framed by the trial court during trial of the suit. Both the parties were granted liberty to adduce further evidence with regard to the said issues, framed by the learned lower appellate court.

2. As it appears that C.S. No.42/2008/19/2009 was filed by the appellant as plaintiff against the respondent as defendant for grant of permanent injunction, the plaintiff's case in short was that the suit land belongs to the State. The forefathers of the plaintiff reclaimed and possessed it during their lifetime. After them, the plaintiff's father possessed the same with his only brother till his death in 2006. The suit land appertains to plot no.407 constituting an area of Ac. 0.124 decimal recorded as jungle and plot no.408 constituting an area of Ac. 0.326 decimal also recorded as jungle, in village Natakata, Bhuban, under Khata No.427. Plaintiff claimed that he being the legal heir of his father- Dhani Behera is continuing in possession over the same with his mother and his brother. This fact has been noted in the remarks column by the Settlement Authority in the record of rights. Basing on the above uninterrupted continuous possession from the time of his forefathers, the plaintiff claimed to have perfected his title by way of adverse possession over the disputed property and he also pleaded to have no cause of action against the State. It was alleged in the plaint that the defendant having no right, title and interest over the land in question threatened to dispossess the plaintiff by propagating publicly, to raise permanent construction over the same and for that purpose gathered materials. It was further alleged that even though an order of status

quo was passed by the trial court, the defendant forcibly constructed a wall on suit plot no.408.

3. The defendant on appearing in the suit filed his written statement, inter alia, stating that plot nos.406 and 410 are also Government lands adjacent to the suit plots and there was a passage over plot nos.405,408 and 410 to the main road. The father of the plaintiff-Dhani Behera along with his brother Ghani Behera occupied the suit plot and constructed house over it. They used the passage for ingress and egress to their house. As the family members increased, the sons of the Dhani constructed their house over suit plot no.407 and Ghani @ Ghanashyam's son constructed their house over plot no.408 without enclosing their passage. The fact of the plaintiff acquiring the entire suit plot was denied. But it was admitted that their names have been recorded in the remarks column in the record of rights, which according to the defendant was done by gaining over the Settlement Officials. The defendant further pleaded that all land owners have got easementary right over the passage over plot nos.405, 408 and 410. Plot No.409 is situated adjacent to plot no.408 and a portion of this land is purchased by defendant from its owner. With an intention to acquire the said plot, the plaintiff has raised the boundary dispute and except a passage over suit plot no.408, defendant has no claim over the rest of the land. The learned trial court framed as many as five issues which are as follows:-

1. Whether there is any cause of action to file this suit ?
2. Whether the state is the necessary party and without whose presence the suit is bad for non-joinder of parties ?
3. Whether the plaintiff is in possession over the suit land ?
4. Whether the plaintiff can claim injunction in presence of other co-shares ?
5. Whether the plaintiff can claim permanent injunction without praying for recovery of possession from the defendant ?

4. Deciding the said issues, the learned trial court found that there was a cause of action for filing of the suit. The suit is maintainable without the State as a party. There is no passage existing over plot no.408, the defendant has raised a wall over the said plot no.408 when the order of status quo was in force. The plaintiff has a right to claim injunction on behalf of the other co-shares also and as per the decision in the case of **Bauri and Others V. Natabar Swain and Others**, A.I.R. 1982 Orissa 268, the plaintiff having been deprived of his possession during the operation of the order of status quo a relief for recovery of possession can be granted even if such relief has not been asked for along with a relief for permanent injunction.

5. The learned trial court basing on the above findings decreed the suit by directing the defendant to deliver vacant possession of the suit land to the plaintiff within two

months and to demolish the wall built on the suit land within the said period and clear the debris at his own cost failing which the plaintiff shall demolish the wall and the cost of such demolition shall be realizable by the plaintiff.

