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**(2018) 05 OHC CK 0012**

**In the Orissa High Court**

**Case No : SA No.1 of 1988**

KRUSHNA CHANDRA MALLIK DEAD AND OTHERS

APPELLANT

Vs

MEHAMUD KHATUN AND OTHERS

RESPONDENT

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**Date of Decision :** 09-05-2018

**Acts Referred:**

Orissa Estates Abolition Act, 1951 — Section 5(1)  
Orissa House Rent Control Act, 1967 — Section 7, 14  
Code of Civil Procedure, 1908 — Section 11, Order 7 Rule 3

**Citation :** (2018) 05 OHC CK 0012

**Hon'ble Judges :** DR. A.K. RATH

**Bench :** Single Bench

**Advocate :** Gautam Mishra, Anupam Dash, M.M. Sahu, Tribhuban Sethi

**Final Decision :** Dismissed

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## **Judgement**

Dr. A.K.Rath, J Â

1. This appeal is directed against the judgment and decree dated 9.12.1987 and 18.12.1987 respectively passed by the learned District Judge, Cuttack

in Title Appeal No.8 of 1987 partly allowing the judgment and decree dated 26.7.1986 and 5.8.1986 respectively passed by the learned Addl. Sub-

Judge, Cuttack in Title Suit No.96 of 1974.

2. Plaintiff-appellant instituted the suit for declaration of possessory title over the suit land, for a declaration that the defendants have no of manner of

right, title and interest over the same and permanent injunction. Case of the plaintiff was that the suit land was Anabadi land. The same belonged to

the ex-intermediary. After abolition of estate, defendant no.1 claimed to be a tenant by virtue of lease purportedly granted by the landlord. A

proceeding under Sec.5(1) of the Orissa Estates Abolition Act (in short, â??the

OEA Act??) was initiated. The Board of Revenue rejected the claim of defendant no.1 and set aside the lease. Pursuant to the order of cancellation, the Tahasildar took over possession of the land in the year 1957.

Prior to abolition of estate, the plaintiff was in possession of the suit land. He constructed a thatched house over the suit land and resided thereon. In the year 1959, his house was destroyed in the cyclone. Thereafter, he took the house of defendant no.1 on rent situated adjacent to the south of the suit land. He entered into an agreement with defendant no.1.

He used to pay rent. During continuance of tenancy, he constructed a house over the suit land. On 20.5.1961, he vacated the house of defendant no.1 and shifted to his newly constructed house. It was further pleaded that holding number of the rented house was 598/C (old) and 875 (new) of ward no.1 of Cuttack Municipality, whereas holding number of his house was 887 (old) and 875-A (new). The two houses are separate. It was further pleaded that defendant no.1 instituted Money Suit No.2 of 1967 against him for realisation of arrear rent in respect of holding no.598/C (old) and 875 (new). The suit was decreed. Thereafter, HRC Case No.90 of 1968 was initiated against him in respect of the same house. He lost the case. The appeal met with the same fate. There was a confusion that the constructed house over the suit land is the same as that of his rented house of defendant no.1. However, these two cases were started at the instance of local agents of defendant no.1. Encroachment cases were initiated against the plaintiff. It was converted to lease case. After retirement, defendant no.1 went to Calcutta and thereafter to East Pakistan, where he died. His agents tried to execute the order of HRC Case No.90 of 1968 for eviction of the plaintiff from the suit house, though the suit house and the house involved in HRC case are two different and distinct.

3. Defendants 2 to 5 filed a written statement denying the assertions made in the plaint. Case of the defendants was that defendant no.1 had taken lease a portion of Survey Plot Nos.814 and 811 from the ex-intermediary. The lease had not been cancelled by the Revenue Authorities under Sec.5(1) of the OEA Act. The plaintiff had not vacated the house, which had been assigned with Holding No.598/C by the Cuttack Municipality. The plaintiff had manipulated municipal records and filed the suit in order to deprive them of their right to evict him from their house. The plaintiff had no

house over survey plot nos.814 and 811.

4. Stemming on the pleadings of the parties, learned trial court struck eight issues. Parties led evidence. Learned trial court came to hold that the

plaintiff was originally a tenant in respect of the house of defendant no.1 situated on a portion of suit plot nos.811 and 814. Money suit was initiated

against the plaintiff for realisation of arrear rent. The same was decreed. HRC Case was started against the plaintiff. Order of eviction was passed.

