AFR

IN THE HIGH COURT OF ORISSA AT CUTTACK

S.A. No.229 of 1987

An application under Section 100 of the Civil Procedure Code.

Kapila Chandra Panda & Others .... *Appellants*

-versus-

Bishnu Charan Jena & Others .... *Respondents*

Appeared in this case by Hybrid Arrangement (Virtual/Physical Mode):

For Appellants - Mr. D.P. Mohanty, Advocate appearing on behalf of Mr. B.H. Mohanty, Advocate

For Respondents - None.

CORAM:

MR. JUSTICE A.C.BEHERA

Date of Hearing :12.12.2023 :: Date of Judgment :25.01.2024

1. This 2nd Appeal has been preferred against the confirming Judgment.

2. The appellants and the respondents of this 2nd Appeal were the plaintiffs and defendants respectively before the trial court in the suit vide Title Suit No.135 of 1978 and they were the appellants and

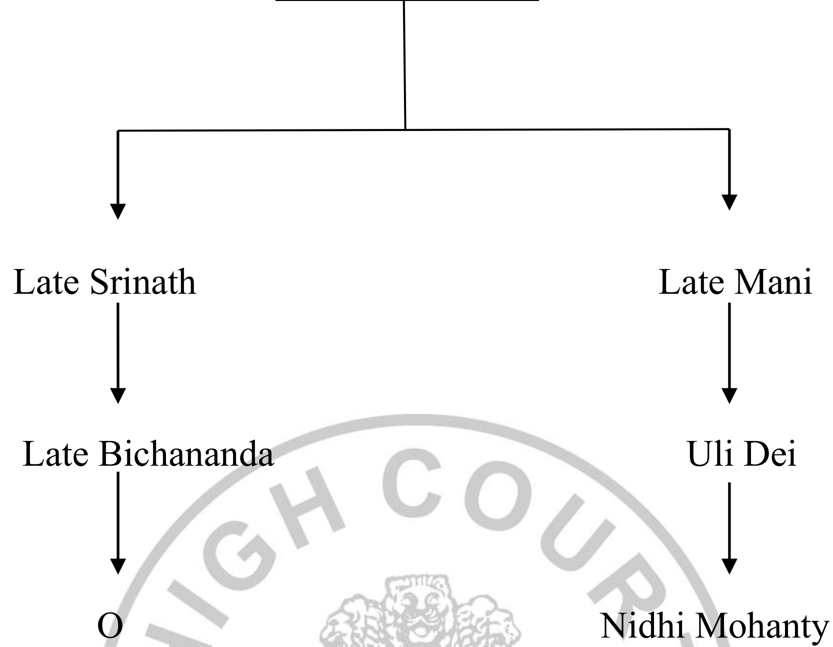
respondents respectively in the 1st Appeal vide Title Appeal No.4 of 1984.

The suit of the plaintiffs (appellants in this 2nd Appeal) vide Title Suit No.135 of 1978 was a suit for declaration of right, title, interest over the suit properties and for recovery of possession of the suit properties from the defendants along with damages and interest.

3. The properties described in Schedule-A of the plaint are the suit properties. According to the plaintiffs, the suit properties were originally belonged to one Bhikari Bramha. The said Bhikari Bramha died leaving behind his two sons i.e. Srinath Bramha and Mani Bramha. Srinath Bramha died leaving behind his only son i.e. Biswanath @Bichananda Bramha. That Biswanath @Bichananda Bramha died on 30.04.1977 during his bachelorhood without leaving any issue. The second son of Bhikari Bramha i.e. Mani Bramha died leaving behind his only daughter i.e. Uli Dei. That Uli Dei died leaving behind her only son Nidhi Mohanty.

