
(2016) 01 OHC CK 0041
In the Orissa High Court
Case No : RSA No. 327 of 2015

Manju and Others

APPELLANT

Vs

Bishnu Charan Mohanty and Others

RESPONDENT

Date of Decision : 22-01-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 9, Order 39 Rule 7, Section 103
ORISSA ESTATES ABOLITION ACT, 1951 — Section 6, Section 7

Citation : (2016) AIRCC 1601 : (2016) 3 CivCC 456

Hon'ble Judges : D. Dash, J.

Bench : Single Bench

Advocate : Prafulla Ku. Rath, R.N. Parija, S.K. Singh, S.K. Pattnaik and A.K. Rout, Advocates, for the Appellant; Gautam Mishra, D.K. Patra, A. Dash, S.R. Pattnaik, N.P. Parija, S.K. Nayak, P.K. Mohanty, I. Kha, S. Mohanty and S. Mohakud, Advocates, for the Responde

Final Decision : Allowed

Judgement

D. Dash, J.—1. The appellants in this appeal have called in question the common judgment followed by decrees passed by the learned 2nd Addl. District Judge, Cuttack in RFA Nos. 13 of 2013 and 23 of 2013.

The appellants as the plaintiffs had filed Civil Suit No. 2 of 2007. The learned Civil Judge (Jr. Divn.), IInd Court, Cuttack having decreed the suit in part, the appellants (plaintiffs) had filed RFA No. 23 of 2013 questioning the refusal of the relief of declaration of their right, title, interest along with those of defendant Nos. 1 to 6 in respect of schedule "B" property and confirmation of their possession, whereas the respondent Nos. 1 and 2 (defendant Nos. 1 and 2) filed RFA No. 13 of 2013 challenging the decree passed in the suit declaring the community of interest and unity of possession of plaintiffs and defendant Nos. 1 to 6 over the suit land and injunction both mandatory and permanent as passed against them. The lower appellate court having finally allowed the appeal filed by the respondent-defendant Nos. 1 and 2 has dismissed the appeal filed by the

plaintiff-appellants. Therefore, the present second appeal has come to be filed by the unsuccessful plaintiffs as the appellants.

2. For the sake of convenience, in order to bring in clarity and avoid confusion, the parties hereinafter have been referred to as they have been arraigned in the trial court.

3. The case of the plaintiffs is that one Narottam Mohanty is the common ancestor of the parties. He had two sons namely, Dhobei and Dibya Singh. Defendant Nos. 1 and 2 are the grand sons of Dhobei through his son Sahadev whereas plaintiff No. 1 is the wife of Gajendra who is the grandson of Dibya Singh through his son Hrusikesh; plaintiff No. 3 is the brother of Gajendra and plaintiff No. 2 is Gajendra's son. Defendant No. 3 is another grandson of Dibya Singh through his son Krutibas whereas defendant No. 4 is the wife of Kunja Bihari, the grandson of Dibya Singh through his son Krutibas. Defendant Nos. 5 and 6 are son and daughter of Kunja Bihari respectively.

It is the further case of the plaintiffs that Dhobei and Dibya Singh had their dwelling houses, threshing floor and bari over the land under Sabik Plot Nos. 758 and 759 and they have also a pond with embankment covering the land under Sabik Plot Nos. 761 and 733. The plaintiffs' case is that there was no partition between Dhobei and Dibya Singh, although by an amicable arrangement, they were in separate possession of separate parcel of land covered under Sabik Plot Nos. 758 and 759 which situate on the western and eastern side of the suit plot. It is further stated that in between the dwelling houses, there lies a strip of vacant land as indicated in schedule "B" of the plaint running from north to south that was used by them and the family members as passage in order to approach the village road running on the south and thrashing floor and bari standing on the north portion of land under Plot No. 759. It is also stated that land under Sabik Plot Nos. 758, 759, 761 and 733 correspond to land under Hal Plot Nos. 1191, 1192, 1213 and 1214 respectively. These lands were originally part of intermediary estate and in possession of Dhobei, Dibya Singh and others and those vested with the State in view of notification under the Orissa Estate Abolition Act. However, no claim having been made, the lands stood recorded in the name of the State with as usual note of possession in their favour. These plaintiffs and defendant Nos. 1 to 6 thus claim to have been in possession of said land as per the said arrangement all along and to have perfected their title by adverse possession. It is categorically stated that the suit land is the only passage for the plaintiffs to approach the village road from their house and as defendant Nos. 1 and 2 stacked building materials for raising construction over the land under Plot No. 1191 by encroaching upon the suit land which is the passage common to all, the plaintiffs had no other alternative but to file the suit.

