

IN THE HIGH COURT OF ORISSA AT CUTTACK

R.S.A. NO.171 OF 2010

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, Baripada, in RFA No. 14/11 of 2010/2005 by confirming the judgment and decree passed by the learned Civil Judge (Senior Division), Karanjia in Title Suit No.20 of 1999.

Jatia Das

:::

Appellant

-versus-

***Smt. Sulochana Devi Gupta &
Others***

:::

Respondents

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

For Appellant - M/s. S.P. Misra, Sr. Advocate,
S. Nanda, A.K. Dash,
S.S. Satapathy, B.S. Panigrahi,
& S.K. Mohanty, Advocate.

For Respondents - M/s. Laxman Pradhan, D.P. Das,
R.K. Mishra, J.N. Mohanty,
P.K. Mallick, Advocates, (R-1).

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

DATE OF HEARING:: 12.07.2022, DATE OF JUDGMENT:: 01.08.2022

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 Additional District Judge, Baripada, in RFA No. 14/11 of 2010/2005.

By the same, the Appeal filed by the present Appellant (Defendant no.2) in the suit under Section-96 of the Code has been

dismissed and thereby the judgment and decree passed by the learned Civil Judge (Senior Division), Karanjia in Title Suit No.20 of 1999 have been confirmed.

The Defendant No.1 as the Plaintiff had filed the suit for declaration of her right, title and interest and confirmation of possession over the land described in Schedule-A appertaining to Khata No.271/1997 under Plot No.850/1237 measuring Ac.0.01 decimal in mouza Girima falling within the Notified Area Council, Karanjia. The Trial Court having decreed the suit in further restraining the Appellant (Defendant No.2) and other Defendants from creating disturbance in the possession of that land, which is used as passage lying between that land and the land of the Plaintiff; this Appellant arraigned as Defendant No.2 in the suit had carried the First Appeal which has been dismissed. Hence, the present Second Appeal before this Court.

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 suit land with other lands was owned by one Sonu Das who died leaving behind his three sons namely Bimba Das, Chitamani Das and Mahiya Das. The three brothers during their lifetime had amicably partitioned those properties in metes and bounds

and in the said partition; the suit land with other lands had fallen to the share of Mahiya Das, who accordingly possessed the same. Mahiya died 40 years prior to the institution of the suit leaving behind his five sons namely, Badia Das, Naba Das, Raju Das, Dhira and Tuna Das. They continued possessed the land as before. These five brothers ultimately shifted to another place by selling away their homestead land which included the suit land in totally measuring Ac.0.02 decimals to one Birendra Kumar Sethi for valuable consideration by executing registered sale-deed on 03.11.1978. The said purchaser has been delivered with the possession of the land that he purchased. He then sold the land to the Plaintiff by executing registered sale-deed dated 27.07.1980 on receipt of valuable consideration followed by delivery of possession. The Plaintiffs claim to be in peaceful possession of the suit land since the time of her purchase. Having purchased the property, the Plaintiff demolished the old thatched house over it and constructed one RCC roofed building wherein she resided with her family and the land was accordingly mutated in her favour.

It is stated that though her purchased land are situated in compact area, there lies a private road within that. The land measuring Ac.0.01 decimal is situated to the east and rest portion Ac.0.01 decimal situated to the west of that private road. Plaintiff's building is on the eastern

portion of her purchased land over which there is no dispute and the western portion of the purchased land is the suit land. After purchase, the Plaintiff in course of time claims to have constructed shads over that patch of land too and as its need vanished, the Plaintiff states to have been using the suit land for dumping garbage. It is her case that said private road is the only passage to go to the suit land from her house and that had been kept for common use since the time of partition amongst the sons of original owner Sonu Das. The Defendants are the close door neighbours and they are the nephews of Mahiya. It is alleged that on 15.01.1999, the Defendants picked up quarrel with the Plaintiff and her family members and claimed the suit land to be belonging to them. When ultimately threat came from the side of the Defendants to close that passage so as to prevent the Plaintiff from having the entry upon the suit land, the Plaintiff filed the suit.

4. The Defendant No.2 alone contested the suit. While traversing the plaint averments; he has gone to deny the factum of partition of all the property amongst the sons of Sonu. He had also denied the factum of sale of suit land by the sons of Mahiya to Sri Birendra Kumar Sethi. It is specifically pleaded that the suit land and other lands are their homestead land falling under the Sabik Plot No. 494 appertaining to Khata No.90 measuring Ac.0.14 decimals standing recorded in the name

of Sonu Das, Shankar Das, sons of Arjun Das and Nakula Das, son of Dina Das as per the record of 1930-31 settlement. It is stated that there was no partition of these properties in metes and bonds and their possession was merely for convenience. The said land is said to have been converted to Plot No.856 under Hal Settlement Khata No.166 coming to be recorded in the name of Bimbadhar, Chintamani, Maheswar, Banshi and Hemanta sons of Sonu Das and Bharat Das and Kailash Das sons of Sankar Das. The land is stated to be situated adjoining to the north of NAC road and it is said to be lying north-south in length and east-west in breadth. The house of Sonu were standing close to the south of the NAC road coming about $1^{1/2}$ decimals of land; whereas houses of other shareholders are stated to be situated on the south of Sonu's house.

