

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

Present:

Shri A.C.Behera, LL.B.,  
Addl. District Judge,  
Bhubaneswar.

**R.F.A .No.33/09/18/126 of 2013/07/06**

(Arising out of Judgment and decree dated 25.11.2006 &  
12.12.2006 respectively passed in T.S. No. 159 of 1999 by the  
learned Civil Judge Junior Division, Bhubaneswar)

Dated, this the 26<sup>th</sup> day of November, 2014

Nabin Kishore Bhukta, aged about 62 years,  
S/o-Late Hattanath Bhukta of D.L.-32  
V.S.S. Nagar, P.S.-Saheed Nagar,  
Bhubaneswar, Dist.-Khurda.

.....

Appellant.

-Versus-

1. Balukeswar Das, aged about 60 years,  
S/o-Late Narayan Das of V/M-7,  
V.S.S.Nagar, P.S. Sahid Nagar,  
Dist.-Khurda.
2. The Orissa State Housing Board,  
Plot No.A/30, Unit-IV,  
Bhubaneswar-0751001,  
Dist.-Khurda.

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Counsel for the Appellant

Respondents

: Sri P.K.Mohanty & his  
associate Advocates.

Counsel for the Respondent No.1 : Sri G.Panigrahi & his  
Associate Advs.

Counsel for the Respondent No.2. : N o n e

Date of Argument :30.10.2014

Date of Judgment : 26.11.2014

### **J U D G M E N T**

This is an appeal U/s. 96 and O.41.R.1 of the Civil Procedure Code 1908, which has been preferred by the appellant against the judgment and decree dated 25.11.2006 & 12.12.2006 respectively passed in T.S. No. 159 of 1999 by the learned Civil Judge Junior Division, Bhubaneswar, wherein the suit of the plaintiff vide T.S. No.159 of 1999 was dismissed on contest against the defendant No.1 and without contest against defendant No.2 with cost.

The appellant and respondents were the plaintiff and defendants respectively before the learned court below in T.S. No.159 of 1999.

2. The case of the appellant/plaintiff before the learned Court below against the defendants/respondents in nutshell as per the averments made in his plaint was that, the disputed land is the middle space in between the house of the plaintiff and defendant No.1. The plaintiff was allotted with a house bearing No.D.L.-32 and the defendant No.1 was allotted with a house bearing No.V/M-7 by its owner i.e. defendant No.2 (The Orissa State Housing Board) near Sainik School, Bhubaneswar. The

house of the defendant No.1 is towards the east of the plaintiff's house. Both the plaintiff and defendant No.1 had remodeled their respective houses leaving three feet each in between their both the houses. The plaintiff had an entrance and exist outlet towards the east of his plot vide D.L.-32 and the middle space of 3 feet was using by him as pathway to approach the main road. But all on a sudden, the defendant No.1 constructed a wall on dated 11.06.1999 towards the west of his plot No. V/M.7 touching the wall of the plaintiff covering the entire middle space in between their both the houses, for which, the eastern side road of the plaintiff's house was encroached by the defendant No.1. So, the plaintiff faced much inconvenience to reach at the main road from his house, as the defendant No.1 had infringed the right of his easement by encroaching upon the space towards east for reaching the main road. For which, without getting any way, the plaintiff approached the learned court below by filing a suit against the defendant No.1 by arraying the real owner of the suit land i.e. defendant No.2 as a party thereof and prayed for passing the decree for mandatory injunction against the defendants to remove the boundary wall from the suit land and also to pass a decree for permanent injunction against the defendants from coming upon the suit land or from interfering into his possession over the suit land in any manner alongwith other relief(s) to which,he (plaintiff) is

entitled for as per law and equity.

3. Having been noticed from the court, out of the two defendants, only the defendant No.1 contested the suit of the plaintiff by filing written statement, but the defendant No.2 did not choose to contest the same and accordingly the defendant No.2 was set ex parte.

4. As per the pleadings of the defendant No.1 in his written statement in brief that, the plaintiff has no cause of action to file the suit. The suit filed by him is not maintainable. The suit is barred by limitation and bad for non-joinder of necessary parties. According to him(defendant No.1), most of the averments made by the plaintiff in his plaint are not correct and the real story of the case is that, the plaintiff is not the owner of the suit land and the same is under his (defendant No.1's) possession. The suit land was never used by the plaintiff at any point of time for ingress and egress to his house. He (defendant No.1) has/had been using the suit land as a part and parcel of his homestead land since the time of construction of his house, but as the plaintiff was trying to demolish the boundary wall therefrom in his absence, for which he had lodged a F.I.R. against him (plaintiff) at the P.S. The plaintiff is not staying with his family in his allotted house vide DL-32, but

the same has been let out from the very beginning of its allotment. He ( plaintiff) is staying with his family in Qr.No. 2 RB/44 at GRIDCO Colony. The plaintiff has its own pathway to his house No.D.L.32. But in order to grab the suit land illegally, he ( plaintiff) has filed the suit against the defendants for which, the suit of the plaintiff is liable to be dismissed with costs.

5. Basing upon the aforesaid pleadings and matters in controversies between the parties, altogether eight numbers of issues were framed by the learned Court below and the said issues are :-

### I S S U E S

- (i) Whether the suit is maintainable in the present form ?
- (ii) Whether the plaintiff has got the cause of action to file the suit ?
- (iii) Whether the plaintiff is entitled for a decree of mandatory injunction directing the defendant No.1 to remove the boundary wall/obstructions made over the path way which is made over the space left in between the plaintiffs and defendant No.1's house?
- (iv) Whether the plaintiff is entitled for permanent injunction restraining the defendant No.1 not to enter into the suit land and not to interfere in the possession of the plaintiff over the same as has been

prayed for ?