The aforesaid genealogy narrated by the plaintiffs in Para No.1 of their plaint stating about the genealogy of Bhikari Bramha is depicted hereunder for an instant reference and so also for an easy understanding:

GENEALOGY



HIGH COURT ORISSA

As per the aforesaid genealogy given by the plaintiffs, after the death of Bhikari Bramha, the properties left by him devolved upon his two sons i.e. Srinath Bramha and Mani Bramha. After the death of Srinath Bramha, the properties left by him devolved upon his son Bichananda Bramha.

After the death of Mani Bramha, the properties left by him devolved upon his only daughter Uli Dei. After the death of Uli Dei, the properties left by her devolved upon her son Nidhi Mohanty.

The suit properties were recorded in the name of Srinath Bramha. After the death of Srinath Brahma, his son Bichanand Brahma was the

owner of the suit properties, being his sole successor. During the life time of Bichananda Brahma, he had expressed his intention to donate his properties i.e. the suit properties in favour of the plaintiff-deity Sri Radharam Dev. But, unfortunately, Bichananda Bramha died without executing any document in respect of the suit properties in favour of the plaintiff-deity. The plaintiff deity is Sri Radharam Dev, is the village deity of the suit village Jabra. The plaintiff Nos.1 to 6 and proforma defendant Nos.3 and 4 are the Marfatdars of the plaintiff-deity Sri Radharam Dev. They (plaintiffs Nos.1 to 6) and proforma defendant Nos.3 and 4 being the Marfatdars of the plaintiff-deity, they were possessing the suit properties left by Bichananda Bramha since the time of death of Bichanand Brahma. The suit properties are the house and homestead properties. Bichanand Brahma was residing in the house situated on the suit properties.

As Bichanand Brahma died issueless, for which, as per genealogy, the suit properties left by him devolved upon Nidhi Mohanty and Nidhi Mohanty became the owner of the suit properties.

After the death of Bichananda Bramha, Nidhi Mohanty being the owner of the suit properties wanted to sell the suit properties along with the house standing thereon. As the plaintiff Nos.1 to 6 and proforma defendant Nos.3 and 4 were possessing the suit properties on behalf of

the plaintiff-deity Sri Radharam Dev, for which, they purchased the suit properties from Nidhi Moahanty on dated 12.12.1977 through registered sale deed on payment of consideration amount of Rs.1,000/- on behalf of the plaintiff-deity. But, as there was some mistakes in that sale deed dated 12.12.1977, subsequent thereto, on dated 05.09.1983, that Nidhi Mohanty executed a correction deed in favour of the plaintiff-deity, correcting the mistakes in the 1st sale deed dated 12.12.1977.

The defendant No.1 is a resident of the suit village Jabra. The defendant No.2 is the wife of defendant No.1. As in the month of Ashada 1977, his house was broken down, for which, he (defendant No.1) had taken shelter in the house of his neighbor. So, the defendant No.1 approached the plaintiffs Nos.1 to 6 for providing him a temporary shelter in the suit house. The plaintiffs after looking to the condition of the defendant No.1, allowed him to reside with his family members including his wife (defendant No.2) in the house situated on the suit properties. But, subsequent thereto, the defendant Nos.1 and 2 tried to not to leave the suit properties. For which, as per the request of the plaintiff Nos.1 to 6 and proforma defendant Nos.3 & 4, the defendant No.1 executed an unregistered Rajinama on dated 09.09.1977 in their favour indicating that, he (defendant No.1) will not claim any right, title and interest over the suit properties, as, he is residing thereon temporarily. But, some months thereafter, the defendant No.1 applied

before the local Tahasildar for mutation of the suit properties into his name. The Tahasildar, allowed his Mutation Application and the suit properties were mutated to the name of the defendant No.1 and after Mutation, the R.o.R of the suit properties was prepared in the name of defendant No.1. When on dated 06.12.1977, the defendant Nos.1 and 2 having their no interest in the suit properties, illegally and unauthorizedly damaged some fruit bearing trees inside the suit properties, then, the plaintiffs requested the defendants to vacate the suit properties in their favour, to which, he (defendant No.1) refused. For which, the plaintiff Nos.1 to 6 on behalf of the plaintiff deity Sri Radha Ram Dev approached the civil court by filing the suit vide Title Suit No.135 of 1978 praying for declaration of the right, title, interest and possession of the deity Sri Radharam Dev over the suit properties and also to declare that, the defendant Nos.1 and 2 have no right, title and interest in the same and to recover the possession of the suit properties from the defendant Nos.1 and 2 and also to direct the defendant Nos.1 and 2 for providing damages worth of Rs.150/- along with compensation.

