

IN THE HIGH COURT OF ORISSA AT CUTTACK

SA No.18 of 1998

In the matter of appeal under Section 100 of the Code of Civil Procedure assailing the judgment and decree dated 07.07.1997 and 21.07.1997 respectively passed by the learned Civil Judge, Senior Division, Keonjhar in Title Appeal No.36 of 1995 setting aside the judgment and decree dated 28.10.1995 and 20.11.1995 respectively passed by the learned Civil Judge, Junior Division, Keonjhar in Title Suit No.36 of 1985.

State of Orissa & Others *Appellants*

-versus-

Kansal Bewa & Others *Respondents*

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

For Appellants - Mr.G.N.Rout,
Additional Standing Counsel

For Respondents - Mr.Soumya Sekhar Parida
(Advocate)

CORAM:

MR. JUSTICE D.DASH

Date of Hearing : 18.07.2022 : Date of Judgment:25.07.2022

D.Dash,J. The State of Orissa and its other functionaries, by filing this Appeal, as the Appellants, under Section-100 of the Code of Civil Procedure, 1908 (for short, 'the Code'), have assailed the judgment and decree dated 07.07.1997 and 21.07.1997 respectively passed by the learned Civil Judge, Senior Division, Keonjhar in Title Appeal No.36 of 1995.

By the same, the Appeal filed by Respondents 1 to 5 as the unsuccessful Plaintiffs, under section 96 of the Code, has been allowed and thereby the judgment and decree dated 28.10.1995 and 20.11.1995 respectively passed by the learned Civil Judge, Junior Division, Keonjhar in Title Suit No.36 of 1985 have been set aside.

The suit pursued by these Respondents 1 to 5, being the legal representatives of the original Plaintiff, namely, Gourang Mohanta being dismissed by the Trial Court, on Appeal, the same has been decreed.

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 Trial Court.

3. The Plaintiff's case is that one Kartika Mohanta is the common ancestor of the Plaintiffs and Defendants. 8 to 10. He acquired the suit land in Nayabadi Case No.2167 of 1927-28 and excavated a tank over the same better described in Schedule-B of the plaint. It is stated that after the death of Kartika, his son Anukur Mohanta, the father of the original Plaintiff renovated the suit tank. In an amicable partition, the suit tank had fallen to the share of the Plaintiff and the Plaintiff renovated the same and used it for pisciculture. He is stated to have been in possession of the suit tank and nearby lands without any disturbance from any quarter. It is stated that Defendants 1 to 7, in connivance with the Settlement Authorities, managed to record the suit tank in Schedule-B under 'Sarba Sadharan' Khata and tried to catch fish forcibly from the said tank. The Plaintiff then filed an application before the Tahasildar for correction of record of right. The Tahasildar, initiating a miscellaneous case, directed the local Revenue Inspector for enquiry. The report being received, finally the Tahasildar started an

Encroachment Proceeding against the Original Plaintiff and it is now questioned as without jurisdiction. The Plaintiff, therefore, filed the suit for declaration of his right, title and interest over the tank in Schedule-B and for confirmation of possession or in the alternative, for recovery of possession and permanent injunction.

4. The Defendants 1 to 7, in their written statement, have averred that Kartik Mohanta, the grandfather of the original Plaintiff had obtained land under Sabik Plot No.90/1, 94/2, 70/1 and 71/2 in total measuring Ac.1.44 decimals and said land is in possession of the Plaintiffs. The rest of the Government land lying vacant, the villagers were in possession of the same. They, in course of time, having excavated the earth and taken those for their use, the area became as like a tank. It is stated that since then, the Defendants have been using the said tank and in the Hal Settlement, therefore, rightly the same has been recorded under 'Sarba Sadharan' Khata. The Villagers claim to have acquired the right of using the said tank and the land lying nearby.

The Defendants 11 and 12, i.e., the State of Orissa and other functionaries of the State, in their written statement, pleaded that the tank and the nearby land had never been used by the Plaintiff or his ancestors. It is stated that the villages used water of the suit tank as and when so needed and, therefore, the same has been rightly recorded under 'Sarba Sadharn' Khata. It is further asserted that the suit tank as situated was never in possession of the Plaintiff or his family members. The Plaintiff has got his land adjoining to the north and east of the Schedule-B lands. It is alleged that although with some ulterior motive, the Plaintiff had initiated Revenue Misc. Case No.161 of 1985, but when the matter came up for hearing, he remained absent for which finally, the case was dismissed on merit refusing to accept the claim of the Plaintiff.

