

The plaintiffs have preferred this suit for declaration of their right, title and interest over a piece of land measuring Ac. 0.001 ½ decimals, recorded under khata No. 401 pertaining to plot No. 1020 out of total 60 decimals of mouza Orabarasingh (hereinafter called to be the suit land and the plot No-1020 to be suit plot) along with permanent as well as mandatory injunction against the defendants and recovery of possession thereof.

02. The plaintiffs case is that the suit plot total measuring 65 decimals was originally recorded in the name of one Maheswar Mangaraj, but Sudam Malika, S/o-Ananta Malika was all along in possession of the same and as such suit plot No. 1020 under khata No. 401 was recorded in the name of Sudama Malika in the settlement ROR of 1962. While Sudam Malika and his son Bhima Das were in possession of the suit plot, they for their legal necessity sold an area measuring 60 decimals out of total 65 decimals to the plaintiffs by executing two registered sale deeds. Sale deed No. 9150 was executed by Bhima Das in favour of the plaintiffs on 26.10.1964, whereas Sudam Malika sold the land to the plaintiffs through registered sale deed No. 9149 dt. 26.10.1964, and handed over the possession of the entire Ac. 0.060 decimals out of plot No. 1020 under khata No. 401 of mouza Orabarasingh. The plaintiffs further case is that while, they have been in possession of their purchased land, the defendants, who are the adjacent southern side neighbors to their purchased land started disturbing the possession of the plaintiffs and attempted to encroach their land, but the plaintiffs could not prevent them till 2007. On 05.07.2007, the defendants unexpectedly and suddenly started

constructing their boundary wall by encroaching the suit land measuring Ac. 0.001 ½ decimals. The plaintiffs first informed the village gentries for settlement, but the same turned in vein and as such they approached the Executive Magistrate, Khordha on 08.07.2007 by initiating a case U/s 144 Cr.P.C., wherein the Executive Magistrate restrained the defendants from entering upon the suit land. But, in spite of the same the defendants did not obey order of the Executive Magistrate and as such the plaintiffs again filed a case U/s 188 of IPC before the Executive Magistrate, Khordha. It is again averred by the plaintiffs that after hearing the matter the Executive Magistrate directed both the parties to demarcate their respective lands, but the defendants without taking any heed to the said instruction of the Executive Magistrate constructed their northern side boundary wall by encroaching the suit land. Therefore, the plaintiffs instituted the present suit by mentioning the cause of action to be 05.06.2007 and 07.06.2007, while the defendants started constructing their northern side boundary wall by encroaching the suit land and on 03.08.2007, while the Executive Magistrate directed both the parties to get their respective land demarcated and finally on 16.08.2007, when the defendants threatened the plaintiffs not to vacate the suit land.

03. The defendants have also submitted their written statement by saying that the suit is not maintainable on the question of cause of action, non-joinder of necessary parties, barred by limitation as well as the suit being undervalued. The above defendants have to say that they have no knowledge about any purchase of the land by the plaintiffs, but in case the plaintiffs pleadings are accepted, the suit

plot was recorded in the name of Brundaban Baliarsingh and others and as such the same cannot be devolved upon to the vendors of the plaintiffs. The specific case of the defendants is that they have not encroached any portion of the land of the plaintiffs and they have been in possession of their own land which is adjacent to the southern side of the suit land. The land of the defendants is their ancestral property having residential house, boundary walls, and fruit bearing trees etc over it. It is again contended by the defendants that when the defendants purported to establish a mill over their land, for the security point of view they want to put stone boundary wall in place of the existing green fence. At that time, the plaintiffs demanded cash from the defendants. While, the defendants refused to give any amount to the plaintiffs, they filed the present suit before this court. They have further averred that the proceeding U/s 144 of Cr.P.C, as instituted by the plaintiffs was closed on 27.07.2007 by the Executive Magistrate with a direction for demarcation of their respective lands, but the plaintiffs without taking any recourse filed the present suit with much imaginary and misconceived fact. The defendants have never violated the condition of the Executive Magistrate and as such the Magistrate did not consider the application of the plaintiffs under section 188 of I.P.C. There is absolutely no cause of action to file the suit and as such the suit is liable to be dismissed.

04. Taking into account of the factual disputes between the parties and for an useful and proper adjudication, the following issues have been settled.

I S S U E S.

