

IN THE HIGH COURT OF ORISSA AT CUTTACK

RSA No.209 of 2014

In the matter of an appeal under section 100 of the Code of Civil Procedure assailing the judgment and decree dated 23.12.2013 and 27.12.2013 passed by the learned Additional District Judge, Bhanjanagar in R.F.A. No.18 of 2004 confirming the judgment and decree dated 20.03.2004 and 03.04.2004 respectively passed by the learned Civil Judge, Senior Division, Bhanjanagar in T.S. No.9 of 2002.

Babulu Kumar Nayak

....

Appellant

-versus-

Smt. Surekha Naik & Others

....

Respondents

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

For Appellant

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Mr.A.R. Dash, N. Swain,
B. Mohapatra & S.K. Nanda-1
Advocates

For Respondents

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CORAM:

MR. JUSTICE D.DASH

Date of Hearing & Date of Judgment:28.03.2022

The Appellant, by filing this Appeal under Section 100 of the Code of Civil Procedure (for short, 'the Code') has assailed the judgment and decree dated 23.12.2013 and 27.12.2013 respectively passed by the learned Additional District Judge, Bhanjanagar in R.F.A. No.18 of 2004.

By the same, the first Appeal filed by present Appellant as the unsuccessful Plaintiff under section 96 of the Code has been dismissed and the judgment and decree dated 20.03.2004 and 03.04.2004

respectively passed by the learned Civil Judge, Senior Division, Bhanjanagar in T.S. No.9 of 2002 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. The Plaintiff's case is that he and the members of his family, are the absolute owners in possession of the land under Plot No.3050 and 3051. The Plaintiff's father being physically challenged and unable to move, the Plaintiff has been managing the affairs of the family since long. It is stated that in the year 1968, in an amicable family partition amongst the members of the joint family of the father of the Plaintiff, he had been allotted with the suit property although the property in question had been purchased by one Baidyanath Naik, who happens to be the elder father of the Plaintiff. The properties are said to have been purchased by Baidyanath under two deeds of the year 1944 and 1946 from Haladhara Naik and Duti Naik respectively. It is stated that having purchased the suit properties, Baidyanath along with Plaintiff's father and the Plaintiff were possessing the same by putting a thatched house and using a portion of the same as cowshed. The father of the Plaintiff having got the property in the amicable partition continued to possess the same as his own.

It is next stated that Haladhar had kept his daughter and son-in-law in his house and they are none other than the parents of Defendant No.1. Arakhita Naik was working as a filed servant under Plaintiff. The Defendant No.1 was also working as a field servant under the father of the Plaintiff. In a cyclone of the year 1969, dwelling house of Arakhita when got raised to ground; he was permitted to take shelter in the cow

shed standing on a portion of the suit land and then he stayed there with his family members including the Defendant No.1. Arakhita and his son (Defendant No.1) thus remained in permissive occupation of the property in question. It is stated that in the year 2001, the Defendant No.1 and Defendant No.2 obtained an order for construction of a pucca house under Indira Awas Yozana from the Authority behind the back of the Plaintiff and his family members and they laid foundation for construction of two rooms on the land under Plot No.3050 lying behind the cowshed. The Defendant No.1 then started digging foundation which was protested to by the Plaintiff. So, when disturbances arose, a proceeding under section 144 Cr.P.C. was initiated wherein the Defendants were restrained from entering upon the suit plots. It is stated that disobeying the restraint order, the Defendants went ahead with the construction work and they are now falsely claiming to be having the right, title, interest and possession over the suit land. Thus, it is stated that the Defendants have no right, title and interest over the suit land and being in permissive possession of the land under plot no.3051 have forcibly trespassed over plot no.3050. The Plaintiff, in view of the disability of his father, has filed the suit for declaration, recovery of possession and correction of right concerning the suit land.

