IN THE COURT OF THE ADDL. DISTRICT JUDGE –CUM- SPECIAL JUDGE, C.B.I. COURT NO.II, BHUBANESWAR.

PRESENT:

Dr.A.K.Mishra,
Addl. District Judge –cum-
Special Judge, C.B.I. Court No.II,
Bhubaneswar.

R.F.A. No. 2/94 of 2015/2009.

(Arising out of Judgment dated 22.5.2009 passed by the learned 1st Addl. Civil Judge (Senior Division) Bhubaneswar in C.S. No. 24/365 or 2009/2003)

1. Santosh Kumar Samantaray, aged about 65 years,
2. Sarat Kumar Samantaray, aged about 62 years,
   Both are sons of late Rama Chandra Samantaray
   Vill/P.O. Janla, P.S. Jatni, Dist. Khurda.

… Appellants.

Versus.

1. State of Orissa,
Represented through the Collector, Khurda,
At/P.O./Dist. Khurda.
2. Tahasildar, Jatani,
At/P.O./P.S. Jatni, Dist. Khurda.

… Respondents.

COUNSELS

For the Appellants : Sri U.Pattanaik & Associates,

For the Respondents : Sri R.P.Nanda (G.P.)

Date of hearing : 21.12.2015
Date of Judgment : 26.12.2015.

JUDGMENT

This appeal preferred by the plaintiffs is directed against the decree and Judgment dated 22.5.2009 of the 1st Addl. Civil Judge (Sr.Dvn.) Bhubaneswar in dismissing the suit. The defendants are the respondents.

2. The facts, shorn of details and necessary for the disposal of this appeal, lie in narrow compass. The suit land is described in plaint A- schedule as follows:

> *"As per 1962 settlement District-Puri (Now Khurda) P.S. Jatni, Mouza- Uttarmuhan, Tahasil- Bhubaneswar (Now Jatani) Khata No.384, Plot NO.223, Area Ac.0.145 decimals. Compact area bounded by: East- Plot NO.469, West- Boundary of Janla Mouza, North- Plot NO.222 (belongs to plaintiffs) and South- Plot No.470 and 471 which corresponds to Lease hold Khata No. 299, Lease hold Plot No. 245, Area Ac.0.160 decimals which further corresponds to Sabik Khata No.5, Sabik Plot No. 245, Area Ac.0.160 decimals".*

In the settlement ROR of the year 1929-30 the suit land under Khata No.5 stood recorded in the name of State of Orissa. Maguni Jagdev had three sons namely Rama Chandra, Abhiram and Arakhita. Plaintiffs are the sons of Rama Chandra. Arakhita died leaving behind his wife Swarnalata and daughter Pravat Manjari. Abhiram died leaving behind a daughter namely Buli and two sons Nrusingha and Sesadeba. The specific case of the plaintiffs is that in the year 1938, Arakhita forcibly possessed the suit land which was lying then fallow, full of shrubs and bushes. He enclosed the same putting green fence and possessed without any hindrance from the state authority. He constructed a thatched house and stayed with his family there. While so possessing, Arakhita applied for lease of some land including suit land to the Tahasildar Khurda Khasmahal and on the approval of SDO Khurda Khasmahal,

the suit land was ordered to be settled in his favour vide Waste land case No.167 of 1945-46. The record was corrected to Khata No 299, Plot No.245 measuring an area of Ac.0.160 decimals. Arakhita paid the salami out of the joint family nucleus for which the said leased out property was treated as joint family property. Thereafter, in the family partition among the three sons of Maguni vide T.S. No.39/1955(1) before the Sub-Ordinate Judge, Puri, the leased out land was allotted to the share of Rama Chandra. Thus, Rama Chandra became owner of the leased out plot and after his death his sons, the present plaintiffs owned and possessed the same as absolute owners. In the ROR published in the year 1962, the leased out land was wrongly recorded in favour of State having status Anabadi. As the lease granted by Tahasildar was never cancelled, it is averred that such wrong recording in the ROR of the year 1962 cannot be taken to have created an interest of the State over the suit land. On the basis of such wrong recording, the defendant no.2 the Tahasildar, Jatni had initiated one Encroachment case No.24 of 2003 against the son of the plaintiff No.1 and Plaintiff No.2. In view of such threat and wrong recording of ROR, the plaintiffs filed suit on 16.5.2003 for declaration of their title and confirmation of possession as well as permanent injunction restraining the defendants from interfering in their possession.

