

IN THE HIGH COURT OF ORISSA AT CUTTACK

R.S.A. No.337 of 2004

AND

R.S.A. No.338 of 2004

In the matter of appeal under Section 100 of the Code of Civil Procedure assailing the judgment and decree dated 28.02.2003 and 06.03.2003 respectively passed by the learned 1st Ad hoc Additional District Judge, Puri in Title Appeal No.8/100 of 2002/1993 setting aside the judgment and decree dated 10.09.1993 and 25.09.1993 respectively passed by the learned Civil Judge, Senior Division, Puri in T.S. No.108 of 1991.

In RSA No.337 of 2004

Binodini Biswal (Since Dead) by ***Appellants***
her LRs

-versus-

Prasanna Kumar Nayak & Another *Respondents*

In RSA No.338 of 2004

Binodini Biswal *Appellant*

-versus-

Prasanna Kumar Nayak & Another *Respondents*

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

For Appellants - Miss. Swetlana Das
(Advocate in both RSAs)

For Respondents - Mr.D.Mohapatra
(Advocate in both RSAs)

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

Date of Hearing : 12.08.2022 : Date of Judgment:22.08.2022

D.Dash,J. These Appellants, having come on record after the death of the original Appellant, namely, Binodini Biswal, in these Appeals under Section 100 of the Code of Civil Procedure, 1908 (for short, ‘the Code’).are assailing the common judgment and decree dated 28.02.2003 and 06.03.2003 respectively passed by the learned 1st Ad hoc Additional District Judge, Puri in Title Appeal No.8 of 2002 (A) and Title Appeal No.100 of 1993 (B).

The Respondent, as the Plaintiff, had filed T.S. No.108 of 1991 arraigning the original Appellant and her husband, the present Respondent No.2 as the Defendants. The prayer, in the suit, is for declaration of his title, confirmation of possession with further prayer to declare the entry in the settlement record of right of the year 1991 in respect of plot no.59/767 as erroneous and illegal and for permanent injunction. The suit having been decreed in part declaring the right, title and interest of the Plaintiff over the suit property and further declaring the settlement entry, as indicated in the prayer, to be wrong and illegal; the Respondent No.1 (Plaintiff) being aggrieved by the Trial Court’s decision for not granting the relief of possession, had carried the First Appeal under Section 96 of the Code afore-indicated as ‘A’, which same has been allowed in granting the relief of possession.

The original Appellant (Defendant), being aggrieved by the judgment and decree passed by the Trial Court granting the reliefs, as afore-stated, in favour of Respondent No.1 (Plaintiff) had carried the Appeal under section 96 of the Code afore-indicated as ‘B’. The First

Appellate Court has allowed the Appeal filed by Respondent No.1 (Plaintiff) and dismissed the Appeal filed by the original Appellant (Defendant No.1) by the common judgment followed by the decrees, which are now under challenge in these two Appeals.

Under the circumstances, both the Appeals were heard together for their disposal by this common judgment.

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 is that the land under sabik plot no.828 under khata no.645 of Mouza-Balukhanda originally belonged to Sudhansubala Mishra. She sold Ac.0.27 decimals of land from out of the said plot on 15.05.1985 to Defendant No.1 by executing the registered sale deed on receipt of consideration of Rs.8000/-. It is stated that from the date of said transaction, the Defendants 1 and 2 possessed the same by constructing a residential house. The Plaintiff also purchased same extent of land, i.e., 0.27 decimals from the middle of the sabik plot adjoining the purchased land of the Defendant No.1. The land was sold by said Sudhansubala Mishra through her Power of Attorney holder, namely, Mrutunjaya Sasmal by executing registered sale deed dated 05.11.985 on receipt of consideration of Rs.7000/-. The possession of the purchased land was taken over by the Plaintiff. The suit land is said to be adjoining on the southern side of the land purchased by Defendant No.1. Said Sudhansubala again sold Ac.0.13½ decimals of land from out of the said plot adjacent to the south of the suit land to one Sundarmani Mahala by executing a registered sale deed on 04.10.1985 through her

Power of Attorney holder. The husband of Sundarmani also purchased further land of Ac.0.13½ decimals of land to the further south of the land purchased by Sundarmani. In the year 1988, one Jogendra Das initiated a proceeding 144 of the Cr.P.C. against the Plaintiff, Defendant No.1 and Sanatana Mahala, the husband of Sundarmani claiming some lands of sabik plot nos.822 and 823. In the said proceeding, the Plaintiff, Defendant No.1 and Sanatan Mahal filed rejoinder. The Defendant No.1 admitted the possession of the Plaintiff in respect of the suit land.

