

IN THE HIGH COURT OF ORISSA AT CUTTACK

S.A. NO.162 OF 1991

In the matter of an Appeal under section-100 of the Code of Civil Procedure assailed the judgment and decree dated 19.03.1991 passed by the learned District Judge, Keonjhar in Title Appeal No.32 of 1987 by setting aside the judgment and decree dated 21.09.1987 and 26.09.1987 passed by the learned Munsif, Keonjhar in Title Suit No.11 of 1986.

Paramananda Behera

....

Appellant.

-versus-

Ketaki Behera & Others

....

Respondent.

**Appeared in this case by Hybrid Arrangement
(virtual/physical mode)**

For Appellant

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M/s. D.P. Dhal, Sr. Advocate,
R.C. Rath, Advocate.

For Respondent

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M/s. S.S. Das, Sr. Advocate,
B.S. Choudhury, Advocate.

CORAM:

MR. JUSTICE D.DASH

DATE OF HEARING:: 14.12.2022, DATE OF JUDGMENT:: 23.12.2022

D. Dash, J. The Appellant by filing this Appeal under Section-100 of the Code of Civil Procedure 1908 (for short, 'the Code') has assailed the judgment and decree passed by the learned District Judge, Keonjhar in Title Appeal No.32 of 1987.

By the same, the Appeal filed by the Respondent being the unsuccessful Plaintiff under Section-96 of the Code has been allowed and thereby the judgment and decree passed by the learned Munsif, Keonjhar in Title Suit No.11 of 1986 have been set aside and the

Respondents having been non-suited by the trial court, in the First Appellate, the suit has been decreed declaring their right, title, interest and possession over the suit land and this Appellant and Respondent Nos..... have been directed not to interfere with the possession of the suit land by the Plaintiff and in the event of dispossession to restore the possession of the suit land to the Plaintiffs.

2. For the sake of convenience, in order to avoid confusion and bring in clarity, the parties hereinafter have been referred to, as they have been arraigned in the Suit.

3. The Plaintiff's case is that they and Defendant No.2 are the sons and daughters of Late Parsuram Behera who was the son of his relation Suduria Behera. Said Suduria Behera is the original owner of the suit land. Suduria died issueless. So the father of the Plaintiffs and Defendant No.2 who was living in his house, looked after the cultivation of his land and accordingly the father of the Plaintiffs and Defendant No.2 continued to possess the suit land after the death of Suduria and thereafter the Plaintiffs are in possession.

One Karunakar Behera proclaiming to be the adopted son of Suduria, sold the suit land to the Defendant No.1. However, during the last settlement operation, the suit land stood recorded in the name of the father of the Plaintiff, but it was with a note of possession in favour of the Defendant no.1. In view of such wrong noting of

possession of the suit land by the Defendant No.1 scramble over the possession having taken place, a proceeding under Section-145 of the Cr.P.C. was initiated. The Executive Magistrate in the said proceeding having directed the parties to get their right adjudicated by the Civil Court, the suit has been filed.

4. The Defendant No.1 while traversing the averments taken in the plaint have stated that one Gada Behera was the original owner of the suit land. He had given the suit land to his younger daughter-Thunga, who had married to Suduria Behera. It is stated that Sudhiri and his wife Thunga lived in the same village and during the last settlement; the suit land was recorded in the name of Suduria. It is stated that Suduria died during the lifetime of Thunga. So, Thunga re-married to one Giridhari @ Haguru, who lived with Thunga in the house of Suduria. Thus, children of Giridhari born through his first wife also lived with them. Giridhari is none other than Thunga's sister's husband and Karunakar was the son of Giridhari through his first wife. Shortly before the current settlement operation, Thunga having died, Karunakar came to possess the suit land; and in that capacity, he had had sold away the suit land to Defendant No.1 and delivery of possession of the suit land was given by him to the Defendant No.1. But despite that, the suit land stood recorded in the name of Parsuram Behera with note of possession in favour of Defendant No.1.

5. On the above rival pleadings, the Trial Court framed six (6) issues. Taking up the crucial issues together for decision i.e. issue nos. 3 & 4 by going through the oral and documentary evidence let in by the parties and upon their analysis from different angles, the answer has been given that neither Giridhari nor Karunakar ever possessed the suit land of Suduria and the Defendant No.1 had not possess it under the sale-deed as he claims. With such finding, the Plaintiffs have been made to suffer being declined with the reliefs that they claimed in respect of the suit land. The Trial Court having thus non-suited the Plaintiffs, First Appeal having been carried out, the Plaintiffs have been successful therein.

