

IN THE COURT OF THE ADDL. DISTRICT JUDGE –CUM- SPECIAL
JUDGE, C.B.I.-II, BHUBANESWAR.

PRESENT:

Dr. A.K.Mishra,
Addl. District Judge –cum-
Special Judge, C.B.I.-II, Bhubaneswar

R.F.A. No. 11/68 of 2015/ 2013.

(Arising out of Judgment and decree dated
24.7.2013 passed by the learned Civil Judge
(Jr. Division), Bhubaneswar in Civil Suit
No. 223 of 2010.)

Fakir Charan Parida, aged about 61 years,
Son of late Bauri Parida, Vill. Raghunathpur
Via- Baranga, P.S. Nandankanan, Dist. Khurda.

... Appellant.

Versus.

1. Radhamani Rout, (dead) vide order dated 12.11.2014.
 - (a) Satyavama Harichandan @ Beura.
w/o. Purna Chandra Beura, At/P.O.Radhakishoreput,
P.S. Khutuni, Dist. Cuttack.
 - (b) Swarnalata Harichandan @ Sahoo,
w/o. Maheswar Sahoo, At/P. Raghunathpur via-Baranga,
P.S. Nandankanan, Dist. Khorda.
Permanently residing at Jharsuguda, BPM Colony, Jharsuguda.
2. Nilakantha Harichandan, aged about 38 years,
3. Badrinath Harichandan, aged about 35 years,
Sl.No.2 and 3 are sons of Janmejaya Rout,
Vill. Raghunathpur, via- Baranga,
P.S. Nandankanan, Dist. Khurda.

... Respondents.

For the Appellant : Sri J.Raheman and Associates, Advocates.
For the Respondent : Sri S.Pattanaik & Associates, Advocates.

Date of Argument : 11.1.2016.
Date of Judgment : 16.1.2016.

JUDGMENT

The unsuccessful plaintiff has preferred this appeal against the judgment and decree dated 24.7.2013 passed by the learned Civil Judge (Jr.Dvn.) Bhubaneswar in dismissing the suit for permanent injunction simpliciter.

The defendants are the respondents. On the death of original respondent no.1, Radhamani, two other legal heirs are substituted as two of her sons were earlier on record.

2. Plaintiff's case may be outlined in the following manner :- The suit land measuring Ac.0.85 decimals out of Ac.0.170 decimals appertaining to plot No.756 under Khata No.195 in Mouza- RaghunathpurJali stood recorded in the name of Gurubari Dei vide settlement ROR published in the year 1973 Ext.3. Bauri Parida was the husband of Gurubari. They had no son born to their wedlock. Plaintiff is the natural born son of the younger brother of Bauri. Original defendant Radhamani was the only daughter of Bauri and Gurubari. So, Bauri adopted plaintiff. After death of Bauri and Gurubari, the adopted son, plaintiff, enjoyed the usufructs of the suit land and looked after the defendant. On 20.3.2010, Plaintiff came to know from one Purusottam Sahu that sister Radhamani had sold 50% of the suit plot through power of attorney holder L.N.Mishra and had executed another power of attorney in favour of her (Radhamani)'s sons, Deft. No.2 and 3 on 21.4.2007 who were trying to sell the land. The plaintiff had no objection to the sale of 50% of suit plot but apprehending sale of his moiety share filed suit for permanent injunction simpliciter on 22.4.2010 with following prayer:

- (a) Let a decree for permanent injunction be passed against defendant to sell balance 50% which is the suit land.
- (b) Let the cost of the suit be awarded in favour of plaintiff.

- (c) Let any other relief the Honour court deems fit and proper under the circumstances be passed.

3. Defendant No.3 did not appear and was set ex-parte on 27.10.2010. Defendants No.1 and 2 filed written statement on 30.9.2010 signed only by defendant no.2. While traversing the plea of adoption, the maintainability of the suit was challenged for want of any declaration. Denying the plaintiff's interest in any manner over the suit land, the status of the plaintiff was asserted to be a stranger not only to the family of the defendants but also to the suit property.