Private road in existence is stated to be close to the house of Sonu Das to its west having width of 14 to 15 feet running north to south. That said private road is in existence since long, that is being used by the Defendants for their ingress and egress in coming over the NAC road from their respective houses and they have been using that land as passage to their houses to approach the NAC Road. It is further stated that last 15 to 16 years prior to the suit; he is using the western portion of the private road as his threshing floor keeping a small path for ingress

and egress to his house. It has been specifically pleaded that Sri Birendra Sethi being an Advocate of the State Bank of India, Karanjia Branch and for some time, the Chairperson of the Karanjia Notified Area Council, the Defendant No.1 and his family members were frequently visiting his house for various works and for the purpose of obtaining loan from the Bank. For this purpose, they used to sign and lend their LTIs on several plain papers as well as stamp papers and handing those over to Sri Biranchi Kumar Sethi. The Defendant No.2 states that said papers might have been used by Birendra Babu in creating fake sale deed from the sons of Mahiya Das in relation to the land measuring Ac.0.02 decimals which is their homestead land. He further pleaded that as ten years prior to the suit, the Mahiya Das left their homestead and shifted to Thakurmunda, their thatched house collapsed. The husband of the Plaintiff finding the suit land lying vacant constructed the building taking advantage of the absence of the Defendants and she lived in that house with her family. It has been stated that they were using the private road for some which is situated to the west of his house. But, its continuity stood hampered, when this Defendant No.2 has raised protest. Pleading all these, the Defendant No.2 also stated in the alternative that in case the sale in favour of the

Plaintiff is found to be genuine, he should be provided with the relief as per Section -4 of the Partition Act.

5. On the above rival pleadings, the Trial Court in total framed seven issues. Proceeding to answer issue no.4 which concerns with the validity of the sale of the land by the sons of Mahiya Das to Sri Birendra Kumar Sethi, which is the source for the Plaintiff for saying to have purchase the said land from Birendra Kumar sethi; upon examination of evidence and their evaluation, the Trial Court has held the sale to be genuine and valid and thereby the stand taken by the Defendant No.2 that the sale-deed Ext.1 is forged one has been repelled.

Having said so, the Trial Court has answered the next issue with regard to the validity of the sale-deed executed by Sri Birendra Kuamr Sethi in favour of the Plaintiff. Lastly, coming to answer issue no.6 which relates to the controversy as to if the Plaintiff has the right, title, interest and possession over the suit land described in Schedule –A, the Trial court has answered in the affirmative by saying that the Plaintiff has the title in respect of small piece of land of size of 8 cubits X 8 cubits situated to the west of the passage and then it has held that the private road being the only passage to go to that piece of land of the Plaintiff from her house, the Defendants are restrained to create

disturbance in her peaceful possession over that land in posing any hindrance on the way of the Plaintiff to use that private road as passage.

6. Although by order dated 18.06.2013, this Appeal had been admitted to answer the following substantial questions of law i.e. “Whether the learned Court below have committed an error in relying upon to recital of the sale deeds vide Ext.1 and 2 and the documents obtained subsequently to execution of the said sale deeds to arrive at a conclusion that there is prior partition to the family”; yet after hearing the learned Counsel for the Parties and on going through the judgment passed by the Courts below, this Court felt apposite to substitute the above substantial questions of law by another which the learned Counsels for the parties also acceded to. That substantial question of law runs as under:-

“Whether the Courts below on the basis of the evidence on record with the rival pleadings even by declaring the right, title, interest of the Plaintiff in respect of the land situated to the west of the passage as shown in the sale deed, (Ext.1) ought not to have restrained the Defendants from using that passage lying between the land and house of the Plaintiff for ingress and egress to their house to come over the NAC road?”

