

IN THE HIGH COURT OF ORISSA AT CUTTACK

R.S.A. No.160 of 2020

In the matter of appeal under Section 100 of the Code of Civil Procedure assailing the judgment and decree 13.01.2020 and 14.02.2020 respectively passed by the learned District Judge, Jajpur in R.F.A. No.34 of 2016 confirming the judgment and decree dated 30.03.2016 and 07.04.2016 respectively passed by the learned Senior Civil Judge, Jajpur in C.S. No.167 of 2012.

Deba Nayak & Others

....

Appellants

-versus-

Ratnakar Nayak & Others

.....

Respondents

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

For Appellants

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Mr.A.K.Tripathy
(Advocate)

For Respondents

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Mr.T.Panigrahi
(Advocate for R.1)
Mr.B.Baug
(Advocate for R.3 & 4)

CORAM:

MR. JUSTICE D.DASH

Date of Hearing : 13.10.2022 : Date of Judgment:20.10.2022

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 preliminary decree 13.01.2020 and 14.02.2020 respectively passed by the learned District Judge, Jajpur in R.F.A. No.34 of 2016.

By the same, the Appeal filed by the present Appellants with one Santi Nayak, being unsuccessful Plaintiffs under section 96 of the code,

has been dismissed and thereby the judgment and preliminary decree dated 30.03.2016 and 07.04.2016 respectively passed by the learned Senior Civil Judge, Jajpur in C.S. No.167 of 2012, have been confirmed. The Appellants (Plaintiffs) have been non-suited.

It may be stated here that the suit had originally been filed by Golakha Nayak as the sole Plaintiff. He having died, these Appellants with Santi Nayak, wife of Golakha had carried the First Appeal and that was dismissed. Now, the Appellants are before this Court in the Second Appeal. Said Santi Nayak, having died leaving behind these Appellants, as her legal representatives, no further substitution has been made on that account.

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 case of the original Plaintiff is that he along with Alekh Nayak (since dead), Ratnakar (Defendant No.1) and Dibakar (Defendant No.5), as the Plaintiffs, had earlier filed a suit, i.e., T.S. No.240 of 2001 against Aruna Gochhayat and four others. That suit has been disposed of by the decreed by judgment dated 28.05.2005 followed by the decree dated 01.09.2005. The right, title and interest of the Plaintiffs therein, as above named, over the land described in Schedule-A of said plaint have been declared.

It is stated that the Defendants 1 and 2 are having their residential house over the southern portion of land Ac.0.01 decimals of land out of Ac.0.08 decimals under Consolidation Plot No.556. Said land measuring Ac.0.01 decimals corresponds to Mutation Plot No.556/1168. It is further stated that there is passage to the western portion of

Consolidation Operation No.555 which measures Ac.0.02 decimals and northern end of the said passage touches that land measuring Ac.0.01 decimals, which is under the possession of Defendant No.1. It is also stated that the southern end of the said passage runs to the public road, which is to the adjacent south of the Consolidation Plot No.555. The Plaintiffs state that all the original tenants have been using the passage jointly for their ingress and egress. The passage is said to be of 43 links in width and 8 links in breadth. So, it is said that out of Ac.0.02 decimals of land under Consolidation Plot No.505, land measuring about Ac.00.344 square links is covered under the said passage. Alekha and Golakha are said to be having three houses over the above land admeasuring Ac.01.849 square link to the east of the said passage over Consolidation Plot No.555. They state to be in possession of the same as passage over the Consolidation Plot No.555 since the time of their forefather. There is no vacant space over eastern side of Ac.0.01.849 square links out of Plot No.555 as had been mentioned by the Pleader Commissioner in his report in the previous suit, i.e., T.S. No.240 of 2001. The Plaintiffs state that after obtaining decree for total 3 decimals of land in the said suit, the same was mutated in their names jointly and they are in joint possession of the same. But, taking advantage of the joint recording of the mutation record of right, Defendant Nos.1 and 2 attempted to put up construction covering the area of land in possession of the Plaintiffs for which the disturbances took place and that forced the original Plaintiff Golakha to file the suit.

4. Defendant Nos.1 and 2, in their written statement, stated that the suit properties are the joint family homestead qua dwelling house of the parties. They claimed to be having 8 anna share over the entire suit property. Uchhab Nayak, the common ancestor of the Plaintiffs and

Defendants is said to have died leaving behind two sons, namely, Sundara and Pari. Defendants 1 and 2 are representing the branch of Sundara whereas Plaintiffs 3 and 4 represent the branch of Pari. Thus, it is stated that the Defendants are entitled to half share over the suit property and they have been possessing the same as owners thereof. The Plaintiffs' statement as to the possession of the suit property by the parties has been denied. They state that the Plaintiff had never possessed Ac.1.849 square links out of Plot No.555 exclusively by constructing house. Said house is rather stated to be the ancestral house of the parties and for that, the Defendants say to be having the subsisting right, title, interest and possession over the same. According to them, the suit property had never been partitioned in metes and bounds.

