

**IN THE COURT OF THE CIVIL JUDGE (J. D.),  
BHUBANESWAR, DISTRICT- KHURDA.**

Present : **Ms. Sujata Priyambada Swain,**  
Civil Judge(Jr.Divn.),  
Bhubaneswar, Dist-Khurda.

**C.S. No. 10/04**

Biswanath Swain, aged about 65 years,  
S/o-Late Banchhanidhi Swain,  
Vill./PO-Bhingarpur Sasan,  
PS-Balianta, Dist-Khurda.

..... Plaintiff

– **Versus** -

Lingaraj Swain, aged about 55 years,  
S/o-Late Ballava Swain,  
Vill./PO-Bhingarpur Sasan,  
PS-Balianta, Dist-Khurda.

..... Defendant

Counsel for the plaintiff : M/s. N. K. Rath  
& Associates,

Counsel for the defendant : M/s. D. Chakrabarty  
& Associates

Date of hearing of argument : **26.08.14**

Date of delivery of judgment : **06.09.14**

**J U D G E M E N T**

1. The plaintiff has filed the present suit for permanent injunction against defendant making any construction over the suit land, till disposal of consolidation proceeding vide

KR No.133/03 and KR No.134/03, pending before the Commissioner of Settlement and Consolidation Odisha and other reliefs.

2. The plaint averments in brief are as follows:

The schedule A of the suit schedule property constitutes Ac 0.06 decimals of plot no.1388 under khata no.14 of Mouza-Bhingarpur and an area Ac 0.06 decimal of plot no.1389 under khata no.8 of Mouza-Bhingarpur. Schedule B of the suit schedule property constitutes Ac 0.04 decimals of plot no.1390 under khata no.915 of Mouza-Bhingarpur. The suit lands originally belonged to the ancestors of Ballava Swain and Banchhanidhi Swain. While the plaintiff is the successor of Banchhanidhi, the defendant is the successor of Ballava. The plaintiff was looking after the agricultural side, while the defendant is an employee of Central Government. The plaintiff being an illiterate person reposed faith upon the defendant, who is an educated service holder. The defendant was looking after the entire consolidation operation on behalf of the family, when consolidation operation was going; both the parties wanted to make partition of the family properties as per instruction of the defendant. The illiterate plaintiff put his signature on different papers and forms. The defendant in connivance with the local ACO managed to obtain the signature of the plaintiff and got the suit plot no.1388 and 1390 recorded in his favour. Although, the Hal plot no.1390 was the property of the both the parties, it was wrongly recorded in the name

of the defendant exclusively; similarly Hal plot no.1389 and 1388 were partitioned in such a manner that there is no road from plot no.1389 and plot no.1388 is on the road side. Plot no.1388 was wrongly recorded in favour of the defendant by the ACO, who had been gained over by the defendant. The plaintiff had not given his free consent before ACO, nor the facts written in the application were read over and explained to the plaintiff, by the defendant or the ACO. The deeds of the defendant came to light when he tried to make permanent construction over plot no.1390 and 1388. Therefore, the plaintiff approached the commissioner of consolidation for correction of records in KR No.133/03 in respect of plot nos. 1388 and 1389 and in KR No.134/03 in respect of plot no.1390. The said two revision petitions are subjudice. On 13.12.03 the defendant tried to make forcible construction over the suit plot. Therefore, the suit may be decreed.

3. On the other hand the defendant has filed his WS in which it is submitted that the suit is not maintainable, there is no cause of action to file the suit, the suit is barred by law of limitation, the suit is bad for non-joinder of necessary parties. It is admitted that the plaintiff is the son of Banchhanidhi and the defendant is the son of Ballava Swain and it is stated that the said two brothers (Banchhanidhi and Ballava) separated themselves by metes and bounds in 1966. It is denied that the family of Banchhanidhi and Ballava were in joint mess and property till consolidation