It is thus stated that rightly the State, invoking the provisions of Orissa Prevention of Land Encroachment Act, 1972 (for short, 'the OPLE Act'), has initiated the Encroachment Case No.10 of 1985-86 in respect of the land under Plot No.332 measuring Ac.0.32 decimals (Jalasaya) under Khata No.56 of Village-Raghubeda and finally, the order having been passed therein for eviction of the Plaintiff; he has been so evicted on 23.09.1986. It is further stated that the grandfather of the Plaintiff had never excavated the tank. It is the specific case of these Defendants that the description of the land, as given in Schedule-B of the plaint measuring Ac.0.74 decimals under Plot No.71/1/108 and Khata No.3/Ka of Village-Raghubeda does not correspond to the land under Hal Plot Nos.329, 331, 332 and 333 measuring Ac.0.70 decimals. It is stated that Hal Plot Nos.535, 536, 538, 540 & 541 correspond to Sabik Plot No.71/1/108. Schedule-B land being under Sarba Sadharan Khata, the Plaintiff when forcibly possessed the same, proceeding under the provisions of OPLE Act vide Encroachment Case No.10 of 1985-86 had been initiated.

5. On the above rival pleadings, the Trial Court framed as many as eleven issues.

At the first round, the suit was disposed of by judgment dated 25.02.1989 followed by the decree. The right, title and interest of the Plaintiff over the suit property under Schdule-B was declared and the Defendants 1 to 8 and 11 to 13 were directed to deliver the possession of the same to the Plaintiff and they too were permanently enjoined from interfering with the possession of the same by the Plaintiff.

The Defendants 1 to 8 and 11 to 13 preferred separate Appeals under section 96 of the Code, which stood numbered as T.A. No.15/1989 (12/93) and T.A. No.16/1989 (13/93). The Appeals, being

heard together, by common judgment, the First Appellate Court had disposed of the Appeals on 17.08.1993. These Appeals then stood allowed. The judgment and decree passed by the Trial Court, having been set aside, the suit was remitted to the Court below for fresh disposal by framing additional issues and directing to answer all those issues together afresh. The Trial Court thereunder was directed to appoint Civil Court Commissioner at the cost of the Plaintiff to measure the suit land and report as to if the suit land of Sabik Khata No.3/ka under Plot No.71/1/108 of Village Raghubeda measuring Ac.0.74 decimals correspond to the land under Hal Khata No.56 vide Plot Nos.329, 331, 332 and 333 measuring Ac.0.70 decimals and then to also consider the same.

6. After remand, the Trial Court, in answering all those issues, has finally dismissed the suit. In answering issue no.7, by taking into account the report of the Civil Court Commissioner and other evidence, has held that the Plaintiffs have failed to establish that the land under Sabik Khata No.3/ka bearing Plot No.71/1/108 corresponds to the land under Hal Plot No.329, 331, 332 and 333. So, it has been said that the grandfather of the original Plaintiff had not excavated the suit tank as under Schedule-B and the father of the Plaintiff as well as the Plaintiff have never renovated the same and possessed by rearing fish and catching those at any given point of time and, therefore, the question of the same falling to the share of the original Plaintiff in view of the partition does not arise. Practically, the answer to this issue has led the Trial Court to dismiss the suit.

7. The unsuccessful Plaintiff, having carried the Appeal, the First Appellate Court has reversed the said finding of the Trial Court on issue

no.7 and has finally declared the right, title and interest of the Plaintiff over Ac.0.20 decimals of land appertaining to Hal Plot No.332 and Ac.0.12 decimals of land appertaining to Hal Plot No.333. In that view of the matter, the initiation of the Encroachment Case in respect of those plots has been held to be without jurisdiction and the order passed therein to that extent has been held as void.

The Defendants have been directed to deliver vacant possession of the suit land, as aforesaid, in favour of the Plaintiff.

