

(2025) 03 OHC CK 1380
In the Orissa High Court
Case No : S.A. No.215 Of 1993

Rama Chandra Jena (since dead through his LRs) APPELLANT
Vs
Ballabhananda Sahoo And Others Vs RESPONDENT

Date of Decision : 11-03-2025

Acts Referred:

Code of Civil Procedure, 1908 — Section 100

Citation : (2025) 03 OHC CK 1380

Hon'ble Judges : A.C. Behera, J

Bench : Single Bench

Advocate : A.K. Bose, A. Sikdar, G. Mukherjee, A. Mishra, G. Mohanty

Final Decision : Dismissed

Judgement

A.C. Behera, J

1. This second appeal has been preferred against the reversing judgment.
2. The appellant in this second appeal was the defendant No.3 before the Trial Court in the suit vide T.S. No.55 of 1978 and respondent No.3 before the First Appellate Court in the First Appeal vide T.A. No.2 of 1984.

The respondent Nos.1 to 10 in this second appeal being the villagers of village Pandua under Tirtol police station in the district of Cuttack at present in the district of Jagatsinghpur were the plaintiffs before the Trial Court in the suit vide T.S. No.55 of 1978 and appellants before the First Appellate Court in the First Appeal vide T.A. No.2 of 1984.

Respondent Nos.11 and 12 in this second appeal i.e. Collector and Tahasildar were the defendant Nos.1 & 2 before the Trial Court in the suit vide T.S. No.55 of 1978 and respondent Nos.1 & 2 before the First Appellate Court in the First Appeal vide T.A. No.2 of 1984.

3. The nature of the suit of the plaintiffs filed by the villagers of Pandua under Tirtol police station vide T.S. No.55 of 1978 against the defendants i.e. against

the Collector, Tahasildar and Rama Chandra Jena was representative character suit for declaration of the customary rights of the villagers of Pandua including the plaintiffs over the suit properties and to injunct the defendant Nos.1 & 2 permanently from leasing out or settling the suit properties in favour of the defendant No.3 or from changing the nature and character of the same in any manner from its communal character along with the other reliefs, to which, they (plaintiffs) entitled for, as the Court deems fit and proper.

4. According to the plaintiffs, the suit properties described in schedule of the plaint belong to the State of Odisha. The villagers of Pandua including the plaintiffs have been performing Dola Yatra (Dola Melana) on the suit properties in each and every year during Dola Purnima since the time immemorial. There is also a well on the suit properties, which has been using by the villagers of Pandua for drinking purpose. The villagers of Pandua have also been using the suit properties for grazing their cattle, performing yatras and drying the harvested paddy crops. As such, the suit properties are communal land, in which, all the villagers of Pandua had/have their customary rights. When, they (villagers of Pandua including the plaintiffs) came to know that, the defendant Nos.1 & 2 are going to settle the suit properties in favour of the defendant No.3 and the defendant No.3 is trying to grab the suit properties illegally by filing a vexatious suit only in order to prevent the villagers of Pandua including the plaintiffs from exercising their customary rights on the same, then the villagers of Pandua on being represented through the plaintiffs approached the Civil Court by filing the suit vide T.S. No.55 of 1978 against the defendants i.e. against the Collector, Tahasildar and Rama Chandra Jena arraying them as defendant Nos.1, 2 & 3 respectively praying for declaration of their customary rights over the suit properties and to injunct the defendant Nos.1 & 2 permanently from leasing out or settling the suit properties in favour of the defendant No.3 and from changing the nature and character of the suit properties in any manner from its communal character along with other reliefs, to which, they (plaintiffs) are entitled for.

5. Having been noticed from the Trial Court in the suit vide T.S. No.55 of 1978 filed by the plaintiffs, the defendant Nos.1 & 2 i.e. Collector and Tahasildar filed their joint written statement stating that, the suit properties belong to the State. The defendant No.3 has no manner of right, title, interest and possession over the same. The defendant No.3 is not residing at village Pandua, because, he (defendant No.3) usually resides at Kolkata. For which, he (defendant No.3) has no interest and possession in the suit properties. They (defendant Nos.1 & 2) are not trying to settle the suit properties in favour of anybody including defendant No.3. For which, the plaintiffs have no cause of action against the defendant Nos.1 & 2. Accordingly, they (defendant Nos.1 & 2-Collector and Tahasildar respectively) filed their joint written statement admitting the ownership of the State over the suit properties without denying/disputing the claim of customary rights of the villagers of Pandua i.e. plaintiffs over the suit properties.