operation. It is denied that the plaintiff is illiterate and rustic, not knowing paper works necessary in consolidation operation for which reason he reposed faith upon the defendant; and the defendant was looking after the entire consolidation operation on behalf of the family. It is denied that both the parties want to make partition during consolidation and on the instruction of the defendant the plaintiff put his signature on different blank papers and the defendant in connivance with the ACO, obtained signature of the plaintiff for getting the plot nos.1388 and 1390 in his favour. It is denied that Hal plot no.1390 is a joint family property which was recorded exclusively in the name of the defendant. It is denied that plot no.1388 and 1389 have been partitioned in such a manner that there is no road to plot no.1389. It is denied that the deeds of the defendant came to light when he tried to make permanent construction over plot nos.1390 and 1389. It is submitted that the plaintiff and the defendant have been separated in mess and property since their fathers' time in 1966; and the partition was recorded during consolidation operation. Since 1966 the parties are in respective possession of their shares. The original documents of the family property including the suit land are with the plaintiff whose father being the elder brother was the custodian of the records. The defendant is a post man who is busy with his duty. Both the plaintiff and the defendant mutually and peacefully worked out a partition without any objection from either side. During consolidation

the concerned ACO, observed all legal formalities and recorded the partition arrived at by Late Banchhanidhi and Ballava. The plaintiff is envious of the defendant availing house loan to complete his residential house. The ancestral homestead building is standing on plot no.1387 which fell to the share of Banchhanidhi. Plot no.1387 connects to the main road. If any order of restrain is passed the defendant will suffer from irreparable loss, as he has constructed his house on borrowed finance. The sketch map attached to the plaint is neither up to scale nor does it reflect the suit land. The plaintiff has challenged the order of ACO on the ground of undue influence, fraud and undue influence can be determined by Civil Court and not by Commissioner of consolidation and settlement.

4. In view of the above pleadings of the parties the following issues have been framed for adjudication.

**Issues**

- i) Whether the suit is maintainable?
- ii) Whether the plaintiff has any cause of action to file the suit?
- iii) Whether the plaintiff is entitled to a relief of injunction against the defendant from making any permanent construction over the suit land, till disposal of the consolidation proceedings vide KR No.133/03 and 134/03 pending before the Commissioner of Settlement and Consolidation Odisha, Bhubaneswar.
- iv) Whether the suit is barred by law of limitation?

v) Whether the suit is bad for non-joinder of necessary parties?

vi) To what other relief (reliefs) is the plaintiff entitled?

5. In order to substantiate his case the plaintiff has examined one witness on his behalf and has proved five numbers of documents on his behalf. In order to contradict the plaintiff, the defendant has examined two numbers of witnesses and has proved five numbers of documents on his behalf.

6. **Findings:**

For the sake of convenience issue no.(iii) shall be taken up consideration first as the same is the vital issue.

**Issue No.(iii):**

l) An evaluation of the oral evidences adduced reveals as follows:

PW 1, who is a son of the plaintiff states that his father is bedridden and he is looking after the case on behalf of his father. The defendant is the younger brother of his father. PW 1 reiterates the plaint averments that originally the suit plots belonged to the ancestors of the parties; Ballava and Banchhanidhi are natural brothers; the plaintiff is the son of Banchhanidhi and the defendant is son of Ballava; the plaintiff is illiterate and the defendant is a Central Government employee; during consolidation both the parties wanted to make partition of joint family properties; the defendant in connivance with the ACO, managed to obtained the signature of the plaintiff and

thereby got plot nos.1388 and 1390 recorded in his favour and plot no.1389 recorded in favour of the plaintiff. The suit plots constitute a compact area. PW 1 reiterates the plaint averments that plot no.1389 has no access to the road; the deeds of the defendant came to the light in year 2003, when he tried to make construction over plot nos.1388 and 1390. The plaintiff has not given free consent for partition before the ACO on 30.12.03. The defendant tried to make construction over the suit plot; the plaintiff has approached the consolidation officer for correction of records in KR No.133/03 and KR No.13/03. PW 1 proves the certified copy of khata no.14, 18, 915 of Mouza-Bhingarpur as Ext.1, 2 and 3 respectively; the certified copy of revision petitions in KR Nos.133/03 and 134/03 pending before the Court of Commissioner of Settlement and Consolidation, BBSR as Ext. 4 and 5 respectively.

