

Jemma Vs. Raghu

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Court : Orissa

Decided On : Jul-21-1976

Reported in : AIR1977Ori12; 42(1976)CLT940

Judge : R.N. Misra and ;P.K. Mohanti, JJ.

Acts : [Specific Relief Act, 1963](#) - Sections 34 and 41; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 6, Rule 17; Orissa Estates Abolition Act, 1952 - Sections 8(2) and 39

Appeal No. : A.H.O. No. 35 of 1975

Appellant : Jemma

Respondent : Raghu

Advocate for Def. : N.V. Ramdas, Adv.

Advocate for Pet/Ap. : G.A.R. Dora, Adv.

Disposition : Appeal allowed

Judgement :

R.N. Misra, J.

1. This is a Letters Patent appeal directed against the judgment of a learned Single Judge in second appeal at the instance of the plaintiff.

2. On 14-5-1970, plaintiff filed the suit for declaration that the properties in dispute belonged to her, the order of the Estates Abolition Collector settling the lands with the defendant was void, for permanent injunction against the defendant from entering upon the disputed properties and for recovery of possession of a house on the allegation that the disputed properties constituted village carpenter's service inam and on the death of Jogi (plaintiff's husband) in 1921, his son Gadadhar had succeeded to the property. Gadadhar however, died in 1943 and thereafter plaintiff was in possession of the disputed properties. As the defendant started interfering with the plaintiff's possession and enjoyment, she was forced to come to court.

3. Defendant is the son of Jogi's brother Bhima. According to his case, after Jogi died in 1921, Bhima rendered service and came to possess the property. Bhima died in 1945 and after him, defendant was rendering service and was in possession. In regard to two plots, no claim was raised by the defendant.

4. The trial court found:--

(i) The service tenure was partible by custom and had been partitioned and the disputed properties had fallen to Jogi's share;

(ii) After Jogi, his son Gadadhar succeeded to the properties and remained in possession till 1943, when he died;

(iii) The plaintiff failed to prove her right, title and possession after 1943; and

(iv) Plaintiff's claim in regard to the house was not supported by any evidence.

The trial court dismissed the suit excepting in regard to the two plots for which there is no contest by the defendant.

5. The lower appellate court affirmed the finding that the property was partible : Gadadhar had rendered service until his death and had remained in possession of the property; plaintiff had failed to establish possession after 1943. It, however, found that to the suit as framed, Article 65 of the new Limitation Act applied and the defendant having failed to establish title by adverse possession, plaintiff was entitled to a decree on the basis of her anterior title. Accordingly it reversed the

decree of the trial court.

6. Defendant was the appellant in the second appeal before this Court. Two contentions had been advanced in support of the appeal by the defendant:--

(1) Plaintiff being out of possession on the date of the suit, relief for injunction was not admissible and the suit was bound to be dismissed.

(2) In view of the settlement of the disputed properties with the defendant under the Estates Abolition Act, the suit was hit by the provisions of Section 39 of that Act and the plaintiff was not entitled to any relief.

7. The trial court as also the lower appellate court clearly found that the plaintiff was not in possession on the date of the suit. A plaintiff not in possession is certainly not entitled to the relief of injunct on without claiming recovery) of possession. If authorities are necessary for such a conclusion, reference may be made to the Full Bench decision in the case of Masjid Shahid Ganj v. S. G. P. Committee, AIR 1938 Lah 369 (FB); Abdul Nabi v. Bajan Sahib, AIR 1944 Mad 221 and Hasmat Hussain v. Inayatullah, AIR 1958 All 706.

8. Before the learned Single Judge, the plaintiff sought for amendment of the plaint by addition of the relief of recovery of possession, but the move was negatived and this is what the learned Single Judge said:--

'Mr. Dora, the learned counsel appearing on behalf of the respondent (plaintiff) when confronted with this situation sought to amend the plaint. I would have allowed the same if the amendment would have been either formal or of a technical nature or it would have tilted the issue in favour of the respondent. But as would be discussed hereafter, there is another hurdle for the respondent to clear to get a finding in her favour. Apart from the fact of not being in possession ever since 1943, which the defendant is very likely to exploit in ,his additional written statement in case of any amendment, the second hurdle is that the suit lands have been settled fay the O. E, A. Act Collector with the defendant in Case No. C. P. 2797 of 1961. Admittedly the service Inam lands have vested with the State Government, Thereafter, there has been settlement of these lands with certain

parties and in the instant case with the defendant.....'

