

HEADING OF DECISION IN THE ORIGINAL SUIT.

DIST: KHORDHA.

IN THE COURT OF THE SENIOR CIVIL JUDGE, KHORDHA

PRESENT :-

***Sri Raj Kishore Lenka
Senior Civil Judge, Khordha.***

Dated this the 21st day of August, 2014

C.S. 154/ 2008

Sk. Jabar, aged about 67 yrs, S/o- Late Sk. Hadu At./P.O.- Keranga,
P.S./Dist- Khordha.

..... Plaintiff.

-Versus-

1, Sk. Rahamutulla, aged about 50 yrs, S/o- Late Sk. Masud of
Vill./P.O.- Keranga, P.S./Dist- Khordha,

(Since dead substituted by his following legal representatives)

1,a) Bibi Pada Begum, aged about 55 yrs, W/o- Late Sk.
Rahamutulla.

1,b) Bibi Bela Begum, aged about 30 yrs, D/o- Late Sk. Rahamutulla.

c) Bibi Chandini Begum, aged about 26 yrs, D/o- Late Sk.
Rahamutulla.

1,c) Bibi Ranjan Begum, aged about 18 yrs, D/o- Late Sk.
Rahamutulla.

All are of Vill./P.O.- Keranga, P.S./Dist- Khordha.

..... Defendants.

Counsel for Plaintiff	... Sri S. Pattanaik & Associates Advocates, Khordha
Counsel for defendants	. . . Sri A.K Pattanaik & Associates, Advocates, Khordha

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Date of conclusion of Argument	–	05.08.2014
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Date of pronouncement of Judgment	–	21.08.2014
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JUDGMENT

The plaintiff has presented the suit for declaration of his right, title and interest over the suit property, mandatory as well as permanent injunction, recovery of possession and other consequential reliefs.

Initially the suit was instituted against the sole defendant namely Sk. Rahamutulla and after his death, his legal heirs were substituted.

02. The case of the plaintiff is that he is the absolute owner of a piece of homestead land measuring Ac. 0.220 decimals in plot No. 1513, khata No. 194 of mouza Keranga (schedule A property as per the plaint). The said land was all along in his exclusive possession, but subsequently the deceased defendant Sk. Rahamutulla entered into the suit land with his laborers and constructed a room by raising wall over 65 decimals of land of the plaintiff (Schedule B land as per the plaint but herein after called as suit land). The plaintiff's specific case is that the defendants are strangers to the suit property and the deceased defendant Sk. Rahamutulla on 19.06.2008, around 3.00 P.M. with hired laborers attempted to dig earth for construction. The plaintiff

objected his act as a result the defendant Sk. Rahamutulla violently reacted, but after intervention of the villagers, the matter was subsided. While leaving the spot the said defendant threatened to construct a stone wall over the encroached portion of the suit land. Thereafter the plaintiff initiated a proceeding U/s- 144 of Cr.P.C. before the Executive Magistrate vide Misc. Case No. 324/2008 against the deceased defendant, Sk. Rahamutulla, but the said defendant forcibly constructed three rooms and a stone wall over the suit land by encroaching Ac. 0.065 decimals of the land of the plaintiff. The plaintiff assigned the cause of action to be 19.06.2008, when the defendant Sk. Rahamutulla attempted and subsequently raised the construction over schedule B land and basing on the above fact the suit has been instituted.

03. During pendency of the suit the defendant Sk. Rahamutulla passed away and as such his legal representatives have been impleaded as parties and they have also adopted the written statement what has been filed by Sk. Rahamutulla. Suit against defendant No. 1 (c) is abated on 12.06.2012 due to her death. As per such written statement the defendants have challenged the suit of the plaintiff on the question of maintainability. It is again raised that there is no cause of action for the above suit and the suit land has not been properly valued. They have also challenged the present suit on the question of limitation. The specific case of the defendants is that the plaintiff and defendants have acquired their respective land on lease since 1982, and they are in possession of the same from the date of lease. The deceased

