

IN THE HIGH COURT OF ORISSA AT CUTTACK

R.S.A. NO.446 OF 2017

In the matter of an Appeal under Section-100 of the Code of Civil Procedure assailed the judgment and decree dated 20.11.2017 passed by the learned District Judge, Cuttack in RFA No. 177 of 2012 by setting aside the judgment dated 08.08.2012 passed by the learned Civil Judge (Sr. Division) 1st Court, Cuttack Civil Suit No.290 of 2009.

Basanti Barik

:::

Appellant

-versus-

Saurendranath Dalai & Others

:::

Respondents

**Appeared in this case by Hybrid Arrangement
(virtual/physical mode)**

For Appellants

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M/s. A.R. Dash, S.K. Nanda,
B. Mohapatra, A. Mohanta,
A.K. Mohanty, K.S. Sahu,
Advocates.

For Respondent

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Mr. S.N. Biswal, Advocate.
M/s. N. Behuria, M. Dhal,
P.K. Rout, N. Behuria,
Advocates.

CORAM:

MR. JUSTICE D.DASH

DATE OF HEARING::01.12.2022, DATE OF JUDGMENT::23.12.2022

The Appellants in filing this Appeal under Section-100 of the Code of Civil Procedure 1908 (for short, 'the Code') have called in question, the judgment and decree passed by the learned District Judge, Cuttack in RFA No. 177 of 2012.

By the same, the Appeal filed by the Respondents being the unsuccessful Defendants in Civil Suit No.290 of 2009 of the Court of Civil Judge (Sr. Division) 1st Court, Cuttack under Section-96 of the Code has been allowed and thereby the suit filed by the Appellant (Plaintiff) has been dismissed and the counter-claim filed by the Respondents (Defendants) has been decreed.

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. Plaintiff's case is that the suit property originally belonged to Mahendranath Dalai, who was the Karta of the family of Defendants. He during his lifetime on 20.09.1976 had entered into an agreement for sale of land measuring Ac.0.29 decimals for a consideration of Rs.2175/-. Mahendranath had taken a sum of Rs.1800/- in two phases towards advance consideration. He had given delivery of possession of the suit properties to the Plaintiff. It has been submitted that in the deed of agreement it was situated that she would pay balance consideration of Rs.375/- at the time of execution of registered sale-deed. But as the suit property came within the purview of the ceiling law i.e. Urban Land Ceiling Regulation Act, 1976. So as per the terms of the agreement, Mahendranath was under the obligation to obtain permission from the

Competent Authority under the Act and then to execute and register the sale-deed. Mahandranath did not obtain the permission despite repeated requests. In the meantime, Consolidation Operation commenced. The Plaintiff filed objection to get her name recorded therein in respect of the suit property and said Mahendranath too gave his consent for recording of the suit property in the name of the Plaintiff. The Assistant Consolidation Officer then by order dated 06.08.1979 directed for recording of the suit property with necessary notings in the remarks column. The final record of right has been prepared in the name of the Mahendranath after his death in the year, 1984. The Plaintiff then approached the Defendants to execute and register the sale-deed, pursuant to the agreement dated 20.09.1976 executed by Mahendranath. But the Defendants in order to deprive the Plaintiff of her claim over the suit property refused to execute and register the sale-deed in the month of December, 1985. The Plaintiff then being helpless could not sue for specific performance of contract. The Defendants therefore threatened to disposes the Plaintiff who somehow could thwart the attempt of dispossession. The Plaintiff then on 20.09.1976 abandoned the agreement and began to possess the suit property openly, peacefully and as of her right, to the knowledge of the entire world including the Defendants. It is stated that her possession with the newly claimed