4. Having been noticed from the court in Title Suit No.135 of 1978, the defendant Nos.1 and 2 being the husband and wife respectively filed their joint written statement challenging the suit of the plaintiffs by taking their stands *inter alia* therein that:

The suit properties were recorded in the name of Srinath Bramha. That Srinath Bramha was the only son of Bhikari Bramha. Mani Bramha is not the son of Bhikari Bramha and he (Mani Bramha) is not the brother of Srinath Bramha. Mani Bramha is totally unconnected with the family of Srinath Bramha. Mani Bramha is not a man of suit village Jabra. Neither Mani Bramha, nor Uli Dei or Nidhi Mohanty had any connection with Srinath Bramha. So, on the death of Bichananda Bramha, Nidhi Mohanty had/has not acquired any interest in the suit properties left by Bichananda Bramha. Nidhi Mohanty is the man of Balungabada and Mani Bramha is the man of Jakhapura. During the life time of Bichananda Bramha, he had transferred Ac.0.01.5 links of land from the suit plot to one Sukadev Pandab, who is in possession over that Ac.0.01.5 links of land. As Bichananda Bramha had no issue, for which, during his life time, he (Bichananda Bramha) had kept the defendant No.2 (Premalata Jena) as his daughter out of love and affection. After the marriage of defendant No.2 with defendant No.1, he (Bichananda Bramha) kept the defendant Nos.1 and 2 in his house in the suit properties and accordingly, even after the death of Bichananda Bramha, the defendant Nos.1 and 2 are residing in the house on the suit properties and they are possessing the suit properties. As Bichananda Bramha died issueless and as the defendant Nos.1 and 2 are in occupation/possession over the suit properties since long, for which, the defendant No.1 had

applied before the Local Tahasildar by filing the Mutation Case No.268 of 1978 for mutation of the suit properties into his name. After making field verification regarding the possession the defendant No.1 over the suit properties, the Tahasildar allowed that Mutataion Case No.268 of 1978 in favour of the defendant No.1 and mutated the suit properties into the name of the defendant No.1. But, in order to grab the suit properties from the defendant Nos.1 and 2, the plaintiffs have managed to create fraudulent documents i.e. a sale deed as well as a correction deed from Nidhi Mohanty, who has no connection with the suit properties and who had/has no interest in the same. He (defendant No.1) has not executed any Rajinama on dated 09.09.1977 in favour of the plaintiff Nos.1 to 6 and proforma defendant Nos.3 & 4. The so-called Rajinama has been fabricated by the plaintiff Nos.1 to 6 and proforma defendant Nos.3 & 4. As the defendant Nos.1 and 2 are in continuous possession over the suit properties since the time of its owner Bichananda Bramha, for which, the plaintiffs are not entitled for any relief prayed by them in the suit vide Title Suit No.135 of 1978. Therefore, the suit of the plaintiffs is liable to be dismissed against them (the defendant Nos.1 and 2).

5. Basing upon the aforesaid pleadings and matters in controversies between the parties, altogether 6 numbers issues were framed by the trial court in Title Suit No.135 of 1978 and the said issues are:

Issues

(1) Is the plaint genealogy correct?
(2) Is Mani a brother of Srinath?
(3) Have the plaintiffs acquired any right to the suit properties?
(4) Have the defendant Nos.1 & 2 acquired right to the suit properties?
(5) Are the plaintiff's entitled to the damages as per schedule B of the plaintiff, if so, then to what amount?
(6) To what other relief?

