

IN THE COURT OF THE SENIOR CIVIL JUDGE, KHORDA

PRESENT :-

Sri Raj Kishore Lenka
Senior Civil Judge, Khurda.

Dated this the 26th day of February, 2014

C.S. 252/ 2009

Sudarsan Behera, aged about 69 years, S/o- Late Lingaraj Behera, of
Vill./P.O.- Golabai, P.S.- Jankia, Dist- Khordha.

..... Plaintiff.

-Versus-

1. Pramod Dash, aged about 42 years.

2. Prasant Dash, aged about 37 years

Both are S/o- Late Harihar Dash.

3. Basanti Dash, aged about 60 years, W/o- Late Harihar Dash.

All are of Vill./P.O.- Golabai, P.s.- Jankia, Dist- Khordha.

.....Defendants.

4. Kelu Charan Pattnaik, aged about 66 years, S/o- Late Kulamani Pattnaik of
Vill./P.O.- Golabai, P.S.- Jankia, Dist- Khordha.

..... Proforma defendant.

Counsel for Plaintiff

... Sri T. Baral and associates,
Advocates, Khordha

Counsel for defendant No. 1 to 3. Sri S. C. Rath and associates,
Advocates, Khordha

Counsel for defendant No. 4 ... Ex-Parte

.....
Date of Argument – 21.02.2014

Date of Judgment – 26.02.2014
.....

JUDGMENT

The plaintiff has presented the suit seeking relief of declaration of his right, title, interest and possession over the disputed property and permanent injunction to restrain the defendant Nos. 1, 2 & 3 from the said property, where as the defendants No-1, 2 and 3 have also in their counter claim sought for the relief of declaration and conformation of possession of their purchased land, which includes the land claimed by the plaintiff in this suit.

02. Plaintiffs case is that he has purchased the property recorded in mouza KAYA appertaining to khata No. 49, plot No. 419 measuring Ac. 357.5 decimals out of total 1.430 decimals (hereinafter referred to be the suit land), from one Kelu Charan Pattnaik. Making his case more transparent the plaintiff has stated that, originally the ROR in respect of the suit land stands recorded in the name of Banabihari Pattnaik, the elder brother of his vendor Kelu Charan Pattnaik. The suit property being joint property of Kelu Charan Pattnaik and Bipinbihari Pattnaik, the same was amicably partitioned among the two brothers. However Kelu Charan Pattnaik was looking after the whole property and as such he sold away his share to the plaintiff vide sale deed No. 1556 dt. 06.05.1985 and delivered possession of the same to him and from the date of purchase the plaintiff has been in continuous and uninterrupted possession over the suit property. The plaintiffs

further case is that the defendants have got no manner of right, title, interest and possession over the suit property in any manner and with an aim to grab the suit land they are creating disturbances in the peaceful possession of the plaintiff over the suit land. The defendant Nos. 1, 2 & 3 are rich and highly influential persons of the locality and few days back they persuaded the plaintiff to execute a registered sale deed in their favour in respect of the suit land, but when the plaintiff did not agree with the suggestion, the defendants threatened the plaintiff to raise permanent construction over the suit land. Acting upon their previous threat, on 10.08.2009, the defendants have gathered stones sands and other materials with an aim to proceed with the construction. Therefore, the plaintiff filed this suit.

03. After institution of the suit the defendant No. 1, 2 & 3 appeared and submitted their joint written statement, whereas the suit against proforma defendant No. 4 set ex-parte due to his non-participation.

The above defendants in their written statement firstly disputed the initiation of the suit putting question mark over non-joinder of necessary parties, limitation, valuation as well as cause of action. It is also contended that the suit property has not been correctly described and cannot be identified and as such a relief cannot be granted as per the provision of law. It is again contended that Kelu Charan Pattnaik, vendor of the plaintiff is a non-entity in village- Golabai. He being not the recorded owner of the suit property does not have any right to alienate the same and as such the sale deed basing on which the plaintiff tried to manifest his claim is a void, shame and ineffective document. The plaintiff was neither in

