

**ORISSA HIGH COURT : CUTTACK**

**R.S.A. NO. 5 OF 2002**

From a judgment and decree dated 08.05.2002 and 20.06.2002 respectively passed by Shri K.C. Mohapatra, learned 1<sup>st</sup> Ad hoc Additional District Judge Bhubaneswar in Title Appeal No. 1/2002 (T.A. No.12/2001) confirming the judgment and decree dated 23.03.2001 and 9.4.2001 respectively passed by Shri S.K. Pathy, learned Civil Judge (Sr. Division), Bhubaneswar in Title Suit No. 176 of 1989.

Bahuda Sahoo

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..... Appellant

***-versus-***

State of Orissa & others

..... Respondents

For Appellant : M/s. R.K. Mohanty , Sr. Advocate,  
B.S. Tripathy,  
M.K. Rath and J. Pati.

For Respondents : M/s. S.P. Mishra, Sr. Advocate &  
P.V. Balakrishna.  
(Respondent No.3)

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***Decided on 30.10.2013***  
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**P R E S E N T :**

**THE HONOURABLE MR. JUSTICE M. M. DAS**  
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***M.M. DAS, J.***

This Second Appeal has been preferred by the plaintiff – appellant against a confirming judgment in a suit for declaration of right, title, interest and confirmation of possession, in the alternative, for recovery of possession.

2. This Second Appeal has been admitted on the following substantial questions of law :-

- I. Whether the plaintiff has acquired occupancy right in respect of the suit land by virtue of the provisions enshrined under Section 13 (2) read with Section 24 of the Orissa Tenancy Act. The raiyati right is carved out by the deeming provision in the said section ?
- II. Whether Section 8 of the Orissa Estates Abolition Act confers tenancy right on the plaintiff. The predecessors were not required to approach the O.E.A. court for settlement of the suit land in their favour after vesting of the intermediary right ?
- III. Whether the learned lower appellate court was correct in his assessment on Ext.5 (permanent lease dated 27.03.1942) Ext.7 (Tenants Ledger of 1964 – 65) and Ext.9 (Rent Receipts). Exts. 5 and 9 being documents of 30 years old and coming from proper custody, should have been accepted by drawing presumption under Section 90 of the Evidence Act ?
- IV. Whether in the facts and circumstances of this case, the ex-proprietor having submitted Jamabandi (Ext.8) in favour of the plaintiff and the State having accepted the Land Revenue till 1965 (Ext.9), the plaintiff's right over the suit land is not extinguished and his tenancy right has to be upheld ?

3. The suit filed by the appellant, i.e., T.S. No.176/1989 was dismissed by the learned trial court by judgment and decree dated 23.03.2001 and 09.04.2001 respectively. The plaintiff carried T.A.

No.1/2012 of 2002/2001 to the learned lower appellate court, which has been dismissed by confirming the judgment of the learned trial court by his judgment and decree dated 08.05.2002 and 20.06.2002 respectively. Hence, this second appeal.

4. The plaintiff – appellant's case was that the land in dispute, was under the ex-proprietor of Patia, which was subsequently acquired by the Raja of Kanika in the year 1942. The suit land was recorded Anabadi non-cultivable, kisam (Jhati jungle). After vesting of the Estate, the ex-intermediary submitted Ekipadia in the name of the plaintiff's father, which was accepted by the State and on that basis, the plaintiff's father was paying rent to the Government till 1965. In 1973 settlement ROR the land measuring an area Ac.9.60 decimals in Mouza – Chandrasekharapur, which is the disputed property, was recorded in the name of the Government. When the defendants claimed possession over the property and disputed the possession of the plaintiff, the plaintiff filed a suit. The State, in its written statement, denied the claim of the plaintiff, inter alia, pleading that after vesting of the property, the same belongs to the State. The Tenants Ledger was disputed by the defendants – State and it was averred that the land was given to the Orissa State Housing Board (OSHB), which was the defendant in the suit. The G.A. Department, which was the owner of the property, also subsequently leased out a part of it to the State Bank of India for construction of staff quarters as per the registered lease deeds dated 21.03.1989 and

21.02.1992 and the defendant No.3 – State Bank of India is in possession over it since 26.10.1992 and has raised a boundary wall. In the ROR of 1973 and 1988, the name of the Government, i.e., G.A. Department has been recorded. Thus, the plaintiff has no subsisting right, title and interest or possession over the suit property. The documents are all created, fabricated and manufactured and not genuine. During the course of argument, various contentions were made by the respective parties with regard to the question of law, on which this Second Appeal has been admitted.

