

IN THE HIGH COURT OF ORISSA AT CUTTACK

SA No.47 of 1994

In the matter of an appeal under section 100 of the Code of Civil Procedure assailing the judgment and decree dated 07.10.1996 and 03.11.1993 respectively passed by the learned Additional District Judge, Bhadrak, in Title Appeal No.3 of 1990 setting aside the judgment and decree passed by the learned Munsif, Bhadrak, in O.S. No.71 of 1987-I.

State of Odisha, Represented by *Appellants*
the Collector, Bhadrak & Another

-versus-

Smt. Koili Dei *Respondent*

Appeared in this case by Hybrid Arrangement
(Virtual/Physical Mode):

For Appellants - Mr.D.R. Parida,
Additional Standing Counsel
For Respondent - M/s.R.K. Sahoo, S.R. Mishra
B.Ray, Advocates

CORAM:
MR. JUSTICE D.DASH

Date of Hearing : 22.02.2022 : Date of Judgment:28.02.2022

The State of Odisha, by filing this Second Appeal under Section 100 of the Code of Civil Procedure (for short, 'the Code'), has assailed the judgment and decree dated 07.10.1996 and 03.11.1993 respectively passed by the learned Additional District Judge, Bhadrak, in Title Appeal No.3 of 1990.

The Respondent, as the Plaintiff, had filed the suit for declaration for her right, title, interest and confirmation of possession over the suit land and in the alternative for recovery of possession. The suit having been dismissed, she had filed the Appeal under Section 96 of the Code,

which has been allowed. The Respondent's suit with the relief as prayed for has thus been decreed. Therefore, the Defendant has carried this Second Appeal.

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 the suit land with other land belonged to her paternal grandfather and stood recorded in C.S. Khata No.66. Rambha Prasad Panda who is the father of the Plaintiff being the only son of Trilochan died during the childhood days of the Plaintiff. The Plaintiff, therefore, was brought up by her grandfather and given in marriage with one Janmejaya Kar, who began to reside in Plaintiff's paternal house as illatom son-in-law. It is stated that the grandfather of the Plaintiff executed a gift deed in respect of his immovable properties of the extent of an area of Ac.8.34 decimals in her favour on 01.01.1943 and the suit land is included therein. The Plaintiff accordingly possessed said gifted the land including the suit land since then.

In the major settlement, Ac.0.69 decimals of land from out of plot no.55 was recorded in her name in M.S. Khata No.66 which corresponds to Ac.0.84 decimals of land under C.S. Plot No.101 of Khata No.66. It is stated that out of residue Ac.0.15 decimals of land, land measuring Ac.0.08 decimals come to be recorded in M.S. Khata No.308 against Plot No.55/1500 and thus there has been a reduction of Ac.0.07 decimals of land in the Major Settlement Map.

It is further stated that although out of Ac.0.36 decimals of land under plot no.321 of C.S. Khata No.66, land measuring Ac.0.27 decimals under M.S. Khata No.66 against Plot No.296, was recorded in

the name of the Plaintiff, Ac.0.09 decimals of land area was reduced in the Map when on the field, the Plaintiff has remained in possession of the same. Accordingly, she applied for correction of the Record of Right, which stood numbered as Misc. Case No.1 of 1983. This case was dismissed and thereafter, an encroachment proceeding was initiated against the Plaintiff wherein order was passed for eviction. So, she filed suit, i.e, T.S. No.208 1983. Said suit being withdrawn with leave to file a fresh suit, subsequently the present suit bearing T.S. No.71 of 1987-I has been filed.

4. The State-Defendant denying the averments made in the plaint, filed the written statement.

5. The Trial Court, on the above rival pleadings, has framed seven issues. Coming to answer the main issue, i.e, issue no.4 as regards the Plaintiff's right, title, interest and possession over the suit land, the answer has been rendered in the negative saying that the husband of the Plaintiff is not a competent witness in the absence of a power of attorney from the Plaintiff to depose on her behalf as to the facts in support of her case/claim. Therefore, the Plaintiff's case based upon the registered deed of gift (Ext.1) has been said to have not been proved in accordance with law. The Trial Court has also held the suit to be barred by law of limitation being not filed within three years of publication of Major Settlement Record of Right in the year 1983.