status commenced on and from 20.09.1976 and that was never objected to by the Defendants. So, by efflux of statutory period, the Plaintiff claims to have acquired valid right, title and interest over the suit property by way of adverse possession. The Plaintiff had also approached Revisional Authority under section-37(1) of the Orissa Consolidation of Holding & Prevention of Fragmentation of Land Act, 1972 (for short, 'the OCH & PFL Act') to get her name recorded. But by order dated 22.03.2006, the Revisional Authority refused to exercise the jurisdiction on the ground that the dispute is adjudicable in the Civil Court. She therefore, filed the suit for declaration on her title and permanent injunction. In the said suit, the Defendants questioned the genuineness of the agreement dated 20.09.1976 which is held by the Plaintiffs as the triumph card and her possession. The Defendants had thus advanced the counter claim for permanent injunction. That suit i.e. C.S. No.17 of 2017 being withdrawn, the Plaintiff filed the present suit. The withdrawal of this suit was made pursuant to the order passed by this Court in W.P.(C) No.5309 of 2009, when the matter was before this Court in connection with the refusal of the prayer for grant of temporary injunction. Said order is as under:-

“The plaintiff is the writ petitioner having aggrieved over the order of the court below in disallowing his application under

Order-39 Rule-1 & 2 C.P.C. The learned counsel for the writ petitioner argued that since plaintiff claimed adverse possession and there are material to show his possession, injunction ought to have granted in his favour. But a reading of the plaint averments may go to show that even according to the plaintiff he was put in possession by the deceased rather of the defendant after getting a registered sale agreement in the year 1976 whereby the plaintiff was shown to have made certain advance payment to the father of the defendant. When such in the case as per the plaint pleading, how could there be a decree passed upon adverse possession is the question. Of course the defendant can make several inconsistent plea in the written statement but it may not apply to the plaint, the plaintiff plea should be only consistent but the plea found in the plaint is mutually inconsistent. Then ultimately it is not only the plaintiff be non-suited at times it may render failure of justice due to latches on the part of the drafting of the plaint. When such is the case, in the larger interest of the parties concerned and that the lis is to be properly resolved, a new plaint may be admitted after withdrawing the suit with a liberty to file a fresh plaint by the learned trial court.

Such a dictum is warranted in this scenario of facts and circumstances of this particular case. Therefore, plaintiff may withdraw the suit in the lower court with liberty to file a fresh suit subject to limitation and as observed earlier. While a new such plaint is filed, the question of protection of the possession of plaintiff may duly be considered by the trial court afresh.”

When that suit C.S. No.17 of 2017 was pending, the Defendant Nos. 1 and 2 and other Defendants except Defendant no.3 sold the suit land to the Defendant No.3 by registered sale-deed dated 23.07.2008. Thus, the Defendant No.3 is said to be a lis-pendense purchaser and as such to have derived no right, title and interest over the suit property.

4. The Defendant Nos. 3, 4 and 11 while filing the written statement also advanced a counter claim. The Defendant Nos. 1, 2 and 6 to 10 filed their separate written statement. The plea taken by all, including Defendant No.1 which is the basis of the counter claim remain the same and identical.

They state that the Plaintiff having agitated the matter before the Consolidation Authority in R.C. Case No.142 of 2005 and in that forum her claim having been dismissed, the suit is not maintainable and barred by the principle of resjudicata as also limitation. It is stated that the Plaintiff has no subsisting right to enforce the so called agreement dated 20.09.1976 after 30 years on the plea of adverse possession. The Plaintiff has not been in possession of the suit land pursuant to so called agreement dated 20.09.1976, which clearly mention that the possession would be delivered to the Plaintiff on the day of registration of the sale-deed. It is further stated that the land which has been included in the agreement is no more available in its original place due to the

