IN THE HIGH COURT OF ORISSA AT CUTTACK

AHO No.48 of 1997

AFR

Sri Sri Durgadevi through Sri Tulsi Charan Praharaj, Marfatdar of the deity and others .... ***Appellants***

-versus-

Maharaja Sri Pradeep Chandra Bhanja Deo(dead) by LRs and others .... ***Respondents***

Appeared in this case:

For Appellants : Dr. Sujata Dash, Advocate

For Respondents : Mr. U.C. Patnaik, Advocate

CORAM:
THE CHIEF JUSTICE
JUSTICE R. K. PATTANAIK

JUDGMENT
08.04.2022

Dr. S. Muralidhar, CJ.

1. Defendant No.5 in O.S. No.17 of 1973 in the Court of Subordinate Judge, Baripada has filed this appeal against a judgment dated 27th June 1997 passed by the learned Single Judge in First Appeal No.226 of 1984 filed by the present Appellant.

2. The said First Appeal No.226 of 1984 was directed against a judgment and decree dated 31st March 1982 of the learned

Subordinate Judge, Baripada in O.S. No.17 of 1973 filed by Respondent No.1 herein.

3. Notice was directed to be issued in the present appeal, filed on 22nd December 1997, on 23rd February, 1999. Thereafter, there have been steps taken for bringing on record the legal representatives (LRs) of the various parties including Respondent No.1.

Preliminary Objection

4. At the outset, a preliminary objection is raised on behalf of the Respondents to the maintainability of the present appeal relying on the judgment of the Full Bench of this Court in ***Mahammed Saud v. (Maj) Shaikh Mahfooz AIR 2009 Orissa 46*** and the judgment of this Court in ***Union of India v. Steel Authority of India Ltd. 120 (2015) CLT 326.***

5. A careful perusal of the judgment in ***Mahammed Saud v. (Maj) Shaikh Mahfooz*** (*supra*) would reveal that a Larger Bench came to be constituted in view of the conflicting views taken in ***Birat Chandra Dagara v. Taurian Exim Pvt. Ltd.2006 (2) OLR 344*** which had held that notwithstanding Section 100-A CPC, a second appeal against an order of a Single Judge of the High Court in an appeal would be maintainable before a Division Bench of the High Court and ***V.N.N. Panicker v. Narayan Pati 2006(2) OLR 349*** which had taken a view that an LPA was not maintainable against the judgment/order of a learned Single

Judge in view of the amendment to Section 100-A CPC. What is important to note is the date of pronouncement of the order of the learned Single Judge which was in appeal in the said LPA in the case of ***Mahammed Saud v. (Maj) Shaikh Mahfooz*** (supra). Clearly, the date of judgment of the learned Single Judge was subsequent to the amendment made in 2002 to Section 100-A CPC with effect from 1st July, 2002. The Larger Bench in ***Mahammed Saud v. (Maj) Shaikh Mahfooz*** (supra) referred to relied upon judgment of the Supreme Court in ***P.S. Sathappan (dead) by LRs v. Andhra Bank Ltd..AIR 2004 SC 5152*** as well as ***Kamal Kumar Dutta v. Ruby General Hospital Ltd. (2006) 7 SCC 613*** to hold that "after introduction of Section 100-A with effect from 1.7.2002, no Letters Patent Appeal shall lie against a judgment/order passed by a learned Single Judge in an appeal arising out of a proceeding under a Special Act".

6. The conclusions reached by the Larger Bench in ***Mahammed Saud v. (Maj) Shaikh Mahfooz*** (supra) were as under:

> "47…(1) After introduction of S.100-A in the Code of Civil Procedure by 2002 Amendment Act, no Letters Patent Appeal is maintainable against a judgment/order/decree passed by a learned Single Judge of a High Court.
>
> (2) The decision of a Division Bench of this Court in *Birat Ch. Dagara* case (supra) has not laid down the correct position of law. On the other hand, the conclusions arrived at by Division Benches of this Court in *V.N.N. Panicker* and *Ramesh Ch. Das* cases (supra) are held to be good law and are confirmed."

7. In the present case, the judgment of the learned Single Judge is dated 27th June 1997 which is prior to 1st July 2002 and the present appeal was itself filed on 22nd December 1997, prior to the amendment to Section 100-A of CPC. Applying the dictum in ***P.S. Sathappan*** (supra), it has to be held that the present appeal is maintainable. In the present case at the relevant point in time when the appeal was filed a second appeal was in fact permitted and therefore a preliminary objection to the maintainability of the present appeal cannot hold.

8. As far as the decision in ***Union of India v. Steel Authority of India Ltd.*** (supra) is concerned, it arose from a Special Act viz., Section 23 of the Railway Claims Tribunals Act, 1987 which provided only for a single appeal at the relevant point in time. Consequently, it was held that no second appeal was maintainable. This decision would have no application to the facts of the present case as it is not under the special enactment.

