

IN THE COURT OF THE ADDL.DISTRICT JUDGE, BHUBANESWAR

Present:

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

R.F.A.No.35/1/21 of 2013/11/09

(Arising out of Judgment and decree dated 25.02.2009 &
07.03.2009 respectively passed in T.S.No.115 of 2002 by the
learned Civil Judge, Junior Division, Bhubaneswar,)

Dated, this the 26th day of November, 2014

Sri Balukeswar Das, aged about 64 years,
S/o-Late Narayan Das, House No.V/M-7
Virasurendra Shaha Nagar, P.S.-Saheed Nagar,
Bhubaneswar, Dist.-Khurda.

..... Appellant.

-Versus-

Sri Nabina Kishore Bhukta, aged about 71 years,
S/o-Late Hatanath Bhukta, House No.D/L-32,
Virasurendra Shaha Nagar, P.S.-Saheed Nagar,
Dist.-Khurda.

..... Respondent

Counsel for the Appellant : Sri G.Panigrahi & his
Associate Advs.

Counsel for the Respondent : Sri P.K.Mohanty & his
associate Advocates.

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 25.02.2009 & 07.03.2009 respectively passed in T.S. No. 115 of 2002 by the learned Civil Judge Junior Division, Bhubaneswar, wherein the suit vide T.S. No.115 of 2002 of the plaintiff was dismissed on contest against the defendant without cost.

The appellant and respondent were plaintiff and defendant respectively before the learned court below in T.S. No.115 of 2002.

2. The case of the plaintiff in nutshell against the defendant as per the averments made in his plaint was that, the plaintiff was allotted with a house bearing No.V/M-7 and the defendant was allotted with a house bearing No.D.L.-32 by the Orissa State Housing Board near Sainik School, Bhubaneswar. The house vide D.L.-32 is to the west of the house of the plaintiff vide V/M-7. There was some open space in between the house of the plaintiff and defendant. The said middle space in between their houses was left by the Orissa state Housing Board for air and light of their respective houses and so also for the beneficial enjoyment and convenience of both the allottees i.e plaintiff and defendant. But, the defendant unauthorizedly

encroached 8 feet of the said vacant space, which was lying to the east of his house and started construction thereon by extending his house towards the said encroached portion. For which, the plaintiff approached to its statutory authority i.e. Bhubaneswar Development Authorities (B.D.A) and accordingly a case vide case No.13/93 has been initiated against the defendant. After encroaching upon the aforesaid 8 feet of the middle space, the defendant destroyed the trees, those were planted by the plaintiff on the rest of the vacant middle place and the defendant also filed a suit before the learned Court below against the plaintiff vide T.S. No.159/99 claiming that vacant middle space i.e. the rest of which was left after his illegal encroachment. Thereafter, on dated 29.03.2002, the defendant tried to extend his building further towards the east i.e. towards the rest of the middle space, for which, without getting any way, the plaintiff reported about the same to the police and by the interference of the police, the defendant could not proceed further but tried to make construction at a later stage forcibly. So, apprehending further illegal encroachment to the rest of the middle space in between their aforesaid both the houses by the defendant at any moment, the plaintiff approached the learned court below by filing the suit vide T.S. No. 115 of 2002 and prayed for restraining the defendant from making any further construction on the house, which has been

constructed by him on the encroached portion and also to restrain him (defendant) from encroaching upon the rest of the existing vacant space in any manner alongwith the cost and other reliefs, to which, he (plaintiff) is entitled for as per law and equity.

3. Having been noticed from the learned court below, the defendant made his appearance and filed his written statement disputing/denying all the averments of the plaint in respect of alleged illegal encroachment and construction by him on the some portion of the middle space in between their house and his further attempt to encroach any of the vacant space. The further case of the defendant was that, he has raised construction as per law after obtaining necessary permission and getting his plan approved by the B.D.A and he has also extended the house as per the approved plan. He has also applied to the G.A. Department as per the report of the Orissa State Housing Board for allotment of the middle vacant space in his favour, which is under consideration. But, on the other hand, the plaintiff has raised illegal construction of a three storied building without necessary permission and without approved plan from its statutory authority by encroaching upon some portion of the middle space left by the Orissa State Housing Board. Such illegal construction of the plaintiff is a

hindrance to the defendant from getting the free air and light to his house. So, the suit of the plaintiff is not maintainable, as he (Plaintiff) is neither the owner of the suit land nor the same is under his possession. Therefore, in view of the above status and conduct of the plaintiff, he is not at all entitled for the equitable reliefs like injunction against the defendant. For which, the suit of the plaintiff is liable to be dismissed with costs.

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

ISSUES

- (i) Is the suit maintainable ?
- (ii) Has the plaintiff cause of action to bring the suit ?
- (iii) Is the suit hit by non-joinder of necessary parties ?
- (iv) Has the plaintiff got a better right than the defendant to seek reliefs of injunction as sought against the defendant?
- (v) To what relief/reliefs if any the plaintiff is entitled ?

5. In order to substantiate the aforesaid case of the plaintiff against the defendant, the plaintiff had examined only one witness from his side i.e. to himself as P.W.1 without proving any document. But on the contrary, the defendant had examined

four witnesses from his side including him as D.W.1 and had proved series of documents starting from Exts. A to J.

6. After conclusion of the trial and on perusal of the materials and evidence available in the record, the learned court below answered all the issues except issue No. iii against the plaintiff and finally dismissed the suit of the plaintiff basing upon the findings made in issue Nos. (i), (ii) & (iv) vide his judgment and decree dated 25.02.2009 and 07.03.2009 respectively on contest against the defendant without cost.