It is stated that after purchase of the suit land, the Plaintiff claims to have reclaimed the same by filing earth and constructing boundary wall on the southern and eastern side and raising fence on other two sides. The Plaintiff states to have fixed grill gate on the eastern boundary wall of the suit land. It is stated that she planted a number of coconut and other trees and constructed a thatched house having brick walls on the south-eastern corner of the suit land for the purpose of storing building materials. It is her specific stand that on 10.03.1991, when his building work was about to complete, the Defendants created obstruction and damaged the fence standing on the northern boundary of the suit land. They thus tried to dispossess the Plaintiff from the suit land without having any manner of right, title and interest over there and attempted to cause damage to the house by taking help of the rowdy elements. It is alleged that the Defendants, by gaining over the Settlement Authority, have got the suit land recorded in the record of Hal Settlement in their favour. For the said reasons, the Plaintiff has been compelled to file the suit.

4. The Defendants 1 and 2, in their written statements which run in the same vein, stated that they have purchased Ac.0.27 decimals of land

from Sudhansubala Mishra on 15.05.1985 and got delivery of possession of the same and are having their house and living therein. It is stated that the Defendant No.2 had proposed to purchase the suit land from Sudhansubala and she had agreed to sell the same for a consideration of Rs.4000/-. It is stated that out of said agreed consideration, the Defendant No.2 had paid advance consideration of Rs.2000/- and taken delivery of possession of the suit land, which is adjacent to the south of the purchased land of Defendant No.1. The Defendant No.1's purchased land and the land which the Defendant No.2 possessed being so delivered by Sudhansubala as the proposed vendee, are in one compact block. It is also stated that they filled the land with sand and constructed their residential house and one cowshed. Sudhansubala is said to have made an agreement in writing on 21.01.1985 for sale of suit land indicating therein that on receipt of the balance consideration of Rs.2000/-, she would be executing the registered sale deed. The Defendants state to have spent a lot of money for filling this land by placing sand over there and after incurring such huge expenditure, they could not pay the balance consideration of Rs.2000/- at the earliest. It is stated that Sudhansubala being approached for that reason had extended the time for payment of balance consideration for a period of three years and ultimately, on receipt of the balance consideration of Rs.2000/-, she on 10.12.1990 executed the sale deed in favour of Defendant No.2 in respect of the suit land. The Defendants state that during the Settlement Operation, since they were in possession of Ac.0.54 decimals of land (0.27D + 0.27D) appertaining to Hal Plot No.59/767, the same has been rightly recorded in their name in the year 1991 and they are continuing to possess the same. They deny

the possession of the Plaintiff over the suit land in any manner at any given point of time.

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

Proceeding to answer issue no.5 as to the claim of the Plaintiff having the right, title, interest and possession of the suit property, upon examination of the evidence and their elaborate discussion, answer has been recorded that the Plaintiff has the right, title and interest over the suit land. However, the Trial Court, while ruling out that the agreement for sale, as projected by the Defendants, to be a fabricated one, having found the Plaintiff to be not in possession of the suit land at the time of filing of the suit, has ultimately declined to grant the relief of possession to the Plaintiff with further finding that the description of the suit land in the schedule of the plaint is vague. The Trial Court has found the Plaintiff to have purchased the suit property by registered sale deed (Ext.4). It has also found the entry in the Settlement Records in respect of the land in favour of the Defendants to be wrong and illegal. Having said all these above, the Trial Court decreed the suit in part by passing the following order:

“That the plaintiff’s suit be and the same is hereby decreed, in part. The plaintiff’s right and title in respect of the suit property is hereby declared and it is also further declared that the settlement entry in respect of plot no.59/767 of the Record of Right of the year 1991 to be wrong and illegal. Parties to bear their own costs throughout.”

This judgment and decree passed by the Trial Court gave rise to two Appeals; one by the Plaintiff and the other one by the Defendant No.1.

It is pertinent to state at this stage that during pendency of the First Appeal, amendment was carried out by the Plaintiff in the plaint by inserting the prayer for recovery of possession of the suit land. That order of amendment passed by the First Appellate Court having been challenged before this Court in revision (CRP No.23/2002) by order dated 7.1.2003, the revision being disposed of; the Defendant No.1 was permitted to raise the question of limitation as to the belated prayer for recovery of possession.

