

**IN THE COURT OF THE DISTRICT JUDGE, KHURDA AT
BHUBANESWAR.**

Present:

Dr. D.P. Choudhury,
District Judge, Khurda
at Bhubaneswar.

Dated, Bhubaneswar the 17th Nov. '14.

R.F.A. No. 58 of 2012.

[Arising out of the judgment dated 03.11.2012 & decree dated 17.11.2012 passed by the learned 2nd Addl. Senior Civil Judge, Bhubaneswar in C.S. No.81/792 of 2012/2007.]

1. Smt. Kalyani Pradhan, aged 50 years, Wife of Alaya Kumar Pradhan, Vill./P.O. – Harekrushnapur, P.S./Dist. – Nayagarh. At present : Durgamadhab Nagar, P.S. – Khandagiri, Bhubaneswar, Dist. – Khurda.
2. Rabindra Kumar Giri, aged 40 years, Son of late Hrushiksha Giri, Vill. – Palasa, P.O. – Chhayl-Singh, P.S. – Banta, Dist. – Bhadrak, Through his Attorney Holder Dr. Baikuntha Parida, aged 70 years, Son of late Achyut Parida, plot No.1052/3414, Prasanti Vihar, Baramunda, Unit-VIII, Bhubaneswar, Dist. – Khurda.

... **Appellants.**

-V e r s u s-

Smt. Sandhya Chakravarty, aged 57 years, Wife of Sri Chandrasekhar Chakravarty, House No.MIG-2, 50/1, Chandrasekharpur, P.O./P.S. – Chandrasekharpur, Bhubaneswar, Dist. – Khurda.

... **Respondent.**

Counsel :

For Appellants -- Shri P.K. Pattnaik &
Associates.

For Respondent -- Shri K.C. Kar & Associates.

Date of argument : 30.10.2014.

Date of judgment : 17.11.2014.

J U D G M E N T

The unsuccessful defendants have filed this appeal challenging the judgment dated 03.11.2012 & decree dated 17.11.2012 passed by the learned 2nd Addl. Senior Civil Judge, Bhubaneswar in C.S. No.81/792 of 2012/2007, decreeing the suit in part directing them not to interfere in the peaceful possession of the plaintiff (respondent herein) over the suit schedule property.

2. The parties hereinafter have been referred to as they have been arrayed in the Court below for the sake of convenience and proper appreciation.

FACTS :

3. The factual matrix leading to the case of the plaintiff is that one Sanjay Kumar Behera was the original owner of the suit land. For legal necessity, he executed a Registered General Power of Attorney in favour of the husband of the plaintiff on receipt of Rs.4,50,000/- on 16.05.2005. The Power of Attorney Holder executed Registered Sale Deed in respect of the suit land in favour of his wife, who is the plaintiff

in the suit, and delivered possession to her. After obtaining possession, the plaintiff constructed boundary wall and house thereon. After the Sale Deed was executed, the plaintiff found that suit plot No.784 has been wrongly typed as 384 in the General Power of Attorney as well as in the Registered Sale Deed. So, the plaintiff approached said Sanjay Kumar Behera to correct the mistake by executing correction deed, but he remained defiant to such request. Finding no other alternative, the plaintiff filed C.S. No.39 of 2006 in the Court of Civil Judge (Sr. Division), Bhubaneswar for declaration of her right, title, interest and possession over the suit plot No.784, but not 384, arraying Sanjay Kumar Behera as defendant No.1. That suit was decreed on contest on 25.08.2007. In the meantime, Sanjay Behera executed another General Power of Attorney in favour of Subash Chandra Gouda, who sold the suit plot No.784 to defendant Nos.1 & 2 by Registered Sale Deed. This transaction took place during the pendency of earlier suit i.e. C.S. No.39 of 2006, but defendant Nos.1 & 2 did not become party to the said suit. While the matter stood thus, defendant Nos.1 & 2 tried to dispossess the plaintiff from the suit land for which she had to approach the learned Executive Magistrate, Bhubaneswar under section 144 of the Cr. P.C. and the learned Executive Magistrate directed the defendants not to

create disturbance on the suit plot. When the defendants and their agents again tried to dispossess the plaintiff on 05.09.2007, the present suit was filed by her seeking permanent injunction against the defendants not to create disturbance in her peaceful possession and in alternative for recovery of possession if found dispossessed during the pendency of the suit. Hence the suit.

