

IN THE HIGH COURT OF ORISSA AT CUTTACK

RSA No.140 of 2002

In the matter of an appeal under section 100 of the Code of Civil Procedure assailing the judgment and decree dated 31.07.2002 and 06.08.2002 respectively passed by the learned Additional District Judge, (FTC), Bhadrak in T.A. No.31 of 1992 setting aside the judgment and decree dated 16.05.1992 and 26.06.1992 respectively passed by the learned Additional Munsif, Bhadrak in O.S. No.303 of 1987-I.

Brundaban Das (Since Dead) ***Appellants***
through his L.Rs and others

-versus-

Urmila Das @ Bewa & Another ***Respondents***

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

For Appellants - M/s.R.K. Mohanty, Sr. Adv.
D.K. Mohanty, P.K. Rath,
P.K. Samantaray, S.N. Biswal,
P.K. Satpathy & A.P. Bose.

For Respondents - M/s.S.P. Mishra, Sr. Adv
S.K. Mishra, P. Sahu
For R.1 and 2.

CORAM:

MR. JUSTICE D.DASH

Date of Hearing : 25.02.2022 : Date of Judgment:07.03.2022

The Appellants, by filing this Appeal under Section 100 of the Code of Civil Procedure (for short, 'the Code') have assailed the judgment and decree dated 31.07.2002 and 06.08.2002 respectively passed by the learned Additional District Judge, (FTC), Bhadrak in T.A. No.31 of 1992.

By the said judgment and decree, the First Appeal filed by the Respondents (Defendants) under section 96 of the Code has been

allowed and the judgment and decree dated 16.05.1992 and 26.06.1992 respectively passed by the learned Additional Munsif, Bhadrak in O.S. No.303 of 1987-I have been set aside.

The Appellants (Plaintiffs) have thus been non-suited.

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. The Plaintiffs' case, in short, is that they are the sons of Kangali Das and the proforma Defendants are their sisters. Harihar Das (Defendant No.1) son of Jagabandhu Das is the uncle of the Plaintiff (brother of Kangali, the Plaintiffs' father) and Defendant No.2 is the wife of Purna Ch. Das, who is son of Defendant No.1. Defendant No.3 being the illatom son-in-law of Defendant No.2, he has been arraigned.

It is stated that Jagabandhu had Ac.0.05 decimals of homestead land. In the Revision Settlement, the land in Schedule-Kha has been recorded in the name of Chema @ Jema, W/o-Bhikari Das, who had gifted the same to the Plaintiffs' father, namely, Kangali by registered deed dated 01.09.1992. It is the further case of the Plaintiffs that Chema, pursuant to the said gift, had delivered possession of that land to Kangali, who accordingly remained in possession and after his death, the Plaintiffs are possessing the same. It is further stated that Ac.0.04 decimals of land gifted by Chema bear Revision Settlement plot no.1264 measuring Ac.0.03 decimal and plot no.1265 measuring Ac.0.01 decimals of land, which correspond to Current Settlement Plot no.1448. It is said that said land has been erroneously recorded in the name of one Gobinda Sil in Current Settlement record of right and he did never possess the suit land. It is stated that Plaintiffs' father had

constructed a house over the suit land and was running a tea and tiffin stall therein which the Plaintiffs were running after the death of their father Kangali. The tea and tiffin stall had to be closed down when one of the Plaintiffs went to serve at Calcutta and the house thus was used by the Plaintiffs for residential purpose. After marriage of Defendant No.3, Defendant Nos.1 to 3 wanted to take that house standing over the suit land on rent basis on 20.10.1987 and when request to that effect was not acceded to, they threatened to possess the suit house forcibly and then damaged the fence and forcibly constructed a new house on the suit land. So, the suit has come to be filed.

4. The suit against Defendant No.1 has abated. The Defendant Nos.4 to 6 have been set ex parte as the Plaintiff has chosen not to bring his legal representatives against whom the right to sue survives on record.

5. The Defendant Nos.2 and 3, filing the written statement, denied the plaint allegations. It is their case that Jagabandhu is the son one Panu and he had only Ac.0.04 decimals of homestead land during the Revision Settlement and he acquired Ac.0.03 decimals of land from Govinda Sil and the land under revision settlement plot nos.1264 and 1264 in total measuring Ac.0.04 decimals from Jema Bewas, who is the sister of Jagabandhu, who gifted the said land to Kangali. Therefore, the land of Ac.0.11 decimals was reflected in Current Settlement Khatian as plot no.1449 in the name of Jagabandhu and again Jagabandhu acquired rest Ac.0.04 decimals from Gobinda Sil through oral sale for a consideration of Rs.20/- and said Ac.0.04 decimals acquired from Govinda Sil after Current Settlement Khatian because Current Settlement Khatian was recorded in his name.