6. The Appeal has been admitted to answer on the following substantial questions of law as indicated in paragraph-1 and 3 at page-9 of the Memorandum of Appeal, which leads as under:-

- “(1) Whether the lower Appellate Court is justified in allowing the Appeal and thereby decreeing the Plaintiffs suit for declaration of title specially when the suit land was not correctly described in the schedule of the plaint and the evidence led by the Plaintiff unmistakably did not relate to the suit land and the survey numbers were wrong?
- (3) Whether both the court below are correct in recording a finding that Thungu is not the married wife of Giridhari after death of her first husband

Suduria and Karunakar the son of Giridhari had no interest in the property specially when the second marriage of Thungu with Giridhari is not being denied by the Plaintiffs and there is no evidence denying the factum of such marriage and after the death of Suduria, the suit property devolved upon Thungu and after Thungu's death, Karuna becomes entitled to the property being the step son of Thungu?

7. Learned Counsel for the Appellants submitted that it being evident that the suit land has not been properly described in the plaint in the schedule given thereunder and the evidence let in by the Plaintiff, when do not relate to the suit land as the survey members being wrongly given, the First Appellate Court has grossly erred in ultimately passing the decree in favour of the Plaintiff when that decree would not be executable. He further submitted that the First Appellate Court is not right in recording a finding that Thunga is not the married wife of Giridhari after the death of Suduria. According to him, the evidence on the score are overwhelming and the First appellate Court had unjustifiably and unreasonably pushed those evidences in support of the case of the Defendant No.1 beyond the zone of consideration. It was submitted that the First Appellate Court ought to have held that Karunakar being the son of Giridhari had no interest in the property, more particularly, when the second marriage

of Thunga with Giridhari is not denied by the Plaintiffs and there is also no evidence denied the factum of such marriage. He, therefore, submitted that after the death of Suduria, the suit property devolved upon Thunga and upon her death, Karunakar became entitled to the property being the step son of Thunga. He, therefore, submitted that no decree as to declaration of right, title, interest over the suit land and possession in favour of the Plaintiffs could have been passed in the suit by the First Appellate Court.

8. None appears on behalf of the Respondent when the matter is called despite opportunities.

9. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below. I have also gone through the plaint and written statement and have perused the evidence both oral and documentary let in by the parties.

10. The fate of the suit depends upon the findings as to whether the Plaintiffs have the right, title and interest over the suit land and as such the right to possess. It is stated by the plaintiffs that they have been in possession of the property for over a period of 50 years from the time of their ancestors. In support of the same, they have led evidence by examining P.W.2. The Defendant No.1 or Karunakar prior to him are stated by that P.W.2 to have never possessed the suit. This P.W.2 had been disbelieved for the reason that he is stated to

have not known the Karunakar and Giridhari. The evidence on record reveals that these Plaintiffs are in possession of the original old record of right, which in the facts and circumstances and in the absence of any other documents being produced from the side of the Defendants have the march for being taken to be the document of title. The First Appellate Court having said above is found to have committed no mistake. The Hal record of right in respect of the suit land had been prepared in the name of father of the Plaintiffs. This has not been challenged before any other forum by the Defendant No.1. The land under Plot Nos.999 and 1089 have been shown to be the land in suit and that is as per the description in the Hal record of right, Ext.2. The discrepancy in the evidence of the witnesses on the face of the record position as to the description given in the schedule in consonance with the record position has rightly been in given any importance to by the First Appellate Court. Since it is the common knowledge that the owners of the land hardly state about survey members of their own lands and for that reason, when the record remains in their name, no adverse view can be taken against their status vis-à-vis said land, if they do not state the numbers on being asked. In addition to this, the Plaintiffs have proved a series of rent receipts which shows that they have been paying rent upto 1981. They have also proved Ext.6, a notice issued to them during the rent camp of the settlement operation.

The land is said to have been purchased by Defendant No.1 way back to 19.03.1975. It remains the fact that he had never got the land recorded in his name pursuant to said sale-deed nor has staked his claim as such during current settlement operation nor there after being aggrieved by the said publication of the said record of right had questioned the same before any forum available under law. So, when the oral evidence adduced by the Plaintiffs in respect of the possession of the suit land receive support from the document as discussed; the evidence of D.W.1 in relation to possession of the suit land is without any such support and the evidence reveals that Karunakar was not permanently staying in the village Jamuda, the permanent stay of Parsuram and after him his son, the present Plaintiff have been the admitted the position. In view of all these evidence on record and taking a cumulative view over the same, the First Appellate Court cannot be said to have committed any error by going to hold that the Plaintiffs are in possession of the suit land as on the date of initiation of the proceeding under Section-145 of the Cr.P.C.

In that view of the matter, with the sale-deed executed by the Karunakar in respect of the suit land in favour of the Defendant No.1's land, when it has not been established by the Defendant No.1 that the Karunakar was possession of the suit land; in my considered view, the answer to the substantial questions of law must run against

the Appellant (Defendant No.1) which paves way for confirmation of the judgment and decree passed by the First Appellate Court which has been impugned in this Appeal.

11. In the result, the Appeal stands dismissed. However, in the facts and circumstances, there shall be no order as to cost.

***(D. Dash),
Judge.***

Narayan

