

IN THE HIGH COURT OF ORISSA AT CUTTACK

RSA No.142 of 2007

In the matter of an appeal under section 100 of the Code of Civil Procedure assailing the judgment and decree dated 20.11.2003 and 04.12.2003 respectively passed by the learned 2nd Additional District Judge, Berhampur in T.A. No.23 of 2002 (T.A. No.68 of 1999 GDC) confirming the judgment and decree dated 08.10.1999 and 16.11.1999 respectively passed by the learned Civil Judge, Junior Division, Berhampur in T.S. No.122 of 1997.

Smt. Vidasree Kumari Samanta ***Appellant***

-versus-

Bhikari Charan Behera & Another ***Respondents***

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

For Appellant - M/s.M.Mohanty, S.C. Dash,
S.N. Jena, R.K. Das and
R.B. Das

For Respondents - M/s.L. Samantaray, G. Das,
B. Pradhan and R.L. Pradhan
(For R.1)

CORAM:
MR. JUSTICE D.DASH

Date of Hearing : 24.02.2022 : Date of Judgment:07.03.2022

The Appellant, by filing this Appeal under Section 100 of the Code of Civil Procedure (for short, 'the Code') has assailed the judgment and decree dated 20.11.2003 and 04.12.2003 respectively passed by the learned 2nd Additional District Judge, Berhampur in T.A. No.23 of 2002 (T.A. No.68 of 1999 GDC).

By the said judgment and decree, the First Appeal filed by this Appellant (Plaintiff) under section 96 of the Code against the judgment

and decree dated 08.10.1999 and 16.11.1999 respectively passed by the learned Civil Judge, Junior Division, Berhampur in T.S. No.122 of 1997 non-suiting her, has been dismissed. Hence, the present Second Appeal.

The Appellant as the Plaintiff filed the suit for recovery of possession of the suit land described in Schedule-B of the plaint from the Respondent No.1 (Defendant No.1) and for permanent injunction.

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 Plaintiff's case, in short, is that she had purchased the land described in Schedule-A which is a house site in the year 1972 and constructed a house thereon. Since that time onwards, inadvertently she had encroached a portion of the Government land described in Schedule-B which was adjacent to her purchased land. It is further stated that the Defendant No.1 was a tenant under her in respect of a portion of the suit house. However, by misrepresentation of the facts, he managed to get one encroachment proceeding vide E.C. Case No.253 of 1986 initiated against him in collusion with the officials of the Defendant No.2 (State). The Plaintiff when came to know about that, she raised objection and accordingly that was dropped. It is stated that thereafter, the Defendant No.2 initiated Land Encroachment Case No.464 of 1996 against the Plaintiff but then Defendant No.1 threatening the Plaintiff to dispossess her from the suit land, entered into the suit land and house by breaking upon the lock. It is stated that Defendant No.1 is occupying the suit house having no right to do so.

The Defendant No.1, in his written statement, has denied the fact that the Plaintiff had never encroached the suit land. It is his specific

case that he, encroaching upon the land measuring Ac.015 decimals from plot no.925 belonging to Defendant No.2 (State) under kisam Bandha Adi”, constructed a room thereon and he has faced an encroachment proceeding vide L.E.Case No.253 of 1986 wherein, an order of eviction had been passed against him and the same was confirmed before the Appellate Forum. Then he having carried a revision in Revision Case No.60 of 1989, the matter has been remanded with certain direction. The direction of the Revisional Forum is to the effect that it be enquired into as to if the land belongs to the third party, i.e., the Plaintiff and if it is private land, the proceeding be dropped and if the land belongs to the Government, steps be taken to settle the same in favour of the real claimant within the four corners of Odisha Prevention of Land Encroachment Act, 1972. It is stated that after said remand, without hearing the Defendants, it has been held therein that the Plaintiff is in possession of the said land when the fact remains that Defendant No.1 has all along been in possession of the Schedule-B land by constructing a shop room over there where he runs a tailoring shop.

4. The Defendant No.2, filing the written statement, has placed that the L.E.Case No.53 of 1986 has been dropped wherein the Plaintiff had been found to be in unauthorized occupation of Schedule-B land and in L.E. Case No.464 of 1996, order of eviction of the Plaintiff from the suit land having been passed, the same has not been challenged and thus has attained finality.

