ORISSA HIGH COURT: CUTTACK

SECOND APPEAL NO.251 OF 1997

From the judgment and decree dated 28.06.1997 and 19.07.1997, respectively, passed by Shri G.C. Mohanty District Judge, Keonjhar in T.A. No.14 of 1989 reversing the judgment and decree dated 30.01.1989 and 13.02.1989, respectively, passed by Sri J.N. Panda, Sub-Judge, Keonjhar in T.S. No.46 of 1985.

Ratan Garai ..... Appellant

V e r s u s

Hiralal Ram (dead)
after him, his L.Rs.
Smt. Pritiprava Lahari & others ... ... Respondents

For Appellant : Mr. P.C. Acharya

For Respondents : M/s. B.H. Mohanty, R.K. Nayak, B. Das, T.K. Mohanty, P.K. Swain, M. Pal & D.P. Mohanty

P R E S E N T :

THE HONOURABLE MR. JUSTICE RAGHUBIR DASH

Date of hearing : 15.10.2014 Date of judgment : 29.10.2014

R. DASH, J. This Second Appeal is against the judgment and decree dated 28.06.1997 and 19.07.1997, respectively, passed by the learned District Judge, Keonjher in T.A. No.14 of 1989 reversing the judgment and decree dated 30.01.1989 and 13.02.1989, respectively, in T.S. No.46 of 1985 passed by the learned Sub-Judge, Keonjhar.

2. The plaintiff is the Appellant. The defendant is the original Respondent after whose death, his L.Rs. have been arrayed

as R-1(a) to R-1(d) in this Second Appeal. Plaintiff's suit is for declaration that decree passed in T.S. No.19 of 1970 is not binding to him, with further prayer for permanent injunction against the defendant. It was decreed by the learned trial court. In the First Appeal the judgment and decree of the learned trial court have been set aside and the plaintiff's suit has been dismissed. Being aggrieved, the plaintiff has preferred this Second Appeal.

3. The plaint story is that plaintiff, who belongs to Purulia District in the State of West Bengal, came to Keonjhar in 1951 and started his business in partnership with one Kalicharan Sahu. They started one Grocery Shop in Gujuri Market area in 1952. In the following year he started running his own Tea Stall over the suit land with an area of Ac.0.03 appertaining to Plot No.695 under Hal Khata No.137 of Mouza-Hatiatanagar-Bhairabpur. In 1962 he started a Sweetmeat-cum-Tea Stall in the very same place. In the year 1970 he constructed a regular shed over the suit land. In 1971 he took electricity connection to his shed and also obtained licence from the Municipality for his shop in the year 1974. Thus, the plaintiff has been in peaceful possession of the suit land without interference from any quarter. When matter stood thus, in 1985 the defendant having no right, title and interest over the suit land collected construction materials in order to raise construction over the suit land. On enquiry, plaintiff could come to know that in a collusive suit (T.S.

No.19 of 1970 in the court of Subordinate Judge, Keonjhar), in which the plaintiff was not a party, a compromise decree was obtained under which the suit land was allotted to the defendant's share.

4. In the written statement the defendant has claimed that the suit land originally belonged to Deity-Balunkesh Mahesh. One Ghanashyam Behera got the suit land under registered permanent Lease Deed No.1650/29.07.1960 from the then Trustee of the Deity. Said Ghanashyam had sold this land to Raghunandan Ram under Registered Deed No.1327/26.06.1962 and gave delivery of possession. Said Raghunandan is the brother of the defendant. The land was purchased by Raghunandan as a Manager of the joint family. Till 1967, Raghunandan had been running a Grocery Shop on his own land adjoining to the suit land. The plaintiff was a domestic servant under Raghunandan. Over a part of the suit land, there was also a storage house. As there started family dissension, a suit for partition bearing T.S. No.19 of 1970 was filed in 1970 which ended in a compromise decree under which suit land was allotted to the defendant's share. It is claimed that since he could not get delivery of possession of the suit land, he started one execution proceeding. It is further claimed that plaintiff with the permission of said Raghunandan had opened a Tea Stall over the suit land and also obtained licence and took electricity connection in his name. It is claimed that on 19.08.1995 the defendant got possession over the

suit land and since then he has been in possession thereof. By way of an amendment, the defendant has further added that as the deity had intermediary interest in the suit land the same vested in the State Government and that in the Hal settlement R.O.R. the suit land stands recorded as Anabadi land with note of possession made in the defendant's name.