consolidation of holdings and the present suit land is far away from the land which finds mention in the said agreement. The so called agreement is also attacked as fraudulent, void and invalid in the eye of law. It is stated that in the meantime, they have invested huge sum of money to develop the suit land and passage has also been created by filling sand and soil. While the suit land adjoins the pitch road, the land indicated in the so called agreement of the year 1976 is not adjoining the public road and its boundaries are completely different from the suit land. It is further stated that the husband of the Plaintiff had good relationship with the family of the Defendant Nos.1 to 5. Mahendranath was the godfather of the husband of the Plaintiff and he had three sons namely, Gynendra, the father of the Defendant Nos. 1 to 4; Guna, father of the Defendant Nos. 7 to 9; and Rabindra, the father of the Defendant No.10. Guna and Rabindra resided in Rourkela and Gyanendra due to his illness was not competent enough to help his father to maintain the family. The husband of the Plaintiff was residing near the house of Mahendranath, who was very innocent and simple ton. So, he was dependant on the husband of the Plaintiff during the Consolidation Operation. Mahendranath resided in his village Subhadrapur till his death. In the year 1975, Chaturbhuja faced financial problem, for which he requested Mahendranath to help and the later requested one

Laxmidhar Parida of village for help. Then Laxmidhar Parida however wanted a nominal deed from Mahendranath. Accordingly, a nominal deed of mortgage was executed and registered on 31.01.1975 and a sum of Rs.800/- was paid to Chaturbhuja as per mutual understanding. One year after Mahendranath repeatedly called upon Chaturbhuja to repay the amount borrowed from Laxmidhar and redeem his mortgage. Chaturbhuja and Laxmidhar then sometime in the September, 1976 came to Mahendranath and proposed for execution of a deed redeeming the mortgage to which Mahendranath agreed. However, then Chaturbhuja and Laxmidhar having colluded with each other managed to obtain the so called agreement dated 20.09.1976 practising fraud and undue influence and misrepresenting Mahendranath who was totally unaware of the said deed. It is stated that contents of the said deed were not read over and explained to that Mahendranath; there was no payment of money as indicated therein. This deed of the year 1976 is stated to be fictitious and invalid and the handiwork of the husband of the Plaintiff. It is also stated that the husband of the Plaintiff on the plea of looking after the lands had managed to get the note of possession in the ROR of the suit property by gaining over the consolidation field staff. In fact, the possession of the suit land was never given. The heirs of Mahendranath having filed Consolidation Revision No.452 of 2006

for correction of the note of possession, the same is pending. It is stated that such note of possession is nonest in the eye of law. The Plaintiff wanted to purchase the suit land from the Defendant Nos. 1 to 10 and approached them in 2006 to which they did not agree, since the Plaintiff could not arrange consideration money as per the prevailing market price. Then the proposal for purchase of the suit land was not on the basis of the so called agreement dated 20.09.1976. It is stated that the Plaintiff is not in possession of the suit land nor any has title. The Defendant Nos. 1 to 10 have sold the suit land to Defendant no.11 on 23.02.2008 by executing the registered sale-deed and delivering the possessions of the same. The Defendant No.11 claims to be the absolute owner in possession of the said suit land by that sale-deed.

5. The Defendant Nos.3, 4 and 11 in their counter claim have sought for permanent injunction against the Plaintiff and her men and agents from coming over the suit land in interfering the possession of the Defendant No.11 and a declaration that the Plaintiff has no manner of right, title, interest and possession over the suit land and the entry in the remark column of the Consolidation Record of Right as to her possession is without jurisdiction has also been sought for. They further sought the relief of declaration that the right, title and interest over the

suit land rests with the Defendant No.11 and in case of dispossession, the possession be restored.

6. The Trial Court proceeding to dispose of the suit and counter claim framed in total seventeen (17) issues. Taking up the crucial issues together for decision as those are interlinked, finally has said as follows:-

“According, I hold that, the plaintiff is not entitled for declaration of her right, title, interest over the suit land, which she had acquired by virtue of adverse possession, and she is also entitled for permanent injunction against the defendants, as has been prayed for, and the defendants are not entitled for permanent injunction against the plaintiff, as they have prayed in the counter-claim, and I further hold that, the agreement dtd. 20.09.1976 is a legal and valid document, but the same is time barred, and the defendants pleaded that, the plaintiff had obtained the above document by practicing fraud, undue influence on Mahendranath Dalai. But, they have failed to prove the same. It is settled principle of law that, the fraud in a Civil Proceeding is to be proved beyond all reasonable doubt as in a Criminal proceeding, which the defendants failed to prove, and I hold that, the defendants are not entitled for any declaration, and as they have prayed in the counter-claim, and I further hold that, defendant No.11 has got no right, title, interest and possession over the suit land, by virtue of her purchase, and no possession was delivered to her,

