

**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, Khurda.*

*Dated this the 17<sup>th</sup> day of June, 2014*

**C.S. 190/ 2010**

1. China Chanda, aged about 40 yrs, W/o- Late Gurubari Chanda.
2. Jitendra Chanda, aged about 14 yrs, S/o- Late Gurubari Chanda.
3. Laxmipriya Chanda, aged about 10 yrs, D/o- Late Gurubari Chanda.

Plaintiffs No. 2 & 3 being minors, represented through their mother guardian China Chanda.

All are of Vill.- Gobardhanpur, P.O.- Kalanga, P.S.- Bolagarh,  
Dist- Khordha.

..... Plaintiffs.

-Versus-

Sudarsan Roula, aged about 60 yrs, S/o- Late Nitei Roula, of  
Vill.- Gobardhanpur, P.O.- Kalanga, P.S.- Bolagarh, Dist- Khordha.

..... Defendant.

Counsel for Plaintiff ... Sri K. Prusty and Associates  
Advocates, Khordha

Counsel for defendant ... Sri T.Baral and associates,  
Advocates, Khordha

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Date of Argument – 03.05.2014

Date of Judgment – 17.06.2014

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**JUDGMENT**

The plaintiffs have instituted the suit with a prayer for declaration of their right, title, interest and possession over the disputed land as well as permanent injunction and in alternative, recovery of possession consequent upon the subsequent events of dispossession if any, whereas the defendant by challenging the case of plaintiffs, advanced his counter claim for declaring his right of easement of way over the said disputed land measuring Ac. 0.011 decimals.

02. The plaintiff's case is that the plot No. 1295, under khata No. 75 of Mouza-Gobardhanpur total measuring Ac. 52 decimals stands recorded in the name of Gurubari Chanda, the deceased husband of plaintiff No. 1 & father of Plaintiff Nos. 2 & 3. After the death of Gurubari Chanda the said 52 decimals of land devolved upon the plaintiffs. Plot No. 1296, which is adjacent to the south of the plot of the plaintiffs, belongs to the defendant. The plaintiffs having their residential house over the plot No. 1295, which has been constructed by deceased Gurubari Chanda and the total plot is the homestead property of the plaintiffs. The further case of the plaintiffs is that the defendant is the brother of the first wife of Gurubari Chanda namely Dhobani. The said Dhobani died about 25 years back. After death of his first wife, Gurubari Chanda got married to the plaintiff No. 1. However, after death of Gurubari Chanda the plaintiffs were in peaceful possession of the plot No. 1295, but the defendant started creating trouble in the peaceful possession of the plaintiffs by occupying a portion of the land measuring 4.5 feet in breadth and 30 feet in length from the southern side of

the plot No. 1295 (hereinafter called to be the suit land). The defendant had put bamboo fence by amalgamating the suit land with his plot No. 1296. Thereafter, dispute took place between the parties and the plaintiff No-1 also reported the matter in the Bolagarh Police Station. Subsequently, the plaintiff No. 1 filed one demarcation case before the Tahasildar, Bolagarh for demarcation of her plot No. 1295. The defendant also filed another demarcation case for demarcation of his plot No. 1296. Accordingly, their respective plots were measured by the R.I., Manikagoda and report compliance on 15.07.2009. The defendant's plot No. 1296 under khata No. 336 measuring Ac. 0.53 decimals was also measured and identified and the R.I. Submitted his joint demarcation report along with a sketch map and both the plaintiff No. 1 and defendant admitted the measurement to be correct. The plaintiffs' specific case is that after identification and demarcation, the plaintiffs and defendant posted bamboo pillars on their respective lands as per such measurement, but the defendant did not remove the bamboo fence put earlier by encroaching the suit land and accordingly the plaintiffs were restricted from their movements upon the suit land being encroached by the defendant. The plaintiffs' subsequent case is that the defendant having no manner of right, title, interest and possession over the suit land. The plaintiffs have been paying land revenue in respect of their homestead land under plot No. 1295 having their exclusive right, title, interest and possession over it. The defendant being an unsocial person has been exercising his right illegally over the suit land. Therefore, the plaintiffs filed the suit to exercise their right over the suit land, which has been encroached by the defendant. The plaintiffs assigned the cause of action to be

30.07.2009, 01.03.2010, 25.04.2010 & 26.04.2010, when the defendant tried to occupy the suit land of the plaintiffs by putting bamboo fence and when the police directed the plaintiffs to take shelter of the court without taking any action against the defendant.

