

A.F.R

IN THE HIGH COURT OF ORISSA AT CUTTACK

R.S.A. No.310 of 2014

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

Gandharba Pradhan and others ***Appellants***

-versus-

Bishnu Charan Pradhan and others ***Respondents***

Appeared in this case:-

For Appellants : Mr. B.Ch. Panda, M. Dash and
Debsis Nanda, Advocate

For Respondents : Mr. N.K. Sahu, B.S. Swain and
Pranaya Swain, Advocate
(for the Respondent Nos.1 to 3)

Appeared in this case:-

CORAM:
JUSTICE A.C. BEHERA

JUDGMENT

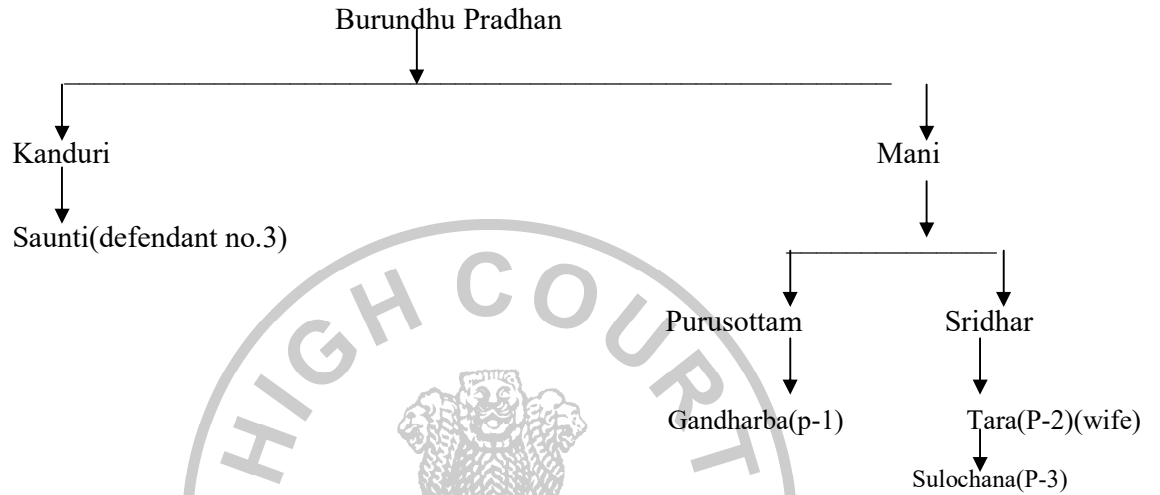
Date of hearing : 16.11.2023 / date of judgment :21.12.2023

A.C. Behera, J. This 2nd appeal has been preferred against the confirming judgment.

2. The appellants and respondents of this 2nd appeal were the plaintiffs and the defendants in the suit vide T.S. No.192 of 2002 and they were the appellants and respondents respectively in the 1st appeal vide T.A. No.73 of 2007.

The suit of the plaintiffs(appellants) vide T.S. No.192 of 2002 was a suit for permanent injunction against the defendants (respondents) under Section 44 of the T.P. Act, 1882.

As per the averments made by the plaintiffs in the plaint, the genealogy of their family is as follows:-



3. According to the aforesaid genealogy provided by the plaintiffs, Burundhu Pradhan was their common ancestor. Burundhu Pradhan died leaving behind his two sons, i.e., Kanduri and Mani. Kanduri died leaving behind his only son Saunti(defendant no.3).

The 2nd son of Burundhu, i.e., Mani died leaving behind his two sons, i.e., Purusottam and Sridhar. Purusottam died leaving behind his only son Gandharba (plaintiff no.1).

Sridhar died leaving behind his widow wife Tara (plaintiff no.2) and one daughter, namely, Sulochana(plaintiff no.3).