The second appeal was allowed and the suit was directed to stand dismissed on the finding that the properties had already been settled with the defendant and the suit was hit by Section 39 of the Orissa Estates Abolition Act and a bare suit for injunction when plaintiff was out of possession was not maintainable. With leave of the learned Single Judge, this Letters Patent appeal has been filed.

9. Mr. Dora for the appellant does not seriously challenge the position that relief of injunction cannot be granted when plaintiff is not in possession unless recovery of possession has been prayed for. He, however, presses his application for amendment of the plaint for which a separate application has been filed in this appeal, Mr. Ramdas for the respondent strenuously opposes the amendment. According to him, plaintiff must have known that she was not in possession when she filed the suit and yet she had omitted to ask for the relief of recovery of possession. Therefore, the prayer should not be allowed.

10. In the written statement, no specific plea was raised on the score that without asking for the relief of recovery of possession, a prayer for relief of injunction could not be maintained. Such an aspect had not been canvassed at any point of time earlier to the second appeal. When the question was raised in second appeal, plaintiff asked for amendment and from what has been extracted from the decision of the learned Single Judge, he was perhaps inclined to allow the amendment if it tilted the result of the litigation. As the learned Judge was of the view that the suit was hit by Section 39 of the Orissa Estates Abolition Act, he did not find any useful purpose for allowing the amendment.

11. An amendment of the pleadings can be granted at any stage -of the litigation. In the case of *Baishnaba v. Nityananda*, AIR 1969 Ori 34, an amendment after the trial stage was allowed. In the case of *Gajadhar v. Ambika Prasad*, AIR 1925 PC 169, the Judicial Committee observed that it was in the discretion of the Court to allow an amendment even at the last stage, i.e. in the appeal before the Court. In the case of *Secretary of State v. I. M. Lall*, AIR 1945 FC 47, the learned Judges were of the view that in exceptional circumstances, leave should be given to the plaintiff to amend the plaint even at the stage when the appeal was before the

Federal Court In the case of Lakshminarasimhachari v. Sri Agastheswaraswamivaru, 'AIR 1960 SC 622, amendment allowed in the High Court was challenged in Supreme Court and the learned Judges observed:--

'In this appeal counsel for the appellant has raised three points: (1) that the suit was not maintainable; (2) that the amendment should not have been allowed and (3) the grant was a personal grant to the appellants burdened with the provision for service and it was not a specific endowment. As far as the first question is concerned it has not been shown as to how the suit was not maintainable. The question of amendment, in our opinion, was rightly decided by the High Court. As held by that court all the necessary allegations had been made in the plaint and the requisite pleas had been raised by the appellants; an issue was framed on the question and the parties were fully cognizant of the points in controversy and the necessary evidence was led by the parties. In this view of the matter the High Court was right in allowing the amendment by the addition of a prayer in the prayer clause.'

In the instant case, no amendment of the pleadings was necessary. The amendment was confined to relief only, namely if the court found that the plaintiff was out of possession, relief of recovery of possession through court be granted. It was the defence case that defendant was in possession. If plaintiff had subsisting title, which was very much in issue in the litigation, on asking by the plaintiff and paying appropriate court-fees, plaintiff would be automatically entitled to the relief of recovery of possession. The learned Single Judge, in our view, was rightly inclined to allow the amendment but as we shall presently show on an erroneous view regarding the consequences of the alleged settlement by the Estate Abolition Collector, he went wrong in not allowing the amendment. Having heard learned counsel for parties, we are inclined to allow the amendment. Plaintiff's application for amendment must, therefore, be allowed.