4. Defendant Nos.1 & 2 filed written statements stating that the suit is not maintainable, there is no cause of action to file the suit, the suit suffers from non-joinder and mis-joinder of necessary parties and the suit land is not properly demarcated. They refuted the averments made in the plaint. Their case is that the plaintiff is not the owner in possession of the suit land. It is further alleged, inter alia, that owner Sanjay Behera for his legal necessity to sell the suit land appointed Subash Chandra Gouda as Power of Attorney Holder, who sold Ac.0.050 decimals to defendant No.1 under one Registered Sale Deed on 27.09.2006 and the equal extent of Ac.0.050 decimals to defendant No.2 on the same day vide another Registered Sale Deed and delivered possession thereof to them. Neither Sanjay Behera nor his Power of Attorney Holder had informed the defendants about the pendency of the suit. After purchase of the suit land, the defendants invested

huge amount for its development and constructed a small house thereon to look after the construction of the main building to the knowledge of the plaintiff and others. The defendants converted the suit land as homestead land, paid tax to the Municipality, and also took electricity connection to their house. It is the plea of the defendants that they are owners in possession of the suit land and in the proceeding under section 144 of the Cr. P.C. their possession has been admitted by the learned Executive Magistrate. According to the defendants, they have a prima facie case, balance of convenience lies in their favour and in the event of dispossession, they will suffer irreparable loss. On the whole, the defendants pleaded that the plaintiff has no case for which the suit should be dismissed.

5. Basing on the pleadings of both parties, the learned trial Court framed the following issues for arriving at a just decision :

- (i) Is the suit maintainable ?
- (ii) Is there any cause of action to bring the suit ?
- (iii) Is the plaintiff entitled for permanent injunction against the defendants by permanently restraining them and their agents from interfering with the peaceful possession of the plaintiff over the suit land ?
- (iv) Is the plaintiff entitled to recovery of possession of

the suit land through Court of law ?

(v) To what other relief, the plaintiff is entitled ?

6. The learned trial Court after examining the witnesses from the side of the plaintiff and defendants and on going through the documents answered issue Nos.(iii) & (iv) in favour of the plaintiff by observing that she has got right, title, interest and possession over the suit land; but the plaintiff is not entitled to get recovery of possession as the possession lies with her. The findings of the learned Court below are based on the judgment and decree passed in C.S. No.39 of 2006, which was not challenged in the higher forum. On the whole, the learned Court below decreed the suit in part but directed the defendants not to interfere in the peaceful possession of the plaintiff over the suit schedule property.

CONTENTIONS :

7. Learned counsel appearing for the appellants submitted that the impugned order of the learned trial Court is wrong and bad in law. According to him, the learned trial Court has erred in law by not dismissing the suit as the suit is not maintainable bereft of any prayer for declaration of right, title and interest. The learned Court below has also erred in law by not appreciating the evidence on possession of the defendants over the suit land. He further submitted that the learned

trial Court ought to have taken into consideration the electricity bill, tax receipt and other documentary evidence of the defendants and should have held that they have got right, title, interest and possession over the suit land. On the other hand, learned counsel for the appellants submitted that the learned trial Court has misdirected itself by not appreciating the evidence on record properly and, as such, reached a wrong conclusion. The learned Court below should not have given much importance to the judgment and decree passed in C.S. No.39 of 2006 as the present appellants were not party in that suit. The learned trial Court ought to have decided the suit afresh basing on the materials on record. It was thus prayed to set aside the judgment and decree passed by the learned trial Court.

