

IN THE HIGH COURT OF ORISSA AT CUTTACK

SA No.89 of 1997

In the matter of an appeal under section 100 of the Code of Civil Procedure assailing the judgment and decree dated 09.12.1996 and 20.12.1996 respectively passed by the learned Additional District Judge, Bhubaneswar in Title Appeal No.27 of 1990 confirming the judgment and decree dated 25.06.1990 and 07.07.1990 respectively passed by the learned Munsif, Bhubaneswar in Title Suit No.215 of 1988-I.

Kanhu Mallik @ Kahnu Charan ***Appellants***
Mallik & Others

-versus-

Trilochan Mukhi ***Respondent***

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

For Appellants - Mr.B.Baug. N.N.Mohapatra,
B.Das
(Advocates)

For Respondent - Mr.C.S.Jena &
A.K. Mohanty
(Advocates)

CORAM:
MR. JUSTICE D.DASH

Date of Hearing : 16.05.2022 :: Date of Judgment:20.06.2022

The Appellants, by filing this Appeal under Section- 100 of the Code of Civil Procedure (for short, 'the Code') have assailed the judgment and decree dated 09.12.1996 and 20.12.1996 respectively passed by the learned Additional District Judge, Bhubaneswar in Title Appeal No.27 of 1990.

By the same, the Appeal filed by the present Appellants (Defendants) under Section-96 of the Code has been dismissed and the judgment and decree dated 25.06.1990 and 07.07.1990 respectively passed by the learned Munsif, Bhubaneswar in Title Suit No.215 of 1988-I decreeing the suit filed by the Respondent, as the Plaintiff, in restraining the Appellants (Defendants) from entering upon the suit land and disturbing the peaceful possession of the (Respondent) Plaintiff over it having been confirmed; further direction issued to the Appellants (Defendants) to pay a sum of Rs.300/- to the Respondent (Plaintiff) as damage has also not been interfered with.

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 he is the owner in possession of the suit land and has been paying the land revenue. It is stated that he has constructed a cowshed over the suit land since long and in the last settlement operation, he has also received Parcha. It is his case that in the Consolidation Operation, the record of right has been finally published in his made and he had planted one Palm tree, one Mango tree, one Achhu tree as also had grown up two bamboo clamps over a portion of the suit land. It is alleged that the Defendants having failed to purchase the property from the Plaintiff in order to grab the suit land, on 12.06.1988 despite protest had cut and removed the Achhu tree standing over the suit land of the value of Rs.800/- In view of the above, the suit has come to be filed seeking the decree for permanent injunction and recovery of damage from the Defendants.

4. The Defendants, in their written statement, neither have questioned the Plaintiff's title over the suit land nor his possession. It is, however, stated that the Achhu tree which they have cut was standing on their land and that was under their possession when they were also cutting branches of the said tree as and when required for their own use. It is stated that said tree is not a valuable one and generally people do not plant such type of trees which grow in natural process. It is their case that the value of the said tree as then was around Rs.300/-.

5. The Trial Court, faced with the above rival pleadings, having framed five issues, has finally held that the Defendants to had cut that Achhu tree standing over the land of the Plaintiff and thereby have caused loss to the Plaintiff. The suit stood accordingly decreed.

Being aggrieved by the finding recorded by the Trial Court and the decree as to recovery of damage; the Defendants have moved the First Appellate Court where that finding has been confirmed.

6. The present Appeal has been admitted on the following substantial question of law:-

“Whether as the Plaintiff discharged the burden of proof that the land from which the tree was cut was in his exclusive possession?”

7. Mr.B.Baug, learned counsel for the Appellants submitted that the evidence as so let in by the Plaintiff on their face value, should not have been held sufficient to conclude that the burden of proof lying upon the Plaintiff to specifically establish that the land over which the standing Achhu tree was cut and removed was in exclusive possession of the Plaintiff. He further submitted that merely because of the positioning of the tree, as per the settlement and the consolidation record of right is

seen to be on the said recorded land in favour of the Plaintiff unless the evidence is there that at the time when the tree was cut, the land was in possession of the Plaintiff, which has not come here in the present case, the Courts below have erred in holding these Defendants as liable for paying damage of Rs.300/- to the Plaintiff.

8. Mr.A.K.Mohanty, learned counsel for the Respondent submitted all in favour of the findings recorded by the Courts below. According to him, such finding of fact being concurrent when there arises no such perversity therein, this Court, in seisin of the Second Appeal should not interfere with the same. He further submitted that the evidence let in by the Plaintiff is enough to show that the Defendants have cut that Achhu tree standing over the land in possession of the Plaintiff where they were having no right, title, and interest over which the tree was standing nor were in possession of the same.

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

10. Dispute is not there with regard to the title of the suit land that it rests with the Plaintiff. The question for consideration is whether said Achhu tree was standing over the land of the Plaintiff and in his possession when it was cut and removed by the Defendants. There is no evidence as to the plantation of the said tree. It is also stated that such trees are ordinarily not planted, but they come up to grow in natural process. As it appears, the Courts below being swayed away the recording of the suit land basing upon the oral evidence of the Plaintiff, have held that the tree was over his land, without addressing that question raised by the Defendants that it was on the boundary of the

land of the Plaintiff and Defendants and was in their possession. The Plaintiff has not led any evidence by examining any witness having made a survey in the field in ascertaining that Achhu tree was standing over his recorded land. The Courts below ought not to have gone to rely upon the witnesses of the Plaintiff taking a cue from the fact that the Defendants have failed to prove their case that the Achhu tree in question was standing over consolidation plot no.1123 in saying that the Plaintiff has duly discharged the burden of proof of the fact that the Plaintiff has established his case that the tree which has been cut and removed was on his recorded land which he owns.

For all the aforesaid, this Court answers the substantial question of law against the Plaintiff in saying that the Courts below ought to have held that the Plaintiff has failed to discharge the burden of proof that said Achhu tree in question was standing on their land and thus while being in his possession, had been cut and removed by the Defendants in causing loss to him.

11. In that view of the matter, the findings on the above score as recorded by the Courts below is liable to be set aside, which finally leads to set aside the judgments and decrees passed by the Courts below to the extent of grant of damage of Rs.300/- to the Plaintiff to be paid by the Defendants.

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

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