

A.F.R.

IN THE HIGH COURT OF ORISSA AT CUTTACK

SA No.235 of 1995

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

Rabindra Bharasagar

....

Appellant

-versus-

Dukalu Bhaina

....

Respondent

Appeared in this case by Hybrid Arrangement

(Virtual/Physical Mode):

For Appellant - Mr.B.Das, Adv.
On behalf of
Mr.N.C.Pati, Adv.

For Respondent - None

**CORAM:
MR. JUSTICE A.C.BEHERA**

Date of Hearing :08.12.2023:: Date of Judgment :29.01.2024

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

2. The appellant of this Second Appeal was the sole plaintiff in the suit vide T.S. No. 11/3 of 1988-92 and he was the appellant in the first appeal vide T.A. No.1/94.

The respondent of the Second Appeal was the defendant in the suit vide T.S. No.11/3 of 1988-92 and he was the respondent in the First Appeal vide T.A. No.1/94.

The suit of the plaintiff vide T.S. No.11/3 of 1988-92 was a suit for declaration and recovery of possession.

3. The case of the plaintiff as per the averments made in his plaint was that, the suit properties were originally belonged to one Harish Chandra Bharasagar, who is one of the brother of the plaintiff.

4. The suit land is Ac.0.011 dec. out of 0.019 dec. of plot No.2140 under Khata No.793 as per the fourth settlement Record of Right. The same corresponds to consolidation LR. Khata No.327 Plot No.1425, which correspondence to final consolidation Plot No.1055 under Khata No.450.

The original owner of the suit properties i.e. Harish Chandra Bharasagar died leaving behind his only son Pitar Bharasagar and accordingly, Pitar Bharasagar being the successor of Harish Chandra Bharasagar became the owner of the suit properties. But, prior to the consolidation operation in the suit village, Pitar Bharasagar left his village for earning his livelihood and stayed somewhere. His whereabouts remained unknown. As such, the whereabouts of Pitar Bharasagar remained unheard for more than 20 years, for which, he (Pitar Bharasagar) attained his civil death. Due to the aforesaid civil death of Pitar Bharasagar, the plaintiff being his relative, he (plaintiff) was looking after his all the properties including the suit properties left by Pitar

Bharasagar. So, the defendant requested the plaintiff to permit him to construct a cow-shed temporarily on the suit properties with a condition to vacate the same as per the wish of the plaintiff. Accordingly, the plaintiff permitted the defendant to construct a cow-shed on the suit properties temporarily with a condition to leave the same at the wish of the plaintiff. But, during consolidation operation, the defendant raised objection before the consolidation Authorities for recording of the suit properties in his name, though, he (defendant) had no right, title and interest in the same. On the basis of the objection of the defendant, an Objection Case was started before the consolidation Authorities vide Objection Case No.960 of 2010 and the said objection case was decided against the defendant rejecting his claim. The defendant did not choose to prefer any appeal against the order of rejection of his claim in Objection Case No.996 of 2010 by the Consolidation Authorities and accordingly, the final consolidation R.o.R. of the suit properties was published in the name of Pitar Bharasagar vide Consolidable Plot No.1055 under Khata No.450. Then, the plaintiff requested the defendant to vacate the suit plot, to which, the defendant did not agree. For which, the plaintiff approached the Civil Court by filing the suit vide T.S. No.11/3 of 1988-92 against the defendant praying for declaration of his title over the suit properties and for recovery of possession of the suit properties from the defendant.

5. Having been noticed from the Court in T.S. No. 11/3 of 1988-92, the defendant contested the suit of the plaintiff by filing his written statement after taking his stands inter alia therein that, the suit properties were originally belonged to Harish Chandra Bharasagar as per the 4th settlement R.o.R. and the final consolidation R.o.R. of the suit properties under Khata No.450 has been published in the name of Pitar Bharasagar, who is the son of Harish Chandra Bharasagar, but not in the name of the plaintiff. Pitar Bharasagar has not at all absconded and he has not attained his civil death. About 8 years ago, he (defendant) has constructed his residential house over the suit properties after purchasing the same through an unregistered sale deed from Pitar Bharsagar and his vendor Pitar Bharsagar had delivered possession of the suit properties to him (defendant). When, he (defendant) had moved to Hirakud area temporarily for earning his livelihood as a labourer, during the period of his stay there, the said unregistered sale deed in respect of the suit properties has been lost somewhere. The above sale of the suit properties to him (defendant) by Pitar Bharasagar is known to all including the plaintiff. The plaintiff had never claimed his title over the suit properties before the consolidation Authorities stating about the civil death of Pitar Bharsagar. Because, he (plaintiff) is quite aware that, Pitar Bharasagar is alive and the present place of staying of Pitar Bharsagar is known to him