The defendant No. 3 to 6 fully supported the case of the plaintiffs.

The defendant Nos. 1 and 2 in their written statement while traversing the plaint averments have pleaded that the land under Hal Plot Nos. 1191 and 1192 stand

recorded in Rakhit Khata in the name of the State. They admit the relationship between the parties. It is their case that they have raised boundary wall around their occupied land since 1999 and have not encroached the land as alleged by the plaintiffs. They state that the plaintiffs and other defendants used the public road straight through their veranda and that the public road adjoins their homestead. They have also denied that there was/is any common passage in between the house of the parties to approach the main road.

4. In view of above rival pleadings, the trial court framed in total ten issues. First taking up issue No. 8 for decision as regard acquisition of title over the suit land by the plaintiffs and defendant Nos. 1 to 6, the same has been answered against the plaintiffs.

At this stage, it may be stated that in this second appeal that is not put to challenge by either of the parties fairly submitting that such finding of the trial court has been rightly confirmed by the lower appellate court with further finding that the parties are in possession of the same and that too the same is legally not permissible to be entertained in the absence of State being a party to the suit.

5. Next taking up issue No. 9 with regard to joint possession of suit land by the plaintiffs and defendant Nos. 1 to 6 as claimed by the plaintiffs and countered by defendant Nos. 1 and 2 in projecting their claim of exclusive possession of suit land, the trial court has recorded the finding on evaluation of evidence on record that the possession rests jointly with the plaintiffs and defendant Nos. 1 to 6. Thereafter, coming to issue Nos. 5 and 6 as regards the existence of common and only passage as claimed by the plaintiffs, it has recorded the answer in favour of the plaintiffs. Such finding has practically led the trial court to answer the other issues in decreeing the suit in part as stated above. The lower appellate court in view of the challenge appears to have taken up the sustainability of the finding of the trial court in respect of issue No. 8 first and having confirmed the same has further proceeded to judge the finding of the trial court in respect of the common passage as claimed by the plaintiff and denied by the defendant Nos. 1 and 2 with reference to issue No. 5. Excluding the evidence of the pleader commissioner examined and tendering his evidence as D.W. 1 and making passing reference to the pleadings, it has straight way gone to hold the said finding of the trial court recorded in favour of the plaintiffs to be unsustainable. With this, the plaintiffs have ultimately been nonsuited since the finding on issue No. 5 running in their favour has been set at naught.

6. Learned counsel for the appellants in course of hearing of this appeal urges that the finding of the lower appellate court on issue No. 5 disagreeing with the finding of the trial court on that score and setting it aside is contrary to the evidence on record as also the pleadings. According to him, the lower appellate court has failed to appreciate the settled position of law with regard to the appreciation of evidence in as much as, it simply having noted the distinctive features of the reports of the commissioner deputed under Order 26 Rule 9 of

the Code of Civil Procedure as well as Order 39 Rule 7 of the Code has gone to keep the evidence of D.W. 1 from out of the purview of consideration, when as per the settled position of law the evidence of D.W. 1 ought to have subjected for consideration with other evidence on the point as to what he marked during his inspection in course of discharge of his duty as commissioner and considered if so acceptable or not. He further submits that the lower appellate court has not taken into consideration the other overwhelming evidence available on record in support of the case of the plaintiffs that the suit land is the common passage for the parties and has been in such use since long. He contends that such finding of the lower appellate court is cryptic and without analysis of evidence as required under law. In the touchstone of the rival pleadings according to him, the lower appellate court has not assigned any reason to differ with the finding of the trial court in ultimately disagreeing with the trial court's conclusion. In this connection, he has taken the pain of placing the evidence of the witnesses examined from both sides. It is his contention that though the evidence of the commissioner deputed under Order 39 Rule 7 of the Code is not evidence per se as in case of the report of the commissioner deputed under Order 26 Rule 9 of the Code yet, when the commissioner is examined, the court is bound to take into consideration his evidence like other evidence as regards the state of affair that he noticed on the day of his visit and then to appreciate the same with other existing evidence let in by the parties in coming to an ultimate conclusion. This according to him has not at all been done by the lower appellate court. Therefore, he urges that the finding of the lower appellate court is unsustainable in the eye of law.