During cross-examination DW 1 states that on account of old age and ailment his father could not come to adduce evidence. He denies having filed any documents concerning his father's illness. He states that plot no.1388 is in the name of the defendant Lingaraj Swain and 1389 is in the name of his father and 1390 is in the name of the defendant. The witness is silent to the question as to whether he has filed revenue map in respect of plot nos. 1388, 1389 and 1390. In Para 27 he states that to the east of plot no.1388 is plot no.1390 and to the west is plot no.1387, to north is plot no.1389, to south is road. In

respect of plot no.1389 - to west is plot no.1387 to north is plot no.1385 and to south is plot no.1388. In respect of plot no.1390 - to east is plot no.1391, to west is plot no.1388, to north is plot no.1389, to south is road. Thus, it seems that plot no.1387 is to west of plots 1389 and 1388. Road is to the south of plot nos.1388 and 1390. PW 1 states that Banchhanidhi had adopted his father, as son and the defendant is the natural son of Ballava. PW 1 denies any partition prior to consolidation. In Para 31 he states that his father might have signed on papers as per instruction of the defendant. In Para 31 he states that he had filed the consolidation revision case nos.133/03 and 134/03. In Para 32 of his evidence PW 1 admits that plot no.1387 and 1388 are recorded in their name and are adjacent plots. PW 1 admits that road exists to the north of plot no.1387 and he approaches road via plot no.1387. In Para 34, PW 1 admits that their cultivable lands have been partitioned. He denies partition of their homestead lands prior to partition of their cultivable lands. He denies knowing if their homestead lands have been partitioned. He denies about any sale deed in favour of the defendant by Ballava Swain.

DW 1 , who is the defendant states that since 1966 he and the plaintiff have been separated in mess and property. The original documents of the family property includes the suit land and are with the plaintiff whose father was the custodian from whom the plaintiff took over. During consolidation the plaintiff was looking after consolidation on

behalf of self and the defendant. He (DW 1) was working as a post man and was busy with his duty. The plaintiff was attending the consolidation authority and partition was effected as per the instruction of the plaintiff. There was no objection from either side and records were fully mutated including agricultural properties. Observing all the formalities the ACO, recorded the partition. The plaintiff is not an illiterate man and he has signed the plaint and other documents. The ancestral homestead building stands on plot no.1387 and fell in the share of Banchhanidhi during partition; said plot no.1387 connects to the main road. The plaintiff inherited the house property. It is denied that Banchhanidhi and Ballava were in joint mess during consolidation operation. It is denied that the defendant in connivance with the local ACO, obtained the signature of the plaintiff who was illiterate, for getting the suit plot nos.1388 and 1390. It is denied that fraud and undue influence were exercised by him and the Assistant consolidation officer over the plaintiff. DW 1 proves the ration cards in his name and in the name of his father as Ext.A and B respectively (marked with objection); the certified copy of ROR bearing khata no.643 of Mouza-Bhingarpur as Ext.C; the certified copy of khata no.9 of Mouza-Bhingarpur as Ext.D; the certified copy of RSD no.7733 dated 7.9.68 as Ext.E.

During cross examination DW 1 admits the filling of KR Case No.133/03 and 134/03. In Para 18 he states that

at the instance of the plaintiff he had gone to the consolidation camp and had given his signature. In Para 20 he denies having influenced his elder brother.

DW 2 states that he knows the parties. Both the families have been separated since the time of their ancestors and they were separated in mess.

II) An evaluation of the documents submitted reveals the following:

Ext.1 is the certified copy of consolidation khata no.14 of Mouza-Bhingarpur; the recorded owner is the defendant. The said khata consists of the plot no.1388 of area Ac 0.06 decimals of status Gharbari.

Ext.2 is the certified copy of consolidation ROR of khata no.8 of Mouza-Bhingarpur; the recorded owner is the plaintiff, Biswanath Swain; the said khata consists of the plot no.1389 of area Ac 0.06 decimals of status Gharbari.

Ext.3 is the certified copy of consolidation ROR bearing khata no.915 of Mouza-Bhingarpur; the recorded owner is the defendant, Lingaraj Swain; the said khata consists of plot no.1390 of area Ac 0.04 decimals of status *baje phasal*. In the boundary description there is reference to road to the south.

Ext.4 is the certified copy of petitions in respect of KR Case Nos.133/03 and 134/03; the petitioner is the present plaintiff and the OP is the present defendant; prayer for recording of scheduled land in favour of both the parties having 50 % share each have been made; the scheduled

land is plot no.1390 of Mouza-Bhingarpur.

Ext.5 is the certified copy of KR No.134/03; the petitioner is the present plaintiff; the OP is the present defendant. There is reference to the OP obtaining the signature of the petitioner who is illiterate for partition in such a manner that the petitioner was allotted land without any approach road. It is pertinent to mention that there is reference to partition of plot nos.1386 and 1387 between the parties mutually. The prayer is for preparation of the map in respect of the suit land as like plot no.1386 and 1387 which have approach to road. The scheduled land is plot no.1388 of area Ac 0.06 decimals under khata no.14 and plot no.1389 of area Ac 0.06 decimals under khata no.8.

