

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

Present:

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

Dated, Bhubaneswar the 22nd Sept. '14.

R.F.A. No.45 of 2013.

[Arising out of the judgment dated 20.04.2013 & decree dated 02.05.2013 passed by the learned 2nd Addl. Senior Civil Judge, Bhubaneswar in C.S. No.2/902 of 2013/2008.]

Sukanta Kumar Mahapatra, aged about 45 years, S/o. Sri Surendra Kumar Mahapatra, resident of L-3/127, Acharya Vihar, P.O. – Acharya Vihar, Bhubaneswar, Dist. – Khurda.

... **Appellant.**

-V e r s u s-

1. Smt. Anita Das, aged about 54 years, W/o. Banabihari Das of Vill./P.O. – Bharatpur, P.S./Dist. – Kendrapara, At present : Jagannath Vihar, Plot No.80/A, Road-2, Lane-2, Baramunda, P.S. – Khandagiri, Bhubaneswar, Dist. – Khurda.
2. Illa Mangaraj, aged about 60 years, W/o. Harihara Mangaraj, Plot No.1240, Nayapalli, Gadasahi, Bhubaneswar, Dist. – Khurda.
3. Mamata Samantaray, aged about 39 years, W/o. Dillip Kumar Samantaray, Plot No.307/4002, Gadasahi, Nayapalli, Bhubaneswar, Dist. – Khurda.
4. Namita Mangaraj, aged about 32 years, Plot No.1240,

Nayapalli, Bhubaneswar, Dist. – Khurda.

5. Sribachha Mangaraj, aged about 29 years, S/o. Late Harihara Mangaraj, Plot No.1240, Nayapalli, Bhubaneswar, Dist. – Khurda.

... **Respondents.**

Counsel :

For Appellant -- Shri R.M. Dash & Associates.
 For Res. No.1 -- Shri S.N. Das & Associates.
 For Res. Nos.2 to 5-- None (Set ex parte).

Date of argument : 19.09.2014.

Date of judgment : 22.09.2014.

J U D G M E N T

This appeal is directed against the judgment dated 20.04.2013 & decree dated 02.05.2013 passed by the learned 2nd Addl. Senior Civil Judge, Bhubaneswar in C.S. No.2/902 of 2013/2008, decreeing the suit of respondent No.1 (plaintiff in the Court below) by declaring her title and confirming her possession over the suit schedule property and restraining the appellant (defendant No.5) and respondent Nos.2 to 5 (defendant Nos.1 to 4 in the Court below) from interfering in her peaceful possession thereover.

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 sabik khata No.1113, sabik plot No.91/1443, measuring an area of Ac.0.115 decimals; sabik khata No.269, sabik plot No.112, area Ac.0.056 decimals; sabik plot No.113, area Ac.0.262 decimals; and sabik plot No.114, area Ac.0.132 decimals of mouza Nayapalli, as described in schedule 'A' of the plaint, originally belonged to one Souri Mangaraj, son of Dasarathi Mangaraj. Souri Mangaraj alienated suit schedule 'A' property in favour of Sahadev Behera and Nakula Behera vide Registered Sale Deed dated 25.01.1966 on payment of valuable consideration. It is further averred, inter alia, that sabik plot Nos.112 & 114 were converted to sabik khata No.268 and sabik plot No.101 with an area of Ac.0.150 decimals, as fully described in schedule 'B' of the plaint. But, in the Settlement Record of Right, sabik khata No.268 stood recorded in the name of Souri Mangaraj. It is further averred that sabik khata No.268, sabik plot No.101 with an area of Ac.0.150 decimals corresponds to hal khata No.399, hal plot No.37 measuring an area of Ac.0.074 decimals, as fully described in schedule 'C' of the plaint, which is the subject matter of the suit. Both Sahadev Behera and Nakula Behera, after purchase of the

aforesaid property from Souri Mangaraj, amicably partitioned the same and enjoyed their respective shares. Sahadev Behera, in his turn, sold the eastern side of Ac.0.072 decimals of land to one Sayed Khan under Registered Sale Deed dated 25.06.1979 on payment of consideration. Similarly, Nakula Behera sold his share of Ac.0.072 decimals to one Sarat Chandra Mishra under Registered Sale Deed dated 16.04.1979. Sayed Khan sold his purchased land to one Brahmananda Mishra for consideration vide Registered Sale Deed dated 26.02.1980. Sarat Chandra Mishra, after purchase of the above property, filed objection case before the Asst. Settlement Officer to record his name in respect of the purchased plot. The Asst. Settlement Officer allowed the case vide his order dated 03.11.1982 and directed to create hal plot No.37/1430, with an area of Ac.0.074 decimals in the name of Sarat Chandra Mishra. Similarly, after purchase, Brahmananda Mishra filed objection case before the Settlement Authority, which was allowed with a direction to record plot No.37 in his favour.