which is apparent from the mutated R.O.R. vide Ext.5, and therefore, she is also not entitled for recovery of possession, and she is a lispendense purchaser, and the sale deed executed in favour of her vide Ext.F is an illegal and void document, and by virtue of Mutation vide Ext.E no title had also been acquired by defendant No.11. However, it is made clear that, defendant No.11 is at liberty to recover the consideration amount paid by her to defendants No. 1 to 10 through their attorney-holder by filing a separate suit, and accordingly, all these issues are answered in favour of the plaintiff against the defendants.”

The above has practically been reiterated in answering all the issues.

7. The First Appellate Court being moved by the Defendant Nos.3, 4 and 11 has held the following as at paragraphs 13 to 16:-

“13. The basis of claim of the respondent-plaintiff is Ext.1-Agreement for sale dtd.20.09.1976, but a perusal of Ext.1 reveals that there is no recital therein that Mahendranath Dalai delivered possession of the suit land to the respondent-plaintiff. Rather it has been recited in Ext.1 that upon execution of sale deed possession would be delivered to the respondent-plaintiff. From the afore-stated discussion thus, the plea of the respondent plaintiff that she entered into possession of the suit land on the basis of Ext.1-agreement dated 20.09.1976, fails.

14. As already noted above the respondent-plaintiff has not entered witness box to depose her claim. According to P.W.2, the

son-in-law of the respondent-plaintiff she suffers from various ailments, however no document has been filed to establish that claim. So adverse inference is to be drawn against the respondent-plaintiff for withholding herself from the witness box. Non-making of testimony by the respondent-plaintiff renders her claim shallow and doubtful.

15. Considering the claim of the respondent-plaintiff that she acquired a title over the suit land on the basis of adverse possession, it is crystal clear that her entry into the suit land was on the basis of agreement for sale; it means her entry was permissible in nature. From the afore-stated discussion, it has emerged that the respondent-plaintiff has miserably failed to prove that later on she started possession the suit land with hostile animus adverse to the title of the true owners. So the plea of acquisition of title by adverse possession advanced by the respondent-plaintiff is wholly untenable. In this regard reference can be made to a decision of our Hon'ble Court in the matter of *Udaya Majhi & Others v. Hadia majhi and others* reported in 2015 (II) CLR-548, wherein our Hon'ble Court have observed that:-

Adverse possession-Ingredients necessary to prove-
Initial possession permissive-It is incumbent upon party claiming adverse possession to clearly plead and lead evidence indicating the particular point of time and the exact nature of overt act in relation to possession which is indicative of denial of title of the real owners-Case remanded.

Further in a recent decision in 2014 SAR 33 (supra), the Apex Court have observed that a suit for declaration of title on the basis of adverse possession is not maintainable. In view of above reasons and conclusions the claim of the respondent-plaintiff that she acquired by way of adverse possession cannot be entertained, her suit deserves to be dismissed.

16. A perusal of the impugned judgment goes to show that the lower Court has miserably failed to take note of these above important facts and circumstances.”

8. Next coming to the counter claim filed by the Defendant Nos. 3, 4 and 11 the First Appellate Court has concluded as can be seen at paragraph-18 of its judgment which is as follows:-

