

IN THE HIGH COURT OF ORISSA : CUTTACK

RSA No.45 of 2003

In the matter of appeal under Section-100 of the Code of Civil Procedure assailing the judgment and decree passed by Additional District Judge, Rairangpur in T.A No.4 of 2001-I confirming the judgment and decree passed by the learned Civil Judge (Senior Division), Rairangpur in Title Suit No. 28 of 1991.

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Kishori Prajapati (since dead)

& Others

: :: Appellants.

- :: VERSUS ::-

Chhotrai Mohanta (since dead)

& Others

: :: Respondents.

Advocate(s) who appeared in this case through virtual mode.

For Appellants

... M/s. S.D. Das, N. Bisoi, B.K. Sinha,
D.R. Sundaray, B. Patnaik, D.
Mohanty, A.K. Nayak, A.N. Sahu.
D.R. Bhokta, H.S. Satpathy & N.
Bisoi, Advocates

For Respondents

... M/s. B.S. Das, P. Behera, A.K.
Panigrahi, S.C. Routray & M.K.
Biswal, Advocates.

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

Date of Hearing: 12.01.2022 :: Date of Judgment: 21.01.2022

The Appellants, by filing this Appeal, under Section-100 of the Code of Civil Procedure (for short, 'the Code') have challenged the judgment and decree passed by learned Additional District Judge, Rairangpur in T.A. No. 4 of 2001-I.

By the said judgment and decree, while dismissing the Appeal filed by these Appellants under section 96 of the Code; the First Appellate Court has confirmed the judgment and decree passed by the learned Civil Judge (Senior Division), Rairangpur in T.S. No. 28 of 1991.

It may be stated at this stage that the present Respondent Nos. 1 to 7 as the Plaintiffs had filed the suit arraigning the Appellants and one Bipin Bihari Mohanta as the Defendants. The Appellant Nos. 1 to 3 had come on record as the Defendants after death of their predecessor-in-interest Raghunath Prajapati who was the original Defendant No.1. Respondent Nos. 1, 2 and 8 have died during pendency of this Appeal; accepting the submission of the learned counsel for the parties that Respondent No.1 was one of the Plaintiffs and he with other Plaintiffs were pursuing the suit and contesting the First Appeal as also the present Appeal, order that effect has been passed on 18.11.2021 that the substitution of his legal representatives was not so necessary as it would have no fatal consequence. Similarly, in view of death of Respondent No. 8 as he was not contesting the suit by filing the written statement nor contesting the First Appeal, the substitution of his legal representatives as submitted by the learned counsel for the parties has been said to be of no fatal consequence to the Appeal on hand. The Respondent No. 2 having died since her legal representatives are already on record as Respondent Nos. 3 to 7, her name has been deleted. The cause title of the Appeal has accordingly been corrected.

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. **Plaintiffs' case:-**

The land described in Schedule 'B' of the plaint had been sold by one Tanu Mohanta (Defendant No.3) and Arjun Mohanta to Sanatan Mohanta, the father of the Plaintiff No.1 by registered sale deed dated 27.8.1963. Sanatan since then being the lawful owner of the said land possessed the same. It is stated that the Defendant No. 1 falsely initiated a proceeding under section 145 of Code of Criminal Procedure against Sanatan, Tanu, Bipin and Laxmidhar Mohanta which was numbered as Criminal Misc. Case No. 25 of 1984. In that proceeding, the possession of the suit land by Raghunath Senapati was declared. So, Sanatan and others filed a suit i.e. T.S. No. 2 of 1965 claiming title over the above land. The suit being decreed declaring the right, title and interest of the Plaintiffs therein and Defendant No.1 (Raghunath Prajapati) was directed to deliver of vacant possession of the suit land to the Plaintiffs. The Defendant No. 1 (Raghunath Prajapati) being aggrieved and dissatisfied with the judgment and decree passed by the Trial Court, filed an Appeal i.e. T.A. No. 22/28-M of 1985. The Appeal was dismissed. Since the Defendant No.1 (Raghunath Prajapati) did not give delivery of possession of the suit land to Sanatan (father of Plaintiff No.1), he initiated an execution proceeding for obtaining the possession of the said land. On 15.8.1967, the possession of the said land was delivered to Sanatan and since then he continued to possess the suit land peacefully till his death. After death of Sanatan, his two sons Mochiram and Chhotray succeeded to the said property. While so possessing, Mochiram died leaving behind his widow, three daughters and two sons who are the Plaintiff Nos. 2 to 7. Accordingly, all the Plaintiffs came to possess the suit land.