Ext.A is the ration card (Consumer Identity Card) in the name of the defendant.

Ext.B is the ration card in the name of some Swain (name is not properly visible).

Ext.C is the certified copy of consolidation khata no.643 of Mouza-Bhingarpur; the recorded owner is Biswanath Swain, the plaintiff. The said khata consists of plot nos.1398, 1387, 1619 and 102 ( non-consolidable plots) and the consolidable plot nos.2319 and 2245.

Ext.D is the certified copy of settlement khata no.9 of Mouza-Bhingarpur; the recorded owners are the plaintiff and Ballava Swain; the said khata consists of plot no.1525 of status homestead of Mouza-Bhingarpur.

Ext.E is the RSD no.7733, dated 7.9.68; the vendor is

Ballava Swain, the father of the defendant; the vendee is Lingaraj Swain, the defendant. There is reference to sale of several plots of Mouza-Bhingarpur.

III) After a careful evaluation of the available evidences and documents on records and the submissions of counsels, the following is revealed:

Admittedly, there has been separate recording of the suit plot and other plots of the parties during consolidation. Such separate recording is the proof of partition between the parties – whether during consolidation or prior to consolidation. While the claim of the defendant is that mutual partition has taken place between the fathers of the parties prior to consolidation and the said partition was reflected during consolidation; the claim of the plaintiff is that the defendant in collusion with the ACO, played fraud and exercised undue influence on the illiterate plaintiff to effect partition in such a manner that the plaintiff did not get land having access to road and plot no.1390 got recorded in favour of the defendant. As separate recording in consolidation is proof of partition the burden of proving fraud or undue influence is on the plaintiff.

As fraud and undue influence by the defendant in collusion with Assistant Consolidation Officer is claimed by the plaintiff, the Civil Court has jurisdiction to deal with the matter. In this respect reference may be made to the decision in ***Gulzar Khan Vs. Commissioner of Consolidation reported in 1993 II OLR 194***, wherein it is

held that “ *We may conclude our views relating to Civil Court’s jurisdiction by stating that the same would be available after closure of the consolidation operations only in any one of the following circumstances;*

- (i) The cause of action accruing after the closure of the consolidation operations,*
- (ii) If the consolidation authorities had taken the decision without complying with the provisions of the Act or had not acted in conformity with the fundamental principle of judicial procedure.*
- (iii) Obtaining of order from the hand(s) of consolidation authorities by playing fraud on the party who seeks to approach the Civil Court”.*

Although, the claim of the plaintiff is such that the Civil Court has jurisdiction to deal with the matter, the plaintiff has prayed for relief of injunction simplicitor against the defendant and has filed cases before consolidation authorities in respect of right, title and interest.

Vide order dated 19.1.04 ex parte order of status quo had been passed and vide order dated 1.11.12 order of status quo was passed u/o 39 rules 1 & 2 in IA no.10/04. As the plaintiff claims that consolidation authorities have the jurisdiction to determine right, title and interest, the plaintiff had the opportunity to file for stay of proceedings till disposal of the consolidation revision cases filed by him.

The plaintiff has disputed the title of the defendant. When title is in dispute suit for injunction simplicitor is not

maintainable; in the present case as discussed the Civil Court has jurisdiction to deal with the matter. But, the plaintiff has filed suit for injunction simplicitor before the Civil Court and revision case before the consolidation authorities and has thus created parallel litigation.

The plaintiff has made the claim that no adjoining road exists to plot no.1389 which was allotted to him on account of fraud and undue influence exercised by the defendant and the ACO. However, the plaintiff has not appeared as a witness to prove such claim made by him; no revenue map of the concerned village has been proved to reveal the relative location of the plots allotted to the parties. The claim of the defendant is that the plaintiff was allotted plot no.1387 on which their ancestral house existed and the said plot has access to road and the said plot is adjacent to the plot no.1389. PW 1 who is the son of the plaintiff has admitted in Para 27 of his evidence that plot no.1387 exists to the west of plot no.1389. In Para 32 PW 1 has admitted that plot no.1387 and 1389 which are recorded in their name are adjacent plots and road exists to the north of plot no.1387 and they approach the road via plot no.1387. Thus, the claim of the plaintiff that there is no passage to the plot allotted to him does not seem to be correct. Further, PW 1 has brought only three plots of the parties within the purview of the discussions and has remained silent concerning other plots belonging to the parties which seem to have been partitioned, as is evident from separate recording. The

plaintiff is silent about the allotment of plot no.1387 to them. Further, the plaintiff has not adduced evidence as a witness and PW 1 the son of the plaintiff has failed to submit any documents concerning the illness of his father as claimed by him. Therefore, it seems that the plaintiff has not come out with clean hands.

