

HIGH COURT OF ORISSA : CUTTACK
RSA NO.38 OF 2021

In the matter of appeal under Section-100 of the Code of Civil Procedure assailing the judgment and decree dated 26.02.2020 and 12.03.2020 respectively passed by the learned District Judge, Nayagarh in RFA No.24 of 2006 in setting aside the judgment and decree dated 11.12.2014 and 05.01.2015 respectively passed by the learned Civil Judge (Senior Division), Nayagarh in Civil Suit No.181 of 2012.

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Banchha Behera
@ Banchhanidhi Behera & Others Appellants.

-:: VERSUS ::-

Arjuna Maharana (since dead) through
Aintha Maharana & Others Respondents.
**Advocate(s) who appeared in this case by hybrid arrangement
(virtual/physical) mode.**

For Appellants Mr. B.K. Nayak-3, Advocate.

For Respondents ... M/s. M.S. Sahoo,
S.Sahoo, R.K. Behera,
(Advocates for R.1(a) to 2(a))
Mr. B. Tripathy, Advocate

P R E S E N T :
THE HON'BLE MR. JUSTICE D.DASH

Date of Hearing: 25.11.2022 :: Date of Judgment: 23.12.2022

D.Dash,J. 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 dated 26.02.2020 and 12.03.2020 respectively

passed by the learned District Judge, Nayagarh in RFA No.24 of 2016. By the same, the Appeal pursued by the Respondents being the legal representatives of the original Plaintiffs who being aggrieved by the dismissal of the suit had carried the Appeal under section 96 of the Code which has been allowed.

One Arjuna Maharana and Manguli Maharana as the Plaintiffs has filed the suit, i.e., Civil Suit No.181 of 2012 arraigning the Appellants as the Respondents. The suit was for declaration of title, recovery of possession and permanent injunction and if found to have been dispossessed for recovery of possession. The suit having been dismissed, those two unsuccessful Plaintiffs had carried the First Appeal. In view of their death during the pendency of the First Appeal, these Respondents had pursued the First Appeal as the legal representatives of the two Appellants (Plaintiffs) therein. The First Appeal has been allowed. Hence, the present Second Appeal is at the instance of the Defendants who are aggrieved by the said decree passed in the suit.

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 Trial Court.

3. The Plaintiffs case is that the suit land measuring an area of 30 squire feet (1 ft. width x 30 ft. length) coming to Ac.0.03 dec. of homestead land under Hal Khata No.3, Plot No.891 situates in Mouza-Dhusuma originally belonged to Arjuna Maharana, Chhatia Maharana and Manguli Maharana who are the sons of Kaibalaya Maharana. They have constructed residential house over the said plot. The Plaintiffs states to be having the right, title, interest and possession over the said land and the Defendant No.1 being the western side neighbor and owner of Plot No.892 is said to have encroached 30 sq.ft. pf of land from out of that Plot No.891 and constructed a cattle shed over the same.

The Defendant in their written statement have pleaded to have not at all encroached 30 sq.ft. of land from out of Plot No.891.

4. On the above rival pleadings, the Trial Court having framed six issues has held that the Plaintiffs have the Defendants have encroached 20 sq. ft. (1 ft. width x 30 ft. length) out of Ac.0.03 dec. of the suit plot. The First Appellate Court has reversed this finding.

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

“Whether the measurement taken from the Bahagabatghara instead of fixed survey mark is

impermissible as violative of Rule-8 of the Orissa Survey and Settlement Rules, 1962?”

6. Learned counsel for the Appellants submitted that the conclusion of the First Appellate Court that the Defendants have encroached 2 links on western side of Plot No.891 basing upon the report submitted by the Amin Commissioner is unsustainable in the eye of law as the measurement has been made contrary to the provisions contained in Rule-8 of the Orissa Survey and Settlement Rules, 1962 when the Bhagabat Ghara has been taken up and fixed as the permanent point instead of what has been provided in Rule-8.

7. Learned counsel for the Respondents submitted that the First Appellate Court having found that the Amin Commissioner taking that Bhagabat Ghara as the fixed and permanent point when with reference to the village map has rightly measured the land and arrived at a conclusion that 2 links may be encroached from the western side and 3 links may be existing in the eastern road of the village did, commit no mistake in passing the decree in that regard as against the Defendants. He submitted that the provision contained in Rule-8 of the Orissa Survey and Settlement Rules refers to the survey marks to be set up by the Survey Officer while preparing the draft survey records and that is during the survey conducted at the time of commencement of the

settlement operation and the said marks have not been taken as the fixed and permanent point when the First Appellate Court has found the report of the Amin Commissioner to be acceptable, has rightly decreed for eviction of the Defendants to that extent has been passed.

8. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below. I have also perused the plaint and written statement and the evidence.

9. The Plaintiffs claim is that the Defendant No.1 being his neighbor is in possession of the land under Plot No.892 which adjoins of the western side of the suit plot no.891. It is stated that when the Plaintiffs intended to construct new house, the Defendants illegally encroached the suit land by dumping three trips of stones inside the bari from the western side of the Plaintiff's suit plot as shown in the rough sketch map appended to the plaint for keeping their buffaloes which was resisted by the Plaintiff and they have encroached the land of 13 sq. ft. (1 sq. ft. x 15 sq. ft.). The Plaintiff further alleges that the Defendants have encroached 30 sq. ft. (1 sq. ft. width x 30 sq. ft. length). In the First Appellate stage, the Amin Commissioner had been deputed and he has submitted his report. The report states that on 26.09.2018 in presence of the Plaintiff and Defendant, the demarcation of Plot No.891 was taken up and fixed, permanent point with reference to the village map was

taken to be the Bhagabat Ghara. He having measured the land, as has been noted by the First Appellate Court, conclusion is the following:

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that there are 2 links may be encroached from the western side and rest 3 links may be existing with the eastern road of the village.

10. The First Appellate Court from his has abruptly arrived at a conclusion that since the Amin Commissioner has not been cross examined, there is a valid case for the Plaintiff with regard to the encroachment of 2 links from the western side of Plot No.891. The First Appellate Court has totally placed reliance on the report of the Amin Commissioner in recording the finding of encroachment of 2 links on western side of Plot No.891 and accordingly has directed the Defendants to give vacant possession of the said 2 links of land encroached by them. The report when is not conclusive in saying that 2 links is under the encroachment of the Defendants and it is said that it 'may be' encroached from the western side that too, indirectly or remotely hinting at the Defendants and rest 3 links may be existing with the eastern road of the village; this Court finds that the Amin Commissioner's report even without being any cross-examination from the side of the Defendants cannot form the basis of a finding of encroachment of 2

links of land by the Defendants and that should not have been so taken to record a conclusive finding. Moreover, when it is not stated by the Amin Commissioner that there was no fixed point available, he out of his own imagination, could not have taken the 'Bhagabat Ghara' of the village as the fixed and permanent point. This being the position and thus, there being glaring infirmity with the finding of the First Appellate Court, this Court finds no necessity to answer the substantial question of law as that would simply serve no purpose for the case and would be merely academic. This Court, therefore, holds that the judgment and decree passed by the First Appellate Court are liable to be set aside. The Plaintiffs thus having failed to establish their case by leading clear, cogent and acceptable evidence, they are liable to be non-suited.

11. In the result, the Appeal stands allowed. There shall, however, be no order as to cost.

**(D. Dash),
Judge**

Himansu