possession nor having his title over the suit property. His claim over the suit property whatsoever as reflected in the plaint is false, frivolous and misconceived. It is the further case of the defendants that there was no amicable partition among Banabihari Pattnaik and his brother Bipinbihari Pattnaik, who might have been accepted by the plaintiff as Kelu Charan Pattnaik, at any point of time. It is again contended by the defendants that late Harihar Dash, the father of defendant Nos. 1 & 2 and husband of defendant No. 3 had duly purchased Ac. 0.357 decimals of land out of the same suit plot through a registered sale deed bearing No. 2585 dt. 21.08.1989 from Banabihari Pattnaik and Bipinbihari Pattnaik for a consideration amount of Rs. 8,000/- and took delivery of possession and continued to possess the same. After his death, defendant No. 1 to 2 being his legal heirs inherited the property, which has been bounded by stone wall. It is also contended by the above defendants that since, the sale deed of plaintiff is a vague and void document and since the plaintiff has never been in possession over the suit land, he is not entitled for any relief and the suit is liable to be dismissed.

The defendants further by making counter claims, sought for a prayer of declaration for the sale deed vide document No. 2585 dt. 21.08.1989 executed by Banabihari Pattnaik and Bipinbihari Pattnaik in favour of Harihar Dash to be valid as well as confirmation of possession of defendant No. 1 to 3 over Ac. 0.357 decimals of land out of plot NO. 419.

04. The plaintiff has also submitted the written statement to the counter claim of the defendants. He in his written statement has also contended that the

counter claim is not maintainable in the eye of law as there is no cause of action as well as barred by the limitation of time. It is specifically contended by the plaintiff that defendant Nos. 1, 2 & 3 got no manner of right, title, interest and possession over the suit land nor their deceased father as possession of such property has never been delivered to them. The suit land was sold away by Kelu Charan Pattnaik to the plaintiff prior to execution of the sale deed by Bana Bihari Pattnaik in favour of Harihar Dash. Therefore, Harihar Dash being the subsequent purchaser, the sale deed executed in his favour is null and void and also not enforceable in the eye of law as his vendor at the time of execution of the sale deed retains no title over the suit property. On the other hand the plaintiff is in peaceful possession over the suit land since 06.05.1985. The plaintiff in the written statement again averred that the plaintiff has accrued title over the suit land by way of his adverse possession on it. Therefore, the counter claim is not maintainable.

05. In view of the rival stands of both the parties as above, the following issues have been settled for an useful adjudication.

I S S U E S.

1. Whether the suit and is maintainable?
2. Whether the plaintiff has any cause of action to institute the suit?
3. Whether the suit is defective for non-joinder of necessary parties?
4. Whether the suit is barred by limitation?
5. Whether Bipinbihari Pattnaik, S/o- Kulamani Pattnaik of Vill./P.O.- Golabai, is the vender to the sale deed vide document No. 1566 dt. 06.05.1989 who has

mentioned his alternative name as Kelu Charan Pattnaik in the said sale deed?

6. Whether the sale deed executed by Kelu charan Pattnaik in favour of the plaintiff, Sudarsan Behera vide R.S.D. No. 1566 dt. 06.05.1989 is valid, effective one and enforceable in the eye of law?
7. Whether the plaintiff is entitled for the relief of deceleration and permanent injunction?
8. To what relief, the plaintiff is entitled for?

ISSUES ON COUNTER CLAIM.

9. Whether the counter claim is maintainable?
10. Whether the defendants No-1 to 3 have any cause of action to institute the suit?
11. Whether the counter claim is barred by limitation?
12. Whether Harihar Dash, father of defendant Nos. 1 & 2 and husband of defendant No. 3 has duly purchased the property measuring Ac. 0.357 decimals out of plot NO. 419, khata No. 49 of mouza KAYA?
13. Whether the sale deed vide document No. 2585 dt. 21.08.1989 is valid, effective one and enforceable in the eye of law?
14. Whether the defendants are in possession of the purchased land of Harihar Dash?

06. In order to prove its case, five witnesses have been examined on behalf of the plaintiff including the plaintiff himself as P.W. 5. Three documents have been exhibited on behalf of the plaintiff, which are noted as follows:-

The registered sale deed bearing No. 1566 dt. 06.05.1985 as Ext. 1, rent receipts as Ext. 2 & 2/a respectively and registered sale deed No. 1985 dt. 06.06.1998 as Ext. 3.

