

**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 27th day of October, 2014

C.S. 375/ 2010

Magbul Khan @ Makbul Khan, aged about 58 yrs, S/o- Late Yakub Khan
of Vill.- Chuda, P.O.- Dabaradhuapatna, P.S.- Bolagarh, Dist- Khordha.

..... Plaintiff.

-Versus-

Sk. Ishac, aged about 40 yrs, S/o- Late Sk. Musahab of Vill.- Chuda,
P.O.- Dabaradhuapatna, P.S.- Bolagarh, Dist- Khordha.

..... defendant.

Counsel for Plaintiff	...	Sri R. Ray & Associates Advocates, Khordha
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Counsel for defendant	...	Sri P.K Senapati & Associates Advocates, Khordha
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Date of conclusion of Argument	–	18.10.2014
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Date of pronouncement of Judgment	–	27.10.2014
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JUDGMENT

This is a suit for permanent as well as mandatory injunction along with other consequential reliefs.

02. The fact of the plaintiff's case is that himself and his mother were the recorded owners of the piece of homestead land in mouza 'Chuda' under khata No. 457, plot No. 1503 measuring Ac. 0.080 decimals (hereinafter referred to as suit

property). After death of her mother, the plaintiff became the absolute owner in possession of the suit land. The plaintiff has a straw and tiled roofed residential house over the suit property, which has been constructed by his deceased father. During the construction of the said house, the father of the plaintiff had left a piece of land towards the village road running from south to north, situated to the west of the suit land for passing of the eve water. The breadth of the vacant land is five feet. But, on 19.01.2010, the defendant along with some of his henchmen came to the suit land and started digging plinth over the said vacant portion to construct a pucca building there and ultimately they have encroached a portion of the land having four feet breadth out of the vacant portion of the suit land. It is the specific case of the plaintiff that due to such encroachment, the plaintiff sustained huge loss and damage to his residential house. Due to storage of water, the mud walls of his residential house is prone to collapse and for which he initially approached the Executive Magistrate, Khordha and initiated a proceeding U/s- 144 of Cr.P.C. vide Misc. Case No. 20/2010 and accordingly the defendant was restrained from his illegal attempts, but after that the defendant again started construction. The defendant again on 26.09.2010 attempted to construct the walls of his building by the side of the suit land and now in a move to construct a pucca building there. Finding no alternative the plaintiff approached this court in the present suit for necessary reliefs.

03. The defendant also filed his written statement by disputing all the claims of the plaintiff. He firstly claimed that the suit is not maintainable both in fact and law. The plaintiff's allegations are all false, frivolous, concocted, imaginary,

vague and baseless. The specific case of the defendant is that he is the southern side neighbor of the plaintiff. While, denying the entire pleading of the plaintiff, the defendant has to say that he is a poor fellow and identified by the government officials for accommodation under '*indira avas yojana*' for his residential purpose. The plaintiff for the said reason got annoyed and foisted a false case against him with an intention to harass him financially and mentally and with an ulterior motive to debar the him to receive the grant under '*indira avas yojana*', the plaintiff has filed the present case and for which the suit is liable to be dismissed.

04. Assessing the rival disputes between the parties and in order to adjudicate the disputes lawfully and purposefully, the following issues have been settled.

1. Whether the suit is maintainable?
2. Whether there is any cause of action to bring the suit?
3. Whether the defendant has encroached any portion of the suit land of the plaintiff illegally?
4. Whether the plaintiff is entitled for the permanent and mandatory injunction in respect of the suit land?
5. To what relief the plaintiff is entitled to?

05. In order to prove the case, the plaintiff has only examined himself as P.W. 1 and also relied upon three documents. The ROR under khata No. 457 is marked as Ext. 1, rent receipt dt. 21.01.2010 as Ext. 2 and his income certificate as Ext. 3.

On the other hand defendant has examined none. He has not also relied upon any document.

FINDINGS.

Issue No. 3 & 4.

06. The plaintiff basing upon his right, title, interest and possession over the suit land has sought for the relief of permanent and mandatory injunction against the defendant. To that effect his pleading is quite clear and he has stated that the suit land is recorded in his name as well as in the name of his mother Jayagan Bibi. After death of his mother, he being the sole successor to the interest of his mother became the absolute owner in possession of the suit land. His evidence in chief is a clear reflection of his pleading. He has been elaborately cross-examined by the counsel for the defendant. P.W. 1 has admitted the ROR in respect of the suit land as Ext. 1, rent receipt dt. 21.01.2010 as Ext. 2, without any objection from the side of the defendant. Ext. 1 also reveals that the plaintiff and his mother are the recorded owner of the suit land, which is a homestead measuring Ac. 0.080 decimals. The rent receipt has been paid by the plaintiff on 21.01.2010. He during his cross-examination has stated that he is the only son of his father beside seven daughters. The defendant is the son of his sister namely '*Pari Bibi*'. She got married at village '*Manikagoda*'. He again stated that the defendant has been staying at village '*Chuda*' since he (defendant) was aged about 9 months. The plaintiff again admitted that the defendant has purchased his land adjoining to the suit land. He has sold the land measuring Ac. 0.025 decimals out of Ac. 0.040 decimals to the defendant. It reveals from his cross-examination that the

suit land has not been erected by any fence. Initially his father has left a portion of land to the west of the suit land for the purpose of free passing of eve water of his residential house to village Danda.