4. Subsequently, it is further averred that late Harihara Mangaraj, whose legal heirs have been made defendants in the suit, filed objection before the Settlement Authority in respect of sabik khata No.268 and sabik plot

No.101 measuring an area of Ac.0.150 decimals, corresponding to hal plot Nos.37 & 37/1430 by virtue of his possession. But, the Settlement Authority, without giving any opportunity to Brahmananda Mishra of being heard, passed order that both Sarat Chandra Mishra and Brahmananda Mishra have failed to prove their purchase and, accordingly, directed to record the name of late Harihara Mangaraj under Stitiban status in respect of hal plot Nos.37 & 37/1430 with note of possession in the names of Brahmananda Mishra and Sarat Chandra Mishra. The plaintiff claims this act of the Settlement Authority to be wrong and without any basis. During proceeding before the Settlement Authority, Brahmananda Mishra sold his purchased land to one Laxminarayan Mohanty under Registered Sale Deed. But, neither Brahmananda Mishra nor his purchaser Laxminarayan Mohanty has been added as party to Objection Case No.343 before the Settlement Authority. So, the Record of Right was published on 25.10.1988 in respect of schedule 'C' property in the name of late Harihara Mangaraj with note of possession of Brahmananda Mishra. Said Laxminarayan Mohanty sold his purchased land to the plaintiff on payment of consideration on 21.09.1994. While the plaintiff was in peaceful possession of suit schedule 'C' property from the date of her purchase by erecting boundary wall, on 12.02.2008 defendant

No.5 tried to encroach the same to which she objected. It was disclosed by defendant No.5 that he has purchased suit schedule 'C' property from Harihara Mangaraj under Registered Sale Deed dated 28.02.2003 on payment of consideration. It is averred that Harihara Mangaraj, in order to delete the name of Brahmananda Mishra from the note of forcible possession, filed revision in 2003 before the Commissioner, Consolidation & Settlement. But, Brahmananda did not appear, as he has sold his purchased property to his successor. In that revision, the plaintiff or her vendor were not party, the reasons best known to Harihara Mangaraj. However, against the circular of Board of Revenue issued in 1987, the Commissioner of Consolidation & Settlement allowed the prayer of Harihara Mangaraj and directed to delete the name and note of forcible possession of Brahmananda Mishra from hal khata No.399, which is schedule 'C' land. Defendant No.5 managed to get his name mutated in revenue record. When there was cloud over the right, title, interest and possession of the plaintiff because of sale and threat given by defendant No.5 to dispossess her, the plaintiff filed the suit for declaration of her right, title, interest and possession, confirmation of her possession and, in alternative, for recovery of possession if found dispossessed during pendency of the suit, with further

prayer seeking permanent injunction against the defendants from dispossessing her from the suit land. Hence the suit.

5. Defendant Nos.1 to 4 were set ex parte. Defendant No.5 only contested the suit. He filed written statement, stating that the suit is not maintainable in law, it is barred by law of limitation, it suffers from non-joinder of necessary parties and the plaintiff has no locus standi to file the suit. It is further averred in the written statement that schedule 'A' property does not correspond to the properties mentioned in schedule 'B' and 'C' of the plaint. According to this defendant, the settlement record, as published in 1962, should show the Registered Sale Deed where schedule 'A' property is said to have been conveyed. On the other hand, he alleged that the Record of Right published in 1962 should have been mentioned in the Sale Deed dated 25.01.1966 where Souri Mangaraj is said to have transferred the suit property to Nakula Behera and Sahadev Behera. According to this contesting defendant, sabik plot No.112 measuring Ac.0.056 decimals and sabik plot No.114 measuring Ac.0.132 decimals, altogether Ac.0.188 decimals, does not seem to have been converted to sabik khata No.268 appertaining to sabik plot No.101 measuring an area of Ac.0.150 decimals. The contesting defendant also averred that the first Sale Deed dated 25.01.1966, as alleged in the plaint