“18. Undoubtedly, the appellant nos.1 and 2 and the respondents no.2 to 10 are the heirs of Mahendranath Dalai who was indisputably the owners of the suit land. It is revealed from Ext.G that the respondent-plaintiff had filed Consolidation R.C. Case No.142 of 2005 seeking recording of the suit land in her name, but the joint Commissioner, Consolidation, vide order dtd.22.03.2006 discarded her claim. As already discussed above, in the foregoing paragraphs the respondent-plaintiff has failed to prove acquisition of title over the suit land by way of adverse possession. The respondent-plaintiff has not advanced any other plea. So, the appellant nos.1 and 2 and the respondent no.2 to 10 being the legal heirs and successors of Mahendranath Dalai acquired title over the suit land on the basis of succession. Law is that an owner can only transfer ownership. So, the appellant nos.1

and 2 and the respondent nos.2 to 10 being the owners of the suit land and had the right to sell their ownership. So, Ext.F is held to be valid and thereunder the appellant no.3 acquired valid title over the suit land. It can be safely presumed from the evidence on record that the appellant nos.1 and 2 and the respondent nos.2 to 10 possessed the suit land as owners till they executed Ext.F, registered sale deed on 23.02.2008. So now the possession of the appellant no.3-vendee over the suit land can be safely presumed. The respondent-plaintiff having no manner of right, title, interest or possession over the suit land cannot come upon thereto. Accordingly the counter-claim of the appellants deserves to succeed. The learned lower Court very wrongly disallowed the same. For the afore-stated conclusions the impugned judgment of the lower Court being palpably wrong cannot be sustained, hence it is liable to be set aside.

Resultantly, the appeal is allowed on contest. The suit of the respondent-plaintiff is dismissed and the counter claim of the appellants is allowed, on contest. The possession of the appellant no.3 over the suit land is confirmed. The respondent no.1-plaintiff is permanently restrained from coming upon the suit land. If in the mean time the appellant no.3 has been dispossessed then she is entitled to recover possession of the suit land through the process of the Court.

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

- (1) When the Trial Court had passed common judgment and decree in the suit as well as the counter claim; the

Defendant Nos. 3, 4 and 11 having only filed one Appeal, if it is taken to have so filed against the decree passed in the suit then, whether the findings returned by the Trial Court in dismissing the counter claim would operate as resjudicata and accordingly, the First Appellate Court should have dismissed the Appeal without interfering with the judgment and decree passed by the Trial Court both in the suit as well as in the counter claim?

- (2) Whether the lower Appellate Court is right in reversing the findings of the trial court with regard to possession of the Appellant over the suit land by discarding the report of the Amin under Ext.3 and the note of possession of the Record-of-Right under Ext.2 which is stated to have been made on the consent of the original owner, coupled with the oral evidence let in by the Appellant?

10. (a) Learned Counsel for the Appellant submitted that the Appeal filed by the Defendant Nos.3, 4 and 11 under Section-96 of the Code was not maintainable. According to him, the Defendants were under the obligation to file two separate Appeals; one for the decree passed in the suit and the other one against the dismissal of the counter claim. He, therefore, submitted that in the absence of two Appeals, the principle of resjudicata and estoppel would be attracted and the judgment and decree not appealed against would be taken to have been acquiesced to by these Defendant Nos. 3, 4 and 11. He submitted that in a recent case of *Shri Ramesh Chand Vrs. Jindu Ram And Others*, RSA No.57 of 2017

disposed of on 17.05.2022 and connected matters, the point has been set at rest by the High Court of Himachal Pradesh. Therefore, here when counter claim was dismissed and the suit was decreed, the Defendants having not filed two separate Appeals, the judgment and decree passed by the First Appellate Court in the one Appeal in reversing the decision in the suit and Counter Claim i.e. in dismissing the Suit and decreeing the Counter-Claim are liable to be set aside.

(b) Coming to the merit of the competing claims, he submitted that when the Plaintiff has clearly established the essential ingredients in support of her claim of acquisition of title by adverse possession and when Ext.2, the Consolidation Record of Right containing the remark and Ext.3, the Amin's report support the factum of possession of the suit land by the Plaintiff at least from the date of publication of the Record of Right in the Consolidation, the possession of the Plaintiff in respect of suit land has to be taken to be adverse to the interest of the heirs of Mahendranath. He thus, submitted that the Plaintiff having remained in open, peaceful and un-disturbed possession over the suit land for all the period till date, the First Appellate Court ought to have decreed the suit of the Plaintiff. He also submitted that the finding of the First Appellate Court about the possession of the suit land by the Defendants is based on no evidence and when the evidence on record go

to show that the Plaintiff is in possession of the suit land till now, the First Appellate Court ought not to have has unreasonably and unjustifiably overlooked the same.

