

IN THE HIGH COURT OF ORISSA AT CUTTACK

SA No.179 of 1992

In the matter of an appeal under section 100 of the Code of Civil Procedure assailing the judgment and decree dated 18.04.1992 and 21.04.1992 respectively passed by the learned 1st Additional District Judge, Cuttack in Title Appeal No.27 of 1983 setting aside the judgment and decree dated 26.02.1983 and 11.03.1983 respectively passed by the learned Subordinate Judge, Cuttack in Title Suit No.341 of 1979.

Narendra Kumr Sahoo & Others* *Appellants

-versus-

Prahallad Sahoo & Others* *Respondents

Appeared in this case by Video Conferencing Mode

***For Appellants* - Mr.D.P. Mohanty
(Advocate)**

***For Respondents* - None**

**CORAM:
MR. JUSTICE D.DASH**

Date of Hearing:20.04.2022 : Date of Judgment: 20.06.2022

D. Dash, J. The Appellants, by filing this Appeal under Section 100 Civil Procedure Code (for short, 'the Code'), have challenged the judgment and decree dated 18.04.1992 and 21.04.1992 respectively passed by the learned 1st Additional District Judge, Cuttack in Title Appeal No.27 of 1983.

By the same, the judgment and decree dated 26.02.1983 and 11.03.1983 respectively passed by the learned Subordinate Judge, Cuttack in Title Suit No.341 of 1979.

The Respondents, as the Plaintiffs, having filed the suit, had lost in the Trial Court. The suit has been decreed by the First Appellate

Court and the Appeal filed by the unsuccessful Plaintiffs under Section 96 of the Code has been allowed. The Present Appellants (Defendants) having thus suffered from the judgment and decreed passed by the First Appellate Court, have come up in this Second Appeal.

It may be stated at this stage that Appellant No.2 (Defendant No.2) having died during pendency of this Appeal, his legal representatives have come on record.

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 Plaintiffs case is that one Dasa Sahoo was the original owner of the suit property as per the description given in Schedule-C of the plot measuring an area of Ac.0.05 decimals. After several transfers made by the original owner Dasa, the suit property came to the hands of Defendant No.4, namely, Saradamani Sahoo. The Defendants 1 to 3 are the sons and daughters of one Baruribandhu Sahoo. It is stated that the Plaintiffs have purchased the suit property from Defendant no.4 by registered sale deed dated 19.12.1977 (Ext.3-C). Having purchased the land, the same has been recorded in their name as per the record of right (Ext.2). The Defendant No.1 has got his homestead adjoining to the eastern side of the suit plot, i.e., 2942. Besides the land under plot no.2942, the Plaintiffs are also the owners of the land under plot nos.2940 and 2941. The land of Defendant No.1 which is adjacent to suit plot no.2942 is under plot no.2943. It is stated that as the house of the Plaintiffs standing over the land under plot nos.2940, 2941 and 2942 got damaged beyond repair, they demolished the same for construction of a new house over there. Sometime in the month of June,

1979, when the Plaintiffs measured the land, they found that Defendants 1 to 3 have encroached the portion of the land under that suit plot no.2942 to the extent of 130 links north-south and 14 links east-west. It is also stated that although they had agreed to vacate the said encroachment, they did not do so. So, the Plaintiffs have filed the suit for declaration of their right, title and interest in respect of the suit property and recovery of possession with permanent injunction.

4. The Defendants 1 to 3, in their written statement, have flatly denied to have encroached any portion of the land under suit plot no.2942. It is said that the property described in Schedule-C of the plaint is a part of their plot no.2943. Having said this, they have also pleaded in the alternative to have perfected title over the suit plot by way of adverse possession. A plea has also been taken that the purchase made by the plaintiff under that registered sale deed is illegal on account of fraud in the registration of the document.

5. With such rival pleadings, the Trial Court, in total, has framed eight issues. On examination of the evidence and their evaluation, the Trial Court, on the crucial issue as to encroachment of the suit land by the Defendants, as alleged by the Plaintiffs, found that the same has not been proved. Thus holding that the Defendants have not encroached upon the suit land belonging to the Plaintiffs, the other issues being so answered against the Plaintiffs, their suit stood dismissed.

The Plaintiffs then preferred the Appeal. The First Appellate Court, by its judgment dated 20.03.1985, allowed the said Appeal filed by the unsuccessful Plaintiff and remanded the suit for its trial afresh with a direction to the Trial Court to appoint a Survey Knowing Commissioner for the purpose of demarcation so as to find out the

encroachment of the suit land, if any made by the Defendants. In remanding the suit, the First Appellate Court then had framed two additional issues for being answered simultaneously which are:-

“(a) Whether the area of plot no.2942 which measures Ac.0.05 decimals is intact; and

(b) Whether the Defendants have encroached upon any portion of the suit plot no.2942 on its eastern side and if so, what is its length and breadth and construction, if any standing therein?”

