

IN THE HIGH COURT OF ORISSA AT CUTTACK

RSA No.457 of 2003

In the matter of an appeal under section 100 of the Code of Civil Procedure assailing the judgment and decree dated 31.01.2003 and 19.02.2003 respectively passed by the learned District Judge, Angul, Dhenkanal in Title Appeal No.19 of 1990 confirming the judgment and decree dated 27.06.1990 and 10.07.1990 respectively passed by the learned Civil Judge, Senior Division, Dhenkanal in Title Suit No.49 of 1976.

Mandakini Mishra & Another* *Appellants

-versus-

***Dhenkanal Municipality through* *Respondents*
*its Chairman & Others***

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

***For Appellants* - Mr.S.P. Mishra, Sr. Advocate
S.Mishra, S. Nanda &
S. Dash
(Advocates)**

***For Respondents* - Mr.S.B.Panda
Advocate for R.3**

CORAM:

MR. JUSTICE D.DASH

Date of Hearing : 12.05.2022 : 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 31.01.2003 and 19.02.2003 respectively passed by the learned District Judge, Angul, Dhenkanal in Title Appeal No.19 of 1990.

By the same, the Appeal filed by the predecessor-in-interest of the present Appellants (Plaintiffs) under section 96 of the Code has been dismissed and the judgment and decree dated 27.06.1990 and 10.07.1990 respectively passed by the learned Civil Judge, Senior Division, Dhenkanl in Title Suit No.49 of 1976 have been confirmed

One Sudhansu Sekhar Mishra as the Plaintiff had filed the suit for specific performance of contract and recovery of possession. The suit having been dismissed, he carried the First appeal. During pendency of the First Appeal, said Sudhansu Sekhar Mishra, having died, the present Appellants pursued the same. The First Appeal having been dismissed, they have filed the present 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. Plaintiff's case is that Purnanda Sidha Bramhachari, being in need of money, had agreed to sell Ac.0.22 decimals of land out of plot no.1477 and 1478 under khata no.82 of Dehnkanal town as per the record of Revision Settlement of the year 1923-24 corresponding to Hal Settlement Plot No.2178 measuring Ac.0.045 decimals, plot no.2179 measuring Ac.0.139 decimals under Khata no.1994 and plot no.160 under khata no.1991 measuring Ac.0.338 decimals; in total Ac.0.22 decimals. It is stated that said Purnanda Sidha Brahmachari executed an agreement for sale of the above land on 20.12.1969 in favour of the Plaintiff and out of the agreed consideration of Rs.5000/-, he had received a sum of Rs.101/-, as advanced consideration from the Plaintiff. It was promised by Defendant No.1 that he would register the sale deed in favour of the Plaintiff in future after he recovers the

possession of the suit land and at that time would receive the balance consideration from the Plaintiff. It is further stated that although such an agreement for sale had been executed, the sale deed could not be so executed as litigation in respect of the said land continued between said Purnandaon one hand and Narayan Mishra and others on the other. The suit terminated finally in favour of Purnanda and his title was declared. He was also restored with the possession of the suit land on 21.09.1975 by the order passed by the learned Subordinate Judge, Dhenkanal in the Execution Case No.15/72.

It is stated that in view of the result coming out in the litigation, the Plaintiff and Purnanda agreed that the execution of registered sale deed would be done after settlement of the land in his favour and in pursuance of the agreement for sale dated 20.12.1969, said Purnanda executed another deed of contract for sale on 29.12.1975, which is after he was restored with the possession of the suit land and then he had received a sum of Rs.2500/- from out of the agreed consideration. Purnanda is said to have then delivered possession of the above area of Ac.0.222 decimals of land to the Plaintiff and since then the Plaintiff possessed the suit land.

It is stated that on 15.01.1976, there was an encroachment of land by Dhenkanal Municipality. It is also stated that on 06.04.1976, one Benudhar Bramhachari (Defendant No.4) holding the Power of Attorney of Purnanda Sidha Brahmachari received a sum of Rs.600/- towards the balance consideration and he endorsed and signed on the back of the agreement dated 19.12.1975. It is also stated that Purnanda himself received Rs.400/- towards the consideration and had granted a receipt on 15.02.1976 although inadvertently the date appears to have been written as 15.02.1968. It is the further claim that Purnanda received

consideration of Rs.3601/- and he was to take balance consideration of Rs.1399/- from the Plaintiff. On 01.05.1976, Purnanda promised to receive the balance consideration and execute of the sale deed in favour of Plaintiff in respect of Ac.0.222 decimals of land within seven days thereafter. But he has not come forward to receive the balance consideration and execute the sale deed. Purnananda despite requests, failed to perform his part of contract when this Plaintiff was and has been ready and willing to perform his part of the contract. When the matter stood, thus, the Dhenkanal Municipality in the meantime for extension of Jagannath Road, which runs adjoining the suit land encroached upon Ac.0.066 decimals from out of the suit land and the request of the Plaintiff not to do so was not paid any heed to.