The defendant No.3 (Rama Chandra Jena) filed his written statement challenging

the suit of the plaintiffs denying the averments made by the plaintiffs in their plaint taking his stands specifically therein that, the suit of the plaintiffs is bad for non-joinder of necessary party.

The plaintiffs have no cause of action for filing the suit. The suit of the plaintiffs is barred by law of limitation. The suit properties were/are not communal land and the suit properties had/have never been using for grazing ground of the cattle, for observance of Dola Yatra or for drying harvested paddy crops on the same.

The specific plea/case of the defendant No.3 is that, the suit properties were the homestead of ex landlord Kedarnath Banerjee. He (defendant No.3) has purchased the suit properties from ex landlord Kedarnath Banerjee through registered sale deed. As such, he (defendant No.3) is in possession over the suit properties since the date of his purchase. His residential house is on the suit properties. The Tahasildar, Kujang had started an encroachment case against him (defendant No.3) in respect of the suit properties only in order to evict him from the suit properties illegally. The ex-intermediary of the suit properties i.e. Kedarnath Banerjee was permitted by the Collector, Cuttack to lease out the suit properties in favour of the defendant No.3 and accordingly, he (defendant No.3) is the owner and in possession of the suit properties. For which, the villagers of Pandua including the plaintiffs have no interest in the suit properties.

Therefore, the suit of the plaintiffs is liable to be dismissed on contest against him (defendant No.3).

6. Basing upon the aforesaid pleadings and matters in controversies between the parties, altogether 4 (four) numbers of issues were framed by the Trial Court in the suit vide T.S. No.55 of 1978 and the said issues are:-

I S S U E S

- (i) Is the suit maintainable?
- (ii) Have the plaintiffs got any kind of customary or communal right over the suit land?
- (iii) Has the defendant No.3 acquired occupancy right over the suit land? (iv) To what relief, if any, the plaintiffs are entitled?

7. In order to substantiate the aforesaid reliefs sought for by the plaintiffs against the defendants before the Trial Court in the suit vide T.S. No.55 of 1978, they (plaintiffs) examined altogether 13 numbers of witnesses from their side as P.Ws.1 to 13 and relied upon the documents vide Exts.1 to 6 on their behalf.

On the contrary, in order to nullify/defeat the suit of the plaintiffs, the defendant No.3 examined 8 (eight) witnesses from his side including him as D.W.8 and exhibited series of documents on his behalf vide Exts.A to F.

8. After conclusion of hearing and on perusal of the materials, documents and

evidence available in the Record, the Trial Court answered issue Nos.1, 2 & 4 against the plaintiffs and in favour of the defendants and basing upon the findings and observations made by the Trial Court in issue Nos.1, 2 & 4 against the plaintiffs and in favour of the defendant No.3, the Trial Court dismissed the suit of the plaintiffs on contest against the defendants as per its judgment and decree dated 30.11.1983 and 08.12.1983 respectively assigning the reasons that, the plaintiffs have miserably failed to establish their customary rights over the suit properties, for which, they (plaintiffs) are not entitled for the reliefs sought for by them.

9. On being dissatisfied with the aforesaid judgment and decree of the dismissal of the suit of the plaintiffs vide T.S. No.55 of 1978 passed by the Trial Court on dated 30.11.1983 and 08.12.1983 respectively, they (plaintiffs) challenged the same by preferring the First Appeal vide T.A. No.2 of 1984 being the appellants against the defendants arraying them (defendants) as respondents.

10. After hearing from both the sides, the First Appellate Court allowed that First Appeal of the plaintiffs vide T.A. No.2 of 1984 on contest against the defendants and set aside the judgment and decree of the Trial Court passed in T.S. No.55 of 1978 as per its judgment and decree dated 08.09.1993 and 15.09.1993 respectively assigning the reasons and relying upon the documents vide Exts.1, 2, 7, 8 & 9 that, the suit properties have been using by the villagers of Pandua i.e. plaintiffs as melana padia since long and the R.o.Rs vide Exts.7 & 8 prepared in the name of the Government in respect of the suit properties are also corroborating the case of the plaintiffs, because in the remarks column of the said R.o.Rs, it has been specifically indicated that, the suit properties are melana padia and the contents of other documents vide Exts.1, 2, 7 & 8 are also in support of the pleadings of the plaintiffs.