11. Learned Counsel for the Respondent No.11 placing reliance upon the decision in case of *Narhari and Others Vrs. Shankar and Others*; AIR 1953 SC 419 submitted that in the present case for filing one Appeal as against the judgment and decree passed in the suit and counter claim, the question of resjudicata would not arise. He placing reliance on the decision of the Hon'ble Apex Court in case of *Managing Director Vrs. K. Ramachandra Naidu*; AIR1995 SC 316, in which the principles set out in case of *Narhari and Others* (supra) have been applied, asserted that the First Appellate Court is right in accepting one Appeal and passing the order therein in respect of the suit as well as counter claim. It was submitted that the object of introduction of Rule-6(A) to Order-8 of the Code by way of amendment in the year 1976 is to reduce multiplicity of the proceedings where the cause of action for the Suit as well as the Counter Claim is similar in nature for being clubbed together for their disposal by common judgment. According to him, for non-filing of two Appeals by application of the principle of resjudicata and estoppel, that Appeal cannot be held to be not maintainable and it would not be permissible to say that said judgment

and decree not appealed against has been acquiesced to by the party since he has not filed two Appeal but only one. He submitted that the First Appellate Court did commit no mistake in passing the impugned judgment and decree in one Appeal.

He next submitted that the First Appellate Court is correct in reversing the finding of the Trial Court with regard to the possession of the Plaintiff and for the purpose very good reasons have been assigned which in no way can be said to be unjust and improper. He submitted that when Plaintiff's claim for declaration of her right, title, interest and possession is based on acquisition of title by way of adverse possession, she herself having not come to depose about the same, the First Appellate Court by pressing into service the provision contained Illustration(g) of Section-114 of the Evidence Act has rightly drawn the adverse inference. He submitted that when much stress has been given from the side of the Plaintiff upon the entry in the remark column of the Consolidation Record of Right, such entry has no legal sanctity as has been held by in case of ***Purna Chandra Panda (Dead) Vrs. Chaitanya Mahaprabhu Bije Nizgaon & Others***; (2) CLR 420. He submitted that when that very Ext.1, which is the base upon which the claim of the Plaintiff stands as to have made the entry over the suit property in the possessing the same; firstly, the document contains no recital that

Mahendranath gave the possession of the suit land to the Plaintiff and secondly, the recital is clear that after execution of the sale-deed, possession would be delivered and in such scenario, the very claim of the Plaintiff falls flat on the ground and bites the dust. It was therefore also submitted that the entry in the remark column is straightway falsified and even if that is so taken, merely by pleading that the Plaintiff has abandoned such nature of possession and began to possess exhibiting hostile animus to the real owner that too without coming to the witness box to depose in support of the same, the Plaintiff's claim has been rightly whittled down and no such error has been committed in decreeing the counter claim.

12. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below. I have also gone through the plaint, written statements and have perused the evidence both oral and documentary on record; more importantly Ext.1, 2, 3 and 5.

13. Proceeding to address the first substantial question of law, at the outset, it be stated that the Trial Court in the suit filed by the Plaintiff had declared her right, title, interest and possession as to have been acquired by virtue of adverse possession. The Trial Court's order reads as under:-

“The suit is decreed on contest against the defendants with cost. The right, title, interest and possession of the plaintiff over the suit land is hereby declared, which the plaintiff has acquired by virtue of adverse possession, and the defendants are hereby restrained including their men and agents from coming over the suit land, and from interfering in the peaceful possession of the plaintiff over the same by way of permanent injunction. However, in these circumstances, the plaintiff is not entitled for any other reliefs whatsoever.”

