IN THE HIGH COURT OF ORISSA AT CUTTACK

RSA No.109 of 2010

(From the judgment and decree dated 03.12.2009 passed by learned Addl. District and Sessions Judge, Fast Track Court, Rourkela in R.F.A. No.8/9 0f 2007-2009 confirming the judgment and decree dated 30.10.2006 passed by learned Civil Judge, (Sr. Division), Rourkela in T.S. No.25/2000)

A.F.R.

Kailash Prasad Sahoo
and others ... **Appellants**

-versus-

Rajendra Prasad Singh
and others ... **Respondents**

Advocates appeared in the case through hybrid mode:

For Appellants : Mr.D.K.Mohanty,
Advocate
Mr. B. Nayak, Advocate

-versus-

For Respondents
: Mr. P.K.Rath, Sr.Advocate.

CORAM:
JUSTICE SASHIKANTA MISHRA

JUDGMENT
07.11.2024.

Sashikanta Mishra,J. This is an appeal by the Defendants against a reversing judgment passed by learned Addl. District and Sessions Judge, Fast Track Court, Rourkela in R.F.A No.8/9 of 2007-2009 on 03.12.2009 followed by decree whereby the judgment passed by learned Civil Judge (Sr. Division), Rourkela, on 30.10.2006 followed by decree in T.S. No.25/2000 was modified to the extent of allowing the cross appeal filed by the Plaintiffs and dismissing the appeal filed by the Defendants.

2. For convenience, the parties are referred to as per their respective status in the trial Court.

3. The schedule property as described in the plaint is as follows;

Plot No.544	Gharabari 1	Ac.0.03.5 kadis
Plot No.545	Gharabari 1	Ac.0.01 dec.
Plot No.369/2169	Gharabari 1	Ac.0.09 decs
	Total	Ac.0.13.5 kadis

4. The suit land has been described as gharabari land and house over Sabik Plot No.188/558 measuring an area

of Ac.0.090 decs. of mouza Mahulpali under Hal Khata No.431.

5. The case of the Plaintiffs is that their father late Shyam Narayan Singh purchased an area of Ac.0.09 decs. of gharabari land out of Plot No.188/558 appertaining to Khata No.3 in Mouza Mahulpali vide registered sale deed No.77 of 1952 from Darghai Mian and Ismile Mian. He took possession of the land and mutated the same in his name in the R.O.R. Because of a communal riot in March, 1964 Shyam Narayan Singh and his family left Rourkela out of fear and returned after the riot was over and constructed a building over the suit property. It is the further case of the Plaintiffs that Defendant No.1 came to Rourkela from Bihar after the communal riot in 1964 and Shyam Narayan Singh permitted him to reside in the house over the suit property and also allowed him to manage his business of straw cutting and a small flour mill (Ata chakki). Shyam Narayan Singh also started business of timber and charcoal in the year 1980 and installed a 10 HP motor for flour mill and 5 HP machine for straw cutting for

which he obtained necessary license. Shyam Narayan Singh died in the year 1982 and his widow in 1997. After his death the Plaintiffs succeeded to the property which stood recorded in their names in Hal ROR. Defendant No.1 was permitted to stay in the house till December, 1988 when Plaintiff No.1 came to know that Defendant No.2 had filed a mutation case before the Tahasildar to record the property in his name, which was dropped. As such, Plaintiff No.1 asked the defendants to vacate the suit premises, which they did not. Hence, the suit.

6. The defendants contested the suit by filing written statement, inter alia, taking the stand that the father of the Plaintiffs was never in possession of the suit property. The sale deed No.77/1952 was also questioned. It was additionally claimed that the defendants have been residing over Sabik Plot Nos.188, 193 and 188/560 corresponding to Hal Plot Nos.554 and 555 and the building standing thereon was never constructed by the father of the Plaintiffs. During Hal settlement, Plot Nos.544 and 545 were wrongly recorded in the name of the father of

the Plaintiffs for which the Tahasildar, Panposh, in Settlement Case No.117/1988 deleted his name from the records and submitted the same before the Board of Revenue by order dated 8.4.1989. In the said case, the Amin had conducted a field inquiry and submitted report stating that Sabik Plot No.188/558 correspondents to Hal Plot No.369/2169 and the family of late Shyam Narayan Singh is residing over an area of Ac.0.04 deces. only. Thus, taking advantage of the wrong recording in the ROR during Hall Settlement operation, plaintiffs have come up with the suit by misrepresenting facts.

