

IN THE HIGH COURT OF ORISSA AT CUTTACK

R.S.A. NO.257 OF 2014

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 Additional District Judge, Kuchinda, in RFA No.28 of 2012 by allowing the judgment and decree passed by the learned Civil Judge (Jr. Division), Kuchinda in C.S. No.35 of 2011.

Bhagaban Luhar & Others ***Appellants***

-versus-

Santosh Penthei & Others ***Respondents***

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

For Appellant - M/s.Manoj Kumar Pati,
R. Mohapatra, B.P. Satpathy,
H.S. Dalai, Advocates.

For Respondents - --- --- ---

CORAM:
MR. JUSTICE D.DASH

DATE OF HEARING::17.03.2022, DATE OF JUDGMENT:: 04.04.2022

The Appellants by filing this Appeal under Section-100 of the Code of Civil Procedure 1908 (for short, 'the Code') have assailed the judgment and decree passed by the learned Additional District Judge, Kuchinda in RFA No.28 of 2012.

By the same, the Appeal filed by the Respondents as the unsuccessful Plaintiffs under Section-96 of the Code has been allowed and they have been held entitled to get half share over Schedule-A land

with further direction that the land sold by the Defendants would stand adjusted from their half share.

The suit has been filed by the Respondents as Plaintiffs against these Appellants arraigning them as Defendants for partition of “A” Schedule property having been dismissed; the First Appeal has been allowed and preliminary decree for partition as aforesaid has been passed.

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 is that the properties are the ancestral properties of the parties and the record of right shows the joint recording of the lands in the name of Judhisthir Luhar and Nisipuri Luhar. It is stated that during their lifetime, they were in possession of separate portion of the suit land for their convenience and after the death of Judhisthir in the year 1990, his legal heirs; the Defendants have been possessing the lands in possession of the Nisipuri. After the death of Nisipuri, the lands in suit having not been partitioned in metes and bounds when the Plaintiffs request for partition was turned down by the Defendants, the suit has been filed.

4. The Defendant Nos. 1 to 3 and 7 have denied the plaintiffs to be the legal heirs of Nisipuri. According to them, Judhisthir Luhar was the

owner and all along in possession of the suit land. It is alleged that name of Nisipuri has been wrongly inserted in the record of right.

5. The Defendant No.1 has stated that the suit land belongs to Ananda Khamari and Sananda Khamari. Judhisthir Luhar is the grant son of Ananda Khamari and the Defendants are the sons and daughters and Judhisthir Khamari @ Luhar. According to him, Nisipuri is the daughter of Late Sananda Khamari. Sananda and his wife died in the year 1965 and at that time, Nisipuri having married was residing in her in-laws house in village Gaipurga and she was not coming to village Bhalubahal nor enjoying any property. Judhisthir was the absolute owner in possession of the same and was solely enjoying the benefit thereof. After the death of Sananda, Nisipuri demanded a share over the property and that was denied by Judhisthir. In spite of that, the Settlement Authority have erroneously recorded Nisipuri's name in the record of right. The Plaintiffs claim to have been in exclusive possession of the suit land and enjoying the same all along exercising exclusive right of ownership and thereby it is said that they have perfected title over the suit land by way of adverse possession.

6. Faced with the above case and counter case projected by the parties, the Trial Court framed in total five issues. Rightly, coming to answer the issue as to the claim of the Plaintiffs over the suit property in

seeking their half share over the same together with the issue relating to the limitation which covers the claim of the Defendants as regards acquisition of title by adverse possession, the answer has been rendered on examination of evidence and their evaluation that the Defendants being in possession of the property to the exclusion of the plaintiffs for upward of 12 years, the suit is barred by limitation. This answer had led, the Trial Court to dismiss the suit.

7. The First Appellate Court being moved by the unsuccessful Plaintiffs has set aside the above findings of the Trial Court. In addressing the rival contentions raised before it, the First Appellate Court has been held that the Defendants have failed to establish their case of ouster and adverse possession as against the Plaintiffs.

8. Learned Counsel for the Appellants (Defendants) submitted that the First Appellate Court has erred in law in holding that the Defendants have not perfected their title over the suit land as they have not challenged the final settlement record of right when as per the admitted position, the ROR does not create or extinguish the title. He further submitted that the land in suit all along being in physical possession of the Defendants, causing ouster of Nisipuri through whom the Plaintiffs claim the title, the Trial Court was right in answering the crucial issues against the Plaintiffs which according to him have been set aside by the

First Appellate Court without any justifiable reason and by not applying the settled position of law as to ouster and adverse possession to the facts and circumstances as emanate from the evidence. He, therefore, urged for admission of this Appeal to answer the above substantial questions of law.

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

10. It is stated by the Defendants that on 08.02.1988, they refused to part with any portion of the land in the suit in favour of the Plaintiffs. The suit land as it reveals from the record of right, Ext. 1 stands recorded in the name of Nisipuri and Judhisthir. This record of right has not been challenged by the Defendants. Therefore, prima facie presumption as to the possession of recorded tenant and the legal heirs claiming through them stands. This ROR had been published way back in the year 1979 and it is questioned by the Defendants only in their defence in the suit against them in the year, 2011. The First Appellate Court has found to have made detail discussion as to the sustainability of the claim of the Defendants with regard to acquisition of the title over the suit land by way of adverse possession at paragraph-13, 14 and 15 of the judgment. The Defendant No.1 being examined as D.W.1 has stated that since 55 to 60 years, Sananda was not possessing any portion of the

suit land and Nisipuri after her marriage was not residing in the suit village. So, it is stated that Judhisthir was exclusively possessing the suit land. He has however not been able to say the year of death of Sananda. The evidence of D.W. 2 reveal that Ananda and Sananda were possessing suit land and about 50 years ago Sananda went away to village Gaipurga and stayed there where his daughter was residing. It is stated by him that Nisipuri, the daughter of Sananda had come and demanded her father's share and then Judhisthir refused to part with. The evidence of other witnesses examined by the Defendants show that the Defendants have been in possession of the suit land. The Trial Court having arrived at a conclusion from the evidence that on 12.02.1988, the Plaintiffs having asked for share as it was refused to be so given by the Defendants has held the suit is barred by limitation.

9. It is the settled position of law that possession of any joint property by one co-owner in the eye of law is possession for and on behalf of all and that is also the position in case of possession of the joint family property by one co-sharer. In order to negative the above presumption, the co-owner/ co-sharer who wants to do so is to prove that he has been in possession of the entire property exclusively by ousting the other co-owner/ co-sharer and denying their right of any sort over the same and with such hostile animus, and as such to have remained in open, peaceful and continuous possession for upward of the

period prescribed. The law requires that to constitute ouster proof of something more than exclusive possession is required. The most important aspect is the open denial of the right of other co-owners and further assertion by the co-owner in possession to be having the exclusive right over the same and accordingly continue to possess. As regards co-owners, the law is that there can be no adverse possession by one co-owner unless there has been denial of title and on ouster to the knowledge of others.

On the basis of the evidence both oral and documentary as obtained, the First Appellate Court having applied the above settled position of law is found to be right in holding that the Defendants have failed to establish that the Plaintiffs are not entitled to the claim of partition as prayed for. The error committed by the Trial Court is thus seen to have rightly been rectified by the First Appellate Court.

In that view of the matter, this Court is not in a position to say that any such substantial question of law surfaces in this case for being answered meriting the admission of this Appeal.

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

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