4. As per the averments made by the plaintiffs in their plaint, the suit properties described in Schedule-B of the plaint, i.e., Plot No.1576 Ac.0.26 decimals under Khata No.179 in Mouza Rahana under Binjharpur Police Station (Now Bari) in Jajpur District are the undivided

homestead qua dwelling house of the plaintiffs and defendant no.3 and the major settlement record of right of the same stands jointly in favour of the plaintiffs and defendant no.3. The plaintiffs and defendant no.3 have their ancestral dwelling house over Plot No.1563. The suit properties covered under Plot No.1576 described in Scheduled-B is adjacent to their dwelling house situated on Plot No.1563. The plaintiffs have been using the suit properties as their kitchen garden. The plaintiff no.1 had a fuel-shed and cowshed over the suit properties, which was broken in 1999 super cyclone. The plaintiffs have not abandoned their idea of raising a house over the "B" Schedule suit properties. The plaintiffs have also been using the suit properties as their threshing floor. The suit properties described in Schedule "B" vide M.S. Plot No.1576 is within one enclosure and the same is a part and parcel of their dwelling house situated on Plot No.1563. They (plaintiffs) cannot spare any part of the suit properties, because the suit properties is their undivided homestead area and the same has not been partitioned through metes and bounds between them and their co-sharers. They (plaintiffs) have been cremating their ancestors on the suit properties and as such, the graveyard of their ancestors exist over a part of the suit properties described in Schedule-"B" of the plaint. They (plaintiffs) also cannot spare any part of the graveyard of their ancestors and also cannot allow to disturb the sanctity of their graveyard situated on the suit properties, i.e., over Plot No.1576. The suit properties are very much essential for their beneficial enjoyment as their undivided dwelling house.

The defendant nos.1 and 2 are the strangers to their family, i.e., to the family of the plaintiffs and defendant no.3. The defendant nos.1 and 2 have no right of joint possession of "B" schedule suit properties with the plaintiffs. Surprisingly, on dated 12.08.2002, the defendant nos.1 and 2 attempted to enter upon the "B" schedule suit properties forcibly and

tried to interfere with the smooth possession of the plaintiffs over the suit properties and also tried to make construction thereon, but, they (defendant nos.1 and 2) could not succeed in their such attempt by the protests of the plaintiffs. When the plaintiffs protested against the above illegal activities of the defendant nos.1 and 2, then, they (defendant nos.1 and 2) disclosed that, they have purchased 8 anna share of defendant no.3 in suit Plot No.1576. As, the defendant nos.1 and 2 are the strangers, they have no right of joint possession of the “B” schedule suit properties with the plaintiffs and as any entry of the defendant nos.1 and 2 into the suit properties will spoil their family prestige and dignity and as by the entry of the defendant nos.1 and 2 into the suit properties, the female members in the family of the plaintiffs cannot move freely over the “B” scheduled suit properties, for which, the plaintiffs approached the civil court by filing the suit vide T.S. No.192 of 2002 against the defendants under Section 44 of the T.P. Act, 1882 praying for restraining them (defendant nos.1 and 2) from entering upon the suit properties.

5. The defendant no.3 was set ex parte.

The defendant nos.1 and 2 contested the suit of the plaintiff by filing their joint written statement denying the averments made by the plaintiffs in their plaint taking their stands that, the suit of the plaintiffs is not maintainable. The plaintiffs have no *locus standi* to file the suit. They (defendant nos.1 and 2) have already been put into possession of their purchased land from suit Plot No.1576 by their vendor, i.e. defendant no.3. For which, no relief of injunction is maintainable against them. The suit properties was/is not the undivided dwelling house of the plaintiffs. The plaintiffs, defendant no.3 along with their other family members have/had been residing on an another plot vide Plot No.1563 under Khata No.179. The suit Plot No.1576 is neither adjacent nor nearer to Plot

No.1563. The suit properties are open bari and some portions thereof are fellow land. There was no house on the same at any point of time. The suit Plot No.1576 is half kilometer away on road from Plot No.1563, on which the plaintiffs and defendant no.3 are residing. The suit Plot No.1576 is adjacent to the land of defendant nos.1 and 2, i.e., to their Plot No.1578. After purchasing the half share of defendant no.3 from the suit Plot No.1576 through registered sale deed no.1318 dated 26.07.2002, they (defendant nos.1 and 2) are possessing the same by amalgamating their purchased land from the suit Plot No.1576 with their homestead land. Because, the defendant no.3 has delivered the possession of the sold land to them (defendant nos.1 and 2). The suit properties were/are not the undivided dwelling house of the plaintiffs and the same were never used as the graveyard of the family of the plaintiffs and defendant no.3. The residential houses of the plaintiffs and defendant no.3 is on Plot No.1563. That Plot No.1563 and the suit Plot No.1576 is intervened by 15 to 16 private plots of other persons. The plaintiffs and defendant no.3 have been residing separately being separated in mess and properties since last 30 years and they were/are possessing their properties including the suit Plot No.1576 separately as per partition between them. They (plaintiffs and defendant no.3) have transferred parts/portions of their respective allotted properties to others including the defendant nos.1 and 2 according to their sweet will. After partition, the defendant no.3 and his predecessors were in exclusive possession over the Eastern half of suit Plot No.1576. The suit Plot No.1576 was/is not the undivided dwelling house of the plaintiffs and defendant no.3. So the suit of the plaintiffs under Section 44 of the T.P. Act, 1882 against the defendants is liable to be dismissed.