07. Similarly, four witnesses have been examined from the side of the defendants including the defendant No. 2 as D.W. 4. Twelve numbers of documents have been relied upon by the defendants and exhibited accordingly. Certified copy of the ROR under khata No. 49 of Mouza KAYA is marked as Ext. A, rent receipts dt. 10.03.2007 & 10.08.2009 as Ext. B & B/1 respectively, mutation ROR as Ext. C, Rent receipt dt. 26.08.2013 as Ext. D, Certified copy of original sale deed vide document No. 2585 dt. 21.08.89 as Ext. E, Sketch Map as Ext. F, Voter I.D. Card of Bipin Bihari Patttnaik bearing No. GTB1377456 as Ext. G, Original HSC Certificate of Bipin Bihari Patttnaik bearing Sl. No. 74558/81 as Ext. H, Hindi Certificate (Parichaya) of Bipin Bihari Patttnaik as Ext. J, Hindi (Prabesa) Certificate of Bipin Bihari Patttnaik as Ext. K & Identity certificate of Bipin Bihari Patttnaik obtained under RTI Act from his official authority as Ext. L.

FINDINGS.Issue Nos. 5 & 6.

08. The above issues are inter related and quite pivotal for an useful adjudication of the disputes between the parties and as such both are taken up together for consideration.

Now the question is whether Kelu charan Pattnaik and Bipin Bihari Pattnaik are two names of one individual. As per the case of the plaintiff Kelu charan Pattnaik, who is the vendor of the sale deed bearing No. 1566/1985 (Ext-1) is the son of Kulamani pattnaik and the younger brother of Bana Bihari Pattnaik. The dispute upon the name, for the first time came to light after filing of the written statement/ counter claim by the defendants. The defendants claim that Kelu Charan Pattnaik, is a non entity in the village 'Golabai' and as such the question of executing a sale deed by claiming himself as the son of Kulamani pattnaik is a vague and false story. The approach of both the parties on that aspect of the case appears to be not unreasonable but for the court, it is a whole matter of evidence and documents as available in the record.

09. Coming to the evidence, P.W. 1 in the cross-examination has stated that Kelu Charan Pattnaik is also known as Bipin Bihari Pattnaik, to be his good name. The defendants have not disputed the said claim of P.W. 1. P.W. 2 in his examination in chief has specifically stated that the plaintiff has purchased the suit land from one Kelu Charan Pattnaik. Several questions have been put to him by the counsel for the defendants but without touching the dispute, whether Kelu Charan

Pattnaik having any entity or not and if he is the same person, who is also known as Bipin Bihari Pattnaik. P.W. 3, in spite of deposing nothing about Kelu Charan Pattnaik in his examination chief has also been cross-examined by the counsel for the defendants on the said aspect of the case as he belongs to the village Golabai. P.W. 3 in his cross-examination has stated that Kelu charan Pattnaik is the brother of Bana Bihari pattnaik. He again stated that he cannot say if Kulamani Pattnaik has two sons namely Bana Bihari Pattnaik and Bipin Bihari Pattnaik. However, both P.W. 1 & 3 have stated that the said Kelucharan Pattnaik is absent in the village for last 20 to 25 years. P.W. 4 is the deed writer, who has drafted the sale deed vide Ext. 1. P.W. 5 is the plaintiff himself. Needless to say that he supported his claim regarding purchase of land from Kelu Charan Pattnaik, S/o- Kulamani Pattnaik. He in the cross-examination has admitted that he cannot show anything to establish that Kelu charan Pattnaik is the S/o- Late Kulamani Pattnaik.

10. It is now needful to mention that after conclusion of the evidence from the side of the defendants, the plaintiff produced one sale deed vide document NO. 1981Dated-06.06.1988 and accordingly the D.W-1 was again recalled for further-cros examination. The said document was admitted before the court as Ext. 3. In the said sale deed the vendor Bana Bihari Pattnaik has sold away certain property to one Dhobi Dei, wherein the name of his brother, who has given consent for sale of the land has been mentioned as Kelu Charan Pattnaik. At this stage it is also quite needful to mention that Bana Bihari Pattnaik, who is alleged by the plaintiff to be the elder brother of Kelu charan Pattnaik has adduced his evidence in this case