6. The First Appellate Court then, however, restrained the parties to adduce any further evidence in the matter except to cross-examine the Survey Knowing Commissioner.

7. The Defendants then questioned that order of remand passed by the First Appellate Court by filing M.A. No.199 of 1985 before this Court. By judgment dated 29.01.1988, this Court, while disposing the Appeal, while not interfering with the framing of additional issues, as made by the First Appellate Court, directed the First Appellate Court to keep the Appeal pending in adherence to the provision of Order 41 Rule 25 of the Code awaiting necessary findings from the Trial Court on the additional issues framed and thereafter to dispose of the Appeal afresh on the basis of the fresh findings and other evidence available on record and as would come on record being so let in by the parties.

8. Pursuant to the above order passed by this Court in M.A. No.199 of 1985, the Trial Court undertook the required exercise. Upon examination of the evidence on record and more importantly the report and the evidence of Survey Knowing Commissioner deputed for measurement of the suit property, has held that the Defendants have encroached upon the suit plot bearing no.2942 to the extent of 130 X 14 links. It has also been said that the Defendants have failed to prove their

case of acquisition of title over the said encroached portion of the land by way of adverse possession. With such answers to the findings, the matter came to be placed before the First Appellate Court and the First Appellate Court, upon hearing the parties and evaluation of the evidence on record at its level, has agreed with the finding returned by the Trial Court after remand and upset the findings of the Trial Court recorded at the first instance. Resultantly, the Appeal filed by the unsuccessful Plaintiff has been allowed and the suit has been decreed.

9. The present Appeal has been admitted to answer the substantial questions of law as indicated at Ground No.A, C, E and F of the Memorandum of Appeal and those read as under:-

“(i) If the Courts below are correct in accepting the report of the Survey Knowing Commissioner, who claims to have undertaken measurement with reference to sabik settlement plots when admittedly a new settlement has intervened and configuration of plots on the field has been considerably changed.;

(ii) If the appellate court has committed an error of record in saying that D.W.1 who is defendant no.1 himself, has admitted the fact of encroachment in his evidence.;

(iii) If the appellate Court is correct in altogether ignoring the evidence of D.W.4, who speaks of the fact that the plots on which the Commissioner claims to have drawn the chain lines are not accessible for chain survey.; and

(iv) If the appellate court has committed an error of records that D.W.3 at the time of measurement told the plaintiff's advocate that the suit property is a part of plot no.2942 and if such evidence is admissible in law. This observation of the appellate judge indicates his non-application of mind inasmuch as it is not disputed that the suit land as claimed by the plaintiff in their plaint is a part of plot no.2942. The point of controversy is if the house of the defendants stands on this part of the plot.”

10. Learned counsel for the Appellants submitted that the Courts below, having ignored the factum of intervention of new settlement operation wherein the configuration of the plots in the field have undergone considerable changes, have erroneously accepted the report of the Survey Knowing Commissioner, who has undertaken the measurement in the field with reference to the survey settlement plots of sabik settlement. It was submitted that when the Survey Knowing Commissioner measured the lands, this aspect as to change of configuration of the plots in the field, in course of new settlement operation, had already been made and in that situation, the report being not with reference to the records and maps of both the settlements, the same should not have been accepted. He further submitted that the Courts below have failed to take note of the infirmities appearing in the report and evidence of the Survey Knowing Commissioner, which have been clearly brought out during cross-examination and those, if would have been duly taken into account, the report ought to have been discarded. It was also submitted that the First Appellate Court is not correct in ignoring the evidence of D.W.4, who has spoken about the fact that the plots on which the Commissioner dropped chain lines, in fact not acceptable for chain survey. He, therefore, submitted that the conclusion of the First Appellate Court is unsustainable as having been made without application of mind, which can be seen from the observation made that there was no dispute that the suit land as claimed by the Plaintiffs in their plaint is a part of the land under plot no.2942.

11. None appeared for the Respondents (Plaintiffs) despite being provided with opportunities.

12. Keeping in view the submissions made, I have carefully read the judgments and passed by the Trial Court at the first instance as well as the answers given to the additional issues on remand, so also the judgment passed by the First Appellate Court. I have also gone through the plaint, written statement and have perused the evidence both oral and documentary on record.

13. The substantial questions of law, which arise for being answered in this Appeal essentially relate to the findings recorded by the Trial Court on remand in those two additional issues, which have been affirmed by the First Appellate Court.