7. Learned counsel for the respondent Nos. 3 to 6 citing decision in case of Santosh Hazari vs. Purushottam Tiwari (Dead) by Lrs.: , AIR 2001 SC 965 and placing the relevant paragraph of the judgment of the lower appellate court submits that here is a case which shows that the lower appellate court has not made the conscious application of mind by recording the finding supported by reasons on all the issues arising along with the contention put forthwith and pressed by the parties and while rendering a judgment of reversal, it has not kept in mind the two settled principles as laid down in the afore cited decision. He has further reiterated the submission advanced by the learned counsel for the appellants in his own way in finally contending that the lower appellate court's finding in setting aside the finding of the trial court on issue No. 5 is not being a finding of fact and law and also being one contrary to the evidence on record as well as being passed ignoring material evidence has to be set at naught.

Learned counsel for the respondent Nos. 1 and 2 in countering the above submission contends all in favour of the finding of the lower appellate court in ultimately non-suiting the plaintiff. It is further submission that here admittedly members of each branch have got half share over the land under plot No. 1191 which is on the Southern side of land under plot No. 1192 and that land under plot No. 1191 adjoins the village road of both the sides i.e. West and South. Placing the evidence on P.W. 1, he contends that the same is very clear that

defendant No. 1 and 2 are residing on the Western side which is adjacent to the village road and plaintiff and defendant No. 3 and 6 being the members of the other branch are residing on the Western side of the plot of land which also adjoins the village road. He has also placed the evidence of D.W. 2 and submits that the same reveals that Dhobei has in occupation of Western side of both the plots and Dibyasingha was in occupation of the Eastern side. Drawing the attention of this Court to the evidence of D.W. 2, he with vehemence submits that the oral evidence of all these witnesses is clear on the point that members of each branch having their respective approach to the village road from the portion in their occupations and thus he contends that the suit is a futile attempt to grab the land on the mid portion falsely labelling it to be the common passage of the parties.

8. The appeal is admitted on the following substantial questions of law:-

(1) Whether the learned lower appellate court is correct in law in reversing the judgment and decree passed by the learned trial court with a finding that the report of the Advocate Commissioner cannot be accepted in evidence when the law is; the report of the Commissioner under order 39, Rule-7 if proved in the court by examining the Commissioner as a witness and the said report is prepared in presence of the parties to the suit, it can be accepted as a piece of evidence to be taken into consideration and appreciated with other evidence?

(2) Whether the learned lower appellate court is justified and correct both in law and fact in reversing the judgment and decree passed by the learned trial court on the question of passage to the suit property having held that the plaintiff has not adduced sufficient evidence in that regard?

(3) The lower appellate court having not taken into consideration (a) the plaintiff's pleading in the plaint where the plaintiff has specifically pleaded under para - 6, 7 and other parts of the plaint; (b) para - 17 of evidence of P.W. - 1; and (c) the admission of D.W. - 2 in his deposition under para-32 as well as para 39, the judgment passed by it whether suffers from the vice of perversity?

(4) Whether the learned lower appellate court is correct in law declaring defendants of occupation over a common passage, when the defendants do not seek a declaration to that effect by filing counter claim, and if for the same the declarations by the appellate court in favour of the defendants is un-sustainable?

9. Before proceeding to address the rival submissions in answering the substantial questions of law, it is felt absolutely necessary to keep in view the rival case of the parties in specific as per their pleadings.

PLAINT Para of Plaint/Averments

WRITTEN STATEMENT/ADDITIONAL WRITTEN STATEMENT BY DEFENDANT NO. 1 & 2

Para of W.S./Addl. W.S./Averments

1(a) That in 1931 Settlement Plot No. 758, 759, 761 and 733 under Khata No. 368 of Vill. PatrakanaDhobei alias Dhobee, paternal grandfather of D. Nos. 1 and 2 had 3 annas 6 pies share and Dibyasingha, paternal grandfather of the plaintiffs and D. No. 3 had 4 annas interest. Dhobei and Dibyasingha had their dwelling houses, threshing floor and Bari over plot Nos. 758 and 759 and they have their joint pond with its embankment appertaining to plot No. 761 and 733.

