

A.F.R.

IN THE HIGH COURT OF ORISSA AT CUTTACK

SA No.188 of 1987

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

Para Mahanta and others *Appellants*

-versus-

Dursu Munda *Respondent*

Appeared in this case by Hybrid Arrangement

(Virtual/Physical Mode):

For Appellants - Mr. S. Mahanta,
Advocate.

On behalf of
Mr.K.B.Patnaik,
Advocate

For Respondent - Mr. A. Routray,
Advocate.

CORAM:

MR. JUSTICE A.C.BEHERA

Date of Hearing :08.11.2023 :: Date of Judgment :30.11.2023

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

2. The predecessors of the Appellant Nos.1 to 6 along with Appellant No.7 of this Second Appeal were the plaintiff Nos.1 to 3 in the suit vide T.S. No.12 of 1978 and they were the Respondent Nos.1 to 3 in the First Appeal vide T.A. No.14/1 of 1983-84-I.

The Respondent No.1 of this Second Appeal was the defendant No.1 in the suit vide T.S. No.12 of 1978 and he was the sole Appellant in the First Appeal vide T.A. No.14/1 of 1983-84-I.

The Respondent Nos.8 and 9 of this Second Appeal were the defendant Nos.2 and 3 in the suit vide T.S. No.12 of 1978 and they were the Respondent Nos.4 and 5 in the First Appeal vide T.A. No. 14/1 of 1983-84-I.

3. The suit of the plaintiffs vide T.S. No.12 of 1978 was a suit for declaration, confirmation of possession and permanent injunction, in alternative for delivery of possession.

4. The case of the plaintiffs in the suit vide T.S. No.12 of 1978 was that, the suit properties are two plots i.e. Plot No.83 measuring area Ac.0.47 decimals under Khata No.16/Ka and Plot No.83/1/416 measuring area Ac.0.12 decimals under Khata No.16/Ka/74 in village Gaduatopa under Barbil Tahasil in the District of Keonjhar.

The suit properties were settled in the name of the plaintiff No.1 and as well as the father of the plaintiff Nos.2 and 3 in Jagiri Case No.116 of 1967 after abolition of the estates as per Orissa Estates Abolition Act, 1951 and accordingly, the plaintiffs being the owners of the suit properties, they had been possessing the same.

In the year 1975, the defendant No.1 forcibly entered into the suit properties, for which, at the instance of the plaintiff No.1, a proceeding under Section 145 of the Cr.P.C. vide Crl. Misc. Case No.60 of 1975 was initiated against the defendant No.1 in respect of the suit properties. In that proceeding under Section 145 of the Cr.P.C., the suit properties were attached. But, subsequent thereto, that proceeding vide Crl. Misc. Case No.60 of 1975 was dropped. For which, the plaintiffs approached the Civil Court by filing the suit vide T.S. No.12 of 1978 against the defendant No.1 arraying defendant Nos.2 and 3 as the proforma defendants praying for declaration of their right, title and interest over the

suit properties and also for confirmation of their possession thereon and also for permanent injunction, in alternative for delivery of possession through Court, if they (plaintiffs) are found to be dispossessed from the suit properties by the defendant No.1 forcibly during the pendency of the suit.

5. The defendant Nos.2 and 3 were set *ex parte* without filing any written statement being the supporters of the plaintiffs.

The defendant No.1 contested the suit of the plaintiffs by filing his written statement denying the averments made by the plaintiffs in their plaint by taking his stands specifically that, the suit properties are under Plot No.86, but not under Plot No.83. The plaintiffs were never in possession over the suit properties. He (defendant No.1) is in possession over the suit properties since last 20 years.

The further case of defendant No.1 was that, if it will be found that, the suit properties are in the name of the plaintiffs, still then, he (defendant No.1) has acquired right, title and interest over the suit properties by way of adverse possession through his continuous peaceful possession over the same for more than 12 years. For which, the suit of the plaintiffs is not maintainable under law and as such the plaintiffs have no cause of action to file the suit. The suit of the plaintiffs is also bad for nonjoinder and misjoinder of parties. So, the suit of the plaintiffs is liable to be dismissed.

6. Basing upon the aforesaid pleadings and matters in controversies between the plaintiffs and defendant No.1, altogether seven numbers of issues were framed by the Trial Court in T.S. No.12 of 1978 and the said issues are:-

Issues

- (i) *Is there any cause of action to bring the suit by the plaintiffs?*
- (ii) *Is the suit barred by limitation?*
- (iii) *Is the defendant No.1 acquired title over the suit land by adverse possession?*
- (iv) *Whether the suit is bad for nonjoinder and misjoinder of the parties?*
- (v) *Whether the suit plots are under Plot No83 and 83/1/416?*
- (vi) *Whether the plaintiffs are the owner of the suit land?*
- (vii) *To what relief the plaintiffs is entitled?*

7. In order to substantiate the aforesaid reliefs sought for by the plaintiffs against the defendant No.1, they examined altogether three witnesses from their side including the plaintiff No.1 as P.W.1 and relied upon several documents on their behalf vide Exts.1 to 12. But, on the contrary, the defendant No.1 examined four (4) witnesses from his side including him as D.W.1 and relied upon two (2) documents on his behalf vide Exts.A and B.

