

IN THE HIGH COURT OF ORISSA AT CUTTACK

RSA No.355 of 2010

In the matter of appeal under Section 100 of the Code of Civil Procedure assailing the judgment and decree dated 23.07.2010 and 07.08.2010 respectively passed by the learned Additional District Judge, Kendrapara in Title Appeal No.10 of 2010 setting aside the judgment and decree dated 18.01.2007 and 06.02.2007 respectively passed by the learned Civil Judge, Junior Division, Kendrapara in Civil Suit No.68 of 2004.

Nimai Chandra Kund & Others *Appellants*

-versus-

Trilokyanath Kund & Others *Respondents*

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

For Appellants - Mr.S.P.Mishra, Sr. Advocate
M/s.S.Nanda, B.S.Panigrahi,
S.K.Sahoo, S.S. Kashyap &
S.K. Samantaray
(Advocates)

For Respondents - Mr.A.K.Mohapatra-1 and
Mr.S.C. Rath
(Advocates for R.1 to 4)

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

Date of Hearing : 19.07.2022 : Date of Judgment:25.07.2022

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 23.07.2010 and 07.08.2010 respectively

passed by the learned Additional District Judge, Kendrapara in Title Appeal No.10 of 2010.

By the same, the Appeal under section 96 of the Code filed by the unsuccessful Plaintiff before the Trial Court as the Appellant therein, whose legal representatives pursued that the Appeal present Respondents 1 to 4, has been allowed and the judgment and decree dated 18.01.2007 and 06.02.2007 respectively passed by the learned Civil Judge, Junior Division, Kendrapara in Civil Suit No.68 of 2004 have been set aside and the suit has been decreed restraining these Appellants (Defendants) or their agent or servants from interfering upon the suit land and making construction by encroaching upon the said land having due regard to the green demarcating fence between the suit plots and the plots of the Appellants (Defendants).

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 Plaintiff's case is that suit plots stated in the schedule of the plaint are his ancestral properties and those are under plot no.316, 317 and 2225. Those lands are said to be the homestead lands standing recorded in Khata No.691. It is stated that the Plaintiff is in exclusive possession of the same with two Chakudna trees and two Palm trees standing to the western side. It is stated that the land under consolidation plot nos.2226 and 2227 are adjacent to his lands and those belong to the Defendants and were lying vacant. In the year 2003, the Defendants attempted to encroach over the suit land for which a local survey knowing Amin was called to demarcate the boundary lines of the suit land of the Plaintiff and Defendants. The private Amin identified the

boundary of the suit land by stating that those trees are within the boundary of the suit land of the Plaintiff and then the Defendants had admitted the said fact. But then again after demarcation, the Defendants again claimed those Palm trees as their own and threatened to cut the same for which FIR had been lodged at the Police Out Post. The matter was then settled that the suit land has to be demarcated by Tahasil Amin. It is stated that as the Defendants did not take any step for demarcation, the Plaintiff filed Demarcation Case No.79 of 2003 when the Defendants created problems in all other plots. The measurement could not be made. On 18.11.2003, the Defendants further attempted to cut the trees. So, the matter had been referred to the Sarpanch. The Defendants then agreed for demarcation of the suit plots but it was of no avail when finally on 24.05.2006, the Defendants were found to have collected bricks and other materials for putting up construction over the suit land. So the suit has come to be filed.

4. The Defendants, in their written statement, have questioned the description of the land, as given in the plaint, to be ambiguous. The specific case of the Defendants is that the suit plots of the Plaintiff in total as has been shown in the plaint schedule although is stated to be measuring Ac.0.39 decimals; but in the hal map, the suit plots in total measure Ac.0.36 decimals which, in the field, is actually Ac.0.37 decimals 6 links, as has been seen by Amin while making the measurement on 22.05.2004. The Defendants assert that they are putting up the constructions over their own land and have never encroached upon any portion of the suit land nor have any mind to do so.

5. On the above rival pleadings, the Trial Court having framed eleven issues, answered issue no.5, which is the crucial one that the

Plaintiff has failed to prove his possession of the land as per the Hal Record of Right in answering the issue as to possession. The Trial Court's finding is that with the available evidence, the Plaintiff cannot be said to be in exclusive possession of Palm and Chakunda trees, which situate over his land. On the next issue as to the demarcation made by the Amin establishes the area of the parties and boundary line as per the Record of Right showing the ownership of the Palm trees and Chakudna trees in possession of the Plaintiff standing over the suit land, finding has been returned in the negative. The other issues having been answered against the Plaintiff, the suit stood finally dismissed.

The unsuccessful Plaintiff, having carried the Appeal, the same has been allowed.

6. The Appeal has been admitted on 08.07.2011 to answer the following substantial questions of law:-

“A. Whether the learned lower appellate court has committed an error of law in holding that the suit for injunction simpliciter was maintainable when the consolidation records that the extent of land recorded in the name of the Plaintiff was 39 decimals when he is not in physical possession of the whole and said area as per the final map is 36 decimals, which was involved in the suit?;

B. Whether the land records have been prepared under the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 (for short, ‘the OCH & PFL Act’) and there is a mechanism under the said Act for redressal of the grievance with regard to the correctness of such recording, the learned lower appellate court could have held that the plaintiffs suit for injunction simpliciter over the suit land not recorded in his name in the consolidation operation is maintainable?”