12. We could have straightway disposed of the litigation and no remand of the litigation was warranted merely because an additional relief was incorporated by amendment and the reasons indicated by their Lordships of the Supreme Court in the case of Gopal v. Mahomed Jaffar, AIR 1954 SC 5 could have been adopted. In

the facts of the case, however, we find certain difficulties to adopt that course. It is not correct that the defendant had not pleaded adverse possession. In paragraph 10 of the written statement, he had pleaded:--

'..... The defendant is in possession and enjoyment of the same from a long time and for over the statutory period.'

According to Mr. Ramdas for the defendant, if prayer for recovery of possession had been advanced, there would have been definite assertion of acquisition of title by adverse possession. We are not very much impressed with the stand of Mr. Ramdas because the prayer for, recovery of possession had nothing to do with the plea of adverse possession. That plea was very much necessary to negative the plaintiff's claim of title and within the framework of the suit, as instituted, the plea was very much necessary to negative the plaintiff's claim. An issue, in our view, however, about adverse possession and consequent loss of tile of the plaintiff should have been struck. Throughout the written statement, there is a clear assertion that the defendant and before him his father had got into possession of the property to the exclusion of the plaintiff. If the written statement had been read as a whole, there could be no escape from the position that the issue of adverse possession arose. There is also oral and documentary evidence on record for such a plea. It is, therefore, appropriate that an issue on the question of adverse possession of the defendant and consequent loss of title of the plaintiff should be struck. There is no necessity for the suit to go back tp the trial court with liberty to parties to produce fresh evidence, because parties have indeed led evidence and they would not be prejudiced if the issue is determined on the evidence already on record. Therefore, the factual question involved in the new issue can be appropriately decided by the lower appellate court on the evidence already on record.

13. As we have allowed the amendment of the plaint, the defendant is entitled to file a written statement and that written statement can be filed by the defendant in the lower appellate court within such time as that court would allow. For the amendment allowed at the belated stage, plaintiff must pay costs to the defendant which we assess at rupees one hundred. This amount must be paid to the

defendant before the appeal is heard in the lower appellate court. The lower appellate court is free to dismiss the title appeal for non-compliance of this direction.

14. The only other question which remains to be answered is the effect of Section 39 of the Orissa. Estates Abolition Act. Undoubtedly, the land in dispute was being held for service as a village servant. Section 8 (2) of the Estates Abolition Act provides:--

'Any person holding land in a village for service as a village servant by whatever name called, shall be deemed to hold it under the State Government subject to such terms and conditions as he was entitled or subject to, immediately before the date of vesting.'

Thus, on the admitted case of the parties, the disputed property could not vest in the State of Orissa. There is no evidence of vesting as a fact. The order of the Estate Abolition Collector has also not been produced.' In that view of the matter, there could not be a settlement under Chapter II of the Estates Abolition Act. The Bench decision of this Court in the case of Bhagaban v. Ukia Dei, AIR 1975 Orissa 139 clearly indicated the effect of Sub-section (2) of Section 8 of the Estates Abolition Act by saying:--

'This sub-section is merely declaratory of the status of the village servant holding land in a village for service immediately before the date of vesting. There is no vesting of such Jagir lands in the State. The settlement of the disputed land on the defendant in rayati character was not under Section 8. There is no provision for settlement of service tenure lands on the holder or any other person under Section 8 (2) of the Act.' Plaintiff's prayer in the suit seems to be misconceived and on the undisputed fact that Section 8 (2) of the Abolition Act would not apply to the lands in dispute, there could be no settlement under the Act in favour of the defendant which could attract the application of Section 39 of that Act. The suit is, therefore, not hit by such provision.

15. We would accordingly allow the appeal, set aside the judgment of the lower appellate court as also the learned Single Judge and transmit the appeal to the

lower appellate court with a direction that it shall proceed on the footing that the plaintiff has been allowed to be amended and the relief of recovery of possession has been incorporated therein. The learned Appellate Judge will allow the defendant to file an additional written statement and before actually hearing the appeal see that the terms of costs are satisfied. He shall be free to dismiss the appeal without examining it on merits if the direction for payment of costs is not complied with. He shall determine the new- issue as also all questions already raised in the litigation on the basis of evidence already on record and no fresh evidence for the new issue would be permitted. Costs of the litigation shall abide the result.

Mohanti, J.

16. I concur.

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