

IN THE HIGH COURT OF ORISSA AT CUTTACK

R.S.A. No.188 of 2022

In the matter of appeal under Section 100 of the Code of Civil Procedure assailing the judgment dated 21.05.2022 passed by the learned 3rd Additional District Judge, Bhubaneswar in R.F.A. No.13/71 of 2016/2015 confirming the judgment and decree dated 23.07.2015 and 29.07.2015 respectively passed by the learned 2nd Additional Senior Civil Judge, Bhubaneswar in Civil Suit No.33/278 of 2011/2005.

Bidyaddhar Mohapatra

....

Appellant

-versus-

Muralidhar Pradhan & Others

....

Respondents

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

For Appellant - Mr.T.K.Mishra
(Advocate)

For Respondents -

CORAM:

MR. JUSTICE D.DASH

Date of Hearing :15.11.2022 : Date of Judgment:25.11.2022

D.Dash,J. The Appellant, by filing this Appeal under Section 100 of the Code of Civil Procedure, 1908 (for short, 'the Code'), has assailed the judgment dated 21.05.2022 passed by the learned 3rd Additional District Judge, Bhubaneswar in R.F.A. No.13/71 of 2016/2015.

By the same, the Appeal filed by the present Appellant (Plaintiff) being aggrieved by the judgment and decree dated 23.07.2015 and 29.07.2015 respectively passed by the learned 2nd Additional Senior Civil Judge, Bhubaneswar in Civil Suit No.33/278 of 2011/2005, under

section 96 of the Code has been dismissed and thus the order of dismissal of the suit against the Respondents (Defendants) passed by the Trial Court has been confirmed.

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 has filed the suit for declaration of his right title, interest over the suit schedule land and for permanent injunction against the Defendants restraining them from entering upon the same. The said schedule property stood recorded under Sabik Khata No.62 Plot No.64/800 measuring an area of Ac.0.207 decimal out of Ac.2.127 decimal which appertains to Hal Khata No.250, Hal Plot No.62 comprising area of Ac.0.207 decimals out of Ac.2.690 decimal as per the record of the settlement of the year 1962 in Mouza Govindpur under Jatni Tahasil in the District of Khurda.

4. It is stated that the land under Sabik Plot No.64/800 measuring Ac.2.127 decimals under Khata No.62 originally stood recorded in the name of Naran Maharaana, the ancestor of Plaintiff. In a suit for partition bearing no.26/45 the plaintiff and his other co-sharers were allotted with Ac.1.012 decimal from northern side of Sabik Plot No.64/800. Subsequently, the said portion of land measuring Ac.1.012 decimals was allotted to the plaintiff by other co-sharers in an amicable arrangement although the record continued to be there jointly in the name of Plaintiff and his brothers, namely, Bimbadhar and Brukodhar under Khata No.141, Plot No.54 measuring Ac.1.210 decimal as per 1962 Settlement Record, whereas Nabakishore Mohapaatra was allotted with an area of Ac.1.115 decimal from the said Sabik Plot in southern

side. It is further stated that Naba had sold his allotted area of land measuring Ac.1.115 decimals in southern part of the suit Sabik Plot No.64/800 to one Raghunath Naik, which was recorded in his name in that very settlement of the year 1962, in the record of right under Khata No.280/37, Plot No.65 with an area of Ac.0.145 decimals and thereby with an increase of Ac.0.030 decimals. It is further stated that Raghunath alienated the said area to Akhaya Baliarsingh, Subrata Kumar Mohanty and Sribatsh Jena. The land under Lot No.1 & 2 of schedule 'A' property measuring an area of Ac.1.871 decimals was recorded in 1962 settlement under Khata No.141, Plot No.52 for an area of Ac.0.095 decimals, Plot No.53 for an area of Ac.0.260 decimals and Plot No.54 for an area of Ac.1.210 decimals which in total Ac.1.565 decimals wherein there has been reduction of an area of Ac.0.306 decimals. The plaintiff claims that this reduced area is schedule 'C' property measuring Ac.0.207 decimals and the balance area measuring Ac.0.099 decimals has been amalgamated/intermingled with the land under Plot No.65 and road as per the record of 1962 settlement. It is the further case of the Plaintiff that Sabik Plot No.73 of an area of Ac.4.283 decimals was originally recorded in the name of Naran Moharana as per 1929-30 settlement. In the partition suit, i.e., Title Suit No.26/45 Bimbadhar was allotted with Ac.1.800 decimal from eastern side whereas Krushna was allotted with Ac.2.483 decimals in the western side. The area allotted to Krushna was again allotted to Sarbeswar Mahapaatra in a partition suit bearing no. 67/48. Sarbeswar is said to have alienated Ac.2.483 decimals of land to Banabasini Dei, the defendant No.1 and accordingly, the record of right was published in the name of Defendant No.1 in 1962 settlement. Now, here, it is said that wrongly the area was enhanced to Ac.2.690 decimals from Ac.2.483