6. Basing upon the aforesaid pleadings and matters in controversies between the parties, altogether five numbers of issues were framed by the trial court in T.S. No.192 of 2002 and the said issues are:-

ISSUES

1. Whether the suit is maintainable?
 2. Whether there was any cause of action to bring the suit?
 3. Whether the disputed property is the undivided dwelling house area?
 4. Whether the defendant nos.1 and 2 are strangers to the family of the plaintiffs?
 5. Whether the plaintiffs are entitled to get the reliefs as sought for?
7. In order to substantiate the aforesaid reliefs sought for by the plaintiffs against the defendants, they (plaintiffs) examined three witnesses from their side as P.Ws.1 to 3 including the plaintiff no.1 as P.W.1 and relied upon two documents on their behalf vide Exts.1 and 2. On the contrary, the contesting defendant nos.1 and 2 examined four witnesses on their behalf as P.Ws.1 to 4 including defendant no.1 as D.W.1 and relied upon series of documents vide Exts.A to Z.
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 plaintiffs and basing upon the findings and observations made by the trial court against the plaintiffs in all the issues, the trial court dismissed the suit of the plaintiffs on contest against the defendant nos.1 and 2 and ex parte against the defendant no.3 without cost vide its judgment and decree dated 12.10.2007 and 06.12.2007 respectively assigning the reasons that, the suit land is not appurtenant or

part and parcel of the undivided qua dwelling house of the plaintiffs and defendant no.3 and the same is not necessary for the beneficial use and enjoyment of the plaintiffs and defendant no.3. So, the plaintiffs are not entitled to get the relief under Section 44 of the T.P. Act, 1882 and the defendant nos.1 and 2 have mutated their purchased land from suit Plot No.1576 into their names and after mutation, separate RoR vide Khata No.934/9 and Plot No.1576/2789 Ac.0.13 decimals has already been prepared in their names and they (defendant nos.1 and 2) are paying rent for their above purchased Ac.0.13 decimals under Khata No.934/9 Plot No.1576/2789 and they (defendant nos.1 and 2) are possessing their above purchased land from suit Plot No.1576 exclusively.

9. On being dissatisfied with the aforesaid judgment and decree of the dismissal of the suit vide T.S. No.192 of 2002 of the plaintiffs, they (plaintiffs) challenged the same by preferring 1st appeal vide T.A. No.73 of 2007 being the appellants against the defendants by arraying them (defendants) as respondents.

10. After hearing from both the sides, the 1st appellate court dismissed the 1st appeal vide T.A. No.73 of 2007 of the plaintiffs on contest vide its judgment and decree against the defendants (respondents) concurring the findings and observations made by the trial court in dismissing the suit of the plaintiffs vide T.S. No.192 of 2002.

11. On being aggrieved with the aforesaid judgment and decree passed by the 1st appellate court in T.A. No.73 of 2007 confirming the dismissal of the suit of the plaintiffs passed by the trial court in T.S. No.192 of 2002, they (plaintiffs) preferred this 2nd appeal being the appellants against the defendants by arraying them (defendants) as respondents.

12. This 2nd appeal has been admitted on formulation of the following substantial questions of law:-

I. Whether the defendant nos.1 and 2 as the stranger purchasers of the Hindu coparcenary properties from one of the coparceners are entitled to joint possession without suing for partition?

II. Whether the suit land is the joint family property qua dwelling house so as to attract the provisions of Section 44 of the T.P. Act and whether the finding of the lower appellate court that, the land in question does not come under the definition of dwelling house so as to attract said provisions of T.P. Act is correct especially in view of the reason assigned that, the dwelling house and the suit land is intervened by some lands of others?

