

HIGH COURT OF ORISSA : CUTTACK
RSA NO.73 OF 2022

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, Balasore in R.F.A. No.49 of 2020 in confirming the judgment and decree passed by the learned Senior Civil Judge, Jaleswar in Civil Suit No.206/127 of 2013/2012.

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Sri Dasaratha Panda

:::: Appellant.

-:: VERSUS ::-

Sri Bhagiratha Panda

:::: Respondent

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

For Appellant

... Mr. P.C. Acharya, Advocate

For Respondent

***... M/s.A.P. Bose, D.J. Sahoo
S.Swai, A. pattanaik & D. ahoo
(Advocates).***

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

Date of Hearing: 07.12.2022 :: 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 dated 23.03.2022 passed by the learned District Judge, Balasore in R.F.A. No.49 of 2020 confirming the final decree dated 29.11.2019 passed by the learned Senior Civil Judge, Jaleswar in C.S. No. 206 of 2013-I (127 of 2012-I)

The Appellant being the Plaintiff had called in question the final decree by carrying the First Appeal. The preliminary decree passed in C.S. No.206 of 2013-I (127 of 2012-I) was modified to some extent in the First Appeal, i.e., R.F.A. No.67 of 2016.

The preliminary decree passed is as under:-

“the time of effecting partition, the existing possession of the parties and their convenience are to be maintained and the value of the properties shall also be taken care of. If the parties agreed that the plaintiff will retain the newly constructed building and the defendant will retain the ancestral house, then in that event, the plaintiff is entitled to get an area measuring Ac.0.02 dec. excess to his half share and the same would be adjusted from the share of the defendant.”

The Defendant then filed an application to make the above preliminary decree final. The Trial Court having finally accepted the Civil Court Commissioner's report with regard to the allotment of the properties in the respective shares of the parties, who are the two brothers when has made the preliminary decree final that having been challenged in Appeal by the aggrieved Plaintiff, the same too has been dismissed. Hence, the present Second Appeal has been filed by the Plaintiff.

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

“(a) Whether the claim of the Appellant (Plaintiff) that while making the division of the property in suit, the Civil Court Commissioner should have kept the passage, which was earlier existing over the land under Plot No.514 as it is, and that

having not been done, the mandate given under the preliminary decree as per the judgment passed in RFA No.67 of 2016 has been violated and therefore, the final decree as passed is not sustainable in the eye of law?”

3. Learned counsel for the Appellant submitted that the decision of the Courts below is not correct as the Civil Court Commissioner while allotting the properties has not paid due regard to the possession of the parties in the field which had been ordained under the preliminary decree. He further submitted that the report of the Commissioner has been erroneously accepted when it runs contrary to the preliminary decree as was passed in R.F.A. No.67 of 2016 in which the preliminary decree passed by the Trial Court had merged. He submitted that while making the division of the property in the field and allotting specific land to the parties towards their shares the Commissioner ought to have given emphasis upon the situation as regards the possession of the parties as it was then existing in respecting the same as much as possible and practicable so as to see that least inconvenience is thereby caused to the parties. He further submitted that a passage which was existing earlier over the land under 514 should not at all been touched and the Commissioner instead of leaving the same as it is having gone to allot the said property towards the share of the Defendant, has clearly acted in violation of the mandate given in the preliminary decree and, therefore, the final decree is liable to be set at naught.

4. Learned counsel for the Respondent, on the other hand, submitted that although in the preliminary decree there was an observation that the possession of the parties would be maintained and if the Plaintiff will retain the newly constructed building and the Defendant will retrain the ancestral house then the Plaintiff would get an area of Ac.0.02 dec. in excess to his entitled half share and the same would be adjusted towards the share of the Defendant. He submitted that the Plaintiff having returned the newly constructed building and the Defendant having returned the ancestral house, the Plaintiff has been mutated with Ac.0.02 dec. in excess to his half share, which has undergone reduction from the share of the Defendant. In view of that he submitted that now if the passage which the Plaintiff claims to be left as before, then for all practical purpose, it would cause deprivation to the Defendant as of his share and the Plaintiff would then again be unlawfully benefited/enriched in getting Ac.0.02 dec. more and then again being able to use a passage to the serious deprivation of the Defendant. He submitted that the Courts below having taken all these aspects into consideration when have accepted the Commissioner's report and these all being the factual settings approved by the courts below, as there surfaces no such perversity, the final decree cannot be said to have been passed by travelling beyond the preliminary decree in utter disregard to the same. He thus contended that the substantial question of law has to be answered against the Plaintiff.

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

6. The First Appellate Court has addressed the above contention as to read at Para-12 and 13 of its judgment. The description appears to be very vivid. It is seen therefrom that there is no existing road to approach the Government road from the newly constructed building and for that a road being proposed, in fact has been given in the map. The Commissioner has clarified this aspect as to why such arrangement was made. As per his evidence if the road is allotted on Plot No.514 then it would be convenient to reach under Plot No.530 and 531 but as that Plot No.514 is a homestead land by allotment of a road over the same by utilizing a portion of it, the usefulness/utility of that homestead plot of land would have to be compromised to a good extent. He, therefore, has proposed the road would be ideal for being used as such in the interest of the parties. It is seen that Plot No.519 has been allotted to the Plaintiff which is adjacent to the proposed road and that can be use by the Plaintiff as per his requirement to approach the newly constructed building. The Commissioner has rightly said that allotment of road on Plot No.514 would be of inconvenience to the Defendant to use his house over Plot No.514.

The First Appellate Court keeping in view all these above has arrived at a conclusion that it would be better for the parties to use the proposed road in the map in order to approach the Government road and instead of that by keeping the road on Plot No.514, the Defendant would

only be inconvenienced at the alter of convenience of the Plaintiff in providing edge to him over the Defendant in the division as well as user and utility.

For all the aforesaid, the substantial question of law is answered against the Appellant (Plaintiff).

7. In the result, the Appeal stands dismissed. However, there shall be no order as to cost.

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



Himansu