- i Is the suit maintainable?
- ii Is there any cause of action to bring the suit?
- iii Is the suit bad for non-joinder of necessary parties?
- iv Whether the suit is bared by law of limitation?
- v Whether the plaintiffs have got right, title and interest over the suit property?
- vi Whether the plaintiffs are entitled to the relief of permanent injunction restraining the defendants from entering upon the suit land?
- vii Whether the plaintiffs are entitled to a decree of mandatory injunction directing the defendants to remove the boundary wall of the suit property already constructed by them?
- viii Whether the plaintiffs are entitled to the relief of recovery of possession of the suit property as indicated in schedule "B" from the defendants?
- ix What relief, if any, the plaintiffs are entitled to?

05. In order to substantiate their case, four witnesses have been examined on behalf of the plaintiffs, out of whom P.W. 4 is the defendant No. 1 himself. Five documents have been relied upon and admitted during the course of evidence from the side of the plaintiffs, out of which the registered sale deed bearing No. 9150 dt. 26.10.1964 is marked as Ext. 1, certified copy of the registered sale deed No. 9149 dt. 26.10.1964 as Ext. 2, certified copy of the ROR under khata

NO. 401 of mouza Orabarasingh as Ext. 3, certified copy of the ROR in khata No. 389 of mouza Orabarasingh as Ext. 4 and one rent receipts concerning to the suit plot as Ext. 5.

On the other hand four witness have been examined on behalf of the defendants including defendant No. 1 as D.W. 4. No document has been relied upon by the defendants.

FINDINGS.

Issue Nos. V.

06. The above issue being the vital issue not only for its core value but also quite important to adjudicate the other issues and as such the same is taken up first for consideration.

It is the undisputed fact that the plaintiffs have purchased a piece of land measuring Ac. 0.060 decimals from the recorded tenant out of plot No. 1020, khata No. 401 out of total area of Ac. 0.065 decimals. The extend of the disputed / suit land is Ac. 0.001 ½ decimals, which has been alleged to be encroached by the defendants. The plaintiffs themselves in the plaint as well as in the evidence have created certain confusions by relying upon two sale deeds, one has been executed by Bhima Malika and another one by Sudam Malika. Both the sale deeds and the corresponding RORs have also been admitted in the evidence by the plaintiffs. So far as the sale deed bearing No. 9150 is concerned one Bhima Das, S/o- Sudam Malika has alienated Ac. 0.060 decimals of land out of khata No. 398 of mouza Orabarasingh. If the record of right, which has been marked as Ext. 4 is perused,

the same has been recorded in the name of Maheswar Mangaraj and others, wherein it has been endorsed by the revenue authority that plot No. 401 measuring Ac. 0.065 decimals is in possession of Sudam Malika. The ROR of Khata No-401 is marked as Ext- 3, which reveals that the plot No-401 was subsequently recorded in the name of Sudam Mallick. Ext-1 further reveals that Bhima Das who is the son of Sudam Mallick alienated the land measuring Ac.0.060 decimals to the plaintiffs out of plot No-1020, Khata No-398. But the facts remains that Ext-1 was executed on 26.10.1964 and on the same day Ext-2 was executed by Sudam Mallick by transferring the same land to the plaintiffs recorded under Khata No-401. This act of the vendors implies that after publication of the record of right under Khata No-401, both the sale deeds have been executed. But the plaintiffs failed to offer any explanation as to what forced the plaintiffs to purchase the suit plot from two vendors in two separate sale deeds in one date. The same further implies that since Sudam Malika was alive at the time of execution of Ext-1 and in possession of the said plot, his son, who is the vendor in sale deed No. 9150/1964 (Ext-1) is not entitled to alienate the said land in absence of his father as the said property is not the exclusive property of the vendor Bhima Das. In the said sale deed his father was not also made as a party. Therefore, the sale deed No. 9150 does not convey any title over the property under khata No. 401, plot No. 1020. The plaintiffs also relied upon certified copy of another sale deed vide document No. 9149, which has been recorded with objection as Ext. 2. It appears that in the said sale deed Sudam Malika, who is the recorded owner of the suit plot under khata No. 401, has sold

