

IN THE HIGH COURT OF ORISSA AT CUTTACK

RSA No.328 of 2004

In the matter of an appeal under section 100 of the Code of Civil Procedure assailing the judgment and decree dated 07.07.2004 and 22.07.2004 respectively passed by the learned Adhoc Additional District Judge, Fast Track, Aska in R.F.A. No.80 of 2004 dismissing the judgment and decree dated 17.01.2002 and 30.01.2002 respectively passed by the learned Civil Judge (Junior Division), Aska in T.S. No.2 of 2001.

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Padma Charan Jena & Others

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Appellants

-versus-

Prasanna Kumar Jena & Another

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Respondents

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

For Appellants - M/s.D.P. Dhal, B.B. Mishra
K. Panigrahi & P.K. Routray

For Respondents - M/s.L. Samantaray, U.K. Barik
R. Pradhan & S.K. Jena
(For R.1)

CORAM:

MR. JUSTICE D.DASH

Date of Hearing : 08.02.2022 : Date of Judgment: 15.02.2022

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 07.07.2004 and 22.07.2004. By the same, the dismissal of the suit in respect of part property as ordered by the Trial Court being confirmed; the cross-Appeal filed by the Respondents-Defendants has been allowed in finally setting aside that decree passed in respect of part property in favour of the Appellants-Plaintiffs and

thereby the suit filed by the Appellants-Plaintiffs has been dismissed in entirety.

It may be stated here that during pendency of this Appeal, Appellant No.2 having died, his legal representatives have come on record as Appellant No.2(a) to 2(d)

One Ganapati Jena had filed the suit as the Plaintiff. On his death, his legal representatives coming to be substituted prosecuted the suit. The said suit having been decreed in part, they had carried the First Appeal and as not only that no such fruitful result has yielded in their favour in respect of that part of the property in respect of which their claim had been dismissed by the Trial Court but also the decree standing in their favour in respect of one part of the property has been set aside since the cross-Appeal filed by the Respondents-Defendants in assailing that part decree has been allowed; they are before this Court in this 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. The Plaintiff's case, in short, is that one Bandhu Jena and Sanyasi Jena are two brothers. During their lifetime, they were in joint mess and estate. They owned and enjoyed the lands. On their death, their sons succeeded the properties. In the last settlement, the suit land is said to have been wrongly recorded in the name of Gourahari Jena, the younger brother of Padmacharan Jena (original Plaintiff). The Defendants are the two sons of said Gourahari Jena. Despite such wrong recording of the land as both brothers, namely, Padmacharan jena and Gourahari Jena

were in good terms, there was no discontentment and they were sailing together and also alienating the lands jointly.

It is stated that the suit land are the lands of the Plaintiffs which had fallen to the share of his father Gourahari in a partition which had been effected on 26.05.1956. The father of the Defendants, namely, Gourahari died in the year 1999 leaving behind his three sons, namely, Prasanna, Prasanta and Sushanta. Prasanta left the village since 1992 and his whereabouts was not known. It is said that he is unheard of since then. Allegation is being made that on 7.11.2001, the two brothers, namely, Prasanna and Prasanta (Defendants) declared in public that they would be selling all the lands recorded in the name of their late father Gourahari. The original plaintiff thus filed the suit claiming that he has share over the said land which is recorded in the name of Gourahari, the father of the Defendants and prayed for declaration of his absolute ownership over the suit land with further relief of injunction as against the Defendants from creating any third party interest over those lands.

4. The Defendant No.1 coming to contest the suit in his written statement, while traversing the plaint averments, asserted that the suit land belong to his father and that had fallen in his share in the partition between the original Plaintiff and his father Gourahari. He further denied any partition to have take place on 26.05.1956. It is further stated that the lands under khata no.76 is in possession of the Plaintiff which had fallen to his share and therefrom, he has sold the land to different persons, who have got their purchased land mutated in their names in the official records. He further stated that the record of right in the current settlement published in the year 1984 was to the knowledge of the original plaintiff and that had never been objected to by him.

5. On the above rival pleadings, the Trial Court in total has framed five issues.

Proceeding to answer issue no.3 as to the claim of the Plaintiff that he is the absolute owner of the suit schedule property, upon evaluation of the evidence and their analysis, answer has been rendered that the Plaintiff is the owner of the land recorded under plot no.1876. Basing upon the above answer, it has also been held that the Plaintiff is in possession of the same and the Defendants have no manner of right, title and interest over the said plot of land under 1876. In that view of the matter, the Plaintiff was granted with the relief of permanent injunction in respect of the said plot of land whereas his claim of ownership, possession and entitlement to the relief of permanent injunction as such in respect of the land under plot nos.1495, 1496 and 1792 has been disallowed. It may be stated here that the land under plot no.1876 covers an area of Ac.0.285 decimals. The suit thus being decreed in part, as aforesaid, the substituted Plaintiffs had carried the First Appeal, which has also been dismissed. In that Appeal filed by the Appellants-Plaintiffs; the Respondents-Defendants having filed cross-Appeal questioning the decree passed by the Trial Court in respect of the land under plot no.1876; the same has been allowed. The Plaintiffs suit thus stood dismissed by the First Appellate Court in entirety.

