

HIGH COURT OF ORISSA, CUTTACK

R.S.A. No. 121 OF 2007

From the judgment and decree dated 18.01.2007 and 20.02.2007 respectively passed by the learned Additional District Judge, Jharsuguda in R.F.A. No. 14 of 2006.

Dr. Nityananda Behera

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Appellant

Versus.

Surendra Dehuri & ors.

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Respondents

For Appellant : M/s.N.C.Pati, B.Pati, S.Misra,
A.K.Das, N.Singh, M.R.Dash,
B.Das, advocates.

For Respondents: M/s.R.K.Mohanty, D.Mohanty,
A.P.Bose, S.N.Biswal,
S.K.Mohanty, M.R.Dash,
S.Mohanty, advocates.

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PRESENT :

THE HON'BLE MR. JUSTICE D.DASH

Date of hearing : 18.06.2015 : Date of judgment: 30.06.2015

The appellant in this appeal calls in question the judgment and decree passed by the learned Additional District Judge, Jharsuguda in R.F.A. No. 14 of 2006 in setting aside the judgment and decree passed by the learned Civil Judge (Junior Division), Jharsuguda in Title Suit No.32/35 of 1993/98. The trial court decreed the suit filed by the appellant as the plaintiff for declaration of right, title and interest over the suit land and recovery of possession with permanent injunction.

The lower appellate court in the appeal filed by the unsuccessful defendants (respondents) has set aside the said judgment and decree passed by the trial court.

2. For the sake of convenience, to bring in clarity and avoid confusion, the parties hereinafter have been referred to as they have been arrayed in the trial court.

3. The plaintiff's case is that he had purchased an area of Ac0.01 decimals from out of the land under H.S. Plot No. 1224 recorded in Khata No. 1 from one Narayan Dehury and his minor sons by Registered Sale Deed dated 02.12.1966. It is his case that pursuant to the said sale he was delivered with the possession of the said land and continued to be in possession since then. It is also his case that this land he purchased comprises of the land under M.S. Plot No. 604 measuring Ac0.003 decimals and 604/3947 measuring Ac0.002 decimals over which he has his pucca building and over the rest he had constructed two khapparelli roofed rooms. The suit land comprises of M.S.Plot No. 604/3947 measuring Ac0.002 decimals and M.S.Plot No. 604, measuring Ac0.001 decimal. It is his further case that some time in the year 1991, the father of the defendants requested the plaintiff to allow them to stay on the portion of the land under M.S. Plot No. 604/3947 measuring Ac0.002 decimals under Khata No. 318 with assurance that they would vacate some time after construction of their house in another place. The plaintiff then permitted the father of the defendants to stay in one of the said

rooms. It is further stated that after the death of the defendant's father, the defendants demolished one room out of those khapparelli roofed rooms constructed by the plaintiff and using same building materials, made a boundary wall close and adjacent to the southern wall of the plaintiff's pucca building. It is further alleged that they made holes in the southern wall of the plaintiff's pucca building despite of his protest and that resulted obstruction in proper ventilation to the plaintiff's house. It is further alleged that the father of the defendants prior to his occupation of the room as stated above fraudulently got his name recorded in the Major Settlement so far as M.S. Plot No. 604/3947 is concerned without knowledge of the plaintiff. So, when the defendants openly declared that they would not vacate the possession of the suit land in favour of the plaintiff which their father had undertaken to do, the plaintiff had no other alternative but to file the suit with the relief as stated above.

4. The defendants resisted the suit, denying the averments as regards sale of the land in respect of Plot No. 603 as void being hit under the provision of Section 22 of the OLR Act. It is their case that the suit land does not comprise of Plot No.604/3947 under M.S. Khata No. 318 measuring Ac0.002 decimals and Ac0.001 decimal of Plot No. 604 under M.S.Khata No.321. Their positive case is that their father constructed the house prior to 1967 and as such they have been residing over there since then, continuously paying land revenue to the State and holding tax to the Municipal authorities,

while going for addition and alteration in the said construction from time to time as and when found so necessary. They asserted that the possession of the land described in Schedule-A of the plaint was never given to the plaintiff and he had never possessed the same. With all these pleadings, they prayed to non suit the plaintiff.

5. On such rival pleadings, the trial court framed as many as nine issues and taking up issue nos. 1 and 2 concerning right, title and interest of the plaintiff over the suit and possession as claimed, on going through the evidence as also the report of the Civil Court Commissioner and his evidence, decreed the suit declaring right, title and interest of the plaintiff over 'A' Schedule land and the house situated over it, and directed the defendants to demolish the boundary constructed thereon within a period of two months and permanently restrained them not to damage the southern wall of the building of the plaintiff.