5. Learned trial court held the decree in the partition suit to be not binding on the plaintiff observing that the suit land having vested in the State, the defendant has failed to establish that he or his brother is a tenant on the date of vesting and that the plaintiff has been in possession of the suit land since 1966-67. Learned lower appellate court reversed the decree observing that plaintiff's brother being a tenant under the intermediary he continued to be a tenant under the State even after the vesting and the defendant having a better title than the plaintiff over the suit land, injunction cannot be granted against the defendant on the basis of plaintiff's possession, more so when his possession has been disturbed in 1986 by way of removal of the unauthorized structure raised by the plaintiff on the suit land by local Municipality.

6. In the Second Appeal the following substantial questions of law have been framed:

> (1) Whether the alleged permanent lease of Debottar property without permission of the Commissioner of

Endowment is valid in view of Section 19 of the Orissa Hindu Religious Endowments Act ?

(2) Whether Raghunandan Ram or his brother Hiralal Ram (defendant-respondent) was/is a tenant under Section 8 (1) of the Orissa Estates Abolition Act ?

7. Facts admitted or not disputed are that the suit land originally belongs to deity Balunkesh Mahesh. It was declared to be Trust Estate under Section 13-B of the Orissa Estate Abolition Act, 1951. Subsequently, the State Government under a notification dated 3.1.1970 declared that the disputed Trust Estate passed to and became vested in the State free from all encumbrances. In the Hal Settlement the suit land stands recorded as Anabadi land whereas in the remarks column of the R.O.R. note of possession is in the name of the defendant.

8. Learned counsel for the appellant has argued on substantial question No.1 submitting that the registered permanent lease deed dated 29.7.1960 relied on by the defendant is invalid and the lease is void inasmuch as permission of the Commissioner of Endowment as required under Section 19 of the Orissa Hindu Religious Endowment Act, 1951 (for short, the OHRE Act) was not obtained for leasing out the property. In support of the contention he has cited the judgment of this Court reported in ***108 (2009) CLT 657*** (Bijay Ketan Brahma Vrs. State of Orissa) wherein the law laid down under the said section has been reiterated observing that Section 19

of the OHRE Act creates an embargo in transferring, alienating or leasing out any property for more than five years without the permission of the Commissioner. Therefore, it is observed, a permanent lease in contravention of Section 19 of the said Act is ab initio void. There is neither any pleading nor any evidence showing that the permanent lease granted by the Trustee of the deity Balunkesh Mahesh vide the registered deed dated 26.6.1962 was granted with the permission of the Commissioner. Therefore, the lease in question is ab initio void. Consequently, under a void lease deed Raghunandan Ram, defendant's brother, cannot be said to have been inducted as a tenant by the intermediary prior to vesting and that on that basis he was in possession of the suit property as on the date of vesting. Therefore, it cannot be said to have been established that Raghunandan Ram is a tenant under Section 8 (1) of the Orissa Estates Abolition Act.

No doubt the application of the provision contained in Section 19 of the OHRE Act was neither pleaded nor raised before the learned Courts below. But it is well settled that when a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but also expedient in the interests of justice to entertain the plea (Connecticut Fire Insurance Co. v. Kavanagh: ***(1892) A.C. 473*** cited by the Hon'ble apex Court in

Yeshwant Deorao v. Walchand Ramchand: A.I.R. (88) 1951 SC 16).

9. In view of the discussion made above, the defendant cannot be said to have got any title and interest in the suit land. It is found by both the Courts below that the plaintiff had been in possession of the suit land. It is only a few days prior to institution of the suit the local Municipality demolished the plaintiff's structure over the suit land claiming the same to be unauthorized. Defendant was never in possession of the suit land. Since the plea of inducting defendant's brother as a tenant is found to be unacceptable, the finding of the learned lower appellate court that defendant has a better title than the plaintiff is unacceptable. Plaintiff's suit for permanent injunction against the defendant based on protection of possessory title claiming that his possession is being threatened by the defendant is maintainable. In ***Ramji Rai v. Jagdish Mallah***, reported in ***AIR 2007 SC 900***, it is observed by the Hon'ble apex Court that in case of a permanent injunction based on protection of possessory title the plaintiff is entitled to sue for mere injunction without adding a prayer for declaration of his rights and that mere fact that the question of title may have to be gone into in deciding whether an injunction can be given or not is not any justification for holding that the suit is for a declaration of title and for injunction.

10. The plaintiff being found to be in possession of the suit land and the defendant being found to be having no right, title and interest therein, the decree for partition passed in T.S. No.19 of 1970 is not binding to the plaintiff and he is entitled to get his possession protected as against the defendant who being armed with a decree in the said title suit has put it to execution.

11. In the result, the Second Appeal is allowed on contest but, in the facts and circumstances, without cost. The impugned judgment and decree passed by the learned lower appellate court are set aside and the judgment and decree passed by the learned trial court are confirmed.

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R. Dash, J.

Orissa High Court, Cuttack
The 29th October, 2014/A.K.Kar, Secretary
D. Aiech/Sr. Steno