

**A.F.R.**

**SA No.170 of 1993**

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## Appellants

*Versus*

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## Respondents

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Miss. S. Mishra, ASC

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Mr.D.C. Choudhury, Advocate  
Mr. K.P. Mohanty, Advocate

## JUDGMENT

**PRESENT:**

**THE HONOURABLE DR. JUSTICE A.K.RATH**

Date of hearing: 23.03.2017 : Date of judgment: 31.03.2017

**Dr. A.K.Rath, J** Defendants are the appellants against a confirming judgment in the suit for permanent injunction.

**2.** The case of the plaintiffs is that originally suit property belonged to one Radhashyam Dutta. His name was recorded in 1930 settlement ROR. After his death, his widow, Sundarmani Dasi transferred her share in property measuring Ac.1.76 dec. 2½ kadies of land along with other plots in favour of Sri Sri Durgadevi Thakurani marfatdar Ananta Kumar Bose, son-in-law of the plaintiff's father's brother and Atul Chandra Ray, plaintiff's father by

means of registered sale deed dated 19.11.1958 and delivered possession. Sri Sri Durgadevi Thakurani is the private deity of the vendee. Similarly, one Jyotshna Rani Dutta, wife of Subodha Kumar Dutta, transferred her share of property in favour of the deity by means of registered sale deed dated 24.7.1959 and delivered possession. Thus the plaintiffs' family became owner in possession of Ac.1.88 dec. of land appertaining to plot No.259. To press the legal necessity, the marfatdar of the deity sold the land to the plaintiffs by means of registered sale deed dated 7.7.1961 for a valid consideration and delivered possession. Thereafter, plaintiffs planted coconut trees and other fruit bearing trees over the same and enjoyed the usufructs. Towards the north of the land, there exists a branch canal. The suit land along with other lands of the plaintiffs measuring Ac.0.12 dec., which are five feet away from the embankment, are used as Bari. A thatched house and a pond exist over the same. The suit land along with other land admeasuring Ac.1.43 dec. appertaining to Khata No.34, Plot Nos.566 and 507 has been recorded in favour of the plaintiffs in 1977 settlement ROR. In the consolidation proceeding, the suit land has not been recorded in the consolidation ROR. The consolidation ROR has been prepared in respect of Ac.1.33 dec. appertaining to Khata No.352 instead of Ac.1.43 dec. The rest Ac.0.10 dec. has been recorded as Government land wrongly. Basing on the wrong recording in the consolidation record-of-right, the Tahasildar, Salipur, defendant no.4, initiated Encroachment Case No.24 of 1984 against the plaintiffs in respect of Ac.0.07 dec. of land on the ground that they have encroached upon the land since 1981-82. The father of the plaintiffs was an old man and looking after the property. Under a bona fide belief that the rent has not been paid and the authorities settled the land in their favour,

they paid rent for the year 1985-86 also. The initiation of encroachment case is a nullity. Defendants 1 and 2 have no semblance of right, title and interest over the property in question. They intended to put the coconut trees standing over the suit plot into auction. The plaintiffs are the settled raiyats in the village. They have right, title and interest and occupancy raiyats over the suit land.

**3.** The case of the defendants is that in the consolidation proceedings, the suit land has been recorded as Government land. Encroachment proceeding was initiated against the plaintiffs for their occupation of the Government land in the year 1981-82. The plaintiffs admitted the encroachment and paid the back rent and penalty. The suit land was leased out temporarily to the plaintiffs for cultivation purpose by way of auction. It belongs to Irrigation Department. The right, title and interest have been decided by the consolidation authorities and as such, the suit is hit under the principle of res judicata.

**4.** Stemming on the pleadings of the parties, learned trial court struck seven issues. To substantiate the case, the plaintiffs had examined four witnesses and on their behalf, ten documents had been exhibited. On behalf of the defendants, two witnesses had been examined and two documents exhibited. Learned trial court came to hold that in the consolidation proceeding, the suit land had been recorded in the name of Irrigation Department. Though D.W.1 has stated that objection was filed by the Irrigation Department in the consolidation proceeding against the plaintiffs, the same was neither pleaded nor any document produced. The suit land had been recorded in the name of the plaintiffs in the Hal settlement ROR of the year 1976-77. The defendants had failed to prove on what basis

the suit land had been recorded in the name of the Irrigation Department in the consolidation proceeding and as such, the recording of the suit land was wrong and without any basis. Defendants had not acquired right, title, interest and possession over the suit land by virtue of the consolidation patta, vide Ext.B. The plaintiffs had purchased the suit land from the rightful owner. They have right, title and interest and possession over the same. The suit land is not a Government land. It further held that the suit is not hit under Section 16 of the Orissa Prevention of Land Encroachment Act and decreed the suit. The defendants filed Title Appeal No.20 of 1991 before the learned 2<sup>nd</sup> Addl. District Judge, Cuttack, which was eventually dismissed.