After appreciating the oral and documentary evidence of the parties, the First Appellate Court held that, the villagers of Pandua have their customary rights over the suit properties and they (villagers of Pandua including plaintiffs) have been observing melana yatra in each year since long over the suit properties and as per the decision of the Consolidation Authorities vide Ext.9 during consolidation operation, the matter of dispute between the parties was left open to be decided by the Civil Court in the present suit vide T.S. No.55 of 1978 and the contents of the order vide Ext.9 passed by the Consolidation Authorities are clearly and unambiguously going to show that, the State is the owner of the suit properties and the defendant No.3 has no interest and possession on the same. For which, the First Appellate Court set aside the judgment and decree of the Trial Court and allowed the First Appeal preferred by the plaintiffs in part on contest and declared the right of the plaintiffs for using the suit land as melana padia.

11. On being aggrieved with the aforesaid judgment and decree dated 08.09.1993 and 15.09.1993 respectively in part passed by the First Appellate Court in T.A. No.2 of 1984 in favour of the plaintiffs, the defendant No.3

challenged the same by preferring this second appeal being the appellant against the plaintiffs arraying them (plaintiffs) as respondents and also arraying the defendant Nos.1 & 2 i.e. Collector and Tahasildar as respondent Nos.11 & 12 respectively.

12. When, during the pendency of this second appeal, the appellant (defendant No.3) expired, then, his LRs have been substituted in his place as appellants.

13. This Second Appeal was admitted on formulation of the following substantial questions of law i.e.-

(i) Whether the lower appellate court has gone wrong in decreeing the suit, when the identity of the suit land is not ascertainable from the plaint or evidence?

(ii) Whether the lower appellate Court was correct to hold that, the villagers have customary right of holding Dola Melana on the disputed land, which as stated above, is indefinite, in view of the pleadings and evidence that earlier the intermediary was holding such 'Melana' and after abolition of the intermediary, the Revenue Inspector of the area continued to hold such 'Melana' and thereafter with the permission of the Revenue Inspector of the area, the villagers are holding such 'Melana'?

14. I have already heard from the learned counsel for the appellant (defendant No.3), the learned counsel for the respondent Nos.1 to 10 (plaintiffs) and the learned Standing Counsel for the Respondent Nos.11 &12 (Collector and Tahasildar).

15. In order to assail the judgment and decree passed by the First Appellate Court, the learned senior counsel for the appellant relied upon the decisions i.e. Manindranath Bhuyan Vrs. State of Orissa and another passed in SA No.229 of 2000, Chidambara Thevar Vrs. T. Vedayya Thevar and Ors. reported in AIR 1967 MAD 164, Smt. Annapurna Dei and Ors. Vrs. Akbar Patel and Ors. reported in AIR 1974 ORISSA 162.

In support of the judgment and decree passed by the First Appellate Court, the learned senior counsel for the respondent Nos.1 to 10 (plaintiffs) relied upon the decisions i.e. Acquisition Officer, D.I.S. Vrs. Madan Gajendra and Ors. reported in 41(1975) CLT 869 and Lachmi Narain Singh (dead) Vrs. Sarjug Singh (dead) reported in (2022) 13 SCC 746.

16. When, both the above formulated substantial questions of law are interlinked having ample nexus with each other according to the pleadings of the parties and judgments and decrees passed by the Trial Court and First Appellate Court, then both the substantial questions of law are taken up together analogously for their discussions hereunder.

17. It is the undisputed case of the parties that, the R.o.Rs of the suit properties have been continuing in the name of the State of Odisha in all the settlements and the suit properties have never been recorded in any of the settlements till

yet either in the name of the plaintiffs or in the name of the defendant No.3. There is reflection in the remarks column of the R.o.Rs of the suit properties vide Exts-7 & 8 that, the said properties are melana padia.

It is the findings of the Consolidation Authorities in Ext.9 that, the suit properties stand in the name of State of Odisha, on which, the plaintiffs are claiming their customary rights.

As such, it is the undisputed case of the parties that, in all the settlements starting from sabik settlement till yet, the name of State has been continuing as the owner of the suit properties in all the R.o.Rs of all the settlements.

When the plaintiffs being the villagers of Pandua have prayed for declaration of their customary rights over the suit properties stating that, they had/have been using the suit properties for the observation of Dola Yatra, for grazing field of their cattle and for drying the harvested paddy crops of their villagers since the time immemorial, to which, the defendant No.3 is seriously disputing stating that, he (defendant No.3) is in possession over the suit properties.

As such, plaintiffs and defendant No.3 have made rival claims against each other claiming possession over the suit properties. For which, the plea taken by the defendant No.3 that, the suit properties is not identifiable falls to the ground. Because, knowing very well to the identity of the suit properties, the defendant No.3 is claiming possession over the same.

18. Now, the question arises, whether the plaintiffs i.e. the villagers of Pandua have become able to establish their customary rights over the suit properties relating to the use of the same as Dola Melana Yatra Padia, cattle grazing field and drying of harvested paddy crops on the same is acceptable or not?

