



A.F.R.

IN THE HIGH COURT OF ORISSA AT CUTTACK

RSA No.351 of 2023

(In the matter of an appeal under Section 100 of the Code of Civil Procedure, 1908)

Keshab Nanda and others ***Appellants***

-versus-

Gouranga Charan Nanda & Others ***Respondents***

For Appellants - Mr. M.K.Mishra, Advocate

For Respondents - Mr. B.C. Panda, Advocate

CORAM:

MR. JUSTICE A.C.BEHERA

Date of Hearing :11.02.2026:: Date of Judgment :17.03.2026

A.C. Behera, J. This Second Appeal has been preferred against the reversing judgment.

2. The Appellants in this Second Appeal were the Defendant Nos.1,2 and LR's of the Defendant No.4 before the learned Trial Court in the suit vide C.S. No.177 of 2003 and Respondent Nos.1 to 4/G before the learned 1st Appellate Court in the first appeal vide R.F.A. No.52 of 2017.

The Respondent Nos.2 to 5 in this 2nd Appeal were the Defendant Nos.8 to 11 before the learned Trial Court in the suit vide C.S. No.177 of



2003 and Respondent Nos.5 to 8 before the learned 1st Appellate Court in the 1st appeal vide R.F.A. No.52 of 2017.

The Respondent No.1 in this 2nd Appeal i.e. Gouranga Charan Nanda was the sole Plaintiff before the learned Trial Court in the suit vide C.S. No.177 of 2003 and Appellant before the learned 1st Appellate Court in the first appeal vide R.F.A. No.52 of 2017.

3. The suit of the Plaintiff (Respondent No.1 in this 2nd Appeal) vide C.S. No.177 of 2003 was a suit for permanent injunction, in alternative recovery of possession, if the Plaintiff is found to be dispossessed from any portion of the suit properties during the pendency of the suit.

4. The case of the Plaintiff i.e. Gouranga Charan Nanda before the learned Trial Court in the suit vide C.S. No.177 of 2003 was that, the properties described in the Schedule of the Plaint i.e. Plot No.1799, Ac.0.026 decs, Plot No.1798, Ac.0.01 decs, Plot No.1791, Ac.0.03 decs and Plot No.1792, Ac.0.02 decs under Khata Nos.253 and 254 in Mouza Shyamasundarpur described in schedule of the plaint are the suit properties. The R.o.R. of the suit properties have been prepared jointly in the name of the predecessors of the Plaintiff and Defendant Nos.5 to 11.



The Defendant Nos.1 to 4 are the real contestant of the Plaintiff in the suit. They (Defendant Nos.1 to 4) are in no way related to the family of the Plaintiff and Defendant Nos.5 to 11.

The Plaintiff and Defendant Nos.5 to 11 are the joint owners of the suit properties described in the Schedule of the plaint. They (Plaintiff and Defendant Nos.5 to 11) have been possessing the suit properties since the time of their ancestors.

The Defendant Nos.1 to 4 have their homestead land adjacent to the Southern, Northern and western side of the suit properties. They (Defendant Nos.1 to 4) have no manner of right, title, interest and possession in the suit properties.

The Defendant Nos.1 to 4 constructed a pucca building in their Plot No.1790 encroaching upon the North-Eastern corner of the suit Plot No.1791 of the Plaintiff and threw garbage into the suit Plot No.1792 and tried to cut and remove the valuable standing mango and chakunda trees from the south-Western portion of suit Plot No.1799 of the Plaintiff and tried to possess the tank of the Plaintiff situated in the suit Plot No.1798.

For which, the Plaintiff approached the Civil Court by filing the suit against the Defendant Nos.1 to 4 and arraying the Defendant Nos.5 to 11 as proforma Defendants praying for restraining the defendant Nos.1 to 4



permanently from entering into the suit properties and from dispossessing them (Plaintiff and Defendant Nos.5 to 11), from making any construction encroaching any portion of the suit properties and also from cutting and removing the valuable standing mango and chakunda trees from the same in alternative recovery of possession of the suit properties, if it is held on the basis of the report of the Civil Court Amin Commissioner about the illegal possession of the Defendant Nos.1 to 4 on any portion of the suit properties of the Plaintiff and to pass a decree for any other relief, to which, he (Plaintiff) is entitled for.