03. The defendant submitted his written statement/ counter claim by denying all the basic allegations of the plaintiffs. It is contended by the defendant that the measurement was taken up by the R.I. incorrectly and under the influence of the plaintiff No. 1. Saying the pleadings of the plaintiffs to be imaginary, false and misconceived, the defendant has to say that he is the owner of the plot No. 1296 as mentioned by the plaintiffs in their plaint. But in order to egress and ingress from his plot No. 1296 to the village road running to the adjacent west of the suit plot No. 1295, the defendant and his family members use a patch of land, i.e. an area of Ac. 0.011 decimals as their passage. Which length is 60 feet and breadth of 8 feet, situates on the southern portion of the suit plot No. 1295 (herein after referred as suit land in counter claim). The defendant has also contended that they have been using the said land peacefully and openly without any interference from any corner since last 30 years with the knowledge of the plaintiffs No. 1 and others and as such the defendant has acquired a right of easement of way in respect of the suit land in counter claim over the plot NO. 1295. Basing on the above facts, the counter claim has been advanced by the defendant making a prayer of right of easement to way over an area of Ac. 0.011 decimals out of total Ac. 0.052 decimals from the south of the suit plot No. 1295. The defendant again averred that he has never tried to occupy the land of

the plaintiffs, but on 01.12.2010, the plaintiff No. 1 threaten the defendant not to use any land as a passage over the suit plot No. 1295. The defendant again averred that the cause of action arose on 18.05.2010, the date of filing the suit and on 01.12.2010, when the plaintiffs threatened the defendant against using the suit land in counter claim.

04. The plaintiffs, after filing of the counter claim by the defendant, submitted their written statement to the counter claim. Sans unnecessary repetitions of the facts as already averred in the plaint, the written statement of the plaintiff reveals that the counter claim is not maintainable as adversely hit the provision U/o 8 R- 6 of CPC and as such the counter claim must have been excluded and rejected. The defendant has got his landed property bearing plot No. 1296 to the adjacent southern side of the suit plot No-1295. He has alternative ways to his land. It is further contended by the plaintiffs that the defendant's claim regarding using the suit land as his passage for 30 years is completely false and misconceived one and as such his counter claim is to be rejected as not basing on facts. It is specifically contended by the plaintiffs that the defendant has no manner of right, title, interest or possession over the suit land and the land mentioned in the counter claim over plot No-1295 and as such his counter claim is liable to be rejected.

05. In view of the above rival pleading of both the parties the following issues have been settled.

### **I S S U E S.**

1. Is the suit maintainable?

2. Is there any cause of action to bring this suit against the defendant?
3. Whether the plaintiffs have got right, title, interest and possession over the suit land?
4. Whether the plaintiffs are entitled for a decree of permanent injunction against the defendant restraining him from entering upon the suit land?
5. Whether the defendant is entitled for a decree declaring his right of easement of way over an area of Ac. 0.011 decimals out of Ac. 0.052 decimals from south of the suit plot No. 1295?
6. Whether the suit is barred by limitation of time?
7. Whether the defendant is entitled for a decree of permanent injunction against the plaintiffs prohibiting them from creating any sort of disturbance in the possession of the defendant over Ac.0.011 decimals of land in suit plot No. 1295, which is being used as a right of easement of way by the defendant?
8. Any other relief, which the plaintiffs and the defendant are entitled to?

06. In order to prove their case two witnesses have been examined on behalf of the plaintiffs. Out of whom P.W. 1 Surasena Sethi is a co-villager to both the parties and P.W. 2 is the plaintiff No. 1 herself.

The plaintiffs relied upon the ROR in respect of their plot No. 1295, which is marked as Ext. 1, one rent receipt dt. 05.03.2010 as Ext. 2, copy of the notice in demarcation case No. 68/2009 as Ext. 3 and the certified copy of demarcation case No. 77/2009 as Ext. 5.