7. On such rival pleadings, the trial Court framed the following issues for determination;

> *(I) Is the suit maintainable?*
> *(II) Is there any cause of action to file the suit?*
> *(III) Has the Plaintiff got right, title and interest over the suit property?*
> *(IV) Did the father of the plaintiffs Shyam Narayan Singh purchased A.0.090 decimals of Gharabari land out of Plot No.188/558, Khata No.3, Mouza-Mahulpali under registered deed No.77/52 from Darghai Mian and Ismile Mian and delivery of possession was given to him?*

(V) Are the defendants and their family members and the persons claiming through defendants be evicted from the suit property?

(VI) Are the plaintiffs entitled for damages @ Rs.2000/- i.e. pendent lite and future damages per month payable by the defendants for illegal occupation of the suit land, till recovery of possession of the suit property?

(VII) Are the defendants be permanently restrained by way of injunction from making alteration, modification or repair over the suit house and its premises?

(VIII) Are the defendants in adverse possession of the suit land since long?

(IX) Have the defendants constructed any house over the suit land and they have got a grocery shop over it?

(X) Was the defendant never a caretaker under Shyam Narayan Singh and the plaintiffs never created any lease-licence permission for the suit schedule property in favour of the defendant?

(XI) Are the defendants paying land revenue and holding tax for the suit land.

(XII) Did defendant No.1 had a grocery business in the suit plot and had installed a straw cutting machine on the verandah of the suit and had also constructed pucca room?

8. Originally, the trial Court disposed of the suit by judgment dated 19.3.2004 by decreeing the same and by declaring the right, title and interest of the plaintiffs over Ac.0.09 decs of land under Plot No.369/2169 under Khata

No.4431 and by holding that the defendants are liable for eviction there from.

9. Being aggrieved, the defendants preferred appeal being RFA No.9/2004, which was disposed of by learned Addl. District Judge, Rourkela, vide judgment dtd.2.1.2006 by setting aside the decree and by remanding the suit to the court below to decide Issue Nos.VIII, V and VI afresh.

10. The Plaintiffs had also preferred appeal being R.F.A. No.16/2004 against refusal of the trial Court to decree the suit in respect of Plot Nos.544 and 545. The learned Addl. District Judge, Rourkela in his judgment dated 1.6.2006 found no merit in the appeal and dismissed the same.

11. Pursuant to the order of remand passed by the 1st Appellate Court in R.F.A. No.9/2004, the suit was heard afresh by the Trial Court and by judgment dtd.30.10.2006 followed by decree, the earlier judgment was reiterated by declaring the right, title and interest of the Plaintiffs only over Hal Plot No.369/2169.

12. Being aggrieved, the defendants carried the matter in appeal being RFA No.8/2007 wherein the Plaintiffs also filed a cross appeal. As already stated, the appeal filed by the Defendants was dismissed. The cross appeal filed by the plaintiffs was decreed by declaring the right, title and interest of the plaintiffs over Hal Plot Nos.544 and 545 of Khata No.431.

13. Being further aggrieved, defendants 1 to 5 have filed this Second Appeal, which has been admitted on the following substantial questions of law;

> *(i) Whether the learned Appellate Court could have been allowed the prayer of the Plaintiffs/Respondents which was previously rejected by the same Court in R.F.A. No.16/2004 by order dated 1.2.2006 and the same was not challenged by the Plaintiffs/Respondents in the higher form.*
> *(ii) Whether the learned Appellate Court could have been given a judgment contrary to his findings?*

14. Heard Mr. Debakanta Mohanty, learned counsel for the Defendant-Appellants and Mr. Prafulla Kumar Rath,

learned Senior counsel appearing for the Plaintiff-Respondents.