9. Consequently, the preliminary objection as to the maintainability of the present appeal is negatived.

Background facts

10. Turning to the merits, the facts leading up to the filing of the present appeal are that Respondent No.1 Maharaja Sri Pradeep Chandra Bhanja Deo filed the aforementioned the O.S. No.17 of 1973 praying for a decree of eviction of the Defendants, including the present Appellant from the suit land and for

delivery of khas possession of the same to him. The case of the Plaintiff was that Maharaja Sri Pratap Chandra Bhanja Deo, the father of the Plaintiff, was a ruler of Mayurbhanj State. At the time of the merger of the State of Mayurbhanj with the State of Orissa, the suit schedule 'A' land and other lands were allowed to be retained by him as his personal properties. The said lands according to him were assessed to land revenue and were also recorded in the record of rights (ROR). According to the Plaintiff, the suit schedule 'A' land adjoins the old palace over which there exists a pucca shed where the late ruler was performing his private Durga Puja.

11. According to the Plaintiff, after the death of Maharaja Sri Pratap Chandra Bhanja Deo in 1968, the Plaintiff as the only son succeeded to all the properties including the suit schedule land and got the same mutated in his name. He claimed that during the year 1968-69, he performed Durga Puja on the suit land and thereafter discontinued it. The case of the Plaintiff was that the Defendants were performing Puja of the deity only during the festival time and they had no right or the interest in the deity or the suit land. Since the Plaintiff decided to sell the suit land, the Defendants, with a view to grabbing it, had initiated proceedings under Section 145 Cr PC. This led to the filing of the suit by the Plaintiff.

12. The contesting Defendants were Defendant Nos.3 to 5 i.e. Tulsi Charan Praharaj, Bibhuti Bhusan Praharaj and the present

Appellant Sri Sri Durga Devi through Tulsi Charan Praharaj claiming to be the Marfatdar of the deity. Their claim was that the suit land was the Bije Sthali of Maa Durga and that the Seva Puja of the said deity was being performed by Sri Tulsi Charan Praharaj (Defendant No.3). It was further stated that as Sebayatdar/Pujak, Defendant No.3 had been possession of the suit land and that the Plaintiff had no right, title or interest therein whatsoever.

Judgment of the Trial Court

13. The learned Subordinate Judge before whom the aforementioned suit was filed in 1973 framed as many as seven issues of which the following three issues were taken up for consideration first:

> "(5) Whether the Plaintiff has any right, title and possession over the suit land and if he is entitled get a decree for eviction?
>
> (6) Have the Defendants any right over the suit land as Pujaka and Raj-Pratinidhi?
>
> (7) Whether the suit land is a public place of worship of Deity Durga and if the Defendants and others have perfected the right by prescription?"

14. On an analysis of the oral and documentary evidence, the Trial Court came to the conclusion that "the suit land was the personal property of the Plaintiff and it was at no time a public property". Further, the Plaintiff had successfully proved by the documents produced "that the suit 'Devimela' land was conceded to him by the Government and recognized as personal property

and since then the Plaintiff's father acquired his exclusive right, title and interest over the same which was inherited by the Plaintiff on his death". As regards evidence, the Trial Court had held that the possession of Defendant No.3 over the suit land is not on the basis of any right but as a trespasser and that "the Plaintiff alone has the right, title or possession over the suit land and he is entitled to get a decree for eviction". It was categorically held that "Defendant No.3 was never the Pujak or Raj Pratinidhi of the Plaintiff for performance of Durga Puja nor had he perfected his right over the suit land by prescription".

Judgment in First Appeal

15. The First Appeal No.226 of 1984 was filed on behalf of the deity, Defendant No.5 before this Court. Learned Single Judge formulated the main question for consideration as "whether the Plaintiff has title to the suit land". In answering this question, on examining the revenue record, it was noted by the learned Single Judge that the suit land pertaining to Plot No.1213 and 1213/6322 and other lands stood recorded in the name of the Plaintiff. Both the plots had been recorded as homestead. Plot No.1213/6322 had been noted as "Debi Mela Padia" in the remarks column. The learned Single Judge noted that "the Defendants have neither specifically denied the Plaintiff's claim of ownership over these two plots nor do they claim title thereto". Consequently, the learned Single Judge did not consider it necessary to discuss the oral evidence adduced by the Plaintiff with regard to title.

Relying on the revenue record Ext.3, the learned Single Judge held that "title to suit land remains with the Plaintiff."