On the other hand four witnesses have been examined on behalf of the defendant. Out of whom, D.W. 1 Ghana Behera, D.W. 2 Ananta charan Pradhan and D.W. 3 Uchhaba Parida are the co-villagers to both the parties. D.W. 4, Sudarsan

Raula is the defendant himself. The ROR in respect of plot No. 1296 and other plots recorded in the name of the defendant under khata No. 336 of mouza Gobardhanpur is marked as Ext. A and the rent receipt dt. 16.02.2010 as Ext. B.

### FINDINGS.

#### Issue Nos. 3, 4 & 5.

07. The above issues being inter related core questions under determination are taken up first for consideration.

After due scrutiny of pleadings of both the parties as well as the evidence adduced thereof, it came to the light in term of admission that suit plot No. 1295 and the plot of the defendant bearing No. 1296 originally belonged to the defendant. The defendant sold the suit plot No. 1295 to Gurubari Chanda, who was the husband of his deceased sister namely Dhobani. He has sold the suit plot No. 1295 during the life time of Dhobani. But, his sister died and his brother in law (BHINOI) Gurubari Chanda again got married to the plaintiffs No. 1. Now it is clear that after death of Gurubari Chanda the suit plot was devolved upon the successors of Gurubari Chanda, who are none else than the plaintiffs themselves. The defendant's plot bearing No. 1296 adjacent to the eastern side of the suit plot as depicted in the plaint. Therefore, no doubt that suit plot No. 1295 is the property of the plaintiffs.

Here the defendant claims his right of easement of way in respect of the suit land/suit land in counter claim. As per the plaint the suit land has been described as 4.5 feet in breadth and 30 feet in length without any calculation in decimals, whereas the defendant claimed his right of easement for way measuring Ac. 0.011 decimals on

the said spot over plot No-1295 as portrayed in the plaint as suit land. The defendant being the counter claimant in term of right of his easement of way over the suit land in counter claim, the onus shifted to the defendant to prove his own case. The defendant has claimed that for last 30 years, he has been using the said land peacefully and continuously for his egress and ingress and also to carry out the bullock cart to access the public way, which is the village road running to the adjacent west of the suit plot No. 1295. He has no other alternative except using the said land over the suit plot No. 1295. Let's now come to the pleading and evidence of both the parties to ensure whether the claim of the defendant is genuine or not?

08. This court has gone through the pleadings, wherein the plaintiffs have clearly mentioned that the defendant has his land at southern side and eastern side of the suit plot. The defendant has given a bamboo fence amalgamating the suit land with his plot No. 1296, for which there was an alternative of hurt words between the plaintiffs and the defendant and accordingly plaintiff No-1 lodged report before the local police and demarcation case was also instituted by the plaintiff No-1 in the year 2009. The surprising fact is that there is no whisper in the plaint to clarify from which date or month or year, the plaintiffs for the first time came to know about the amalgamation of the suit land by the defendant into his plot No. 1296 by making bamboo fence. The cause of action what has been mentioned in the plaint reveals that the first cause of action arose on 30.07.2009 and on subsequent dates when the defendant tried to occupy the land of the plaintiffs by putting bamboo fence. Only for the sake of discussion, let's now accept that the defendant first encroached the suit

land on 30.07.2009. To that effect, P.W. 1 in his examination in chief has stated that in no point of time the defendant uses the suit land as because the land of the defendant is an agricultural land. Other nearby land owners are using their respective ridge and the ridge of the Badapokhari (pond) as their way. In the cross-examination P.W. 1 clearly admitted that the village road is approaching towards the western side of the said land of the defendant. There is a passage to the southern side of the suit land, which happens to be used by the plaintiffs. He again admitted that the land of the defendant is adjacent to the southern side of the above noted passage and both the plaintiffs and defendant are using the said passage. The defendant uses the said passage to enter his bullock cart to his own homestead land for various purpose. It is not only a clear admission by P.W. 1, rather he supports the entire pleading of the defendant to the effect that the defendant has been using the suit land as his passage to egress and ingress. P.W. 2 is the plaintiffs' No. 1 herself. As per her evidence the defendant has given bamboo fence around the suit land by amalgamating the same in his plot No. 1296. Therefore, the same is still in possession of the defendant. She again stated that in spite of demarcation, the defendant did not remove the encroached portion of the suit land. Very surprisingly, P.W. 2 in the cross-examination has stated that the defendant has not approached the settlement authority to record his right to easement over the suit land. In the cross-examination she admitted that Ananta and defendant are the southern side land owners to the suit land. The village road is running towards western side of the suit land. Ananta is the southern side land owner to the defendant. The defendant has been using his land (plot No-1296) for cultivation.