Execution case is sub judice. Plaintiff had not furnished the boundary or sketch map to prove that the suit house is separate and distinct from the

rented house. In HRC case, the plaintiff had not taken the plea that he vacated the house on 20.5.1961. The suit house of the plaintiff is the same as

that of defendant no.1. The municipal record showing assessment in the name of different persons under two holding numbers under Exts.7 and 10

are not contemporaneous. Ext.10 the assessment of defendant no.1's house was the earlier point of time. Defendant no.1 was not residing in the

house. Taking advantage of his absence, the plaintiff tried to record the house in his own name.

Mere municipal assessment of two houses under two different holding numbers cannot establish that the two houses are separate and distinct. No

reliance can be placed on the settlement recording and encroachment case. Both the proceedings do not conclusively decide the title and possession of

the plaintiff. The plaintiff has not vacated the case house. The house and the suit house are not two different and separate houses. The order passed

by the HRC Controller is binding on the parties. The prayer of the plaintiff for possessory title over the suit land cannot be granted, since the State

Government is not a party to the suit. Held so, it dismissed the suit. Felt aggrieved, the plaintiff filed Title Appeal No.8 of 1987 before the learned

District Judge, Cuttack. Learned appellate court came to hold that the plaintiff does not dispute that he had taken the house of the defendant no.1 on

lease, which was standing over Survey Plot No.184 and assigned with the Municipal Holding No.598. The plaintiff had described that the suit land

appertains to portions of Plot Nos.814 and 811. He had not given any map for proper identification. He did not refer to the suit land by the municipal

holding number. The omission was deliberate with a view to creating confusion. Since the claim of the plaintiff that he had vacated the house involving

in HRC Case No.118 of 1961 was negated, the plea of the plaintiff that he had vacated possession of the house gets watered down. The plaintiff

could not dispute the title of the defendant in respect of the house assigned with the Municipal Holding No.598 subsequently changed to 875 so long as

he had not vacated the possession thereof through court in Execution Case No.105 of 1973.

Though the plaintiff described the suit land for its identification by its survey number, but the same is suffice. In the event the relief sought for by him

with reference to survey plot is allowed, the same may impair the right of the defendants with reference to Survey Plot No.184, which constitutes the

subject-matter of dispute in Execution Case No.105 of 1973. No document has been exhibited to show that the plaintiff had acquired title over the suit

property. In the encroachment case, the revenue authorities had just recognized his possession. If he had obtained possession on the strength of Ext.B,

he had to make over that possession to the defendants because of the principle of estoppel. The plaintiff admitted to have taken lease of the house

standing on plot no.184 of which the suit land is a part. There is no material on record that the suit land was separate and distinct from the lease hold

covered under the lease deed, Ext.B. In the absence of clear evidence on that score, no court can pass a decree. There is no evidence with regard to

the identity of the land which had been assigned with holding no.598 by the municipality. Thus it will be difficult to declare the right of the plaintiff over

that portion of the land appertaining to Survey Plot No.814. Basing on the evidence of D.W.1 and taking into account the lease deed vide Ext.B

wherein no claim over Survey Plot No.811 consisting of Ac.0.020 dec. was advanced, the learned lower appellate court held that the plaintiff is

entitled to plot no.811 and thus to this extent reversed the judgment of the learned trial court. It is apt to state here that during pendency of the appeal,

sole plaintiff died whereafter his legal heirs have been substituted.

5. The second appeal was admitted on the substantial questions of law enumerated in Ground Nos.A,B and C of the appeal memo. The same are - Â

â??A. Does the judgment of the learned District Judge suffers from gross errors of record ?

