
AIR 2014 Ori 162 : (2014) 118 CLT 942 : (2014) 2 OLR 572 Suppl. : (2014) 2 OLR 572

Orissa High Court

Case No: F.A.O. No. 511 of 2011

Jayalakshmi Patra

APPELLANT

Vs

Shyama Kanta
Mohanty

RESPONDENT

Date of Decision: Aug. 7, 2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) â€” Order 39 Rule 1, Order 39 Rule 2, Order 7 Rule 11,
151#Specific Relief Act, 1963 â€” Section 19#Transfer of Property Act, 1882 â€” Section 108,
53-A

Citation: AIR 2014 Ori 162 : (2014) 118 CLT 942 : (2014) 2 OLR 572 Suppl. : (2014) 2 OLR
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Hon'ble Judges: Raghubir Dash, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Raghubir Dash, J.

This appeal is in challenge of the order dated 28.10.2011 passed by the learned Civil
Judge (Senior Division),

Bhubaneswar in I.A. No. 179 of 2011 arising out of C.S. No. 286 of 2011 dismissing the
application under Order 39 Rules 1 and 2 read with

Section 151 of the C.P.C.

2. The appellant is the plaintiff-petitioner before the lower court. She has filed the suit for
specific performance of contract with other ancillary

reliefs. Her case is that the suit land measuring Act. 104 decimals located in Mouza
Jayadev Vihar is a piece of Government land. It was leased out

to Respondent No. 1, Shyamakanta Mohanty, by the G.A. Department, Government of Orissa (R-2) under a deed executed on 22.12.1984

which was registered on 4.1.1985. As R-1 could not pay the premium dues, a show cause notice was served on him for termination of the lease.

So, R-1 put forth an offer to the present appellant and late Rajendranath Patra, predecessor-in-interest of proforma Defendant Nos. 3 to 5, for

sale of the suit land which was accepted and accordingly on 31.12.1991 an agreement for sale was entered into between R-1 on one hand and the

appellant and said Rajendranath Patra on the other. On the same day, i.e., on 31.12.1991, R-1 also executed one registered General Power-of-

Attorney in favour of appellant's husband authorizing him, inter alia, to sell the suit land on his behalf. On the very day of agreement for sale,

possession of suit land was delivered to the appellant and late Rajendranath Patra. On the strength of such agreement for sale the appellant

deposited with the R-2 Rs. 57,974/- towards arrear premium dues in respect of the lease. Thereafter, on different dates part payments were made

by the appellant and late Rajendranath Patra to Respondent No. 1 towards the consideration payable under the agreement for sale. On

23.12.1992 and 29.12.1993 the last two installments, at the rate of Rs. 8,282/-, towards payment of premium were paid to R-2 by the appellant

and Rajendranath Patra. Thus, R-2 has received the full and final consideration/premium amount in respect of the suit property. On 26.1.2011 the

appellant and the legal heirs of Rajendranath Patra requested R-1 to execute a sale deed in respect of the suit property but he did not turn up to

execute the same. Instead, it is learnt from reliable source that R-1 is going to create third party interest over the suit property. Therefore, the

appellant has filed the interim application with a prayer to restrain the respondents-O.Ps. from taking any coercive action against the appellant as

well as proforma defendants and creating any third party interest in the suit property during pendency of the suit.

Further case of the appellant-plaintiff is that on 15.12.1998 a show cause notice was served on R-1 by R-2 for non-utilisation of the suit land in

terms of the lease to which R-1's power of attorney holder had responded by submitting show-cause. It is further stated that on 4.11.2003 the suit

land was mutated in favour of R-1 and on 5.11.2003 the appellant and Rajendranath Patra had approached the G.A. Department (R-2) to transfer

the suit land in their favour on the strength of the agreement for sale. Despite their repeated approach, R-2 has not taken any steps in that regard. It

is further claimed that after getting possession of the suit land R-1 and Rajendranath Patra developed the land spending huge amount. They have

constructed building over the land and they are paying ground rent, holding tax, water tariff and electricity bills. They are running business in the

premises now existing over the suit land and have obtained sales tax registration for their Firm which is running business in the suit land.