It is alleged that as the Plaintiffs were staying in village Baikala, they could not attend the settlement operation. So in the current settlement, the suit land has been recorded in the name of Defendant

No.3 (Tanu Mohanta) better described in Schedule B-I of the plaint. It is next alleged that on 19.3.1991 the Defendant Nos. 1 and 2 dug foundation over the suit land. Being so informed, the Plaintiffs protested to such illegal action of the Defendants. But instead of listening, the Defendant Nos. 1 and 2 continued with their illegal activities over the suit land. They forcibly completed the construction of the house covering an area of Ac.0.01 decimal from the land under Schedule 'B' which corresponds to the law under Schedule-B-1 and is the subject matter of dispute. The Plaintiffs claim that they are the rightful owner of the suit land and therefore, the suit came to be filed claiming the relief of declaration of right, title and interest of the Plaintiffs over the suit land and also for recovery of possession of the same after developing the constructions made by the Defendant Nos.1 and 2 over the suit land.

4. The Defendant Nos. 1 and 2 contested the suit by filing joint written statement. It is stated that Sanatan never purchased the suit land vide registered sale deed dated 27.8.1963 and the Plaintiffs have thus no right, title and interest over the suit land. It is next stated that during the Mayurbhanj State Regime, way back in the year 1939, the land under sabik plot No. 153 with other lands had been acquired for construction of a road and for the purpose, huge quantity of earth had been removed from the land under plot No. 153 so also the land under other plots. The road in front of the land under plot No. 153 was raised to a height of 10 ft to 15 ft and therefore, Tanu Mohanta and Arjun Mohan left the possession of the land under plot No. 153 and that land was lying as unsuitable for any purpose being full of ditches. However, the sketch and khatian of village stood uncorrected without taking note of the developments made by said acquisition. They claim that Tanu and Arjun thus never possessed the suit land under sabik plot No. 153 from the year 1939 onwards and taking advantage of the non-correction of the

Record of Rights, the sale deed has been created when there was no delivery of possession of the suit land in the field by Tanu and Arjun in favour of the father of the Plaintiff No. 1 i.e. Sanatan. In the year 1952, the Defendant No. 1 intended to purchase 6 (six) gunthas of land from one Subhanath Mohant lying to the west of the suit land. So, pursuant to oral agreement, Subhanath delivered the possession of the said land to Defendant No.1 lying to the west of the suit land and Defendant No. 1 constructed the house over that land and resided there with his family. The Defendant No.1 being a potter then started his business of making earthen pots and earthen roofing tiles locally known as 'Khapara' on his land and earned his livelihood. In the year 1955, the Defendant No. 1 finally purchased the land from Subhanath Mohant by a registered sale deed. The suit land was then a ditch. The Defendant No. 1 filled up the ditch and labeled it and then possessed the same as its owner. He constructed a cow-shed over the suit land and also carried out his activities of making earthen roofing tiles and pots and stocked those over the suit land. It is stated that since the year 1950, the Defendant No. 1 has been possessing the suit land as its owner. In the year 1968, the Defendant No. 1 gave some foundation on a portion of the suit land as also his own land for constructing a pucca house. Finally, the house was constructed and since the year 1955, he is in possession of the suit land as its owner. The possession of these Defendants over the suit land was said to be open, peaceful and continuous to the knowledge of Arjun, Tanu and Sanatan, the father of the Plaintiff No. 1 as also to the knowledge of the Plaintiffs. So it is said that they have perfected title over the suit land by way of adverse possession. They denied about the initiation of any proceeding under section 145 of the Cr.P.C. in respect of the suit land. They also state that the T.S. No. 2 of 1965 whose decision had been challenged in T.A. No.22/28 of 1965 and finally,