No written statement was filed on behalf of the defendants, State of Orissa and the Tahasildar, Jatni. But, defendants contested the suit by cross-examining the witnesses to demolish the plaintiffs' case. No formal issue was framed.

On behalf of plaintiffs four witnesses were examined. P.W.1 is the plaintiff No.2. Plaintiff No.1 is not examined. P.W.2 is a co-villager. P.W.3 is the Amin who being engaged by the plaintiffs has conducted survey of the suit land and has proved his report Ext.7 to Ext.12. P.W.4 is the son of plaintiff no.1 against whom encroachment notice was issued in the year 2003 vide Ext.5 and Ext.6.

Twelve documents have been exhibited from the side of the plaintiffs. Ext.1 is the certified copy of Waste Land lease case No. 167 of 1945-46, Ext.2 is the certified copy of corrected ROR of the year 1952 as per lease, Ext.3 is the certified copy of final decree dated 19.6.1957 of original suit no.39 of 1955. Ext.4 is the certified copy of settlement of ROR finally published in the year 1962 in respect of plot no.283 under Khata No. 384 in the name of Govt. of Orissa. Ext.7 to Ext.12 include the traced maps and the report of Amin. No evidence, either orally or documentary, is adduced from the side of the defendants.

3. Learned 1st Addl. Civil Judge (Sr. Dvn.) without posing any point for determination has analyzed the evidence to record a finding that ''the claim as put forth by the plaintiffs that they have title over the Hal suit plot has to be rejected and the ROR for the suit land in the year 1962 settlement cannot be held unfounded''. In order to reach such conclusion, he disbelieved the report of P.W.3 being unscientific. The plaintiffs-appellants have questioned the lower court judgment on the grounds amongst others that in absence of any pleading of respondents, the evidence of P.W.3 and his report should not have been discarded and. If the report of P.W.3 Amin was found not reliable, the matter

should have been sent to the survey knowing commissioner of the court to find out the vital link of Sabik Hal correspondence at the cost of the plaintiffs.

In this appeal, in course of hearing the appellant-plaintiffs filed a petition on 3.2.2012 for deputation of a survey knowing commissioner under order 26 rule 9 CPC and the same was allowed on 19.4.2012. The report of Amin received on 25.1.2014 was accepted on 15.9.2014. On behalf of appellants, it is urged to accept the said report as additional evidence under order 41 rule 27 CPC and basing upon that report as the nexus between leased out plot and present suit plot is established, the decree should be passed in favour of plaintiffs setting aside the lower court decree. On behalf of respondent, the admissibility of additional evidence is objected stating that it would amount to patch up the latches of plaintiffs' evidence and the legal requirements for production of additional evidence are not satisfied.

4. On the conspectus of the facts and the circumstances of the case, the points for determination are:

(i) Whether the additional evidence as bought in through Survey Knowing Commissioner's report on behalf of the appellants is to be accepted?

(ii) Whether the title and possession of the plaintiffs over the suit land is proved?

5. **ANSWER TO POINT NO.1**

The acceptance of additional evidence is sought by the appellant-plaintiffs on the ground that learned lower court has discarded the report of Amin which they had adduced by examining the Amin P.W.3 and unless the present report

