

IN THE HIGH COURT OF ORISSA AT CUTTACK

S.A. No.84 of 1999

In the matter of appeal under Section 100 of the Code of Civil Procedure assailing the judgment and decree dated 11.12.1998 and 06.01.1999 respectively passed by the learned District Judge, Khurda at Bhubaneswar in Title Appeal No.2(a) of 1997 confirming the judgment and decree dated 02.04.1997 and 25.04.1997 respectively passed by the learned Civil Judge, Junior Division, Bhubaneswar in Title Suit No.87 of 1990.

Smt. Santilata Kanungo (Since Dead) by her LRs ***Appellants***

-versus-

Smt. Sandhya Das & Another ***Respondents***

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

For Appellants - Mr.S. Mantry,
(Advocate)

For Respondents - Mr.T.Mishra, Advocate
Mr.D.K. Mishra, Advocate

CORAM:

MR. JUSTICE D.DASH

Date of Hearing : 11.08.2022 : Date of Judgment:20.10.2022

D.Dash,J. The original Appellant, by filing this Appeal under Section 100 of the Code of Civil Procedure, 1908 (for short, 'the Code'), has assailed the judgment and decree dated 11.12.1998 and 06.01.1999 respectively passed by the learned District Judge, Khurda at Bhubaneswar in Title Appeal No.2(a) of 1997.

By the same, the Appeal filed by the original Appellant here under section 96 of the Code in assailing the judgment and decree dated

02.04.1997 and 25.04.1997 respectively passed by the learned Civil Judge, Junior Division, Bhubaneswar in Title Suit No.87 of 1990, has been dismissed and thereby the judgment and decree passed by the Trial Court in decreeing the suit restraining the original Appellant (Defendant) to enter upon suit land followed by issuance of mandatory injunction to demolish the cow shed and other construction standing over the suit land, have been confirmed.

The Respondent No.1 had filed the suit as the Plaintiff arraigning Santilata, the original Appellant as Defendant No.2 and her husband as Defendant No.1. The suit, being decreed, Defendant No.2 had carried the First Appeal, which has been dismissed. That Defendant No.2 having filed the Second Appeal, now her legal representatives are pursuing the same in view of her death.

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 that one Narayan Mohapatra, being the recorded owner of Schedule-A property, one Nrusingha Charan Das had purchased the same from him on 16.05.1960. The possession of the property sold by Narayan having been delivered to Nrusingha, he possessed the same. Said Nrusingha, on 6.5.1961 sold land measuring Ac.0.028 decimals from the southern side to his wife Pramodini Das while his wife's house is on the northern portion of the land. Pramodini, for the purpose of putting up construction over the purchased land, availed financial assistance and mortgaged Schedule-B property with Bhubaneswar House Building Cooperative Society. She raised construction up to the plinth level. Pramodini died in the year 1972. The

loan could not be repaid. As a result of the same, the property in Schedule-B of the plaint was put to auction on 24.09.1976 in Execution Proceeding No.1620 of 1974-75.

One Nilakantha Swain purchased the property in the said auction and he possessed the same. Nilakantha then sold the suit land to the Plaintiff on 28.04.1978 and delivered the possession of the same to the Plaintiff. The Defendant No.2 had filed T.S. No.77 of 1990 against the Plaintiff for declaration of right, title, interest and confirmation of possession. That suit was dismissed on 29.09.1992. The First Appeal, being carried by the Defendant No.2, as the unsuccessful Plaintiff therein, being numbered as T.A. No.34 of 1992, the same has been dismissed on 22.08.1995. The Defendant No.2, having carried the Second Appeal, it has been numbered as S.A. No.258 of 1995 and admitted on 25.03.1996.

It is the further case of the Plaintiff that the Defendant No.2 was a monthly tenant in respect of a portion of the house situated over Schedule-A land. During stay of the Defendant No.2, just six months prior to filing of the suit, he constructed a chow shed without the knowledge of the Plaintiff and despite protest, as he refused to dismantle the cow shed, the Plaintiff was compelled to file the suit.

4. The Defendant No.1, in his written statement, has disputed the transaction made between the father of the Plaintiff and Narayan. His allegation is that Nrusingha, the father of the Plaintiff is unnecessarily trying to harass the Defendants.

The Defendant No.2, who happens to be the wife of Defendant No.1, in her separate written statement, however, admitted that Narayan was a tenant under Sikimi Khata No.93 under Record of Right of the year 1962. Her claim is that said land being inalienable, the Plaintiff

cannot derive any title and consequently, the suit for injunction is to fail. It is further stated that Defendant No.2 was being treated as daughter by Narayan and accepted by him as such. Said Narayan had gifted the land to her with the knowledge of Surendranath Mohapatra, who happens to be the son of Narayan. It is stated that Defendant No.2 had acknowledged the gift and then she has constructed her house over the land under Sabik Plot No.2267 and has been living therein since the year 1960. So, it is said that the Defendant No.2 had acquired title over the entire plot of land, i.e., 2267 to the extent of Ac.0.064 decimals by way of adverse possession.