6. The First Appellate Court, on re-appreciation of evidence at its level, has recorded the following findings:-

“a. the suit land is identifiable and the decree can be effectively executed;

b. appellant is the subsequent purchaser and even if she was in possession of the suit land, the plaintiff will always be entitled to recover possession in a suit for declaration of title and confirmation of possession; and

c. the prayer for recovery of possession which has been inserted by way of amendment is not barred by limitation.”

7. Learned counsel for the Appellant (Defendant No.1) submitted that the First Appellate Court has committed the error in saying that the Defendant No.1, in order to protect her possession on the basis of that agreement for sale in banking upon the doctrine of part performance, she was required to further claim title on the basis of adverse possession. She submitted that in view of the evidence on record with regard to the possession of the suit land by the Defendants for all these period, the prayer for recovery of possession as inserted by way of amendment only during pendency of the First Appeal ought to have been held to be barred by limitation. She also stated that when the proposed vendor

admitted to have executed the agreement for sale as also the sale pursuant to the agreement, the Courts below have committed error in disbelieving the said agreement for sale and holding it to be a created one for the purpose. She, therefore, submitted for admission of these Appeals to answer the above as the substantial questions of law.

8. Learned counsel for the Respondent (Plaintiff), in assisting the Court in the matter of admission of these Appeals, submitted all in favour of the findings returned by the First Appellate Court. According to him, the Plaintiff being the purchaser of the suit land and his purchase having been proved and as such the Courts below when has disbelieved the agreement for sale projected by the Defendants as the basis for them to have made the entry to the suit property and on their failure to prove that they have perfected title over the suit property by way of adverse possession, the decree for declaration of right, title and interest of the Plaintiff over the suit land as also for recovery of possession has been passed in favour of the Plaintiff is not assailable.

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

10. The Plaintiff's suit is based on title. He claims to have the right, title and interest over the suit properties on the strength of his purchase from the original owner whose ownership over the suit property is not in dispute. The Courts below have concurrently found the Plaintiff to have proved through clear, cogent and acceptable evidence that he has purchased the property in suit from the original owner by registered sale deed dated 05.11.1985 (Ext.4) on receipt of valuable consideration. The Defendants' case is that they are in possession of the suit land being so

delivered with by the original owner Sudhansubala pursuant to an agreement for sale that she had executed on 21.06.1986, which too is also after the registered sale deed in favour of the Plaintiff came into being. The Courts below, on thorough scrutiny of the evidence, have disbelieved this Ext.C holding it to be fabricated one. On going through the reasons indicated for the purpose as those emerge from the evidence on record; this Court also finds no such justification to accord its disapproval. The subsequent sale deed executed by Sudhansubala in favour of Defendant No.2, which has been admitted in evidence and marked Ext.E thus is having no value in the eye of law as the vendor Sudhansubala by then had no title over the property after alienating the same to the Plaintiff.

The very claim of possession of the suit land by the Defendants springs from the agreement for sale. The Courts below, as it appears on detail discussion of the evidence, have found the same to be not at all acceptable that at any point of time, Sudhansubala had delivered the possession of the suit land to the Defendants after having entered into an agreement with them for sale of the said land. In fact, Sudhansubala having executed the sale deed (Ext.4) in favour of the Plaintiff on 10.11.1985 had no more the right to possess and even to enter into an agreement for sale of the suit land to anyone and there was thus no scope on her part for delivering the possession of the suit land to the Defendants having an agreement that the same would be sold to them on receipt of balance consideration. Furthermore, the Defendants again having obtained the subsequent sale deed from Sudhansubala under Ext.E which is dated 10.12.1990, the possession of the suit land for the prior period, even if any, has no legal significance at all.

In fact, here the question of limitation as to advancement of the prayer for recovery of possession by the Plaintiff to me appears to be hardly of any significance when originally prayer remains for confirmation of possession. It is the settled position of law that in a case where the suitor is found to be having the subsisting right, title and interest and then he/she even being not in physical possession, when the Defendants competing claim over the property stands negated, there remains no bar in law to grant the relief of recovery of possession.

For the aforesaid discussion and reasons, the submission of the learned counsel for the Appellant (Defendant No.1) that there arises the substantial question of law as pointed out for being answered in this Appeal meriting its admission cannot be countenanced with.

11. In the result, the Appeals stand dismissed. There shall, however, be no order as to cost.

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