8. On the contrary, it was the submission of learned counsel for the respondent that the contention advanced by learned counsel for the appellants is totally misconceived. According to him, the judgment and decree passed against the vendor Sanjay Behera in C.S. No.39 of 2006 is also binding on the appellants even though they are not party in the said suit as per the decision of the Hon'ble Apex Court. He further submitted that section 52 of the Transfer of Property Act is a bar to the transaction made in favour of the present defendant-

appellants, as the sale has been made by the vendor, who is a defendant in that suit. According to him, the plaintiff-respondent was not required to make a prayer for declaration of her right, title and interest as the same has already been declared in her favour in C.S. No.39 of 2006 by the competent Court and the judgment and decree in that suit being unchallenged has reached its finality and, as such, the same are binding on the present appellants as per the decision of the Hon'ble Supreme Court. Thus, learned counsel for the respondent absolutely supported the judgment and decree passed by the learned trial Court.

DISCUSSIONS :

9. Being the First Appellate Court, this Court has got the duty to reappreciate the evidence on record and give finding of facts whether the findings arrived at by the learned trial Court are concurred with or not. At the same time, the Appellate Court has to give finding on facts and law by discussing the materials on record on every issue. Bearing in mind the above salutary principles about the role of the First Appellate Court, let me find out if at all the appellants have been able to prove that the judgment and decree of the learned trial Court are bad in law and are liable to be set aside.

10. Let me first of all take up issue No.(iii) for

discussion. It is reported in the case of ***Union of India and others*** Vs. ***Sugauli Sugar Works (P) Ltd.*** (AIR 1976 SC 1414) that once both the parties have adduced evidence, the question of onus loses its significance and it becomes an academic issue.

With due respect to the said decision, I find that in the instant case due to leading of oral and documentary evidence by both parties, the burden of proof loses its importance and the parties have to prove their respective pleas to discharge their onus.

11. The plaintiff has examined two witnesses including her husband and exhibited fourteen documents. It is revealed from the evidence of P.W.1 that originally Sanjay Kumar Behera is the owner of the suit land and the said fact is also admitted by the defendants. In support of his evidence, he has proved the certified copy of Record of Right, which shows that suit plot No.784/1380/2607 measuring Ac.0.100 decimals stands in favour of Sanjay Kumar Behera. According to P.W.1, on 16.05.2007, Sanjay Behera executed a Registered Power of Attorney in his favour vide Ext.3 and he sold the suit land to the plaintiff vide Registered Sale Deed dated 02.07.2007 vide Ext.4. These documents unequivocally go to show that in fact plot No.784/1380/2607 has been mentioned in the schedule of

property. He has also proved the certified copy of the judgment and decree passed in C.S. No.39 of 2006 vide Ext.5, which discloses that vendor Sanjay Kumar Behera was the defendant in that suit and the present respondent filed the suit for declaration of her right, title, interest and possession on the suit land after detecting that suit plot No.784 has been wrongly described as plot No.384 in the General Power of Attorney and Registered Sale Deed executed by Sanjay Kumar Behera. On going through that document vide Ext.5, it shows that the present respondent, who is the plaintiff in that suit, was declared as the original owner in possession of suit plot No.784/1380/2607 under suit khata measuring Ac.0.100 decimals in suit mouza Shyampur and it was further declared that the sale deed of the plaintiff has contained a wrong plot No.384/1380/2607 instead of correct plot No.784/1380/2607. As a matter of fact, that judgment and decree has not been challenged in upper forum and it has reached finality, as there is no cross-examination on the above observation of that Court to P.W.1. It is well settled law that once the Civil Court has declared right, title, interest and possession after observation that the plot number has been wrongly written and the said decision has remained unchallenged, the present plaintiff-respondent has got very good evidence to prove that