said to have been executed by Souri Mangaraj, is different from plot No.101, which is recorded in favour of Harihara Mangaraj, who is the son of Souri Mangaraj. He refuted the entire transactions right from Souri Mangaraj till the plaintiff and asked the plaintiff to prove the same. He further stated that the Settlement Authorities have exercised their jurisdiction and the Civil Court has no jurisdiction for directing survey, preparation of Record of Right or settlement of rent under the Orissa Survey & Settlement Act (hereinafter called "the Act"). In fact, Sarat Chandra Mishra and Brahmananda Mishra have filed objection and Sahadev Behera, Nakula Behera & Harihara Mangaraj were duly noticed. Since Brahmananda Mishra, Sahadev Behera & Nakula Behera could not show any document, sabik plot No.101 corresponding to suit hal plot Nos.37 & 37/1430 was recorded in the name of Harihara Mangaraj. Even Sarat Chandra Mishra admitting Harihara Mangaraj as true owner has purchased suit plot No.37/1430 from him. Harihara Mangaraj filed revision case to delete the name of Brahmananda Mishra and succeeded in such attempt. The said order has not been challenged by Brahmananda Mishra, for which the same is binding as no appeal has been filed under section 42 of the Act. According to this defendant, all the Sale Deeds in favour of Brahmananda Mishra and

subsequent thereto are fake, illegal and void *ab initio*. The case of the contesting defendant is that Harihara Mangaraj is the owner in possession of schedule 'C' land and this defendant negotiated with Harihara Mangaraj and purchased schedule 'C' property from him on payment of consideration under Registered Sale Deed No.1640 dated 28.02.2003 and he got delivery of possession from his vendor. After getting possession, he has constructed boundary wall thereon and has been in possession uninterruptedly without any objection from any quarter. Thus, it was prayed to dismiss the suit.

6. Basing on the pleadings of both parties, the learned trial Court framed the following issues :

- (i) Whether the suit is maintainable ?
- (ii) Whether there is any cause of action to file the suit ?
- (iii) Is the suit barred by law of limitation ?
- (iv) Whether the vendor of the plaintiff has valid title over the suit property at the time of it being purchased by her ?
- (v) Whether the plaintiff is entitled to her possession along with confirmation of the same from 'C' schedule property ?
- (vi) Whether the plaintiff is entitled to get relief of permanent injunction ?
- (vii) To what other relief / reliefs, the plaintiff is entitled ?

7. The learned trial Court, after considering the

evidence of witnesses examined by plaintiff and defendants and the documentary evidence produced by them took up issue Nos.(iv), (v) & (vi) at a time and gave findings in favour of the plaintiff by declaring her right, title, interest and possession over the suit land and also confirmation of her possession thereon. The learned trial Court also decided issue Nos.(i), (ii), (iii) & (vii) together by holding that there is cause of action to file the suit, the suit is maintainable in law, the suit is not barred by law of limitation and the defendants are required to be enjoined from interfering with the possession of the plaintiff over the suit land. On the other hand, the learned trial Court has decreed the suit in favour of the plaintiff on contest against defendant No.5 and ex parte against defendant Nos.1 to 4, but has not awarded any cost.

CONTENTIONS :

8. Defendant No.5 being the appellant has challenged the findings of the learned trial Court, stating that the impugned judgment and decree are against the facts of the case and contrary to law. It was submitted by learned counsel appearing for the appellant that the learned trial Court has erred in law by deciding the facts against the weight of evidence on record and, particularly, against the maxim of equity, namely, *Actus-Curiae-Neminem-Gravabit*. He further

submitted that the judgment passed by the learned trial Court is whimsical, arbitrary and against the principles of law. He further submitted that proper issue has not been framed in this case with regard to whether schedule 'A' property corresponds to schedule 'B' & 'C' properties. It was also argued that the learned trial Court has not discussed on several issues like whether the suit is barred by law of limitation and other issues. The learned trial Court has erred in law in appreciating the Record of Right in settlement while survey numbers are given in the Final Record of Right. The learned Court below has completely lost sight of the settled position of law that hal plot number in the settlement prevails over the previous Record of Right and should have based decision on the Record of Right finally published in 1962 till 1988. He further submitted that the learned trial Court should have framed an issue as to whether the evidence adduced by the plaintiff is cogent and clear to prove their plea. Since the learned trial Court has not gone through the documentary evidence, save and except giving importance to the oral evidence, his entire findings are vitiated. So, he prayed to allow the appeal by setting aside the impugned judgment and decree passed by the learned Court below.