defendant namely Sk. Rahamutulla after getting the land, constructed his own house. The defendants have further to say that the plaintiff and Sk. Rahamutulla have taken possession of the land in presence of the village gentries. The plaintiff raised his boundary wall as per his possession, but unfortunately around four to five years back a portion of the boundary wall was demolished and the plaintiff did not repair the same which made inconvenience to the defendant's family. Thereafter, the defendant Sk. Rahamutulla approached the Muslim 'Zamat' for settlement of the matter. As per the instruction of the 'Zamat' the deceased defendant Sk. Rahamutulla raised his boundary wall over the land leaving one foot of land from the old boundary wall of the plaintiff and as such the fact as raised by the plaintiff is completely baseless and false. The defendants have not encroached any land of the plaintiff. It is again mentioned by the defendants that if at all they have encroached any portion of the land of the plaintiff; because of the statutory provision of law the plaintiff is estopped to raise any objection against such possession of the plaintiff. It is again contended that the plaintiff has come with the present suit with false, fabricated and misconceived facts with an ulterior motive only to harass the defendant. The rooms under dispute have been constructed by the deceased defendant, Sk. Rahamutulla, during his lifetime in his plot and therefore, the suit is liable to be dismissed on cost.

04. The rival pleadings of both the parties give rise of the following issues for an useful adjudication.

I S S U E S.

1. Is the suit maintainable?
2. Is there any cause of action to bring the suit?
3. Whether the suit is undervalued?
4. Whether the suit is barred by law of limitation?
5. Whether the plaintiff has right, title and interest over the suit and under schedule A including B schedule land and his possession thereon is to be confirmed?
6. Whether the plaintiff is entitled to the decree of permanent injunction restraining the defendant from entering upon the "B" Schedule suit land and from raising any construction and creating any mischief thereon?
7. Whether the plaintiff is entitled to the relief of mandatory injunction for demolition of structure constructed by the defendant over "B" Schedule land and the plaintiff is entitled to recover possession of the same from the defendant?
8. What relief, if any, the plaintiff is entitled to?

05. In order to prove his case the plaintiff has adduced evidence of three witnesses including the plaintiff as P.W. 3. The plaintiff has exhibited the ROR in respect of his land recorded under khata No. 194 of mouza Keranga as Ext. 1 and two rent receipts as Ext. 2 & 2/a respectively.

Similar three witnesses have been examined on behalf of the defendants out of whom P.W. 3 is the defendant No. 1 (b) herself. The defendants have admitted the certified copy of the ROR under khata No. 382/71 of mouza-Keranga recorded in the name of Sk. Masud, father of deceased defendant Sk. Rahamutulla as Ext. A and the corresponding

mutation ROR under khata No. 531 of mouza Keranga recorded in the name of Sk. Rahamutulla as Ext. B.

FINDINGS.

Issue Nos. v, vi & vii.

06. The above three issues being pivotal issues and inter related to each other are taken up first for consideration.

It is the very admitted case that the plaintiff is the absolute owner of the land recorded under khata No. 194, plot No. 1513 measuring Ac. 0.220 decimals of mouza Keranga. Similarly, the defendant, who is the eastern side land owner to the above land of the plaintiff, is the owner of his land recorded under Khata No-531 of Mouza-keranga. Therefore, it is clear that the plaintiff is the owner of the schedule A land which includes the suit land. The suit land as specified to be schedule B land has been depicted in the plaint to show the area encroached by the defendants, which is Ac. 0.065 decimals in total. Now the subsequent question is whether the defendants have encroached the suit land? Coming to the said question it is now became obligatory on the party of the court to visit the pleading as well as the stand of the defendants The plaintiff has to say that the entire schedule A land was in his possession, but the deceased defendant Sk. Rahamutulla with hired laborers constructed rooms and raised a wall by encroaching the suit land. He has amalgamated the suit land in his area. His action was illegal and against the interest of the plaintiff.

07. Whereas the defendant in his written statement has specifically contended that the house of the defendants constructed since last 40 years and the plaintiff raised his boundary wall as per the possession. Coming to the evidence on such aspect of the case P.W. 1 in his evidence in chief has stated that Sk. Rahamutulla (deceased defendant) entered into the suit land around five years back and dug earth and built up three rooms and put a stone boundary wall by encroaching a portion of the suit land of the plaintiff. In the cross-examination P.W. 1 again stated that the properties of the plaintiff and defendants are separated by one common wall, which belongs to defendant Sk. Rahamutulla. He has a house adjoining to the common wall. P.W. 2 has also supported the said fact and stated that Sk. Rahamutulla in spite of objection of the plaintiff continued to raise three rooms and a well encroaching the land of the plaintiff. In the cross-examination P.W. 2 also stated that the said residential house of the plaintiff was constructed around five years back. P.W. 3 being the plaintiff himself has repeated his earlier version as mentioned in the plaint. In the cross-examination he has stated that there was a boundary in between both of their land, which has been recently constructed by the defendants. He has constructed the boundary around 3 to 3.5 years back and he has filed the present case around three to four years back. He again admitted that the deceased defendant Sk. Rahamutulla has constructed the wall after institution of the suit. But, he has not intimated the court during the

pendency of the suit. He further admitted that no demarcation has been made yet to identify the respective land including both the boundary.