14. In respect of Counter Claim while deciding the issues, it has been said by the Trial Court that the Defendants are not entitled to the declaration as they have prayed in the Counter Claim and the sale-deed executed in favour of Defendant No.11 vide Ext.F has been held to be illegal and void and consequently, the order of mutation vide Ext.E has been found to be of no value in the eye of law. It has thus been said that she has acquired no title over the suit land.

15. Adverting to the case on hand, here the ordering part at the end of the judgment of the Trial Court as above reproduced is totally silent on that score as to the fate of the Counter Claim and it is not even indicated therein that the Counter Claim stood dismissed. The decree passed on 18.08.2012 also reflects the very same position which is only with regard to the reliefs granted in favour of the Plaintiff as prayed for in the suit whereas nothing is indicated therein with regard to the Counter

Claim and its fate i.e. the decision rendered thereof. Therefore, the findings in respect of the Counter Claim being not so finally noted in the ordering portion and that too again, the decree being passed by the Trial Court when is only in respect of the suit; on the face of the settled position of law that no Appeal lies against mere findings, the Defendants could not have filed the Appeal as against the findings returned against them in relation to their Counter Claim. The Defendants thus had the right to prefer one Appeal which they have done and no fault can be attributed to them for having not filed two Appeals. This being the position, the Defendant Nos. 3, 4 and 11 in the present situation when could not have filed two separate Appeals under Section-96 of the Code, the First Appellate Court cannot be said to have committed any wrong by sitting over to judge the sustainability of the findings returned in the judgment in relation to the set of issues framed keeping in view the entire pleadings i.e. facts placed in plaint, written statement containing the Counter Claim as also the written statement to the Counter Claim at its level by independently examining the evidence and upon their evaluation so as to decide the fate of the suit as well as the Counter Claim in that Appeal filed which is a continuation of the suit.

In that view of the matter and in the facts situations with which we are facing; the decision in the case of *Sri Ramesh Chand* (supra) does not come to the aid of the Plaintiff in accepting the contention that the First Appellate Court's judgment and decree in dismissing the suit and decreeing the Counter Claim are not sustainable. Furthermore, when we keep in view, the clear intention of the legislature in introducing the provision contained in Order-8 Rule-6A of the Code, even as it come in the present form after introduction of the Amendment Act of 1976 by bringing within its fold all such types of suit for the Counter Claim to be raised which is simply to avoid multiplicity of proceedings and to save time and energy of all concerned; in my considered opinion when a party to the suit is aggrieved by the result in the suit as well as the Counter Claim; there stands no justification to further obligate him/her to file two separate Appeals again for being heard and disposed of together which would simply run contrary to the very intent behind introduction of the said provision of Order-8 Rule-6A of the Code by enlarging its scope and ambit. The first substantial question of law thus is answered accordingly.

16. Coming to find out the answer to the next substantial question of law in the present suit, it is seen that the Plaintiff's claim is based on acquisition of title by way of adverse possession. It is the settled

position of law that when the suitor sets up the case of acquisition of title over a piece of immovable property by way of adverse possession in order to deprive the true owner in saying that his right, title and interest has since been extinguished, the burden of proof squarely lies on the suitor, not only to clearly plead but also to prove the factum of possession from a particular point of time as to have continued for a period, upward of the statutory period. The suitor is also obligated to plead and prove that such possession was open, peaceful and continuous without any interruption from any quarter and more importantly, exhibiting hostile animus, denying the title of the true owner and setting up title unto himself all throughout the period.

It is the settled position of law, that mere possession of a piece of immovable property by the possessor for any length of time whatever it may be does not *ipso facto* make out a case of acquisition of title over the land by way of adverse possession and he is required to prove through clear, cogent and acceptable evidence in support of the classical requirements i.e. *nec vi, nec clam, nec precario*.

It is only when an answer, expressing the satisfactions in the above scores is rendered, it has to be said that for the above assertive

action of the suitor/possessor, the right, title and interest of the true owner has been extinguished.