2. That the assertions made in para-1(a) of the plaint are got up story. There is no specification share of any branch as 3 anna 6 pie 4 annas etc. But fact remains in plot No. 758 and 759 as 761, 733 in Khata No. 368 each branch has got equal share.

2(a) That after severance of joint status between Krutibas and Hrusikesh in or about the year 1947 Krutibas remained in amicable separate possession of the houses on the South-Eastern side of 1931 settlement plot No. 758 to the adjacent East of the common passage and Hrushikesh remained in separate possession of the houses on the Northern portion of 1931 settlement plot No. 758 and a portion of 1931 settlement plot No. 759 from its SouthEastern side to the adjacent East of the common passage. Remaining portion of 1931 settlement plot No. 759 was possessed by each of them separately, Krutibas possessing the Northern portion and Hrusikesh possessing the Southern portion.

4. That, the assertions made in para ? 2(a) are not fully admitted. It has been earlier stated that there is no joint passage on plot No. 758 in the Western side of plot No. 758 the courtyard, dwelling house, kitchen house, cow shed and approach up to the village road of defendant No. 1 and 2 exists. Whereas, the Eastern side of plot No. 758 is being possessed by defendant No. 3 to 5. The plaintiffs repeatedly averred regarding joint passage time and again in order to make out a case in their favour to guard the courtyard of the defendant No. 1 and 2.

2(b) That the status of 1931 settlement Khata No. 368 to which plot Nos. 758, 759, 761 and 733 appertained was Anabadi and the same was under Touzi No. 7887 and 1st part Khewat No. 11 of which DhobeiMohanty, DibyasinghaMohanty and others were the intermediaries. After vesting of the intermediary interest under the O.E.A. Act none of the heirs of Dhobei and Dibyasingha applied for settlement of fair and equitable rent in their names u/s. 6 and 7 of the O.E.A. Act in respect of the aforesaid plots. According to the records prepared during the Hal Settlement operation 1931 settlement plot Nos. 758, 759, 761 and 733 corresponds to H.S. Plot No. 1191, 1192, 1213 and 1214 respectively and have been included in RakhitKhata No. 743 and recorded in the name of State of Orissa with the note of illegal possession of D. Nos. 1 to 3, plaintiff No. 3 and Gajendra; husband of plaintiff No. 1 and father of plaintiff No. 2. Since, H.S. plot Nos. 1191, 1192, 1213 and 1214 constitute the house and homestead of the parties where they have been living for generations and no portion of these plots is based for communal purpose inclusion of the same in the RakhitKhata of the village is per se illegal and without jurisdiction. Even in the absence of any

settlement of rent u/s. 6 and 7 of the O.E.A. Act the parties have possessory title over the said plots.

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3. That the common passage referred to earlier which is 7 1/2 kadies in width and runs from South to North starting from the village road and running over H.S. Plot Nos. 1191 and 1192 as showing in a dotted line in the sketch map attached to the plaint in the suit land.

9. That the assertions made in para 3 of the plaint that there is passage measuring 7 1/2 kadies in breadth from North to South on plot No. 1191 and 1192 are false and imaginary. There is no such passage in existence. The sketch map given in the plaint is wrong and baseless. It is not identifiable from such map. The defendants furnish a rough sketch map in schedule of this written statement indicating the respective houses of the parties and verandah and courtyard and boundary wall for appreciation.

4. That as stated earlier, the plaintiffs and proforma defendant No. 3 and Kunjabehari predecessor-in-interest of D. Nos. 4 to 6 from the time of their forefathers are in possession of the said piece of land and residing there with their family members by constructing the residential house towards Eastern side of plot No. 1191 and plot No. 1192 there exists house of plaintiff No. 1 marked in the red colour as Sl. No. 2 in the map. Similarly, the house of proforma D. Nos. 3 to 6 exists towards South-Eastern side of plot No. 1191. The plaintiffs and proforma D. Nos. 3 to 6 are residing with their family members in their respective houses. The suit passage is the only passage of the plaintiffs for ingress to their house from the village road to the adjoining south of H.S. Plot No. 1191 and egress from their house to the said road. Save and except the suit schedule passage there is no other way for the plaintiffs to have access to the village road.