15. Mr. Mohanty would assail the impugned judgment by arguing that in an earlier appeal being R.F.A. No.16/2004, the 1st Appellate Court had dismissed the same refusing thereby to grant the relief claimed by the plaintiffs over Plot Nos.544 and 545. The other appeal being preferred by the plaintiffs being RFA No.9/2004 was remanded on a limited point i.e. to decide Issue Nos.VII, VI and V afresh. The Plaintiffs never challenged the judgment passed in R.F.A No.16/2004 and therefore, the same became final. According to Mr. Mohanty, this being the factual position, the 1st Appellate Court could not have reopened the issue again which already stood decided by the same Court in its earlier judgment rendered in RFA No.16/2004 in relation to suit Plot Nos.544 and 545. Mr. Mohanty further argues that in so far as Plot Nos.369/2169 is concerned, both the courts below have failed to consider the evidence that the Plaintiffs were not in possession of the suit land prior to 12 years from the date of institution of the suit

whereas the defendants adduced adequate evidence to show their possession. In such view of the matter, the courts below having ignored vital evidence available on record, the finding in respect of Plot Nos.369/2169 cannot be sustained and therefore, the matter needs to be remanded again for fresh adjudication on that point.

16. Per contra, Mr. Rath, learned Senior counsel would argue that a single appeal preferred by the Defendants against the judgment passed by the 1st Appellate Court covering the appeal as well as the cross appeal is not maintainable in the eye of law. Since the decree passed in the cross appeal is a separate decree, it therefore, needs to be independently challenged. Mr. Rath, further argues that from the pleadings of the defendants, it will be clear that their claim of adverse possession is in respect of Sabik Plot No.188/560 which corresponds to Hal Plot No.543, which does not form part of the suit properties. Moreover, Hal Plot No.543 stands recorded in the name of the State and therefore, the claim of adverse possession cannot lie against the plaintiffs in the present suit. That apart, the

defendants have not proved the necessary ingredients to maintain the plea of adverse possession.

17. Before proceeding to decide the substantial questions of law framed while admitting the appeal, it would be proper to first consider the contentions raised by the Plaintiffs-respondents that one appeal being preferred against the judgment passed by the 1st Appellate Court covering both the appeal preferred by the defendants against the decree passed by the trial court and the cross objection preferred by the plaintiffs is not maintainable. In this regard, reference has been made to the provision under Order 41, Rule 22 of C.P.C., which is quoted for immediate reference;

> *"22. Upon hearing respondent may object to decree as if he had preferred a separate appeal (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree '(but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour, and may also take any cross-objection] to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow."*

Further, the judgment passed by this Court in the case of ***Kumudabandhu Das and others vs. Aswini Ku. Das and others*** [1] has been cited. While Order 41 deals with appeals from original decree, Order 42 deals with appeals from appellate decrees. Rule 1 of Order 42 makes it clear that the Rules of Order 41 shall also apply as far as may be to appeals from appellate decrees. Bare reading of the provision under Rule 22 make it clear that the same permits the Respondents to file a cross objection to any part of a decree if the same is against him without filing a separate appeal. There is nothing in Rule 22 to hold that an order passed in such a case can only be appealed separately. To amplify, if the appellate court passes an order covering both the appeal and the cross objection preferred by the respondents, it does not automatically follow that if the respondent is aggrieved by the order passed by the appellate court in respect of both the appeal as well as the cross objection, he has to file separate appeals. In the case of ***Kumudabandhu Das (supra),*** no cross objection was filed and what was being considered

