

HIGH COURT OF ORISSA : CUTTACK

RSA NO.299 OF 2015

In the matter of appeal under Section-100 of the Code of Civil Procedure assailing the judgment and decree passed by the learned District Judge, Angul in RFA No.9 of 2014 in confirming the judgment and decree passed by the learned Civil Judge (Senior Division), Angul in Civil Suit No.328 of 2009.

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Adwait Pradhan @ Adwait Ch. Pradhan* :::: *Appellant.

-:: VERSUS ::-

Bishnupriya Dang & Another* :::: *Respondents

**Advocate(s) who appeared in this case by hybrid arrangement
(virtual/physical) mode.**

For Appellant

... M/s. R.K. Mohanty, Sr. Advocate
D.K. Mohanty, S. Mohanty,
A. Mohanty, S. Mohanty &
D. Varadwaj (Advocates).

For Respondents

... M/s.D.P. Mohanty, R.K. Nayak,
T.K. Mohanty & M. Pal,
(Advocates).

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

Date of Hearing: 28.11.2022 :: Date of Judgment: 23.12.2022

D.Dash,J. 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, Angul in RFA No.09 of 2014. By the same, the Appeal filed by the present Appellant being the

aggrieved Defendant in Civil Suit No.328 of 2009 of the court of the learned Civil Judge (Sr. Division), Angul under section 96 of the Code has been dismissed. The Trial Court having decreed the suit holding the Respondent to be entitled to recover the suit property and the Appellant as well as the Respondent No.2 (Defendants) are to be enjoined from coming over the suit land and the counter claim of the Appellant (Defendant No.1) having also been dismissed; those have been confirmed in the First Appeal.

The Respondent No.1 as the Plaintiff had filed the suit for recovery of possession of the suit property by evicting the Appellant and Respondent No.2 (Defendants) from the suit land in further seeking permanent injunction. The Appellant (Defendant No.1) in the suit had filed the counter claim to declare his right, title and interest over the suit property as to have been acquired by adverse possession. The Trial Court had decreed the suit filed by the Respondent No.1 (Plaintiff) and dismissed the counter claim filed by the Appellant (Defendant No.1) and the First Appellate Court has confirmed the said decision of the Trial Court.

3. 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.

4. Plaintiff's case is that the suit land stands recorded in her name. It is further stated that the suit property originally stood recorded in the name of Sidheswar Behera. In a partition the suit property and other properties had fallen in her share and therefore, the same has been recorded in her name

(Plaintiff) and she claims to be in possession of the said property after the death of her father. On 10.05.2008, the Plaintiff had been to the suit land with her husband. When she found the Defendants present there restrained them from entering into the suit property. Subsequently, on 15.05.2008, it was found that the Defendants have constructed a latrine over a portion of the said land. The matter was reported to the Sarpanch of the local Gram Panchayat and a meeting had been convened. But the Defendants remained absent in the said meeting. It is alleged that on 05.06.2008 night, the Defendants constructed a thatched house over the suit plot. The matter being reported to the police, no action was taken. When the matter stood thus, on 24.06.2008, the Plaintiff received a notice from the Defendant No.1 through his Advocate and then could ascertain that the Defendant No.1 is claiming the property on the basis of a sale transaction between her father, namely, Sidheswar Behera and the mother of the Defendant No.1, namely, Pana Bewa. The Plaintiff replied to the said notice. Thereafter, a proceeding under section 144, Cr.P.C. was initiated. The Plaintiff thus filed a suit claiming the reliefs as stated above.

5. The Defendant No.1 is the husband of Defendant No.2. They filed the written statement admitting the position that in the record of right, the suit property stands recorded in the name of the Plaintiff. It is also admitted that the suit property was initially recorded in the name of Sidheswar and subsequently, the Plaintiff got her share by amicable partition whereby the record of right in favour of the Plaintiff has been prepared. The Defendant

No.1 having stated as above, has levied a counter claim wherein he pleaded that the suit property originally stood recorded in the name of Sidheswar, the father of the Plaintiff and others. In an amicable settlement, the suit plot came to the hands of the father of the Plaintiff, namely, Sidheswar. He on 08.09.1974 sold the property to Pana Bewa, the mother of the Defendant No.1 and mother-in-law of Defendant No.2 by way of Chuktinama on receipt of consideration of Rs.500/- in presence of village gentries. It is stated that Pana with the Defendant No.1 then possessed the suit land by amalgamating the same with their own homestead land and they planted some trees over there. They also admitted to have constructed a latrine over a portion of the suit land long prior to the institution of the suit and using the rest portion as Gharabari and thrashing floor. Such possession of the suit land is said to be well within the knowledge of the Plaintiff from the beginning and all others. It is alleged that the Plaintiff with her two sons had attempted to trespass into the suit property and threatened to destroy the threshing floor and the thatched house thereover. The Defendant No.1 claims that the possession of the suit land from 08.09.1974 has been uninterrupted and, therefore, he has acquired title over the said land by way of adverse possession.

The Plaintiff, in reply to the counter claim has denied the factum of execution of that Chuktinama signed by Sidheswar and the uninterrupted possession of the suit land by the Defendant No.1 from the time of her mother. It is stated that after the death of Sidheswar and his wife, the legal

heirs of Sidheswar partitioned the landed properties amicably and applied for preparation of separate record of right in OLR Case No.18 of 2006 and upon due inquiry in the field as to the possession of the parties in respect of the lands falling in their respective shares as so allotted, order has been passed for preparation of separate record of right accordingly. The Plaintiff refuted the claim of the Defendant No.1 as to the acquisition of title by him over the suit land by way of adverse possession.