7. Mr. S.P. Misra, learned Senior Counsel for the Appellant straightway inviting the attention of this Court to the paragraphs-12, 13 & 14 of the judgment of the Trial Court, submitted that in view of the

discussion of the factual settings placed in the plaint and the evidence of the Plaintiff, the Trial Court while declaring right, title and interest of the Plaintiff in respect of the land situated to the west of the passage as shown in Ext.1, the sale-deed and restraining Defendants from creating disturbance in her possession over that piece of land ought to have further declared that the passage lying to the west of the house of the Plaintiff which starts from the NAC road is also be used by the Defendants to go to their houses, which is the only passage for them to go to their houses from NAC road which is stated by the Plaintiff to be about 40 to 50 feet length and 6 to 7 feet in breadth; they should not have been restrained and thus allowed to be used as such passage for ingress and egress to their houses to approach over the NAC road as like the Plaintiff. He submitted that the First Appellate Court has not at all touched upon such important aspect and has failed to discharge its duty in rectifying the mistake committed by the Trial Court for avoidance of future complications and confusion as also further unnecessary litigation.

8. Mr. Laxman Pradhan, learned Counsel for the Respondents in placing those relevant paragraphs of the Trial Court's judgments does not dispute the position that Plaintiff being examined as P.W.5 has clearly stated that she has no objection for the Defendants user of that

passage for ingress and egress to their house to approach the NAC road and that it is the only passage for them to come to NAC road from their houses which too is used by the Plaintiff, to come over the suit land as well as to the NAC Road. He, therefore, submitted that accordingly this Court may pass appropriate order. By filing written note of submission, the following have been placed therein:-

- 1) That, all the parties may be allowed to use the passage for their outgress and ingress. The other parties may also be restrained to stop the passage at the entrance point of the Plaintiff-Respondent No.1 land as she is using the vacant land of her situated on the other side of the road for her use.
- 2) That, all the Defendants-Appellant may also be directed to maintain peace over the road and its use by the parties.
- 3) That, the Respondent No. 1 has stated in her evidence as P.W. No.5 that she had no objection for the use of the passage by the parties.
- 4) That, the plaintiff-Respondent may also be allowed to use the passage to go to her vacant land without any obstruction from other side and their relations.

9. Keeping in view the submissions made, I have carefully read the judgments of the Courts below.

The Plaintiff has pleaded that there is a intervening private road in between her purchased land which runs from north to south. It is also pleaded that some portions of her purchased land is situated to the east

and the rest is on the west of that private road. It is her case that she has constructed her house on the eastern portion of her purchased land over which there is no dispute and the western portion of the purchased land is the suit land. The private road lying in between is said to be the only passage available for her to go from her house to the suit land and that the said road had been kept a part for common use since the time of amicable partition of the land amongst the sons of Sonu Das.

Plaintiff being examined as P.W.5 has further stated on oath that her house is standing on bigger patch of the purchased land and is adjoining the NAC road. It has further been stated that the house of Defendant No.2 and Defendant No.1 are situated behind her house and there is a passage to west of her house which starts from the NAC road, which the Defendants too are using as passage to go to their houses and that is the only passage for them to approach the NAC road, which they have been using since long. Approximately the passage size has been stated to be 40 to 50 fit in length and 6 to 7 feet in breadth. In no unclear term she has stated to have no objection if the Defendants use that passage for ingress and egress for their houses. The Trial Court has very rightly thus arrived at a conclusion as to the existence of a passage to the west side of the house of the Plaintiff, which is being used by her and her family members as well as the Defendants and that the Plaintiff had

purchased and constructed house on the bigger patch and the small patch on her purchased land is situated to the west of said passage. So, this Court does not find any fault with the Trial Courts finding that the Plaintiff had title in respect of small piece of land of the size of 8 cubits X 8 cubits towards the west side passage.

The First appellate Court on re-appreciation of evidence has rightly affirmed the said finding. But then while saying about the user of private road by the Plaintiff, the Courts below in order to avoid complication and confusion as also to prevent future litigation in stead of saying as under:-

“That the private road being the only passage to go over that piece of land by the Plaintiff from her house, the Defendants are restrained to create disturbance in her peaceful possession over that land and to create disturbance over the passage.”

Ought to have further ordered that the parties would use the private road as passage by keeping it as such and maintaining its status such as to be available for the Plaintiff to go to her rest portion of the purchased land as also to come to the NAC road and the Defendants to come to the NAC road from their houses.

The substantial question of law is thus accordingly answered. The decree passed by the Courts below thus stands substituted by the following:-

“The right, title and interest of the Plaintiff is declared in respect of the land situated to the west of the passage as shown in Ext.1 and the Defendants are restrained to create disturbance in her possession over that piece of land and further the parties are directed to maintain the passage lying between that land and the house of the Plaintiff which is situated on the other patch of her purchased land as such for its use as passage for them to come to the NAC road and not to create any obstruction in any manner for the said user of the passage by them.”

10. The Appeal is accordingly allowed in part with modification in ordering portion of the judgment and consequentially, the decree passed by the Trial Court.

In the peculiar facts and circumstances of the case; no order as to cost is passed.

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