

IN THE HIGH COURT OF ORISSA AT CUTTACK

R.S.A. NO.343 OF 2013

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, Cuttack in RFA No.137 of 2011 confirming the judgment and decree passed by the learned Civil Judge (Sr. Division), Cuttack in Civil Suit (CS) No.258 of 2006.

Sasmita Swain

....

Appellant

-versus-

Jhuna Maharana

....

Respondent

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

For Appellant

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M/s.Banshidhar Baug,
S.K.Mitra, M.R. Baug,
Advocates.

For Respondent

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M/s.Bibekananda Bhuyan,
B.N. Mishra, S. Patra, S.N. Das,
C.R. Swain, P. Mohanty,
Advocates.

CORAM:

MR. JUSTICE D.DASH

DATE OF HEARING::16.03.2022, DATE OF JUDGMENT::04.04.2022

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, Cuttack in RFA No.137 of 2011.

By the same, while dismissing the Appeal filed by this Appellant under Section-96 of the Code, the First Appellate Court has confirmed

the judgment and decree passed by the learned Civil Judge (Sr. Division), Cuttack in Civil Suit (CS) No.258 of 2006.

The present Respondent as the Plaintiff had filed the suit seeking a decree of eviction in her favour directing the Appellant (Defendant) to give vacant possession of the suit shop room claiming arrear rent and damage. The suit having been decreed; the Appellant (Defendant) being aggrieved by the same had filed the Appeal.

The present Appeal is thus as against the confirming judgments and decrees of eviction of the Appellant (Defendant) from the suit shop room for recovery of a sum of Rs.36,000/- with further direction to the Appellant (Defendant) to pay a sum of Rs.5,000/- per month with effect from 01.06.2006 till vacation with pendentelite and future interest @ 6% per annum.

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:-

The suit shop room was the self-acquired property of one Chaitanya Maharana. He in the year, 1999 had inducted the Defendant as a tenant on month to month basis. Chaitanya during continuance of said relationship with the Defendant sold the property to the Plaintiff for

valuable consideration. When the Defendant did not accept the Plaintiff as her landlord, the Plaintiff under misconception of the fact that the husband of the Defendant was the tenant had filed the suit against the husband of the Defendant,

In that suit, the Defendant's husband took the plea that it is his wife who is a tenant under Chaitanya since the year, 1999 and on Chitanya's death even under his legal heirs. In the said suit, the Court recorded a finding holding that this Plaintiff had the title over the suit property. The suit however was dismissed for the reason that the Defendant therein i.e. the husband of the present Plaintiff was not the tenant. After this result in the suit against the husband of the Defendant; the Plaintiff serving notice of termination of tenancy as provided under section-106 of the Transfer of Property Act, 1882 instituted the present suit against the Defendant claiming the reliefs as already stated.

4. The Defendant in her written statement had admitted Chaitanya to be her erstwhile landlord. Though she has denied Chaitanya to be the exclusive owner of the property yet it is said that by virtue of a registered Power of Attorney executed by Chaitanya, his son Sarat has executed an agreement for sale in her favour on 05.05.2000 receiving advance consideration of Rs.1,20,000/- And therefore, from that time onwards, she is in possession of the property as the prospective vendee

/ purchaser instead of as a tenant. It is further stated that pursuant to the said agreement for sale, the legal heirs of Chaitanya have executed a sale-deed; in respect of the suit shop room in her favour on 09.04.2003 which has been registered on 10.04.2003.

It is her specific case that sale-deed standing in the name of the Plaintiff has been obtained by practicing fraud, exercising undue influence, misrepresenting the material facts/particulars and that apart having full knowledge as to the agreement for sale.

5. The Trial Court on the above rival case in total framed thirteen issues. First of all rightly going to answer issue nos. (vii), (viii), (ix), (x), (xi) and (xii) together as those are interlinked; upon examination of evidence and their evaluation, the same being answered in favour of the Plaintiff, finally it has held the Plaintiff to be entitled to the reliefs as stated at the beginning.