decimals. This excess area of Ac.0.207 decimals is now the suit land described in schedule 'C' of the plaint. It is next stated that the suit land situated on the eastern side of Sabik Plot No.64/800 was originally allotted to the Plaintiff in Title Suit No.26/45 and thus the Plaintiff is in possession of the same. It is also stated that the judgment and decree passed in that suit i.e. Title Suit No.26/45 was the outcome of fraud committed upon the heirs of Naran by one Bansidhar, son of Krushna styling himself as the adopted son of Naran and the said judgment and decree is not binding on the legal heirs of Naran to the extent of share allotted to Bansidhar. In that partition, suit schedule 'A' were allotted to the legal heirs of Naran and schedule 'B' to Krushna. Subsequently, Lot No.1 of schedule 'A' property was given to the Plaintiff and Lot No.2 of Schedule property to one Brukodhar in an amicable arrangement.

5. In the settlement of the year 1962, the property in Lot No.1 schedule 'A' together with other properties were jointly recorded in the name of Plaintiff and his two brothers namely Bimbadhar and Brukodhar. It is further stated that as per the previous arrangement, Brukodhar become the owner in possession of Ac.0.845 decimal land whereas the Plaintiff is having the ownership and in possession of Ac.0.012 decimals of land. The Plaintiff is the owner of schedule 'C' property which is a part of Ac.1.012 decimal.

6. It is stated that the record of right of the year 11962 was erroneous as under the same, the above land was recorded in the name of Banabasini. Even if her venders were entitled to Ac.2.483 decimals as described in schedule 'B'. In the settlement of 1962, the suit land is stated to have been amalgamated with Hal Plot No.62. The Defendant No.1's wife who purchased an area measuring Ac.2.483 decimals as per

Sabik map is having no right, title, interest and possession over the suit land in schedule 'C' because she had neither purchased it by any registered sale deed nor she or her legal heirs i.e Defendants are in possession over the same. The Defendant No.1 asserted that the suit land described in schedule 'C' is the purchased land of his wife. However, it is said that the Defendants have no right, title, interest over the suit land measuring Ac.0.207 decimal.

7. The Defendant's case is that they are the rightful owners in possession of the land which forms the subject matter of the suit as described in schedule 'C'. They said to have been in possession of the land under Hal Plot No.62 having an area Ac.2.690 decimals under Hal Khata No.250 which corresponds to Sabik Plot No.73 and Khata No.62. It is stated that even though Sabik Plot No.73 was recorded with an area of Ac.4.283 decimals as per the previous ROR; in the field, the said plot was Ac.4.770 decimal. Bimbadhar is said to have been allotted with an area of Ac.1.800 decimal from eastern side out of Sabik Plot No.73 whereas Krushna is said to have been allotted with an area of Ac.2.403 decimal from western side out of said Sabik Plot No.73 as per the Sabik ROR. Subsequently, said area of Ac.2.483 decimals from western side out of Sabik Plot No.73 as per the Sabik ROR as allotted to Sarbeswar in decree in O.S No.67/48 and he then on 09.06.1954 sold the same to Banabasini, the wife of Defendant No.1 as well as the mother of Defendant No.2 to 7 by registered sale deed on 09.06.1954 for valuable consideration. Pursuant to the sale deed, the vendees took possession of Ac.2.690 decimals. Accordingly, during settlement operation in the year 1961-62, the Settlement Authority after measurement finding the possession of Banabasini over that area of land directed for preparation of the settlement map and the record of right for an area of Ac.2.690

decimals under suit Hal Plot No.62 Khata No.250 in the name of Banabasini.