6. The lower Appellate Court, first of all has found the averments taken in the written statement to be wholly evasive and in gross violation of the provisions contained in Order 8 Rule 4 of the Code. In the written statement, it only being controverted that Ac.0.08 decimals of land against plot no.55/1500 of M.S. Khata No.380 (Ext.9) does not

correspond to C.S. Plot No.101, the lower Appellate Court has held that the Trial Court was not right in holding that the claim of the Plaintiff is unjustified and vague. The view taken by the Trial Court as regards the competency of the husband of the Plaintiff examined in the Trial Court as P.W.1 has been held to be erroneous and accordingly the evidence of P.W.1 being discussed at great length, analyzed and being evaluated have been taken together with the evidence of P.W.2 as also other documents on record as to have established her case/claim over the suit land. At the end of said exercise, the answer of the lower Appellate Court has been that the Plaintiff's suit has to be decreed.

7. The Appeal has been admitted on the following substantial questions of law:-

“i. Whether the learned appellate court is justified in reversing the decree when the plaintiff withdraw from the witness box and on her behalf the power of attorney holder has been examined?

ii. Whether the lower appellate court is justified in placing reliance on gift deed, Ext.1, when the same was not accepted by the donee?”

8. Mr.D.R.Parida, learned Additional Standing Counsel for the Appellant-State supported the view taken by the Trial Court in eschewing the evidence of P.W.1 from consideration and finally saying that the Plaintiff has failed to prove the ownership over the property covered under the deed of gift, which in the absence of evidence of the Plaintiff herself cannot be accepted. He, therefore, submitted that the First Appellate Court was not justified in placing reliance on that gift deed (Ext.1) when it has not been proved in accordance with law and its acceptance by the donee, the Plaintiff has not been established. He, therefore, urged for recording the answer to the substantial questions of

law in favour of the view taken by the Trial Court and accordingly contended for restoration of the judgment and decree passed by the Trial Court in dismissing the suit filed by the Plaintiff.

9. None appeared for the Respondent despite several opportunities.

10. P.W.1 is none other than the husband of the Plaintiff and that stands admitted. The very case of the Plaintiff is that her grandfather had given her marriage to P.W.1 and from the beginning, her husband stayed in the paternal house of the Plaintiff as an illatom son-in-law. These facts are not specifically denied. The deed of gift is said to have been executed on 01.01.1943. This P.W.1 has been living in the house since long and he has produced the deed of gift, which has not been questioned and admitted in evidence and marked as Ext.1 without objection. Ext.1 is a thirty years old document and also carries the presumption as provided in Section 90 of the Evidence Act. In view of all these evidence on record, the error committed by the Trial Court in holding that basing upon the testimony of P.W.2 with regard to possession when he had not been able to indicate the plot numbers, the Plaintiff's case is not established, has rightly rectified by the first Appellate Court in taking a view to the contrary, moreso when as per the report of the Amin attached to the office of Tahasildar, Basudevpur vide Ext.8 the Plaintiff is in possession of Ac.0.84 decimals of land of C.S. Khata No.66 against Plot No.101 though Ac.0.08 decimals out of it has been recorded in the name of the State against Plot No.55/1500 vide Ext.9 for recording of which there arises no justification. The First Appellate Court thus has rightly set aside the order passed by the Trial Court in non-suiting the Plaintiff and refusing to grant her the reliefs as prayed for in not giving any importance to the ground taken by the Trial

Court that P.W.1 having no power of attorney of the Plaintiff when has deposed, his evidence is of no value. When this P.W.1 has deposed all the facts well within his knowledge, he having said so without the power of attorney of the Plaintiff is of no fatal consequence to the Plaintiff's case.

The aforesaid discussion and reasons thus provide the answer to the substantial questions of law against the Appellants-Defendants, which lead for confirmation of the judgment and decree passed by the lower Appellate Court.

11. In the result, this Appeal stands dismissed and the suit filed by the Respondent-Plaintiff stands decreed. However, there shall be no order as to cost.