7. On being aggrieved with the aforesaid judgment and decree dated 25.2.2009 and 07.03.2009 respectively passed by the learned court below in T.S. No.115/02 against the plaintiff, he (plaintiff) has challenged the same by preferring this appeal after taking several grounds in his appeal memo.

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

of the appeal is :-

Whether the impugned judgment and decree dated 25.02.2009 & 07.03.2009 respectively passed in T.S.No.115 of 2002 by the learned Civil Judge, Junior Division, Bhubaneswar in refusing the prayer for injunction sought for by the plaintiff is sustainable under law ?

9. It is the clear and unambiguous case of the plaintiff/appellant that, he (plaintiff) had sought for injunction against the defendant praying for restraining the defendant from raising any further construction on the building constructed by him on its encroached portion and also to restrain him from raising any construction over the rest middle vacant place in between their house i.e. on the suit land, to which the learned court below has refused to provide through the impugned judgment and decree, which is under challenge in this appeal

So, it is forthcoming from the aforesaid pleadings of the plaintiff that, the suit of the plaintiff was only for injunction simplicitor.

10. It is the well settled propositions of law that, the relief of injunction is a fully discretionary relief of the Civil

Court. The Civil Court has every discretion either to grant or refuse the said relief i.e. the relief of injunction by taking various factors into account. The very conduct of the plaintiff is also one of the criteria for granting or refusing the same.

11. It is forthcoming from the pleadings and evidence of the parties that, neither the plaintiff nor the defendant are the owners of the suit land. According to them, the suit land belonged to Orissa state Housing Board or G.A. Department of the Govt. The same is not under the exclusive possession of any of the parties to the suit. The said vacant space in between their both the houses was left by the Orissa State Housing Board for connivance and enjoyment of both the parties i.e. plaintiff and defendant.

12. It is the statutory law under Orissa Development Authorities Act that, in case of any illegal/unauthorized construction or encroachment other than the allotted area within the territorial jurisdiction of the development authorities, the same will be prohibited and removed through the special statute i.e. Orissa Development Authorities Act, 1982.

13. The plaintiff has stated in his plaint that, on the basis of his application, a case vide U.A.P. Case No.13/93 is subjudice

against the defendant for the alleged unauthorized encroachment and construction of the defendant on the middle space (i.e. on the suit land).

The plaintiff (P.W.1) has admitted in para-12 of his cross-examination that, “he has developed his allotted house i.e. V/M-7 to three storied building. He has got approval from B.D.A. for two storied building, but, he has not got any plan approved for his third storied building. He has completed one room on third story”

It is also forthcoming from the pleadings and evidence of the parties that, both the parties have approached to the owner of the middle vacant space of their houses i.e. for suit land before its owner i.e. the Orissa state Housing Board/ G.A. Department for settlement/allotment of the same in their favour which are under consideration as yet.

14. As stated above, when both the parties including the plaintiff are the applicants before the true owner of the suit land for allotment/settlement of the same in their favour and their respective applications are under consideration as yet and when a case vide case No. 13/93 is subjudice before the B.D.A. against the defendant at the instance of the plaintiff for his alleged illegal encroachment and construction and when the

suit land is not under conscious and excessive possession of any of the parties as per law and when the plaintiff himself has made constructions of his third floor without approval of the plan for the same, then at this juncture, non-granting of the full discretionary relief of injunction by the learned court below to the plaintiff/appellant in the impugned judgment and decree can not be held to unreasonable and erroneous. Because, the interference of the Civil Court with the same was absolutely unnecessary, when the matter of same nature of dispute between the parties is under consideration before its statutory authorities i.e. B.D.A. and when both the parties have approached its true owner of the same for allotment /settlement of the said land through their indirect statements therein that, the same is not any body's exclusive possession.

The above conclusion finds support from the ratio of the following decisions :-

2005(I) C.C.C. Specific Relief Act, 1963-Sec.38 (S.C.)
205 – Kanchusthabam Satyanarayana & others (V) Namuduri Atchutaramayya & others -- Permanent injunction suit- An equitable remedy- Held-- Grant of discretionary relief such as injunction being in nature of equitable relief must be granted interalia on consideration of equity and justice- But where plaintiff himself is guilty of inequitable conduct can not claim such relief.

A.I.R. 1976 (S.C.) 2621- Specific Relief Act, 1963-Sec.-41(h)- Injunction is a discretionary equitable relief, which can not be granted, when an equally efficacious relief is obtainable in any other usual mode of proceeding except in cases of breach of trust- Thus, here, the remedy U/s.169 of Delhi Municipal Corporation Act, 1957 was available to plaintiff. So, injunction can not be granted.

15. As stated above, when it is held that, the impugned judgment and decree passed by the learned court below is not unreasonable, as such, it can not be held that, the impugned judgment and decree passed by the learned court below against the plaintiff refusing his prayer for injunction is not sustainable under law. For which, in other words, it is held that, the impugned judgment and decree passed by the learned court below against the plaintiff is sustainable under law. As such, there is no justification under law for making any interference with the impugned judgment and decree passed by the learned court below against the appellant/Plaintiff in this appeal filed by him. Accordingly, 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 costs. The impugned Judgment and decree dated 25.02.2009 and 07.03.2009 respectively passed in T.S.No. 115/02 by the learned Civil Judge, Junior Division, Bhubaneswar is hereby confirmed.

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

Dictated & corrected by me.

Addl. District Judge,
Bhubaneswar

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