as D.W. 1. The said D.W-1 in his earlier evidence has specifically stated that Kelu charan Pattnaik is not his brother and he again stated that he does not know anybody in the name of Kelu charan Pattnaik. He has made such statement before the court in his evidence prior to filing of Ext. 3. But, after production of Ext. 3 the said Bana Bihari Pattnaik in the further-cross-examination has admitted Ext. 3 to be the registered sale deed executed by him in favour of Dhobi Dei. He for the first time made a surprise disclosure by changing is earlier version and also by admitting the signature of Kelu Charan Pattnaik to be the signature of his brother who is known as Bipin Bihari Pattnaik. D.W. 1 further stated that Bipin Bihari Pattnaik, S/o- Kulamani Pattnaik has wrongly mentioned his name as Kelu charan Pattnaik probably with a plea to cheat the vendee of Ext-3. So far as the evidence of other witnesses from the side of the defendants except D.W. 1 is concerned, the same needs no discussion as they all are claiming in one voice that Kelu charan Pattnaik is a non entity in village 'Golabai'. The said D.W. 1 was again recalled by the defendants for further-examination in-chief and during examination in chief he presented several documents such as the voter I.D. Card, original HSC Certificate and Identity of Bipin Bihari Pattnaik obtained under RTI Act from the State Bank of India. In this way the defendants tried to establish that Bipin Bihari Pattnaik, who is the son of Kula Mani Pattnaik is a different individual having his identity and he is not the same person, who executed Ext. 1 in favour of the plaintiff. The documents produced by the defendants are public documents and this court has no hesitation to accept that Bipin Bihari Pattnaik is an individual, who is the son of Kulamani

Pattnaik and brother of Bana Bihari Pattnaik. But, simultaneously, if one visits the next page to the same chapter can realize the peculiarity involving therein. True that Bipin Bihari Pattnaik has a separate identity. But, his brother who came forward to the court in order to prove that Kelu charan Pattnaik is not his brother has ultimately admitted that his brother might have mentioned his name as Kelu Charan Pattnaik in the Ext. 3 only to cheat the vendee.

11. This being the statement of D.W. 1, who is the most vital witness for the defendants case, it is worthwhile to mention that Bana Bihari Pattnaik and Bipin Bihari Pattnaik (D.W. 1) are the vendors to harihar Das who is the father of the defendants No- 1 and 2 and husband of defendant No-3. The certified copy of the said sale deed has been admitted by the defendants as Ext. E. Wherein, the name of both the vendors have been clearly mentioned as Bipin Bihari Pattnaik and Bana Bihari Pattnaik. But in Ext. 3, the name of the vendor has been mentioned as Bana Bihari Pattnaik and Kelu Charan Pattnaik has been shown as the brother of the vendor Bana Bihari Pattnaik. D.W. 1 admitted in his examination in para – 20 that some people also called his brother Bana Bihari Pattnaik as Kelu and as such he mentioned his name in Ext. 3 as 'Kelu' charan Pattnaik. The said admission of D.W. 1 implies that he has seriously attempted to conceal the real truth but, after production of Ext. 3, truth itself came out and D.W. 1 was compelled to face the reality and he ultimately admitted that his brother Bipin Bihari Pattnaik is also known as Kelucharan Pattnaik. However after perusal of the two above documents, this court would like to proceed a little ahead to sweep out the other confusions.

12. Firstly the signature of Kelu charan Pattnaik appearing on Ext. 3, as brother of Bana Bihari Pattnaik, must have been put down in presence of the vendor, vendee and other witnesses who are well known to him. That being the real circumstances, the question of putting signature in a wrong name appears to be not believable as the same is not possible without the consent of vendor, vendee, scribe and all the witness present therein. Secondly, the sale deed vide Ext. 3 was executed in the year 1988, whereas the sale deed vide Ext. 1, has been executed in favour of the plaintiff in the year 1985, three years prior to execution of Ext. 3. Ext. 1 was also executed in presence of vendor, vendee and other witness. Therefore saying that Bipini Bihati Pattnaik for the purpose of cheating the vendee wrongly mentioned his name as Kelu Charan Pattnaik is not believable. The above two vital documents and the admission of D.W. 1 make it crystal clear that Bana Bihari Pattnaik is also known as Kelu charan Pattnaik. He has executed the Ext. 1 in favour of the plaintiff and he is the same person, who has given consent over execution of Ext. 3. He is a highly educated person, retired being a Bank officer. But, the reason of non-mentioning of his actual name in the above sale deeds and mentioning his alternative name is best known to him.

