



IN THE HIGH COURT OF ORISSA AT CUTTACK

SAO NO.5 of 2024

(An appeal U/O.XLIII. Rule-1(u) of the Code of Civil Procedure, 1908.

Tara Khandelwal ***Appellant***

-versus-

Kamalakanta Mohapatra & Others ***Respondents***

For Appellants : ***M/s. N. Behuria & Associates, Advocates***

For Respondents : ***Mr. T.K. Praharaj, SC (R. Nos.2 to 4)***

CORAM:

JUSTICE G. SATAPATHY

DATE OF HEARING : 30.08.2024

DATE OF JUDGMENT: 20.11.2024

G. Satapathy, J.

1. This appeal under order U/O.XLIII Rule-1(u) r/w. Section 105 of the Code of Civil Procedure, 1908 (in short, "the CPC") seeks to challenge the judgment dated 27.01.2024 passed in RFA No. 104 of 2017 under Annexure-4 by which the learned 3rd Additional District Judge, Bhubaneswar has not only set aside the judgment dated 25.11.2017 passed by the learned 1st Additional Senior Civil Judge, Bhubaneswar in Civil Suit No.1105 of 2010, but also remitted back the suit for



fresh disposal by taking necessary steps to add "Lord Lingaraj Mahaprabhu" as a party to the suit.

2. For clarity and better appreciation, the parties in this appeal may be referred to as they were in the original suit. Accordingly, the appellant was the plaintiff, whereas the respondents are the defendants in the suit. The plaintiff's claim revolves around the facts which are described in precise, that one Banamali Panda was the common ancestor of the vendors of the plaintiff and he had two sons namely Radhakrushna and Kali Prashad, but Radhakrushna had three children namely Jayanarayan, Gadadhar and Damodar, out of whom, Jayanarayan died leaving behind his wife Rambhamani, Gadadhar died as issueless and Damodar died leaving behind him his three sons namely Debadutta, Siba Sankar and Sangram Keshari. According to the plaintiff, the suit scheduled property under Plot No.3662 of Khata No. 280 measuring an area of Ac.0.708dec was originally recorded in the name of Damodar Panda and Rambhamani Dibya as Sthitiban Rayats in the finally published Record of



Rights (ROR) in 1962 settlement as their ancestral property. Accordingly, the son of Damodar Panda got the land partitioned in T.S. No.58 of 1972 and the suit land was allotted in the share of Siba Sankar Panda and Sangram Keshari Panda, who being in exclusive possession of such land got it finally recorded in their names in the ROR published in the year 1991, but for their legal necessity, the said two sons of Damodar Panda, alienated the suit land together with building, rooms and other benefits standing thereon to the plaintiff by executing a registered sale deed on 21.05.2010 for a consideration of Rs.1,42,88,000/- (Rupees one crore forty two lakhs eighty eight thousand only) and delivered the vacant possession thereof to the plaintiff, but when the plaintiff intended to remodel and repair the houses standing on the suit land as per her choice, defendant No.1 being a mischievous greedy person and being failed to purchase such land at a lower price from its vendor forcibly tried to occupy the suit property by influencing Government officials and in such pursuit, defendant No.1 took the



help of the Government officials by trying to open a Veterinary Dispensary over the suit land. It is further asserted by the plaintiff that defendant Nos. 2, 3 & 5 have got no semblance of right, title, interest and possession whatsoever over the suit scheduled property, but could manage to construct a single storied building over a portion of suit scheduled 'A' property covering an area of 135 sq. meters (suit scheduled 'B' property) without prior permission of the original owners of the property or the plaintiff, but no portion of the suit property was being acquired by the State Government under the provision of Land Acquisition Act. However, the disputed land has been recorded by the BDA as a residential plot and the plaintiff wanted to enjoy the same with modern outlook and facility. In this situation, finding no way out and by craving leave of the Court U/S.80(2) of the CPC, the plaintiff instituted the suit for declaration of her right, title, interest and possession over the suit scheduled 'A' land with confirmation of possession thereon or in the alternative for recovery of possession by way of



mandatory injunction in case she is found dispossessed in the meanwhile or further in the alternative to give compensation to her for the suit scheduled 'B' property and to protect her possession over suit scheduled 'A' property by way of perpetual injunction restraining the defendants from causing any damage or changing the nature and character of the suit.