**5.** The second appeal was admitted on the following substantial questions of law;

“(i) Whether a simple suit for injunction would be maintainable without praying for correction of ROR prepared by the consolidation authorities ?

(ii) Whether the plaintiffs are estopped challenging the title of the defendants in view of the statement in the encroachment proceeding admitting the title of the appellants ?”

**6.** Heard Ms. S Mishra, learned Addl. Standing Counsel for the appellants and Mr. D.C. Choudhury, learned counsel for the respondents.

**7.** Ms. Mishra, learned ASC for the State, submitted that the suit land had been recorded in the name of the Irrigation Department in the consolidation ROR. Since the plaintiffs were unauthorised occupation of the suit land, encroachment proceeding under the provision of the Orissa Prevention of Land Encroachment Act was initiated against them in the year 1981-82. They admitted the encroachment and paid the rent and penalty. The suit land had been

leased out by the Irrigation Department by way of auction. The plaintiffs have no right, title and interest over the suit land. The simple suit for permanent injunction without any consequential relief is not maintainable.

**8.** Per contra, Mr. Choudhury, learned counsel for the respondents, submitted that the suit land was originally recorded in the name of Radhashyam Dutta in 1930 settlement ROR. Sundarmani Dasi, widow of Radhashyam Dutta, alienated her share along with other plots to Sri Sri Durgadevi Thakurani marfatdar Ananta Kumar Bose, son-in-law of the plaintiff's father's brother and Atul Chandra Ray, plaintiff's father by means of registered sale deed dated 19.11.1958. One Jyotshna Rani Dutta had also transferred her share of property in favour of the deity by means of registered sale deed dated 24.7.1959. Thus the plaintiffs' family became owner in possession of Ac.1.88 dec. of land appertaining to plot No.259. The marfatdar of the deity alienated the land to the plaintiffs by means of registered sale deed dated 7.7.1961. The suit land along with other lands had been recorded in favour of the plaintiffs in 1977 settlement ROR. But then, the suit land had been recorded in the name of the Government in the consolidation ROR wrongly. The father of the plaintiffs paid the rent and penalty under a bona fide belief that the authority had settled the land in their favour. The defendants had no semblance of right, title and interest over the same. He further submitted that notwithstanding the publication of consolidation record-of-right, the simple suit for permanent injunction is maintainable. Defendants had lost in both the courts. There is no perversity in the findings of the courts below. To buttress his submission, he relied on a decision of this Court in the case of

Gulzar Khan v. Commissioner of Consolidation and others, 1993 (II) OLR 194.

**9.** Reliance placed on the Full Bench decision of this Court in the case of Gulzar Khan (supra) is totally misplaced. In the said case, question arose whether power conferred by Section 37 of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act (in short, “the OCH & PFL Act”) would be available for exercise after a notification has been issued as contemplated by Section 41(1) of the OCH & PFL Act on the subject that consolidation operations have been closed in the unit, the result of which is that the village or villages forming part of the unit cease to be under consolidation operations. The Full Bench of this Court summarised the following principles.

“36. We may conclude our views relating to Civil Court’s jurisdiction by stating that the same would be available after closure of consolidation operations only in any one of the following circumstances;

- (i) The cause of action accruing after the closure of the consolidation operations.
- (ii) If the consolidation authorities had taken the decision without complying with the provisions of the Act or had not acted in conformity with the fundamental principle of judicial procedure (which would take within its fold the case of violation of natural justice).
- (iii) Obtaining of order from the hand(s) of consolidation authorities by playing fraud on the party who seeks to approach the Civil Court.”

It was further held that the power under Section 37 of the OCH & PFL Act being unfettered shall be available only under compelling circumstances. Despite closure of the consolidation operation which would be result of the notification under Section 41 of the OCH & PFL Act, power under Section 37 would be available; whether in a particular case the same would be exercised shall have

to be decided by the Consolidation Commissioner depending upon the facts and circumstances of that case.

**10.** In *Anathula Sudhakar vs. P. Buchi Reddy (Dead) by Lrs. and others*, AIR 2008 SC 2033, the apex court held that where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

**11.** Notwithstanding the closure of consolidation operation and publication of record-of-right, the aggrieved party may institute the suit or approach the authority under Section 37 of the OCH & PFL Act. In the event a party files a suit, a prayer has to be made to set aside the record-of-right published by the consolidation authority. In absence of any prayer to set aside the record-of-right published by the consolidation authority, the simple suit for permanent injunction is not maintainable. The substantial question no.1 is answered accordingly.

**12.** In encroachment case, the plaintiffs have paid rent and penalty. Thus the inescapable conclusion is that the plaintiffs admit the title of the Government. The substantial question no.2 is answered accordingly.

**13.** In the result, the appeal is allowed. Consequently, the suit is dismissed. No costs.

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**DR. A.K.RATH, J**