5. On the above rival pleadings, the Trial Court having framed as many as ten issues, has first of all answered the crucial issues, i.e, issue nos.3 and 4 regarding the Plaintiff’s encroachment over the Schedule-B land as also the encroachment as claimed by Defendant No.1. Upon

examination of the evidence and their evaluation, the answer has been recorded that the Plaintiff had never raised any construction over any portion of the suit schedule land belonging to the State by encroaching upon the same and it is the Defendant No.1, who has encroached the land of an extent of Ac.0.15 decimals under plot no.925, which is within the schedule land and having constructed a shop room over there, is in possession of the same. It has also found that the Defendant No.1 had not trespassed into the shop room standing on the land described in Schedule-B on 13.03.1999.

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

“Whether the findings of the Courts below on issue nos.3 and 4 against the case/claim of the Plaintiff that she was not in possession of the suit land under Schedule-B including the shop room which stands over it and that the shop room is in possession of Defendant No.1 is the outcome of perverse appreciation of evidence, which in view of the evidence on record is liable to be reversed?”

7. Mr. Maheswar Mohanty, learned counsel appearing for the Appellant submitted that the Courts below have not considered Ext.6 and Ext.7 in their proper perspective. He further submitted that the evidence on record having not been properly approached and appreciated in the backdrop of the rival pleadings, the answers given to issue nos.3 and 4 suffers from the vice of perversity. It was submitted that in the facts and circumstances of the, the lower Appellate Court ought to have remitted the matter to the Trial Court to frame an additional issue as to whether the Plaintiff can get the relief under section 6 of the Specific Relief Act in so far as Schedule-B land is concerned and decide the same.

8. Mr.L.Samantaray, learned counsel for the Respondent No.1 submitted all in favour of the findings recorded on issue nos.3 and 4. According to him, the Courts below have not at all fallen error in the matter of appreciation of evidence on record and on the face of the overwhelming evidence on record, the shop room standing over Schedule-B land by Defendant No.1, the answer has been rightly given that Defendant No.1 has been in occupation of the same and he had never trespassed over the same by dispossessing the Plaintiff. He, therefore, submitted that with such clear and positive finding being recorded by the lower Appellate Court, upon detail scrutiny of evidence; there was no occasion to remit the matter to the Trial Court to frame any additional issue and rule upon the same, as submitted by the learned counsel for the Appellant.

9. In order to address the rival submission, in finding out the answer to the substantial question of law, the settled position of law that the finding of possession recorded by the Competent Authority in encroachment proceeding in favour of the Plaintiff do not operate as res judicata as held in case of *State -v- Bhanu*; 1996(1) OLR 460 has to be kept in mind. The Courts below, upon analysis of evidence at their respective level, have concurrently found the evidence to be deficient to record a finding that it is the Plaintiff who had constructed a house over Schedule-B land by encroaching upon the said land belonging to the State. The finding of the Competent Authority in O.P.L.E. Case No.464 of 1996 saying that the Plaintiff is in possession of the suit land in Schedule-B has been rightly held to be of no aid to the Plaintiff's case so as to sustain her claim in obtaining the relief as prayed for. The Plaintiff has stated that Defendant No.1, while was a tenant under her, in order to grab the suit land, had got the encroachment case initiated

against himself for his said occupation purposely terming it to be unauthorized. This itself pushes the case of the Plaintiff as laid as unbelievable and unacceptable. The reason being that when on her own showing, the Defendant No.1 was a tenant, with the concurrent finding of the Courts below that the Defendant No.1 had never dispossessed the Plaintiff and forcibly possessed on 13.03.1999 as alleged by the Plaintiff, certainly the possession of the Defendant No.1 thus continues to be that as a tenant under her. In that view of the matter, without termination of the tenancy, the suit for recovery of possession is being rendered as not maintainable.

On going through the evidence on record, as this Court finds that the finding of the Courts below that the Defendant No.1 is in possession of the suit room standing over the scheduled land, does not suffer from the vice of perversity then with what have been said in the foregoing paragraph; the answer to the substantial question of law stands recorded against the case/claim of the Plaintiff. In that view of the matter, the judgments and decrees passed by the Courts below are hereby confirmed.

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

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