It is stated that the land under plot no.1448 is possessed by Defendant Nos.1 and 2 by amicable settlement and Defendant No.1 has constructed a house over the suit land and possessing the same for more than fifty years wherein the Plaintiffs have no right, title and interest or possession. It is stated that Kangali was looking after Major Settlement operation and he has somehow managed to record his name in respect of the suit land. It is, however, stated that Major Settlement Record of Right is erroneous and the Plaintiffs have filed the suit to just harass them.

6. With such rival pleadings, the Trial Court has framed as many as seven issues. Coming to answer the crucial issue with regard to the Plaintiffs' right, title and interest and possession over the suit land and Simultaneously, the recording of the land in Major Settlement also dealing therein the Plaintiffs' alternative claim of acquisition of title by adverse possession, upon examination of the evidence and their evaluation, answer has been given in favour of the Plaintiffs.

These answers have practically led the Trial Court to decree the suit restraining the Defendant No.3 permanently from coming over the suit land and disturbing the peaceful possession of the Plaintiffs over the same. The Defendants being aggrieved by the same having preferred an Appeal has been successful in that move. Hence, the present Second Appeal is at the instance of the Plaintiffs.

7. The Appeal has been admitted on the following substantial question of law:-

“(a)Whether the learned Lower Appellate Court was correct in coming to finding that decree will be an in-executable one even after holding right, title and possession in favoiur of the plaintiffs and against defendant nos.2, and 3? And

(b) Whether the learned lower Appellate Court was correct in setting aside the decision of the learned Trial Court without examining that non-substitution of Defendant No.1 is of no consequence as his estate has been represented by Defendant No.2 and there would be no difficulty in executing the decree in favour of the said legal heir of Defendant No.1?”

8. Ms.S.Mohanty, learned counsel appearing for the Appellants submitted that the view taken by the learned First Appellate Court that in view of the death of the Defendant No.1 during the suit and non-substitution of his legal representatives, the decree as prayed for and if so passed, would be ineffective against the legal representative of said deceased-Defendant No.1 and as such in-executable is not legally correct. She further submitted that based upon the erroneous view, the learned First Appellate Court having set aside the judgment and decree passed by the Trial Court, the same are required to be restored.

9. Mr.S.P.Mishra, learned Senior Counsel for the Respondents submitted that when in view of the rival pleadings of the parties, the learned Trial Court, in order to decide as to whether the Plaintiffs are entitled to get a decree of permanent injunction against the Defendants, has gone to decide the question of right, title and interest in respect of the suit properties as per the competing claims laid by the parties and that too in the absence of any prayer for declaration of right, title and interest and thus the right to possess the suit land, the view taken by the learned First Appellate Court is unassailable.

10. A careful reading being given to the plaint and the written statement, it is seen that the parties have laid their competing claim of the right, title and interest and as such, their respective right to possess the suit land. The Plaintiffs have also taken an alternative plea of acquisition of title over the suit land by adverse possession. The Trial

Court having framed an issue with regard to the right, title, interest and possession over the suit land as also the sustainability of the claim of the Plaintiff as to acquisition of title over the suit land by adverse possession, has accordingly proceeded to answer the same by examining the evidence on record. Although it is not so clearly stated that the said finding on title stands as necessity for being recorded for ruling finally upon the issuance of the decree for permanent injunction as prayed for by the Plaintiff, yet the approach of the Trial Court to answer those issues being seen with the rival case as projected leaves no room for doubt that the final decision on the prayer advanced by the Plaintiff and thus the fate of the suit as laid is dependant upon the answer on the competing claim of title over the suit land advanced by the parties. This Court, having taken into consideration the rival pleadings, is also of the considered view that in the facts and circumstances of the case on hand, de jure possession has to be established on the basis of title to the property and thus the issue of title, directly and substantially arise for consideration and answered as without a finding thereon, it will not be possible to decide the issue of possession and thus here the fate of the suit is dependant on that decision itself which the Trial Court has so decided.

Therefore, in the absence of the legal representatives of the Defendant No.1 against whom the right to sue survives that answer on the issue of title to the property is not recordable. In that view of the matter, the First Appellate Court cannot be said to have fallen in error in holding that the decree of permanent injunction as passed by the Trial Court cannot be sustained when the suit has abated against the Defendant No.1. The Trial Court should not have proceeded to decide

the suit on merit and instead ought to have held the suit to have abated in its entirety.

The substantial questions of law thus receive their answers against the Plaintiffs in holding that the judgment and decree passed by the First Appellate Court are not liable to be interfered with.

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

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

Basu