08. After a due scrutiny of the evidence adduced from the side of the plaintiff, it came to the light that the plaintiff has not measured the suit land prior to institution of the suit. So far as the encroachment of the suit land by defendant is concerned, the evidence of the witnesses is quite corroborative and the basic structure of their allegation has not been truly challenged through the cross-examination. However, the defendants urged certain facts at the time of argument to put a question mark on the cornerstone of the allegation of the plaintiff. It is urged that since the suit land has not been demarcated, the plaintiff has no locus-standi at all to say that his particular land has been encroached by the defendants. The claim of the plaintiff is based on hypothetical assumption and misconceived perception, without any solid basis.

09 Now this court has visited the evidence adduced from the side of the defendants. The defendants claim is quite confusing. Firstly, the defendants have stated that they have not encroached any portion of the land of the plaintiff and in alternative they again stated that whatever construction has been made by the defendant Sk. Rahamutulla cannot be challenged by the plaintiff as the same is barred by limitation as the said constructions were made around 40 years back. D.W. 1 in his evidence in chief has deposed that the house of the defendants is there since more than 40 years with boundary

walls around their land. D.W. 2 in his evidence in chief has also repeated the said version of D.W. 1, but he in his cross-examination has stated that there is a house consisting upon four rooms and boundary wall situated over the suit land, which has been constructed by Sk. Rahamutulla around 40 years back. By making a surprising disclosure he again admitted that as per the dictation of his sister Bibi Papa Begum (defendant No. 1 (a)) his affidavit evidence in chief was prepared. D.W. 3 is the most important witness, who has stated that his father Sk. Rahamutulla constructed the boundary wall over the suit land leaving one feet of land from the old boundary wall of the plaintiff. In the cross-examination she has stated that she could not say the extend of length and breadth of their land as well as the length of their land extending from east to west as the north side as well as southern side of their land, but it is equal.

10. After going through the detail evidence of the witness, it is well observed by this court that the defendant witness such as D.W. 1 & 2 are not the proper persons having genuine knowledge over the suit matter as well as if the defendants have encroached any land of the plaintiff or not. As because, both the witnesses are not sure about the extent of the land of the plaintiff as well as the defendants and they have also informed the court that on the information of defendant No. 1 (a) they only came to know about the dispute and even D.W. 2 has admitted that his affidavit evidence in chief is prepared by the defendant No. 1(a). So far as the evidence of D.W. 3 is concerned she has only repeated the pleading as mentioned in the written statement. She has

again gave a very relevant disclosure by saying that the extend of the lease hold property of his grandfather was Ac. 0.220 decimals (vide Ext. A), but now the said lease land has been reduced to Ac. 0.190 decimals, while recorded in the name of his father (vide Ext. B).

Let's now come to the factual dispute between the parties. The defendants have firstly urged that unless and until the suit land is demarcated it is not fair on the part of the plaintiff to claim a specific portion of the land to be encroached by anybody else. It is true that the plaintiff admitted that his land has not been demarcated. At this juncture it may further be noted that the land of the defendant is not also been demarcated. It is also the admitted case of both the parties that they have been in possession of their respective land since long. The defendants' alternative claim is that they have been residing over the land under their possession since the time of their grandfather around 40 years by constructing their house. It is again contended by the defendants that initially one boundary wall was existing by separating the land of the plaintiff and defendants. When the defendants have admitted that the boundary wall was the symbol of the boundary line of both the parties, it would not be good enough for them to take a subsequent plea that the plaintiff has not in possession of his land as the same has not yet been measured. Let's accept that the land of the plaintiff and defendant is being separated by a boundary wall, which is very much within the knowledge of the defendants. Therefore, they admitted the possession of the plaintiff over the specific portion

of the land. The plaintiff effected his appearance over his land measuring Ac. 0.220 decimals. By that time the boundary wall was existing as it was constructed by the plaintiff prior to coming to his land to reside over it. While, the defendants have admitted the possession of the plaintiff over the specific portion of the land, then they have no locus standi to say the suit land has not been demarcated. It is true that the suit land can be demarcated at any moment. But, only because the suit land has not been demarcated the defendant cannot take the advantage of the same.