(plaintiff). In view of the wrong decision of the consolidation Authorities, his title i.e. the title of the defendant over the suit properties has been denied by the Consolidation Authorities. But, he (defendant) is in long possession over the suit properties by purchasing the same from Pitar Bharasagar. The plaintiff has no right, title interest and possession over the suit properties, but he (defendant) has the right, title, interest and possession over the same. For which, there was no cause of action for the plaintiff to file the suit against him (defendant). Therefore, the suit of the plaintiff is liable to be dismissed against him (defendant) with costs.

6. Basing upon the aforesaid pleadings and matters in controversies between the parties, altogether 7 numbers of issues were framed by the Trial Court in T.S. No.11/3 of 1988-92, the said issues are:-

Issues

1. *Whether the plaintiff has got right, title and interest over the suit lands?*
2. *Whether the defendant has perfected his right, title, interest by way of adverse possession over the suit lands?*
3. *Whether the suit is bad for non-joinder of necessary parties?*
4. *Whether there is any cause of action?*
5. *To any other relief, the plaintiff is entitled?*
6. *Whether the plaintiff has locus standi to file the suit?*
7. *Whether the Pitar Bharasagar has attained the civil death?*

7. In order to substantiate the aforesaid reliefs sought for by the plaintiff in the suit vide T.S. No.11/3 of 1988-92, against the defendant,

he (plaintiff) examined three witnesses from his side including him as P.W.1 and relied upon several documents on his behalf vide Exts.1 to 7.

8. On the contrary, the defendant examined two witnesses from his side including him (defendant) as D.W.1 without relying upon any document on his behalf.

9. After conclusion of hearing and on perusal of the materials, documents and evidence available in the record, the trial Court answered issue No.1, 3, 4 and 6 against the plaintiff and also answered issue No.2 against the defendant and basing upon the findings and observations made by the Trial Court in all the issues, dismissed the suit of the plaintiff vide T.S. No.11/3 of 1988-92 on contest against the defendant as per the judgment and decree dated 27.11.1993 and 15.12.1993 respectively by assigning the reasons that, the suit properties were originally belonged to Harish Chandra Bharssagar and after the death of Harish Chandra Bharasagar, the suit properties devolved upon his only son Pitar Bharasagar and the consolidation R.o.R. of the suit properties has been prepared by the consolidation Authorities in the name of Pitar Bharasagar and the said Pitar Bharasagar has not attained his civil death and the plaintiff is not the successor of Pitar Bharasagar, for which, the plaintiff has no interest in the suit properties. Likewise, the defendant has also no

interest in the suit properties, because the defendant has not been able to establish him as a purchaser of the suit properties from Pitar Bharasagar.

10. On being dissatisfied with the aforesaid Judgment and Decree of dismissal of the suit vide T.S. No.11/3 of 1988-92 of the plaintiff on contest against the defendant vide its Judgment and decree dated 27.11.1993 and 15.12.1993 respectively, he (plaintiff) challenged the same by preferring the first appeal vide T.A. No.1/94 being the appellant against the defendant by arraying him (defendant) as respondent.

11. After hearing from both the sides, the 1st Appellate Court dismissed to the said first Appeal vide T.A. No.1/94 of the plaintiff against the defendant vide its judgment and decree dtd.11.07.1995 and 26.07.1995 respectively concurring/accepting the findings and observations made by the Trial Court in T.S. No.11/3 of 1988-92 against him (plaintiff/appellant) and confirmed the Judgment and Decree of dismissal of the suit vide T.S. No.11/3 of 1988-92 passed by the Trial Court in T.S. No.11/3 of 1988-92.

12. On being aggrieved with the aforesaid judgment and decree of dismissal of the first appeal of the plaintiff vide T.A. No.1/94 by the 1st Appellate Court vide its judgment and decree dtd.11.07.1995 and 26.07.1995 respectively, he (plaintiff) challenged the same by preferring

this Second Appeal being the appellant against the defendant by arraying him (defendant) as respondent.