away the property to the plaintiffs measuring Ac.0.60 decimals. The defendants raised objection as the original sale deed has not been filed. But, so far as the genuineness of the sale deed is concerned, the defendants have not put any question with regards to Ext. 2 nor disputed the same to be a manufactured document or obtained by forge. More over the defendants have not claimed any part of the suit property to be their own or in their possession. Therefore, even though due procedures have not been followed by the plaintiffs while exhibiting Ext. 2, it cannot be held that the certified copy of the sale deed cannot be accepted before the court to be genuine one unless and until any contrary is proved to that effect. The certified copy of the sale deed is a public document. The original sale deed is required in order to prove its contents while the same is under dispute, which is not possible in case of a certified copy. But in the present case the sale transactions what have been advanced by the plaintiffs in their plaint has not been disputed by the defendants by saying that the same is not within their knowledge. Ext. 3 reveals that Sudam Mallick is the recorded tenant to the suit plot who transferred Ac.0.060 decimals to the plaintiffs by virtue of Ext-2. Therefore, it is the opinion of this court that the vendor Sudam Malika has duly alienated Ac. 0.060 decimals out of total Ac. 0.065 decimals from plot No. 1020 under khata No. 401 of mouza Orabarasingh to the plaintiffs.

07. Giving due regards to the above fact and finding, it is the conclusive opinion of this court that the plaintiffs have purchased the property measuring Ac.0.060 decimals out of plot No. 1020 as mentioned above by virtue of Ext-2. They

have the right, title, interest and possession over the same as not disputed in this case by the defendants. Most importantly, it has been pleaded and was advanced by the plaintiffs that the suit land measuring Ac. 0.001 ½ decimals is the part and parcel of their purchased land. This part of the evidence has not also been disputed by the defendants, rather it is the case of the defendants that they have never encroached any land of the plaintiffs. Regarding being had to the above admitted facts, it is the further opinion of this court that the suit land, which is the part and parcel of the purchased property of the plaintiffs, they got the right, title and interest over the suit property.

Issue Nos. vi, vii & viii.

08. The above three issues are interrelated with regards to the reliefs as sought for by the plaintiffs and as such these are taken up together for consideration for a complete adjudication.

In the above three issues this court will decide if the plaintiffs are entitled for the reliefs or any relief as sought for by them. Firstly, the plaintiffs case is that the portion of the land, which has been mentioned to be the suit land is an area measuring Ac. 0.001 ½ decimals out of the total Ac. 0.060 decimals. In the plaint they have specifically mentioned the area of the suit land as mentioned above. There is no dispute that the suit land is a part and parcel of Ac.0.060 decimal of land as purchased by the plaintiffs by virtue of Ext. 2. Now, the question is whether the said portion of the land has been encroached by the defendants or not? If the plaintiffs succeeded to prove the same, their propose of filing the suit will

be served. The defendants in their written statement have specifically stated that they are the southern side land owners and they have constructed the boundary wall adjoining to the suit land, but not encroaching the suit land. It is the further admitted case of both the parties that the land of the defendants adjoining to the southern side of the suit land which is the ancestral homestead land and BARI of the defendants. That being the admitted case of both the parties, lets come to the question of encroachment, which has been completely disputed by the defendants. To prove the same the plaintiffs relied upon the evidence of four witnesses including the plaintiffs' No. 1 himself as mentioned earlier. P.W. 1 in his examination-in-chief has stated that the area of the suit land is around 0.002 decimals having a size of about 2.5 feet width and 25 feet length in south-east side of the suit plot. P.W. 2 in support of the same also mentioned that the suit land is Ac. 0.001 $\frac{1}{2}$ decimals having a size of 2.5 feet width into 25 feet length in south-east direction. P.W. 3 has also stated that the area of the suit land is Ac. 0.002 decimals having a size of 2.5 feet width and 25 feet length in south-east direction. However, this court has gone through the cross-examination. P.W. 1, in the cross-examination has stated that the suit land has not been measured in his presence. He again stated that he has not demarcated the suit land at any point of time and he only heard from Nabaghana Malika (plaintiffs No. 1) that the defendants have encroached the suit land. P.W. 2 in his cross-examination has stated that he cannot say the measurement of decimals in feet calculation, which ultimately implies that his evidence in chief is not as per his statement. He nowhere stated that the suit land was measured in his

presence at any point of time. Similarly, if one goes through the cross-examination of P.W. 3, would found that the suit land was not measured in his presence and he also stated that he cannot say the length and breadth of the suit land. He admitted that he was not present when the land of the defendants, adjoining to the suit land was measured. He again stated that the land of the plaintiffs is situated to the eastern side of the suit land. The evidence of the three witnesses cannot be accepted to be complete one and trust worthy as because the suit land or the land of the plaintiffs has not been measured in their presence and they are unable to say as to how they came to know about the encroachment of the suit land by the defendants and particularly, the area encroached by the defendants. They might have been guided by the description of the plaintiffs with regards to the area encroached by the defendants and deposing accordingly. However, ignoring the above version of the witnesses, lets come to the evidence of P.W. 4, who is the plaintiffs No. 1 himself are the most vital witnesses for his own case.