11. While, this court has gone through the evidence adduced from the side of the plaintiff, became more convenience regarding the encroachment and when the defendants have taken a specific stand that after the existing wall of the plaintiff was demolished, the same cause inconvenience to the defendants family and as such the deceased defendant Sk. Rahamutulla informed the muslim 'Zamat' and as per their instruction he constructed the boundary wall without making any measurement of his own land and most importantly the defendants nowhere explained regarding cause of reduction of their land as per the Hal record of right. It is true that initially the father of deceased defendant No. 1 was allotted Ac. 0.220 decimals of land, but subsequently as per the Hal ROR the land was reduced into Ac. 0.190 decimals. This reduction of Ac. 0.030 decimals of land remains unexplained, but the plaintiff was all along in possession of Ac. 0.220 decimals of land. Such reduction of the land in the revenue record has not been

challenged by the defendants or their ancestors. Therefore, it is quite unknown to both the parties as to in whose land the said Ac. 0.030 decimals of land was merged.

12. In the instant case the documents on record as well as the admitted position of the case goes to prove that the plaintiff was in long, peaceful and settled possession of the suit land. Now in order to obtain a relief of perpetual injunction, the plaintiff must have to establish apprehended breach of an obligation existing in his favour whether expressly or by implication. The plaintiff has also to prove his right before he gets the injunction "to prevent recurrence of violation". The above discussion leads to the conclusion that the dispute between the plaintiff and defendants is lingering since long. The plaintiff has also filed one case U/s- 144 Cr.P.C against the deceased defendant Sk. Rahamutulla. The matter was also put before their village committee, which is called as ZAMAT and as per their direction the original defendant defendant Sk. Rahamutulla raised the construction. It is also admitted by the defendant witnesses that the deceased defendant Sk. Rahamutulla has constructed the boundary wall. It is also admitted that the boundary wall has been made without any measurement of the land of the defendants. The real dispute started between the parties when the defendant Sk. Rahamutulla constructed the boundary and the plinth over the suit land and the plaintiff came to the court with an allegation that the defendant has encroached Ac. 0.065 decimals of land from his plot. D.W. 2 has also admitted

in his evidence that there is a house consisting upon four rooms and boundary wall over the suit land which belongs to the defendants. Sk. Rahamutulla (deceased defendant) has constructed the said house and boundary over the suit property. At this stage the plaintiff owes all right to preserve and protect his property. By providing the admitted facts, the plaintiff has clearly established apprehended breach of an obligation in his favour and unless he is protected by the way of perpetual injunction, his possession over the suit property may be terminated by the act of the plaintiff and the purpose of filing the suit will be frustrated.

13. Coming to the question of mandatory injunction, the defendants have urged that the suit land has not been measured by the amin commissioner or by an expert. Therefore the claim of the plaintiff that he is the owner of the suit land measuring Ac. 0.065 decimals is quite improper and basing on a personal perception the court cannot pass any order. He has again pointed out the cross-examination of the plaintiff, who has stated that the length of his land is 115 links and 80 links in breadth at the time of his possession. Now he is in possession of the land of its length 100 to 105 or 110 links and its breadth is as it was. Basing on the said statement of the plaintiff, the defendants have to say that if the case of the plaintiff is accepted the breadth of the suit land must not be similar. True that some infirmities have been appearing in the evidence of the plaintiff, who is examined as P.W. 3 but, it should be remembered that he is a person of 73 years old and a case of this

nature cannot be decided on certain statements, which have been answered by confusion or not by understanding the object of putting such question. Apart from that if the said part of the statement of the plaintiff is taken into consideration, he express that he is not sure about the length of his land. Therefore, it is the considered opinion of this court that the plaintiff is not sure about the length and breadth of his land, but still the admitted case is that the defendants are not disputing the right, title, interest and possession of the plaintiff over his land measuring Ac. 0.220 decimals.

14. The witnesses examined on behalf of the defendants have stated that they have no personal knowledge about the extend of the land of the plaintiff and defendants. They have also admitted that they are not sure about the extend of the land of the defendants. D.W. 1 & 2 being the relatives of the defendants have deposed their evidence and their evidence cannot be accepted as they have expressed their ignorance about the suit matter and even D.W. 2 has stated that the evidence in chief has not been prepared as per his dictation, rather it was prepared by defendant No. 1 (a). Similarly, the defendant No. 1 (a), who is the D.W. 3 has also stated that she is unable to say the length and breadth of their land as well as the length of their land extending from east to west. On the contrary the evidence adduced from the side of the plaintiff appears to be quite clear and cogent. So far as the construction of house over the suit land is concerned the said fact also finds

support from D.W. 2, who spontaneously deposed that there is a house over the suit land.