13. This Second Appeal was admitted on formulation of the following substantial questions of law.

1. *Whether, the Trial Court has committed illegality in relying upon the Statements of the plaintiff in objection case No.996/10?*
2. *Whether, the Consolidation Authorities had no jurisdiction to decide right, title in respect of non-consolidable land prior to 1989 amendment of the Orissa Consolidation Act (Act 2 of 1989) and whether, the omission by the plaintiff to claim title on the suit land before the Consolidation Authorities on the basis of Civil death of Pitar Bharasagar would estop the plaintiff from claiming title on that basis in the Civil Court?*

14. I have already heard from the learned counsel for the appellant only, as none participated in the hearing from the side of the respondent.

15. It is the undisputed case of the parties that, the suit properties were originally belonged to Harish Chandra Bharasagar and after the death of the Harish Chandra Bharasagar, the suit properties devolved upon his only son i.e. Pitar Bharasagar by way of inheritance and succession.

It is the own case of the plaintiff that, Harish Chandra Bharasagar was one of the brother of the plaintiff, because the plaintiff had several brothers including Harish Chandra Bharasagar (who was the original owner of the suit properties).

16. The plaintiff has claimed his ownership over the suit properties on the basis of succession on the ground of civil death of Pitar Bharasagar, as, he (Pitar Bharasagar) remained unheard for more than 7 years from his village.

The mode and manner of establishing the civil death of a person has already been clarified by the Hon'ble Courts and Apex Court in the ratio of the following decisions:-

(i) **1972 (1) C.W.R. 299—Biswanath Padhi and another Vrs. Dharamu Padhi & 2004 (1) OLR (SC) 527—Indian Evidence Act, 1872—Section 108—burden of proving that person is alive who has not been heard of for 7 years**—This Section is a proviso to Section 107 of the Evidence Act. While Section 107 deals with the presumption of continuance of life, whereas, Section 108 deals with the presumption of death.

Both these Sections come into play when a suit is instituted and provide a procedure when a question is raised before a Court as to whether a person is alive or dead. The propositions regarding the scope of the presumption raising under Section 108 deducible are firstly, the occasion for drawing a presumption under Section 108 of the Evidence Act arises, when the dispute regarding the death of a person who has been unheard of for 7 years or more is raised in a Court of law.

Secondly, the presumption is a rebuttal one; thirdly, there can be no presumption that the person died during or at the end of the said period and lastly, the question as to when he died has to be proved like any other fact.

(ii) **AIR 2002 (Supreme Court) 606—Darshan Singh and Ors. Vrs. Gujjar Singh (Dead) by Lrs. and Ors.—Indian Evidence Act, 1872—Section 108**—there is no presumption of exact time of death under Section 108 of the Evidence Act and date of death has to be established by evidence by person who claims a right for establishment of which that fact is essential.

If there is neither any pleading nor an averment regarding the date of death, the presumption cannot arise. Because, a

person is not heard for more than 7 years, the date of filing of the suit would be considered as date of death, is contrary to the provision of law.

(iii) AIR 2005 (Supreme Court) Page 4407—Indian Evidence Act, 1872—Section 108— if a person has not been heard of for 7 years, there is a presumption of law that, he is dead, but at what time within that period he died is not a matter of presumption, but of the evidence, and the onus of proving that, the death took place at any particular time within 7 years lies upon the person, who claims a right to the establishment of which that fact is essential. The presumption would not be a ground that she had died 7 years prior to the date of institution of the suit.

17. Here in this suit at hand neither there is any pleading nor there is any evidence in the record on behalf of the plaintiff either to show about the date of death or taking place of the death of Pitar Bharasagar at any particular time within 7 years in conformity with the guidelines formulated by the Hon'ble Courts and Apex Court in the ratio of the aforesaid decisions, though it was obligatory on the part of the plaintiff to establish the date and time of death of Pitar Bharasagar by bringing materials into the record, in order to establish his civil death, but the plaintiff has not fulfilled such criterias.

When, the pleadings and evidence of the plaintiff have not fulfilled the above requisite essentials of Section 108 of the Indian Evidence Act, 1872 for establishing the civil death of Pitar Bharasagar, then at this juncture, the findings and the observations made by the Trial Court and the first Appellate Court in their respective judgments and decrees that,

the plaintiff has not become able to establish the civil death of Pitar Bharasagar cannot be held as erroneous or improper under law.

In addition to the above loopholes and lacunas of the plaintiff, it appears from the final order passed by the consolidation Authorities in respect of the suit properties in Objection Case No.996 of 2010 vide Ext.4 that, in that Objection Case No.996 of 2010 vide Ext.4, the defendant (Dukalu Bhaina) was the objector and Pitar Bharasagar was the opposite Party. That objection case was decided finally on 7.11.1987 by the Consolidation Authorities in favour of the opposite Party Pitar Bharasagar after rejecting the objection of the defendant.