07. The evidence of P.W-1 enables this court to assert that the plaintiff and defendant are adjoining neighbors. Undisputedly the plaintiff carries title of the suit land with his mother but his claim over the entire suit land after the death of his mother is absolutely misleading. As per his admission, he has seven sisters. Therefore the seven sisters of the plaintiff having their respective interest over the said property. But the present status of the plaintiff does not debar him from filing the suit in his individual capacity because every co-sharer has a right to preserve and protect his undivided interest in a property in absence of the other co-sharers.

So far as his allegation against the defendant is concerned, he has deposed in his evidence in chief regarding the encroachment caused by the defendant over the suit property. But, even though the plaintiff has been cross-examined in detail not a pinch of evidence has been retracted from him to disbelieve his allegation. It is also asserted by this court that the defendant has purchased a piece of land from the plaintiff and residing there but unfortunately the said land of the defendant is adjacent to the suit land. The defendant is the son of the sister of the plaintiff. Therefore, the defendant has suggested to the plaintiff during his cross-examination that the defendant has a subsisting interest over the suit property.

08. This court after taking account of the whole matter under dispute as well as the evidence of P.W. 1 came to ascertain that the plaintiff is the only son of his

parents. He has seven sisters. The defendant being the son of one of the daughter of the plaintiff claims his subsisting interest over the property. But the defendant has neither advanced any counter claim nor adduced his evidence to that effect. Therefore the said fact is out of context. It is the further opinion of this court that the plaintiff has substantiated his interest over the suit land but since his mother has other successors in interest, he cannot be treated to be the absolute owner of the suit land. But the question is whether the plaintiff in the available facts and circumstances of his case is entitled for the relief of permanent and mandatory injunction. The plaintiff again claims his exclusive possession over the suit land. The obstruction of the eve water by the defendant has been causing damage to the residential house of the plaintiff and as such he has all right to protect and preserve his residential house from further erosion and damage because of the act of the defendant.

09. The plaintiff's case has been elaborately discussed in the forgoing paragraphs. The plaintiff has specifically sought for the relief of permanent injunction as well as mandatory injunction. Consequent upon the said reliefs, the plaintiff has to say that the defendant has encroached a portion of the land extending four feet width towards the southern side of the suit land without giving any description of such encroached area. Firstly, the length, breadth and size of the encroached land has not been mentioned in the plaint. Even the boundary description has not been given by the plaintiff in the plaint as well as in his evidence in chief. Rather the property under the head note of schedule of property has been mentioned to be Ac. 0.080 decimals. It is true that the entire Ac. 0.080 decimals of land is mentioned to be suit property, but to

show the encroachment area it is highly obligatory on the part of the plaintiff to identify the encroached area and to sought for relief of recovery as well as confirmation of his possession. But, the plaintiff has not sought for the above reliefs.

Under Order 7 Rule 7 of CPC provides that “**Relief to be specifically stated** :- Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his Written Statement”.

In context to the present case it is worthwhile to mention that if the plaintiff brought a specific case against the defendant, the same also enable the defendant to place his matter with sufficiency. But, in the present case the plaintiff while seeking for the relief of perpetual injunction suppressed other facts by non-mentioning the portion and extend of the land encroached by the defendant and for which the scope for the defendant to advance his case on the question of encroachment became limited. It could have convenient if the plaintiff would have specifically raised the matter relating to the encroachment of the land. In case this court will proceed in giving a larger relief to the plaintiff only basing on his case for perpetual injunction, the same will cause prejudice to the defendant and the order will not be executable as the executing officer would not have any scope to assert the exact portion of the land encroached by the defendant.

10. If this court will again turn into the basic facts as well as the evidence of P.W. 1, could well assert that the plaintiff has not measured his land at any point of time. He has not also explained basing on which fact he came to know about the encroachment of his land. Since, he has not measured his land, he is silent with regard to the area encroached by the defendant if any. Since, the plaintiff has not come to the court in a clean hand it is not possible for the court to provide him a larger relief than he has sought for in his suit. This court cannot give a relief of permanent injunction to the plaintiff while the plaintiff is not in possession of the suit land and not sought for deceleration and recovery of possession. The general proposition in the present context is well settled that a plaintiff is not entitled to the relief of injunction without claiming recovery of possession. The provision U/o- 7 R- 7 of CPC is not applicable in this case to give a larger relief to the plaintiff to which he has not sought for. The issues are answered accordingly.

Issue No. 1, 2 & 5.

11. Coming to the question of maintainability, it is quite expedient enough to mention that the suit is filed with misconceived facts as discussed in the forgoing paragraphs. The plaintiff has not come in a clean hand. In view of an elaborate discussion of the fact and circumstances of this case, it is clear that the plaintiff has not come to the court in a clean hand and his case is cobbled with misconceived and misleading fact. Therefore the plaintiff is not entitled for any relief and as such the suit for the above reason is not maintainable. Hence it is order.

ORDER.

The suit of the plaintiff be and the same is dismissed on contest against the defendant, but in the circumstances without any cost.

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 27th day of October, 2014.

Senior Civil Judge, Khordha.

List of witnesses examined on behalf of Plaintiffs :-

P.W. 1 Magbul Khan @ Makbul Khan

List of witnesses examined on behalf of defendant :-

None.

List of documents admitted in the evidence on behalf of the Plaintiff :-

Ext. 1 ROR under khata No. 457 of mouza Bolagarh.

Ext. 2 Rent .receipt dt. 21.01.2010.

Ext. 3 Income Certificate dt. 15.04.2010.

List of documents admitted in the evidence on behalf of defendant :-

Nil.

Senior Civil Judge, Khordha.