10. That the averment of para -4 is that the plot No. 1191, 1213 and 1214 stand recorded in RakhitKhata No. 743. But the note of possession does not stand in the name of plaintiffs and defendants.

10. At this stage it is also necessary to have a look at para 20(b) & (c) of the W.S. of the defendant No. 1 and 2:-

"20(b). The plaintiff and proforma defendant No. 3 belong to one branch and the defendants No. 1 and 2 belong to another branch. Such branch have half share therein, so far possession is concerned. Hence from time of their fore-fathers, each branch is in separate possession by mutual oral partition as per convenience. Hence, the plaintiff and proforma defendant No. 3 being members of one branch have got their houses verandah and courtyard on the Eastern side from time of their ancestors where as the defendants No. 1 and 2 have their houses, verandah and courtyard on the western side of the plot No. 1191 and 1192. Each branch is in almost half of the said plots separately. The defendant

No. 1 and 2 have got their boundary wall around their occupied lands of the plot No. 1191 since, 1999. Hence, the defendant No. 1 and 2 have no scope to encroach any part of the land in occupation of the plaintiffs. The defendant No. 1 and 2 have no scope to encroach any part of the land in occupation of the plaintiffs. The defendant No. 1 and 2 have their gate in the western side to approach the public road running in the south. The plaintiffs and proforma defendants used to approach the public road straight through their verandah and courtyard as the public road adjoins to their homestead. There is no common passage in between the houses of the parties to approach the public road.

20(c). May it be made clear that there was gate ways of the plaintiffs from coming from northern side to southern side which is indicated in red in the rough sketch map given by defendants to avoid entry of stray dogs. Now, they by closing it want to enter into defendant's courtyard by breaking boundary wall and to open a passage on the courtyard of the defendants. With this mischievous intention, the plaintiffs and proforma defendant No. 3 have colluded and this suit is filed to claim a way on the courtyard of the defendant No. 1 and 2. Though they have separate way on their verandah and courtyard leading to door gates attached to public road."

11. The above pleadings make it clear that the parties since long are in separate occupation and enjoyment of the portions of land from out of the entire having their respective houses and other structures and with other developments being made in course of time. The controversy is with regard to the common enjoyment of a passage said to be lying in between the lands in occupation of plaintiff No. 1 to 3 and defendant No. 3 to 6 as also the land of defendant No. 1 and 2 in a strip from North to South with village road running on the South from West-East. The first ground of objection by the defendant No. 1 and 2 to said claim of the plaintiffs lies in saying that its an imaginary one and next rests on the stated fact that each portion of land in occupation of above parties has its opening to the said village road. In order to appreciate the above properly when reference is made to Schedule B, the sketch map in plaint, it is seen that there are four houses facing to the alleged common road with each house having front courtyard and when two houses have vacant space adjoining the village road two others on northern side have simply the backyards. The houses are independent as shown. In written statement, the defendant No. 1 and 2 no doubt deny the existence of common passage and assert it to be an imaginary one, yet in the sketch map appended to the written statement, they have shown houses of plaintiffs and to its south houses of defendant No. 3 and open space in front of house of plaintiffs as well as defendant No. 3 with boundary wall in front of the house of defendant No. 3 and pillars in front of the open courtyard of the plaintiffs. Thus according to them, the plaintiffs are to come to the open space in front of the house of defendant No. 3 to go to village road. Nonetheless, in that map in between the land in occupation of plaintiffs and defendant No. 3, rooms have been shown to be in existence and then narrow openings are shown.

