ORISSA HIGH COURT

Jemma

Vs

Raghu

A.H O. No.35 of 1975

(R.N. Misra and P.K. Mohanti, JJ.)

21.07.1976

JUDGEMENT

R.N. Misra, J.

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

2. On 14-5-1970 plaintiff field 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 Gadadher, 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 Accordingly to his case after Jogi died in 1921. Bhima rendered service and came to possess the property. Bhima died in 1945 and after him, defendants 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, 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 bout 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 provision 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 injunction without claiming recovery of possession. It 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*[1] *Abdul Nab. v. Bajan Sahib*[2] and *Hasmat Hussain v. Inayatullah*[3]

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:

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> "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 on 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 amendement, the second hurdle ids that the suit lands have been settled by the O.E.A. Act Collector with the defendant in Case No.C.P.2797 of 1961. Admittedly the Service Inam land 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 alredy been settled with the defendant and the suit was hit by the section 39 of the Orissa Estate Abolition Act and a bare Suit for injunction when plaintiff was out of possession not maintainable. With leave of the learned Single Judge, this Letters Patent appealed has been filed.

9. Mr. Dora for the appellant does not seriously challenge the position that relifs of injunction

cannot be granted when plaintiff is not of possession unless recovery of possession has been prayed for. He, however press his application for the amendement of the plaint for which a separate application has been filed in this appeal. Mr. Ramdas for the respondent stenuously opposes the amendement. Accordingly to him plaintiff must have known that she was not in possession when she filed in the appeal. Mr.Ramdas for the respondent stenously opposes the amendement. Accordingly to him, plaintiffs must have known that she was not in possession when she filed suits and yet she had omitted to ask for the relief of recovery of possession. Thereof, 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 recovery of possession, a prayer for relief of injunction could not be maintained. Such an aspects had not been canvassed at any point of time earlier to second appeal. When the question was raised in second appeal. When the question was raised in second appeal, plaintiff asked for the amendement and from what has been extracted from the decision of the learned Single Judge, he was perhaps inclined to allow the amendement 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 Estate Abolition Act, he did not find any useful purpose for allowing the amendement.

11. An amendment of the pleadings can be granted at any stage of the litigation. In the case of *Baishnaba v. Nityananda*[4], an amendement after the trial stage was allowed. In the case of *Gajadhar v. Ambika Prasad*[5], the judicial Committee observed that it was in the discretion of the Court to allow an amendement 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 FC47, the learned judges were of the view that in exceptional circumstances, leave should be given to the plaintiff to the amend the plaint even at the stage when the appeal was before the federal Court. In the case of *Lakshminarsimhachari v. Sri Agastheswaraswamivaru*[6], amendement allowed in the High Court was challenged in Supreme Court and the learned Judges observed:-

> "In this appeal counsel for the appeallant has raised three points: (1) that the suit was not maintainable; (2) that the should not have been allowed and (3) the grant was a personal grant to the appeallants burdened with the provisions for the service and it was not 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 amendement in our opinion was rightly decided by the High Court as held by the Court all the necessary allegation had been made in the plaint and the requisite pleasa had been mad by the appeallant; an issue was made on the question and parties were fully cognizant of the point in the contraversary and the bnecessary evidance was led by the parties.In the view of the matter the High Court was right in allowing the amendement by the addition of a prayer in the prayer clause".

In the instant case no amendement of the pleading was necessary.The amendement was confined to relief only, namely if the court found that the plaintiff was out of possession, relief of recovery of the possesion through the court be granted. It was the defence case that the defendant was in possession.If plaintiff had subsisting title which was very much in issue in the litigation, on

asking by the plaintilff 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 right 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 and no remand of the litigation was warranted merely because an additional relief was warranted merely because an additional relief was incorporated by amendement and the reasons indicated by their Lordship of the Supreme Court in the case of *Gopal v. Mohamed Jaffar*[7], could have been adopted. In the facts of the case, however we find certain difficulties to adopt 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 nothing to with plea of adverse possession. That plea was very much necessary to negative the plaintiff's claim. An issue in our, view, however, about adverse possession and consequent loss of the title 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 in to possession of the property of the exclusion of the plaintiff should have been struck throughout 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 question of adverse possession of the defendant and consequent loss of title of the plaintiff should be struck. There is no necessarily for the suit to go back to 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 can be filed by the defendant in the lower appellate court within such time as that court would allow For the amendment allowed at belated stage plaintiff must pay costs to the defendant which was assesses 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
noncompliance 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, this disputed parties could not vest in the state of Orissa. There is no evidence of vesting as a fact, The order of the Estate abolition the collector has also not been produced. In that view of the matter, there could not be a settlement under chapter II of the Estate Abolition Act. The Bench decision of this Court in the case of Bhagban v.Ukia Dei, AIR 1975 Orissa 139 clearly indicated the effect of sub-section (2) of section 8 of the estate abolition Act by saying:-

> "This sub-section is merely declaratory of the statute of the village servants 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 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 plaint 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 actuality 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 alredy raised in the litigation on the basis of evidence alredy 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.

Appeal allowed.

Cases Referred.

[1] AIR 1938 Lah 369 (FB)
[2] AIR 1944 Mad 221
[3] AIR 1958 All 706
[4] AIR 1969 Ori 34

[5] AIR 1925 PC 169
[6] AIR 1960 SC 622
[7] AIR 1954 SC 5