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**(1993) 01 OHC CK 0012**  
**In the Orissa High Court**  
**Case No : Second Appeal No. 161 of 1982**

Raghunath Prusty and Others

APPELLANT

Vs

Raghunath Baliarsingh

RESPONDENT

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**Date of Decision :** 15-01-1993

**Acts Referred:**

Specific Relief Act, 1963 — Section 36, 38A

**Citation :** (1993) 75 CLT 554 : (1993) 1 OLR 505

**Hon'ble Judges :** G.B. Pattnaik, J

**Bench :** Single Bench

**Advocate :** P. Kar, for the Appellant; R.C. Ram, for the Respondent

**Final Decision :** Allowed

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## Judgement

G.B. Pattnaik, J.—Defendants are the appellants against a confirming judgment in a suit for injunction against them restraining them from interfering with the plaintiff's possession in respect of the disputed land.

2. Plaintiff's case in a nut shell is that the disputed property measures Ac. 0. 035 decimals appertaining to plot No. 999 in mauza Srichandanpur wherein plaintiff had 12 annas 9 pies interest and one Bali had rest 3 annas 3 pies interest and they were so possessing peacefully. Said Bali sold his interest over the suit property to the plaintiff by executing a registered sale deed on 10.7.1979 and with effect from that date plaintiff became the sole owner in peaceful possession of the property. Defendants having no manner of right, title and interest over the same tried to create disturbances over the plaintiff's possession and hence the plaintiff filed the suit.

3. Defendants filed their written statement stating therein that even though Bali was recorded in respect of 3 annas 3 pies in the C. S. Record-of-Rights, but in fact, he had no interest or possession over the same, since he left the village and stayed in village Pichukuli. It is further pleaded that the suit property is the ancestral property of Banka Behera, grandfather of Bali and Basu Behera. After

death of Banka, his interest devolved on his son Ainthu and on Ainthu's death it devolved upon Bali and Basu. There was a separation between Bali and Basu in the year 1956 and after the said partition, Bali left for village Pichukuli leaving the disputed land in favour of Basu Behera and, therefore, Bali has no interest nor possession over the same and consequently, the sale deed executed by Bali in favour of the plaintiff will not convey any title in favour of the plaintiff. It is further pleaded that Basu who was in possession of the land has executed a sale deed in favour of the defendants Chaitanya, Dayanidhi and Maheswar after receiving consideration money therefore and delivered possession of the same. In these premises, it was prayed that the decree for injunction cannot be granted.

4 On these pleadings, the learned Trial Judge framed as many as 5 issues and recorded the following findings :

(a) The story putforth by the defendants that in the family partition Basu Behera got the said plot and Bali Behera got the homestead at village Pichukuli is not believable.

(b) The Current Settlement Record-of-Rights stands in the name of Bali Behera and defendants have not adduced any evidence to prove that the said record was erroneous.

(c) In view of statutory presumption to the Record-of-Rights, Bali Behera must be held to be the owner of the land.

(d) The property in question no longer remains joint in view of the partition in the family.

(e) Plaintiff having purchased the land from Bali becomes the full owner of the property and in possession of the same.

(f) Basu Behera had no right, title and interest and, therefore, defendants do not derive any title on the basis of their purchase from Basu.

On these findings, the suit was decreed.

On appeal, the lower appellate Court having affirmed the same, the present second appeal has been filed.

5. Mr. Kar appearing for the appellants contends that the property being the ancestral property of Banka, and the same not having been established to the share of Bali in the partition, Basu's interest in the same cannot be wiped off and, therefore, the Courts below committed gross error of law in coming to the conclusion that the defendants do not derive any interest on the basis of their purchase from Basu. Mr. Kar further urges that settlement entry does not create or extinguish any title and, therefore, recording of Bali's name in the C.S. Record-of-Rights cannot create any title in Bali nor does it extinguish Basu's title. Lastly, Mr. Kar urges that in view of the disputed title, the suit for injunction is not maintainable.

The learned counsel for the plaintiff-respondent, on the other hand, urges that defendants have not made out a positive case that the land fell to Basu's share in the earlier partition and not having established the same, plaintiff's right on the basis of his purchase from Bali cannot be taken away and, therefore, the suit for injunction has rightly been decreed. He further urges that possession having been found with the plaintiff, the prayer for injunction has to be granted even against the true owner and there is no infirmity with the conclusions arrived at by the two Courts below.

6. Admittedly, the disputed property stood recorded in the name of Ainthu, father of Bali and Basu in the Record-of-Rights of the year 1927 which is apparent from both Exts. 1 and 7. But Ainthu had only 3 annas 2 pies interest and balance 12 annas 9 pies interest remained with the plaintiff and that is why the property had been jointly recorded. The ancestral property of Ainthu will devolve upon both his sons Bali and Basu. No doubt, in the subsequent settlement papers, the property has been recorded in the name of Bali, but such exclusive recording will not divest Basu of his interest in the ancestral property unless it is established that in an earlier partition it fell to Bali's share or Bali proves a case of ouster of Basu. It is no doubt true that Basu had claimed the entire property on the ground of earlier partition, but he having failed to establish the same his half interest in the property will not be wiped off. It is too well settled that entry in the Record-of-Rights does not create or extinguish title of a person. Consequently in the absence of any materials as to how the property came to the hands of Bali alone and the property being the joint ancestral property, Basu's half interest in the same cannot be taken away by mere entry in the Record-of-Rights in the name of Bali. That being the position and defendants having purchased Basu's interest under the registered sale deed (Ext. A) dated 19-5-1978, they cannot be enjoined from exercising their right over the purchased holding.

7. Learned counsel for the plaintiff-respondent relying upon the decision of a learned Single Judge of the Kerala High Court in the case of Karthiyayani Amma Vs. Govindan, contends that the plaintiff having been found to be in possession, he can get the relief of injunction even against the rightful owner until and unless the plaintiff is evicted in due course of law and in that view of the matter, the relief of injunction has been rightly granted. But I am unable to subscribe to the aforesaid contention. A person found to be in possession of a disputed property can resist interference from persons who have no better title than himself to the suit property, but a trespasser cannot enjoin a rightful owner of the property from possessing the same. It has been so held by their Lordships of the Supreme Court in the case of AIR 1972 2292 (SC). In this view of the matter, since Ainthu had admittedly 3 annas 3 pies interest in the suit property and on his death both Bali and Basu had 8 annas interest in the same and defendant purchased Basu's interest under Ext. A defendants cannot be restrained from enjoying their purchased holding. I am, therefore, of the opinion that the Courts below committed gross error in decreeing the suit for injunction.

8. In the net result, therefore, the judgments and decrees of both the Courts below are set aside and the plaintiff's suit is dismissed. The second appeal is allowed. There will be no order as to costs.