6. The defendant-respondent carried the matter to the first appellate court in the aforesaid RFA No.1 of 2010. The learned lower appellate court in the impugned judgment after noting the facts of the case and the issues framed by the learned trial court and the prayer made in the plaint, came to the conclusion that the issue no.5 as framed by the learned trial court is found to be wrongly framed. Similarly, issue no.4 as framed by the learned trial court is found not necessary, inasmuch as, there is no such bone of contention raised by either party. Accordingly issue nos.4 and 5 as framed by the learned lower court is to be struck out. The learned lower appellate court thereafter in the impugned judgment has stated that on careful consideration of the pleadings of both the parties, the following issues are required to be settled for complete and effective adjudication of the matters in controversy and framed the following issues:

- (1) Whether the suit is maintainable?
- (2) Whether the suit is barred by law of limitation?
- (3) Whether the plaintiff is entitled for permanent injunction in respect of suit properties as shown in schedule to the plaint?
- (4) Whether the plaintiff is entitled for mandatory injunction in respect of suit plot no.408 of Mouza Natakata with a direction to remove the wall erected during pendency of the suit against the defendant?
- (5) Whether the plaintiff is entitled for recovery of possession in respect of suit plot no.408?
- (6) Whether the defendant has got easementary right as of right over a portion of suit plot no.408 as shown in red colour in a separate map attached with the W.S.?

7. On framing the above issues, it set aside the judgment and decree of the trial court and remitted the matter back for fresh adjudication, as already stated above. Being aggrieved, the plaintiff-appellant has approached this Court in the present appeal.

8. Mr. Mishra, learned counsel for the appellant submitted that the learned lower appellate court has completely failed to note the provision of Order-XLI, Rule-24 of the Code of Civil Procedure and though noted in the impugned judgment that the appellate court should, as far as possible, decide on all issues to avoid piecemeal trial, protracted litigation and repeated appeals in the same suit, has committed an error of law in remitting the matter afresh to the learned trial court for a de novo trial.

9. Mr. Bose, learned counsel for the respondent, on the other hand, contended that the learned trial court has to frame specific issues, which were raised in the suit and was

noted by the learned lower appellate court, who on examining the pleadings of the parties, framed the real issues to be tried in the suit. Therefore, in support of the impugned judgment, he argued that this Court should not interfere with the said judgment as there is no illegality on the part of the learned lower appellate court in remanding the suit to the learned trial court for fresh adjudication.

10. This Court on analyzing the facts of the case as per the pleadings of the parties finds that originally the suit was filed for a relief of permanent injunction, which was prohibitory in nature. But subsequently, on account of the alleged violation of the order of status quo and allegation of raising of a wall over Plot no.408 by violating the said order of status quo by the defendant, the plaintiff prayed for amendment of the plaint by introducing a relief for mandatory injunction seeking removal of the wall constructed over the said plot and recovery of possession. The said amendment was allowed. Parties have led evidence in respect of their respective contention made in their pleadings.

11. It is a well settled proposition of law that as per the provision of Rule-24 of Order-XLI where parties have led evidence in respect of issues involved in a suit and such evidence is available on record and is sufficient to enable the appellate court to pronounce the judgment, the appellate court even if resettles the issues, if necessary, shall finally determine the suit notwithstanding that the judgment of the court from whose decree the appeal is preferred has proceeded upon some ground other than that on which the appellate court proceeds.

12. In the instant case, as stated above, the parties having led evidence on the contentious issues, this Court being of the opinion that there was sufficient evidence on record on which the learned lower appellate court could have pronounced its judgment even after resettling the issues so as to finally determine the suit, has committed an error of law in remitting the matter back to the learned trial court for trying the suit afresh by exercising power under Order-XLI, Rule-23-A, C.P.C.

13. Hence, this Court is of the view that the impugned judgment passed by the learned lower appellate court cannot be sustained. The same is accordingly set aside and the matter is sent back to the learned lower appellate court to rehear RFA No.1 of 2010 afresh and finally determine the suit on the evidence and materials available on record with liberty to reframe the issues, if necessary. The appeal shall be disposed of within a period of six months from the date of communication of this order by giving opportunity of hearing to both the parties.

14. The S.A.O. is accordingly allowed, but in the circumstances without cost.

Appeal allowed.