13. I have already heard from the learned counsels of both the sides.

In order to nullify the judgments and decrees of the trial court and as well as 1st appellate court in T.S. No.192 of 2002 and T.A. No.73 of 2007, the learned counsel for the appellants (plaintiffs) relied upon the following decisions:-

- (i) ***AIR 1966 S.C. 470 Para-5, 19 : M.V.S. Manikayala Rao vrs. M. Narasimhaswami and ors.;***
- (ii) ***AIR 1953 SC 487 : Sidheshwar Mukherjee vrs. Bhubaneshwar Prasad;***
- (iii) ***AIR 2007 Ori 65 Para-8;***
- (iv) ***AIR 1990 SC 867 : in Dorab Cawasji Warden vrs. Coomi Sorab Warden;***
- (v) ***(2002) 6 SCC 359 : Srilekha vrs. Parth;***

- (vi) *AIR 1969 Ori Pg. 18 para-1;*
- (vii) *2008 (suppl-1) OLR 477 Para-8;*
- (viii) *Mulla Hindu Law Art.260 and Art.269, Lexicon on Revenue Terms;*
- (ix) *AIR 1960 Cal. 467 Para-17;*
- (x) *AIR 1955 Ori 143 Para-5, Vol XXI CLT Bhabani Bewa & others vrs. Akshoy Kumar Das & another;*
- (xi) *1970(1) CWR 283 : Jati Bewa and others vrs. Shyam Sundar Sahu and others;*
- (xii) *1970(1) CWR 183;*
- (xiii) *1972(1) CWR 221;*
- (xiv) *AIR 1968 Cal 245;*
- (xv) *(2002) 2 CALLT 147; H.C. Sankar Ghose vrs. Rakshit Kumar Cal. HC;*
- (xvi) *AIR 1969 Pat 270 at para3 and 4;*
- (xvii) *AIR 1952 All. 207 at para-8;*
- (xviii) *Civil Appeal Nos.7363, 7364 and 7365 of 2000 : State of Rajasthan and others vrs. Shiv Dayal and others;*
- (xix) *Civil Appeal No.4905 of 2012 : Vishwanath vrs. Sarla Vishwanath Agrawal;*
- (xx) *Civil Appeal No.1374 of 2008 : Union of India (UOI) vrs. Ibrahim Uddin and others;*
- (xxi) *Second Appeal No.50 of 1075 decided on 31.01.1978 : Pratap Chandra Patnaik vrs. Kamala Kanta Das and others;*
- (xxii) *AIR 1966 S.C. 470(V 53 C 98) : M.V.S. Manikayala Rao vrs. M. Narasimhaswami and others;*
- (xxiii) *AIR 1966 S.C. 478 (V 53 C 99) : The Joint Chief Controller of Imports and Exports, Madras (In all the Appeals) vrs. M/s. Aminchand Mutha etc.;*
- (xxiv) *AIR 2007 Orissa 65 : Purna Chandra Mallik vrs. Smit Renuka Jena and Ors.;*

- (xxv) *AIR 2007 Orissa 69 : Smt. Shantilata Masanta and Ors. vrs. Smit Rajanimani Nayak & Ors.;*
- (xxvi) *AIR 1990 S.C. 876 : Dorab Cawasji Warden vrs. Coomi Sorab Warden and others;*
- (xxvii) *AIR 1990 S.C. 879 : M/s. Babu Ram Gopal and others vrs. Mathra Dass;*
- (xxviii) *(xxviii)(2002) 6 SCC-359 : Srilekha Ghosh(Roy)and another vrs. Partha Sarathi Ghosh;*
- (xxix) *AIR 1969 Orissa 19 (V 59 C 10) : Sri Gopinath Deb and others vrs. Jagannath Baral and others;*
- (xxx) *2008(Supp.-I)OLR-477 : Nitei Ranjan Swain and others vrs. Krushna Swain (after his death) Suni Dei and others;*
- (xxxii) *AIR 1960 CALCUTTA 467 (V 47 C 125);*
- (xxxiii) *AIR 1955 Orissa 143 (V 42, C. 38 Sept.) : Bhabani Bewa and others vrs. Akshoy Kumar Das and another;*
- (xxxiiii) *1972(1) C.W.R. 221 : Purusottam Sutar vrs. Chuin Majhi and others;*
- (xxxv) *AIR 1968 CALCUTTA 245 (V 55 C 45) : Manick Lal Singh vrs. Gouri Sankar Shah;*
- (xxxvi) *AIR 1969 PATNA 270 (V 56 C 70) : Kalipada Ash and another vrs. Tagar Bala Dasi and others and*
- (xxxvii) *AIR (39) 1952 Allahabad 207 [C.N.80] (LUCKNOW BENCH) : Bhagirath vrs. Rasul and another.*

