

IN THE HIGH COURT OF ORISSA AT CUTTACK

S.A. NO.135 OF 1999

In the matter of an appeal under section 100 of the Code of Civil Procedure has assailed the judgment and decree passed by the learned District Judge, Balangir in Title Appeal No.26/17/37 of 1992-1993-1996 by dismissing the judgment and decree passed by the learned Additional Munsif, Balangir in Title Suit No.9/21 of 1986-90.

Ghasiram Patel

:::

Appellant

-versus-

Haladhar Patel & Others.

:::

Respondents

**Appeared in this case by Hybrid Arrangement
(virtual/physical mode)**

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For Appellant

:::

M/s.Manoj Mishra, S. Mishra,
B. Mishra, P.K. Das,
Advocates.

For Respondents

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None

CORAM:

MR. JUSTICE D.DASH

DATE OF HEARING::21.06.2022, DATE OF JUDGMENT::04.07.2022

D.Dash, J. The 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 passed by the learned District Judge, Balangir in Title Appeal No.26/17/37 of 1992-1993-1996.

By the same, the Appeal filed by the present Appellant being the unsuccessful Plaintiff under Section-96 of the Code has been dismissed

and thereby the judgment and decree passed by the learned Additional Munsif, Balangir in Title Suit No.9/21 of 1986-90 have been confirmed.

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 the land under Plot No.276 appertaining to holding No.5 of village Bijabahali stands recorded in the name of his father as per the record of the current settlement. His father died in the year, 1985. The Plaintiff succeeded to the same and he with his sisters being the owners possessed the same. It is alleged that the Defendants having no manner of right, title and interest over the said land have been trying to interfere with the Plaintiff's possession over the same.

It is next stated that land under Plot No.277 of that very village adjoins Plaintiff's land under Plot No.276. This land under Plot No.276 is part of land under Sabik Plot No.149 under holding No.7 as per record of 1936 settlement. This plot of land is said to be the waste land and being used as road by the villages. During the current settlement, the said plot has been shown as road in the village map and as such recorded in the record of right. In order to reach the land of the Plaintiff under Plot No.276 from his village basti, the Plaintiff has finally to pass through the land under Plot No.277. So, it is said that for last 40 years

from the time of his father, this land under Plot No.277 is being used as path way for approaching the land of the Plaintiff under Plot No.276 as also to go over the Gochar land behind. The Plaintiff stated that he has been openly using this land as a road without any obstruction from any quarter and as of right to the knowledge of the Defendant and all concerned. It is also stated that there is no other way for Plaintiff to go to his own land under Plot No.276 and the Gochar land other than going over the land under Plot No.277. It is also stated that the Plaintiff has acquired natural right over the said plot of land as the entry to his own land. It is alleged that the Defendants are trying to interfere with the right of way of the Plaintiff over said plot No.277.

4. The Defendants who are the members of the joint family essentially challenged the right of the Plaintiff as claimed over the land under Plot No. 277. It is stated that they are in physical possession of the said land under Plot No.277 and it is their exclusive raiyati land recorded in their name as per the record of current settlement, although its kissam had been stated as Anyana Rasta having no relevance. They state that the suit plot of land was never used as road as the Plaintiff or any villagers at any given point of time. It is their case that over Plot No.277, there stands a Nala on the western side and wide ridge exists. It is their case that in order to come to the Plaintiff's land under Plot

No.276 from the village basti one has to cover several plots of land stretching over distance of more than half mile and there is no road or path way to the same. It is also stated that the Plaintiff has his own individual site on the eastern side of his own plot for the purpose of storing water.

5. The Trial Court on the above rival pleadings framed as many as seven issues. Answering those issues the suit stood decreed in respect of both the plots of land under Plot No.276 and 277. The Trial Court found that the Plaintiff is the owner of the land under Plot No.276 and has the right of way over the land under Plot No.277. The First Appellate Court being moved by the Defendants suffering from the judgment and decree passed by the Trial Court, they have been successful in negating the decree of the Trial Court annulled in so far as land under Plot No.277 is concerned.

6. The Appeal has been admitted on the following substantial questions of law as indicated in ground (A) and (B):-

- (A) Whether the impugned judgment of the learned lower Appellate Court is perverse for non-consideration of evidence of D.W.2 that the Plaintiff was releasing water through Plot No.277 and that the Plaintiff and his forefathers have been using that land as Rasta?

