

IN THE HIGH COURT OF ORISSA AT CUTTACK

RSA No.321 of 2015

In the matter of appeal under Section 100 of the Code of Civil Procedure assailing the judgment and decree dated 10.09.2014 and 24.09.2014 respectively passed by the learned Additional District Judge, Chhatrapur in RFA No.67 of 2013 (RFA 76/12-GDC) setting aside the judgment and decree dated 06.07.2012 and 21.07.2012 respectively passed by the learned Civil Judge, Senior Division, Khallikote, Ganjam in C.S. No.05 of 2009.

Rabi Chandra Dalai & Others* *Appellants

-versus-

Dandapani Parida* *Respondent

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

***For Appellants* - M/s.M.K.Mohanty, T. Pradhan,
M.R. Pradhan & S. Mishra
(Advocate)**

***For Respondent* -**

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

Date of Hearing : 03.08.2022 : Date of Judgment:08.08.2022

D.Dash,J. The Appellants, by filing this Appeal, under Section-100 of the Code of Civil Procedure, 1908 (for short, 'the Code'), have assailed the judgment and decree dated 10.09.2014 and 24.09.2014 respectively passed by the learned Additional District Judge, Chhatrapur in RFA No.67 of 2013 (RFA 76/12-GDC).

By the same, the judgment and decree dated 06.07.2012 and 21.07.2012 respectively passed by the learned Civil Judge, Senior Division, Khallikote, Ganjam in C.S. No.05 of 2009 have been set aside and thus the Appeal filed by the present Respondent (Defendant) under section 96 of the Code has been allowed and the Appellant (Plaintiff) has been non-suited.

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 she has purchased land measuring Ac.0.017 decimals appertaining to plot no.148 with a thatched house standing over there from Mahadei Gouda by registered sale deed dated 19.03.1994 for valuable consideration. It is stated that adjoining to the west of the said purchased land, the Plaintiff has another piece of land having house thereon, which was purchased by her husband Natabar Dalei on 26.06.1978 from Govinda Gouda by registered sale deed dated 26.06.1978, which is to an extent of Ac.0.018 decimals. The Plaintiff thus claims that she and her sons are in possession of the total area of land coming to Ac.0.035 decimals whose breadth is 15 feet on the front side and 14 feet 3 inch on the back side. It is further stated that there was a common wall between the house of the Plaintiff and the Defendant and that was in a dilapidated condition. The Plaintiff approached the Defendant to raise new construction of the said wall but he did not agree for which the Plaintiff constructed a new wall of 9 inches thickness over her land leaving a space of 5 inch towards eastern side as indicated in Schedule-A of the plaint. In the year 1999, the Defendant falsely claimed to be having his land inside the land of the Plaintiff and

encroached 2 to 3½ links in breadth of land from the southern point of Schedule-A wall by putting bamboo and thorn fencing. The matter being reported to the Executive Magistrate, proceeding under section 144 was initiated and the preventive order passed therein was made absolute. Thereafter, the Defendant on two occasions, repaired the fence and at that time, he illegally and un-authorizedly made Schedule-B property as part of his backyard. When the Defendant created various other disturbances over the wall of the Plaintiff as shown in Schedule-A of the Plaint, the Plaintiff filed the suit seeking declaration of her right, title, interest with the prayer of recovery of possession of Schedule-B and permanent injunction against the Defendant in respect of the said wall.

4. The Defendant, in his written statement, has asserted that Schedule-A wall is a joint wall of both parties. It is stated that Schedule-B is not the land of the Plaintiff. He asserted to have never encroached any land of the Plaintiff. The Defendant also filed counter claim that declaration of his joint right over Schedule-A of the Plaintiff in respect of the Schedule-B land.

The Plaintiff, in reply to the counter claim of the Defendant, also stated that Schedule-B property is part of her purchased land under plot no.148.