9. On the other hand, learned counsel appearing for

respondent No.1 submitted that the plaintiff has successfully proved her right, title, interest and possession over the suit land through documentary and oral evidence and defendant No.5 being the contesting defendant has not proved the title of his vendor, much less about his own title. He further submitted that there is no necessity of framing fresh issue because the materials are available to find schedule 'A' property corresponds to schedule 'B' & 'C' properties. According to him, the Settlement Authority cannot decide right, title, interest and possession, whereas it is the Civil Court who will decide the same over the suit property and the learned trial Court has rightly observed so in its judgment. Learned counsel for the contesting respondent further submitted that defendant No.5 while leading evidence has not been able to prove the title of Harihara Mangaraj over the suit land and, accordingly, the appellant has no case. On the other hand, he supported the findings of the learned trial Court and prayed to dismiss the appeal.

DISCUSSIONS :

10. Being the First Appellate Court, this Court has got the duty to reappraise 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 appellant has 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.

11. It appears that the learned trial Court has first disposed of issue Nos.(iv), (v) & (vi) together. The real issue in controversy should be taken up first. In my considered opinion, issue Nos.(iv) & (v) being decisive to other issues should be disposed of together at the first instance for the sake of convenience.

12. It is the plea of the plaintiff that she has valid right, title, interest and possession over schedule 'C' property, which corresponds to schedule 'A' & 'B' properties, whereas defendant No.5 has pleaded that the plaintiff has no such valid right, title, interest and possession over the suit land; rather he has got valid right, title, interest and possession having purchased the same from its rightful owner. Both the parties have led evidence, both oral and documentary, to prove their respective plea. 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, onus has been divided and both parties are required to discharge their onus.

13. The plaintiff has examined two witnesses, out of whom P.W.1 is the husband of the plaintiff, and filed documentary evidence. P.W.1 has proved the certified copy of the Record of Right of khata No.268 published in 1962 vide Ext.1 and certified copy of Yadast of the year 1974 vide Ext.2. He has also proved the certified copy of the Record of Right of suit khata No.399 published in 1988 vide Ext.3. All the exhibits have been marked with objection. Since all are certified copies of Record of Right & Yadast, which are maintained in due discharge of duties by Government servants and are relevant, the objection is nullified.

14. It is revealed from Ext.1 that suit schedule 'B' property with an area of Ac.0.150 decimals has been recorded in favour of Souri Mangaraj on 08.03.1962 by the Settlement Authority. Ext.2 shows that Nakula Behera has made objection to record his name in respect of his purchased schedule 'A' property. On going through the said recording, it appears that suit plot Nos.112 & 113 being the plot numbers assigned in the

previous settlement correspond to one suit plot No.101 of 1962 settlement. This order has been passed by the Asst. Settlement Officer on 02.04.1974. Not only this, but also hal plot No.37 corresponds to sabik plot No.101 as per the Yadast and that hal suit plot No.37 as per Ext.3 finds place in suit schedule 'C' property. On this score, cross-examination has been made to P.W.1 by the contesting defendant; but there is nothing revealed from his detailed cross-examination to dispute such documents.

15. P.W.1 has proved the certified copy of the Sale Deed dated 25.01.1966 vide Ext.4, which shows that Souri Mangaraj has sold schedule 'A' property in favour of Sahadev Behera & Nakula Behera on payment of consideration of Rs.1,000/- and also delivered possession to them. It also shows that these plots are according to the previous settlement. Further, P.W.1 has proved the certified copy of the Sale Deed vide Ext.5 executed on 25.06.1979 by Sahadev Behera in favour of Sayed Khan in respect of Ac.0.072 decimals from the east of schedule 'B' property on payment of consideration. Similarly, P.W.1 has also proved the certified copy of the Registered Sale Deed vide Ext.6 executed by Sayed Khan in favour of Brahmananda Mishra on 26.02.1980 in respect of Ac.0.072 decimals on payment of consideration. All

have been marked with objection by contesting defendant No.5. Of course, in cross-examination, he could not say under whose custody, the original Sale Deeds vide Exts.4, 5 & 6 are kept. Even if the custody is not proved, but the certified copies of Sale Deeds being public documents can be proved. So, the objection to mark those documents as exhibits is overruled.