- (v) Whether the suit is barred by limitation ?
- (vi) Whether the suit is defective for non-joinder of necessary parties ?
- (vii) Whether the suit land is in possession of the defendant No.1 since long and hand been never used as path way by the plaintiff at any point of time ?
- (viii) To, what other relief, the plaintiff is entitled for ?

6. In order to substantiate the aforesaid case of the plaintiff, he had examined altogether three numbers of witnesses from his side including him as P.W.1 and had proved series of documents starting from Ext.1 to 7. But on the contrary, the defendant No.1 had examined four witnesses on his behalf including him as D.W.1 and had proved four nos. of documents from his side as Exts.A to D. One Court Commissioner was examined as a Court witnesses i.e. C.W.1 and ten documents were proved by him vide Ext.1 to X.

After conclusion of trial and on perusal of the materials and evidence available in the record, the learned Court below answered all the issues except issue No.V against the plaintiff and finally dismissed the suit of the plaintiff on contest against

the defendant No.1 and without contest against the defendant No.2 with cost vide his judgment and decree dated 25.11.2006 and 12.12.2006 respectively.

7. On being aggrieved with the aforesaid judgment and decree dated 25.11.2006 and 12.12.2006 respectively passed in T.S. No. 159/99 by the learned court below against him ( plaintiff), he ( plaintiff) has challenged the same by preferring this appeal after taking several grounds in his appeal memo.

I have already heard from the learned counsels of the parties and so also have perused the materials and evidence available in the record.

8. Basing upon the pleadings of the parties, rival submissions of the learned counsels of both the side, the findings made by the learned court below in the impugned judgment and the grounds taken by the appellant in his appeal memo, the crux of this appeal is :-

Whether the impugned judgment and decree dated 25.11.2006 & 12.12.2006 respectively passed in T.S. No.159/1999 by the learned court below refusing the prayer for mandatory and permanent injunction sought for by the plaintiff over the suit land (middle space in between the house of the plaintiff and defendant No.1 i.e. in between D.L.-32 & U/M-7)

is sustainable under law ?

9. It is forthcoming from the undisputed materials available in the record coupled with the findings made by the learned court below in the impugned judgment and the submissions of the learned counsels of both the side during hearing of the appeal that, the ownership of the suit land i.e. middle space in between the house of plaintiff and defendant No.1 i.e. in between D.L.-32 & V/M.-7 lies with the defendant No.2 ( The Orissa State Housing Board).

It is also forthcoming from the consolidated plaint filed by the plaintiff on dated 12.12.2006 that, he had prayed for mandatory and permanent injunction in respect of the suit land against the defendants i.e. against defendant Nos. 1 & 2 both.

10. The learned court below has assigned a reason in para 10 of his impugned judgment at the time of answering issue Nos. (iii) and (iv) in refusing the prayer for injunctions of the plaintiff that “in his opinion ( i.e. in the opinion of the learned court below) the plaintiff ( now the appellant in this appeal) has got no right whatsoever to pray for either mandatory injunction or temporary injunction against the defendants, more particularly when defendant No.2 ( the Orissa State Housing

Board) is the true owner of the suit land”

11. The above reasons of the learned court below in refusing the prayers of injunction of the plaintiff against the defendants including defendant No.1 (respondent No.1) cannot be held to be unreasonable. Because in my view, a person like plaintiff having no ownership over the suit land is not entitled for any injunction against another person i.e. defendant No.1 ( who has no ownership on the same) in presence of the true owner of the suit land i.e. defendant No.2, when the true owner is not in favour of such prayer for injunction of the plaintiff.

Because, the suit land i.e. middle space in between Q.No.DL-32 and V/M-7 belonged to the Orissa State Housing Board (defendant No.2) & though both the parties were allowed by him ( defendant No.2) to use the same for their convenience, but the actual possession thereof under law lies with defendant No.2. So, as per law, the possession of the parties if any including the plaintiff over the suit land is a mere permissive possession under defendant No.2. Because, the aforesaid claim of possession of the plaintiff over the suit land is as a caretaker of the defendant No.2. According to the ratio of the decision of Apex Court reported in 2012 (II) O.J.R. (S.C.) 326 Maria Mangarida (v) Erasmo Jack De Page-326, the courts are not at

all justified in protecting such nature of possession of a caretaker like plaintiff in this case at hand.

The above conclusions also finds support from the ratio of the following decisions.

1995 AIHC 236(All) “person in permissive possession cannot get injunction temporary or permanent, against rightful owner”.

12. On analysis of the facts and circumstances of the case, as per the discussions and observations made above, when it has been held that, the findings made by the learned Court below in the impugned judgment and decree against the appellant/plaintiff in refusing his prayer for mandatory and permanent injunctions are not unreasonable, for which there is no justification under law for making any interference with the same in this appeal filed by the appellant. So, there is no merit in the appeal of the appellant. The same must fail. Hence ordered.

### **ORDER**

The appeal filed by the appellant is dismissed on contest, but under the circumstances without cost. The impugned judgment and decree dated 25.11.2006 & 12.12.2006 respectively passed by the learned Civil Judge, Junior Division,

Bhubaneswar in T.S. No.159/99 is hereby confirmed.

Pronounced the judgment, in open Court today, this the 26<sup>th</sup> day of November, 2014 under my seal and signature.

Dictated & corrected by me.

Addl. District Judge,  
Bhubaneswar

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