In such state of affairs, the lower appellate court's approach is clearly found to have been in a negative way and that appears to be creative one unfounded on the pleadings perhaps with a bid to somehow dispose the list finding a way open. It has said that since the plaintiffs say that the parties are in possession of specific portion of the land out of the suit land on the basis of amicable arrangement, the plaintiffs must prove when such arrangement was made and what were the terms and conditions of that arrangement. This totally in view of above rival case makes no sense. When parties admit separate possession of land with separate houses, the lower appellate court being the final court of fact simply ought to have searched for the available evidence as regards the situation of all those as on the date of suit and that for the purpose of the dispute as raised ought to have been taken to have been on the arrangement, when none say that earlier arrangement was disturbed significantly at any later point of time. Again, it is not understood as to what was the reason for the lower appellate court to find fault for absence of evidence on the score as to which property was included during such amicable arrangement and the extent of lands allotted in favour of each of the branches. The controversy when remains as regards existence of a common passage as alleged by the plaintiffs and the trial court when, has found it in favour of the plaintiffs, the lower appellate court's duty was to judge the sustainability of the said finding on appreciation of evidence and their evaluation putting it under acid test in concluding as to if the reasons assigned by the trial court are acceptable, keeping it very much in mind that the trial court having recorded oral evidence has so appreciated in finally expressing the view whether the trial court's appreciation of evidence suffers from material irregularities or is based on inadmissible evidence and on conjectures and surmises. The lower appellate court in the matter has found fault with the trial court in treating the report of Commissioner who was deputed for inspection under Order 39 Rule 7 of the Code. But the oral evidence of the parties have not at all been taken up for appraisal at its level as if there is no other evidence on the aspect of existence of common passage and even if those are there, those are inadmissible and there has even been absolutely no reference to those. In view of all these, the submission of the learned counsel for the respondent Nos. 3 to 6 is found to be having great force.

12. The lower appellate court has held the evidence of D.W. 1 (the Commissioner) and the report Ext. E are not to be taken into consideration. Support in this connection has been derived from the ratio of the decision reported in case of "Kalandi Swain & others vs. Braja Kishore Das and others; AIR 1980 Orissa 98. The ratio of the said decision lays down the distinctive features in the report of the Commissioner deputed under Order 26 Rule 9 of the Code and under Order 39 Rule 7 of the Code. But in view of that the lower appellate court is not at all right in sweeping away the evidence of D.W. 1 and the report proved by him from the purview of consideration. When the Commissioner deputed under Order 39 Rule 7 of the Code is examined in the trial as a witness and gives evidence, the evidence is certainly admissible to the

extent as to what he noticed during his visit and all also those features marked by him during local inspection which very well stand for being appreciated with other evidence on record and acceptance if so found, in recording the finding on the issue.

In case of Kunja Prusti vs. Harekrushna Prusti; , 70 (1990) CLT 269, the Commissioner having not tendered evidence, this Court refused to look into his report holding that it is per se not evidence. Similar is the view in case of Savitri Devi and others vs. Prasanna Kumari Devi; 1992 (2) OLR 14. In view of aforesaid, the lower appellate court is held to have erred in law by not considering the evidence of D.W. 1 and his report and by not taking those for appraisal with other evidence in judging as to if the finding on that score of existence of common passage as rendered by the trial court is tenable or not. It is further seen that the lower appellate court after having discarded the report of the Commissioner has abruptly concluded saying that the findings on those issues by the trial court are unsustainable which is not appreciated by this Court. The said conclusion as arrived at, thus is not held to be the outcome of proper and just approach.

13. With the above, at this moment, the easiest course available to this Court, is to remand the appeal to the court below for deciding the appeal afresh in accordance with law. However, when parties have already led extensive evidence as regards the issue of existence of common passage, being fully aware that it's the most important one for deciding the fate of the suit, this Court feels it proper to exercise the power under Section 103 of the Code of Civil Procedure for disposing the appeal in order to decide the lis finally hereby re-apprising the evidence on record.

14. Over and above the pleadings as discussed above, the evidence has been let in by the plaintiffs in support of their claim to the effect of common passage. Plaintiff No. 3 being examined in the case as P.W. 1, when has deposed about the existence common passage during his examination-in-chief on affidavit, he has been subjected to searching cross-examination on this aspect. It has been brought out during then that after the order of status-quo being passed by the trial court, the defendant No. 1 and 2 have constructed two asbestos rooms as indicated in the sketch map filed by defendant No. 3 which has also been said by him to be fully correct. He has further deposed that those defendants are using the rooms as cowshed and for storing the fire woods which at times blocking the passage. In para - 24 of his deposition, he has further made it clear that the vacant space in between the house of defendant No. 1 and 2 and the house of plaintiff is being used as Rasta. While denying that the suit passage was earlier also not connecting the two pillars, he has further clarified that no doubt the cowshed was never earlier on the suit passage and it was on the Western side of the suit passage and in view of the new cowshed coming up, there has been blockage of the suit passage which has compelled them to use the Rasta through a newly constructed gate.