3. Respondent No. 1 has taken the stand that on the basis of the lease he took over possession of the suit land on 18.1.1985. Since the lease was

for the purpose of running one Cinema Hall, he started construction of a Cinema Hall over the suit land but due to some difficulties could not

complete the construction within the stipulated period for which R-2 issued show cause notice on 15.5.1998. His reply to the show cause was not

taken into consideration and the lease was cancelled vide order dated 2.1.1999. He approached this Court by filing W.P.(C) No. 12214 of 2006

which was disposed of with a direction to R-2 to consider his grievance. After receiving the order of this Court, R-2 rejected his prayer for

revocation of the order of cancellation of lease. So, he moved the Chief Secretary, Government of Orissa who did not take any action. He

preferred a writ application vide W.P.(C) No. 591 of 2007 and this Court directed the Chief Secretary to consider his case sympathetically. But

the Chief Secretary rejected his prayer for reconsideration of the order of cancellation of lease. He challenged that order before this Court in W.P.

(C) No. 16118 of 2008 which was disposed of with a direction to the Chief Secretary to reconsider his case and take a decision on the same by

the end of March 2011. He put forth a fresh proposal before the Chief Secretary for consideration of his case which is still pending.

Since the lease has been cancelled, it is pleaded, the agreement for sale executed by R-1 is not enforceable inasmuch as he has no valid title over

the suit property. It is further contended that at no point of time possession of the suit land was delivered to the appellant and late Rajendra Patra.

4. Respondent No. 2 filed objection taking the stand that the G.A. Department leased out the suit land in favour of R-1 for the purpose of a

Cinema Hall. But R-1 having failed to utilize the suit land for the specific purpose, the Government issued notice for determination of the lease and

ultimately the lease was cancelled. Further stand is that R-2 has got no knowledge about any agreement for sale between R-1 on one hand and the

appellant and Rajendranath Patra on the other. R-2 has not received any representation from R-1 for transfer of the suit land in favour of any one.

Without the permission of the Government, R-1 cannot make any transaction with anybody and in case any transaction is there, that is void.

Therefore, the appellant is not entitled to any interim relief.

5. Learned lower Court has observed that the agreement for sale was brought into existence without the consent or knowledge of the owner of the

land. It is also observed that there is no scrap of paper indicating that the State in any manner has recognized the appellant's possession. It is also

observed that the lease deed executed on behalf of the State has been determined vide order dated 2.1.1999 for which the agreement for sale is

not enforceable under the law. Thus, it is observed by the learned lower court, the appellant has no prima facie case in her favour.

6. Challenging the impugned order learned counsel for the appellant argues that the interest of the appellant is protected u/s 53-A of the Transfer of

Property Act read with Section 19 of the Specific Relief Act. It is also contended that there is no bar against the lessee to transfer or assign his

leasehold interest in the suit land. It is also submitted that there being no requirement of permission of the owner of the land for making transfer of

such leasehold interest, absence of consent or knowledge of the State is of no consequence. Even otherwise also, it is submitted, there are

materials on record showing that the G.A. Department of the State has got knowledge about the agreement for sale. Further submission made by

the learned counsel for the appellant is that the cancellation of lease being subsequent to the execution of the agreement for sale, the cancellation is

of no consequence. It is also submitted that all the three ingredients for grant of interim injunction are well made out by the appellant.

7. Learned counsel for the State has argued in support of the impugned order with further submission that as against the State there is no prima

facie case and the suit itself is not maintainable. Learned counsel for R-1 also supports the impugned order submitting that in view of cancellation of

the lease, the Court cannot grant the relief of specific performance of contract as against R-1.