4. Learned lower court framed the following four issues:

- “i. Whether the suit is maintainable?
- ii. Whether the plaintiff has got any cause of action to bring the suit?
- iii. Whether the plaintiff is entitled for a decree of permanent injunction the defendants from selling the suit land?
- iv. To what relief or reliefs, the plaintiff is entitled? ”

5. Plaintiff himself was examined as P.W.1 and proved six documents including deed of acknowledgment of adoption dated 21.3.1966 Ext.1, School leaving certificate of plaintiff Ext.2, ROR of the suit khata and rent receipt Ext.3 and Ext.4 respectively, legal heir certificate of Bauri Parida Ext.5 and non-encumbrance certificate in respect of suit khata Ext.6. P.W.1 was not cross-examined being declined. No witness was examined on behalf of the defendants.

6. Learned lower court analysing the evidence did not accept “that the plaintiff is the adoptive son of Bauribandhu Parida and Gurubari Dei” and consequentially found the suit not maintainable and dismissed the suit on contest against the defendants without cost.

7. Learned counsel for appellant rallying round the ground nos.3 and 7 of the appeal memo advanced his argument to the effect that as the evidence

adduced by the plaintiff was not challenged by anybody, the judgment should not have been shown as contested and unchallenged oral and documentary evidence should have been accepted to prove the adoption of plaintiff as claimed. It is categorically submitted that in this nature of lis for permanent injunction simpliciter, under adjudication of title as ancillary to the main issue, the question of adoption can be gone into and for that the simple suit for permanent injunction as laid is maintainable. Learned counsel for respondents supporting the impugned judgment stated that the factum of adoption even in case of ex-parte is required to be proved by the person who claims it and the appreciation of the learned lower court in this regard cannot be interfered with in this appeal for being not perverse. In support of his contention he relied upon the decisions reported in **2015 (II) OLR 824 Sarat Chandra Behera and others -vrs- Santosh Kumar Behera and others, AIR 1981 Bombay 240 Krishnabai Shivram Ptil -v- Ananda Shivram Patil, 1974 (1) CWR Page 403 (Orissa) Bauri Dei and others -vrs- Dasarathi Sahu and Others, 77 (1994) CLT 523 Doctor Nahak -v- Bhika Nahak and another, 2002 (II) OLR-235 Shyamasundar Mishra -vrs- Sribatcha Mishra and others, 2012 (II) OLR- 681 Jayaram Sahoo @ Behera -vrs- Banamali Sahoo and others, and 69 (1990) CLT Page-388 Prahalad Charan Swain -vrs- Suka Dei and others.**

8. On his second plank, learned counsel for respondents relying upon decision reported in **AIR 2009 Supreme Court 901 Gurunath Manohar Pavaskar and others -vrs- Nagesh Siddappa and others** put forth that the suit as laid is not maintainable as the defendant has questioned very status of the plaintiff to dispute his title which cannot be adjudicated for want of declaration.

9. Delineation of facts pleaded and law argued pose a defining feature for determination by this court as to whether the simple suit for permanent injunction is maintainable when the question of adoption is required to be gone into? The above point assumes importance when the record of the lower court unfolds an uncanny abstention in adherence to the procedure of law for settlement of issues. The relevant orders are quoted below:

"Order dated 24.6.2011

Advocate for the parties are present. Issues between the parties are settled. Put up on 14.10.2011 for hearing of suit.

Order dated 4.5.2013.

The learned advocates for plaintiff and defendant are present. Put up on 6.5.2013 for hearing on the suit. The issues are available but not signed. The same is signed today. "

10. The issue is found to have been signed by the Presiding Officer on 24.7.2013 (by her own hand). What transpires from the above that the framing of issue is not in accordance with the procedure prescribed u/o.XIV rule 1(5) CPC .

Order 14 Rule 1 (5) C.P.C. reads as under:-

"1.Framing of issues. -- (1)... (2)... (3)... (4)... (5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after examination under **Rule 2 of Order X** and after hearing the parties or their pleaders, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend."

