

IN THE COURT OF THE ADDL. DISTRICT JUDGE, BHUBANESWAR.

PRRESENT:-

Shri I.K. Das, LLB,
Addl. District Judge, Bhubaneswar.

FAO No. 7/43 of 2011-09

(Arising out of order dtd. 17.4.09 passed by learned
Civil Judge, Jr. Division, Bhubaneswar in IA No.
129/09 arising out of CS No. 101 of 2009)

1. Hadu Sethi, aged about 76 years
2. Kartika Sethi, aged about 65 years

Both are sons of Late Bauri Sethi
Resident of Vill: Bhainchua, PS: Baliana, Dist: Khurda

... Appellants

Vrs.

Damei Sethi, aged about 55 years
of Vill: Bhainchua, PS: Baliana, Dist: Khurda

... Respondent.

Advocate for the appellant:- Sri M.R. Barik & Associates
Advocate for the Respondent- Sri G. Patnaik & Associates

Date of argument- Dt.27.03.14

Date of judgment- Dt.05.04.14

JUDGMENT

1) This appeal is directed against the order dtd. 17.4.09 passed by learned Civil Judge (Jr. Divn.), Bhubaneswar in IA No. 129/09 out of CS No. 101/09 wherein the learned lower Court dismissed the IA petition filed by the present appellant who were plaintiff-petitioner before the learned Civil Judge, Jr. Division, Bhubaneswar.

2. The case of the petitioners is that Hal plot no. 1904 and 1905 under Khata No. 460 at mouza Baichuan is the joint ancestral property of the petitioners alongwith other co-sharers. It is still undivided and in joint possession of all the

co-sharers including the appellants and the respondent who is a stranger to the family is creating disturbance with peaceful possession of the appellants and also trying to dispossess them from the suit land. Accordingly, they prayed for grant of temporary injunction against the stranger respondent from doing any high handed action and to encroach into the suit property. It is the grievance of the appellants that the learned lower Court did not take into account that the respondent is a stranger to the family having no right, title and interest over the suit property and rejected the petition on the ground that the matter has already been disposed of in the Court of Addl. District Judge, Fast Track, Bhubaneswar in Misc. Case No. 406/99 and 436/99 arising out of CS No. 39/465 of 2008-99. It is the further grievance of the appellants that the three golden principles namely, prima facie case, balance of convenience and irreparable loss are not considered by the learned lower Court and accordingly submitted that the order is arbitrary without any legal basis and therefore, appeal is preferred praying to set aside the order and to pass the order of injunction against the respondent.

3. On the other hand, learned counsel for respondent objected the claim of the appellants and submitted that the order passed by learned Civil Judge, Jr. Divn. Bhubaneswar is in conformity with legal provision of law under order 39 R 1 CPC and further the matter having been decided by learned Fast Track court, the appellants have no locus standie again to raise the same grievance in another Court being prohibited under the principle of res judicata. Hence, it is submitted to dismiss the appeal awarding cost in favour of the respondent.

4. I have perused the LCR alongwith all connected documents filed by the parties. The present appellants while filed the suit in the learned lower Court as plaintiffs against the respondent, they have not described the address of the O.P in the proper manner. Neither her husband's name nor her father's name has been described, although the given address shows that they belong to village of the plaintiffs. Both the plots consisting of suit land are having area Ac.0.080 dec each. As regards plot No. 1904 under Khata No. 460 is stands recorded in the name of Bauri Sethi, Kelei Sethi, Bhaba Bewa and plot No. 1905 also is recorded in the name of the same persons under Hal ROR. The status of land is stitiban

with category of Gharabari. Plot No.1904 consists of Sabik Plot No. 1794, 1795 and 1796 having area Ac.0.002 dec, Ac. 0.002 dec and Ac.0.004 dec respectively. Plot No. 1794 was in possession of Bauri while Plot No. 1795 and 1796 was in possession of Udia @ Udayanath. It is the case of the respondent that long since before Sabik settlement, the land was partitioned amicably by metes and bounds having separate note of possession and in the year 1943, Udayanath purchased plot No. 1794 from Bauri vide RSD No. 2890 dtd. 25.5.1943. But, during Hal settlement as the appellants were dealing with land records, they have been successful again to record the land jointly by gaining over the settlement authorities. Thus, it is the claim of the respondent that her mother Champa who is the daughter of late Udayanath is the absolute owner of plot No. 1794, 1795 and 1796 which constitute plot No. 1904 in the Hal settlement.