13. Lets now come to the most vital question regarding genuineness of the registered sale deed bearing No. 1566 dt. 06.05.1985 (Ext. 1). On the basis of the above sale deed the plaintiffs claims his right, title and interest over the suit property. The defendants have completely disputed the sale deed by projecting it as a vague and nominal document. On the above circumstances, the onus lies on the

plaintiff to establish that the document is a valid, effective one and enforceable in the eyes of law. In the pleading the plaintiff has stated that the suit property stands recorded in the name of the brother of the vendor of the plaintiff namely Bana Bihari Pattnaik. The suit property is a joint family property and there was an amicable partition in between Bana Bihari Pattnaik and his vendor Kelu charan Pattnaik and as such the suit property allotted in favour of his vendor Kelu Charan Pattnaik. The suit property was in exclusive possession of Kelu Charan Pattnaik and he sold away the same to the plaintiff. The above pleading gives rise of a little more question than expected. Let's have a discussion on the viability of the said documents. Firstly; the plaintiff has to prove that the vendor is capable enough to execute a sale deed over a property which is admittedly a joint family property. The plaintiff admitted that suit property is recorded in the name of Bana Bihari Pattnaik. The plaintiff has not produced a scrap of paper to show that the suit property is the ancestral or joint family property of Bana Bihari Pattnaik and his vendor Kelu @ Bipin Bihari Pattnaik. But, if the evidence of Bana Bihari Pattnaik be looked into, he in his evidence in chief mentioned that himself and his brother (Kelu @ Bipin Bihari Pattnaik) having half share each over the suit plot No. 419 and they have already sold Ac. 0.615 decimals of land out of the said suit plot. On that basis, even if it is accepted that the suit property is the joint family property of Bipin Bihari Pattnaik and the vendor of the plaintiff, the same has not been partitioned by metes and bounds. So far as the question of amicable partition is concerned, the plaintiff admitted to having no personal knowledge about such partition nor any witness from the side of both the

parties whispered a single word regarding any amicable partition. The plaintiff himself in his cross-examination has stated that he cannot say the share allotted to Bana Bihari Pattnaik and Kelu Charan Pattnaik over partition as well as the share from individual plot if any. Therefore, the question of partition cannot be believed at any stress of imagination. Secondly, if it is accepted that an amicable partition has been taken place between the parties, the same is meaningless unless the date of the partition and the share allotted therein is not proved or admitted by the parties. After all, law does not recognize an amicable partition to be a partition by metes and bonds and as such the said partition if believable do not make the vendor of the plaintiff capable enough to alienate the joint property without the consent of other co-sharers.

14. Lets come to the next question. The ROR in respect of the suit khata No-49, plot No-419, has been marked as Ext-A. Wherein the property stands recorded in the name of Bana Bihari Pattnaik and others. Kelu or Bipin Bihari Pattnaik is not the recorded tenant of the said property. The plaintiff in his pleading has clearly contended that his vendor was looking after the entire property for his brother Bana Bihari Pattnaik. And by virtue of an amicable partition the suit property was allotted in favour of Kelu Charan Pattnaik. Now the plaintiff at this stage has to prove the existence of the suit property with its description, which was allotted to his vendor. There is no whisper as to the extent of the property come to the share of his vendor. The description of the suit land as per the plaint reveals that the total area of the plot No. 419 is Ac. 1.430 decimals. The vendor of the plaintiff sold away Ac.

357.5 decimals to the plaintiff. The plaintiff's further case is that since the suit property was partitioned between two brothers, his vendor sold his exclusive share to the plaintiff. The sale deed vide document No. 1566 was executed in the year 1985 wherein, Kulu Charan Pattnaik alienated the suit property to the plaintiff. The plaintiff again relied upon a sale deed executed in the year 1988 vide document No. 1981 dated 06.08.1988. In the said document the elder brother of the vendor of the plaintiff namely Bana Bihari Pattnaik alienated a portion of the land, wherein Kulu Charan Pattnaik given his consent as the co-sharer of the joint family property. The same implies that the suit property has not been partitioned and as such the consent of other co-sharer was required for sale of the land by another co-sharer. That being the plaintiff's case, the vendor Kulu Charan Pattnaik was not competent to sell the suit property as he is neither a recorded tenant nor the plaintiff succeeded to establish any allotment of land to his vendor Kulu Charan Pattnaik or his exclusive right over the suit property. The sale deed executed in favour of the plaintiff vide document No. 1566 of 1985 is not enforceable in the eye of law.