16. P.W.1 has proved the original Sale Deed bearing No.5281 dated 08.06.1983 executed by Brahmananda Mishra in favour of Laxminarayan Mohanty vide Ext.9. He has also proved the original Registered Sale Deed dated 21.09.1994 in favour of the plaintiff by Laxminarayan Mohanty vide Ext.10. There is no objection raised to accept those documents in evidence. On going through both the Sale Deeds, it appears that vide Ext.9, Brahmananda Mishra sold the property purchased by him under Ext.6 to Laxminarayan Mohanty on payment of consideration and delivered possession thereof. Similarly, Ext.10 shows that Laxminarayan Mohanty sold the land purchased by him under Ext.9 in favour of the plaintiff on payment of consideration and delivered possession thereof. Exts.9 & 10 disclose that the properties covered under both the Sale Deeds are part of suit schedule 'B' property. Not only this, but also on these aspects, there is no proper cross-

examination to P.W.1. In cross-examination at page-9, suggestion was given to P.W.1 that the specification of properties vide Exts.5, 6, 9 & 10 and also the boundaries mentioned thereunder do not tally with each other, to which he agreed. It is quite obvious that schedule 'A' property has got huge area. Suit schedule 'B' property has been amalgamated to one plot and schedule 'C' property is part of schedule 'B' property, for which the evidence of P.W.1 in this respect is natural. But, at the same time, he denied to the suggestion of defendant No.5 that the property, as mentioned in Ext.4, does not correspond to the property mentioned in Exts.5, 6, 9 & 10. He also denied to the suggestion of defendant No.5 that Souri Mangaraj had not sold the property under khata No.268, plot No.101 to Sahadev Behera & Nakula Behera. In fact, as per the above discussion, schedule 'A', 'B' & 'C' properties are involved in the aforesaid Sale Deeds and when the property under the previous settlement has been sold to Nakula Behera & Sahadev Behera by Souri Mangaraj, it cannot be said that the property under schedule 'B' has not been sold to Nakula Behera & Sahadev Behera. At the same time, he has admitted that schedule 'C' property is not mentioned under Ext.10. On close examination of Ext.10, it appears that schedule 'B' property has been mentioned in

Ext.10; but, as observed earlier, schedule 'B' property corresponds to schedule 'C' property, for which the property mentioned in Ext.10 is not the plot number mentioned in schedule 'C' property. But, that does not mean that schedule 'C' property has not been sold under Ext.10. Be that as it may, nothing has been elicited during vivid cross-examination to P.W.1.

17. It is revealed from the evidence of P.W.1 that there was objection filed on 11.05.1982 by Brahmananda Mishra to record his name basing on his Sale Deed and that was allowed on 03.11.1982. Accordingly, suit hal plot No.37 with an area of Ac.0.074 decimals was allowed to be recorded out of sabik suit plot No.101. Similarly, he has proved the certified copy of order in Objection Case No.1745 filed by Sarat Chandra Mishra, who has purchased land from Sahadev Behera, and such Mutation Case was allowed and he was permitted to separate hal plot No.37/1430 measuring Ac.0.074 decimals by carving out the same from suit schedule 'B' property under plot No.101. He has proved the certified copy of order in Objection Case No.343 vide Ext.8, whereunder Harihara Mangaraj being the son of Souri Mangaraj has objected to the recording of the names of Brahmananda Mishra & Sarat Chandra Mishra in respect of hal plot Nos.37 &

37/1430 respectively. It is found from the said order that the Asst. Settlement Officer has observed that both Sarat Chandra Mishra & Brahmananda Mishra could not prove their purchase, for which the land was recorded in favour of Harihara Mangaraj by cancelling their earlier recording on 10.06.1983, but allowed to maintain the forcible possession of Brahmananda Mishra & Sarat Chandra Mishra in their respective khatas along with Harihara Mangaraj. Of course, in this regard, P.W.1 could not prove anything as he is a purchaser of 1994. Not only this, but also P.W.1 has proved the certified copy of the Record of Right vide Ext.3, which shows that there was revision petition filed by Harihara Mangaraj to delete the name of Brahmananda Mishra, whose property has been passed to the plaintiff, which is an admitted fact of both parties, and the possession note of Brahamanda Mishra has been cancelled by order of the Commissioner, Consolidation & Settlement. In this regard, learned counsel for respondent No.1 has urged that such type of Record of Right deleting the name of Brahmananda Mishra is contrary to the Circular issued by the Revenue Department in 1987. This Court takes cognizance of the Government Circular No.XLII-65/87, 8089/LRS, dated 13.07.1987 issued by the Director, Land Records and Surveys, Orissa, wherein the old practice of note of possession in remarks column is

