

A.F.R.

IN THE HIGH COURT OF ORISSA AT CUTTACK

S.A. No.27 of 1989

(In the matter of an appeal under Section 100 of the Code of Civil Procedure, 1908)

Braja Patel and another ***Appellants***

-versus-

Chandramani Naik ***Respondent***

Appeared in this case by Hybrid Arrangement

(Virtual/Physical Mode):

For Appellants - Mr. B. Das,
Advocate.
on behalf of
Mr.N. C. Pati,
Advocate.

For Respondent - None

CORAM:
MR. JUSTICE A.C.BEHERA

Date of Hearing :04.12.2023 :: Date of Judgment :16.01.2024

A.C. Behera, J. This Second Appeal has been preferred against the reversing judgment.

2. The Appellants of this Second Appeal were the defendants in the suit vide T.S. No.20 of 1977 and they were the Respondents in the First Appeal vide T.A.20/35 of 1984-87.

The Respondent of this Second Appeal was the sole plaintiff in the suit vide T.S. No.20 of 1977 and he was the appellant in the First Appeal vide T.A.20/35 of 1984-87.

The suit of the plaintiff (Respondent in this Second Appeal) was a suit for declaration, confirmation of possession and permanent injunction against the defendants (Appellants in this Second Appeal).

3. The total area of the suit properties is Ac.0.02 decimal i.e. Ac.0.0 ½ decimal out of Ac.1.76 decimals of Plot No.473 and Ac.0.0 ½ decimal out of Ac.1.86 decimal of Plot No.470 under Khata No.8/1 in Mouza Bhaler under the jurisdiction of Balangir P.S. in the district of Balangir, which corresponds to Hal Settlement Plot Nos.764 and 557 under Khata No.49.

4. As per the averments made by the plaintiff in his plaint, the suit properties were originally bhogra lands and through bhogra conversion proceeding, the suit properties vide suit Plot Nos.473 and 470 along with other properties were settled in the name of the father of the plaintiff. After the death of the father of the plaintiff, the suit properties along with other properties left by him devolved upon the plaintiff and his brothers by way of succession and thereafter, the plaintiff and his brothers partitioned the suit plots along with other plots between them in the year 1958-59 and in such partition, the suit properties vide Plot Nos.473 and 470 corresponding to Hal Plot Nos.764 and 557 fell into the share of the plaintiff and thereafter, the plaintiff being the exclusive owner of suit Plot

Nos.473 and 470 mutated the same to his name through Revenue Case No.8/23 of 1959-60 and paid rent for the same to the Government in his name and accordingly, the plaintiff is the exclusive owner over the suit plot Nos.473 and 470, which corresponds to Hal plot Nos.764 and 557. As such, the Hal Plot Nos.764 and 557 have been recorded exclusively in the name of the plaintiff under Hal Khata No.49.

The defendants being the neighbours of the plaintiff started digging plinth for construction of their boundary wall and latrine and tried to encroach the suit properties covered under Plot Nos.473 and 470, to which, the plaintiff protested, but the defendants did not respond the same, though, the defendants have no interest at all over any portion of suit Plot Nos.473 and 470 corresponding to Hal Plot Nos.764 and 557. When without having any interest over the suit properties, the defendants tried to construct their boundary wall and latrine on the same, for which, without getting any way, the plaintiff approached the Civil Court by filing the suit vide T.S. No.20 of 1977 against the defendants praying for declaration of his right, title and interest over the suit properties and also for confirmation of his possession on the same and also prayed for injuncting the defendants permanently from interfering into his

possession over the suit properties along with other reliefs, to which, he (plaintiff) is entitled for as the Court deems fit and proper.

5. Having been noticed from the Court in T.S. No.20 of 1977 filed by the plaintiff, the defendants contested the same by filing their joint written statement after taking their stands *inter alia* therein that, they have never taken any step for construction of their boundary wall and latrine over any portion of suit plot Nos.473 and 470 as alleged by the plaintiff. Their specific plea/case was that, they are making constructions by digging earth on their own land. Even if, it is held that, they (defendants) have constructed their latrine and boundary wall over the suit properties i.e. over the Plot Nos.473 and 470, then, it will be held that, they were in possession of the same since long and they (defendants) have acquired their title over the suit properties by way of adverse possession. They (defendants) are making constructions at the places, on which, they had their old constructions and after demolishing their old constructions, they (defendants) are making their new constructions. So, it cannot be said that, they (defendants) have encroached any portion of suit Plot Nos.473 and 470 i.e. to the suit properties. For which, the suit of the plaintiff is liable to be dismissed against them (defendants).