8. It is further stated that the northern portion of the suit Sabik Plot No.64/800 is at higher level than the level of the land under Hal Plot No.62 which corresponds to Sabik Plot No.73. Therefore, it is false to say that the suit land measuring an area of Ac.0.207 decimal has been amalgamated with the land which is situated at higher level and the claim of the Plaintiff on that score is said to be false. It is also stated that neither the Plaintiff nor his brother had/has ever any right, title, interest and possession over any area of land from out of suit Hal Plot No.62 at any point of time. They state that the plaintiff or his co-sharer has no right to challenge the said recording of Hal Plot No.62 after expiry of long 43 years from the date of publication of the record of right. It is also stated that the total area of the Plaintiff in Hal Plots is excess than the total area of Sabik Plots as mentioned in the schedule 'A'. The excess is by Ac.0.049 decimal. So it is stated that the Plaintiffs claim over schedule 'C' property is false and baseless.

9. The Trial Court, being faced with the above pleadings, has framed 7 issues. Taking up to answer to the crucial issue concerning the Plaintiffs claim of declaration over the suit land in schedule 'C', the Trial Court, upon examination of evidence and their evaluation, has answered the same against the Plaintiff. This has paved the way for the Trial Court to all other issues against the Plaintiff. The Trial Court at the end has dismissed the suit.

10. The First Appellate Court, sitting over to judge the correctness and sustainability of the finding of the Trial Court on that issue as to the right, title, interest and ownership of the Plaintiff over schedule 'C'

property, as asserted by the Plaintiffs and denied by the Defendants, upon reevaluation of the evidence and on independent appreciation at its level, has found no reason or justification to arrive at a different conclusion than that of the Trial Court and, therefore, it has found itself to be not in a position to disturb the said finding of the Trial Court on issue no.5. The Plaintiff thus has been non-suited by both the Courts below.

11. Learned counsel for the Appellant submitted that the Courts below ought not have given importance upon the record of right of the year 1962 with the evidence on record standing clear on the score that the same is erroneous. He submitted that when the Defendants claim title on the basis of record of right and it is seen that the area of land purchased by them is less; the Courts below ought to have decreed the suit of the Plaintiff. It was also stated that the Courts below have committed grave error by not taking into account the factual setting that when the defendant's claim title on the basis of ROR, their purchased land is less in area and therefore, simply on the basis of the record of right looking to the area of land as mentioned therein on the face of the available evidence on record; the Plaintiff suit ought to have been decreed. He therefore urged for admission of this appeal to answer on the substantial question of law.

12. Keeping in view the submissions on record, I have carefully read the judgment passed by the Court.

13. It is the settled principles of law that the plaintiff in order to succeed in a suit for declaration of suit for title and permanent injunction has to prove its case affirmatively that he has the title over the land in suit which in our case is described in schedule 'C'. For the purpose the

Plaintiff cannot take advantage of the weakness of the case of the defendants nor the failure of the Defendants to prove to their case.

14. In the case on hand, we see that the plaintiff has not prayed for a decree of recovery of possession and the prayer is also for declaration and permanent injunction against the defendants. So the Plaintiff is under the legal obligation to discharge the burden of proof of the fact as to how he has the ownership over the schedule 'C' land and that he is in a possession of the suit land as on the date of the suit. The record of right of the year 1962 is in respect of the area in question. Saying that the suit land has been erroneously recorded therein; this suit has been filed in the year 2005 and the said record of right is impeached in the suit after a lapse of long 42 years. When a record of right in respect of the land in question has held the field for a period of 42 years and is under challenge on the 43rd year, the presumption in my considered view has to be that the person in whose name the land stands recorded is in possession of the same. The Defendants have been paying rent as can be seen from Ext.D series which are the rent receipts in respect of the suit land. When such is the position that the suit land has remained under the Khata of the Defendants from the year 1962 and they have been paying the rent for the same continuously all along for a period of more than 42 years and that record of right has not faced any challenge for these period of more than 4 decades, the presumption being that the suit land was being in possession for all these years with said recorded owners; the suit in my view is not maintainable without a prayer for recovery of possession. As the plaintiff has not been able to prove by leading clear, cogent and acceptable evidence in rebutting the presumption as above in establishing that he is in possession of the suit land despite such recording of the same in the record of right of the year 1962 which is

referable to his title and ownership, the absence of prayer for recovery of possession is fatal to the suit.

15. For the above discussion and reasons, I am not in a position to accept the submission of the learned counsel for the appellant that there arises substantial question of law meriting at the admission of this appeal.

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

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



Gitanjali