8. The State, being aggrieved by said judgment and decree passed by the First Appellate Court, is now in appeal.

9. The Appeal has been admitted to answer the following substantial questions of law:-

“A. Whether the First Appellate Court is right in placing the report of the Civil Court Commissioner by upsetting the finding of the Trial Court assigning good reasons in holding the said report as apparently wrong, in arriving at a finding their title in respect of the land measuring Ac.0.32 decimals from out of Ac.0.74 under Sabik Plot No.71/1/108?;

B. Whether the learned First Appellate Court is right in holding that the land under Hal Plot No.332 and 333 measuring Ac.0.32 decimals, correspond to Sabik Plot No.71/1/108 which is the Rayati land of the Plaintiffs and the institution of the Encroachment Proceeding against the plaintiffs was void being without jurisdiction?; and

C. Whether the learned First Appellate Court in consideration of Ext.C (Plot Index) is correct in not holding that Sabik Plot No.71/1/108 corresponds to Hal Plot No.535, 538, 540 and 541 which are in the possession of the Defendant No.8 to 10 who are the brothers of the Plaintiff, namely, Gouranga Mahanta?”

10. Learned counsel for the State submitted that the Trial Court, assigning good and valid reasons when had declined to accept the report of the Civil Court Commissioner, the First Appellate Court has committed grave error in placing reliance on that report, which has not been in conformity with the writ issued to the Commissioner and when the Commissioner, in discharging his duty thereunder, has travelled beyond its mandate. He further submitted that the well reasoned finding of the Trial Court on issue no.7 holding the Plaintiffs to have failed to establish their right over the Schedule-B land measuring Ac.0.32 decimals out of Ac.0.74 decimals under Sabik Plot No.71/1/108 has been unjustifiably set aside. He further submitted that the First Appellate Court is not right in holding that the land under Hal Plot Nos.332 and 333 measuring Ac.0.32 decimals correspond to the land under Sabik Plot No.71/1/108, which is the rayati land of the Plaintiff and that view is said to be completely against the weight of evidence on record and based upon the perverse appreciation of evidence. He further submitted that the First Appellate Court ought to have accepted the documentary evidence let in by the Defendants in establishing that the land under Sabik Plot No.71/1/108 corresponds to the land under Hal Plot No.535, 538, 540 and 541, which are in possession of the Defendants 8 to 10, who are none other than the brothers of the original Plaintiff Gouranga and in that view of the matter, the claim of the Plaintiff ought to have been held to be in the direction of taking double benefit and advantage in garbing public property.

11. Learned counsel for the Respondents (Plaintiffs), inviting attention of the Court to the discussion of evidence, as made by the First Appellate Court, submitted that the First Appellate Court, upon just and proper appreciation of evidence both oral and documentary, has rightly

arrived at a conclusion that the Plaintiffs have the right, title and interest over the land in respect of Hal Plot Nos.332, 333 measuring Ac.0.28 decimals and Ac.0.12 decimals respectively. He submitted that the report of the Civil Court Commissioner and his evidence, which had been erroneously eschewed from consideration by the Trial Court, have rightly been so detected by the First Appellate Court and the evidence adduced by the parties being tested with the said report, the answer given on issue no.7 by the Trial court has been rightly set at naught.

12. Keeping in view the submissions made, I have carefully gone through the judgments passed by the Courts below.

13. The substantial questions of law framed for being answered in this Appeal revolve around the answer on issue no.7. This issue no.7 runs as under:-

“Is the description of the suit land as per the Sabik and Hal Settlement correct?”

In order to find the common answer to the substantial questions of law, in addressing the rival submissions, this Court is, therefore, called upon the sustainability of the finding on issue no.7, as has been rendered by the First Appellate Court by saying to the contrary as that of the Trial Court.

14. The Plaintiff's case, in the plaint, is that the land under Sabik Plot No.71/1/108 corresponds to Hal Plot Nos.329, 331, 332 and 333. The First Appellate Court has found that the land under Hal Plot Nos.332 and 333 to the extent of Ac.0.20 decimals and Ac.0.12 decimals respectively as corresponding to the land under Sabik Plot No.71/1/108. The Trial Court had found the same to have not been established by the