(B) Whether the learned lower Appellate Court erred in law in not considering Ext.B which clearly goes to show that the kissam of Plot No.277 is “Other Road?”

7. Learned Counsel for the Appellant submitted that the First Appellate Court is not right in disturbing the finding of the Trial Court in respect of the land under Plot No.277 over which it had been held by the Trial Court that the Plaintiff has the right of way to have the entry to his land under Plot No.276 and the Gochar land. She further submitted that the evidence of D.W.2 to the effect that the Plaintiff has been releasing water from the land under Plot No.276 through the Plot No.277 from the time of his ancestors and they have using the same as Rasta have been completely over looked. She further submitted that when the kissam of the land finds mentioned in the record of right, Ext.B in respect of Plot No.277 as ‘Anyana Rasta’ (other road), the First Appellate Court ought to have given due weightage to the same in deciding the issue which had been rightly taken note of the Trial Court. She, therefore, submitted that on proper appreciation of evidence on record, keeping the rival pleadings in the background, the judgment and decree passed by the Trial Court in respect of the land under Plot No.277 have to be restored.

8. None appeared on behalf of the Respondents despite service of notice and due opportunity.

9. Keeping in view the submissions made and I have carefully read the judgments passed by the Courts below. I have also gone through the pleadings as well as the evidence on record.

10. It is stated by the Plaintiff that he has the prescriptive right of way over the land under Plot No.277. At the very next it is stated by the Plaintiff that he has natural right of way. The foundations of both the claims are quite distinct having no commonality except to the extent of user. When natural rights are those incident and advantage which are provided by the nature for the use and enjoyment of the person's property, the easements are acquired rights abstracted from the ownership of one man and added to the ownership of another in putting a burden upon the land. The evidence as obtained stands that in order to go to the land of the Plaintiff under Plot No.276 from the village road, one has to walk for about more than half mile crossing land of several others. The Plaintiff has utterly failed to plead and proof as to how he claimed the natural right over all those lands including the land under Plot No.277. When it is next claimed that he has easementary right of way over that plot of land under Plot No.277, he does not admit the Defendants to be the owners of that plot of land and it is stated that said

plot of land as per Sabik record of right was a piece of waste land and it has been so recorded in the current settlement as 'other road'. The claim of the Defendants is that though it was recorded as waste land in 1936 settlement, it has become the raiyati land and it has been recorded in their favour in the current settlement. But then they have not been able to state possesses as to how the Anabadi land became their raiyati land. The documents filed reveal that the entire land under Sabik Plot No.149 except a part of it was of the extent of Ac.0.082 decimals which has been settled with the ancestors of the Defendants. So, on the basis of the fact that in 1936 settlement, Sabik Plot No.149 was recorded as Anabadi, the Trial Court when has declared the Plaintiff's right of way over the same, it has been rightly stated by the First Appellate Court that the Trial Court has omitted to consider as to how Plaintiff has the prescriptive right of way over that Plot No.277, which in the current settlement measures 25 decimals and is only a part of the Sabik Plot No.149 whose total area is Ac.0.76 decimals.

11. Plaintiff being examined as P.W.1 in his evidence has stated that the land under Plot No.276 is situated half mile away from his residence in the village basti. The map of the village admitted in evidence and marked Ext.A shows that in order to come to the land under Plot No.276 and the Gochar land situated beyond that one as to pass through several

plots belonging to several persons. It is the evidence of D.W.1 that Plot No.277 consists of Nala and ridge of the width of the 13 cubits lies over it. So, this ridge of quit sizable width being used by the villagers let us say also the Plaintiff to go to their lands cannot confer them with the easementary right of way.

The evidence on record does not reveal that the user by the Plaintiff in so far as land under Plot No.277 is concerned, is as of right hostile to the rights of the recorded owners.

Taking into consideration the situation of the house of the Plaintiff as at Plot No.57 and his land under Plot No.276 by the side of the land under Plot No.277, the First Appellate Court in view of all these aforesaid have rightly held that the Plaintiff cannot be said to have been using the same as of right. In that view of the matter, the reliefs claimed by the Plaintiff that he has easementary right of way over the land under Plot No.277 has been rightly negated by the First Appellate Court. The substantial questions of law are thus answered against the case/claim of the Plaintiff in so far as land under Plot No.277 is concerned.

12. In the result, the Appeal stands dismissed and the judgment and decree passed by the First Appellate Court are hereby confirmed. There shall however be no order as to cost.

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

Narayan