The Plaintiff, therefore, filed the suit against Purnanda Sidha Brahmachari and others for specific performance of contract and for recovery of possession of the land described in Schedule-B of the plaint from Defendants 2 to 4. The

4. Defendant Purnanda Sidha Brahmachari and Benudhar Bramhachari, Defendants 1 and 4 (originally) submitted written statement denying all the averments taken in the plaint. They denied to have executed any agreement for sale on receiving any such consideration money in advance. They also denied to have delivered possession of the suit land or any portion thereof to the Plaintiff. The Municipality (Defendant No.2) and its officials (Defendants 3 and 4) having raised the question of maintainability of the suit in the eye of law for lack cause of action and that the suit is barred by limited have also taken the plea that the Municipality has not encroached Ac.0.06 decimals of land of the Plaintiff and the Plaintiff was never in possession of the said land. It is their case that Dhenkanal Municipality

undisputedly is in possession of Ac.0.110 decimals of land for more than 12 years being so within the Jagannath Road. It is further stated that said Jagannath Road is on the same position as it was constructed since 1936 during Darbar Administration, but simply its topping has undergone improvement and there has been no encroachment. It is also stated that the Plaintiff and Purnanda Sidha Bramhachari had or has no right, title and interest over the suit land and the status of the land was Bramhottor Lakharaj Bahal and that is still with the State Government being vested under the provisions of Orissa Estate Abolition Act free from all encumbrances.

5. The original plaint has underwent extensive amendments during when Defendant No.1 Purnanda Sidha Brahmachari executed the registered sale deed on 27.10.1978 and expired leaving behind his disciple Defendant No.4 and after expunging of Purnananda.

6. The Trial Court, coming to answer the issues, on examination of the evidence and upon their evaluation, has held that the suit is liable to be dismissed. The First Appeal being filed has also been dismissed.

7. Learned counsel for the Appellants submitted that the Plaintiff having established his title over the suit land, which is admittedly in possession of the Defendant-Municipality, which has constructed the road over the same by encroaching it at the time expansion and they having made out a case of acquisition of title by way of adverse possession, the suit ought to have been decreed directing recovery of possession from the encroached land in favour of the Plaintiff. He, therefore, urges for admission of this Appeal on the above substantial questions of law.

8. Mr.S.P.Panda, learned counsel for the Municipality-Respondent assisting the Court in the matter of admission of the Appeal, submits that the suit is not maintainable. The Plaintiff having filed the suit for specific performance of contract and recovery of possession could not have later on prayed for recovery of possession of a part of the said suit land over which admittedly Jagannath Road lies alleging that it is an encroachment after abandoning the prayer of specific performance of contract. He further submitted that the Plaintiff having not led any evidence that when he obtained registered sale deed in respect of the suit land over which the Jagannath Road runs was in possession of his vendor and had been so delivered to the Plaintiff, the claim of the Plaintiff as to recovery of possession of the land covered under the road has rightly been rejected. He also submitted that there being absolutely no evidence on record that all along the land over which the road lies was in possession of the vendors of the Plaintiff and they have accordingly delivered the possession of the same to the Plaintiff pursuant to the said sale deed, the said claim of recovery of possession of the land measuring Ac.0.06 decimals from the Defendants-Municipality is liable to be rejected.

9. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below.