6. In order to substantiate the aforesaid reliefs sought for by the plaintiffs in their plaint, they (plaintiffs) examined 6 numbers of witnesses from their side including the plaintiff No.4 as P.W.1 and relied upon series of documents on their behalf vide Exts.1 to 6.

But, on the contrary, the defendant Nos.1 and 2 examined 6 witnesses on their behalff including the defendant No.1 as D.W.1 and relied upon series of documents from their side vide Ext.A to D.

7. After conclusion of hearing and on perusal of the materials, documents and evidence available on the record, the trial court answered the issue Nos.1,2,3,5 and 6 against the plaintiffs and also answered the issue No.4 against the defendant Nos.1 and 2 and basing upon the findings and observations made by the trial court in the issues, dismissed the suit of the plaintiffs vide Title Suit No.135 of 1978 on contest against the defendant Nos.1 and 2 and ex parte against the defendant Nos.3 and 4 vide its Judgment and decree dated 31.10.1983 and 08.11.1983 respectively by assigning the reasons that, Mani Bramha is not the brother

of Srinath Bramha and the genealogy given by the plaintiffs in their plaint is not correct. As Mani Bramha is not the brother of Srinath Bramha, for which, Nidhi Mohanty had no interest in the suit properties left by Bichananda Bramha and as such, Nidhi Mohanty had no saleable interest in the suit properties. As Nidhi Mohanty had no saleable interest in the suit properties, for which, the sale deed and correction deed executed by him vide Ext.2 & 2/A in respect of the suit properties, in favour of the plaintiff has not conveyed any interest in favour of the plaintiffs. Therefore, neither the plaintiff-deity Sri Radharam Dev nor the plaintiff Nos.1 to 6 along with proforma defendant Nos.3 and 4 has any right, title and interest in the suit properties. For which, they are not entitled to get any relief as prayed for by them. The trial court also further held that, though, the defendant Nos.1 and 2 are residing in the suit properties, but as they (defendant Nos.1 and 2) are not the successors of the owner Bichanand Brahma and Bichanand Brahma has died without leaving any heir, for which, the defendant Nos.1 and 2 have not acquired any title over the suit properties. Because, mutation of the suit properties in the name of the defendant No.1 without any document of title shall not create any title over the suit properties.

8. On being dissatisfied with the aforesaid Judgment and decree of dismissal of the suit of the plaintiffs vide Title Suit No.135 of 1978 passed on dated 31.10.1983 & 08.11.1983 respectively by the trial court,

the plaintiffs challenged the same by preferring the 1st Appeal vide Title Appeal No.4 of 1984 being the appellants against the defendants by arraying them (defendants) as respondents.

After hearing from both the sides, the 1st Appellate Court dismissed the 1st Appeal of the plaintiffs vide Title Appeal No.4 of 1984 on contest vide its Judgment and Decree dated 22.07.1987 & 29.07.1987 respectively accepting the findings and observations made by the trial court in the Judgment and decree of the suit vide Title Suit No.135 of 1978.

9. On being aggrieved with the aforesaid Judgment and decree of dismissal of the 1st Appeal vide Title Appeal No.4 of 1984 of the plaintiffs passed by the 1st Appellate Court vide its Judgment and decree dated 22.07.1987 and 29.07.1987 respectively, they (plaintiffs) preferred this 2nd Appeal being the appellants against the defendants by arraying them (defendants) as respondents.

10. This 2nd Appeal was admitted on formulation of the following substantial question of law, i.e.

Substantial Question of Law

> *Whether due to want of registration of Ext.1, it is inadmissible in evidence and whether even if it is inadmissible, for that reason, can it be still relied upon for collateral purposes?*

11. I have already heard from the learned counsel of the appellants only, as none appeared from the side of the respondents to participate in the hearing of the appeal.