is accepted, the nexus between leased out plot in favour of Arakhita and the plot as per 1962 ROR for which encroachment case has been instituted cannot be established. Contextually, the submission of appellants indicates that the present survey knowing commissioner's report deputed by appellate court should be accepted without disturbing the lower court's appreciation that the Amin report Ext.11 and Ext.12 are unscientific. Thus, the infirmity in the report of P.W.3 Amin presented in the lower court is virtually accepted by the appellants. In this back drop, the acceptance of additional evidence by appellants i.e. Survey Knowing Commissioner's report is to be considered. Appointment of survey knowing commissioner by Appellate court on the request of the appellants does not ipso facto imply its admissibility u/o.41 rule 27 CPC. Occasion for court to require additional evidence is circumscribed by the limitation specified in the rule 27 of order 41. The true test is whether the appellate court is able to pronounce judgment on the materials available on record. Rule 27 does not allow a party to patch up the weak parts of his case and to fill up the omission in the appeal. The law in this regard is recently enunciated by the Hon'ble Apex court in a **Judgment dated 8.12.2015 in CIVIL APPEAL No. 14055 OF 2015 (Arising out of S.L.P. (C) No. 7798 of 2015) A. Andisamy Chettiar Versus A. Subburaj Chettiar** where it is said that

> “It is clear that the parties are not entitled to produce additional evidence whether oral or documentary in the appellate court, but for the three situations mentioned above. The parties are not allowed to fill the lacunae at the appellate stage. It is against the spirit of the Code to allow a

party to adduce additional evidence without fulfillment of either of the three conditions mentioned in Rule 27.''

6. On the anvil of above law, the adduction of additional evidence in this appellate court as sought for by the appellants is nothing but to patch up the lacuna of plaintiffs. Rejection of evidence on appreciation by lower court does not warrant substituted evidence of the same nature in the appellate court because the additional evidence could have been adduced in the lower court at the instance of the plaintiffs-appellants. There was no impediment to seek appointment of survey knowing commissioner through court. The lower court had never refused to admit such evidence. The plaintiffs have not explained as to why they did not seek appointment of survey knowing commissioner in the lower court u/o.26 rule 9 C.P.C. As the issue relates to the title and possession of leased out plot, which would be analyzed in the second point, the materials on record are sufficient to pronounce the judgment in this appeal and in my considered opinion additional evidence is not required to be admitted as it would amount to patch up the latches of the plaintiffs' case.

7. **ANSWER TO POINT NO.II.**

The plaintiffs' case is based upon the lease granted to Arakhita in Waste land lease case No. 167 of 1945-46. The pleading is indicative of the fact that Arakhita forcibly possessed fallow land full of shrubs and bushes and constructed a thatched house and stayed there. On his application, the lease was granted but salami was paid out of joint family nucleus for which the leased out property was

treated as joint family property. No ROR published prior to alleged lease is filed. Instead, the certified copy of corrected ROR dated 24.5.1952 in the name of Arakhita Samantray under Khata No.299, Plot No.245, Ext.2 is filed which reveals that it was of *DAKHAL SATWA SUNYA* status "*SaradaFasala*". The certified copy of order sheet in W.L No.167 of 1945-46 is filed vide ext-1. order dated 13.12.1945 of it states that Arakhita Samantray of Janla wanted lease of Ac.0.160 decimals of Plot No.245 of Khata No.5 and Ac.0.050 decimals of Plot No.274 under Khata No.4 which were recorded as *PURUNA PADIA* and on the recommendation of Tahasildar, S.D.O. sanctioned the proposal on 7.3.1946 and on 12.4.1946 record corrected slips were prepared, checked and signed. Ext.2 the certified copy of corrected ROR reveals that it was given force on 24.5.1952 w.e.f 1355 Saal (1948). Neither original ROR is filed nor any deed. No salami paid receipt nor any rent receipt in respect of leased out plot is filed. No explanation is given as to why such receipts are withheld. A lease of immovable property is a transfer of right to enjoy such property made for a certain time in consideration of premium and rent in any form is required to be paid. The plaintiffs have averred that salami was paid out of joint family nucleus. Plaintiff No.2 who is examined as P.W.1 has stated in his cross-examination that Arakhita died in the year 1980 and the last settlement took place in the year 1972. He also admitted that neither he nor his father took any steps for correction of ROR after publication and suit land stood recorded in the name of State. He has categorically admitted saying that "it is a fact that the suit