5. The Defendant Nos.1 to 4 contested the suit of the Plaintiff by filing their joint written statement denying the averments made in the plaint of the Plaintiff taking their stands therein that, they (Defendant Nos.1 to 4) and one Subhadra Nanda are the co-owners and in possession over their properties vide Plot Nos.1790, 1793, 1794, 1795, 1796 and 1797 under Khata No.441 in suit village Shyamasundarpur and the R.o.R. thereof has been published in their name along with the name of the Subhadra Nanda (daughter of late Bikali Nanda). The Defendant No.1 (Keshaba Nanda) has already constructed a building consisting of four rooms over Plot No.1790 and he has been staying there with his family members since the year 2003. He (Defendant No.1) has left 5 links land in breadth from plot No.1790 at its south-west portion for future repairing works of his building. After



construction and completion of the building on Plot No.1790 by the Defendant No.1 Keshab Nanda, the Plaintiff filed the suit for no other reason, but, only in order to harass them (Defendant Nos.1 to 4). They (Defendant Nos.1 to 4) are in possession of their homestead land and they have not encroached or trying to encroach any portion of suit land of the Plaintiff described in the schedule of the plaint. The Plaintiff has no tank over Plot No.1798, but, he (Plaintiff) has constructed a pucca house in a portion of Plot No.1798 having tin roof. The Plaintiffs ancestors more than three decades before had constructed a pucca boundary wall in the southern side of suit Plot No.1798, which is standing as such till yet. So, there is no chance for the Defendant Nos.1 to 4 to encroach upon any portion of suit Plot No.1798 of the Plaintiff. There is a small tank in Plot No.1798, which belong to Plaintiff. The plaintiff is unnecessarily creating dispute with them (Defendant Nos.1 to 4). The Plaintiff had no cause of action to file the suit against them. As, the plaintiff has not come to the Court with clean hands, for which, he is not entitled to get any relief. So, the suit of the plaintiff is liable to be dismissed.

6. Basing upon the aforesaid pleadings and matters in controversies between the parties, altogether five numbers of issues were framed by the learned Trial Court in the suit vide C.S. No. 177 of 2003 and the said issues are:-



I s s u e s

1. Whether the suit is maintainable in the present form or not?
2. Whether there exists any cause of action to bring the suit?
3. Whether the plaintiff is entitled to seek relief of permanent injunction to injunct the Defendant No.1 to Defendant No.4 from entering upon the suit land, from dispossessing the plaintiff from the suit property, from making any construction encroaching over any portion of the suit land and from removing the standing mango and Chakunda trees from the suit land?
4. Whether the plaintiff is entitled to recover the possession of the suit property, if he is found to have been dispossessed there from in the course of this suit?
5. To what other relief the plaintiff is entitled?

7. In order to substantiate the aforesaid relief(s), sought for by the plaintiff against the defendant Nos.1 to 4, the plaintiff examined two witnesses from his side including him as P.W.1 and relied upon the documents vide Exts.1 to 7.

On the contrary, in order to defeat/nullify the suit of the Plaintiff, the Defendant Nos.1 to 4 examined three numbers of witnesses on their behalf including Defendant Nos.1 as D.W.3 and exhibited one document from their side i.e. village map as Ext.A.

8. After conclusion of hearing and on perusal of the materials, evidence and documents available in the record, the learned Trial Court



answered all the issues against the Plaintiff and in favour of the Defendant Nos.1 to 4 and basing upon the findings and observations made by the learned Trial Court in the issues against the Plaintiff and in favour of the Defendant Nos.1 to 4, the learned Trial Court dismissed the suit of the Plaintiff vide C.S. No.177 of 2003 on contest against the Defendant Nos.1 to 4, but, without cost as per its judgment and decree dated 31.08.2017 and 07.09.2017 respectively assigning the reasons that,

“the Plaintiff has failed to establish that, the Defendants have encroached upon his homestead land. Because, there is contradiction between the sketch map and the averments made by the Plaintiff in his plaint.