The First Appellate Court being moved by the Defendant suffering from the judgment and decree passed by the Trial Court upon re-appreciation of evidence let in by the parties at its level; in the backdrop of the rival pleadings has affirmed all those findings and consequentially, the result of the suit rendered by the Trial Court has been confirmed.

6. The Appeal has been admitted on the following substantial question of law:-

“Whether the Courts below committed illegality in decreeing the suit in absence of prayer for the relief of declaration of title on the face of the Defendants assertion of title on the strength of the sale-deed Ext. C?”

7. Mr. B. Baug, Learned Counsel for the Appellant (Defendant) argued that in the totality of the facts and circumstances as those emanate from the case and counter case projected by the parties as well as the evidence both oral and documentary on record, the Courts below ought to have dismissed the suit in absence of a prayer for declaration of a title over the suit land; wherein both the Plaintiff and Defendant are having the competing claim of title. He further submitted that the First Appellate Court has committed the error by saying that the Defendant in order to succeed in non-suiting the Plaintiff in the suit in the form as laid and for the reliefs claimed is under definite obligation to show that Ext.D, which is the agreement for sale purported to have been executed by the legal heir of Chaitanya on 05.05.2000 was actually in existence on the day, the sale-deed Ext.1 came into being.

8. Mr. B. Bhuyan, learned Counsel for the Respondent (Plaintiff) submitted all in favour of the findings so recorded by the Courts below.

He submitted that in the suit for eviction of the Defendant with assigned the status of tenant qua Chaitanya who is admittedly the predecessor in interest of the vendors of the Defendant; the Plaintiff having purchased the property in question from Chaitanya, the First Appellate Court has rightly gone to examine the evidence and other circumstances in ascertaining as to whether the said agreement for sale, Ext.D pursuant to which the Defendant claims to have purchased the property by registered sale-deed, Ext.C and which is the foundation of the claim of Defendant over the property was there on the date of execution of Ext.1 by Chaitanya in favour of the Plaintiff or not. According to him, this answer is necessary to be given for deciding the fate of the suit and therefore the Courts below did commit no mistake in decreeing the suit after having arrived at the conclusion that the Defendants stand that w.e.f. 05.05.2000, the date of execution of Ext.D, she has ceased to be the tenant and became the prospective vendee/purchaser and possessed the property as such is not at all acceptable.

9. Admitted position is that the Defendant was the tenant in respect of the suit shop room under Chaitanya. The Defendant however when is saying that it was not Chaitanya's self-acquired property but his ancestral property; it is seen from Ext.E, the registered deed of power of attorney executed by the Chaitanya; that therein he has asserted and

affirmed his exclusive title over the property and pursuant to the authority as given therein; the Defendant is found to have obtained the agreement for sale i.e. Ext.D. The Defendant having relied upon the proved Ext.E is bound by the recitals and is estopped from asserting otherwise. The Plaintiff when basing upon his sale-deed, Ext.1 has mutated the suit land in her favour, the Defendant having not the set up or advanced any counter claim is simply questioning the validity and genuineness of the Ext.1 on the ground of fraud, undue influence and misrepresentation; that too setting those in a very generic manner and without furnishing any particular whatsoever as mandated under the provision of Rule-4 Order-6 of the Code. No such evidence has also been piloted from the side of the Defendant in that direction. In that view of the matter, the First Appellate Court having held that the institution of the suit by the Plaintiff basing upon Ext.1 in the form and for the reliefs claimed is sustainable, this Court finds the same to be well in order and thus beyond the arena of interference.

Having said as above, the First Appellate Court has rightly proceeded to take up the enquiry by having a look at the evidence with regard to the nature of possession of the suit shop room by the Defendant. The course adopted by the First Appellate is found to be absolutely in order and for the purpose; it has rightly admitted the

documents filed in Title Suit No.99 of 2002 as additional evidence being marked as Ext.11.