However, she deny to the suggestions that defendant has been using the suit land for last 30 years as his passage. Now it is worthwhile to mention that Gurubari Chanda to whom the land has been sold by the defendant happened to be his brother in law. After death of the sister of defendant, who happens to be the first wife of Gurubari Chanda, the plaintiff No. 1 got married to Gurubari Chanda around 25 years back.

Now it is pertinent to mention that 25 years back while Gurubari Chanda and the sister of the defendant have been residing over the suit plot, there would not be any difficulties of using the suit land by the defendant for his convenience and such probability of using of the suit land by the defendant as his passage cannot be ruled out. The plaintiff No. 1 got married to Gurubari Chanda around 25 years back. Therefore, she is not able to describe the status of the defendant over the suit land 25 years back. Keeping in mind the said aspect of the case, this court again turn up to the evidence of the plaintiffs. The plaintiffs have assigned the first cause of action to be on 30.07.2009. As per the pleading of the plaintiffs, plaintiff No-1 first approached the police and then filed a case for demarcation of her land vide demarcation case No-68 of 2009. The order of the Tahsildar, Bolagarh in demarcation case No. 68/2009 has been filed and marked as Ext. 4, which reveals that the order of the Tahasildar in such demarcation case has been passed on 30.06.2009, which is one month prior to the first cause of action as depicted in the plaint. Therefore, the claim of the plaintiffs that the defendant put the fence over the suit land on 30.07.2009 appears to be completely false and misleading as because the demarcation case was filed much prior to the cause of action as assigned by the plaintiffs in the plaint.

09. Lets come to the subsequent question regarding any alternative way to the defendant to access the public road. The plaintiffs' plea is that the defendant has alternative ways. By saying so, the plaintiffs have stated that the defendant has been using his land under plot No. 1296 for the purpose of cultivation and he can use the adjacent ridge of the adjoining agriculture lands to access his plot as well as the ridge of the pond, which has also been used by the villagers. The examination in chief of P.W. 1 & 2 has been surfaced in the aforesaid paragraphs. Both have stated that the defendant has the alternative way of using the ridge and the embankment of the pond. But neither the pleadings of the plaintiffs nor the evidence in chief reveals that whether the ridge and the pond is a direct access to the defendant to reach the public road. So far as the ridges of agricultural lands of others are concerned, it is well known that the size of the ridges of the agricultural lands are extremely narrow in width and it is almost impossible for a person to walk over it properly and it is almost impossible for a person to ingress or egress a bullock cart or any conveyance over such ridge. Those are meant for identification of the boundary of the respective lands. Therefore a ridge of an agricultural land cannot be an alternative of a way/road for an individual to ingress and egress. So far as the embankment of the pond is concerned, P.W. 1 has described the boundary of the suit land, which reveals that the land of the defendant falls towards the east, village road towards the west, house of Ghana Majhi and Ananta Majhi towards north and south respectively. It is also the admitted case that the suit land is a direct access to the defendant to the village road approaching towards the western side of the land of the defendant. The length of the suit land as

per the plaint is 30 feet. Therefore, the suit land is the shortest and immediate access to the defendant to the village road. Here searching for the alternative way, this court has scrutinized the evidence of the plaintiffs as well as the evidence of the defendants. Nothing has been reveals from the evidence from the side of the plaintiffs to give a clear picture as to how the embankment/ridge of the said pond is an access for the defendant to reach at the village road. Therefore, this court has visited the evidence from the side of the defendant. D.W. 1 in the cross-examination has stated that the land of the plaintiffs and other lands are lying vacant. The vacant lands includes the land of the defendant are used for seasonal crops. The pond is covered with wide ridge. The villagers use the pond for their necessity. The defendant also uses the ridge of the pond as the passage to his land. True that D.W.1 admitted that defendant use the ridge of the pond as a passage to his land. But, the same does not imply that the ridge of the pond is a direct and common access to the defendant to reach at the village road which is the subject matter of the dispute. D.W. 2 in the cross-examination also stated that the pond is also adjacent to the eastern side boundary of the land of the defendant. He again stated that if one crosses the land of the plaintiffs China Chanda, he will directly access to the pond. This implies that the pond is not a direct access to the defendant rather the defendant has to use the land of the plaintiffs to reach at the pond. D.W. 3 also stated that there is a pond adjoining to the eastern side boundary of the land of the defendant. The pond is an open pond. The government road connects the western side land of the defendants plot. D.W. 4 is the defendant himself. He has stated that the pond is existing to the eastern side of his another plot, which situates to