3. In response to the summons of the suit, defendant Nos. 3 & 5 filed their written statement denying all the allegations raised in the plaint by *inter alia* pleading that the suit land was lying vacant and in the year 1983, the Government developed the land by starting a Veterinary Dispensary. In their written statement, while expressing ignorance regarding partition of the suit land between the vendors of the plaintiff, the answering defendants pleaded that they had no connection with defendant No.1, but they representing the Govt. are in peaceful possession of the suit property making renovation and repairing from time to time through Government machineries and the suit land has already been recorded in the BDA Map as



a Government land meant for Government Offices and the plaintiff has got no manner of right, title, interest and possession over the suit property which is in their possession since 1983 without any interruption and there is no question of dispossessing the plaintiff and occupying the same. Ultimately, defendant Nos.3 & 5 prayed to dismiss the suit in their written statement.

4. On the basis of the rival pleadings, the learned 1st Additional Senior Civil Judge, Bhubaneswar framed necessary issues relating to maintainability, cause of action, law of limitation, mis-joinder or non-joinder of parties & compliance or non-compliance of Section 80 CPC in the suit with further issues regarding allotment of the suit property in the name of vendor of the plaintiff in T.S. Case No.58 of 1972, purchase of such property by the plaintiff on 21.05.2010, construction of Government Veterinary Dispensary along with the staff quarters by the Government of Orissa over the suit scheduled 'B' land and entitlement of the plaintiff to a decree of right, title, interest and confirmation of possession over suit scheduled 'A' property and lastly,



w.r.t the possession of the defendant over the suit property. In support of the rival claims, the plaintiff and defendants adduced evidence, both documentary and oral. Finally, on analysis of evidence on record upon hearing the parties, the learned 1st Addl. Senior Civil Judge, Bhubaneswar dismissed the suit by way of passing the judgment dated 25.11.2017 in the suit mainly on the ground of limitation by recording an observation that the plaintiff's right to recover the suit property has extinguished and the suit is barred by limitation and not maintainable. The aforesaid observation was recorded by the learned trial Court on the basis of finding that a suit for recovery of possession basing on title has to be necessarily filed within a maximum period of 12 years from the date of accrual of cause of action, but the plaintiff has filed the suit beyond that period. In addition, the learned 1st Addl. Senior Civil Judge, Bhubaneswar has answered issue Nos. 8 & 9 against the plaintiff by observing that in the year 1983, the Government Veterinary Dispensary along with staff quarters have been



constructed over the suit scheduled 'B' land and the suit scheduled property is the exclusive property of defendant Nos. 3 & 5 and they are in possession thereof. Further, the learned 1st Addl. Senior Civil Judge, Bhubaneswar although had returned with a finding that the plaintiff had purchased the suit property and the suit land had fallen to the share of Damodar Panda, the predecessor-in-interest of the vendor of the plaintiff, but thereafter, the learned 1st Addl. Senior Civil Judge, Bhubaneswar by taking into account the findings on other issues, more particularly on the point of limitation, has proceeded to dismiss the suit. Feeling dissatisfied, the plaintiff preferred an appeal in RFA No. 104 of 2017 which was allowed, but the suit was remitted back to the learned 1st Addl. Senior Civil Judge, Bhubaneswar for fresh disposal by adding "Lord Lingaraj Mahaprabhu" as a party. However, being dissatisfied with such finding, the plaintiff has again preferred this appeal from order assailing the findings of the learned 1st Appellate Court.



5. In the course of hearing of the appeal, Mr. N. Behuria, learned counsel for the appellant has submitted that although the learned 1st Appellate Court had framed four points to examine the legality of the judgment and decree passed by the learned 1st Addl. Senior Civil Judge, Bhubaneswar, but instead of answering anyone of the said four points, the learned 1st Appellate Court took a third course by returning with a finding that the suit was hit for non-joinder of necessary party and accordingly, remitted the matter directing the learned 1st Addl. Senior Civil Judge, Bhubaneswar to add "Lord Lingaraj Mahaprabhu" as a party to the suit, but in essence, the learned 1st Appellate Court has failed to exercise the jurisdiction vested in it by not deciding the points of the determination as formulated by it in the appeal. It is further submitted by Mr. Behuria that although an application U/O.1 Rule-10 of the CPC was filed by the intervenor-petitioner to implead "Lord Lingaraj Mahaprabhu" as a party, but the same was rejected by the learned 1st Appellate Court on 21.09.2023 on the