The law relating to the customary rights and easementary rights has already been clarified by the Hon'ble Courts in the ratio of the following decisions:-

(i) In a case between Harisadhan De and others Vrs. Radhika Prosad Pandit and others reported in AIR 1938 (Calcutta) 202 that, easements are, so to speak, private right belonging to particular person, while customary rights are public rights annexed to the place in general.

(ii) In a case between Pasupuleti Krishnamurthi Vrs. Annadasu Bapanayya and others reported in AIR 1957 (Andhra Pradesh) 997 that, a practice that has arisen in comparatively recent years due to indulgence or tacit permission of the owner of land must be distinguished from a custom originating in the assertion of a legal right and a prolonged submission to or acceptance of the exercise of that right by those interested in disputing it.

Vacant lands in a village are commonly used for purposes such as threshing or boiling and drying turmeric or for juvenile sporting without involving any invasion of the rights of the owner or the creation of rights in others who are tacitly allowed to use the land.

No fixed period of enjoyment can be prescribed as necessary to prove a customary right and the character and length of enjoyment necessary for such purpose must depend upon the nature of the customary right claimed.

(iii) In a case between Baisnah Barik and another Vrs. Sheikh Nasiruddin and others reported in AIR (32) 1945 (Patna) 118 that, right claimed by public over certain lands as village pathway is not easement, but customary rights and may also be traceable to dedication.

No particular number of years is necessary to enable the Court to draw the necessary inference.

(iv) In a case between Jagabandhu Sahu and others Vrs. Bipin Jena and others (at Para 8) reported in AIR 1971 (Orissa) 219 that, customary rights of pasturage over waste lands. If the villagers had been utilizing the waste lands owned by a State for pasturage for many years past without any resistance from the Government, it can be said to be from a time immemorial and the villagers are entitled to a decree declaring their right of pasturage over the said land.

19. Here in this suit/appeal at hand, it is the pleadings of the plaintiffs that, they (plaintiffs) had/have been using the suit properties as their dola melana padia since the time immemorial and also using the same as their cattle grazing field as well as for drying the harvested paddy crops of the villagers of Pandua including plaintiffs, which has been duly corroborated through the documents and evidence i.e. Exts.7 & 8, as in the remarks column of the Hal R.o.Rs of the suit properties vide Exts.7 & 8, there is specific indication that, the suit properties are melana padia.

The undisputed owner of the suit properties i.e. State of Odisha has supported to the above claim of the plaintiffs relating to the use of the suit properties by the villagers of Pandua including plaintiffs as dola melan padia since long.

The customary rights can be asserted by a party over a property only against its owner, but not against the person, who is not the owner of that property.

When, the undisputed documents i.e. Exts.7, 8 & 9 (R.o.Rs and the judgment of the Consolidation Authorities) are establishing that, the State is the owner of the suit properties, then at this juncture, as per law, the claim of customary rights of the plaintiffs over the suit properties is against the State, but not against the defendant No.3, as the defendant No.3 is not the owner of the suit properties.

As per the discussions and observations made above, when the undisputed owner of the suit properties i.e. State of Odisha through its legally authorized statutory agents i.e. Collector and Tahasildar (defendant Nos.1 & 2) is indirectly admitting the claim of the plaintiffs i.e. their customary rights over the suit properties relating to their use to the same since long observing Dola Melana Yatra on the same in each year through the pleadings and evidence of the defendant Nos.1 & 2, then at this juncture, by applying the principles of law enunciated in the ratio of the decisions of the Hon'ble Courts indicated in

Paragraph No.18 of this judgment to this suit/appeal at hand, it is held that, the part judgment and decree passed by the learned First Appellate Court reversing the judgment and decree of the Trial Court in part declaring the right of the plaintiffs to use the suit land as melana padia is not erroneous in any manner.

For which, the decisions relied upon by the learned counsel for the appellant (defendant No.3) indicated above in paragraph No.15 of this judgment for the annulment of the judgment and decree passed by the First Appellate Court have become inapplicable to the suit/appeal at hand on facts as discussed above.

20. As per the discussions and observations made above, when it is held that, the judgment and decree passed by the First Appellate Court is not erroneous in any manner, then at this juncture, the question of interfering with the same through this second appeal filed by the appellant (defendant No.3) does not arise.

Therefore, there is no merit in the appeal of the appellant (defendant No.3). The same must fail.

21. In result, the second appeal filed by the appellant (defendant No.3) is dismissed on contest, but without cost.

The judgment and decree passed by the First Appellate Court in T.A. No.2 of 1984 is confirmed.

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