in fact she is the owner in possession of suit plot No.784/1380/2607. It is also revealed from the evidence of P.W.1 that he has made construction over the suit land and to that effect he has produced photographs vide Exts.6 to 6/d. But, without any sort of negatives of the said photographs, the positives cannot be acceptable. It is inferred from the evidence of P.W.1 that he has started construction over the suit land after taking delivery of possession of the suit land. He has also proved the certified copy of the order passed in C.M.C. No.1025 of 2007 under section 144 of the Cr. P.C. vide Ext.9. The objection filed by the present appellants in that case vide Ext.10 shows that they were aware of the pendency of C.S. No.39 of 2006 and in that Misc. Case the second party members were prohibited from undertaking any construction thereon. There is clear admission of P.W.1 that he and his wife after the sale possessed the suit land. During cross-examination of P.W.1, it is revealed that he did not know to whom the suit land was transferred by Sanjay Kumar Behera till the suit was disposed of on 25.08.2007. There is no fruitful cross-examination to this witness, rather it is revealed from his evidence that the plaintiff has got right, title, interest and possession over the suit land after the Sale Deed was executed by Sanjay Kumar Behera in her favour through Power of

Attorney Holder.

12. P.W.2 corroborating the evidence of P.W.1 has stated that in May, 2005 he constructed four sides of the compound wall and incomplete house upto roof level at the cost of the plaintiff. It may be mentioned here that the plaintiff is the wife of P.W.1 and the Sale Deed was executed just two months after execution of General Power of Attorney by Sanjay Kumar Behera in favour of P.W.1. He has been cross-examined at length, but it is clear from his evidence that he has made construction over the suit land under the supervision of the husband of the plaintiff i.e. P.W.1. From the aforesaid discussion, it is clear that the plaintiff has adduced clear, consistent and positive oral evidence coupled with documentary evidence to prove that she has got right, title, interest and possession over the suit land and, at the same time, it is also proved that the defendants have tried to dispossess her.

13. The defendants have also led both oral and documentary evidence. D.W.1, who is defendant No.2-appellant No.1, revealed that Subash Chandra Gouda, who is the Power of Attorney Holder of Sanjay Kumar Behera vide G.P.A. No.6769 dated 06.09.2006 has executed two Sale Deeds in her favour and in favour of defendant No.1; but the

General Power of Attorney is not produced by the defendants. D.W.1 has produced the Registered Sale Deed executed by Subash Chandra Gouda in their favour vide Exts.A & E. On going through these Sale Deeds, they show that Subash Chandra Gouda being the Power of Attorney Holder of Sanjay Kumar Behera has sold Ac.0.050 decimals of land each to defendant No.1 and defendant No.2 vide Sale Deed dated 27.09.2006. Not only this, but also she has stated that she has got two electricity bills vide Exts.B & B/1, holding assessment receipt vide Ext.C and conversion receipt vide Ext.D. I went through the documents and found that Exts.B & B/1 are service connection estimate issued in favour of defendant Nos.1 & 2 over suit plot No.784 and the same have been issued on 12.11.2007. Similarly, Ext.C shows that the Municipal Commissioner has issued assessment receipt on 10.12.2007. Ext.D shows that conversion has been allowed in respect of Ac.0.050 decimals of land in the name of defendant No.1 in O.L.R. Case No.5415 of 2006. Unfortunately, the defendant has not proved the General Power of Attorney duly executed by Sanjay Kumar Behera in favour of Subash Chandra Gouda. Moreover, in cross-examination in para-8, D.W.1 has admitted that she has not seen and does not know the original owner Sanjay Kumar Behera in respect of the suit land. In

cross-examination, she has admitted that without any B.D.A. plan, she has made construction and the suit land is coming under Bhubaneswar Municipality. If at all plan has not been approved, it is not understood how the defendants got those documents vide Exts.B, C & D. Moreover, she could not say in para-6 of cross-examination that which documents were verified before execution of the Sale Deeds and she also failed to say who identified her vendor at the time of execution of Exts.A & E. Her evidence in cross-examination has been shaken well. So, she does not prove in clear and positive manner about accruing title by her and the other defendant and their possession over the suit land.