5. On the above rival pleadings, the Trial Court framed eleven issues. The crucial findings rendered by the Trial court is that the wall described in Schedule-A is the joint wall of the parties and that they have the joint right over the said wall. Therefore, the Plaintiff was not held entitled to the relief of permanent injunction as prayed for in respect of the wall shown in Schedule-A of the plaint. Her suit was dismissed in respect of the wall described in the Schedule-A of the

plaint and the counter claim of the Defendant in respect of said wall has been decreed when the Trial Court declared joint right, title and interest of the parties over the same. The next main finding of the Trial Court is that Schedule-B property is the land of the Plaintiff and that she is entitled to recover from the Defendant, who is in unauthorized occupation of the same. In that view of the matter, claim of the Plaintiff with respect to Schedule-B land has been allowed and the Defendant's counter claim on that score stood has failed.

6. In the Appeal filed by the Defendant, the First Appellate Court, upon examination of the evidence in the backdrop of the rival pleadings and their evaluation, has set aside the judgment and decree passed by the Trial Court in respect of Schedule-B property.

7. The First Appellate Court has held that upon mere claim advanced by the Plaintiff and her sons that their land is encroached by the Defendant when the Plaintiff was not piloted any satisfactory evidence on that score, the Trial Court ought not to have decreed the suit in respect of Schedule-B land in directing the Defendant to give vacant possession of Schedule-B property to the Plaintiff. Being aggrieved by the above decision of the First Appellate Court, the Plaintiff is now before this court in Appeal.

8. Learned counsel for the Appellant submitted that the First Appellate Court has committed the error by dismissing the suit in respect of Schedule-B property when the suit property has been properly described in the schedule given in the plaint, which is identifiable and when the evidence tendered by the Plaintiff clearly establish the factum of encroachment of the said Schedule-B land by the Defendant. He further submitted that when the length and breadth of the Schedule-B

has been noted and so also the boundary, the First Appellate Court merely for non-mention of plot number is not right in saying that any decree being passed in favour of the Plaintiff in respect of that land, the same would not be executable in holding that the deficiencies in describing Schedule-B land as pointed out are in substance and not in form. He, therefore, urged for admission of this appeal to answer the above as the substantial questions of law.

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

10. In so far as the Schedule-B property is concerned, the Trial Court had ordered that the same be restored to the Plaintiff as he has the right, title and interest over the same and entitled to so possess.

The Plaintiff having claimed their right, title and interest over Schedule-B land in further seeking restoration of possession of the same from the hands of the Defendant; is for the Plaintiff to establish those aspects by leading clear, cogent and acceptable evidence. He is either to stand or fall on his own and failure of the Defendant to prove his case would not lead the Court to pass a decree in favour of the Plaintiff.

The Plaintiff has been examined as P.W.3. it is stated by her that Schedule-B land as mentioned in the plaint exists in her favour which belongs to Ramamurty Kumuti and she is no way related to that land. Sons of P.W.3, i.e., P.Ws.1 and 2, in their evidence, have deposed that the Defendant has encroached their land but then they have not stated anything as to the length and breadth of their plot no.148 as per the map and their physical possession. Help of Amin or Survey Knowing Commissioner to ascertain as to whether any portion of their land has been amalgamated in the land of the Defendant has not been taken and

no evidence in that light is forthcoming. Therefore, the bald statement of P.Ws that the land belong to the Plaintiff and her sons is encroached by the Defendant cannot sustain.

The land under Schedule-B is described as vacant land of 3½ links in breadth and 40 feet in length and the boundaries of the same are given. It has not been stated as to from which plot the same is being claimed by the Plaintiff. Plot numbers have not been mentioned even in respect of such boundaries. In that view of the matter, the First Appellate Court appears to have rightly answered the issue as against the case/claim of the Plaintiff in so far as Schedule-B land is concerned.

For all the aforesaid, submission of the learned Counsel for the Appellants that there stands the substantial questions of law as indicated in the aforesaid paragraph for being answered meriting admission of this Appeal cannot be countenanced with.

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

(D. Dash),
Judge.

Basu