the eastern side of his plot NO. 1296. The said pond is locally called as BADAPOKHARI. There is a separate road for the villagers to the said pond. The width of the embankment of the said pond is around 20 feet. The said embankment of the pond is assessable to all the villagers. The defendant again stated that he has three patches of land near the suit site.

10. This being the evidence from the side of the defendant, it is worthwhile to note down an important feature of the present case, which is extremely important to appreciate the evidence as adduced by the witnesses from the side of the defendant. Such fact imparts significance to assess the whole evidence regarding the location of the pond and to get a clear picture with regards to the plea of the plaintiffs regarding the alternative way for the defendant. In the pleading the plaintiffs has stated that the plot of the defendant situates to the southern side and eastern side of the suit plot. P.W. 1 in the cross-examination also stated that the western side land of the above land of the defendant also belongs to the defendant. The defendant in his cross-examination has stated that except his plot NO. 1296, he has another plot situates to the eastern side of the plot No. 1296. So far as the pond is concerned, D.W. 1 has to say that the defendant is the owner of the land extending from the eastern side boundary of the suit land till the village pond. This implies that the pond is adjacent to the land of the defendant, but not to the plot No. 1296. Rather the embankment of the plot and the plot of the defendant bearing No. 1296 has been intervened by another agriculture land which also belongs to the defendant. This is an unchallenged and clear admission by the plaintiffs as well as the other witnesses. Therefore, while the

witnesses from the side of the defendant are saying that the embankment of the pond is adjacent to the land of the defendant, the same does not implies that the embankment of the pond is adjacent to the plot No. 1296, rather to another plot of the defendant, which situates in between the embankment of the pond and the plot No. 1296. The said plot of the defendant, which situates in between the plot No. 1296, cannot be a way for regular use to reach at the village road.

11. Even after a thorough discussion of the evidence as discussion earlier, it is quite desirable to mention that the plaintiffs have not taken any serious initiative to prove that there is an alternative for the defendant to access the village road. If the written statement to the counter of claim and the evidence adduced from the side of the plaintiffs are taken into count, it can be well ascertained that except a bare pleading by saying that there is other alternative for the defendant to access the public road nothing has been clarified or explained by the plaintiffs to establish the said fact with a concrete and cogent evidence at the time of hearing of the suit. Witnesses from the side of the plaintiffs have only stated that the ridge of the agricultural land and the embankment to the pond are the alternative ways for the defendant. But, they failed to establish that both the ridge and embankment of pond is a direct access to the defendant to reach at the village road for his egress and ingress to plot No. 1296. On the other hand the admitted position of the case as discussed above makes it quite clear that Gurubari Chanda, who is the real owner of the plot NO. 1295 was the husband of the sister of the defendant. She died around 25 years back. By then there must not be any dispute of using the suit land by the defendant. The plaintiff No. 1 got

married to Gurubari Chanda after the death of the sister of the defendant and the disturbances started between the parties. Therefore, with all probabilities this court is forced to accept the plea of the defendant that the land measuring Ac. 0.011 decimals is the only way for the defendant to access the village road and he has been using the same permanently and still in his possession as admitted by the plaintiffs herself in her evidence in chief and also admitted by P.W. 1. Therefore, it is the considered opinion of this court that the counter claim of the defendant is tenable in the eyes of law and the defendant is entitled for a decree of declaring of his right of easement of way over an area of Ac. 0.011 decimals out of plot No. 1295 from the south of the suit plot.