5. On the above rival pleadings, the Trial Court framed as many as three issues. Sitting over to decide the crucial issue with regard to the partiability of the suit property, upon examination of evidence both oral and documentary and their evaluation, final answer has been given that the suit property are liable to be partitioned and in view of the status of the parties, the Plaintiffs, who represent the branch of Golakha have been found to be jointly entitled to 1/4th share when Plaintiff No.2 and Defendants 3 & 4, being the successors of Alekha have held to be 1/4th share. Similarly, Defendants 1 and 2 have been found to be having 1/4th share each over the suit property.

The Plaintiffs being aggrieved by the said judgment and preliminary decree, having carried the First Appeal, have been unsuccessful.

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

“Whether the First Appellate Court has not at all discussed the oral evidence of the parties, being the last Court of fact in affirming the findings of the Trial Court.”

7. Learned counsel for the Appellants submitted that the Courts below have erroneously interpreted the document such as Exts.1, 3 and 4 and, therefore, the findings rendered by the Courts are perverse. It was further submitted that the Courts below, in the facts and circumstances of the case emerging from the evidence both oral and documentary, are not correct in giving half share to Defendants 1 and 2, which is contrary to Ext.1. He submitted that the source in acquiring the suit property by the parties being their possession and as they are not related to one another nor represent anybody, the partition claim as per distinct separate possession as it prevails on the field ought to have been upheld.

8. Learned counsel for the Respondents 1 and 2 as well as Respondents 3 and 4 have submitted all in favour of the findings returned by the Courts below. They submitted that in view of the judgment passed in the earlier suit, i.e., T.S. No240 of 2001 which has been admitted in evidence and marked Ext.1, where those Plaintiffs had never specifically claimed separate portions of the property to be in their exclusive possession nor had advanced their claim of having any definite interest with reference to the distinct possession, the Courts below are right in dismissing the suit wherein the Plaintiffs had prayed for being given the land under their exclusive possession on partition.

9. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below. I have also perused the judgment passed by the learned Civil Judge, Senior Division, Jajpur in T.S. No.240 of 2001 which is Ext.1.

10. Ratnakar Nayak, Dibakar Nayak, Golakh Nayak and Alekh Nayak, as the Plaintiffs, had filed T.S. No.240 of 2001 in the Court of the learned Civil Judge, Senior Division, Jajpur arraigning Aruna Gochhayat, Nagendra Gochhayat, Ramakanta Gochhayat, Shankar Gochhayat and Hari Gochhayat as the Defendants. Those Plaintiffs, in that suit, had claimed for declaration that they have acquired the title over the suit land by way of adverse possession in seeking further declaration that said Aruna Gochhayat and four others arraigned as the Defendants therein had no manner of right, title, interest and possession over the suit land at any point of time. The suit had been decreed ex parte and therein the right, title and interest of all those Plaintiffs had been declared over the suit land. In the said suit, none of the Plaintiffs including the original Plaintiff Golakha, who is the predecessor-in-interest of the present Appellants 1 to 5 and the predecessor-in-interest of Appellant No.6 had claimed exclusive possession and as such having definite interest in respect of that separate portions of the suit land by showing in separate schedule. When that was the source of the right, title, interest and possession of the Plaintiffs, now the claim as advanced by the Plaintiffs in the present suit, basing upon their separate and exclusive possession, certainly on the face of the earlier judgment cannot be so held as therein this Plaintiff with others together had claimed for declaration of title jointly as to have so acquired by virtue of joint possession and not separate possession in respect of separate parcels of land. Accordingly, the right over those portions, as claimed by the Plaintiffs to the exclusion of the Defendants, has rightly been turned down. The oral evidence let in by the Plaintiffs as to their separate possession in respect of distinct portion of the land even being accepted for a moment under their circumstance as above cannot form the basis of

the claim of the Plaintiff's as now has been advanced as that would offend the very decree under which the entitlement of the parties has arisen. Their claim in that suit was as if one body clearly suggestive of the position as if the possession was by all and the separate possession of distinct portion of land by one has to be taken to be for and on behalf of all.

The substantial question of law thus is answered against the claim/case of the Plaintiffs, which leads to confirm the judgments and preliminary decrees passed by the Courts below.

While parting, it is, however, felt pertinent to observe that the Commissioner, while effecting the partition of the suit properties in terms of the preliminary decree would do well to take into consideration the respective possession of the properties by the parties and their convenience and accordingly, allot the properties to them in their shares as per the preliminary decree by respecting said possession as far as possible and practicable.

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

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

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