

IN THE COURT OF 2ND ADDL. DISTRICT & SESSIONS JUDGE,  
KHURDA.

Present: Sri A.K.Sahoo,LL.M.,  
2<sup>nd</sup> Addl. Dist & Sessions Judge, Khurda.

**F.A.O No. 9 OF 2008**

1. Srikanta Barik, aged about 38 years, S/o late Shyamakanta Barik, of Nandapur,Samil Mangarajpur, P.S. Banpur, Dist. Khurda.

..... Appellant

Vrs.

1. Trilochana Sahoo, aged about 70 years, S/o Late Bharat Sahoo
2. Sania Sahoo, aged about 35 years, S/o Khali Sahoo.
3. Arjuna Rout, aged about 51 years, S/o Late Raju Rout
4. Jhadeswar Behera, aged about 43 years, S/oManguli Behera
5. Laxmi Parida, aged about 45 years, S/oGodabari Parida
6. Kailash Parida, aged about 45 years, S/o Lingaraj Parida
7. Bhaskar Sahoo, aged about 41 years,S/oLate Bharat Sahoo
8. Purna Sahoo, aged about 33 years, S/o Pravat Sahoo,  
All are of vill. Mangarajpur, P.S Banpur, Dist. Khurda.

.....Respondents.

For the appellants :Sri S.S Pattnaik, Adv.

For the defendants: Sri B.K.Samantsinghar,Adv.

Date of argument : 23.8.14

Date of Order : 30.8.14

**ORDER**

This is the first appeal from order in I.A No. 5/05 filed in C.S No. 7/05 of the court of Civil Judge,(Jr.Dvn), Banpur dtd. 2.12.08 has been filed by the unsuccessful plaintiff-appellant,challenging dismissal of his petition under Order-39, Rule-1 and 2 C.P.C.

2. The plaintiff -appellant has filed the suit C.S 7/05 praying for permanent injunction simplicitor over the suit property measuring an Ac.0.067 dec under plot no.854, Khata No.832 in mouza-Nandapur, Kisam- Gharabari against the defendant-respondents no.1 to 8.

3. Case of the plaintiff-appellant is that he himself alongwith his mother Kuntala Barik the proforma-defendant are the recorded tenants of the suit property and in peaceful possession over it having their right title, interest and possession. Consolidation authority has finally published R.O.R in their favour. In 1962 settlement also the suit property was recorded in the name of late grand mother of the plaintiff. The tomb ( Samadhi) of his grand father exist over such property at its extreme eastern part. A pond situates over plot No. 850 and the suit property is to the south east of such pond. The pond is under the Management of Nandapur Grampanchayat. In the R.O.R , it is recorded as Rakhita Anabadi in the name of government of Orissa. The suit has been filed on the cause of action that on 24.6.05 the defendants tried to cut and remove the Southern fence of the suit land being armed with deadly weapons with intention to construct a road to the pond over the suit land. On such ground as well as on further cause of action on 7.8.05 the plaintiff-appellant has filed such suit alongwith a petition under Order-39, Rule-1 and 2 C.P.C, praying for temporary injunction.

4. After hearing both sides on 2.12.08 Trial court dismissed the petition under-39 Rule-1 and 2 C.P.C mainly on the ground that the plaintiff-petitioner has not indicated the alternative path of the villagers to the pond, in his pleadings as well as the claim of the opp.party that they have easementary right over the suit property. Trial court considered prima facie case in favour of the defendant-opp.parties and that comparative mischief shall be more to them if order of injunction is made, since the villagers and opp.parties will be deprived of taking bath in the pond, so also that irreparable injury shall be caused to the opp.parties.

5. During argument of the case, it is urged on behalf of the petitioner that the suit land is Gharabari land of the appellant over which several fruits bearing trees are standing and in his exclusive possession and also that no road to village pond exist over it. The respondent belong to a different village, for which do not use the tank. Consolidation R.O.R or the village map does not indicate

existence of any road over the suit land. At the same time, it is urged on behalf of the respondents that to go to the pond they have to pass over the suit land and they have been using it as such since long, for which and when they are not cutting any tree or causing damage to the property much inconvenience shall be caused if their right of passage is interfered with.

6. The recording of suitland under Gharabari kisam, in the name of the plaintiff-appellant in consolidation R.O.R in continuation of recording of such property in the name of his grand mother in 1962 settlement R.O.R and payment of rent indicates a prima facie case in favour of plaintiff-appellant. The fact remains that the defendant-respondent have laid their claim of right of passage in the form of easementary right over the entire plot, which is Gharabari land of the plaintiff appellant. It is urged on behalf of respondents that, though plaintiff has preferred appeal, but there was never any prayer under-39 rule-4 C.P.C that inconvenience is caused to plaintiff-appellant for dismissal of the I.A. On such ground it is contended that comparative mischief shall be more to the defendant-respondents if injunction granted, and for which balance of convenience leans in their favour and irreparable loss shall be caused to them if they are restrained from passing over the suit land to go to the pond. I find some force in it. Learned counsel for the appellant submits that there are other alternative path to go to the pond, since the pond situates in an open place. The court below has appreciated the matter that nothing in particular regarding alternative path is averred in the petition by the plaintiff-appellant. Admittedly the plea of defendant-respondents is not specific regarding the dimension of the path used by them to the pond. The matter of easementary right of path of the respondent villagers may be taken during hearing of the simple suit for permanent injunction, but at this stage comparative mischief shall be more to the respondent-respondents if injunction is granted. For granting temporary injunction fulfillment of three conditions like prima facie case, balance of convenience and irreparable loss is required and for failure of any of those prayer has to be rejected. When using of the suit land by the villagers to go to the pond as claimed since long is there in this simple suit for permanent injunction, granting of temporary injunction restraining the opp.parties may lead to passing the decree before hearing of the suit. Hence ordered.

**ORDER**

Having regard to all such findings the appeal against order under order-39, rule-1 and 2 C.P.C bears no merits and stands dismissed without cost under the circumstances, confirming the order dtd. 2.12.08 in I.A No.5/05.

Since the suit was filed in the year 2005 and there is delay, learned Civil Judge(Jr.Dvn), Banpur shall do well in deciding the case at the earliest.

2<sup>nd</sup> Addl.Dist & Sessions judge, Khurda.

Typed to my dictation & corrected by me. The order is pronounced in the open court today this the 30<sup>th</sup> day of August,2014 under my hand and seal of this court.

2<sup>nd</sup> Addl. Dist & Sessions Judge, Khurda.

Extract copy of order passed by 2nd Addl. Sessions Judge, Khurda in F.A.O No. 9 OF 2008 arising out of I.A No. 5/05 filed in C.S No. 7/05 of the court of Civil Judge,(Jr.Dvn), Banpur dtd. 2.12.08.

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Extract copy of order dtd.

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Sd/-2<sup>nd</sup> Addl. Dist & Sessions Judge,  
Khurda.

Memo No.....Date.

Copy of order alongwith the L.R.C send to the court of learned Civil Judge, Jr.Dvn,Banpur for information.

Sd/-2<sup>nd</sup> Addl. Dist & Sessions Judge,  
Khurda.