ground that it will amount to *de-novo* trial, but while passing the judgment in the appeal, the learned trial Court has ignored such finding as earlier rendered in the same appeal. Further, it is submitted by Mr. Behuria that the copy of the Sabik ROR under Ext.1 clearly shows that Sabik Plot No. 3662 was the Stitiban property of the recorded tenant Damodar Panda, but notwithstanding to such fact, the learned 1st Appellate Court has come to a third case that the suit land had stood recorded in the name of "Lord Lingaraj Mahaprabhu" in 1962 settlement, but by virtue of vesting of the Trust Estate of "Lord Lingaraj Mahaprabhu" to the State, the land has been recorded in the name of Government. It is further argued that notwithstanding to the fact that neither the plaintiff nor the defendants have ever pleaded that the suit land belonged to "Lord Lingaraj Mahaprabhu" in 1962 settlement and the learned 1st Addl. Senior Civil Judge, Bhubaneswar while deciding the issue of mis-joinder and non-joinder of party has not whispered a single word with regard to the suit land standing recorded in



the name of “Lord Lingaraj Mahaprabhu” in 1962 settlement, the learned 1st Appellate Court has come to such finding that the suit land originally belonged to “Lord Lingaraj Mahaprabhu”, which is not only erroneous, but also unsustainable in the eye of law. Accordingly, Mr. Behuria has prayed to allow the appeal by setting aside the impugned judgment of the learned 1st Appellate Court.

None appears for the respondents to address this Court in this matter despite having duly appeared through State counsel and this Court, therefore, perused the record including the judgment to dispose of this appeal.

6. After having considered the submission of the appellant upon perusal of record, it can never be disputed that the learned 1st Appellate Court after going through the record has framed the following four issues (points of determination):-

(a) Whether the plaintiff has right, title, interest and possession over the suit land?

(b) Whether the defendant No.3 & 5 were in possession over suit scheduled B land since



1983 by constructing Government Veterinary dispensary along with staff quarters over the said land?

(c) Whether the plaintiff has cause of action to file the suit?

(d) Whether the suit is barred by limitation?

It is also not in dispute that without deciding or touching upon any of the aforesaid points of determination as framed by it, the learned 1st Appellate Court straight away proceeded and discussed the evidence by perusing the ROR of the suit land and held that the landlord is "Lingraj Mahaprabhu Bije Nijagaon Marfat Trust Board" and the land found therein was recorded in the name of Damodar Panda and Radhamani Dibya as Stitiban land. Further, the learned 1st Appellate Court after perusing the copy of the settlement ROR in the year 1991 found the land therein to have been settled in the name of Government of Orissa under Khewat No.1 with Stitiban status in the name of Siba Sankar Panda and Sangram Keshari Panda, who are the successor-in-interest of Damodar Panda. It is also observed by the learned 1st Appellate Court that the name of "Lord Lingaraj Mahaprabhu" has



been deleted in the settlement ROR published in the year 1991. True it is that neither the plaintiff nor anyone of the defendants has either pleaded or adduced any evidence to establish that the suit land was recorded in the name of "Lord Lingaraj Mahaprabhu" and such recording of land was deleted in the ROR published in the year 1991. However, the learned trial Court has also not whispered a single word in its judgment in suit regarding the recording of the suit land in the name of "Lord Lingaraj Mahaprabhu" in any of the ROR.

7. Be that as it may, even though the land was found to be recorded in the name of "Lord Lingaraj Mahaprabhu", but the suit was never dismissed for non-joinder or mis-joinder of parties nor any fact was raised/pleaded with regard to non-joinder of "Lord Lingaraj Mahaprabhu" as a party to the suit which of course can be taken care of in the Appellate Forum, however, the fact remains that when a suit is dismissed by the learned trial Court on certain issues, the learned 1st Appellate Court being the final Court of facts is



required to consider the same issues at the first instance inasmuch as the plaintiff has carried an appeal against the finding of the learned trial Court on certain issues. In this regard, for example, when the suit is dismissed for limitation, it would not be proper to decide the other issues like non-joinder or mis-joinder of parties at the inception without touching upon the issues which have been answered against the plaintiff, inasmuch as even the issue of non-joinder of party is taken up first and the learned 1st Appellate Court remanded the matter on the said point, it would be forcing the parties to another round of litigation since the issue which has been answered against the plaintiff has not yet been adjudicated in the appeal carried by the plaintiff and the learned trial Court would be in confusion as to what would be its finding on the issues which has not been answered/adjudicated in the appeal. In such situation, the learned trial Court may consider its findings on the issues not adjudicated in the appeal to be correct and, thereby, compelling the party to again agitate the same issues before the 1st



Appellate Court in another round of litigation. It is, therefore, advisable that the learned 1st Appellate Court being the final Court of facts is required to consider the findings of the learned trial Court, more particularly which has been rendered against the party in the appeal at the first instance and thereafter, proceed to take up other issues inasmuch as, in that case the litigation would be resolved quickly and the learned trial Court would be in a position to know as to whether its finding was upheld or rejected by the learned 1st Appellate Court which would avoid further litigation in deciding the matter afresh.