6. Basing upon the aforesaid pleadings and matters in controversies between the parties, altogether 9 (nine) numbers of issues were framed by the Trial Court in T.S. No.20 of 1977 and the said issues are:-

Issues

- (i) *Has the plaintiff cause of action?*
- (ii) *Is the suit maintainable in the present form?*
- (iii) *Is the suit barred by limitation?*
- (iv) *Is the suit land suffers from improper identification?*
- (v) *Has the plaintiff, right, title, interest and possession over the suit land?*
- (vi) *whether the suit land is within the bari of the defendants and if they have acquire, title over the same by adverse possession?*
- (vii) *If the raising of compound wall and latrine would cause inconvenience and injury to the health of the family members of the plaintiff?*
- (viii) *If the plaintiff is entitled to a permanent injunction restraining the defendants to put compound wall and construct latrine over the land in question?*
- (ix) *To what other relief the plaintiff is entitled to?*

7. In order to substantiate the aforesaid reliefs sought for by the plaintiff against the defendants, he (plaintiff) examined altogether three numbers of witnesses from his side including him as P.W.1 and relied upon series of documents on his behalf vide Exts.1 to 7. But, on the contrary, the defendants examined three witnesses on their behalf including defendant No.2 as D.W.1.

8. After conclusion of hearing and on perusal of the materials, documents and evidence available in the Record, the Trial Court answered all the issues against the plaintiff and in favour of the

defendants and basing upon the findings and observations made by the Trial Court in the issues against the plaintiff and in favour of the defendants, the Trial Court dismissed the suit of the plaintiff vide T.S. No.20 of 1977 on contest against the defendants vide its judgment and decree dated 23.07.1984 and 31.07.1984 respectively assigning the reasons that, the plaintiff has not been able to establish his title over the suit properties. For which, he (plaintiff) is not entitled for the reliefs sought for by him against the defendants.

9. On being aggrieved with the aforesaid judgment and decree of dismissal of the suit vide T.S. No.20 of 1977 of the plaintiff passed on dated 23.07.1984 and 31.07.1984 respectively by the Trial Court, he (plaintiff) challenged the same by preferring the First Appeal being the Appellant vide T.A.20/35 of 1984-87 against the defendants by arraying them (defendants) as Respondents.

10. After hearing from both the sides, the First Appellate Court allowed the First Appeal preferred by the plaintiff (appellant) vide T.A.20/35 of 1984-87 and set aside the judgment and decree of the dismissal of the suit dated 23.07.1984 and 31.07.1984 respectively passed by the Trial Court in T.S. No.20 of 1977 and decreed the suit of the plaintiff vide T.S. No.20 of 1977 and declared the title of the plaintiff

over the suit properties and restrained the defendants from interfering with the possession of the plaintiff over the suit properties vide its judgment and decree dated 19.08.1988 and 07.09.1988 respectively, observing that, he (plaintiff) is the owner of the suit properties and he (plaintiff) is in possession over the same, but the defendants have no interest thereon.

11. On being aggrieved with the aforesaid judgment and decree dated 19.08.1988 and 07.09.1988 respectively passed in T.A.20/35 of 1984-87 against the defendants (those were the respondents in the First Appeal vide T.A.20/35 of 1984-87), they (defendants) challenged the same by preferring this Second Appeal being the Appellants against the plaintiff by arraying him (plaintiff) as Respondent.

12. This Second Appeal was admitted on formulation of the substantial questions of law i.e.:-

(i) When the Amin Commissioner's report does not indicate the length and breadth of the encroached land and the area covered at different point and when the Commissioner has measured the land of defendants and when the said Amin Commissioner's report is inconsistent with the plaintiff's case, then whether the First Appellate Court has acted illegally in decreeing the plaintiff's suit basing on such Commissioner's report?

(ii) Whether the suit of the plaintiff was maintainable in view of the evidence of P.W.2 and D.Ws. without prayer for recovery of possession?

13. I have already heard from the learned counsel for the Appellants only, as none participated from the side of the Respondent at the time of hearing of the Appeal.

14. The suit of the plaintiff vide T.S. No.20 of 1977 was a suit for declaration, confirmation of possession and permanent injunction. The total area of the suit properties is Ac.0.02 decimal i.e. Ac.0.01 ½ decimal from sabik Plot No.473 and Ac.0.0 ½ decimal from sabik Plot No.470 under sabik Khata No.8/1. The suit plot Nos.473 and 470 corresponds to Hal Plot Nos.764 and 557 under Khata No.49.