discontinued, but the practice of recording unauthorised possession will continue as usual without mentioning as to from which year they are in possession. Now, it appears that forcible possession of Brahmananda Mishra is recorded against Col.2 in the Record of Right, but not in remarks column. Apart from this, the order of Commissioner of Settlement, is always subject to challenge in the Civil Court because Mutation Record of Right never creates or extinguishes the right, title and interest. Be that as it may, the fact remains that schedule 'C' property being under title and possession of Brahmananda Mishra is conveyed to Laxminarayan Mohanty and then to the plaintiff. The name of Harihara Mangaraj was only inserted in 1994, whereas his father had already sold the suit property to Nakula Behera & Sahadev Behera in 1966. Learned counsel for the appellant submitted that Registered Sale Deeds are not binding on Harihara Mangaraj, as he is a third party. When Souri Mangaraj being the father of Harihara Mangaraj has executed the Sale Deed in 1966, it cannot be said that Harihara, who is his successor, is not bound to it. When the father has sold the property and the fact has been admitted by both parties that Harihara Mangaraj has three brothers, the said Record of Right in favour of Harihara Mangaraj solely does not sound louder. So, it is proved by P.W.1 that by virtue of

settlement records, the right, title and interest, as availed by him over the suit land under Ext.10, cannot be extinguished by Ext.3.

18. From the aforesaid discussion, it appears that P.W.1 in one hand has successfully proved the title, at the same time has also proved that the name of Harihara Mangaraj, who is the vendor of defendant No.5, has no title over the suit property because of non-availability of the same from his father, who had already sold the same to Nakula Behera & Sahadev Behera, who successfully passed on the same to the successors-in-interest and, finally, the plaintiff got it with the possession. At the same time, he has also proved the certified copy of the Registered Sale Deed executed by Harihara Mangaraj in favour of defendant No.5 vide Ext.11. But, on going through Ext.11, it appears that though schedule 'C' property has been mentioned, but it is not noted in Ext.11 as to how he succeeded to the property except Patta from the Revenue Authority in major settlement . It is well settled law that Settlement Record of Right cannot be taken as a document of title, but it is a document of possession. Learned counsel for the appellant submitted that in view of the decision in the case of *Cuttack Municipality Vs. Sk. Khairati (and after him) Jaitan Bibi and others* [1988 (II) OLR-475], Record of

Right can be the basis of title, but learned counsel for contesting respondent opposed such view. In para-5 of the said decision, His Lordship has been pleased to observe that :

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“Normally, a Record of Rights does not confer any title, but where it is asserted that title inherits in a particular person and in support of such claim of title, old Record of Rights is produced, it would be prudent for the Court to attach importance to such document and in certain cases Courts have even treated such entry as the basis of title. It has been so held in the case of ***Ganesh Das v. Jagabandhu Prusti and others, 37 (1971) C.L.T. 420***”.

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With due respect to the above decision, I find Harihara Mangaraj has not claimed to have succeeded his father for which the Record of Right in his favour cannot be the basis of title. Moreover, as discussed earlier, title was not available to him in 2003 when it had already been alienated by his father. Therefore, it is proved by P.W.1 that he has got right, title, interest and possession under Ext.10 over the suit land whereas defendant No.5 has not got so.

19. P.W.2 discloses that he is a boundary tenant of suit schedule 'C' property and he has been seeing the boundary wall constructed on all sides by the plaintiff since 15 to 17 years and P.W.1, who is her husband, has been possessing the same. In cross-examination, he has stated that

the plaintiff was staying in a rented house, but she constructed the boundary wall on the suit land. It is quite obvious that at the time of construction of boundary wall, the plaintiff must be staying in a rented house. So, the evidence of P.W.2 amply proves that he being a boundary tenant of the suit land has seen the possession of P.W.1 and his wife (plaintiff) thereon. Barring the above, the documents vide Exts.7 & 8 amply disclose that the vendors of the plaintiff are in possession, for which Brahmananda Mishra's note of possession was allowed to be recorded. So, the plaintiff has also proved through the evidence of P.Ws.1 & 2 that she has got right, title, interest and possession over the suit land. As such, the plaintiff has discharged her onus.