For the sake of discussion let's assume that the defendants have not constructed any house over the land of the plaintiff. Therefore, the defendants must not have to be frightened by the order of this court as they have nothing to do with the suit property which is far away from their own land. While, the order is not prejudicial to the defendants as they are not challenging the right, title, interest and possession of the plaintiff, there would be no reason for them to be more apprehensive by the order of this court.

15. Coming back to the factual question regarding mandatory injunction, it may be noted that "an injunction is a judicial process whereby a party is ordered to refrain from doing or to do particular act or thing. In the former case, it is called restrictive injunction and the latter a mandatory injunction. It is a remedy of an equitable nature and the injunction does not run with the land. A perpetual injunction is based on a final determination of the rights of the parties and is intended permanently to prevent infringement of those rights and obviate the necessity of bringing action after action in respect of every such infringement".

In the instant case the suit land was owned by the plaintiff and the plaintiff has to say that the defendants are in unauthorized possession of the suit land. The defendants have taken two different stands. Firstly, they have stated that since they have been in possession of the land for more that

the statutory period the plaintiff is estopped to institute a suit against them, but to that effect the defendants have not explained the exact period of their possession nor advanced any counter claim against the plaintiff. The forgoing discussion is clear and cogent to the effect that the right of the plaintiff over his land has been violated by the defendants and they have been encroached the suit land, which exclusively belongs to the plaintiff and as such the plaintiff is also entitled for the relief of mandatory injunction. The above issues are answered accordingly.

Issue Nos. 1, 2, 3, 4 & 8 .

16. The defendants in their written statement have contended that the suit is not maintainable for the reason of under valuation of the land by the plaintiff and there is absolutely no cause of action to bring the suit. So far as the question of under valuation is concerned no evidence has been adduced to that effect by the defendants to establish the exact value of the land and therefore the said aspect regarding maintainability of the suit appears to have not been pressed by the defendants. It is not under controversy that cause of action is a bundle of events. The forgoing discussion well established that after demolition of the existing boundary, the defendant Sk. Rahamutulla construct a new boundary without the consent of the plaintiff and accordingly he proceed with the construction of houses over it and the said fact has also been admitted by the witness from the defendants and the last cause of action has been assigned by the plaintiff to be on 19.06.2008, when the defendants

raised plinth over the suit land. Therefore, the plaintiff has assigned a serious and absolute cause of action in favour of his case. The suit is not also barred by limitation as it has been filed in time. Therefore, after a thorough scrutiny of the evidence as well as pleading of both the parties this court has already arrived into the conclusion that the plaintiff is entitled for the relief of perpetual as well as mandatory injunction against the defendants. Hence it is order.

ORDER

The suit of the plaintiff be and the same is hereby decreed on contest against the defendants but in the circumstances without any cost. The right, title and interest of the plaintiff over the suit land is hereby declared. The defendants are hereby permanently enjoined not to interfere with the peaceful possession of the plaintiff over the suit land in any manner. They are also directed to demolish the structure over the suit land by delivering it's possession to the plaintiff within three month hence. Violation of this order entails the plaintiff to adopt the proper recourse to law against the defendants to execute the order of this court through the process of the court.

Advocates fees are at contested scale.

Senior Civil Judge, Khordha.

Transcribed to my dictation, corrected and signed by me and pronounced in the open court this the 21st day of August, 2014.

Senior Civil Judge, Khordha.

List of witnesses examined on behalf of Plaintiffs :-

- P.W. 1 Hanif Khan.
P.W. 2 Mohisin Khan.
P.W. 3 Sk. Jabar.

List of witnesses examined on behalf of Defendants :-

- D.W. 1 Sadakat Alli Khan.
D.W. 2 Sk. Ibrahim.
D.W. 3 Baby Reshma @ Bibi Bela Begum.

List of documents admitted on behalf of the Plaintiff :-

- Ext. 1 ROR in khata No. 134 of mouza Keranga.
Ext. 2 Rent receipt dt. 30.10.2006
Ext. 2/a Rent receipt dt. 11.08.2008.

List of documents admitted on behalf of Defendants :-

- Ext. A Certified copy of Hal ROR in khata No. 382/81 of mouza
Keranga.
Ext. B ROR in khata No. 531 of mouza Keranga.

Senior Civil Judge, Khordha.