It is the clear and unambiguous case of the plaintiff as per his pleadings and evidence that, the suit properties vide Plot Nos.473 and 470 were originally bhogra lands and as per the bhogra conversion proceeding, the said two plots vide Plot Nos.473 and 470 along with other plots were settled in the name of the father of the plaintiff. After the death of the father of the plaintiff, the aforesaid two suit plots vide Plot Nos.473 and 470 along with other plots left by his father had devolved upon him (plaintiff) along with his brothers. So, after the death of the father of the plaintiff, he (plaintiff) and his brothers partitioned their all joint properties including the properties covered under suit Plot Nos.473 & 470 and in such partition, the suit Plot Nos.473 and 470 had fallen into his

share and on the basis of such partition, the plaintiff became the exclusive owner over the suit Plot Nos.473 and 470. Accordingly, the Hal R.o.R. in respect of the properties covered under sabik suit Plot Nos.473 and 470 has been prepared exclusively in the name of the plaintiff vide Hal Plot Nos.764 and 557 under Khata No.49. As such, he (plaintiff) is the exclusive owner and in possession over the suit properties.

In the pleadings of defendants, they have not at all denied to the ownership of the plaintiff over the suit plot Nos.473 and 470. In that regard, the defendant No.2 as D.W.1 has deposed in paragraph No.6 of his deposition on oath by stating that, *“he has no claim on the Plot Nos.473 and 470 nor did he possess any portion of those plots. The suit properties are the portions/parts of sabik suit plot Nos.473 and 470, those corresponds to Hal Plot Nos.764 and 557.”*

In paragraph No.3 of the written statement, they (defendants) have specifically pleaded that, *“they have not dug the plinth of their boundary wall beyond their own area and they have not started construction of their latrine over any portion of Plot Nos.470 and 473 corresponding to Hal Plot Nos.764 and 557 of the current settlement as marked in red ink in the map of the plaint.”*

15. As per the above pleadings and evidence of the defendants, their specific case is that, they are not the owners of the suit properties and they have not dug the plinth for construction of their boundary wall and latrine over any portion of the suit plot Nos.764 and 557 i.e. over any portion of the suit properties.

16. When the plaintiff is establishing his ownership and possession over the suit properties on the basis of his family partition and when recording of such partition, the Hal R.o.R. of the suit properties vide Khata No.49 has been prepared in his name and when, the defendants have admitted the ownership of the plaintiff over the suit plots in their above pleadings and evidence, then at this juncture, it cannot be held that, the judgment and decree passed by the First Appellate Court declaring title and possession of the plaintiff over the suit properties is erroneous in any manner.

So far as the decree for permanent injunction passed by the First Appellate Court in favour of the plaintiff and against the defendants reversing the judgment and decree of dismissal of the suit passed by the Trial Court is concerned;

17. It appears from the paragraph No.16 of the judgment of the First Appellate Court that, at the time of filing of the suit vide T.S. No.20 of

1977 by the plaintiff, he (plaintiff) had filed a Misc. Case vide M.J.C. No.25 of 1977 under Order 39 Rule 1 & 2 of the CPC, 1908 praying for a temporary injunction against the defendants in order to restrain the defendants from interfering into his possession over the suit properties till the final disposal of the suit vide T.S. No.20 of 1977.

In that M.J.C. No.25 of 1977, he (plaintiff) had filed a petition under Order 39 Rule 3 of the CPC, 1908 praying for an *ex parte ad interim* injunction in order to restrain the defendants from interfering into his possession over the suit properties till the final disposal of the M.J.C. Case No.25 of 1977 under Order 39 Rule 1 & 2 of the CPC, 1908. That petition of the plaintiff under Order 39 rule 3 of the CPC, 1908 in M.J.C. No.25 of 1977 for an *ex parte ad-interim* injunction against the defendants was allowed on dated 13.05.1977 and the defendants were restrained from interfering into the possession of the plaintiff over the suit properties till the final disposal of M.J.C. No.25 of 1977 and subsequent thereto, as per the final order passed on dated 21.06.1977 under Order 39 Rule 1 & 2 of the CPC, 1908 in that M.J.C. No.25 of 1977, the defendants were temporary injected from interfering into the possession of the plaintiff over the suit properties till the final disposal of the suit vide T.S. No.20 of 1977.

18. The above orders dated 13.05.1977 and 21.06.1977 respectively passed in M.J.C. No.25 of 1977 arising out of T.S. No.20 of 1977 by the Trial Court itself are going to show that, as the defendants were trying to interfere into the peaceful possession of the plaintiff over the suit properties during the pendency of the suit, for which, they (defendants) were enjoined temporarily from interfering in the possession of the plaintiff over the suit properties till the final disposal of the suit vide T.S. No.20 of 1977 and as such, when the defendants have not entered into the suit properties and they (defendants) are trying to enter into the same, then at this juncture, the findings and observations made by the First Appellate Court holding about the maintainability of the suit of the plaintiff for declaration of title and permanent injunction against the defendants without any prayer for recovery of possession cannot be held as erroneous or illegal in any manner.