16. In answering the next question whether Defendant Nos.3 to 5 had any right in respect of the suit land, learned Single Judge noted the initial plea of Defendant No.3 in the written statement that "Shri Shri Durga Devi was a public deity and his family members were Pujaks". However, in an additional written statement, he took a new plea that "his predecessors had installed a silver idol of Goddess Durga in the house that stands on the suit land and were performing the Puja throughout the year except during the Puja festival when clay idol of Goddess Durga was being installed and the expenses of the festival were being made by public contribution". The learned Single Judge then discussed the evidence of D.Ws.1, 3, 4 and 5 and found the evidence to be 'discrepant' and therefore, it was difficult to believe that they had insisted either that a permanent idol of Goddess Durga was on the suit land to which Puja was being performed. On the other hand, the evidence of the DWs coupled with the evidence of P.W.1 showed that "only during Dushera festival Durga Puja was being performed every year till 1969 and this festival was exclusively confined to the family of the Plaintiff and the public were in no way concerned with it"

17. The learned Single Judge noted that the trouble began when the Plaintiff transferred a portion of the suit land to one Girish Chandra Dutta and to transfer the rest entered into an agreement

with Radhakrishna Bhanja and Laximani Sahu. The learned Single Judge concluded the judgment as under:

> "In my considered opinion there is no existence of any deity on the suit land and because in the remarks column against one of the suit plots it has been noted as "Devi Mela Padia", Defendant No.3 took the plea that both the plots belong to the deity (Goddess Durga) and he happens to be 'Pujaka' of the said deity. In my opinion, the Defendants are rank trespassers and have no manner of right over the suit land. The findings and ultimate conclusion arrived at by the trial court being based on proper appreciation of evidence, do not call for any interference in the present appeal."

The present second appeal

18. This Court has heard the submissions of Dr. Sujata Dash, learned counsel for the Appellants and Mr. U.C. Patnaik, learned counsel appearing for the Respondents who have been substituted by their respective LRs.

19. It must be noted at the outset that this appeal was never formally admitted by this Court and no substantial questions of law have been framed for consideration. The question really would arise whether any substantial question of law indeed arises for consideration. In the considered view of the Court, both the Trial Court and the learned Single Judge have arrived at concurrent findings of fact based on the evidence laid by the parties and for the reasons stated hereafter, no substantial question of law in fact arises for consideration in the second appeal. No attempt was made by Dr. Dash to even suggest that any such substantial question of law arose for consideration.

20. Nevertheless, the Court has also at the instance of learned counsel for the Appellant-Defendant No.5 examined carefully the judgment of Trial Court as well as learned Single Judge.

21. It should be mentioned at this stage that when the appeal was originally filed the lone Appellant was Defendant No.5 namely the deity. Later the LRs of Tulsi Charan Praharaj have been added as Appellant No.2.

Discussion of the submissions

22. Dr. Dash first submitted that since the Plaintiff did not examine himself as a witness, the Trial Court as well as learned Single Judge ought to have drawn an adverse influence against the Plaintiff.

23. It appears from the judgment of the Trial Court that the Plaintiff examined four witnesses, two of them P.Ws.1 and 3 were the employees of the Plaintiff's palace establishment. P.W.2 was an Advocate of the local Bar having his residence about 200 cubits from the suit land. P.W.4 was another resident of the locality residing at a distance of 200 yards from the suit land. P.W.1 was a Charge Officer in the establishment of the Plaintiff and was employed for several years. He was clearly in a good position to speak about the happenings on the suit land including the performance of the Puja of the deity. It is the quality of evidence that matters and not the number of witnesses examined.

There was no occasion to draw any adverse inference against the Plaintiff for not having examined himself. Such a submission seems to be made in desperation and for the first time before this Court as no such plea was raised before the learned Single Judge.

24. The Court has carefully examined the memorandum of appeal filed. There is no such plea taken in the memorandum of appeal in the grounds. Consequently, the Court does not permit the Appellant to raise this plea at this stage. In any event, the evidence laid by the Plaintiff was cogent and convincing and the findings of the Trial Court were consistent with such evidence.

25. It was next contended by Dr. Dash that Exts.5 to 8 were receipts granted by different persons which were not public documents and which were not proved in accordance with Section 67 of the Evidence Act, 1872. It was contended that the Civil Judge ought not to have allowed for exhibition of such inadmissible documents. It was next contended that a document marked as Ext.A which was an ROR of the year 1929 ought to have been considered by the Trial Court as well as the learned Single Judge. Further, the written statement of Tulsi Charan Praharaj filed after being arrayed as Defendant by the High Court by an order dated 1st December 1978 in Civil Revision No.408 of 1976. It was stated to have not been taken into consideration by the Trial Court as well as by the learned Single Judge.