4. The Defendants, in their written statement, besides raising the technical issues as regards the maintainability of the suit for lack of cause of action, suit being barred by limitation and bad for non-joinder of necessary party have refuted the facts pleaded by the Plaintiff that he and his family members are the owners in possession of the suit property. It is stated that the ownership and possession of the suit property was never parted with by the predecessors-in-interest of the Defendants, who are the actual owners of the same and, therefore, the

question of placing the said property in hotch potch for amicable partition of the properties amongst the Plaintiff's father and his brothers had never arisen. It is their case that the land under plot no.3051 in khata no.466 has been recorded in the name of the father of Defendant No.1 in the Hal Settlement Record. The Plaintiff nor his family members have ever challenged the same in adherence to the provisions of the Orissa Survey and Settlement Act and the Rules made thereunder. It is also stated that the land under plot no.3050 in khata no.579 has been recorded in the name of Defendant No.1 and his mother in the Hal Settlement Record. The mother of Defendant No.1 and mother of Defendant No.9 being two sisters; the Defendant No.9 has given suit plot no.3050 over khata no.579 to Defendant No.1 after the death of his mother. The Defendants claim to have constructed their residential house over the suit plots and assert to be in peaceful possession of the same. It is stated that Defendant No.9 is residing in his other house in the said village. It is their case that Haladhar had never sold the suit property or any portion thereof to the elder father of the Plaintiff and so also Duti naik had never done so. It is said that the sale deeds of the year 1944 and 1946 have nothing to do with the suit properties. It is also their case that the Block Development Officer, Buguda, having made a detail survey and verification of the land in question, has rightly issued the order for construction of the house over those two plots under Indira Awas Yozana Scheme and that exercise has been completed after due verification of the relevant records and documents as also the investigation in the field. It is also stated that in the year 2001, the Plaintiff in order to harass the Defendants had initiated a proceeding under section 144 Cr.P.C. and the Defendants claim to be in possession of the suit plots bearing nos.3050 and 3051 for more than thirty years.

According to them, the Settlement Authorities have rightly record the suit land in their names on observance of all the formalities as provided in law. With all these above, the Defendants have prayed to non-suit the Plaintiff.

5. Faced with above rival pleadings, the Trial Court having framed seven issues, has first taken up the issue as to maintainability of the suit and cause of action for filing of the same. Coming to issue no.3 as to whether the suit is barred by limitation, the decision has been against the Plaintiff holding the suit as barred. The next issue, i.e, issue no.4 has again been answered against the Plaintiff holding that the legal heirs of Baidyanath, who are necessary parties ought to have been joined as parties. Dealing with issue nos.5 and 6, upon evaluation evidence and their examination, answers have been recorded against the case of the Plaintiff and then the answer to issue no.7 has flowed thereto being consequential.

The Plaintiff thus being unsuccessful before the Trial Court having carried the First Appeal has again been unsuccessful. Thus, the concurrent judgments and decrees of the Courts below have been called in question in the instant Second Appeal.

6. Learned counsel for the Appellant submits that the overwhelming evidence on record in support of the case of the Plaintiff that the land in question has been in possession since the time of his predecessors-in-interest and as such, the same had been continuing till a part was permitted to be occupied by the Defendants who subsequently have forcibly taken over the r other part; the Courts below have completely fallen in error by not holding in favour of the claim of the Plaintiff in granting the relief as prayed for. He further submits that the grounds on

which the Courts below have eschewed the two deeds Ext.2 and Ext.3 from consideration are wholly untenable. He submits that the documentary evidence coupled with the oral evidence when clearly show that the elder father of the Plaintiff was in possession of the suit property and thereafter his father has been in possession of the suit property, the Courts below are not at all right in discarding the same. He, therefore, submits for admission of this Appeal for answering the above as the substantial questions of law.

7. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below. I have also gone through the documents exhibited from the side of the Plaintiff (Appellant) in the Trial Court.

8. The Plaintiff claims is that the suit properties are the purchased property of his elder father. In support of the same, he has proved Ext.2 and Ext.3, the two sale deeds. One such sale deed (Ext.2) concerns with land measuring 7½ cubits and the other one (Ext.3) concerns with 11 cubits of land. The claim of the Plaintiff that since that time onwards, his elder father remaining in possession of the property which was later placed for being amicably divided amongst him and his brothers including the Plaintiff's father and that ultimately came to the hand of the Plaintiff's father who remained in possession.