As already discussed the burden of proving fraud and undue influence as claimed by the plaintiff is upon the plaintiff. No oral or documentary evidence has been submitted to establish such fraud or undue influence.

In Para 34 PW 1 admits that their cultivable lands had been partitioned and states that he is cultivating Ac 1.004 decimals as per the said partition. PW1 has admitted in his evidence that he had filed KR Nos.133/03 and 134/03 before consolidation authority. Thus, according to PW 1 he had filed the consolidation revision cases although, the father of PW 1 is the plaintiff and the consolidation revision cases have been filed in his name. In Para 31 PW 1 states that his father might have signed on papers on instruction of the defendant. Thus, PW 1 does not make any claim that his father (plaintiff) had signed as per instruction of the defendant and only makes a guess.

Although, the claim of fraud and undue influence in getting the signature of the plaintiff by the defendant has been claimed – the plaintiff has not appeared as a witness and his son has not claimed during cross examination that the signatures of his father were obtained by the defendant.

In view of the aforesaid discussions the claim of the plaintiff for injunction simplicitor is not tenable as the Civil Court has jurisdiction to deal with dispute concerning title in the light of claim of fraud and undue influence in collusion with consolidation authorities. Further, as already discussed the plaintiff has not come out with clean hands about all the properties which were partitioned and has failed to establish his claim of fraud and undue influence and PW 1 has admitted about road adjacent to plot no.1387 which adjoins to the plot no.1389 allotted to the plaintiff. Accordingly issue no.(iii) is answered in negative.

**Issue no.(i) and (ii):**

In view of the discussions made suit for injunction simplicitor is not maintainable as the Civil Court has jurisdiction to deal with dispute concerning title and the plaintiff has no cause of action to file the suit.

**Issue no.(iv):**

The plaintiff claims that he later came to know about the recording in consolidation ROR when the defendant tried to make permanent construction over plot no.1390 and 1388. But, the plaintiff is silent concerning the date of such knowledge. In the absence of any claim concerning date of such knowledge, period of limitation will be calculated from the date of publication of ROR i.e. 31.3.87 as per Ext.3 and Ext.1. Therefore, the suit is barred by the law of limitation.

**Issue No.(v) and (vi):**

No evidence has been put forth in this regard. PW 1 has denied knowing about any partition between his father and Ragamani Dash. Existence of other co-sharers is not known. It is admitted that the father of the plaintiff and father of the defendant are two brothers. Under the circumstances, as no sufficient evidence has been put forth concerning non-joinder of necessary parties; this issue is answered in negative. Under the circumstances the plaintiff is not entitled to any other relief.

**Order**

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

Advocate's fee be assessed at contested scale.

**Civil Judge (Jr. Divn.)**

**Bhubaneswar.**

The judgment is dictated, corrected and pronounced by me in the open Court today i.e. on the day of 6<sup>th</sup> Day of September,2014 under my seal and signature.

**Civil Judge (Jr. Divn. )**  
**Bhubaneswar.**

**List of witnesses examined on behalf the plaintiff:**

P.W.1                      Sarat Chandra Swain

**List of witnesses examined on behalf of the defendant:**

D.W.1                      Lingaraj Swain

D.W. 2                      Hadu Nahak

**List of documents marked as exhibits on behalf of the Plaintiff:**

Ext.1, 2 and 3      Certified copy of Khata nos.14, 8, 915 of Mouza-Bhingarpur respectively.

Ext.4 & 5              Certified copies of Revision Petition Nos.133/03 and 134/03 respectively.

**List of documents marked as exhibits on behalf of the Defendant:**

Ext.A & B              Ration cards in favour of defendant and his Late Father respectively.

Ext.C                      Certified copy of ROR bearing khata no.643 of Mouza-Bhingarpur.

Ext.D                      Certified copy of Khata no.9 of Mouza-Bhingarpur.

Ext.E                      Certified copy of RSD No.7733 dated 7.9.68.

**Civil Judge(Jr.Divn.)  
Bhubaneswar.**