7. Learned Counsel for the Appellants submitted that when the Defendants have disputed the title and possession of the Plaintiffs over Ac.0.39 decimals of land and the Plaintiff is said to be in possession of Ac.0.37 decimals and 6 links of land, in field as against the map area coming to Ac.0.37 decimals; the First Appellate Court has erred in law by passing a decree for permanent injunction in the absence of any prayer for declaration of title over the land of Ac.0.39 decimals in favour of the Plaintiff and a finding of conclusive nature on that. He further submitted that when admittedly, the demarcation of the suit land, as applied for, has not been made and reached finality, the First Appellate Court ought not to have passed an order of injunction which itself appears to be vague. He submitted that the final records having been prepared under the provisions of OCH & PFL Act and there being prescribed forums under the said Act for rectification of the mistakes, if any, the First Appellate Court, on the face of such claim of mistake, as projected by the Defendant, is not right in passing the order of decree for injunction, which cannot even be executable with certainty.

8. Learned counsel for the Respondents submitted all in favour of the findings returned by the First Appellate Court. It was submitted that the Plaintiff's prayer in the suit is very clear for issuance permanent injunction against the Defendants not to come upon the suit land and cut any trees standing over the suit land as also not to put up any construction over the suit land which has been described at the foot of the plaint and, therefore, the Defendants by merely saying that the suit plots together do not measure Ac.0.39 decimals and as per the map finally prepared in the Consolidation Operation, the area measures Ac.0.36 decimals when in the field, its area is Ac.0.37.06 decimals, the suit filed by the Plaintiff, without advancing a prayer for declaration of

right, title and interest over the suit land and simply making a prayer for permanent injunction, cannot be said to be falling foul of the proviso to section 34 of the Specific Performance of Relief Act.

9. 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 statement.

10. The suit land, as described in the plaint, comprises of three plots in total measuring Ac.0.39 decimals. It is ascertained by the Defendants that although in the Consolidation Record, the total area of these three plots, i.e., 316, 317 and 2225 has been shown to be Ac.0.39 decimals if the area is computed from the final map prepared in the Consolidation Operation, it would come to Ac.0.36 decimals when they say that in the field the Plaintiff's possession of these three plots actually concern with an area of Ac.0.37.06 decimals. Thus it is said that there has been a reduction of the area in the map and in the field, which is not in consonance with the area as indicated in the Record of Right and also the possession in the field.

In such state of affair in the pleading, when the evidence is not clear before the Court with regard to the above aspect of measurement of the suit land, the First Appellate Court, in my view has made an erroneous approach in saying that the burden of proof shifts on the Defendants to establish that the area is less in the field which was recorded on the ROR and if the Plaintiff is claiming the reduced area to have been there in the adjacent plots of the Defendants, it is for the Defendants to dispel the same. Fact remains that when P.W.1 has stated that the suit plots were demarcated by a private Amin, he has not filed and proved said Amin report. It is his evidence that on 22.05.2004, the

Amin had measured the suit plots in his presence but he did not complete the measurement and his evidence is silent as to if any report has been presented by Amin and what happened in the said demarcation case. On the other hand, the Defendants have examined one private Amin, who has narrated in detail about the demarcation and stated about the total extent of land of the suit plots in comparison of the land records, map etc. He has also stated that the area of the plots of the Defendants is adjacent to the suit plots is in tact and comes to Ac.0.23 decimals.

In such state of affair in the evidence, the First Appellate Court having ordered that the Defendants are permanently restrained from entering upon the suit land or to make any construction by encroaching any portion of the suit land having due regard to the green demarcating fence between the suit plots and their plots; the same itself appears to be vague. Keeping in view the rival case as well as the evidence on record, the First Appellate Court, instead of straight away passing a decree for permanent injunction, as aforesaid, ought to have passed a decree for demarcation of the suit land of the Plaintiff in consonance with the record and map finally published under the provision of OCH & PFL Act by pressing into service the provision of Order 7 Rule 7 of the Code. Moreso with the unverified disparity in the area in the record of right and map, the decree for permanent injunction, as passed being more likely to be inexecutable, such a course adopted by the First Appellate Court cannot sustain. In that view of the matter, the decree for permanent injunction, as passed by the First Appellate Court, is hereby set aside and instead, the Plaintiff's suit is decreed by passing a decree for demarcation of the suit land on comparison of the record of rights published in the Consolidation Operation and the final map prepared

therein leaving it open to the Plaintiff to execute the said decree seeking deputation of Civil Court Commissioner to complete the exercise, as aforesaid.

11. In the result, the Appeal stands allowed in part, with the modification as indicated above. There shall, however, be no order as to cost.

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



Basu

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