12. It appears from the record that, Ext.1 (on which the plaintiffs have relied upon) is a Rajinama, said to have been executed by defendant No.1 stating about not to claim any right, title and interest over the suit properties, as he is residing thereon temporarily.

Though the plaintiffs pleaded in their plaint about the execution of the said unregistered Rajinama by the defendant No.1 on dated 09.09.1977 stating about non-claiming of any right, title and interest over the suit properties by the defendant No.1 as, he (defendant No.1) is residing on the same temporarily, but, to which, they (defendant Nos.1 & 2) have seriously denied in Para No.2 of their written statement by stating that, the execution of the so-called Rajinama dated 09.09.1977 vide Ext.1 is false. Because, he (defendant No.1) has not executed that Ext.1. The so-called Ext.1 is a false and fabricated document of the plaintiffs.

So, due to the aforesaid denial made by the defendants in their written statement to the execution of the so-called Rajinama dated 09.09.1977 vide Ext.1, it was obligatory on the part of the plaintiffs to prove about the due execution of that Ext.1 by the defendant No.1.

13. On perusal of the Ext.1, it appears that, the same is not a registered document and the same was written by one Jagadananda Kabi. Though,

HIGH COURT ORISSA सत्यमेव जयते

that Jagadananda Kabi has been examined as P.W.4 on behalf of the plaintiffs, but, he (P.W.4) has not exhibited his signature on it. There is no witness in Ext.1. Though one signature is available in that Ext.1, as the signature of Bishnu Charan Jena and one LTI is also available therein, but neither that signature nor the LTI on the Ext.1 has been proved by anybody including P.W.4 (the so-called scribe of Ext.1). The defendant No.1 (Bishnu Charan Jena) has deposed in his evidence as D.W.1 that, he has not at all executed that Ext.1. So, the execution of Ext.1 by the defendant No.1 is not duly proved.

As the execution of Ext.1 has not been duly proved, for which, the trial court as well as the 1st Appellate Court have not taken the same into account for using the same in favour of the plaintiffs. Because, due to non-proving of the due execution of Ext.1 by the plaintiffs through legally admissible evidence, that Ext.1 has become inadmissible under law.

As the Ext.1 is inadmissible under law, for the reasons assigned above, the same cannot be relied upon for any collateral purpose.

It is the specific case of the plaintiffs that, they have purchased the suit properties through the R.S.D. vide Ext.2 and as well as its correction deed vide its Ext.2/a from one Nidhi Mohanty.

That Nidhi Mohanty has sold the suit properties, as the successors of Bichananda Bramha. But, after appreciating the oral and documentary

evidence of the parties, the trial court and the 1st Appellate Court have come to a conclusion that, the genealogy provided by the plaintiffs in their plaint stating that, Nidhi Mohanty belongs to the branch of Mani Bramha and Mani Bramha was the brother of Srinath Bramha are not correct. Because, Mani Bramha was not the brother of Srinath Bramha. Srinath Bramha was the only son of Bhikari Bramha. Bichanand Brahma was the only son of Srinath Bramha. Bichanand Brahma has expired without leaving any heir. For which, Nidhi Mohanty is a stranger to the family of Bichanand Brahma. As such, Nidhi Mohanty is in no way related to Bichanand Brahma.

The law for proving the genealogy has been clarified by the Apex Court and the Hon'ble Courts in the ratio of the following decisions:

I) **III (2009) Civil Law Times 441 (Mad.) (Para Nos.23 & 24)— R. Pannerselvam Vs. A. Subramanian & Another**—*"Genealogy—Burden of proof—Mere delineation of genealogy not sufficient, but there should be evidence in support of the same."*

II) **AIR 1918 (P.C) 49—Mewa Singh & Others Vs. Basant Singh & Others & AIR 1983 (S.C.) Page 684—State of Bihar & Others Vs. Sri Radha Krishna Singh & Others (Para No.202)—***"In order to succeed in the suit, the pedigree delineated by the plaintiff must be proved by the plaintiff himself/herself through proper evidence."*

HIGH COURT ORISSA सत्यमेव जयते

14. Here in this suit at hand, the trial court and as well as the 1st Appellate Court after appreciating the oral and documentary evidence of both the sides have come to the conclusion that, the genealogy delineated by the plaintiffs in their plaint has not been duly proved. Because, it is found that, Nidhi Mohanty is in no way related to the family of Bichananda Bramha.