The First Appellate Court, proceeding to address the contentions raised before it, has gone for analysis the evidence at its level. Having undertaken that exercise, on its completion, the First Appellate Court has ultimately arrived at the same conclusion as rendered by the Trial Court in respect of those lands covered under plot nos.1495, 1496 and 1972 but the conclusion of the Trial Court in respect of the land under plot nos.1876 has been overruled and a contrary view has been taken.

6. Learned counsel for the Appellants submitted that the findings of learned First Appellate Court against the claim of the Plaintiffs in respect of the land under plot nos.1495, 1496, 1792 as also 1876 are contrary to the evidence on record and the learned First Appellate Court having not properly approached the evidence and appreciating the same in a perverse manner has recorded the said finding, which is thus liable to be set at naught. It is submitted that the learned First Appellate Court has not kept in mind the settled position of law that record of rights neither creates nor extinguishes right, title and interest. It was further submitted that the findings of the learned First Appellate Court as to the factum of possession of those plots of land is completely against the weight of evidence on record and for the purpose, the overwhelming evidence of possession adduced from the side of the Plaintiffs have been totally ignored. He, therefore, urged for admission of this Appeal to answer the above substantial questions of law.

7. Learned counsel for the Respondent No.1 assisting the Court in the matter of admission hearing submitted all in favour of the findings of the First Appellate Court. He further submitted that the only error committed by the Trial Court has been rightly rectified on proper appreciation of evidence.

8. Keeping in view the submissions made, I have carefully gone through the judgments passed by the Courts below.

9. At the cost of repetition, it may be stated that the Plaintiff had advanced his claim over the suit land which comprises of four plots, i.e, 1495, 1496, 1792 and 1876. His claim had been allowed by the Trial Court only in respect of the land under plot no.1876 and he has been

held entitled to a decree as prayed for in respect of the said plot of land, which has also been set aside by the First Appellate Court.

The Plaintiffs claim is that he has half share over three plots of land, i.e, 1495, 1496 and 1792 and the land under plot no.1876 in entirety belongs to him. It is stated that under pata no.9, these lands belonged to Bandhnu and Sanyasi and were recorded in the name of Choudhury Jena. In the year 1964, the lands were recorded under patta no.99. However, in the current settlement, the record has not been prepared in his name and his possession has not been given respect to. It is stated that erroneously the land was recorded in the name of his brother but because of good relationship between them, there was no dispute and, therefore, no step was taken for correction of the record of right by way of inclusion of the name of the Plaintiff. It is next admitted by him (P.W.1) that the land under khata no.76 stands recorded in his name and according to him, the Defendants are in possession of the same when the lands under patta no.102 stands jointly recorded in his name as well as in the name of other co-sharers and that is also the position in respect of the land under patta no.104. Having said as above, during cross-examination this original Plaintiff (P.W.1) has gone to admit that his brother Gourahari is in possession of the land under plot nos.1889, 1772, 1495 and 1496 under patta no.96. He has also expressed his inability to say as to how much of property from those under sabik patta, he was allotted with towards his share. It is his evidence that he is paying the rent in respect of the land under patta no.76 whereas Gourahari is paying rent in respect of the land under plot no.96. He has of course denied that the property under khata no.76 was allotted to him and that he is in possession of the same. It has also been stated that he

has not sold the property under khata no.76 and the Defendants to have sold the property under khata no.96

It is the settled position of law that the Plaintiff in order to succeed in his suit has to establish his case. In our given case; it is said that the Plaintiff is the owner in possession of the land under plot no.1876 and co-owner in respect of rest three plots of land. For this purpose, he cannot take advantage of the weakness of the case of the Defendants and even failure on the part of the Defendants to establish their case as projected in the written statement would not ipso facto be the reason/ground to decree the suit filed by the Plaintiff and grant him the reliefs as prayed for. With the above evidence of the Plaintiff as stated, his other witness-P.W.2's evidence need now to be touched upon.

It is stated by him that the suit lands are part of the properties allotted to Ganapati and Gourahari in a partition. He, however, describing the boundary has stated that one plot locally known as Bandha-Bill is in exclusive possession of the Plaintiff. The Trial Court, on verification of the description of the properties given in the plaint, keeping the above evidence on P.W.2 has ascertained that said evidence refers to the land under plot no.1876. The Trial Court has also found the evidence of P.W.3 to be in that line and two documents (Exts.6 and 7) coming to support.

The First Appellate Court, has made an independent survey of evidence, has found that the evidence of P.Ws.2 and 3 do not tally on that score on material particulars, further having difference with the plaint averments. The P.W.1's evidence being clear that he is paying rent for his share of property since the date of partition and that is under patta no.76 standing in the name of Gourahari and that is not in dispute.

On the face of the record of right giving rise to a statutory presumption and in the absence of any such acceptable evidence that said recording is wholly erroneous; taking into consideration, the evidence as available, the First Appellate Court has rightly said that the Plaintiff is liable to be non-suited being not entitled to the reliefs claimed.

For the aforesaid discussion and reasons, this Court finds that there surfaces no substantial question of law meriting admission of this Appeal.

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

Basu