14. On the contrary, in support of the impugned judgments and decrees passed by the trial court and as well as by the 1st appellate court in T.S. No.192 of 2002 and in T.A. No.73 of 2007 against the plaintiffs and in favour of the defendant nos.1 and 2, the learned counsel for the respondent nos.1 and 2 (defendant nos.1 and 2) relied upon the following decisions:-

- (i) *AIR 1959 SC 57 : Deity Pattabhiramaswamy vrs. S. Hanymayya and others;*

- (ii) **(1995) 6 SCC 213 : Kashibai W/o Lachiram and another vrs. Parwatibai W/o Lachiram and others;**
- (iii) **(1995) 6 SCC 219 : State of H.P. vrs. Nikku Ram and others and**
- (iv) **1970(1) C.W.R.-283 : Jati Bewa and others vrs. Shyam Sundar Sahu and others.**

The trial court and as well as the 1st appellate court after appreciating the oral and documentary evidence of the parties of both the sides including the village map vide Ext.-G have given same and one finding on facts regarding the physical location (topographical situation) as well as the status of the suit Plot No.1576 that, the houses of the plaintiffs and defendant no.3 on Plot No.1563 is situated at a far distance from the suit Plot No.1576 being intervened by Plot Nos.1565, 1566, 1567, 1568, 1569, 1578, 1579 and 1577 along with a road plot and accordingly, good numbers of plots belonging to other persons are situated in between Plot No.1563 and suit Plot No.1576. There was/is no house of the plaintiffs and defendant no.3 on suit Plot No.1576 at any point of time. So, from the evidence on record and as per the location of the suit Plot No.1576 according to the village map vide Ext.G, the suit Plot No.1576 is not the part, parcel and appurtenant to the houses of the plaintiffs and defendant no.3 situated on Plot No.1563.

15. When it is the settled propositions of law as per the ratio of the decisions of the Apex Court reported in *AIR 1959 (SC) 57 ; Deity Pattabhiramaswamy vrs. S. Hanymayya and others and (1995) 6 SCC-213; Kashibai W/o Lachiram and another vrs. Parwatibai W/o Lachiram and others*— that, the 2nd appellate court, i.e., High Court has no jurisdiction to entertain a 2nd appeal even on the ground of erroneous finding of facts based on appreciation of relevant evidence, except any gross error therein, then at this juncture, when the trial court as well as 1st

appellate court have given same and one finding on facts after appreciating the relevant oral and documentary evidence of both the sides including the village map vide Ext.G that, there was no house of the plaintiffs and defendant no.3 over suit Plot No.1576 and they (plaintiffs and defendant no.3) have their houses on Plot No.1563 and the said Plot No.1563 and the suit Plot No.1576 is intervened by so many plots of other persons and the suit Plot No.1576 has/had never been used as an appurtenant to the houses of the plaintiffs and the defendant no.3 situated on Plot No.1563 and the suit Plot No.1576 is not a part and parcel of the dwelling house of the plaintiffs and defendant no.3 on Plot No.1563, for which, in view of the principles of law enunciated by the Apex Court in the ratio of the above decisions, the question of interfering with the concurrent findings on above facts by the trial court and 1st appellate court through this 2nd appeal does not arise.

16. As per the discussions and observations made above, without interfering with the concurrent findings on facts as appreciated above by the trial court and 1st appellate court, when it is held that, though the Kissam of the suit Plot No.1576 in the RoR is as homestead, but there is totally absence of evidence regarding any house either in past or at present on the same and when the plaintiffs have not been able to establish, about the existence of any house on suit Plot No.1576 at the time of selling of the same by the defendant no.3 in favour of the defendant nos.1 and 2 and when there are materials in the record that, the suit Plot No.1576 is situated at some distance from the houses of the plaintiffs and defendant no.3 being intervened by so many plots belonging to outsiders and when the suit Plot No.1576 is not associated with the houses of the plaintiffs and defendant no.3 on Plot No.1563, then at this juncture, it is held concurring to the findings of the trial court and 1st appellate court that, the suit Plot No.1576 was/is not the

undivided qua dwelling house of the plaintiffs and defendant no.3 either with the theory of convenience or physical affinity or appurtenance or on the theory of physical integrity of parts of the component. For which, the plaintiffs are not entitled for the decree of permanent injunction as per Section 44 of the T.P. Act, 1882 against the defendant nos.1 and 2, because, the suit Plot No.1576 was/is neither the undivided qua dwelling house of the plaintiffs and defendant no.3 nor the defendant nos.1 and 2 are the purchasers of the undivided dwelling house of the defendant no.3.

