

IN THE HIGH COURT OF ORISSA AT CUTTACK

R.S.A. NO.273 OF 2014

In the matter of an Appeal under Section-100 of the Code of Civil Procedure has assailed the judgment and decree dated 28.03.2014 & 01.04.2014 respectively passed by the learned Civil Judge (Senior Division), Udala in RFA No. 02 of 2008 setting aside the judgment and decree dated 19.07.2008 & 02.08.2008 respectively passed by the learned Civil Judge (Junior Division), Udala in Civil Suit No.30 of 2005.

Laxmimani Behera & Others ::: ***Appellants***

-versus-

Baisnab Charan Das and Another ::: ***Respondent***

**Appeared in this case by Hybrid Arrangement
(virtual/physical mode)**

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For Appellants - M/s. B.R. Mohanty,
I.P. Mohanty, S. Rath,
Advocates.

For Respondents - M/s. K. Patnaik, R. Samal,
K.K. Mahanta, Advocates.

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

DATE OF HEARING:: 19.10.2022, DATE OF JUDGMENT:: 25.11.2022

These Appellants, in filing this Appeal under Section-100 of the Code of Civil Procedure 1908 (for short, 'the Code'), assail the judgment and decree dated 28.03.2014 & 01.04.2014 respectively passed by the learned Civil Judge (Senior Division), Udala in RFA No. 02 of 2008.

By the same, the Appeal filed by the Respondent No.1 (Plaintiff) under Section-96 of the Code has been allowed and thereby, the judgment and decree dated 19.07.2008 & 02.08.2008 respectively passed by the learned Civil Judge (Junior Division), Udala in Civil Suit No.30 of 2005 have been set aside and consequently, the suit filed by the Respondent as the Plaintiff has been decreed and these Appellants, the successors-in-interest of the original Defendant No.1 have been permanently enjoined to enter upon the suit land and it has been held that the Respondent (Plaintiff) is entitled to recover the land to the extent of 540 square links which having been encroached by the original Defendant No.1, as such was in his possession.

2. It be stated that original Defendant No.1 having died during pendency of the First Appeal, his legal representatives had come on record and they being aggrieved by the judgment and decree passed by the First Appellate Court are now the Appellants before this Court in the Second Appeal. The original Defendant No.2 having died during this Second Appeal, their legal representatives are on record.

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 Suit.

4. Plaintiff's case is that he is the recorded owner of the land under Plot No.2256 appertaining to Khata No.676 of mouza Sainkula. It is stated that original Defendant No.1 is the owner of the land under Plot No.2652 and Defendant No.2 is the owner of Plot

No.2651 which adjoin the suit land. The Plaintiff having got the record of right from the Consolidation Authority in order to avoid future trouble got his land measured by a private Amin for peacefully possessing the same by constructing boundary wall. Due to non-cooperation of the Defendant No.1, said measurement however could not take place. The Plaintiff then had filed an application for identification of the suit land before the Tahasildar. The measurement was made by Tahasil Amin in presence of Police and after measurement, said Amin had put identification marks on the boundary line of the land of the Plaintiff on the portion which was adjoining the land of the Defendants. The Plaintiff (Appellant) thereby went for construction of the boundary wall and then the threat came from the side of the Defendant No.1 for which the Plaintiff could not proceed to construct the boundary. The Defendant No.1 then is said to have removed the boundary marks and on 13.02.2006, he put a thatched house over the land measuring 540 square links appertaining to Plot No.2256 by encroaching upon his land.

5. The Defendant No. 1 in his written statement asserted to have never encroached any land of the Plaintiff. He denied to have any idea about the demarcation of the land by Tahasil Amin. He further stated that the Plaintiff has filed the suit in connivance with the Defendant no.2 with an ulterior motive to grab the land of the Defendant No.2.

6. Defendant No.2 has stated to have no such claim over the suit land in stating that he has nothing to do with the suit land.