18. It also appears from the said final order dated 7.11.1987 passed in that Objection Case No.996 of 2010 that, in the said objection case, the objector Dukalu Bhaina (who is the defendant in the suit) was present personally. But, on behalf of the Opposite Party (Pitar Bharasagar), the plaintiff Rabindra Bharasagar had participated as the representative of Pitar Bharasagar and he (plaintiff-Rabindra Bharasagar) had claimed for recording the suit properties in the name of Pitar Bharasagar, as he (Pitar Bharasagar), is the owner of the suit properties.

19. After hearing from both the sides, the Consolidation Authorities decided that Objection Case No.996 of 2010 in favour of Pitar Bharasagar rejecting the claim of the Objector (who is the defendant in the suit) and

held that, Pitar Bharasagar is the owner of the suit properties. Accordingly, the final consolidation R.o.R. of the suit properties vide Ext.7 was published on dated 14.5.1988 in the name of Pitara Bharasagar indicating the name of Pitar Bharasagar as the exclusive owner of the suit properties.

20. When the plaintiff Rabindra Bharasagar had appeared in the Objection Case No.996 of 2010 before the Consolidation Authorities as the representative of Pitar Bharasagar and had claimed to record suit properties in the name of Pitar Bharasagar without claiming his own ownership and title over the same and without raising civil death of Pitar Bharasagar and when, the final order in Objection Case No.996 of 2010 vide Ext.4 was passed by the Consolidation Authorities on 07.11.1987 rejecting the objection of the defendant Dukalu Bhaina and accepting the title of Pitar Bharasagar over the suit properties and when the final consolidation R.o.R. of the suit properties vide Ext.7 has been published in the name of Pitar Bharasagar and when, that finally published consolidation R.o.R. of the suit properties in the name of Pitar Bharasagar has not been challenged before any statutory higher forum of the consolidation Authorities, then, at this juncture, the plaintiff, Rabindra Bharasagar is estopped under law to claim his title and ownership over the suit properties subsequently by filing the suit vide T.S. No.11/3 of

1988-92, because the finally published R.o.R. by the consolidation Authorities vide Ext.7 in respect of the suit properties in the name of Pitar Bharasagar is a res judicata for the plaintiff to claim his title on the same.

21. The conclusions drawn above against the plaintiff on the ground of estoppel and res judicata under Section 115 of the Indian Evidence Act, 1872 and U/s 11 of the CPC, 1908 finds support from the ratio of the following decisions of the Hon'ble courts and Apex Court:-

(i) **101 (2006) CLT 617 & 2006 (1) CJD (HC) 182 —Shri Paresh Nath Kuanr Vrs. State of Orissa and others—**(Para-8)— Indian Evidence Act, 1872—Section 115 – Estoppel— participation in the meeting without protest— later challenging the validity of the meeting cannot be raised.

(ii) **AIR 2016 (Supreme Court) 3373—Veerendra Kr. Gautam and Ors. Vrs. Karuna Nidhan Upadhyay and Ors.—**(Para-20)— Indian Evidence Act, 1872—Section 115—a candidate, who participated in the interview and challenged it after results were declared. He is estopped to raise the same on the principle of Aprobate and reprobate.

(iii) **1998 (1) OLR 378 & 86 (1998) CLT 650—Panu Biswal and another Vs. Balabati Biswal and others—**(Para-6)— **Indian Evidence Act, 1872—**Section 115— When, a document is filed and relied upon by a party in support of his own case and admitted into evidence at his instance, he cannot turn back and challenge the admissibility or genuineness of the very same document at a later stage.

(iv) **2009 (2) C.J.D. (HC) 71 & 108 (2009) CLT 384—Purna Chandra Panda (dead) through his legal heirs Vs. Chaitanya Mahaprabhu Bije Nizgaon & others—**(Para-13)— **and 1998 (1) OLR 71—Nakula Charan Das Vs. Nishakar Behera & others—** Odisha, Consolidation of holding and prevention of fragmentation Land Act, 1972—Sections 2(g) and 4 – non-consolidable land – the decision taken by the Consolidation Officer as to right, title, interest of non-consolidable land would be valid in

view of amendment of Section 2 (g) by Odisha Act of 2 of 1989 and the same is applicable retrospectively.