Plaintiff. The claim in the written statement is that the land under Sabik Plot No.71/1/108 corresponds to the land under Hal Plot Nos.535, 536, 538, 540 and 541. On such rival pleadings, certainly the burden of proof lies on the Plaintiff to establish his case and accordingly, to taste the success on said burden of proof upon being discharged by him. The certified copy of the record of right granted in favour of Karitk Mohanta, the grandfather of the original Plaintiff as per the order passed in Nayabadi Case No.2167 of 1927-28 upon acceptance of the report of the Revenue Inspector, who had been deputed for making an enquiry on the basis of an application made by the Plaintiff would to show that Sabik Plot No.71 corresponds to Hal Settlement Plot Nos.329, 331, 332 and 333. Ext.3 is the certified copy of the Sabik Record of Right and Ext.2 is the report of the Revenue Inspector. This Revenue Inspector has, however, not been examined to prove the report. In the said report, it has been clearly stated that Sabik Plot No.171 is corresponding to Hal Plot Nos.329, 331, 332 and 333. It is not in his report that Sabik Plot No.71 corresponds to Plot Nos.329, 331, 332 and 333. So, rightly the Trial Court has said that the report of Revenue Inspector (Ext.2) does not help the Plaintiff in showing that the land under Sabik Plot No.71 is corresponding to Hal Plot Nos.329, 331, 332 and 333. Ext.E, the document marked at the Appellate stage at the first round shows that Sabik Plot No.108 is corresponding to Hal Plot Nos.334/538, 335/540 and 334/541 under Khata Nos.18 and 45 and Sabik Khata No.71 is corresponds to Hal Plot Nos.329, 330, 332 and 333 relating to Khata No.56. Thus, the report of Revenue Inspector (Ext.2) and the contents of Ext.E admitted in evidence stand in contradiction to one another. Therefore, the Trial Court having said that no conclusion can be drawn that the land under Sabik Plot No.71 corresponds to Hal Plot Nos.329,

331, 332 and 333; this Court finds no justification to accord any disapproval to the same. It is precisely for this reason the First Appellate Court in the first round of the Appeal had directed for deputation of Civil Court Commissioner to measure the land and submit his report specifically saying whether the land under Sabik Khata No.3/ka, Plot Nos.71/1/108 corresponds to Hal Plot No.56, Plot Nos.329, 331, 332 and 333 of that village Raghubeda, for the issue being adjudicated upon. This obtained report of the Civil Court Commissioner is Ext.VII. He has been examined as C.W.1. The parties have cross-examined at length. It has been stated by him that the suit land, i.e., under Sabik Plot No.71/1/108 measured in total Ac.0.74 decimals under Khata No.3/ka and from that. Out of this Ac.0.74 decimals, the recorded land of the Plaintiff is Ac.0.36 decimals and the rest Ac.0.22 decimals of Sabik Plot No.71 is stated to be the Government land. He has stated to have neither obtained the Nayabadi Case record nor taken the correct trace map of Plot No.71/1/108. It has been stated that he was not directed in the writ for measuring Sabik Plot No.71/1/108 and its corresponding Hal Plot numbers. It has not been there in the report as to whether land under Sabik Khata No.3/ka, Plot No.71/1/108 corresponds to the land under Hal Khata No.56, Plot Nos.329, 331, 332 and 333. Therefore, the Trial Court was justified in saying that the Civil Court Commissioner, by submitting the report, has travelled beyond the writ issued in terms of the order of remand and observation made therein by the First Appellate Court in the Appeal in above round. Therefore, the First Appellate Court ought not to have taken the different view in favour of the same. Thus on the oral and documentary evidence adduced by the parties, this Court finds that the Trial Court was correct in answering issue no.7 against the claim/case of the Plaintiff and the First Appellate Court in saying that

since the parties have not challenged such aspect of the composition of Sabik Plot No.71/1/108 and then by going to further analyze the report, has erred in saying that the Trial Court was not right in rejecting the said report of the Civil Court Commissioner. The First Appellate Court then also is not right in saying that inadvertently that there has been mention of Sabik Plot No.171 in the second line of the report of the Revenue Inspector, which the Revenue Inspector has corrected with regard to Sabik Plot No.71. With the obtained evidence on record, in my considered view, the First Appellate Court, has gone wrong in taking a view that the Plaintiff has been able to establish the title in respect of Ac.0.32 decimals of land out of Ac.0.74 decimals of Sabik Plot No.71/1/108, which corresponds to Plot Nos.332 and 333 measuring Ac.0.20 decimals and Ac.0.12 decimals respectively.

The aforesaid discussion and reasons provide the answer to the substantial questions of law to the effect that the Plaintiff has failed to establish his right, title and interest over the suit land and the description of the suit land as per Sabik and Hal Settlement Record as given by the Plaintiff has not been established so as to be entitled to get a decree. Therefore, the judgment and decree passed by the First Appellate Court are hereby set aside and those passed by the Trial Court are hereby restored. The Plaintiffs suit stands dismissed.

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

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