20. Defendant No.5, in order to discharge his onus, has examined two witnesses, out of whom D.W.1 is his father and D.W.2 is defendant No.5 himself. They have also adduced a good number of documents. Let me first of all discuss the evidence adduced by defendant No.5. It is the case of defendant No.5 that they have purchased the property from Harihara Mangaraj, who is admittedly the son of Souri Mangaraj, vide Registered Sale Deed dated 28.02.2003. But, at the same time, he has taken plea that the property purchased by Sarat Chandra Mishra from Nakula Behera is there. After

correction of Record of Right, again Sarat Chandra Mishra purchased hal plot No.37/1430, which he has purchased under sabik khata from Nakula Behera, from Harihara Mangaraj admitting him as owner. To justify this claim, he has produced the Record of Right published in favour of Sarat Chandra Mishra vide Ext.A and also he has produced another Record of Right in favour of Sarat Chandra Mishra appertaining to khata No.330 & plot No.36/1382 vide Ext.B, which is not pleaded in the written statement. Similarly, he has produced the Record of Right in the names of Jagannath Mohapatra & Niharika Das vide Exts.C & D respectively. There is no pleading in this context. So, Exts.B, C & D are excluded from consideration being not pleaded, as evidence has to be led according to pleading. D.W.1 has proved the certified copy of the Sale Deed executed by Harihara Mangaraj and his brothers and other legal heirs of Souri Mangaraj vide Ext.C whereunder it is found that they have sold the property alleged to have been purchased by Sarat Chandra Mishra again on 07.04.1986. That apart, D.W.1 has proved the certified copy of the Sale Deed of the same property executed by Nakula Behera in favour of Sarat Chandra Mishra vide Registered Sale Deed dated 16.04.1979 vide Ext.F. In the Sale Deed, it has been written that he and Sahadev Behera have jointly purchased the

property in question and other properties from Souri Mangaraj and, after mutual partition, he has sold the said property to Sarat Chandra Mishra. In fact, D.W.1 has not clarified why Sarat Chandra Mishra purchased the said property after purchasing the same from the father of Harihara Mangaraj. It is very strange to find out that a property has been sold twice - once by father and for the second time by son. Hence, it is felt that son being the kingpin of the dispute has created terror with the purchasers of the property sold by his father. But, he had no knowledge of law that once property is sold by father for legal necessity, its further sale by his legal heirs is not permissible without cancellation of earlier Sale Deed. On the other hand, the right, title and interest once bequeathed cannot be retransmitted by a registered document. In this regard, D.W.1 has been cross-examined. Moreover, production of these documents are irrelevant and not necessary for the dispute in question. In cross-examination, he could not say why the documents under Exts.A, B, C & D have been filed before the Court and he also could not say the contents of Exts.E & F. So, the documents, as discussed above, being not relevant for the dispute cannot be construed much for the defendants.

21. D.W.1 has proved the Registered Sale Deed

executed by Harihara Mangaraj in favour of defendant No.5 vide Ext.G. He has also proved the document, which shows about certified copy of order in Revision Case No.83 of 2003 of the Court of Commissioner, Consolidation & Settlement, vide Ext.H and original corrected Record of Right vide Ext.J. On going through Ext.H, it appears that the same is the certified copy of the order passed in Settlement Revision Case No.83/2003. On going through the same, it appears that Harihara Mangaraj has preferred revision to delete the name of Brahmananda Mishra from hal Record of Right in respect of hal plot No.37, which is described in suit schedule 'C' property. The learned Commissioner, Consolidation & Settlement, relying upon the Circular of the Board of Revenue, as discussed earlier, has directed to delete the note of possession of Brahmananda Mishra. In this context, discussion has already been made while evaluating the case of the plaintiff in the above paragraphs. However, the Record of Right was corrected by deleting the name of Brahmananda Mishra, as available from Ext.3 against Col.2. On this aspect, I have already discussed in the foregoing paragraphs. So, in no way, the order of the learned Commissioner and the subsequent development give an aid to justify that Harihara Mangaraj being the owner of the property has sold the same to P.W.2. In fact, Ext.G, which is

the original Sale Deed executed by Harihara Mangaraj in favour of defendant No.5, does not disclose the source of his getting the property i.e. suit hal plot No.37 for sale to defendant No.5. Apart from this, it is only available from Ext.4 that he being the legal owner of the property has obtained Patta from the concerned Revenue Authority and, as such, sold the same. It is never stated by Harihara in Ext.G that he being the successor-in-interest of Souri has sold the same or the property in question is his self-acquired property. Similarly, D.W.1, the father of defendant No.5, has clearly admitted in his evidence that at the time of execution of Ext.G, all the brothers of Harihara Mangaraj were alive; but it is not known why they were not added as vendors in respect of such property, although Souri has got four sons, including Harihara Mangaraj, as available from the evidence of D.W.1. Moreover, D.W.1 has admitted that he has not enquired whether the suit land was exclusively recorded in favour of Harihara Mangaraj. He has further admitted at page-11 of cross-examination that there is no mention in Ext.G regarding the source of getting the land from Harihara Mangaraj. Further, he has admitted that the suit land is not part and parcel of the land of Souri, which was sold by him in 1966. When it is held that Ext.A corresponds to Ext.B and Ext.B corresponds to Ext.C, as