In the decision reported in **2012 (6) SCC 430 -- A.Shanmugam vs- Ariya K.R.K.M.N.P.Sangam ... on 27 April, 2012**, it is said that-

" 30. Framing of issues is a very important stage of a civil trial. It is imperative for a judge to critically examine the pleadings of the parties before framing of issues. Rule 2 of Order X CPC enables the Court, in its

search for the truth, to go to the core of the matter and narrow down, or even eliminate the controversy."

Further it is reiterated in the decision reported in **(2011) 8 SCC -249 Ramrameshwari Devi & Ors vs Nirmala Devi & Ors on 4 July, 2011** that

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"43. Framing of issues is a very important stage in the civil litigation and it is the bounden duty of the court that due care, caution, diligence and attention must be bestowed by the learned Presiding Judge while framing of issues."

11. On this score, for the breach of u/o. XIV rule (1) 5 C.P.C not only an important adjudicating procedure has been breached but also the scope of Section 89 CPC is allowed to be circumcised. The impact of such withdrawal potent is nothing but to frustrate the object of Sec.89 CPC as well as order XIV rule 1 (5) CPC. Had the matter been heard as mandated for framing of issues, the contentious contour of adoption could have been avoided. Suffice it to respond the latter point that for the fault of court no party should suffer and as the maintainability of the suit is dependent upon on this point for the answer to be followed, the impugned judgment is liable to be set aside.

12. Now the point posed first as to whether a simple suit for permanent injunction impregnated at adoption is maintainable, needs to be addressed. In the wake of infraction found above necessitating the remand, it is apt to extract the principles reiterated by the Hon'ble Apex court in the decision reported in **(2008) 4 SCC 594, Anathula Sudhakar –vs- P. Buchi Reddy (Dead) By Lrs & Ors on 25 March, 2008** , as follows --

In such a situation, where the title is clear and simple, the court may venture a decision on the issue of title, so as to decide the question of de jure possession even though the suit is for a mere injunction. But where the issue of title involves complicated or complex questions of fact and law, or where court feels that parties had not proceeded on the basis that title was at issue, the court should not decide the issue of title in a suit for injunction. The proper course is to relegate the plaintiff to

the remedy of a full-fledged suit for declaration and consequential reliefs.

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To summarize, the position in regard to suits for prohibitory injunction relating to immovable property, is as under :

(a) Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title [either specific, or implied as noticed in **Annaimuthu Thevar (supra)**]. Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straight-forward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because

some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.

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The predicament of plaintiffs, was brought upon themselves, by failing to convert the suit to one for declaration even when the written statement was filed, and by not seeking amendment of issues to include an issue on the question of title. In the absence of a prayer of declaration of title and an issue regarding title, let alone the pleadings required for a declaration of title, the parties cannot be said to have an opportunity to have a full-fledged adjudication regarding title. "

13. Tested in the touch stone of above law , I am of the considered view that the decisions relied upon by the learned counsel for respondents on the issue of adoption need no narration for being held inapplicable to the points at hand. Having found that the basic of adjudication is given good-bye for passing impugned judgment, it is desirable that the interest of justice would be subserved if the impugned judgment is set aside and the matter is remitted to the learned lower court for retrial u/o.41 rule 23 -A CPC and date for appearance of parties is given u/o.41 rule 26 -A C.P.C. While adducing further evidence, the evidence on record should be considered during the hearing of the suit. Hence, it is ordered.

ORDER.

The appeal be and the same is allowed on contest without cost. The impugned judgment and decree dated 24.7.2013 passed by the learned Civil Judge (Jr.Dvn.) Bhubaneswar in C.S.No.223 of 2010 is hereby set aside. The case is remanded to the lower court for re-trial with a direction to re-admit the suit under the original number in the register of civil suit and proceed to determine the suit and the evidence recorded during the original trial shall

subject to just exceptions be evidence during the trial. The parties are directed to appear in the lower court on 10.2.2016.

Addl. District Judge-cum-
Special Judge, C.B.I.-II, Bhubaneswar.

Dictated and corrected by me. Judgment is pronounced in the open court today this the 16th January, 2016.

Addl. District Judge-cum-
Special Judge, C.B.I.-II, Bhubaneswar.