B. Does the judgment suffers from non-consideration of pleadings and material evidence on record ?

C. Is the judgment consistent with the pleadings, evidence and circumstances disclosed in the case ?â??

6. Heard Mr. Gautam Mishra along with Mr. Anupam Dash, learned counsel for the appellants and Mr. M.M. Sahu along with Mr. Tribhuban Sethi, learned counsel for the respondents. Â

7. Mr. Mishra, learned counsel for the appellants submitted that the plaintiff has instituted the suit for declaration of possessory title. He has

constructed a house over the suit land and resided thereon. The courts below failed to consider the document vide Ext.3. Defendants are not in

possession of the suit land. The plaintiff can maintain his possession. The courts below laid undue emphasis on the judgment of HRC Court. The HRC

Court is a court of limited jurisdiction. Finding of HRC Court shall not operate as res judicata. Furthermore, the suit land was the subject-matter of

dispute before the HRC Court. The suit land has been described by assigning the khata number, plot number and area. The same is identifiable. In the

plaint, the plaintiff has clearly stated that his land is separate from the defendantâ??s land. The defendantâ??s land is adjoining to his land. The

boundary of the lease hold property is North-Mahanadi embankment South-one building, East-one building, West-vacant land. Md. Azam is staying in

the house adjoining to the west of the homestead occupied by the plaintiff. To the further west of Md. Azam, the houses of other Mahamadan Basti

situate. There is a boundary wall on the house of the plaintiff. Owners of adjoining lands have raised those boundary walls. To the adjoining north of

plaintiffâ??s occupied land the burial ground situates. The burial ground has four sides boundary wall. To the adjoining north, boundary wall of the

burial ground lay Mahanadi embankment. On the north and south her gate and houses of others situated. He further submitted that learned trial court

has discarded the testimony of defendant no.1 on untenable grounds. The evidence of D.W.1 clearly shows that the house of the plaintiff and the

defendants are different. The findings of the courts below are perverse. To buttress the submission, he relied on the decisions in the case of Nair

Service Society Ltd. V. K.C. Alexander, AIR 1968 SC 1165, Life Insurance Corporation of India v. M/s. India Automobiles and Co. and others, AIR

1991 SC 884, Hadarao Dajiba Shrawane (dead) by L.Rs v. Nanilal Harakchand Shah (dead) and others, AIR 2002 SC 2849, Brundaban Naik and

another v. Panchu Naik and others, 2007 (Supp II) OLR 839, Easwari v. Parvathi and others, AIR 2014 SC 2912 and Rebati Khuntia & others v. Sri

Debi Prasad Rath, 2015 (II) OLR 504.

8. Per contra, Mr. Sahu, learned counsel for the respondents submitted that the plaintiff was a tenant. Money Suit No.2 of 1967 was filed for

realization of arrear rent. The suit was decreed. Thereafter, the defendants initiated house rent proceeding under Sec.7 of the House Rent Control

Act (HRC Act) for eviction of the plaintiff. Order of eviction was passed. The order passed by the House Rent Controller had attained

finality. The execution proceeding is sub judice. Both the courts concurrently held that the plaintiff is in possession of the house of defendant no.1. A

tenant cannot question the title of the landlord. Defendants are the owners of the suit property. An attempt has been made by the plaintiff to frustrate

the decree. The plaintiff had not taken the plea in the HRC case that he had vacated the house on 20.5.1961. Under Sec. 7 of the HRC Act, a tenant

can be ejected if he has denied title of the landlord or claimed a right of permanent tenancy and such denial is not bona fide. Under Sec.14 of the

HRC Act, the order passed by the House Rent Controller is final and shall not be called in question in any court. The defendants are the owners of the

suit house. Landlord has come forward asserting his title through process of law. His right over the suit land has not been extinguished. The decision

of the apex Court in the case of Nair Service Society Ltd. v. K.C. Alexander and others, AIR 1968 SC 1165 is distinguishable on facts. The decision

of this Court in the case of State of Orissa v. Bhanu Mali (Dead) Nurpa Bewa and others, 1996 (I) OLR 460 has no application to the facts of the

case. Since the plaintiff is a tenant, ExplanationVIII to Section 11 CPC comes into play. The order passed by the House Rent Controller will operate

as res judicata. The suit land is not identifiable.

9. Mr. Mishra is right in his submission that the decision of the House Rent Controller will not operate as res judicata. In Life Insurance Corporation of

India (supra), the apex Court held that the decision of the Rent Controller on the question of title will not operate as res judicata. Taking a cue from

Life Insurance Corporation of India (supra) and Smt. Gangabai v. Smt. Chhabubai, AIR 1982 SC 20, this Court in State of Orissa v. Bhanu Mali

(Dead) Nurpa Bewa and others, 1996 (I) OLR 460 held that the decision of the

Revenue Officer in the proceeding under the Orissa Prevention of Land Encroachment Act would not operate as res judicata.