ended in the Execution Proceeding No. 4 of 1967 had no concern with the suit land. Thus, they deny that the suit land had ever been delivered to the Plaintiffs in that execution proceeding as they claim. It is stated that such documents have been created for the purpose. Next, they state that the delivery of possession shown therein is only a paper transaction and the Settlement Officials have wrongly recorded the suit land in favour of Defendant Nos. 3 and 4. They deny the allegation that they forcibly did the construction over the suit land on 19.3.1991.

It is further stated that the Defendants have acquired prescriptive right of easement pathway over the suit land and they have no other way to come to their residential house situated on their own land from the main public road and this path is in front of their house.

5. On the above rival pleadings, the Trial Court has framed in total 12 (twelve) issues. In the facts and circumstances as those emanates from the rival pleadings as well as ongoing through the documentary evidence adduced by the parties, the Trial Court appears to have rightly first taken up issue No. 10 for decision and then other issue as also issue No. 11. Finally, answers on all the issues being recorded in favour of the Plaintiffs, the suit has been decreed as under :-

“ORDER

That the suit be and the same is decreed on contest against defendant No.1(a) Kishori Prajapati, 1(b) Damayanti Prajapati, 1(c) Mukta Dei, Defendant No.2-Puran Ram Prajapati with costs and ex parte against other defendants without costs. While defendants have no right, title and interest over the suit, plaintiffs' right, title, interest over the same are hereby declared and they are regarded as lawful & rightful owner of the suit land.

Mandatory injunction is hereby issued in favour of the plaintiff and against the defendants 1(a) to 1(c) and Defdt. No.2 and these defendants are also directed to demolish their unauthorized construction from over the suit land at their own costs and to delivery vacant possession of the suit land to plaintiffs within three (3) months hence, failing which plaintiffs are at liberty to recover the same in due process of Court.

Plaintiffs are to take steps before the Revenue Authorities to correct the R.O.R. in their favour. Advocate's fee at the contested scale."

The Defendants being aggrieved by the said judgments and decree, having challenged the same by filing Appeal have been unsuccessful. The present Second Appeal has been admitted on the following substantial question of law:-

"Whether presumption of possession can be drawn in favour of the plaintiff in the absence of writ with regard to delivery of possession?"

The above substantial question of law concerns with the finding recorded by the courts below on issue No. 10.

6. Mr. S. D. Das, learned Senior Counsel for the Appellants at the outset on 12.01.2022 opening the submission placed the fact that in the meantime, keeping in view the observation/direction of the Hon'ble Apex Court in case of Asian Resurfacing of Road Agency Pvt. Ltd. & Another vs. Central Bureau of Investigation in Criminal Appeal No. 1375-1376 of 2013, the Executing Court saying that the earlier order of stay of further proceeding of Execution Case No. 5 of 2001 filed for execution of the decree under challenge in this Appeal has finally

executed the decree. It was submitted that as during the short period of time and in the prevailing Covid-19 Pandemic situation, the Defendants having not been able to move this Court for stay in right time; they had no other option but to abide by the order of the Executing Court.

Mr. B.S. Das, learned counsel for the Respondents in response submitted that the decrees under challenge in this Appeal having been fruitfully executed, now the delivery of possession of the suit land has already been given to the Plaintiffs who are thus in peaceful possession of the said land.

7. In the above given situation, Mr. S.D. Das, learned Senior Counsel for the Appellants instead of pressing for answering the substantial question of law as framed prayed for disposal of this Appeal with necessary observation/direction completely in tune with and in adherence to the findings recorded by the courts below in saving and the respecting the respective right of the parties over their own land and in the direction of protection of the same.