(v) **2015 (1) CLR 360—Chintamani Kandi (Dead) after him, his LRs. Para Dei and others Vrs. Arjuna Kandi and Others—(ParaNo.13)**—R.o.R.—R.o.R. prepared by the Consolidation Authority—value thereof— R.o.R. is necessary to enable the Court to pronounce the judgment. Because the Consolidation authority having decided appellant's title in the suit land, they have recorded the same in the name of the appellants. So, the title and possession of the appellants through the same proves.

(vi) **2007 (Supp.-I.) OLR-276—Balaram Bhoi Vs. Babajee Bhoi and others**—(Para-9)—Consolidation R.o.R. – Value thereof. An R.o.R. published by the Consolidation Authorities cannot be varied or set aside by the Civil Court.

(vii) **2017 (1) OJR 393—Krushna Chandra Biswal Vrs. State of Orissa and Others**—Consolidation R.o.R.—value thereof – Consolidation R.o.R. has been published in the name of the state – the said R.o.R. had not been challenged either before the Commissioner of Consolidation or before the Civil Court – it attained its attend finality.

(viii) **50 (1980) CLT 337(FB)—Srinibas Jena and Others Vs. Janardan Jena and others—(Para-18)—CPC 1908—Section 9**—once, the parties work out their rights before the Consolidation Authorities and exhaust their remedies under the Act, they cannot re-agitate the same questions over again in the Civil Court. Those questions stand finally concluded by the decision of the Consolidation Authorities.

It was clearly laid down that a decision of the Consolidation authorities on the question of right, title and interest, which are matters within their jurisdiction, would operate as res judicata and that being so, the Civil Court will have no jurisdiction to hear and decide the suit afresh.

(ix) **2021 (2) CLR 645— Gita Mishra Vrs. Premananda Mishra & Others**—(Para-9)— Consolidation Record of Rights— value thereof – Record of right prepared and finally published under the Orissa Consolidation and Prevention of Fragmentation of Land Act holds good for the right, title and interest in respect of the property so recorded therein in favour of the holder of the said record of rights— Possession in respect of the suit land also stands presumed in favour of the holder of the record of rights.

22. Here in this suit at hand, when the Consolidation Authorities have prepared the final R.o.R. of the suit properties vide Ext.7 in the name of Pitar Bharasagar by publishing the same on dtd.14.5.1988 and when, the said R.o.R. of the Consolidation Authorities in the name of Pitar Bharasagar has not been challenged before any statutory higher forums of the Consolidation Authorities and when the plaintiff has filed the suit vide T.S. No.11/3 of 1988-92 on dtd. 10.3.1988 before final publication of the Consolidation R.o.R. and during the continuance of the Consolidation operation i.e. after passing of the final order in objection case No.996 of 2010 vide Ext.4 on dtd.7.11.1987 in favour of the recorded owner Pitar Bharasagar, then at this juncture, the suit of the plaintiff was not maintainable under law. Because, it is the clarified propositions of law as per the Full Bench decision of the Hon'ble Courts in *AIR 1981 (Orissa) 1 (FB) Srinibas. Jena Vs. Janardan.Jena and others* that:-

OCH and PFL Act, 1972—Section 51 and 4 (4) – Consolidation Authorities have been vested with exclusive jurisdiction to decide right, title and interest of the land during the Consolidation operations and the Civil Courts jurisdiction has been taken away. So on this Ground also the suit of the plaintiff filed on 10.3.1988 during the pendency of continuance of the consolidation operations is not maintainable under law.

23. On analysis of the facts and circumstances of the suit at hand, as per the discussions and observations made above, it is held that, the

findings and observations made by the Trial Court in dismissing the suit of the plaintiff vide T.S. No. 11/3 of 1988-92 refusing all the prayers of the plaintiff including his prayer for declaration of his title over the suit properties and the confirmation to the same by the First Appellate Court in TA No.1/94 cannot be held as erroneous in any manner. For which, the question of interfering with the same through this Section Appeal filed by the appellant (plaintiff) does not arise.

As such, there is no merit in the appeal of the appellant, the same must fail.

24. In the result, the appeal filed by the appellant is dismissed on contest, but without cost.

The Judgment and decree passed by the Trial Court in T.S. No. 11/3 of 1988-92 in dismissing the suit of the plaintiff on contest and the confirmation to the same by the first Appellate Court in T.A No. 1/94 are confirmed.

(A.C. Behera),
Judge.

Orissa High Court, Cuttack.
29.01.2024, //Binayak Sahoo//
Junior Stenographer