Here in the case, Ext.D, the agreement for sale is of a date anterior to Ext.1, the sale-deed which is the foundational document of the case of Plaintiff in this suit. The First Appellate Court is found to have made detail discussion on this score at paragraph-17, 18 and 19 of the judgment. In this connection, the evidence of one of his vendor examined from the side of the Defendant appears to be of great importance. He has said to have executed the sale-deed, Ext.C in pursuance of the agreement for sale, Ext.D. He however states that decision was taken for sale of the suit property to the Defendant after the death of her husband, i.e. Chaitanya Maharana and following that, the house rent was no more collected from the Defendant.

With such positive evidence coming from the lips of one of the vendors of the Defendant, Ext.D being glanced, it is crystal clear that the said Ext.D had come into being during the lifetime of Chaitanya. Therefore, case of the Defendant that she is possessing the suit land in pursuance of Ext.D as a prospective vendee/purchaser being in part performance of the contract wholly a falls flat on the ground. From this, the First Appellate Court cannot be said to have committed any wrong by holding that the claim of the Defendant basing upon Ext.D dated

05.05.2000 gets pushed into thick clouds as no more visible. The evidence of D.W.5 that Chaitanya was very much present when the Ext.D was executed, creates further doubt that Chaitanya being alive and present, how could his signature did not appear in the document and what was at all the necessity even then for execution of said agreement for sale, Ext.D through the power of attorney. Moreover, the conduct of the husband of the Defendant examined as D.W.6 is certainly noteworthy. The Defendant has not come to the witness box and remained satisfied by sending her husband, for being examined as D.W.6 and deposing the facts of her case being so acquainted with. This D.W.6 thus is defending the present suit on behalf of the Defendant. His evidence is that in the written statement that he had filed in the earlier suit of the year, 2002, he had not averred anything about this agreement for sale to be with his wife i.e. the Defendant, when he has further admitted here that on 11.05.2000, which is after the agreement dated i.e. 05.05.2000, he had given the house rent to Chaitanya in respect of the suit premises and obtained a receipt in writing. Said receipt is Ext.11 which has been admitted as additional evidence. This D.W.6 has given evidence on behalf of the Defendant and has no claim of his own but to support the case of the Defendant residing together; his silence in the written statement in the suit of the year, 2002 as to the factum of

agreement for sale in respect of the suit property coming to the hands of his wife (Defendant) and she then being in possession as the prospective vendee/ purchaser clearly leads to disbelieve the case of the Defendant. The averment in the written statement filed by D.W.6 in that suit that he is no more the tenant but wife so is very much relevant and leads for drawal of adverse inference on the case as projected by the Defendant as to change of nature of possession and that also raises strong doubt on the claim of the Defendant that she had on agreement for sale with her on 11.05.2010. The above rather leads to show that its creation was later. The First Appellate Court therefore is found to be absolutely right in recording the finding that Ext.D was never in existence on the date of execution of the sale-deed, Ext.1.

10. When the above finding emerges from the evidence being properly examined and analyzed in the back drop of the rival case projected by the parties, this Court finds no reason or justification to take a view contrary to the one as has been taken in saying the followings:-

“Since the possession of the defendant-appellant over the suit property was only that of a tenant under the vendor of the plaintiff-respondent, who executed the sale deed, Ext.1, the plaintiff-respondent was entitled to exercise her rights as provided under law vis-à-vis, a tenant. The Plaintiff-respondent has proved service of notice vide Ext.10

terminating the tenancy in view of section 106 of Transfer of Property Act. Notwithstanding service of the said notice, the defendant-appellant having denied title of the plaintiff-respondent, so also landlord-tenant relationship, has reduced herself to the status of a trespasser and the plaintiff-respondent being the rightful owner of the property and in view of the discussions made herein before, she having established her claim, is entitled to the reliefs as sought for in the suit. Hence, the impugned judgment and decree of the trial court do not call for any interference and the appeal being devoid of merit is liable to be dismissed.”

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11. In the wake of aforesaid, the substantial questions of law receive their answers in favour of confirmation of the judgments and decrees passed by the Courts below and against the case/claim of the Defendant (Appellant).

12. In the result, the Appeal stands dismissed and in the facts and circumstances with costs throughout.

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