The above concurrent findings on facts made by the trial court and 1st Appellate Court that, Nidhi Mohanty (the so-called vendor of the plaintiffs) is in no way related to the suit properties not being the relative of Bichananda Bramha cannot be interfered with in this 2nd Appeal filed by the plaintiffs by this 2nd Appellate Court. Because the power and jurisdiction of interference of the 2nd Appellate Court as per Section 100 (4) of the CPC, 1908 is limited. The 1st Appellate Court is the last court under law for giving findings on facts. On that aspect, the propositions of law has already been clarified by the apex court in the ratio of the following decisions:

> I) **AIR 1959 SC 57—Deity Pattabhiramaswamy Vs. S. Hanymayya & Others, (Para No15) (Three Judges Bench) & 1995 (6) SCC 213—Kashibai & Ors. Vs. Parwatibai & Others—(Para No.12)**—*"CPC 1908—Section 100(4)—2nd appeal—High Court in 2nd Appeal cannot reappreciate the evidence and interfere with the concurrent findings of fact of trial court and 1st Appellate Court.*

High Court has no jurisdiction to entertain a 2nd Appeal on ground of erroneous finding of fact, based on appreciation of relevant evidence, however, gross the error may seem to be."

15. Here in this suit at hand, when after appreciating the oral and documentary evidence of both the parties, the trial court and as well as the 1st Appellate Court have given concurrent findings on facts that, the vendor of the plaintiffs i.e. Nidhi Mohanty has/had no interest in the suit properties, as he is in no way related to the family of Bichananda Bramha and the genealogy delineated by the plaintiffs in their plaint is not duly proved, then at this juncture, the same cannot be interfered with in this 2nd Appeal. So, the concurrent findings on facts given by the trial court and as well as the 1st Appellate Court holding that, the plaintiffs have not been able to prove the genealogy delineated by them in their plaint are not improper in any manner.

16. When, as per the concurrent findings of the trial court and 1st Appellate Court that, the owner of the suit properties i.e. Bichananda Bramha has expired during his bachelorhood without leaving any hier and when, as per law, if any person like Bichananda Bramha expires without leaving any heir/successor, then, the lawful procedures for dealing with the properties left by him like the suit properties has already been clarified in the provisions of law envisaged in Section 29 of the Hindu Succession Act, 1956.

HIGH COURT ORISSA सत्यमेव जयते

As per Section 29 of the Hindu Succession Act, 1956, *If an intestate has left no heir qualified to succeed to his or her property in accordance with the provisions of this Act, such property shall devolve on the government; and the government shall take the property subject to all the obligations and liabilities to which an heir would have been subject i.e. called as ESCHEAT.*

17. On this aspect, the propositions of law has already been clarified by the Hon'ble Courts and Apex Court in the ratio of the following decisions:

I) **2003 (II) OLR 199—Bauribandhu Mohanty Vs. Raghunath Panigrahi & Others—Absence of Heir—***"In absence of any heir or devises, the property shall vest on the State Government, on the basis of doctrine of Escheat."*

II) **AIR 2000 (S.C) 1141 (Para No.13)—Sheo Nand & Others Vs. The Deputy Director of Consolidation Allahabad & Others—** *"Any property in the territory of India which, if this Constitution had not come into operation, would have accrued to His Majesty or, as the case may be, to the Ruler of an Indian State by escheat or lapse, or as bona vacantia for want of a rightful owner, shall if it is property situate in a State, vest in such State, and shall, in any other case, vest in the Union."*