5. As regards plot No. 1905, it also stands recorded jointly in the Hal settlement in the name of Bauri, Kelei and Bhaba (wife of Udayanath). But, during Sabik settlement, this plot No. 1905 was consisting of three plots namely, Plot No. 1797,1798 and 1799. There was also separate note of possession in respect of all the three plots during sabik settlement and each of the co-sharer was having separate possession admitting the family partition by metes and bounds. Plot No. 1797 having area Ac. 0.004 dec was in possession of Bauri Sethi, Plot No. 1798 having area Ac. 0.002 dec was in possession of Balia Sethi and plot No. 1799 having area Ac. 0.002 dec was also in possession of Balia Sethi. Balia died issueless. Therefore, his share of Ac. 0.004 dec of land is to be distributed among other three co-sharers namely, Baja, Undayanath and Bauri and accordingly they have also partitioned the land and are having separate possession to the knowledge of all the co-sharers. It is further submitted that the mother of the present respondent Champa was in possession of Ac.0.11/3rd dec of land having her own possession from plot No. 1905. LCR reveals that Champa, the mother of present respondent preferred one partition suit bearing CS No. 465/99 which was subsequently transferred to the Court of Addl. District Judge, Fast Track, Bhubaneswar. Only Hadu Sethi was the defendant in the said suit. Champa preferred a petition U/o 39 R-1 CPC praying for ad-interim order of injunction

against the defendant Hadu Sethi vide Misc. case No. 406/99 in respect of plot No. 1904. The Court after perusal of records and on examination of documents disposed of the Misc. Case vide order dtd. 4.2.03 and directed that the O.P is restrained from interfering with the possession of the plaintiff-petitioner over plot no. 1794,1795 and 1796.

6. As regards plot No. 1905, Champa filed another Misc. Case against Hadu and Kartika vide Misc. Case No. 436/99 U/o 39 R-1 CPC. In respect of her share of Ac.0.01 1/3rd dec of land and the Court vide order dtd. 25.3.09 has extended the order of status quo till 20.4.09. It is submitted that the said order of status quo still continues in respect of the suit land against both the appellants. The appellants without taking any steps to set aside such order in both the Misc. cases has approached again the Court of Civil Judge (Jr. Divn.), Bhubaneswar by suppressing the fact that the present dispute is pending in the Court of Addl. District Judge, Fast Track, Bhubaneswar since the year 1999. I have taken into consideration the submission of learned counsel for the appellants that the present respondent Damei Sethi is a complete stranger to their family having no interest over the suit land. But, it is the case of the respondent that Damei is the only natural born daughter of Champa and she is also staying with Champa over the suit land. She being the only successor of Udayanath (her grandfather) she is entitled for all the properties. One document is filed in the Court which is the affidavit filed by Champa in IA case no. 129/09 wherein she described that present respondent Damei is her natural born daughter and she is looking after her case land situated at Bhainchua. I have further perused a petition filed u/s 144 Cr.P.C vide CMC No. 1568/08 in the Court of Addl. DCP-cum-Executive Magistrate, Bhubaneswar wherein Bauri Sethi, the father of the present appellants described the respondent as the only daughter of late Champa who is staying at Bhainchua. Thus, there is no dispute regarding the identity of Damei as claimed by the appellants. Under no stretch of imagination, it can be said that she is stranger to the family of the parties and has no interest over the suit land.

7. The three golden principles of injunction are to be tested if the appellants have been successful to prove prima facie case, balance of convenience and

irreparable loss in their favour. On perusal of record and on hearing of the learned counsels, I find that although plot No. 1904 has been jointly recorded in the Hal ROR, but in the Sabik there was separate note of possession and there was also transfer of land between the co-sharers admitting their partition. Thus, the present respondent is the sole owner over the entire plot of 1904 and prima facie it can be said at this stage that the appellants cannot claim any interest over the plot taking the advantage of joint recording in Hal ROR. As regards plot No. 1905, the respondent has established that she has interest over Ac.0.01 1/3rd dec of land and it is also argued that the respondent is staying thereon after construction of her own house. The appellants have asked for injunction over entire plot of 1905. In such circumstance, the respondent will be affected as she is residing on some portion of the plot having his own title . Taking into consideration and the facts placed before the Court, I am of the view that prima facie case does not lean in favour of the appellants to pass order of injunction against the respondent.

8. As regards balance of convenience and irreparable loss, I have already observed above that plot No. 1904 appears to be the sole property of the respondent over which the appellants have no interest. Of course, during hearing of the case, the real fact of partition and share will come to light, but at this stage record reveals that there was earlier partition and amicable transfer of land between the co-sharers. The respondent having interest over a portion of plot No. 1905 cannot be restrained to enjoy her land being the grand daughter of Udayanath. Accordingly, balance of convenience and irreparable loss do not lean in favour of the appellants. Learned lower Court after taking into consideration of all the materials on record and interest of the parties have passed the order and further the matter having been decided earlier in CS No. 465/99 in the Court of Addl. District Judge, Fast Track, Bhubaneswar vide Misc. Case No. 406/99 and 436/99. The appellants are not permitted to agitate the same point in another Court without preferring appeal against the previous order. In the circumstance, I do not find any irregularity or illegality in the order of Civil Judge, Jr. Divn., Bhubaneswar. Hence, it is ordered.

ORDER

The FAO is dismissed on contest but in the circumstance, without cost. The order passed by the learned Civil Judge, Jr. Division, Bhubaneswar is hereby confirmed.

Pronounced in the open Court today this the 5th day of April, 2014
Dictated and Corrected by me.

Addl. District Judge, Bhubaneswar

Addl. District Judge, Bhubaneswar