14. D.W.2 revealed that he was witnessing while the defendants came to the suit land for its occupation. In cross-examination, he stated that Harekrushna Ojha is the original owner of the suit land; but he could not say who was the subsequent purchaser. He has no knowledge about the litigation in respect of the suit land prior to the suit. In para-11 of his cross-examination, he stated that he only noticed about measurement of the suit land, but he could not say the exact date of such measurement. He further stated that after noticing measurement, he went to the spot, but found no person of their locality present there except himself. So, the

evidence of D.W.2 is not clear to prove the possession of the defendants after the Sale Deeds were executed. Moreover, if at all being a local person he himself was only present there, it shows that he is much more interested for the purpose. So, his evidence is to be tested with a pinch of salt. It is revealed from the evidence of D.W.3 that he is the Power of Attorney Holder of Sanjay Kumar Behera bearing G.P.A. No.6769 dated 06.09.2006. But, he has not proved the said document. He has rather stated that he has executed Registered Sale Deeds No.7410 & 7411 dated 27.09.2006 in favour of Kalyani Pradhan and Rabindra Giri respectively after receiving full and final consideration. He has been cross-examined at length. In cross-examination, it is revealed that he is a resident of Ganjam district but not of Shyampur. He came to know Sanjay Kumar Behera in 2006 when he had come to see the plot. When he does not belong to Shyampur, it is not known why he had come to the spot. He admitted that he has not filed the said Power of Attorney in the Court. Said Sanjay Behera did not tell him about the pendency of C.S. No.39 of 2006 for the self-same land. He admitted that he has paid Rs.3,70,000/- to Sanjay Behera, but he has not produced any document to that effect. He further pleaded to have delivered the possession on the next day of execution of the Sale Deeds to Kalyani &

Rabindra. If there is a General Power of Attorney, it is not known why the same is not filed by the defendants or by him. Thus, the evidence of D.W.3 is not positive and satisfactory to show that he has got Power of Attorney from Sanjay Kumar Behera to sell the suit land, far less of receiving any consideration thereof. Thus, D.W.3 does not develop the case of the defendants. From the discussion made above, I find the defendants have no strong positive, consistent, clear and trustworthy evidence to prove that they have got right, title, interest from Sanjay Kumar Behera over the suit plot and, as such, they are in possession of the same.

15. On a comparison of the evidence, it appears that the evidence of the plaintiff is more positive and satisfactory than the evidence adduced by the defendants. So, the plaintiff has got strong case to prove her right, title, interest and possession over the suit land. Alternatively, when the defendants have come up with the story that Sanjay Behera has sold the suit land through Power of Attorney Holder to defendant Nos.1 & 2 under Registered Sale Deeds and C.S. No.39 of 2006 was pending by then, as revealed from the aforesaid materials, definitely section 52 of the Transfer of Property Act is a bar to such transaction. It is well settled law that the doctrine of lis pendens under section 52 of the said

Act can be pressed into service in such case. Their Lordships of the Hon'ble Apex Court in the case of ***Kedarnath Lal (dead) by his legal representatives and another Vs. Sheonarain and others (AIR 1970 SC 1717)*** have been pleased to observe in para-18 that :

“18. Lastly it was argued that if the fields were released from the operation of the mortgage they could not be made the subject of a mortgage decree, and whatever was done in the mortgage proceedings was not of any consequence. To this there are two answers. Firstly, the respondent before the Registrar (Ram Narain Ram) made no objection to the inclusion of the plots in the petition for a mortgage award. Secondly, the doctrine of lis pendens applies irrespective of the strength or weakness of the case on one side or other. See Gouri Dutt Maharaj v. Sukur Mohammed, 75 Ind App. 165 = (AIR 1948 PC 147). xx xx xx xx xx”.

With due respect to the said decision, I find the doctrine of lis pendens applies to the case on one side or other.