17. The Plaintiff claims to have entered into the possession of the suit land on 20.09.1976 under an agreement for sale, Ext.1, which is said to have been executed by Mahendranath in her favour. Then it is said that in the month of December, 1985, when she approached for sale of the suit land, there was refusal and she was threatened of dispossession. Thus, she claims to have begun to possess the suit land adversely to the interest of the true owners and continued to possess as such from that onwards by abandoning the earlier nature of possession having rebirth which we may say as “Nabakalebara”.

The agreement stands in the name of the Plaintiff shown as the proposed vendee and more surprisingly, she has not come to the witness box to depose in support of her said claim which concerns her and it is her acts and intentions which only matter and of no one else. The witnesses are her brother, P.W.1 and son-in-law, P.W.2. The evidence of P.W.1 at one stage is that Ext.1 is a registered sale-deed whereas while proving the document, it has been said to be an agreement for sale. He has nowhere stated that possession of the suit land by the Plaintiff was by exhibiting hostile animus, in adverse to the interest of

the true owners i.e. Defendant Nos. 3, 4 and others. His evidence is plain and simple that Plaintiff possessed the suit land openly, peacefully and continuously without hindrance, to the knowledge of the whole world. When he has stated that possession was delivered by Mahendranath to Basanti after execution of Ext.1, it has not been so find mention in Ext.1 which is the base on which the whole case of passing of possession at the inception stands. That apart this P.W.1 during cross-examination has stated that the possession was not delivered by Mahendranath in favour of Basanti. The First Appellate Court is thus absolutely right in saying that the same totally cuts at the root of the case of the Plaintiff through and through that she first entered into the possession of the property by virtue of Ext.1. Furthermore, the Plaintiff being the only and the best person to so depose when is out coming to the witness box, the evidence of P.W.1 cannot stand as the substitute and more importantly, when this P.W.1 cannot go to express the intention of the Plaintiff and even if, he says so, it's not acceptable on the score that with what intention the Plaintiff possessed; as to if it was as the proposed vendee, being permissive in nature or thereafter from sometime by shunning that nature as if as the owner and in exercising all the rights as such which are all within the special knowledge of the Plaintiff and non-else. The evidence of P.W.2 is also

on the score that on the basis of Ext.1, the Plaintiff is possessing the land. This runs contrary to the evidence of the P.W.1, when he has stated that no possession has been delivered after execution of Ext.1, which shows that there was absolutely no entry over the suit land by the Plaintiff. The evidence of P.W.3 being viewed with P.Ws. 1 and 2, the entry in the remark column of ROR, Ext.2 as well as the noting in the Amin report, Ext.3 are of no significance at all; more so when even the note shows that the possession was on the basis of Ext.1 and not forcible or asserting to be the owner or in exercise of any such right of ownership. Furthermore, the noting by the Amin in his report is completely different that it had been stated by Mahendranath that he had sold the suit land to the Plaintiff when the contents run contrary to the very claim of the Plaintiff as also its initial basis i.e. Ext. 1.

In view of all these above, this Court is of the considered view that, keeping in view the settled position of law holding the field, the First Appellate Court is right in reversing the findings of the Trial Court which had accepted the case of the Plaintiff that by abandoning earlier nature of possession of the suit land basing upon Ext.1, she began to possess the suit land exercising the right of ownership from a later point of time and that too disowning her earlier status as that of proposed

vendee which could not have even been considered as the evidence on that fact is not coming from the lips of the Plaintiff.

The Defendant Nos. 1 to 10 are the heirs of admitted original owner Mahendranath which has also been recognized in the consolidation operation wherein the final ROR has been so prepared. The Plaintiff having filed the application before the Revisional Authority under the OCH & PFL Act seeking to record the suit land in her name, the revision has been dismissed. Thus, when they have sold the property by executing registered sale-deed, Ext.F in favour of Defendant No.11 and when it has already been held that the Plaintiff has failed to establish her claim / case of acquisition of title, over the property by adverse possession, the First Appellate Court has rightly decreed the Counter Claim granting the reliefs to the Defendant Nos. 3, 4 and 11.

18. In the result, the Appeal stands dismissed. No order as to cost is passed.

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

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P.A.

Narayan