After the remand, the Trial Court, on going through the report of the Survey Knowing Commissioner and his evidence as well as other evidence available on record, upon an elaborate and extensive assessment, has arrived at the following findings:-

“(i) the area of plot no.2942 measuring Ac.0.05 decimals is not intact?; and

(ii) the land under plot no.2942 is under the encroachment of Defendants and the Defendants have failed to prove their alternative case as to acquisition of title over the said portion of the land under plot no.2942 by way of adverse possession.”

The First Appellate Court, having sat over to judge the sustainability of those findings, upon assessment of evidence at its level, has refused to record any findings contrary to that of the Trial Court.

14. The report of the Survey Knowing Commissioner has been marked as Ext.XII., The Survey Knowing Commissioner has been examined as CW-1 and cross-examined by the Plaintiffs as well as the Defendants 1 to 3. The filed book prepared by him has been admitted in

evidence and marked as Ext.VII, the spot map as Ext.VI and the case map as Ext.X. The enlarged case map has been admitted in evidence and marked as Ext.XI.

The Commissioner's report states that the area of suit plot no.2942 measures Ac.0.05 decimals and that although remains intact at the spot, the Defendants have encroached from out of it and the land to the extent of 1524 square links. Out of the total area of 2322 links from the eastern side of the suit plot no.2942 from the south up to a distance of 129 links north, which is in consonance with the plaint allegation. With respect to the construction over the said encroachment area, the Commissioner has reported that a portion of the tile, which is belonging to the Defendants exists over 705 square links, their courtyard exists over an area of 234 square links and their passage is over 585 square links. All these features as to measurement made by the C.W.1 in the field have neither been shaken during cross-examination nor any of her material has been brought on surface so as to doubt the evidence in holding as not acceptable as the base of finding. The Defendants, in order to rebut the said evidence, has examined another Amin (D.W.3). The Defendants had taken a stand that there was no existence of sabik plot no.2921, 2922 and 2923, which have been split up bringing such change in shape and size of the previously existing sabik plots in the said locality as per sabik map practically not enabling said Commissioner to take up the measurement as per the old settlement map. It has also been stated that the entire area under plot nos.2912 and 2919 are within the pond and pisciculture is going over a tank over plot no.2909. This has, however, denied by C.W.1. The Courts below have recorded on detail examination of evidence that the Defendants could not point out in which respect, the measurement of the Commissioner is

incorrect when they have also failed to show any material that due to existence of the tank, pond, mango grooves, debdaru jungle and due to change of shape and size of sabik plot which are evident from hal settlement record of right published in the year 1982-83, the Commissioner could not have proceeded with chain line through such area to find out the fix points to be adopted at the spot. D.W.3, being examined to counter the report and evidence of C.W.1, has not been able to satisfy the Courts below that which facets of the report and evidence of C.W.1 are not incorrect so that the same would be discarded. This Court simultaneously on going through the evidence of C.W.1 and D.W.3 is also not in a position to ascertain anything in that light. C.W.1 appears to have taken up measurement of suit plot nos.2942 and 2943 according to the settlement map of the year 1927-28 and has found the area of encroachment made by the Defendants. This being so, D.W.3 has, however, has not taken up necessary measurement in respect of suit plot no.2942. The Trial Court, as it appears, has found it not to be justified for D.W.3 to examine the suit plot no.2942 and 2943 with reference to hal settlement map at the spot and his explanation has been found to be without any such substance and as such acceptable; more-so when he has totally denied to have measured sabik plot nos.2942 and 2943 in order to ascertain their area. In this connection, the prevaricating statement of D.W.3 has also been taken as factor to adversely view his evidence. With such evidence on record, the Courts below are found to have rightly refused to accept the evidence of D.W.3 and another witness (D.W.4) to disbelieve the report of the Survey Knowing Commissioner (C.W.1) and his evidence.

In so far as the alternative case set up by the Defendants as to have acquired title over the suit land by way of adverse possession, the

very averments taken in the written statement, being taken into consideration, in their proper perspective where it is seen that they have not claimed to have entered into possession of the same by denying the title of Defendant No.4 which has specifically come to rest with the Plaintiffs, said plea itself does not stand visible in the eye of law as the very essential ingredient that the possession must be in denial of the title of the true owner remains unfulfilled. Besides the same, the findings of the Courts below that all other ingredients have also not been fulfilled from the side of the Defendants by leading clear, cogent and acceptable evidence when are not found to be suffering from the vide of perversity, the findings of the Courts below on that score are not liable to be interfered with.

The aforesaid discussion and reasons thus provide the answer to the substantial questions of law against the case/claim of the Defendants, which leads to confirm the findings recorded by the Trial Court on remand, as affirmed by the First Appellate Court.

15. In that view of the matter, the First Appeal being allowed and the Plaintiffs' suit having been decreed, this Court finds that this Appeal is devoid of merit.

16. In the result, the Appeal stands dismissed. There shall, however, be no order as to cost.

(D. Dash)
Judge.