8. It is true that there is no bar against a lessee to transfer his/her leasehold interest in immovable property. This is well recognized under Clause (j)

of Part (B) of Section 108 of the T.P. Act. But it is well settled that such transfer is always subject to the terms of contract under which the lease is

created and despite of such transfer the lessee does not cease to be subject to any of the liabilities attaching to the lease. Annexure-2 to the appeal

memo is the lease deed. Under the terms of the lease deed the lease is for a period of 90 years on payment of premium payable in 10 equal

installments on or before stipulated dates. It is also subject to payment of rent as specified in the deed. Under the terms of the lease, the lessee is to

hold and use the leasehold property only for commercial purpose which is none other than running of a Cinema Hall by raising structures in strict

conformity with the plan annexed to the lease deed. The lease is also subject to the condition that the lessee should complete construction of the

Cinema Hall within 36 months or within such time as would be extended by the lessor from time to time. It is also found from the lease deed that

the lessor has reserved the right of re-entry for any breach of the covenants under (v) or (xiii) of Clause 2 of the lease deed. But what the appellant

has pleaded in her W.S. makes it clear that the term of the lease has been clearly violated after execution of the agreement for sale. The appellant

claims to have developed the suit land making huge investment and presently the Firm, in the name and style: M/s. Shree Jagatnath Auto Mobiles,

is running its wholesale distribution business from the building now standing over the suit land. Such use of the suit premises is in clear violation of

covenant (xiii) of the lease deed which lays down that the lessee shall not, without the consent in writing of the lessor, use or permit the use of the

land for any purpose other than that for which it is leased. It also contravenes the covenant (v) of the lease deed which lays down that the lessee

shall not erect or build or permit to be erected or built on the demised premises any building other than that specified in a plan approved by the

lessor, nor shall he make any addition to any existing building or structures at any time except with the written approval of the lessor. For such

contravention, the owner of the land has got right of re-entry into the suit premises as well as the right to prevent use of the suit land for any

purpose other than what is specified in the lease deed. For these subsequent developments appellant cannot be said to have come to the Civil

Court with a clean hand. So, as against R-2, no interim injunction can be granted preventing R-2 to take any coercive action against the appellant

and the proforma Defendants. That apart, since an interest in the leasehold has been created in respect of the suit land, the State cannot be

directed to execute a sale deed in favour of the appellant and the proforma Defendant which is the main prayer made in the plaint. Therefore, the

learned lower court has rightly observed that the plaintiff-appellant has no prima facie case as against the State. That apart, u/s 19 of the Specific

Relief Act such specific performance of contract cannot be enforced against the State.

9. The plaintiff-appellant has filed the suit claiming that the State has executed a lease-cum-sale deed in favour of R-1 which is incorrect. Nothing is

there in the lease deed wherefrom it can be inferred that it is a lease-cum-sale deed. This is indicative of the fact that the appellant has not

approached the Civil Court with a clean hand.

10. It is true that there is a possibility of revalidation of the lease, inasmuch as R-1's application for reconsideration of the order of cancellation of

the lease is pending consideration. However, unless and until the order of determination of the lease is revoked and the lease in question is

revalidated, R-1 cannot be directed to assign even the leasehold rights. In that view of the matter, no decree of specific performance of contract

can be passed against R-1 until the order of cancellation of the lease is revoked.

Therefore, the learned lower court has rightly observed that the

plaintiff-appellant has not made out a prima facie case.

11. In view of the discussion made above, the appeal stands dismissed with cost.

12. Before parting with, this Court considers it necessary to make it clear that the observations made herein above shall not be deemed to have

been made on the merit of the case. Further, to emphasize the procedural law, it is indicated that if a prayer is made on behalf of the defendant-

Respondent No. 2 before the learned trial court to take up the maintainability of the suit as against D-2 as a preliminary issue, the same shall be

taken up and after giving opportunity to the parties of being heard in the matter, the learned trial court shall pass a reasoned order thereon. Learned

trial court may, suo motu, take up the matter regarding existence of any cause of action as against the State and pass necessary order under Order

7 Rule 11 of C.P.C.