9. On being dissatisfied with the aforesaid judgment and decree of the dismissal of the suit of the Plaintiff vide C.S. No.177 of 2003 passed on dated 31.08.2017 and 07.09.2017 respectively by the learned Trial Court, he (Plaintiff) challenged the same preferring the 1st Appeal vide R.F.A. No.52 of 2017 being the Appellant against the Defendant Nos.1 to 4 arraying them as Respondent Nos.1 to 4 and also arraying the proforma Defendant Nos.8 to 11 as the proforma Respondent Nos.5 to 8.

10. After hearing from both the sides, the learned 1st Appellate Court allowed that first appeal vide R.F.A. No.52 of 2017 of the Plaintiff and set aside to the judgment and decree of the dismissal of the suit vide C.S. No.177 of 2003 of the Plaintiff/Appellant passed by the learned Trial Court



as per its judgment and decree dated 15.05.2023 and 19.05.2023 respectively and directed Defendant Nos.1 to 4 to deliver the possession of the encroached area of the suit Plot No.1791 to the Plaintiff within three months, failing which, the plaintiff is at liberty to move the proper forum for execution of the decree and after delivery of possession of the encroached portion of the suit Plot No.1791 to the Plaintiff, the Defendant Nos.1 to 4 and their agents are to be restrained/injuncted permanently from interfering with the possession of the plaintiff over the entire area of suit Plot No.1791 assigning the reasons that,

“a Survey knowing commissioner was deputed, as per order No.4 dated 03.01.2017 passed by the High Court in CMP No.1567 of 2015 to inspect the suit properties in order to answer, whether the vacant space situated between the Plaintiff’s residential building on suit Plot No.1791 and the residential building of the Defendant Nos.1 to 4 comes under the suit Plot No.1791 and on the basis of the directions of the High Court passed in CMP No.1567 of 2015, a Survey knowing Amin commissioner was deputed and he (Survey knowing Amin commissioner) visited the spot and submitted his report. Neither plaintiff nor the Defendant Nos.1 to 4 filed any objection to the report of the Survey Knowing Amin Commissioner. For which, the said report of the survey Knowing Amin Commissioner was accepted by the learned Trial Court without objection.

When, it is found from the report of the survey knowing Amin commissioner that, there is a vacant space between the northern side residential building of the Plaintiff on Plot No.1791



and the southern side residential building of the Defendant No.1 on Plot No.1790 and the length of the vacant space from East to West in both northern side and southern side is 60 links and the breadth of the vacant space from North to south in both the eastern side and western side is 5 links and the total area of the vacant space is 300 Sq. links and the said vacant space comes under Plot No.1791, the residential building of the Defendant No.1 on Plot No.1790 encroaches 4 links towards south in eastern direction excluding the vacant space between Plot Nos.1790 and 1791. So, the report of the Survey Knowing Amin Commissioner clearly speaks that, the residential building of the Defendant No.1 encroaches 4 links from the Plot No.1791 of the Plaintiff.

Therefore, the findings of the learned Trial Court is contrary to the law and without any basis. So, the suit of the Plaintiff is liable to be decreed on contest against the Defendant Nos.1 to 4 without cost. Therefore, the Defendant Nos.1 to 4 were directed to deliver the possession of the encroached area of suit Plot No.1791 to the Plaintiff within three months.”

11. On being aggrieved with the aforesaid judgment and decree dated 15.05.2023 and 19.05.2023 respectively passed by the learned 1st Appellate Court in the 1st Appeal vide R.F.A. No.52 of 2017 in decreeing the suit of the Plaintiff against the Defendant Nos.1 to 4, the Defendant Nos.1 to 4 challenged the same preferring this 2nd appeal being the appellants against the Plaintiff and arraying him (Plaintiff) as Respondent No.1 and also arraying other Defendants as proforma Respondents.



12. This 2nd Appeal was admitted on formulation of the following substantial questions of law i.e.:-

1. Whether judgment and decree passed by the learned lower appellate Court is perverse, as the learned court below ignored the well-established evidence on the record that, the defendants Nos.1 to 4 have not encroached the land of the Plaintiff?
2. Whether, the learned lower Appellate Court is right in reversing the judgment of trial Court without any prayer of declaration sought by the Plaintiff particularly when serious doubt is casted on his title over the disputed land?
3. Whether, the suit is barred under OCH and PFL Act?
4. Whether, the suit is barred by non-joinder of necessary party, as Subhadra, D/o-Late Bikali Nanda is not a party to the case?
5. Whether, the suit is hit under O-7, Rule-3 of the C.P.C.?
6. Whether, the learned Court below is right in its approach to rely the survey knowing commissioner report blindly without corroborating or taking account the evidence on record?