8. After conclusion of hearing and on perusal of the materials, documents and evidence available on Record, the Trial Court answered all the issues in favour of the plaintiffs and against the defendant No.1 and basing upon the findings and observations made in the issues in favour of the plaintiffs and against the defendant No.1, the Trial Court decreed the suit of the plaintiffs on contest against the defendant No.1 and *ex-parte* against the defendant Nos.2 and 3 vide its judgment and decree dated 18.10.1982 and 08.11.1982 respectively and declared the right, title and interest of the plaintiffs over the suit properties and enjoined the defendant No.1 permanently from entering into the suit properties entitling them (plaintiffs) to get possession of the suit properties through Court, as they are found to have been dispossessed in

the meantime during the pendency of the suit assigning the reasons that, the plaintiffs have proved their ownership over the suit properties, but the defendant No.1 has no interest on the same.

9. On being dissatisfied with the aforesaid judgment and decree dated 18.10.1982 and 08.11.1982 respectively passed by the Trial Court in the suit vide T.S. No.12 of 1978 in favour of the plaintiffs and against the defendant No.1, the defendant No.1 challenged the same by preferring the First Appeal vide T.A. No.14/1 of 1983-84-I being the Appellant against the plaintiffs and the Respondent Nos.2 and 3 by arraying them as Respondents.

10. After hearing, the First Appellate Court allowed the First Appeal vide T.A. No.14/1 of 1983-84-I of the defendant No.1 on contest against the respondents vide its judgment and decree dated 31.03.1987 and 10.04.1987 respectively and set aside the judgment and decree of the Trial Court on the ground of inacceptability of the report of Civil Court Commissioner.

11. On being aggrieved with the aforesaid judgment and decree dated 31.03.1987 and 10.04.1987 respectively passed by the First Appellate Court in T.A. No. 14/1 of 1983-84-I in favour of the defendant No.1 and against the plaintiffs, they (plaintiffs) along with proforma Respondent Nos.2 and 3 challenged the same by preferring this Second Appeal being the Appellants against the defendant No.1 by arraying him (defendant No.1) as Respondent.

12. This Second Appeal has been admitted vide its Order No.5 dated 03.02.1988 on formulation of the substantial question of law i.e.:-

“if without recording any finding the appellate court could reverse the decision of the trial court?”

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

14. The suit properties are Plot No.83 under Khata 16/Ka and Plot No.83/1/416 under Khata No.16/Ka/74. The R.O.Rs. of the suit properties vide Exts.1 and 2 under Khata Nos.16/Ka and 16/Ka/74 stand in favour of the plaintiffs.

The defendant No.1 (Respondent in the Second Appeal) has specifically pleaded in his written statement that, the suit properties are in Plot No.86, but not in Plot no.83 and he (defendant No.1) is the owner and in possession over the Plot no.86 and if the suit properties will be found in the name of the plaintiffs, still then, he (defendant No.1) has acquired right, title and interest over the suit properties through adverse possession by remaining in peaceful possession on the same for more than 12 years.

Through the aforesaid pleadings of the defendant No.1 in his written statement in one way, he has claimed his ownership and possession over Plot No.86, but not over any of the suit plots, because the suit plots are Plot No.83 and 83/1/416.

15. Undisputedly, the R.o.Rs. of the suit properties vide Khata Nos.16/Ka and 16/Ka/74 (Exts.1 and 2) stand in favour of the plaintiffs.

As such, when the plaintiffs are claiming their title over suit Plot Nos.83 and 83/1/416, but in one way the defendant is claiming his title over an another plot vide Plot No.86, which is not the suit plot. Undisputedly, the suit plots and the undisputed Plot No.86 are separate plots in the R.O.Rs. and maps.

Through the aforesaid pleadings of the defendant No.1 in his written statement in an another way, he (defendant No.1) has claimed his title over the suit properties through adverse possession.

16. As per law, the claim of adverse possession of the defendant No.1 over the suit plots itself is his indirect admission to the ownership of the plaintiffs over the suit plots and as well as to the identities of the suit properties.

17. On this aspect, the propositions of law has already been clarified in the ratio of the following decisions:-

(i) **2008(4) CCC 239 (P&H)—Gurbax Singh Vrs. Karnail Singh—Adverse Possession—** The plea of adverse possession necessarily implies the admission of the title of the other side.

(ii) **2008 (3) CCC 173 (P. & H.)—Jagat Singh and others Vrs. Srikishan Dass and others—Suit for possession filed by plaintiff—** Defendant raised plea of adverse possession over the suit land—Held, once a plea of adverse possession is raised, it pre-supposes the title of the plaintiff over the suit land.

When the title of the plaintiff over the suit land is deemed to be admitted by the defendant, then the contention/argument of the defendant that, the suit property is not identifiable falls to the ground.