8. Law is very clear that though the issue which has not been raised before the learned trial Court can be adjudicated upon by the concerned 1st Appellate Court, if the evidence and pleadings require the same for effective adjudication/resolution of the suit, but as a matter of principle, the learned 1st Appellate Court must re-examine the evidence and pleadings to see the findings of the learned trial Court which has been recorded against the party approaching the Appellate



Court. In the present case, had the learned 1st Appellate Court decided the points of determination as formulated by it, it would shorten the litigation, inasmuch as the learned trial Court has decided the right, title, interest and possession over the suit land against the plaintiff, so also the cause of action and limitation to file the suit, in addition to the other points as formulated by the learned 1st Appellate Court to ascertain the possession of defendant Nos.3 & 5 over the suit property by constructing Government Veterinary Dispensary along with staff quarter over the said land, which in essence would adjudicate the reliefs claimed by the plaintiff including the alternative relief for recovery of possession and compensation. In the present appeal, the learned 1st Appellate Court has not at all touch upon any of the four points which it formulated, but the fact remains that the learned trial Court has decided the issue of maintainability, cause of action, limitation and entitlement of the plaintiff against the plaintiff in addition to the other issues like whether the suit property is exclusive property of defendant



Nos.3 & 5 and whether they are in possession thereof.

9. Had the learned 1st Appellate Court decided the four points of determination, probably in addition to the issue of non-joinder of "Lord Lingaraj Mahaprabhu", in that event this Court could have effectively adjudicated the dispute between the parties and there would not be any need for remanding the suit/appeal. Since the learned trial Court has remanded the matter back to the learned 1st Addl. Senior Civil Judge, Bhubaneswar to decide the suit afresh by adding "Lord Lingaraj Mahaprabhu" without deciding the real dispute between the parties, it would just and proper for this Court to ask the learned 1st Appellate Court to decide the real issues between the parties and thereafter, to decide the issues of non-joinder of "Lord Lingaraj Mahaprabhu".

10. What is most important in a lis before the Court is not the disposal of the case, but the resolution of the dispute between the parties. It is obvious that remitting the matter back for fresh disposal without deciding the issue or touching upon the merit of the



case would mean in the context of burdening the litigants with further litigations. In the present case, this Court is not adverse what the learned 1st Appellate Court has decided in the first appeal, but it should have answered all the points of determination formulated by it since in that event it would have decided the real controversies between the parties. Thus, the interest of justice demand that the learned 1st Appellate Court must decide the points of determination first and in doing so, it would have answered the issue of non-joinder of the parties. In a matter like this, for example, had the learned 1st Appellate Court come to a finding that the plaintiff is not entitled to right, title and interest and possession of the suit land, or the suit is barred by limitation, which are the opinion of the learned trial Court, there would not have any necessity to remit the suit for fresh disposal by adding "Lord Lingaraj Mahaprabhu" as a party which in that event a futile exercise. However, in this situation, when the learned 1st Appellate Court has not at all decided the points of determination as formulated by it nor re-



examined the findings of the learned trial Court which have been decided against the plaintiff, the only way left out is to remand the appeal to the learned 1st Appellate Court for fresh disposal of the appeal in RFA No. 104 of 2017 in accordance with law.

11. In the result, the appeal stands allowed, but no order as to costs. Consequently, the appeal in RFA No. 104 of 2017 is remitted back to learned 3rd Additional District Judge, Bhubaneswar for fresh disposal in accordance with law by answering the points of determination as formulated by it after hearing and securing the presence of parties afresh.

It is, however, clarified that if any of the parties does not appear after due notice, the Court may proceed in accordance with law. A copy of this order be immediately transmitted to the learned 3rd Additional District Judge, Bhubaneswar for compliance.

**(G. Satapathy)
Judge**

*Orissa High Court, Cuttack,
Dated the 20th day of November, 2024/S.Sasmal*