Issue Nos. 7 & 8.

15. The plaintiff's subsequent case is that after purchase he has been in peaceful possession over the suit property. Even though he did not have a valid title over the suit property, in alternative the plaintiff in his written statement to counter claim took the plea of adverse possession. He has claimed possession over the suit property from the date of purchase. To that effect he only produced the rent receipts of year 2006 & 2007.

Firstly, the manner of possession over the suit property has not been clearly described by the plaintiff himself. The plaintiff, who is examined as P.W. 5 in his cross-examination has stated that initially he has raised cashew nut trees over the suit property and was enjoying the fruits. Except the cashew nut trees he has never raised any plant due to scarcity of water. Now it is clear that the suit land is lying vacant and the possession of the plaintiff over the suit property as claimed by the him do not indicate a physical possession. Coming to the evidence of the other witness, P.W. 1 in his cross-examination has admitted that the defendants have been forcibly occupied the suit land. P.W. 2 in his cross-examination has stated that the suit land being a stony land it is almost impossible to raise any crop there. Both P.W-2 and P.W. 3 gave wrong boundary descriptions of the suit land. P.W-3 again stated that he cannot say if the defendants are owners in possession of the suit land by virtue of a sale deed execute in favour of Late Harihar Das by the owners of the suit property. Now it is clear that the plaintiff has no case to prove that he is in absolute possession of the suit land. Even if the rent receipts are accepted, the same indicate that the rent has been paid in respect of total Ac. 1.430 decimals under khata No. 49. This does not imply that the plaintiff has been paying rent only in respect of the suit land and also do not establish a case of his long standing possession over the suit property for more than a statutory period. Plaintiff has not also advanced his case over the fact of adverse possession. Rather the documents seem to have been obtained for the purpose of the case. So far as the relief as sought for by the plaintiff in the suit is concerned, the plaintiff has failed to establish

his right, title, interest or possession over the suit property and as such he is not entitled for the relief of declaration and permanent injunction against the defendants.

Issue Nos. 12, 13 & 14.

16. In the counter claim the defendants demanded that they are the real owners of the suit property as their father had purchased the suit land by virtue of the sale deed from the true owners. The suit land has been muted in their favour. To that effect, as discussed earlier, the certified copy of the sale deed vide Ext. E, and the ROR under khata No. 49 and the mutation ROR under khata No. 103/141 has been relied upon. The rent receipts of year 2006, 2007 & 2013 have also been exhibited for consideration. The original sale deed has not been produced by the defendants on the reason that the same is missing. P.W. 1 is one of the vendor of the sale deed vide Ext. E. He in his evidence in chief has specifically stated that the suit plot No. 419 under khata No. 49 measuring Ac. 1.430 decimals stood jointly recorded in his name and in the name of Somanath Pattnaik, Gopinath Pattnaik and Kasinath Pattnaik, wherein he had half share and the remaining recorded tenants jointly have rest half share. The ROR under khata No. 49 has been produced and it has been clearly mentioned therein that the vendor of the defendants having half share over the suit property and the rest recorded tenants jointly having the rest half share. If the recorded of right to the plot no-419 under khata No. 49 is looked in to, the total property is still in joint ownership. The defendants are completely silent as to how their vendor without any division of share could enable himself to sale a

specific share out of a joint property. Surprisingly, the plaintiff has not also disputed such alienation on the ground of jointness of status. However it reveals that the said land has been alienated to Harihar Das for a consideration amount of Rs. 8,000/- in the year 1989 by one of the recorded tenant namely Banabihari Patnaik. The suit land has already been muted in the name of present defendants along with other legal heirs of Harihar Dash. The plaintiff only challenged the sale deed on the ground that since he is the first purchaser, the subsequent sale deed executed by Bana Bihari Pattnaik in favour of Harihar Dash is a shame, nominal and void document. But, here the matter is completely different. This court in the forgoing paragraph has already come to the conclusion that the sale deed executed by Kelu Charan Pattnaik in the name of the plaintiff has no legal sanctity and the same is not enforceable in the eye of law. But, so far as the sale deed executed by Bana Bihari Pattnaik in favour of Harihar Dash is concerned, it is seen that both Bipin Bihari Pattnaik and Bana Bihari Pattnaik have jointly sold the suit property to Harihar Dash vide Ext. E. It has been clearly mentioned in the said sale deed (Ext. E) that the vendors have been in separate possession of their half share over the land recorded under khata No. 49. The said land has already been muted, which implies that the purchased land of Harihar Das has been muted with the consent of the other recorded tenants. Since the sale deed has not been disputed nor the mutation ROR has been challenged by the plaintiff, there is no scope for the court to discard the title of the defendants and others as per the mutation record of right.