18. When in view of the ratio of the above decisions, as per law, the defendant No.1 has admitted the title of the plaintiffs over the suit properties by claiming his own title on the same through adverse possession without disputing the identities of the suit properties and when the suit plots and the undisputed Plot No.86 are different and separate plots in all the revenue records including in the R.o.Rs. and maps and when the document vide Exts.1 and 2 coupled with the oral evidence adduced on behalf of the plaintiffs are showing the ownership of the plaintiffs over the suit properties, then at this juncture, the suit of the plaintiffs for declaration of their title over the suit properties can never be denied. Because, the defendant No.1 has no claim over any of the suit plots, as he has claimed his ownership over an undisputed plot vide Plot No.86, which is not the suit plot and he (defendant No.1) has admitted to

the ownership of the plaintiffs over the suit properties through his plea of adverse possession.

19. The conclusion drawn above in support of the ownership of the plaintiffs over the suit properties finds support from the ratio of the following decisions:-

(i) **2017 (I) CLR (SC) 256—Kundan Lal & another Vrs. Kamruddin and another—Civil Trial**—When the appellant was in possession and was allotted different survey number, then he has no right to claim the suit property.

(ii) **2018 (II) OLR (NOC) 987—Smt. Susama Rani Dhala Vrs. Nirupama Biswal and another—CPC, 1908—Section 100—Second Appeal**—Title of both the parties with respect to their respective plots is not disputed—Both the Court on an anatomy of pleadings and evidences held that the defendants have not encroached upon the plaintiff's land—There is no perversity in the findings of the Courts below—The appeal fails and is dismissed.

20. When as per the discussions and observations made above, it is held that, the identity of the suit properties are not under dispute and when the title of the plaintiffs over the suit properties finds support from the undisputed documents vide Exts.1 and 2 in their favour and when the defendant No.1 has no claim over the suit plots and when he (defendant No.1) is claiming his title over an undisputed separate plot vide Plot No.86 and when the defendant No.1 has indirectly admitted the ownership of the plaintiffs over the suit properties, then at this juncture, the First Appellate Court should not have discarded the findings and observations made by the Trial Court only on the ground of inacceptability of the report of Civil Court Commissioner without considering the other oral and documentary evidence available in the record. Because, the report of the Civil Court Commissioner is like any

other evidence in the suit and the same is to be considered along with other evidence on Record.

21. On that aspect, the propositions of law has already been clarified in the ratio of the following decision:-

1996 (I) OLR 342—Smt. Lalteomoni Mohanty Vrs. First Addl. Dist. Judge, Cuttack and others—Paragraph 5—CPC, 1908—Order 26 Rule 10—Report of the Civil Court Commissioner—Evidential value— Report of Civil Court Commissioner is like any other piece of evidence in the suit— It is to be considered along with other evidence on record.

22. When the aforesaid other materials in the record than the report of the Civil Court Commissioner are establishing the ownership of the plaintiffs over suit properties and when the Trial Court has declared the right, title and interest of the plaintiffs over the suit properties taking into account all the evidence available on record and when as per law, the report of the Civil Court Commissioner is like any other evidence in the suit and the same is to be considered along with other evidence on Record, then at this juncture, the First Appellate Court should not have set aside the judgment and decree of the Trial Court only on the ground of inacceptability of the report of the Civil Court Commissioner without taking into account the other materials and evidence available in the record.

23. Here in the suit at hand, when other materials and evidence on Record as discussed above are in support of the claim of ownership of the plaintiffs over the suit properties, then at this juncture, the First Appellate Court should not have discarded the findings of the Trial Court assessing the report of the Civil Court Commissioner only.

As per law, it was the duty of the First Appellate Court to assess the entire evidence available on Record without assessing the report of the Civil Court Commissioner only.

24. The law in respect of the duties of the First Appellate Court has already been clarified in the ratio of the following decision:-

2023 (3) CCC 87 (Raj.)—Umar Khan (Deceased) Vrs. Sumer Khan (Now deceased)—Paragraphs 10 & 13.9—CPC, 1908—Section 96—First Appeal—First Appeal is always treated as the continuation of the civil suit—Virtually, First Appeal is re-hearing of civil suit and whole case is open for reconsideration.

25. When the First Appellate Court has passed the judgment in the First Appeal without considering the whole case, but only considering the report of the Civil Court Commissioner, then at this juncture, the judgment and decree of the First Appellate Court cannot be sustainable under law.

26. On analysis of the facts and law concerning to the substantial question of law of this Second Appeal, it is held that, there is justification under law for making interference with the judgment and decree passed by the First Appellate Court through this Second Appeal filed by the plaintiffs (Appellants). For which, there is merit in the Appeal of the Appellants. The same must succeed.

27. In the result, the Appeal filed by the Appellants is allowed on contest, but without cost.

The judgment and decree dated 31.03.1987 and 10.04.1987 respectively passed by the First Appellate Court in T.A. No.14/1 of 1983-84-I are set aside.

The judgment and decree dated 18.10.1982 and 08.11.1982 respectively passed by the Trial Court in T.S.No.12 of 1978 in favour of the plaintiffs and against the defendant No.1 are hereby confirmed.

(A.C. Behera),
Judge.

Orissa High Court, Cuttack.
30th November, 2023//Utkalika Nayak//
Junior Stenographer