17. The conclusions drawn above finds support from the ratio of the following decisions :-

(i) ***AIR 1990 (S.C.)-867 : Dorab Cawasji Warden vrs. Comi Sorab Warden and others (Para-21)—Partition Act, 1893—Section 4 and T.P. Act, 1882—Section 44***—Both the Sections under partition acted and T.P. Act are complementary to each other. The terms undivided family and dwelling house” have same meaning in both the sections.

(ii) ***AIR 1959 Orissa-173 : Bikal Swain vrs. Iswar Swain***

Partition Act (1893), S.4—Scope and object—Conditions for applicability—Dwelling house not existing at time of transfer but constructed after words—Privilege of S.4 cannot be claimed.

Partition Act, 1893—Section 4 read with T.P. Act, 1882—Section 44—In order to attract the operation of Section-4:-

(1) There must be a dwelling house in existence belonging to an undivided family;

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Where the finding of the Court was that there was no dwelling house belonging to the undivided family in existence on the date of the transfer, the plaintiff is not entitled to the benefit of S.4 of the Partition Act. (Para-6)

- (iii) **1970(1) C.W.R.-283 : Jati Bewa and others vrs. Shyam Sundar Dashoo and others**—Partition Act, 1893—Section 4—(para nos.2 and 4)—Dwelling house—the question, whether a particular plot of adjacent land is or is not necessary for the enjoyment of a house is to be determined on evidence.

In the present case, the disputed land is situated at some distance from the petitioner's house intervened by lands belonging to outsiders. Section 4 of the Partition Act or Section 44 of the T.P. Act shall not apply.

- (iv) **36(1970) CLT-275 (para-6) : Kuntala Debi and others vrs, Nagu Naik and others**—T.P. Act, 1882—Section 44—Once a garden or open land or a tank is disassociated from the structure or building, it is no longer a dwelling house either with theory of convenience or physical affinity or appurtenance or on the theory of physical integrity of parts of competent.
- (v) **2019(II) CLR-855 : Janardan Das and others vrs. Durgadevi Thakurani and others(Para-10)**—T.P. Act, 1882—Section 44—Where the suit plots are not within the vicinity of the plaintiff's house and homestead and are not indispensable for the use and occupation of his dwelling house, suit under Section 44 of the T.P. Act, 1882 is not maintainable.
- (vi) **2013(Supp-1) OLR-410 : Dillip Kumar Sahoo vrs. Smt. Malati Rout and others(Para-42)**—Partition Act, 1893—Section 4 read with T.P. Act, 1882—Section 44—Gharabari Kissam, which means that, nature of the suit plot is homestead, but in the absence of any evidence with regard to the existence of dwelling house or even house on the suit property, provisions relating to transfer of undivided property, i.e., dwelling house under Section 44 of the T.P. Act are not attracted.

18. On analysis of the materials on record as discussed above along with the propositions of law enunciated by the Apex Court and Hon'ble Courts in the ratio of the aforesaid decisions, it is held that, the provisions of Section 44 of the T.P. Act, 1882 are not attracted to injunct the defendant nos.1 and 2, for which, the decisions relied upon by the

appellants indicated above in Para no.13 of this judgment have become inapplicable to this suit and appeal at hand on facts.

19. As per the discussions and observations made above, when it is held that, the concurrent findings of the trial court and 1st appellate court made in the judgments and decrees of T.S. No.192 of 2002 and T.a. No.73 of 2007 in dismissing the suit of the plaintiffs are not erroneous, then at this juncture, the question of interfering with the same through this 2nd appeal filed by the (appellants/plaintiffs) does not arise. As such, there is no merit in this 2nd appeal filed by the appellants(plaintiffs). The same must fail.

20. In the result, the 2nd appeal preferred by the appellants(plaintiffs) is dismissed on contest, but without cost.

The judgments and decrees passed in T.S. No.192 of 2002 and in T.A. No.73 of 2007 by the trial court and 1st appellate court respectively are hereby confirmed.


(*A.C. Behera*)
Judge

Orissa High Court, Cuttack
The 21st of December, 2023/ Jagabandhu, P.A.