land is not the ancestral property of Arakhita Samantray". He has also stated that Arakhita had only one daughter namely Pravat Manjari Samantray. So, the evidence of plaintiff no.2 is very clear to the effect that the leased out land was never treated as ancestral property. Plaintiff No.1 Santosh Kumar Samantray is not examined for the reasons best known to the plaintiffs. His son P.W.4 is examined and he has admitted that an encroachment case was filed against him and he did not contest the case and the Govt. was not a party in the suit for partition. He has also stated that neither his father nor uncle took any steps for correction of record of the year 1962. On behalf of defendant, it was suggested that partition decree was not binding. P.W.2 has denied any direct knowledge about the lease. This being the total evidence with regard to lease of the year 1945, I am of the considered opinion that when plaintiff no.2 has himself admitted that it was not ancestral property and no rent receipt or salami paid receipt is filed, it is difficult to accept that leased out property in favour of Arakhita was subsequently treated as joint family property because of payment of salami out of joint family nucleus. The very existence of the lease is based upon jural relationship between lessor and lessee. When lease was sanctioned individually in favour of Arakhita Samantray, in absence of any evidence with regard to amount and payment of salami and subsequent rent receipt, it is not reasonable to infer that property was thrown to the stock of joint family. It becomes stronger when the legal heirs of Arakhita are not impleaded in the suit.

8. The certified copy of final decree dated 19.6.1957 in Original Suit No.39 of 1955 is pressed into service to show that the leased out plot has been allotted in favour of Rama Chandra, father of plaintiffs. On perusal of the same it reveals that Abhiram Samantray had filed that suit against Arakhita and Rama Chandra for partition in which the leased out plot was not included as suit land. The suit was decreed by compromise and in the compromise petition while allotting the ''KA''-schedule property in favour of Rama Chandra Samantray, vide sl.no.16 suit Khata No.299, Plot No.245 was included but the area is mentioned to be Ac.0.145 decimals. In that suit Govt. who was lessor, was not a party. Simple mention of a part of leased out area in a compromise petition would not change the nature of lease. Further in the final decree, the land is allotted in favour of a person who is not a lessee. It is not understood as to why it was not given effect by mutation by recording the same in the name of Rama Chandra. All the three brothers have signed in English which belies the averment in the plaint that being a rustic villager Rama Chandra could not take step for recording his name in the settlement. The totality of the circumstances brought in around the final decree Ext.3, are prognostic of the fact that the nature of the lease was not changed and the allotment in favour of Rama Chandra was not inconsonance with the lease in favour of Arakhita. It may be noticed that in the partition suit, the lessor was not a party and in the present suit the legal heirs of the lessee are not impleaded. Regard being had to the above analysis, it is found that the lease granted in favour of Arakhita could not have been treated as joint family

property amongst the sons of Maguni Jagdev and the allotment of such land in a compromise decree of partition in favour of a person other than the lessee is not lawful. So, no title having been passed to Rama Chandra, the plaintiffs are not entitled to inherit the same in respect of leased out plot. Once the plaintiffs are found to have no title over the leased out plot, it would be academic to consider the corresponding plot of leased out land to track the title whether with the State or with the legal heirs of the lessee.

9. P.W. 4 has stated about encroachment case of which notices are proved vide Ext.5 and Ext.6. Those were of the year 2003. In his evidence P.W.4 has stated that he did not contest the encroachment case of which notice was received by him. The jurisdiction of Civil court is limited as far as the encroachment proceeding under Orissa prevention of land encroachment Act,1972 is concerned. It transpires that encroachment proceeding is sought to be nullified in the suit but plaintiffs being found without title, such an exercise is not permissible.

10. Fact remains that the title and possession of plaintiffs over the leased out plot is not proved. Consequently, the plaintiffs had no cause of action to bring the suit in respect of the suit land. No fault is found in the impugned order in dismissing the suit though the reasons stated by lower court are found unacceptable to some extent.

11. In the result, the appeal stands dismissed on contest. The parties to bear their own cost.

Addl. District Judge, -cum-
Special Judge, CBI-II, Bhubaneswar.

Typed to my dictation and corrected by me.
Judgment is pronounced in the open court today
this the 26th December, 2015.

Addl. District Judge, -cum-
Special Judge, CBI-II, Bhubaneswar.