13. I have already heard from the learned counsel for the Appellants (Defendant Nos.1 to 4) and the learned counsel for the Respondent No.1 (Plaintiff).

14. When, as per the findings and observations made by the learned Trial Court as well as learned 1st Appellate Court in their respective



judgments and decrees on the basis of the pleadings and evidence of the Parties, the aforesaid six substantial questions of law are interlinked having ample nexus with each other, then, all the formulated substantial questions of law are taken up together analogously for their discussions here under.

15. The learned 1st Appellate Court has passed its entire judgment in setting aside the judgment and decree passed by the learned Trial Court on the basis of the report of the survey knowing Amin commissioner.

The learned 1st Appellate Court has specifically observed in Para No.12 of its judgment that,

“Neither Plaintiff nor the Defendant Nos.1 to 4 filed any objection against the report of the survey knowing commissioner. Therefore, the report of the survey knowing commissioner was accepted by the learned Trial Court without objection.”

16. The report of the survey knowing commissioner was not marked as exhibit either at the instance of the parties or at the instance of the Court during trial of the suit before the learned Trial Court or in the 1st Appeal before the learned 1st Appellate court.

So, it is clear that, the report of the survey knowing commissioner has not been exhibited either before the learned Trial Court or before the learned 1st Appellate Court.



17. It appears from the order No.200 dated 06.07.2017 passed by the learned Trial Court in the suit vide C.S. No.177 of 2003 that,

“the Defendant Nos. 1 to 4 had filed their objection against the report of the Civil Court Amin Commissioner stating that, the report submitted by the Civil Court Amin Commissioner is illegal and contrary to law. The same is in contravention to the directions and questions given by the Court. The said report has been submitted by the Amin Commissioner without measurement of the suit properties. The report of the Civil Court Amin Commissioner is not in accordance with law. No notice was given by the Civil Court Amin Commissioner on them (Defendant Nos.1 to 4) for his inspection to the spot nor any report of the Amin Commissioner was served upon them (Defendant Nos.1 to 4). The report and map submitted by the Civil Court Amin Commissioner do not disclose any fixed point as well as starting point. In the said report, no survey has been taken from any fixed point. For which, they (Defendant Nos.1 to 4) had submitted their objection for rejection of the report of the Civil Court Amin Commissioner.”

18. The learned Trial Court as per order No.200 dated 06.07.2017 passed in C.S. No.177 of 2003 held that, if the Defendant Nos.1 to 4 have any objection against the report of the Civil Court commissioner, they (Defendant Nos.1 to 4) are entitled to examine the commissioner under Order 26 Rule 10(2) of the C.P.C, which, would sub-serve the ends of justice.



Though, it appears from the order No.200 dated 06.07.2017 passed by the learned Trial Court in the suit vide C.S. No.177 of 2003 that, the Defendant Nos.1 to 4 had seriously objected to the report of the Civil Court Commissioner and the learned Trial Court had held that, if, the Defendant Nos.1 to 4 have any objection, they are entitled to examine the Commissioner under Order 26 Rule 10(2) of the C.P.C. during trial of the suit, which shall sub-serve the ends of the justice, but, still then, in the Para No.12 of the impugned judgment and decree passed by the learned 1st Appellate Court, the learned 1st Appellate court held that, neither the Plaintiff nor the Defendant Nos.1 to 4 filed any objection against the report of the Survey Knowing Amin Commissioner.

19. The aforesaid findings of the learned 1st Appellate Court in the judgment of RFA No.52 of 2017 that, there was no objection to the report of the Civil Court Amin Commissioner is not held to be correct.

Because, the learned Trial Court had passed the order No.200 on dated 06.07.2017 on the basis of the objection of the Defendant Nos.1 to 4 against the report of the Civil Court Amin commissioner that, they (Defendant Nos.1 to 4) are entitled to examine the Civil Court Amin Commissioner under Order 26 Rule 10(2) of the C.P.C. during trial of the suit on the basis of the objections raised by them (Defendant Nos.1 to 4). But, during trial, no opportunity was given to them, Defendant Nos.1 to 4



(Appellants in this 2nd appeal) to cross examine the Civil Court Amin Commissioner.