10. The case of the Plaintiff is now only against Defendant Nos.1 to 3 and the claim of relief is against them. At present, the dispute concerns with the land measuring Ac.0.06 decimals, which is said to have been encroached by the Defendants-Municipality whereupon a portion of the public road is said to be running. When the suit was instituted, the Plaintiff had no title over this Ac.0.06 decimals of land. He is said to have acquired title over the suit land by virtue of the sale deed which

has come into being during pendency of the suit which he had filed with the main goal of obtaining that sale deed from the vendor saying that he agreed to do so, has been avoiding. It is stated by the Plaintiff that on 15.01.1973, when Jagannath Road was laid, this land measuring Ac.0.06 decimals was encroached upon as it was lying by the side of the said road. The total area of his land is said to be Ac.0.22 decimals and the encroachment said to be of an extent of Ac.0.06 decimals. The Plaintiff has obtained the sale deed in respect of the suit land on 27.10.1978 and as per his own case, his vendors were not in possession of this land of Ac.0.06 decimals with them and, therefore, this Plaintiff was not delivered with the possession of the said land pursuant to the said sale.

11. In the suit, the originally Purnananda has been arraigned as Defendant No.1. Stating that Purnananda during suit has fulfilled his part of the contract by executing the sale-deed on 27.10.1978 and has expired leaving behind his disciple Benudhar Brahmachari, the plaint has undergone extensive amendment by abandoning relief claimed against original Defendant No.1 in stating that the Plaintiff does no more press the relief of specific performance of contract against said Defendant No.1, who is represented by his disciple-Defendant No.5.

It is well known in law that a suit to specifically enforce the performance of contract, has its own sphere and operates within that. The Plaintiff seeking such enforcement of the contract does have a title over the property and that he only acquires after the passing of the decree when finally the same is concluded by execution of the document either by the party or at the instance of the Court. The points require to be established and proved by the suitor seeking such enforcement of the contract needs no recitation. In the present suit, the Plaintiff claims that during the suit, he has acquired the title. Although there was a prayer for

recovery of possession at the initial stage, it was not then claimed on the basis of title which is now claimed after amendment. In my considered view, it was impermissible for the Plaintiff to join the Defendant Nos. 1 to 4 in seeking recovery of possession of a portion of the suit land which was the subject matter of the contract for sale; in this suit which essentially for specific performance of contract against the proposed vendor (original Defendant No.1). The very advancement of said prayer for recovery of possession as against these Defendants 1 to 4, who have no concern with the contract for sale and are said to be encroachers is seen to have been made as if 100% certain of getting a decree for specific performance of contract as against said original Defendant No.1 and as if the suit is an empty formality for that purpose to give a show. When the suit for specific performance contract was pending, the sale-deed is said to have been executed by the proposed vendor (Defendant No.1). He, in the written statement, had denied to have executed any such contract for sale and to have never delivered possession of the suit land to the Plaintiff. The collusion between the Plaintiff and Defendant No.1 is apparent when the above are viewed with the subsequent development which has taken place outside the Court culminating with the sale of land by original Defendant No.1. In view of the above, the Trial Court ought to have held the suit to be falling foul of the provision of Rule-3 of Order-2 read with Rule-3 of Order-1 of the Code. When the Plaintiff had no title over the property and no prior possession and in fact when he would have derived the title in future in the subject matter or not was dependant on the final result in the suit; how is that he would seek the relief of recovery of possession of a part of the suit land from other Defendants alleging that they have so encroached and assigning them with the status as those encroacher.

Amendment of the plaint as had been prayed for, in my considered view should have been disallowed. Therefore, it is held that the order to that effect is erroneous. That having affected the decision of the suit, keeping in view the provision contained in section-105 of Code this Court therefore so declares.

12. Coming to the merit and taking no objection to the maintainability of the suit in the form laid and for the reliefs claimed liable to be dismissed for joinder of causes of action; it is seen that as stated those evidence that Jagannath Road is there since the year 1936 being constructed during Darbar Administration period. It is stated by the Defendant No.4, the Chairman of the Municipality, that they have been so seeing positioning of the the road since long being maintained by the Municipality all along and there has been no change in its size and shape. The Plaintiff too has not taken any step to identify that Ac.0.06 decimals to have been within that road and had led no such evidence to clearly so establish. The description of the suit land as essential for the purpose of the relief claimed against the Defendant Nos.1 to 4 also does not appear to be not only wholly insufficient but also vague. In view of all the aforesaid, this Court finds that the Courts below are right in declining to grant the relief of recovery of possession of that land of Ac.0.06 decimals from the Defendant Nos.1 to 4. Therefore, this Court finds that no such substantial question of law arises for being answered in this Appeal meriting its admission.

13. Resultantly, the Appeal stands dismissed. There shall be, however, no order as to costs.

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