09. P.W. 4 in his evidence in chief has specifically contended that on 05.06.2007, the defendants forcibly encroached the suit land having 25 feet in length and 2.5 feet in breadth from the southern side of the suit plot. He requested the village gentries to resolve the matter, who advised both the parties to get their respective land demarcated. The defendants did not pay any heed to it and as such the plaintiffs filed a case U/s 144 of Cr.P.C before the Executive Magistrate, Khordha. The Executive Magistrate directed the defendants not to encroach the suit

land of the plaintiffs but in spite of such direction, the defendants constructed the boundary wall by encroaching the suit land.

This being the plaintiffs case, there is absolutely no whisper by the P.W. 4 that the plaintiffs have ever demarcated the suit plot or the suit land to ascertain the exact area encroached by the defendants. In the cross-examination, P.W. 4, who is one of the plaintiff in this case has admitted that the defendants cut two 'TENTULI' trees, which are existing in their side and another two 'TENTULI' trees are still in their (plaintiffs) side. P.W-4 also deposed that the defendants have constructed their boundary wall keeping aside the TENTULI trees of their (plaintiffs) side. Another surprising fact is that P.W. 4 has stated in his cross-examination in para – 14 that the boundary line of their purchased land is not straight, but little curving to the western side. If that is the admitted case of the plaintiffs, now it would be profitable to visit the sketch map appended in the plaint and became a part and parcel of the pleadings. The sketch map shows that the suit plot No. 1020 is a square shaped area and the boundary line adjoining to the defendants land approaching from east to west direction is completely straight. The eastern side of the suit plot is adjoining to the plot No. 1019 and the southern side of the suit plot is adjoining to the defendants land. From the admitted case of P.W. 4, it is became quite clear that the boundary line approaching from east to west is curving towards western side but the sketch map does not reflect the same and as such the rough sketch map appended in the plaint appears to be not correct and also not enough to reflect the exact portion of the land encroached by the defendants as well as the

correct shape of the encroached land. It is again worthwhile to note that the said P.W. 4 in the cross-examination again admitted that since the area of their land was not correct, the Executive Magistrate has directed for measurement. He again admitted that the suit land was never subjected for demarcation after purchase till date. Since, they have been in possession of the suit land since long, basing on such possession, they came to know that defendants have encroached the suit land. He again stated that the suit land was measured by a private amin in presence of villagers. No notice was issued to the defendants for such measurement.

10. Now, the most crucial question is how the plaintiffs became sure that a portion of land measuring Ac. 0.001 ½ decimals has been encroached by the defendants? Firstly, the description of the suit plot has been given with its boundary in foot of the plaint. Whereas, the present case requires boundary descriptions of the purchased land of the plaintiffs measuring Ac.0.060 decimals. The said sketch map does not disclose the purchased area of the plaintiffs. Therefore, this court is unable to ascertain the purchased land as well as the land encroached by the defendants, from the rough sketch map. Provision under order 7 rule 3 CPC provides that “where the subject matter of the suit is immovable property, the plaint shall contend a description of the property sufficient to identify it and a case, such property can be identified by boundary or numbers in a record of settlement of survey, the plaint shall specify such boundary of numbers.” The entire purchased land of the plaintiffs is not the disputed land. Only the encroached portion is the subject matter of the suit. If the sketch map is accepted the disputed land is

bounded by the land of defendant to the south, plot No. 1019 towards east, and plot No. 1020 towards north and west. This has not been reflected in the plaint. It is true that it is a matter for discussion in the question of maintainability but this court desire to go with the above discussion only for the sake of identification of specific land. As because, the measurement of the suit land is under serious dispute.