The defendant No. 3 has also come to the dock as D.W. 2 and he has deposed in respect of existence of common passage. What I find that despite of scathing cross-examination on that score, no such material has surfaced to discard his testimony with regard to the existence of the common passage. He has rather said about the existence of said passage since long. On being cross-examined, he has further stated that the defendant No. 1 and 2 have constructed compound wall in the passage and there remains some vacant space in between the gate and compound wall. D.W. 2 has also stated that when the defendant No. 1 and 2 have their own access to the land under plot No. 1192, the plaintiff and defendant No. 3 to 6 don't have their independent passage for approaching the village road on the southern side. He has clearly denied to have an independent access to the land under plot No. 1192. D.W. 1 examined on behalf of the defendant No. 2 and 3, during cross-examination, has stated that the dispute between the parties is for the cowshed and for that cowshed Manjusa Mohanty (plaintiff) has not able to approach the public road. While deposing in the year 2012, he has further stated that the dispute is going for last 5-7 years which roughly comes around the year of institution of the suit. The other witness D.W. 4 has gone to state that he used to approach the Manjusa and Nagendra's house (plaintiff) from the public road by proceeding first North, then to East, then to North and then to West. He clearly means and refers to this type of user after the dispute. It is further clarified in his subsequent statement on oath that as Banabehari Mohanty, defendant No. 1 blocked the earlier passage; he has to take so many turns to reach the house of the plaintiffs. When the evidence of contesting defendant No. 1 examined as D.W. 5 is gone through, it is seen that he admits about the visit of the pleader Commissioner, D.W. 1 and he has also deposed to be very much present during then. In reiterating their case, though he has stated that the sketch map provided by them in the written statement was prepared by one Babaji Mohapatra, being an Amin yet although he is alive, he has not been examined to prove the said map which evidence could have been put to test for appreciation as regards the state of affairs as were prevailing in the field during his measurement. This rather amounts to withholding of material evidence relied upon by the defendant No. 1 and 2 cussing its own reflection over their case. He further admits that during such measurement by Babaji Mohapatra, the plaintiff and other defendants were not called to remain present and that very Amin had not visited the houses of the plaintiffs and defendant No. 3 to 6.

At this stage, the evidence of D.W. 1, the pleader Commissioner is of significance. He has proved the report as Ext. E and the sketch map prepared by him as Ext. E/1 which very well describe and show the existence of the suit common passage which is identifiable running straight way joining from the village road to the pond situated on land under plot No. 1192 and 1191 indicating as ABCD and DEFGHJKC. It almost tallies with the sketch map provided in the plaint as also the defendant No. 3 to 6 in their written statement in so far as the description of common passage is concerned. More importantly,

these witness has further stated to have found during the visit and to have observed that there remains no other passage than the common passage as he had seen as available for the plaintiff to approach the public road. The witnesses have proved Ext. D, the notice that he had given to the plaintiffs and defendant No. 1 as also to their learned counsels. The question before him was that whether there is/was passage over the suit schedule plot as claimed by the plaintiffs and whether there is any other common passage for ingress or egress to the house of the plaintiffs to the village road. Both the questions have been answered in the affirmative giving further description as indicated in the report. Going through the evidence of this D.W. 1, no such material is found to be surfacing therein either to impeach credibility of the witness or even to say that his evidence particularly with reference to the above two important aspects as stated above is not acceptable.

In view of above discussion of evidence on record, this Court holds the finding of the lower appellate court at para - 7 of its judgment that the plaintiffs have failed to substantiate their case that there was existence of any common passage for user of the parties to come to the main road as claimed by them and that is also the only passage suffers from the vice of perversity without consideration and due appreciation of evidence on those score as noted above and without their due appreciation in their proper perspective which was the duty of the first appellate court being the final court of fact.

The aforesaid discussion and reasons accordingly provide the answers to the substantial questions of law which run in favour of the appellants. Therefore, the judgment and decree passed by the lower appellate court are liable to be set aside and those passed by the trial court decreeing the suit in part as aforesaid is hereby given the seal of approval.

15. Resultantly, the appeal stands allowed. The judgment and decree passed by the lower appellate court are hereby set aside and the trial court's judgment and decree as passed are hereby restored. However, there would be no order as to cost.