17. So far as the question of possession is concerned, the vendor of the defendants in his examination in chief has stated that after purchase he delivered possession to Harihar Dash. Nothing has been extracted from his mouth to disbelieve his story. Similarly the other witnesses including the defendant No. 2 have also claimed their possession over the suit property. It is the settled law that unless and until a contrary is proved the possession always follows the title. Here the defendants have a better title than the plaintiff. They have specifically and categorically adduced evidence with regards to their possession over the suit land being supported by rent receipts which reveals that they have been paying land revenue in respect of their purchased land.

Issue Nos. 1, 2, 3 & 4.

18. So far as the question of maintainability of the suit of the plaintiff on the above ground is concerned, the defendants have seriously raised a good question regarding identification of the suit property. If one go through the whole pleading, written statement, counter claim and W.S. to the counter claim, it would not be possible to ascertain how both the parties purchased a similar patch of land. The plaintiff purchased measuring Ac. 357.5 decimals of land out of total Ac. 1.430 decimals. If that is the case of the plaintiff, a proper identification of the land is utmost important. On the other hand Harihar Dash has purchased measuring Ac. 0.357 decimals. There is a difference of 5 decimal of land in both the sale deed vide ext-1 and ext-E. Now the plaintiff has to identify the land purchased or encroached by the defendants out of his purchased land. The description of the land as per the

plaint is not sufficient to explain the actual suit property. One sketch map has been produced from the side of the defendants vide Ext. F, showing the purchased land of Harihar Dash. Even though the sketch map is not as per the scale, the same has not been disputed by the plaintiff and after all the suit land has been muted under plot No. 419/692 as per the HAL ROR. Since the purchased property of Harihar Das has already been muted, this court lost a definite scope to interfere with this act of the revenue authority unless challenged by the aggrieved parties as per the provision of law. Therefore, the suit of the plaintiff is not identifiable and as such the suit is incompetent as per the provision U/o 7 Rule 3 CPC.

Issue Nos. 9, 10 & 11.

19. The above issues conferred with the question of maintainability of the counter claim. It reveals from the mutation ROR vide Ext-C that Harihar Das has four sons out of which his two sons such as Promod Dash and Prasant Das and the wife of Harihar Das have implied as defendants in the suit. They have filed their written statement and counter claim. The counter claim being a cross-suit the defendants must have to comply all the formalities of presenting a plaint as much as the counter claim is concerned. In the counter claim the defendants No. 1, 2 & 3 sought for the relief of declaration of the sale deed vide document No. 2585 dated 21.08.1989 to be valid and confirmation of possession of defendant Nos. 1, 2 & 3 over the purchased property of Harihar Dash.

Coming to the said fact, after perusal of the document vide Ext. C, it came to the knowledge of the court that two other sons of Harihar Dash, who are

the recorded tenants to his purchased property have not been made as parties. This fact has not been agitated by any of the parties to the suit. Undisputedly, both Pranaya Dash and Prabhat Dash are the necessary parties to the suit. Now coming to Ext. A, the vendor of Harihar Dash and others are the recorded tenants to the suit khata No. 49 and plot No. 419. This is a property under joint title and possession. While the defendant Nos. 1, 2 & 3 are claiming the sale deed vide document No. 2585/89 to be valid and effective one, it is their legal obligation to implead all the recorded tenants as well his vender of the said property as parties by taking appropriate steps as per the provision of law. In the present case the counter claim is also suffering from non-joinder of necessary parties. It is true that as per the provision Under Order 1 Rule 9 of CPC a suit cannot be dismissed solely on the ground of non-joinder of necessary parties, but in the present case even though the counter claim cannot be rejected solely on the ground of non-joinder of necessary parties, but no effective order can be passed on the prayer of the defendants on the following reasons.