6. The unsuccessful defendants then carried an appeal which came to be heard by the learned Additional District Judge, Jharsuguda. The finding rendered by the trial court on issue nos. 1 and 2 were put to serious challenge in the said appeal with reference to the evidence available on record as well as of the Civil Court Commissioner. The lower appellate court taking the exercise of independent analysis of evidence has set aside the said finding and that has led to the dismissal of the suit.

7. At this stage, it is worthwhile to mention that earlier the suit was disposed of by judgment dated 08.09.1998 and the appeal being carried against the same, the suit had been remanded with necessary direction to decide the issues on assessing the probative value of the report of the Survey knowing Commissioner and upon due analysis of evidence.

8. The present appeal has been admitted on the following substantial questions of law:

(i) Whether the lower appellate court is justified in reversing the finding of the trial court?

(ii) Whether the finding of the lower appellate court is justified for non-consideration of the materials available on record (Ext-1- sale deed and evidence of P.Ws. 1 and 2) from their proper perspective?

9. The learned counsel for the appellant contends that the findings of the lower appellate court by upsetting that of the trial on court issue nos. 1 and 2 is perverse as no consideration has been bestowed upon the evidence available on record and the report of the Civil Court Commissioner as well as his evidence have not been appreciated in their proper perspective. It is his further contention that the lower appellate court has simply been swayed away by some finding by the Civil Court Commissioner indicated in the report without testing those with other evidence running counter to it.

10. Learned counsel for the respondents on the other hand submits that the error committed by the trial court in over-looking

most important part of the report of the Civil Court Commissioner which has been duly proved in the case and his evidence directly clinching issue has been rightly rectified by the lower appellate court and therefore, the finding of the lower appellate court reversing finding of the trial court on that score can never be said to be perverse and rather it is inconsonance with due and proper appreciation of evidence on record and thus it has been rightly so held.

10. In order to answer the substantial questions of law as indicated above, it's only required to be examined as to whether the lower appellate court has rightly answered in negative that the land under Major Settlement Plot No. 604/3947 is the land covered under Ext. 1. This was the question which was required to be ascertained by the Civil Court Commissioner by comparison of land records, maps and upon measurement in field if so necessary. From the report of the Civil Court Commissioner and his evidence it reveals that he has referred to the map of the Hamid Settlement and the map prepared during Major Settlement. On examination by comparing both, he has stated that Hamid Settlement Plot No. 1224 measuring an area Ac. 587 decimals corresponding to Major Settlement Plot Nos. 591, 599, 603, 604/3947 607, 608, 610, 612 to 620, 3712, 599 and 591, and part of the plots bearing No. 590, 592, 593, 600, 601 and 611. On field measurement, the area of plot No. 603 has been found 600 sqft. i.e. Ac. 0.03 decimals. The Commissioner on measurement has

further found the plaintiff's area in field to be 50 ft (east -west) X 35 ft (north-south) coming to 1750 sqft or to say Ac. 0.040 decimals. The possession of the plaintiff has been found to be with respect to 150 sqft i.e. to Ac. 0.003 decimals out of M.S. Plot No. 600. The Commissioner has also measured the house area of the defendants and found it to be 17 ft in length and 5 ft in width from the land under plot no. 604 coming to 165 square feet or to say Ac0.004 decimals. The area of the land under plot no. 604/3947 in field has been found to be at a distance from the pucca house under the plaintiff. Thus, it has been reported that the said land is not concerned with the land sold under the Ext. 1 and as described therein. The evidence of the Commissioner is clear on the point of occupation of the defendants of land measuring Ac.O.002 decimals from out of land under plot No. 604/3947 which is part of land under Hamid Settlement Plot No. 1224. Thus, it is seen from the evidence on record that land sold under Ext. 1 does not cover the land under plot no. 604/3947 measuring Ac. 0.002 decimals.

In view of this, the trial court's finding that the plaintiff has the title over the said land and the defendants are liable to be evicted is untenable. This is what has been said by the lower appellate court. When the report of the Civil Court Commissioner and his evidence have not been shaken in order to show that there was no sale of land vide Ext. 1 so far as the M.S. Plot No. 604/3947 measuring an area Ac. 0.02 decimals is concerned by Narayan and his sons to the

plaintiff, the straight cut answer emerges that the lower appellate court is justified in reversing the finding of the trial court and thereby has rightly non-suited the plaintiff. The substantial questions of law are accordingly answered.

11. In the result, the appeal stands dismissed and in the peculiar facts and circumstances without cost.

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D. Dash, J.

Orissa High Court, Cuttack
The June, 2015/Routray