19. Therefore, the suit of the plaintiff was maintainable in the present form without prayer for recovery of possession and likewise when the defendants are not disputing the ownership and possession of the plaintiff over the suit properties covered under sabik Plot Nos.473 and 470 corresponding to Hal Plot Nos.764 and 557, then at this juncture, any defect in the report of the Amin Commissioner cannot bring any adverse

impact/affect on the claim of the plaintiff for declaration of his title over the suit properties and permanent injunction against the defendants.

20. The conclusions drawn above in support of the findings and observations of the First Appellate Court on the basis of the above admissions of the defendants to the title and possession of the plaintiff over the suit properties in their pleadings and evidence finds support from the ratios of the following decisions:-

(i) **2020 (1) CCC 394 (Jhar.)—Miss China Moitra Vrs. Dinanath Moitra and others—Written statement**—Averments made in written statement are admissible as per the evidence act.

(ii) **2023 (3) Civil Court Cases 645 (Telengana)—Dantaluri Venkatapathi Raju Vrs. D. Rajeswari Sirisha & Anr.—Evidence Act, 1872—Section 58—Admission**—Admission in the pleadings of written statement are admissible under Section 58 of the Evidence Act.

(iii) **2006 (II) OLR 458 & 2006 (II) CLR 348—Tarini Kanta Giri Vrs. Bhajanananda Giri and others—(Paragraph 3)—Section 58**—Facts admitted by a party need not be proved.

(iv) **2012 (4) CCC 171 (A.P.)—Devarapalli Malla Reddy (died) & Ors. Vrs. Gadiyam Hanumamma & Ors.—Section 17, 18 & 58**—There cannot be a better proof than the admission of a fact in issue by the defendant in a suit.

(v) **2005 (2) CCC 66 (Bombay)—Mrs. Gocul B Naik (deceased through LRs.) vrs. Sanso Chudu Naik & another—Section 58**—Admission was the best evidence which opposite party could rely, though not conclusive, was decisive of the matter, unless successfully withdrawn or proved to be erroneous.

(vi) **AIR 1975 (S.C.) 117—Biswanath Prasad Vrs. Dwarakanath Prasad & AIR 1977 (S.C.) 1724—Thiru John Vrs. The Returning Officer and others—Sections 17, 18 & 58**—Admission made in the pleading is substantive evidence and any such admission, if clearly and unequivocally made, is the best evidence against the party.

(vii) **2015 (II) CLR (S.C.)—1126 & 2015 (3) CCC 222 (S.C.) —Zarif Ahmad (D) through LRs. & another Vrs. Mohd. Farooq—Section 38**—Plaintiff establishing his possession over plot No.358 by oral and documentary evidence- Defendants

possessing plot No.357—Trial Court decreeing suit only in respect of plot No.358—No illegality.

(viii) **2017 (I) CLR (SC)—256—Kundan Lal & another Vrs. Kamruddin & another—Sections 34 & 38**—Concurrent findings of fact that the appellant was in possession and allotted different survey number and that he had no right to claim the suit property are proper.

(ix) **2021 (1) CCC 155 (S.C.)—A. Subramanian & another Vrs. R. Pannerselvam—Suit for injunction**—When the plaintiff has proved his right over property as well as possession over suit property, he is entitled for decree of injunction.

21. When as per the discussions and observations made above, it is held that, the judgment and decree dated 19.08.1988 & 07.09.1988 respectively passed by the First Appellate Court in T.A.20/35 of 1984-87 declaring the title over the plaintiff over the suit properties and restraining the defendants from interfering with the possession of the plaintiff over the suit properties after setting aside the judgment and decree dated 23.07.1984 & 31.07.1984 respectively passed by the Trial Court in T.S. No.20 of 1977 are not erroneous in any manner, then at this juncture, the question of interfering with the same through this Second Appeal filed by the defendants/Appellants does not arise. Therefore, this Second Appeal filed by the Appellants must fail.

22. In the result, the Second Appeal filed by the Appellants is dismissed on merit, but without costs.

The judgment and decree dated 19.08.1988 & 07.09.1988 respectively passed in T.A.20/35 of 1984-87 by the First Appellate Court are confirmed.

**(A.C. Behera),
Judge.**

Orissa High Court, Cuttack.
16th January, 2024//Utkalika Nayak//
Junior Stenographer