26. Again, it must be pointed out that neither in the grounds of first appeal nor in the grounds of second appeal have any such plea been taken by the Appellants. In the second appeal, there are only five grounds set out of which Grounds 1 and 2 are of routine nature. Ground No.2 concerns the learned Single Judge relying on Ext.3 and not considering it necessary to discuss the oral evidence. Ground No.3 is regarding the learned Single Judge drawing an adverse inference against the Defendants for the discrepancies in the pleadings. Ground No.4 is about the learned Single Judge erring in holding that the Defendants were ranked trespassers.

27. A careful perusal of the judgment of the Trial Court reveals that there was in fact a new case set out in the written statement filed by Defendant No.3. The specific discussion in this regard of the learned Single Judge reads as under:

> "As regards his case of installing a 'Jantra' or silver image in the shed for daily puja, Defendant No.3 has not averred anything in his original written statement but in the additional written statement filed on 2.4.79, he seems to have created a new case. However, from the evidence of D.Ws. including that of Defendant No.3, it clearly transpires that the clay image of Goddess Durga was being worshipped during Dasahara month by the Maharaja till 1969 at his own expense and that after the trouble started over the suit land in 1972, when the intending purchasers tried to occupy the same and when Police came for enquiry, D-3 put some 'Jantra' there and started doing its puja in order to establish his claim of possession on the suit land. There is no evidence that Defendant No.3 was the Pujak or Marfatdar of Goddess Durga or any 'Jantra'

> or image consecrated there for permanent worship. Rather, the evidence is clear that the suit land was all along in the possession of late Maharaja and during the Dasahara month only, the clay image of Goddess Durga was being installed by him for puja which was stopped after 1969. No idol or image of Goddess Durga appears to have been permanently installed on the suit land for Puja purposes. The evidence of the DWs. that a 'Jantra' or a silver image of Goddess Durga was consecrated there for daily puja is not only discrepant but also unbelievable. Thus, my finding is that the Defendants had no right over the suit land as Pujak and Raj Pratinidhi to perform any puja over the suit land."

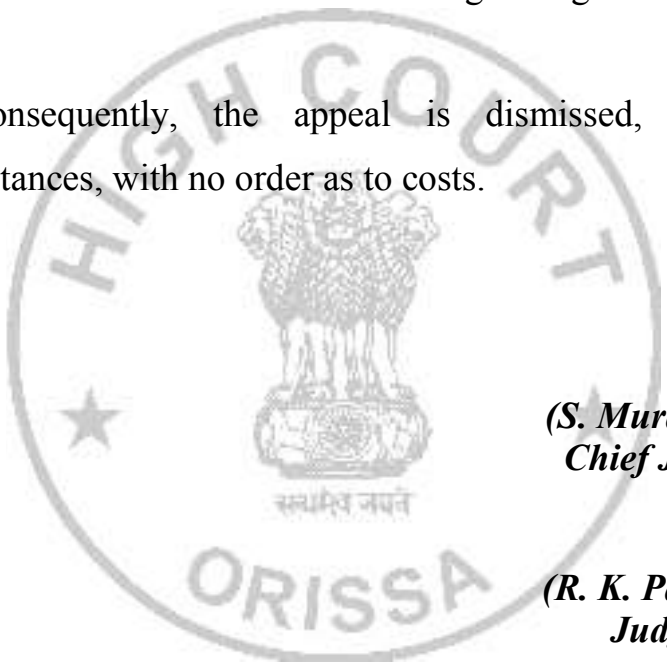
28. Consequently, there is no merit in the above contention of learned counsel for the Appellants. In order to meet the above objection, learned counsel for the Appellants sought to rely on the observation in ***Uttar Pradesh Avas Evam Vikas Parishad v. Sheo Narain Kushwaha (2011) 6 SCC 456*** to urge that a new plea going to the root of the case and available from the records of the case, can be taken up for the first time.

29. Having carefully examined the decision in ***Uttar Pradesh Avas Evam Vikas Parishad*** (supra), the Court finds that it lays down no such proposition. Even otherwise, the new plea is also not substantiated by the Appellant. In the present case, the discussion by the Trial Court as well as the learned Single Judge of the evidence on record is exhaustive. No document has been ignored and no evidence of any witness has been omitted from the discussion. The examination has been thorough and with reference to the official documents. The plea taken by the counsel for the Appellant invites the Court to re-examine the entire facts

and to come to a different conclusion. The Court not being satisfied that any error has been committed in the analysis and the reasoning of both the Trial Court as well as the learned Single Judge, is not persuaded that these new pleas should be permitted to be urged at this stage.

30. The Court is not satisfied that any grounds have been made out for interference with the well reasoned judgments of the learned Trial Court and the learned Single Judge in the matter.

31. Consequently, the appeal is dismissed, but in the circumstances, with no order as to costs.



(S. Muralidhar)
Chief Justice

(R. K. Pattanaik)
Judge

S.K. Guin/
Sr. Stenographer