11. It is ascertained from the plaint as well as from the evidence in chief of the witnesses from the side of the plaintiffs that neither the purchased land nor the suit land of the plaintiffs has ever been measured. P.W. 4, who is one of the plaintiffs, has initially admitted that the suit land has not been measured from the date of purchase till date. He again stated that the suit land was measured by a private amin. If the said fact is true the plaintiffs ought to have produced the amin report for specific identification. To the utter surprise of the court, if the examination in chief of P.W. 4 is counted again he nowhere stated that the suit plot or their purchased land was ever demarcated by a private amin and in the cross-examination he admitted that since the area of their land was not correct, the Executive Magistrate directed for measurement. That being the very admitted case, if the plaintiffs have any point of time demarcated the land through a private amin they should not have suppressed the same and must have been produced before the court with the correct sketch map to prove the exact land encroached by the defendants. It is also difficult for the court to ascertain whether the land of the plaintiffs was measured prior to encroachment or after encroachment. Even after a lengthy discussion on the evidence from the side of the plaintiffs, this court do not

find a pinch of evidence to ascertain how the plaintiffs came to know that a area measuring Ac. 0.001 ½ decimals of land to the extent of 2.5 feet width and 25 feet length towards the south has been encroached by the defendants. The onus lies on the plaintiffs to prove the same and to that effect a cogent, concrete and reliable evidence is required otherwise any order to that effect will cause prejudice to the other parties. There is no basis at all either in the pleading or in the evidence of the plaintiffs to prove how they came to know about the exact portion of the land encroached by the defendants without any measurement to the same. That could only be possible after measurement by an expert. Except a bald statement to that effect, there is nothing in the evidence of the plaintiffs to prove the same. The sketch map is apparently wrong and misleading. The evidence of the plaintiffs' No. 1 (P.W. 4) regarding identification of land is also misconceived one as he has admitted that since the area of his land was not correct, the Executive Magistrate has directed for measurement. If that being the basic difficulties with the plaintiffs case, prior to filing the suit they could have measured the land by an expert and after ascertaining the exact portion of the land should come to the court seeking for the relief. But, in absence of all the facts the court cannot direct the defendant to vacate the suit land, which is ultimately not proved by the plaintiffs to be encroached by the defendants. The plaintiffs are not entitled for any relief.

Issue Nos. i, ii, iii, iv & ix.

12. So far as the question of maintainability is concerned, the same has not been pressed by the defendants, but this court has already discussed on the

legal aspect of the case referring the provision under order 7 rule 3 of CPC with a finding that the disputed land/suit land has not also been properly identified. Law is well settled that an Opp. Party has the right to know the case, it has to meet. Therefore, the other party has an obligation to give such further and better particular as may be appropriate and relevant. In case such property can be identified by boundaries or numbers in survey records such boundary and numbers should be given in plaint in respect of an immovable property. Opportunity was available with the plaintiffs in this case to give a proper identity of the suit property, but the plaintiffs remain silent and as such the suit is also not maintainable also as per non-compliance of provision under order 7 rule 3 CPC. The plaintiffs for the forgoing reasons are not entitled for any relief. Hence it is order.

ORDER

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

Advocate's fees are at contested scale.

Sr. Civil Judge, Khurda.

Transcribed to my dictation, corrected and signed by me and pronounced in the open court this the 25th day of April, 2014.

Sr. Civil Judge, Khurda.

List of witnesses examined on behalf of plaintiffs :-

P.W. 1	Kanhu Malik
P.W. 2	Rankanidhi Das.

P.W. 3 Prasant Mangaraj.
P.W. 4 Nabaghana Das @ Malika.

List of witnesses examined on behalf of Defendants :-

D.W. 1 Gadadhar Barisal.
D.W. 2 Gobinda Baliarsingh.
D.W. 3 Dama Behera.
D.W-4 Baikuntha Baliarsingh.

List of documents admitted on behalf of the plaintiffs :-

Ext. 1 Regd. Sale deed No. 9150 dt. 26.10.1964.
Ext. 2 Certified copy of Regd. Sale deed No. 9149 dt. 26.10.1964.
Ext. 3 Certified copy of ROR in khata No. 401 of mouza Orabarasingh
Ext. 4 Certified copy of ROR in khata No. 398 of mouza Orabarasingh
Ext. 5 Rent receipt.

List of documents admitted on behalf of Defendants :-

Nil.

Sr. Civil Judge, Khurda.