**Issue Nos. 7 and 8**

12. The plaintiffs have come with a prayer for declaration as well as injunction against the defendant over the suit land as noted earlier. They have made such prayer over the suit plot without describing the area in decimals. Rather have mentioned the area in term of feet which extending to 30 feet in length and 4.5 feet in breadth. But, in view of the above discussion, it is well ascertained that the land as mentioned by the plaintiffs and the area of the land as mentioned by the defendant implies the same area which is the subject matter of the dispute. This court has already come to the conclusion that the suit land in counter claim has been using by the defendant as his only way to access the village / public road. Since, he has no other alternative, he has to use the suit land in counter claim as his way imposing his right of easement over such property. Therefore, the defendant cannot be enjoined from

using the suit land in counter claim and as such the plaintiffs are not entitled for any relief.

**Issue Nos. 1, 2 & 6.**

13. So far as the above three issues are concerned the same has not been pressed by both the sides, but it came to the light during the course of assessing the evidence that the cause of actions as mentioned by the plaintiffs are apparently misconceived and improper. The plaintiffs in their pleading have mentioned the first cause of action to be on 30.07.2006, when the defendant tried to occupy the land of the plaintiffs by putting bamboo fence. In this way the plaintiffs have admitted their dispossession from the suit land. But Ext. 4 reveals that the demarcation case was filed by the plaintiff No-1 prior to the cause of action as mentioned in the plaints. In the same way the pleading of the plaintiffs reveals that they first approached the defendant regarding his unlawful act of encroachment of the suit land by putting bamboo fence, but the defendant threatened the plaintiff No. 1 to carry of her life. Thereafter on 01.03.2010, the plaintiffs reported the matter to the I.I.C. of Bolagarh Police Station. Thereafter, she approached the Tahsilidar, Bolagarh for demarcation. But the said fact finds no support from the document as relied upon by the plaintiffs. Rather the same implies that the cause of action never arose on 30.07.2009. Rather the cause of action, such as the encroachment of the suit land by the defendant arose much prior to 30.07.2009. The suit is also not maintainable because of suppression of the actual cause of action and making out an imaginary cause of action in order to file the suit. The plaintiffs are not entitled for any relief; rather the defendant is entitled for the

relief of his right to easement of way over the suit land in counter claim measuring Ac. 0.011 decimals towards the southern of the plot No. 1295. The defendant is also entitled for the relief of permanent injunction against the plaintiffs not to create any sought of disturbance in the peaceful possession of the defendant over the suit land in counter claim. However, the plaintiffs and the others are at liberty to use the suit land in counter claim peacefully without causing any inconvenience to other parties. Hence it is order;

**ORDER**

The suit of the plaintiffs be and the same is hereby dismissed on contest against the defendant, but in the circumstances without any cost. But, the counter claim of the defendant is decreed in part against the plaintiffs. The defendant is entitled to use the suit land in counter claim, measuring Ac. 0.011 decimals towards the south of the plot No. 1295 under khata No. 75 of mouza Gobardhanpur. The plaintiffs are hereby permanently enjoined not to create any sort of disturbances against the right of way of the defendant over the suit land in counter claim. Violation of which, the defendant is at liberty to adopt the proper recourse of law against the plaintiffs.

Advocate's fees are at contested scale.

Senior Civil Judge, Khurda.

Transcribed to my dictation, corrected and signed by me and pronounced in the open court this the 17<sup>th</sup> day of June, 2014.

Senior Civil Judge, Khurda.

List of witnesses examined on behalf of plaintiffss :-

P.W. 1 Surasena Sethi.

P.W. 2 China Chanda.

List of witnesses examined on behalf of Defendants :-

D.W. 1 Ghana Behera.

D.W. 2 Ananta Charan Pradhan.

D.W. 3 Uchhaba Parida.

D.W. 4 Sudarsan Raula.

List of documents admitted on behalf of the plaintiffs :-

Ext. 1 ROR in khata No. 75 of mouza Gobardhanpur.

Ext. 2 Rent Receipt dt. 05.03.2010.

Ext. 3 Notice for demarcation.

Ext. 4 Certified copy of report on demarcation case No. 68/2009.

Ext. 5 Certified copy of report on demarcation case No. 79/2009.

List of documents admitted on behalf of Defendants :-

Ext. A ROR bearing khata No. 336 of mouza Gobardhanpur.

Ext. B Rent receipt dt. 16.02.2010.

Sr. Civil Judge, Khurda.