At this stage, it is pertinent to state that when it is said that the Plaintiff's father was allotted with the suit property in the family partition and when he is alive, he has not filed the suit and instead, the Plaintiff as his son has filed the suit where he claims that his title over the suit property be declared and he being given back the possession of the suit which has remained with the Defendants; one piece being

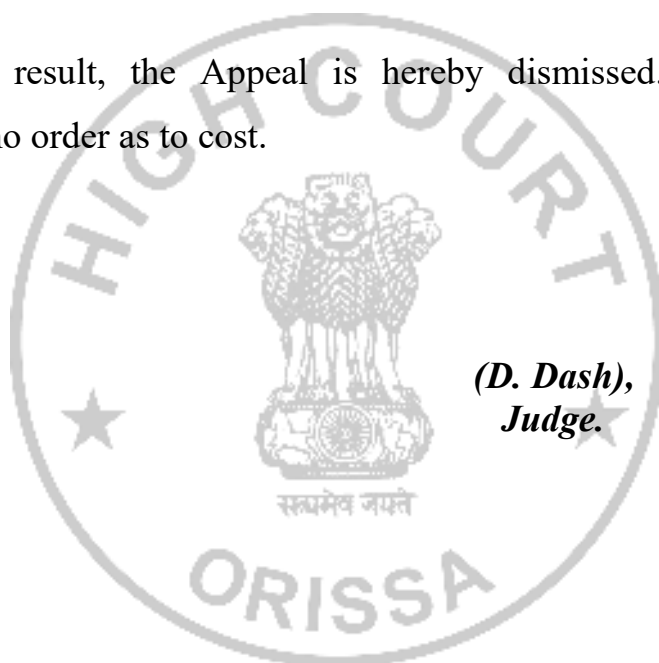
permitted and another piece being forcibly taken. Even in that event in the suit, the father of the Plaintiff has not been examined as a witness from the side of the Plaintiff and accepting for a moment that he is physically challenged, no step from the side of the Plaintiff has been taken to examine him on commission considering from another angle that the suit has been filed by the Plaintiff for the benefit of the members of the family.

9. Adverting to the facts and circumstances of the case, as those emanate from the pleading, when it is seen that the suit land has been recorded in the name of Defendants 1 and 9 in the settlement record published in the year 1984 vide plot no.3050 and 3051 respectively; the sale deeds projected as the documents of title in support of the case of the Plaintiff do not have any reference to any such plot number, khata number even as per the record as was prevailing in the year 1944 and 1946 giving any such scope for verification taking help from plot index or other such related documents. Thus it is not possible when even we believe the deeds; to arrive at a conclusion that the land under plot nos.3050 and 3051 were the lands involved in those sale deeds (Exts.2 and 3) So, the very the foundation of the case of the Plaintiff has remained unestablished. In so far as the possession of the suit land is concerned, it is stated that in the year 1969, after the cyclone, a part of the suit property was permitted to be possessed by Defendant No.1 when the other part has been forcibly taken over on 08.12.2001; no such document has been proved from the side of the Plaintiff that at any point of time during that period, any such claim with regard to purchase and possession of the suit property had been made before any Authority or that any such attempt had been made to record the suit land in the name of the Plaintiff's father or his elder brother. The silence of the Plaintiff's

father and his elder father for such a long period without any action or exhibition through conduct in creating the record of the land when on the face of Ext.2 and Ext.3 those do not appear relatable to the suit land; falls fatal to the claim of possession of suit land as stated by the Plaintiff.

For all the aforesaid discussion and reasons; this Court is not in a position to accept the submission of the learned counsel for the Appellant that there surfaces any substantial question of law for being answered in this Appeal meriting its admission.

10. In the result, the Appeal is hereby dismissed. There shall, however, be no order as to cost.



Basu