16. In the case of ***Radhashyam Routray Vs. Puranjan Mohapatra and others (AIR 1987 Orissa 142)***, His Lordship has been pleased to observe that :

“The doctrine of lis pendens embodied in S.52 is intended to prevent a party to a suit from making an assignment inconsistent with the rights which may be established in the suit and which might require a further party to be impleaded to make effectual the Court's decree. The broad purpose of S.52 is to maintain the status quo unaffected

by the Act of any party to the litigation pending its determination. The effect of S.52 is not to wipe out a sale pendente lite altogether but to subordinate it to the rights based on the decree in the suit. Where after the passing of a final decree in the partition suit, an application for review was filed and ultimately the review application was allowed and a compromise decree was passed, the sale of his share by the defendant during the pendency of the review application would be hit by the principle of lis pendens under S.52 and the purchaser would be bound by the compromise decree.”

With due respect to the above decision, I find during pendency of the suit if any transaction is made, the purchaser is bound by the judgment and decree passed in the suit. In the case at hand, the plea taken by the defendants that they are not bound by the judgment and decree passed in C.S. No.39 of 2006 is not tenable and they are bound by the judgment and decree passed against Sanjay Kumar Behera, even if their sales are relied on. In view of the aforesaid analysis, I find in the instant case, the right, title, interest and possession over the suit land lie with the plaintiff and thereby she has got prima facie case and balance of convenience leans in her favour. When she is going to be dispossessed by the defendants having no clear right, title, interest and possession being bound by the judgment and decree passed against the so-called vendor in earlier suit in C.S. No.39 of 2006, irreparable loss would cause to the plaintiff in case she is

dispossessed. Hence, the plaintiff is entitled for permanent injunction against the defendants. The view taken by the learned lower Court is justified and there is no point to interfere with its findings. On the other hand, I have no disagreement with the finding of the learned trial Court on issue No.(iii) that the defendants should be permanently restrained from interfering with the peaceful possession of the plaintiff over the suit land.

17. So far as issue No.(iv) is concerned, the learned trial Court has decided the matter against the respondent, but not in favour of the appellants and the appellants have not challenged such issue. However, prayer has been made that in the event of her dispossession during pendency of the suit, recovery of possession be ordered. Discussion has been made in the above paragraphs that the respondent is the owner in possession of the suit land for which the relief sought for recovery of possession is unwarranted. As regards issue No.(ii), there is cause of action to file the suit to restrain the appellants from interfering with her peaceful possession. Thus, issue No.(ii) is answered in favour of the plaintiff–respondent. With regard to issue No.(i), learned counsel for the appellants submitted that the suit is not maintainable in the absence of declaration of right, title and interest, whereas it was the

submission of learned counsel for the respondent that there is no such proposition of law that without such claim, the prayer for permanent injunction cannot be made. Moreover, learned counsel for the respondent submitted that the plaintiff–respondent has already got the title by virtue of judgment and decree passed in C.S. No.39 of 2006 and there is cause of action for injuncting the defendant–appellants. In view of the discussion made in the foregoing paragraphs, I find that there is force with the submission of learned counsel for the respondent. In fact, the plaintiff has got declaration of her right, title and interest in C.S. No.39 of 2006 and there is cause of action for permanent injunction for which the suit is maintainable in its present form. Thus, I agree with the view taken by the learned trial Court in respect of the findings on issue Nos.(i) & (ii). The plaintiff is entitled to all the reliefs and there is no occasion to give any relief on the alternative prayer for recovery of possession. Hence, the findings arrived at by the learned trial Court are correct and legal, justifying no interference by this Court. Hence ordered :

O R D E R

The appeal fails and the same is dismissed without cost. The judgment dated 03.11.2012 & decree dated 17.11.2012 passed by the learned 2nd Addl. Senior Civil Judge,

Bhubaneswar in C.S. No.81/792 of 2012/2007 are hereby confirmed.

**District Judge, Khurda
at Bhubaneswar.**

17.11.2014.

Dictated, corrected by me and pronounced in the open Court this day the 17th November, 2014.

**District Judge, Khurda
at Bhubaneswar.**

17.11.2014.