Inviting the attention of the Court to paragraph 18 of the Trial Court judgment, he submitted that the right of easement of pathway as claimed by the Defendants over that piece of land under plot No. 343 in approaching the public road from their own land under plot No. 346 has mainly been declined with a finding that the Defendants have the approach to their land under plot No. 346 to come over the public road over the land under plot No. 344 where the Plaintiffs have absolutely no right. He next submitted that by virtue of delivery of possession of the suit land under plot No. 343 which is adjacent plot No. 344, the Plaintiff having an upper hand has encroached upon the only path for the Defendants now to approach the public road and that passage over the land under plot No.344 is totally closed. He submitted that the

Defendants are now even unable to reside in their own house when the electricity connection and water supply connection too taken to their house through the land under plot No. 343 have been disconnected as the delivery possession of that land has been given to the Plaintiffs. He thus submitted that thus it has been a life and death question for the Defendants and their family members which they are temporarily managing with the mercy being shown to them by others.

In support of the same by filing an application under order 41 rule 27 read with section 151 of the Code which has been numbered as I.A. No. 1 of 2022, he prayed for admission of the documents annexed to the application being the finally published map of the concerned mouza showing the suit land in particular as also other adjacent lands are not disputed any angle. He submitted that a bare perusal of these documents would reveal that the Defendants are having no access to the public road through the land under plot No. 343 whose possession has been delivered to the Plaintiffs and they can only live in their dwelling house situated over the plot No. 346 by going over the land under plot No. 344 to the public road which has also been so found by the courts below. He therefore submitted that for fair play and in the interest of justice, the action of the Defendants over the land under plot No. 344 detrimental to the interest of the Plaintiffs completely raising the issue of human rights need be properly dealt with. He therefore submitted that the substantial question of law in the above light need be framed and answered so as to protect the right of the Defendants to approach the main public road by going over the land under plot No. 344.

8. Mr. B. S. Das, learned counsel for the Respondents responding to the above did not however dispute the position that the courts below have found the existence of a passage for the Defendants touching their land under plot No. 346 over which their house stands up to the main

public road. He also submitted that the same has been taken as the important ground to deny the claim of the Defendants as to acquisition prescriptive right of easement of pathway over the suit land under plot No. 343 measuring Ac. 0.01 decimal. He however submitted that the Plaintiffs neither at any prior point of time nor after getting the delivery of possession of the suit land from the baliff of the Court sent by the Executing Court in any way infringed the right of the Defendants over the land under plot No. 344. He submitted that the said land is available for the Defendants to approach the public road from the land under plot No. 346.

9. Considering the submission as above, the following substantial question of law had been framed on 12.1.2022.

“Whether the Courts below while passing the decree in favour of the Plaintiffs as prayed for ought to have further passed a decree in respect of the land under plot No. 344 found to have been used by the Defendants as their pathway to come over the main public road from their house for its protection and non-infringement in any manner by the Plaintiffs as otherwise the right of the Defendants as to their user and living in their house over the land under plot No.346 would stand completely jeopardized and they would practically drove them out of their own land and house.”

On 12.1.2011, learned counsel for the parties have also advanced their rival submission over the above substantial question of law too.

10. Mr. S.D. Das, learned Senior Counsel for the Appellants (Defendants) having reiterated what he had submitted as above further contended that under the extreme circumstance when now the Defendants are no more contesting the claim of the Plaintiffs under plot

No. 343, they should be restrained from creating any obstruction over the land under plot No. 344 and thereby infringing the right of pathway being exercised by the Defendants in going from their house to the main public road as without the same despite having their land and house; they would be on the street to take their shelter under the sky which till now they have been able to somehow manage with the mercy shown by other land owners.

11. Mr. B.S. Das, learned counsel for the Respondents (Plaintiffs) submitted that the Defendants have neither encroached upon that land under plot No. 344 nor has infringed right of way of the Plaintiffs over the said land in any manner.

12. Keeping in view the submissions made, I have carefully perused the judgments passed by the courts below. I have also read the averments taken in the application filed by the Defendants giving rise to I.A. No. 1 of 2022 as also the averments taken in the objection filed by the Plaintiffs which are all supported by affidavits.