5. On the above rival pleadings, the Trial Court framed five issues. On going through the evidence and their detail examination, issue nos.1 and 2 as to the competing claim of the parties over the suit land having the right, title, interest and possession, the finding has been that the Plaintiff is in constructive possession over the suit land and the Defendants when having no manner of right, title and interest, have put up that cow shed over the suit land and since the Plaintiff has the title and right to possess the suit land, the Defendants are liable to be enjoined for any such future action over the suit land and also to remove the construction already put up. Having said as above, the Trial court has gone to answer the other issue in decreeing the suit. The First Appellate Court being moved by the aggrieved Defendant No.2, in addressing the contentions raised before it, has found no convincing reason to record a different finding on the core issues. Thus having said that there surfaces no such infirmity and illegality in the judgment and decree passed by the Trial Court, the First Appeal has been dismissed.

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

“A. Whether the Court must draw an adverse inference against the Plaintiff for having not examined herself as a witness in the suit?; and

B. Whether the Plaintiff could have derived title from a person who have absolutely no alienable right.”

7. Learned counsel for the Appellants submitted that the Plaintiff, having not examined herself as a witness in the suit, the Courts below have erred in law by not drawing adverse inference in accordance with the provision contained in section 114(g) of the Evidence Act relating to her claim of right, title, interest and possession over the suit land. He submitted that the construction of cow shed said to have been made by the Defendants on Schedule-B land in the absence of any sketch map or dimension being given in the plaint so as to make it identifiable, the decree could not have been passed. He further submitted that the evidence of P.W.1, the husband of the Plaintiff ought not to have been accepted for the purpose of the establishment of the claim of the Plaintiff over the suit land in support of the relief claimed. He further submitted that the Defendants having taken the clear stand that the description of Schedule-B land is unspecified and unidentifiable and wrong, in the absence of any sketch map and dimension and without the Plaintiff, coming to the witness box to depose and proving which is Schedule-B land out of Schedule-A land, the Courts below have erred in passing a decree in the suit. He further submitted that the Courts below ought to have held that the purchase of the suit land by the Plaintiff from Nilakantha is void. It was submitted that Narayan was not a tenant but a Sikimi tenant in respect of Schedule-A land and, therefore, Narayan had absolutely no right title of alienation of Schedule-A land. So the sale

deed executed on 16.5.1960 by Narayan in favour of Nrusingha is void as even on that day, the Sikimi right was not heritable or transferable. He further submitted that subsequent sale by Nrusingha in favour of Pramodini in respect of Ac.0.028 decimals of land out of it on 05.06.1961, which has been mortgaged by her to the House Building Cooperative Society and then put to auction sale in execution proceeding on 24.09.1976 in favour of Nilakantha are all void. He, therefore, submitted that the Plaintiff has no title over Schedule-B land which should not have held by the Courts below.

8. Learned counsel for the Respondents, on the other hand, supported the findings of the Courts below. He submitted that the Plaintiff has established through evidence that she had acquired right, title and interest over the suit land by virtue of the sale deed (Ext.1) from her vendee, who had purchased the property in an auction sale held in an execution proceeding. He further submitted that the right, title and interest of the Plaintiff has been well established by the Courts below in T.A. No.34 of 1992 arising out of T.S. No.77 of 1990 and, therefore, the Defendant have been rightly enjoined by the Courts below and directed to remove the construction. He submitted that once the relationship between the parties is admitted and established, the tenant is estopped and thus precluded from the challenging the title of the landlord and if he does so under the general law, he makes himself liable for eviction on that ground which has been taken note of by the Courts below. He further submitted that the Defendant has not been able to establish the title over the suit land by virtue of Ext.A and when the Plaintiff has established her title over the suit land, the decree for permanent injunction and mandatory injunction has been rightly issued by the Courts below. He submitted that the suit land having been demarcated as

proved with its situation beyond Ac.0.057½ decimals from the Plaintiff's boundary wall of the suit land inside the campus and that Hal Plot No.750 when is having Ac.0.081 decimals, deputation of Civil Court Commissioner was no more the requirement and, therefore, such a petition has rightly been dismissed by the First Appellate Court.

9. Having argued as above, learned counsel for the parties, however, submitted that the result of the earlier filed Second Appeal, i.e. S.A. No.258 of 1995 arising out of T.A. No.34 of 1992 wherein the judgment and decree passed in T.S. No.77 of 1990 filed prior to the present suit are under challenge would hold the key in answering the substantial questions of law framed in this Second Appeal and that would decide the fate of the present Second Appeal.

10. The position now emerges that Second Appeal, i.e., SA No.258 of 1995 has been dismissed. Thereby, the judgment and decree passed in T.S. No.77 of 1990 confirmed in T.A. No.34 of 1992 have been upheld and are thus in full operation.

In the above present scenario, the substantial questions framed for being answered in this Appeal do not survive for being answered.

Resultantly, the judgment and decree passed in T.S. No.87 of 1990, as confirmed in T.A No.2(a) of 1997, firmly hold the field.

11. Accordingly, this Appeal stands dismissed. No order as to cost.

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

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