10. In *Easwari* (supra), the apex Court held that the High Court cannot preclude from reversing the order and judgment of the lower appellate court if there is perversity in the decision due to misappreciation of evidence.

11. Reverting to the facts of the case and keeping in view the enunciation of law laid down by the apex Court, this Court finds that the plaintiff was a tenant under defendant no.1. The order of eviction was passed in HRC Case No.90 of 1968. The execution case is sub judice. While matter stood thus, the plaintiff instituted the suit seeking the reliefs mentioned supra. A higher court cannot pass permanent injunction restraining the lower court from executing the decree.

12. On an anatomy of the pleadings and the evidence on record, the appellate court held that the plaintiff admitted that he had taken lease of the house standing over survey plot no.814, which is a part of suit plot. The plaintiff failed to substantiate that the suit land is separate and distinct from the lease hold covered under the lease deed, Ext.B. Ext.B reveals that he had taken lease of two houses standing over survey plot nos.811 and 814. Evidence of P.W.3 reveals that out of two houses of defendant no.1, he was in occupation of one house. There is no evidence with regard to the area of the land of the said two houses. There is also no evidence with regard to identity of the suit land, which has been assigned with Holding No.598/C by the Cuttack Municipality. It is not possible to declare the right of the plaintiff over a portion of that land appertaining to Survey Plot Nos.814. It further held that survey plot no.814 and plot no.814 do not belong to defendant no.1. The lease deed, vide Ext.B, does not reveal survey no.811 area Ac.0.020 dec. The defendant has not advanced any claim over Ac.0.020 dec. of land. Therefore, the plaintiff has possessory title over the same. It further held that the suit land is not identifiable. These are essentially finding of facts. There is no perversity or illegality in the same.

13. With regard to identification of the suit land, the courts below are perfectly justified in holding that the suit land is not identifiable. There are two plots, i.e., plot nos.814 and 811. In the schedule of the plaint, the plaintiff has described the suit plot is as follows; Schedule

District and Townâ€"Cuttack

P.S. Lalbag

Mouza-Tulsipur,

Khata No.390,

Plot No.814 Ac.0.182 out of Ac.0.257

Plot No.811 Ac.0.038 out of Ac.0.235

These two plots are contiguous. Boundary of the entire plots has been given. But then, the boundary of part plots has not been assigned. There is no

indication in the schedule or in the plaint from which site of the entire plot, the suit plot belongs. Order 7 Rule 3 CPC provides where the subject-

matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be

identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers. In the instant case, there

is neither any boundary of individual plots, part plots or there is any counter claim. The substantial questions of law are answered accordingly.

14. In *Nair Service Society Ltd. V. K.C. Alexander and others*, AIR 1968 SC 1165, the apex Court held that possession is good against all but the true

owner. The apex Court quoted with approval the decision in the case of *Perry v. Clissold*, 1907 AC 73 and held that it cannot be disputed that a

person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title

against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by the process of law within the period

prescribed by the provisions of the statute of Limitation applicable to the case, his right is for ever extinguished, and the possessory owner acquires an

absolute title. There is no quarrel over the proposition of law. As held above, the defendants are in possession of the land.

15. The decisions in the case of *Brundaban Naik and Rebati Khuntia* (supra) are distinguishable on facts. In *Brundaban Naik*, this Court held that the

discrepancy in the eastern boundary goes to the root of the matter and makes the suit land unidentifiable, particularly when there was evidence

regarding the local name and boundary in three sides. But in the instant case, no boundary has been assigned in respect of individual plots part plots.

16. In *Rebati Khuntia*, the defendants lodged the counter claim in respect of the suit plot. This Court held that the parties fought out the suit having

clear idea with regard to the space forming the subject matter of the suit, there remains no further scope for the defendants to raise the said question.

The decision is distinguishable on facts.

17. Resultantly, the appeal fails and is dismissed. There shall be no order as to costs.