[1] 1993 (11) OLR 124

by the Court was whether different appeals preferred against the same judgment would operate as res-judicata. In that case, the suit for partition and another suit for declaration and compensation were heard together and by a common order a preliminary decree for partition of land and compensation was made. Only one party filed the appeal. On such facts, the Court considered whether persons who did not challenge a finding can get the benefit where the same is available to appellants along with them. After analyzing the facts and law on the point, it was held that the legal representatives of the deceased-appellant cannot be permitted to raise the question already decided against them as it would be hit by the rule of resjudicata. Such is not the case at hand inasmuch as there was only one suit and decree by the trial Court was in respect of one out of the three suit plots while the cross objection was in respect of the remaining two suit plots. The 1st Appellate Court passed a composite judgment covering both the issues. It cannot therefore, be said that having not challenged the finding in respect of the issue covered under the cross objection, the defendants would be debarred to

prefer appeal or would have to separately prefer appeal against the said findings.

18. Coming to the substantial questions of law framed for adjudication of the present appeal, as already stated herein before, originally the trial Court in its judgment dtd. 19.3.2024 decreed the suit of the plaintiffs in respect of Plot No.369/2169 and by refusing to grant the relief in respect of Plot Nos.544 and 545. This was challenged by the plaintiffs in RFA No.16/2004. By judgment dtd. 1.2.2006, R.F.A. No.16/2004 was dismissed on contest. It is common ground that no further appeal was preferred by the Plaintiffs against dismissal of the appeal. Thus, the finding of the trial Court as regards Plot Nos.544 and 545 obviously stood confirmed. Undoubtedly, the suit was remanded for fresh adjudication by the 1st Appellate Court in R.F.A. No.09/2004, but for a limited purpose i.e. re-adjudication of Issue Nos.VIII, VI and V.

19. In the judgment on remand, the trial Court reiterated its earlier finding with regard to suit Plot No.369/2169 and again decreed the suit. Nothing was said in the decree

about the said two suit plots i.e. 544 and 545, obviously because the earlier finding rendered by it had already been confirmed by the 1st Appellate Court in R.F.A.No.16/2004. The said judgment not having been challenged by the plaintiffs, they could not have preferred a cross objection. Nevertheless the cross objection was not only considered but also allowed by decreeing the suit in respect of Plot Nos.544 and 545. This is entirely contrary and in conflict with the judgment passed by the very same court in RFA No.16/2004 by rejecting the prayer of the plaintiffs in respect of the said plots. In other words, the issue that stood finally adjudicated. Under such circumstances, the 1st Appellate Court could not have reopened the issue much less adjudicate upon the same as it would be hit by the principle of res-judicata enshrined under Section 11 of C.P.C. The arguments advanced on behalf of the defendant-appellants therefore, carry considerable force and are hence, accepted.

20. As regards the contentions raised with regard to the finding in respect of suit Plot No.369/2169, this Court

finds that the Trial Court on careful appraisal of the evidence on record, found the plaintiffs to have title over the same. The said finding was reiterated by the trial Court after remand, again basing on the evidence on record. The 1st Appellate Court confirmed the finding referring to the evidence on record as well as the settled position of law. Nothing has been demonstrated to show as to how such concurrent findings of fact are wrong. It is trite law that concurrent findings of facts rendered by two courts can only be interfered with if it is shown that the same is perverse, against the weight of evidence on record or otherwise untenable. Such is not the case at hand, for which this Court does not feel persuaded to interfere.

21. From the foregoing discussion, it is evident that the impugned judgment in so far as it relates to decreeing the suit of the plaintiff in respect of Plot Nos. 544 and 545 is bad in law. However, the finding in respect of Suit Plot No.369/2169 does not warrant any interference.

22. In the result, the appeal is allowed in part. The impugned judgment passed by the 1st Appellate Court in so

far as it relates to the decree passed in respect of suit plot Nos.544 and 545 is hereby set aside. The decree in respect of suit Plot No.369/2169 is hereby confirmed.

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Sashikanta Mishra,
Judge

Ashok Kumar Behera

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Reason: Authentication
Location: High Court of Orissa, Cuttack
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