5. Mr. R.K. Mohanty, learned senior counsel appearing for the appellant submitted that the appellate court has recorded a concurrent finding in paragraph – 11 of its judgment that the plaintiff's predecessors were settled raiyats of village Chandrasekharapur and, if, lease of such property is established, the plaintiff is to be bestowed with occupancy right. He further submitted that the learned courts below have committed an error of law in disbelieving Exhibits- 5 to 8 on the ground that they are manufactured and fraudulent document, even though no such stand was taken in the written statement filed by the defendants and no fraud was pleaded by them. Mr. Mohanty drew attention of the Court to Exhibits- 5 to 9 and submitted that the said documents are the original documents, which are more than thirty years old and the same being in favour of the plaintiff and having come from his custody, they are admissible under Section 90 of the Indian Evidence

Act and the learned courts below acted contrary to law in shifting the burden of proof in respect of such documents to the plaintiff, instead of attaching the statutory presumption under Section 90 of the Evidence Act. He further contended that though it was admitted by the State authorities that they are in custody of the original records and orders were passed to produce such records, the same having not been produced, the courts below should have drawn adverse inference under Section 114, Illustration (G) and Section- 89 of the Evidence Act. The courts below should have presumed the correctness of the said documents.

6. Learned Advocate General appearing for the defendants-State, on the contrary, submitted that the defendants disputed in the written statement the genuinity of the certified copies produced by the plaintiff as well as pleaded that Ext. 7 was never issued from the Tahasil Office. He further submitted that D.W.1, during cross – examination by the defendant No.2, categorically made a statement that Ext.7 is a forged document and the sabik tenancy ledger of Mouza – Chandrasekharpur is not available in the Tahasil office or in the office of the R.I., Kalarahanga.

7. I have also heard Mr. P.V. Balkrishna, learned counsel appearing on behalf of the State Bank of India – respondent No.3, who supported the judgment of the learned courts below and submitted that there is absolutely no evidence from the side of the plaintiff that he has exercised any sort of right over the disputed property

inasmuch as a portion of the property has been transferred in favour of the State Bank of India, over which the bank has raised construction and is in possession thereof.

8. In this backdrop, on perusal of the impugned judgment of the learned courts below, it would be seen that the learned lower appellate court, in paragraphs – 13 to 23 of the judgment, has referred to all the evidence, both documentary as well as oral, in coming to the conclusion that the exhibits, on which the plaintiff claims his title, are not genuine and, hence, not acceptable. The said finding of fact cannot be gone into in a second appeal as there is no error committed in appreciating the said evidence.

9. With regard to the question as to whether the documents should have been accepted being thirty years old documents, it is to be noted that accepting a document under Section 90 of the Evidence Act will not have any presumptive value, with regard to the correctness of the same. If the documents have been found to be not genuine, the question of applicability of provision of Section 13 (2) r/w Section 10 of the Tenancy Act will not arise in the present case. Further, when admittedly, the land is in possession of the Orissa State Housing Corporation as well as the State Bank of India and the State Government in its G.A. Department, Section- 8 of the OEA Act will have no application, as there is no finding of fact that on the date of vesting, the plaintiff was in possession over the disputed property.

10. In view of the above conclusion, this Court finds that the substantial questions of law, on which the second appeal was admitted, are not pure questions of law, but are dependant on facts brought out during the course of hearing of the suit. Hence, the questions are mixed questions of fact and law, which cannot be gone into in a second appeal under Section 100 CPC.

11. This Court, therefore, finds no reason to interfere with the confirming judgment passed by the learned lower appellate court, by which the judgment of the learned trial court was confirmed and dismisses the Second Appeal being devoid of merit, but in the circumstances without any cost.

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**M. M. DAS, J.**

**Orissa High Court, Cuttack.  
October, 30th ,2013/Subha.**