III) **2019 (3) CCC 458 (S.C)—State of Rajasthan & Others Vs. Lord Northbrook & Others (Para No.20)—Hindu Succession Act, 1956—Section 29—Escheat and Bona Vacantia—***"Absence of any heir or the property being abandoned—Pre-condition for initiation of the proceedings for escheating of the property to the Government."*

18. Here in this suit at hand, when the title and possession of the suit properties was with Bichananda Bramha and when the said Bichananda Bramha has expired leaving no heir, then at this juncture, in view of the principles of law enunciated by the apex court in the ratio of the aforeasid decision reported in ***2019 (3) CCC 458 (SC),*** for escheating the suit properties to the Government, initiation of a proceeding at the instance of the Government is necessary. But, there is no material in the record to show about the initiation of any proceeding for Escheating the suit properties to the Government. Though, it appears from the materials in the record that, the defendant Nos.1 and 2 are residing in the suit properties and the suit properties have been mutated into the name of the defendant No.1 as per the Mutation Case No.268 of 1978 vide Ext.A and he (defendant No.1) has been paying rent in respect of the suit properties to the Government as per the rent receipt vide Ext.B series, still then, the above possession of the defendant Nos.1 and 2 and as well as mutation of the suit properties to the name of the defendant No.1 will never create any title of the defendant Nos.1 & 2 over the suit properties. Because,

HIGH COURT सत्यमेव जयते ORISSA

they (defendant Nos.1 and 2) are neither the successors of Bichananda Bramha nor they have purchased the suit properties from Bichananda Bramha.

The legal effect of mutation and payment of rent has already been clarified by the Hon'ble Courts and Apex Court in the ratio of the following decisions:

I) **(1996) 5 SCC 618—Durga Das Vs. The Collector & Others—***"Mutation entries in revenue record do not confer any title to the property. It is only an entry for collection of the land revenue from the person in possession."*

II) **1997 (1) Apex Court Journal 105 (S.C.)—Sankalchan Jaychandbhai Patel & Others Vs. Vithalbhai Jaychandbhai Patel & Others, (1996) 7 Supreme 658 & (1996) 7 (Supreme) Page-6—***"Mutation entries does not create any title or interest. They only enable the State to collect the revenue from the person in possession."*

III) **2021 (4) Civ.C.C. 244 (Gau.)—Baniz Uddin & Others Vs. Golapi Nessa—***"Mutation—Entry of names in record of right do not vest any ownership over said land—Same is only indicative about possession over suit land."*

IV) **32 (1990) OJD 560 (Civil) Ramakanta Padhi Vs. Bholanath Praharaj (Para No.8)—** *"Rent receipts and mutation orders are good evidence of possession—Facts and circumstances to be taken into consideration."*

19. When the defendant Nos.1 and 2 having no title at all over the suit properties, they are residing on the same on payment of rent to the Government on the basis of the mutation of the suit properties into the name of defendant No.1 and when the plaintiffs have no interest at all over the same in any manner, as per the concurrent findings of the trial court and 1st Appellate Court and when the documents relied upon by the plaintiffs vide Ext.1 has become inadmissible under law for the reasons assigned above, then, at this juncture, the question of interfering with the Judgment and decree passed by the trial court and the 1st Appellate Court in dismissing the suit of the plaintiffs vide Title Suit No.135 of 1978 through this 2nd Appeal filed by the appellants does not arise at all. For which, there is no merit in the appeal of the appellants, the same must fail.

20. *In the result, the 2nd Appeal filed by the appellants is dismissed on merit, but without cost.*

21. The Judgments and Decrees passed by the trial court in Title Suit No.135 of 1978 and by the 1st Appellate Court in Title Appeal No.4 of 1984 are confirmed.

(A.C. Behera),
Judge.

Orissa High Court, Cuttack.
25th January, 2024//Rati Ranjan Nayak//
Senior Stenographer