20. It is the settled propositions of law that, in case of failure or omission to consider the objections against the report of the Civil Court Amin Commissioner either by the Trial Court or by the 1st Appellate Court, it will be open to raise objections against the report of the Civil Court Amin Commissioner in the 2nd Appeal contending that, the Courts below ought not to have relied upon the report of the Amin Commissioner to enter any particular findings on the basis of such report.

It is very fundamental in law that, the Court enjoins certain discretion, either to examine the objections against the report of the Amin Commissioner or can permit the parties to examine the Commissioner at the trial.

When, the report of the Civil Court Amin Commissioner is not prepared after giving notice to both the Parties, the said report cannot be accepted as per Order 26 Rule 10 (2) of the C.P.C. Because, the purpose of deputation of the Civil Court Amin Commissioner is to narrow down the dispute, but, not to resolve the dispute itself.

21. On this aspect, the propositions of law has already been clarified by in the ratio of the following decisions:-



(i) In a case between Retnamma Vrs. Mehboob reported in 2013 (3) Civ.C.C. 65 (Kerala) that,

In case of failure or omission to consider objections and decide whether a further enquiry was necessary or not, it will be open to contend in 2nd appeal that, Courts below ought not to have relied upon the report to enter any particular finding on the basis of such report.

(ii) In a case between Abhijit Lahiri and another Vrs. Ashok Roy reported in 2014 (Supp.) Civ.C.C. 58 (Calcutta) that,

When, there is no specific provision provided under CPC for filing or inviting objections to report of local Commissioner deputed under Order 26 Rule 9 of the C.P.C., the Court enjoins certain discretion either to examine objections, the moment, it is raised or can permit parties to examine Commissioner at trial.

(iii) In a case between Abdul Nazar Vrs. Iyyathumma reported in 2016 (3) Civ.C.C. 13 (Kerala) (DB) that,

Report of local Commissioner deputed under Order 26 Rule 9 of the C.P.C Must be the one obtained after notice to both the Parties, in order to apply O.26 R.10(2) CPC.

(iv) In a case between Amit Bhalla and others Vrs. Bharat Rao reported in 2016 (2) Civ.C.C. 75 (Delhi) (DB) that,

Report of local Commissioner—Value of report of local commissioner, whose mandate is to inspect a site and give a report is equivalent to that of evidence and no more—Report is to narrow down the dispute and not to resolve the dispute itself.

(v) In a case between Om Parkash Vrs. Ram Kumar reported in 2020 (4) Civ.C.C. 638 (P and H) in Para No.8 that,

Report of local Commissioner—Objections—Parties have right to cross examine Commissioner upon permission so granted by Court—Objections filed by Parties are to be considered after cross examination of Commissioner.

(vi) In a case between Ram Ujagar and another Vrs. Smt.Kailasha and others reported in 2011 (3) Civ.C.C. 28 (Allahabad) that,

Local Commissioner-An opportunity is to be given to the Parties to be present before the Commissioner in the property at the time of investigation.

(vii) In a case between Sankar Kumar and another Vrs. Mohanlal Sharma reported in AIR 1998 Orissa 117 in Para No.4 that,



Acceptance of the Commissioner's report under order 26, rule 10(2) of the C.P.C. at the stage of trial means acceptance as a part of record, but, Court is not bound to accept it at time of deciding case finally.

22. Here in this suit/appeal at hand, when, it appears from the order No.200 dated 06.07.2017 of the learned Trial Court in the suit vide C.S. No.177 of 2003 that,

the Defendant Nos.1 to 4 (Appellants in this 2nd appeal) had raised their objection against the report of the Civil Court Amin Commissioner on the ground that, no notice was served upon them by the Amin Commissioner at the time of so-called inspection of the Civil Court Amin Commissioner to the suit properties and the report of the Amin Commissioner is defective on various grounds indicated in the said order and when, the learned Trial Court had passed the order forming the report of the Civil Court Amin Commissioner, as the part of the record entitling the objectors i.e. Defendant Nos.1 to 4 (Appellants in this 2nd appeal) to cross examine the Amin Commissioner during trial of the suit and when, as per law, it was the duty of the learned Trial Court to permit the Parties to cross examine the Civil Court Amin Commissioner at the trial and when, the learned 1st Appellate court accepted the contents of the report of the Civil Court Amin Commissioner without answering to the objections raised by the Defendant Nos.1 to 4 against such report and when the learned 1st Appellate Court has held beyond the record that, the Defendant Nos.1 to 4 had not raised any objection against the report of the Civil Court Amin Commissioner and when, the entire judgment of the learned 1st