discussed earlier, and if the property sold under Ext.G is not part and parcel of Ext.A, the question of succeeding this property by Harihara Mangaraj is a myth one. However, the source of getting the property by Harihara Mangaraj, which remained far from proof by the evidence of D.W.1, the passing of title under Ext.G of the suit land to defendant No.5 is also nonest. Of course, D.W.1 has proved the Record of Right issued in favour of defendant No.5 vide Ext.J and also payment of rent receipt vide Ext.K. But, at the same time, he has admitted that they have not made any construction of the house over the suit land. Since the oral evidence is inconsistent with the documentary evidence as to possession through the evidence of D.W.1, the same does not prove the possession of defendant No.5 over the suit land. On the whole, I find that D.W.1 has not proved the right, title, interest and possession of defendant No.5 over the suit land.

22. D.W.2, who is defendant No.5, has simply stated about Exts.G & J; but in cross-examination has admitted that he has purchased the suit land from Harihara Mangaraj. He could not say whether the suit land was self-acquired property or ancestral property of Harihara Mangaraj. He has not made thorough verification of the suit land prior to its purchase. So, he has not proved the right, title, interest and possession of

his vendor. When he has failed to prove the right, title, interest and possession of his vendor, Ext.G proved by him does not convey any right, title, interest and possession to him. With regard to boundary of the suit land, a public road exists on the northern side of the suit land; but there is nothing mentioned in Ext.G as to the existence of such public road on the north. So, he has also not proved his possession over the suit land by preponderance of probability. On the whole, I find that the evidence of D.W.2 has not improved, in any way, to prove his right, title, interest and possession over the suit land. Finally, at para-22 of his cross-examination, he has admitted that he has not claimed the same as claimed by the plaintiff; but he has not verified the documents of the plaintiff. If he has not seen the documents of the plaintiff, it is not known as to how he is able to vouch that the land of the plaintiff is not claimed by him. Thus, it is found that defendant No.5 as a whole has failed to establish his right, title, interest and possession over the suit land by not discharging his onus.

23. From the foregoing discussion, I am of the considered view that the plaintiff has discharged her onus by proving that she has got right, title, interest and possession over suit schedule 'A' property and schedule 'B' property corresponds to schedule 'C' property of hal plot; whereas

defendant No.5 has not been successful in proving his right, title, interest and possession over schedule 'C' property. When the plaintiff has right, title, interest and possession over schedule 'C' property, her possession thereon should be confirmed. In fact, I agree with the findings of the learned trial Court that issue Nos.(v) & (vi) are answered affirmatively in favour of the plaintiff.

24. So far as issue No.(ii) is concerned, when there is evidence of P.W.1 that defendant No.5 made attempt to encroach the suit land by virtue of the Sale Deed, definitely there is cloud cast on the title of the plaintiff. When the plaintiff has got right, title, interest and possession over the suit land, there is cause of action to file the suit. It is also revealed that the suit has been filed within time for declaration of right, title, interest and possession, for which the suit is not barred by limitation. This is not a suit for correction of Record of Right, but for declaration of right, title, interest and possession of the plaintiff, for which the suit is otherwise maintainable being not barred by the Act. I have already discussed in the foregoing paragraphs that the plaintiff has been able to prove her possession over the suit land, whereas defendant No.5 has not been able to prove his possession over the same. When the plaintiff has got right, title, interest and

possession over the suit land and there is cause of action to file the suit, the defendants, including defendant No.5, should be restrained permanently from disturbing the possession of the plaintiff. On the other hand, I find that all the issues have been answered in favour of the plaintiff and I agree with the findings of the learned trial Court on all such issues. So, the plaintiff is entitled to get reliefs, as prayed for, and as such, the learned trial Court has rightly decreed her suit. Hence ordered :

O R D E R

The appeal fails and the same is dismissed without cost. The judgment dated 20.04.2013 & decree dated 02.05.2013 passed by the learned 2nd Addl. Senior Civil Judge, Bhubaneswar in C.S. No.2/902 of 2013/2008, are hereby confirmed.

**District Judge, Khurda
at Bhubaneswar.**

22.09.2014.

Dictated, corrected by me and pronounced in the open Court this day the 22nd September, 2014.

**District Judge, Khurda
at Bhubaneswar.**

22.09.2014.