The documents sought to be adduced as the additional evidence are not disputed in any manner. Those are the certified copies of final map published in the last settlement. The map indicates the situation of the suit land and the main public road as well as the lands of the parties and therefore, those are also found necessary to enable this Court to pronounce judgment and for the substantial cause of consideration of the matter relating to the approach of the Defendants to the public road from their land and house. The prayer of the Defendants being thus allowed, those documents are marked as Exts G and G-1. The I.A. No. 1 of 2022 is accordingly, disposed of.

13. In order to address the above submissions in answering the substantial question of law; straight way coming to paragraph-18 of the

judgment of the Trial Court in which there has been discussion in finding out the answer to issue No. 11, it would be seen that in clear terms the Trial Court has stated about the existence of general RASTA from the land under plot No. 346 to the main public road through the plot No. 344. At the beginning of the said paragraph, it has been noted that the land under plot No. 343 belongs to the Plaintiffs and the land plot No. 344 is 'Gharoi Rasta' indicated in Exts. 11 and 17. It has again been reiterated that the land under plot No. 344 is a passage connecting the main road. Having further discussed the evidence, the Trial Court is of the view that the Defendants might be using the suit land as passage to come from the house to the road being shortcut one and merely because it was lying vacant.

The Plaintiffs in their objection to the Application giving rise to I.A. No. 1 of 2022 at paragraph-5 have very importantly stated on affidavit as under:-

“That it is strenuously refuted by the Respondents that the Appellants have no other way or approach to the main road as allegedly claimed by the Appellants. It is humbly submitted that there is a path in front of plot No. 346 belonging to the Appellants to approach the main road, the Appellants have been using the said path/road to approach the main road.”

The above statement lends full support to the submission made from the side of the Appellants (Defendants).

In the above premises, in my considered view while decreeing the suit filed by the Plaintiffs declaring their right, title, interest and possession over the land under plot No. 343 which is the suit land, the right of way of the Defendants over the land under plot No. 344 which has been taken as the ground to deny the Defendants' right over the suit

land to approach the main public road ought to be protected from the hands of the Plaintiffs, their henchmen, agents and servants etc and the Plaintiffs being granted with the reliefs claimed over the land under plot No. 343 be not allowed to have undue advantage in grabbing the land under plot No. 344 used as the approach or pathway for these Defendants to come over the main public road from their house standing over the land under plot No. 346 and thereby create an extreme situation as to the living of the Defendants and his family members.

The substantial question of law as reformulated stands accordingly answered.

14. Accordingly, this Appeal stands disposed of with the following order:-

“The suit be and the same is decreed declaring the right, title and interest of the Plaintiffs over the suit land.

Mandatory injunction is hereby issued in favour of the Plaintiffs and against the Defendants who are directed to demolish their unauthorized construction over the suit land and deliver vacant possession of the same to the Plaintiffs within three months hence at their own cost failing which the Plaintiffs would be at liberty to recourse the same through court as the cost recoverable from the Defendants.

Permanent injunction is hereby issued in favour of the Defendants and against the Plaintiffs restraining them from interfering with the user of the land under Plot No. 344 (Gharoi Rasta) as passage/pathway/approach of the Defendants from coming over the main public road from their land and house over plot No. 346 and in case of any such

obstruction/infringement/construction by the Plaintiffs over that land under plot No. 344 in the user of the same as above by the Defendants; mandatory injunction is issued against those Defendants to remove those within a month hence at their own cost failing which the Defendants can restore the status of that land as ‘Gharoi Rasta’ for their user as above through the court by way of execution at the cost recoverable from the Plaintiffs.”

No order as to cost in this Appeal is passed.

15. As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of the order available in the High Court’s website, at par with certified copy, subject to attestation by the concerned advocate, in the manner prescribed vide Court’s Notice No.4587 dated 25th March, 2020 as modified by Court’s Notice No.4798 dated 15th April, 2021, and Court’s Office Order circulated vide Memo Nos.514 and 515 dated 7th January, 2022.

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