Appellate Court is based upon the report of the Civil Court Amin Commissioner without any other evidence and when, as per law, no judgment of a Court in a suit can be passed solely upon the report of the Civil Court Amin Commissioner, as, the said report of the Civil Court Commissioner is to be considered along with other evidence on record and when, the learned 1st Appellate Court without considering the other evidence on record, passed the impugned judgment only on the basis of the report of the Civil Court Commissioner, then at this juncture, it is held that, the impugned judgment and decree has been passed by the learned 1st Appellate court in contravention to the provisions of order 26 Rule 10(2) of the C.P.C. as well as in violation of the principles of natural justice and without giving opportunity to the Defendant Nos.1 to 4 to cross examine the Civil Court Amin Commissioner. For which, the impugned judgment and decree passed by the learned 1st Appellate Court cannot be sustainable under law.

23. When, any judgment or order is struck down as invalid on the ground of violation of principles of natural justice, then, as per law, it will be held that, there is no final decision of the case and fresh proceedings are left open.

On this aspect, the propositions of law has already been clarified by the Hon'ble Court in the ratio of the following decision:-

(iv) In a case between Durgawati Singh And Ors. vs Deputy Registrar, Firms Societies & Chits Lucknow and others decided in Special Appeal No.497 of 2021 (Allahabad) that,



Whenever an order is struck down as invalid being in violation of principles of natural justice, there is no final decision of the case and fresh proceedings are left open.

24. Here, in this matter at hand, as per the discussions and observations made above, when, it is held that, the impugned judgment and decree has been passed by the learned 1st learned Appellate Court in contravention of the provisions of Order 26 Rule 10(2) of the C.P.C. as well as in violation of the principles of natural justice, then at this juncture, there is no other alternative for this 2nd Appellate Court, but, by applying the principles of law enunciated in the ratio of the aforesaid decisions indicated in Para Nos.21 & 23 of this judgment, to remit back the 1st Appeal vide R.F.A. No.52 of 2017 to the learned 1st Appellate Court i.e. to the Court of learned Additional District Judge, Kendrapara in order to decide the same afresh as per law.

Therefore, this 2nd appeal filed by the Appellants (Defendant Nos.1 to 4) is to be allowed in part.

25. In result, the 2nd appeal filed by the appellants (Defendant Nos.1 to 4) is allowed in part.

The impugned judgment and decree passed by the learned 1st Appellate Court on dated 15.05.2023 and 19.05.2023 respectively in RFA No.52 of 2017 is set aside.



The 1st Appeal vide RFA No.52 of 2017 is remitted back to the learned 1st Appellate Court i.e. to the Court of the learned Additional District Judge, Kendrapara for deciding the same afresh as per law after giving opportunity to the Parties including the Appellants (Defendant Nos.1 to 4) to cross examine the Civil Court Amin Commissioner on the basis of their objection and the learned 1st Appellate Court shall record the evidence of the Civil Court Amin Commissioner as per Order 41 Rule 28 of the C.P.C. and shall pass the Judgment in RFA No.52 of 2017 afresh in accordance with law after taking to the oral and documentary evidence of the Parties and the materials available in the record into account and shall dispose of the 1st Appeal vide RFA No.52 of 2017 as expeditiously as possible within a period of five months from the date of filing of the certified copy of this judgment by any of the Parties before the learned 1st Appellate court.

The Parties to the 2nd Appeal are directed to appear before the learned 1st Appellate Court in RFA No.52 of 2017 on dated 09.04.2026 for the purpose of receiving the directions of the learned 1st Appellate Court as to the further proceedings of that RFA No.52 of 2017 on the basis of the observations made in this judgment.

Signature Not Verified

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17th of March 2026/ Binayak Sahoo// Junior Stenographer

(A.C. Behera),
Judge