7. The Trial Court on the above rival pleadings framed in total eight(8) issues. It be stated at this stage that on an application filed by the Plaintiff under Order-26 Rule-9 of the Code, the Civil Court Commissioner was appointed to demarcate the land on 19.04.2006. He also prepared the report which is Ext. IV. The field book and rough sketch map which the Civil Court Commissioner has submitted are Exts.V & VI; whereas the trace map that he prepared in Ext.VIII and the badar is Ext.VII.

On going through the evidence and upon their analysis at its level, the Trial Court found the Plaintiff to have not established that the Defendant No.1 has encroached any portion of his land; and thus it is held that he is not entitled to the relief so asked for. Having said, the Trial Court has dismissed the suit.

8. The unsuccessful Plaintiff then filing the First Appeal has been obtained a decree in his favour as stated above. The First Appellate Court has accepted the evidence of the Plaintiff and has also held that the report of the Civil Court Commissioner which has been erroneously discarded from being considered by the Trial Court has to be accepted. In that view of the matter, the suit has been decreed as aforesaid.

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

“Whether in the facts and circumstances of the case, acceptance of the report of the Civil Court Commissioner by the learned lower Appellate Court is sustainable in the eye of law?”

10. Learned Counsel for the Appellants submitted that when the open elaborate discussion of evidence of witnesses more importantly

the evidence of the Civil Court Commissioner, the Trial Court was right holding that the Plaintiff has failed to prove the alleged encroachment and dismissed the suit; the First Appellate Court has committed grave error by accepting the claim of the Plaintiff. In support of the said argument, he urged that it is a fit case to set aside the judgment and decree passed by the First Appellate Court and consequently, restore the judgment and decree passed by the Trial Court in non-suiting the Plaintiff.

11. Learned Counsel for the Respondent No.1 submitted all in favour of the conclusion arrived at by the First Appellate Court. According to him, the Trial Court having illegally rejected the Civil Court Commissioner and his report, the First Appellate Court has rightly held the same as correct in all the required aspects for being accepted to be pressed into service and for that reason, when the First Appellate Court has simply rectified the mistake committed by the Trial Court, it would not be permissible for this Court to overturn that finding.

12. 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 written statements. The evidence both oral and documentary have been perused.

13. The Defendant No.1 before the First Appellate Court reiterating his objection questioned the report of the Civil Court Commissioner and his evidence (C.W.1) on the following grounds:-

- (a) the measurement has not been done in presence of the Defendant No.1;

- (b) the measurement has been done by Civil Court Commissioner (C.W.1) without fixing proper points which is the essential for measurement in ascertaining the boundary on particular plot of land; and that
- (c) the oral evidence contradicts the evidence of P.Ws.1 to 3.”

14. The evidence of Civil Court Commissioner (C.W.1) and the measurement that he has made as seen from the report (Ext.IV), being carefully gone through; this Court finds that the First Appellate Court is right in saying that the report of C.W.1 is correct on all those aspects as reported especially as to the encroachment. The report of the Civil Court Commissioner is seen to be very clear and unambiguous; wherein it is specifically said that the Defendant No.1 is in encroachment of the land measuring 540 square link under plot no.2256. The Defendant No.1 being well aware of the appointment of the Civil Court Commissioner having chosen to remain absent, when the measurement made by the Commissioner with reference to the records which are not challenged, the report simply for that reason is not liable to be eschewed from consideration. The Commissioner has identified one fixed point and his evidence is that there was traverse pillar stone at the corner of Plot No.2739 which he has verified with the village map and found its location as correct. The Commissioner being cross-examined, no such material has been elicited from him to show that his measurement in the field with reference to the records available is in any way faulty. That being so, the First Appellate Court in my view did commit no such error in reversing the judgment and decree passed by the Trial Court which had discarded the report of the Commissioner and his evidence on the grounds which are found to

be untenable. The substantial question of law is accordingly answered which leads to confirm the judgment and decree passed by the First Appellate Court.

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

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

Narayan