20. Firstly, so far as the sale deed vide document No. 2585/89 vide Ext. E is concerned, there is absolutely no mention in the said document that the properties which is recorded in khata No. 49 has been partitioned or allotted to the share of the vendor of Harihar Dash. The said vender who is a witness for the defendant case as D.W-1 in the sale deed has mentioned that himself and the other tenants had been possessing the property under khata No. 49 separately. Such a claim does not confer an absolute right, title, interest or possession over any portion

of the land, which has not been legally partitioned by metes and bounds. However, the said fact can only be proved in presence of all the necessary parties. In absence of the other recorded tenants to the khata NO. 49, the sale deed vide document No-2585/89 vide Ext. E cannot be declared to be effective one and enforceable in the eye of law even though the possession is established otherwise.

21. Similarly, the defendants have sought for a prayer of declaration of their possession in absence of other tenants such as Pranaya Dash and Prabhat Dash. The reason of avoiding them in the counter claim appears to be quite mysterious. In case the possession of defendant Nos. 1, 2 & 3 is declared over the purchased property of Harihar Dash measuring Ac. 0.357 decimals, recorded under khata No. 103/141 and plot No. 419/692 in absence of other recorded tenants, it would be illegal and improper. Moreover, in absence of the necessary parties an executable order cannot be passed in the counter claim and if so, the same will lead to multiplicity in proceeding. Therefore, the defendants are also not entitled for any relief. However they have a liberty to institute an independent suit for the purpose as they desired in the counter claim. Hence it is order.

ORDER

The suit of the plaintiff be and the same is dismissed on contest against the defendant Nos. 1, 2 & 3 while ex-parte against defendant No. 4, but in the circumstances without any cost.

Similarly, the counter claims of the defendant No-1,2 and 3 is hereby dismissed on contest against the plaintiff, but in the circumstances without any cost.

Advocates fee at on contested scale.

Sr. Civil Judge, Khurda.

Transcribed to my dictation, corrected and signed by me and pronounced in the open court this the 26th day of February, 2014.

Sr. Civil Judge, Khurda.

List of witnesses examined on behalf of Plaintiff :-

P.W. 1	Kasinath Tarei.
P.W. 2	Pramod Kumar Srichandan.
P.W. 3	Arjun Kandi.
P.W. 4	Kulamani Mangaraj.
P.W. 5	Sudarsan Behera.

List of witnesses examined on behalf of Defendants. :-

D.W. 1	Banabihari Pattnaik.
D.W. 2	Chandrakanta Rout.
D.W. 3	Chandrakanta Pattnaik.
D.W. 4	Prasant Kumar Dash.

List of documents admitted on behalf of the Plaintiff :-

Ext. 1	Regd. Sale deed No. 1566 dt. 06.05.1985.
Ext. 1/a	Signature of P.W. 4 on Ext. 1.
Ext. 1/b	Signature of Kelu Charan Pattnaik on Ext. 1.
Ext. 1/c	Signature of Vendee on Ext. 3.
Ext. 1/d	Signature of Banambar Pattnaik on Ext. 1.
Ext. 1/e	Signature of Bansidhar Paikray on Ext. 1.
Ext. 2 & 2/a	Rent receipts.

Ext. 3	Regd. Sale deed No. 1981 dt. 06.06.1988.
Ext. 3/a	Signature of D.W. 1 on Ext. 3.
Ext. 3/b	Signature of Sudarsan Samantray on Ext. 3.
Ext. 3/c	Signature of Banambar Pattnaik on Ext. 3.
Ext. 3/d	Signature of Kelu Charan Pattnaik on Ext. 3.

List of documents admitted on behalf of Defendants :-

Ext. A	C.C. Of ROR under khata No. 49, plot No. 419 of mouza Kaya.
Ext. B	Rent receipt dt. 10.03.2007.
Ext. B/a	Rent receipt dt. 10.08.2009.
Ext. C	Mutation ROR.
Ext. D	Rent receipt dt. 26.08.2013.
Ext. E	C.C. Of original sale deed vide document No. 2585 dt. 21.08.89
Ext. F	Sketch Map.
Ext. G	Voter I.D. Card bearing No. GTB1377456.
Ext. H	Original HSC Certificate Sl. No. 74558/81.
Ext. J	Hindi Certificate of Parichaya.
Ext. K	Hindi Certificate of Prabesa.
Ext. L	Identity obtained under RTI Act.

Sr. Civil Judge, Khurda.