6. On the above rival pleadings, the Trial Court having framed nine issues has answered the crucial issue, i.e., Issue No.8 first in favour of the Plaintiff and against the Defendant in holding that the Chuktinama dated 08.09.1974 (Ext.A) which is on a plain paper and unregistered one had been executed by Sidheswar Behera in favour of Pana Bewa. However, coming to Issue no.7 as to the competing claim of Defendant No.1 to have perfected title over the suit land by way of adverse possession with the admitted position that Sidheswar was the owner of the suit land and thereafter, the Plaintiff stood as one of his successors, upon examination of evidence and their evaluation, the answer has been returned against the Defendant No.1. Practically, these answers have led to provide the final result for the suit ending with dismissal.

The Defendant No.1 being aggrieved by the said judgment and decree passed by the Trial Court had carried the First Appeal which too has been dismissed.

7. The Appeal has been admitted to answer the following substantial question of law:-

“Whether in the absence of any specific plea being taken by the Appellant (Defendant No.1) that his possession in respect of the suit property is protected under section 53-A of the Transfer of Property Act, 1882, the Court can so protect his possession if the evidence on record satisfy the requirements as to attraction of said defence?”

8. Learned Senior Counsel for the Appellant submitted that the Courts below having held Ext.A to be the document on the basis of which the mother of the Defendant No.1 was delivered with the possession of the suit land by Sidheswar, the father of the Plaintiff and as evidence on record reveal that since that time onwards the mother of the Defendant No.1 and thereafter the Defendant No.1 have been possessing the suit land and for their eviction, the suit has been filed, although it would not be permissible for the Court to say that by such possession, the Defendant No.1 has perfected title over the suit land by way of adverse possession yet the Courts below ought to have protected the possession of Defendant No.1 in respect of the suit land in view of the provision contained under section 53-A of the Transfer of Property Act (for short ‘T.P. Act’). He submitted that even though the Defendant No.1 has claimed title over the suit land in the counter claim as to have been acquired by adverse possession in the facts and circumstances and with the evidence on record, the Courts below

should have moulded the reliefs in saying that the possession of the Defendant No.1 stands protected.

9. Learned counsel for the Respondent No.1 submitted all in favour of the findings returned by the Courts below. According to him, the document which has been admitted from the side of the Defendant, i.e., Ext.A. as has been executed by the father of the Plaintiff in favour of the mother of the Defendant No.1 being an agreement for sale as has been nomenclatured and as also finds narrated in its contents in the absence of any specific pleading in the plaint when on that basis possession of the Plaintiff for any length of time is not adverse and thus based upon that possession, his title over the suit land cannot be said to have been so acquired by adverse possession; it was incumbent upon him to plea and prove all the required elements in support of the plea under section 53-A of the T.P. Act. According to him, in the present suit the Defendant in his written statement while levying the counter claim having not pleaded such facts so as to seek protection of his possession by virtue of the provision contained in section 53-A of the T.P. Act, that cannot at this stage be looked into. According to him, the Courts below in the absence of all these above have rightly not bestowed their attention on that aspect and thus cannot be said to have faulted for having not acted in that direction.

10. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below. I have also gone through the plaint and have perused the evidence both oral and documentary and more

importantly Ext.A, which is the weapon in the hands of Defendant No.1 to thwart the claim of the Plaintiff.

11. Admittedly, the property originally belonged to Sidheswar Behera, who happens to be the father of the Plaintiff and he was the recorded owner of the suit land. The claim of the Defendant No.1, who asserts to be in possession of the suit land is said to be pursuant to the transaction as would reveal from Ext.A. This transaction as has been written down and nomenclatured is an agreement for sale (Jami Bikrya Chuktinama). It has been indicated therein that the possession of the suit land was delivered to the proposed vendee, i.e., the mother of the Defendant No.1 and when she would want; she would get the sale deed executed. So even if accepting for a moment that the mother of the Defendant No.1 continued to possess the suit land being so delivered by the father of the Plaintiff pursuant to this document (Ext.A), the nature of possession as per the settled position of law in the hands of the mother of the Defendant No.1 and thereafter in the hands of Defendant No.1 would remain permissive. In view of that when here it is not stated by Defendant No.1 that from a particular date disowning that agreement for sale and shunning the nature of possession as such so assumed under the Ext.A either his mother or he possessed the suit land on their own as its owner by denying the title of Sidheswar or his legal heirs including the Plaintiff and claiming title unto themselves and in that way to have continued all through for upward of the period prescribed, the claim of Defendant No.1 that he has acquired the right, title and interest

over the suit land by virtue of adverse possession and as such the right to continue to possess without suffering from any eviction from the side of the Plaintiff does not stand in the eye of law. Therefore, the Courts below on the basis of the admitted title of Sidheswar and his daughter, the Plaintiff over the suit land are right in dismissing the counter claim of the Defendant No.1 and consequentially, passing the decree in the suit in favour of the Plaintiff.

In saying so, to consider the matter to protect the possession of the Defendant No.1, the Courts below in fact had no pleading before them as to have been advanced from the side of the Defendants that the mother of the Defendant No.1 was all along ready and willing to get the sale deed executed from the father of the Plaintiff, which he in turn avoided on some pretext or other and as such Sidheswar failed to perform his part of contract. No amount of evidence having been let in from the side of the Defendant; on that score in proving such essential factual requirements; in my considered view, it was not permissible for the Courts below to proceed to examine further in the matter as to whether the Defendant No.1's possession over the suit land if has to be so protected on application of the provision as under section 53-A of the T.P. Act.

For the aforesaid discussions and reasons, the answer to the substantial question of law is rendered against the Defendant No.1 which in turn leads to confirm the judgments and decrees passed by the Courts below.

12. The Appeal stands accordingly dismissed. No order as to cost.

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

Himansu

