

(2018) 03 OHC CK 0003
In the Orissa High Court
Case No : R.S.A. NO.91 OF 2014

Smt. Joshna Rani Patnaik and another	APPELLANT
Vs	
Dr. Krushna Singha Padhy & another	RESPONDENT

Date of Decision : 08-03-2018

Acts Referred:

Indian Evidence Act, 1872 — Section 102, 103
Orissa Survey and Settlement Act, 1958 — Section 21
Code of Civil Procedure, 1908 — Order 26 Rule 9
Orissa Survey and Settlement Act, 1958 — Rule 34(e)

Citation : (2018) 03 OHC CK 0003

Hon'ble Judges : D.P. CHOUDHURY

Bench : Single Bench

Advocate : Shakti Prasad Das, P.K. Singh, A.R. Dash, S.K. Nanda, B. Mohapatra,
N. Swain, K.S. Sahu, L.D. Achari

Final Decision : Disposed of

Judgement

DR. D.P. CHOUDHURY, J.

1.This Second Appeal assails the judgment and decreen dated 27.11.2013 and 17.6.2014, respectively, passed by the learned District Judge, Ganjam,

Berhampur in R.F.A.No.104 of 2010 confirming the First Appeal arising out of the judgment and decree dated 16.9.2010 and 1.10.2010, respectively,

passed by the learned Civil Judge (Senior Division), Berhampur in T.S. No.56 of 1997 dismissing the suit. Plaintiffs are the appellants and Defendants

are the Respondents in this Second Appeal. Hence, in the judgment respective parties are shown as plaintiffs and defendants.

PLAINTIFFSâ?? CASE

2. The suit land relates to a piece of homestead land measuring 45 feet in width x 60 feet in length situated within Baidyanathpur Revenue village of

Berhampur Town. They pertain to Plot No.610/2362, under Khata No.734 and Plot No.610/2363, under Khata No.282. One Krushna Panda was the

original owner of the suit land and he has sold 45 feet x 75 feet and 10 feet 6 inch x 75 feet each under two Registered Sale Deeds dated 19.1.1978 in

favour of Rama Chandra Pasupalak and Janaki Pasupalak on payment of consideration. It is averred that Plaintiff No.1 purchased her portion of the

suit land (30 feet x 60 feet) from one Rama Chandra Pasupalak and Janaki Pasupalak under Registered Sale Deed No.4643 dated 27.10.1992 on

payment of consideration. Out of the aforesaid two plots which is marked as ABCD attached to the plaint, after sale of the said land Rama Chandra

Pasupalak still have land to the north of said sold land and same is marked as ABXY. The Plaintiff No.2 acquired the balance portion of 15 feet x 60

feet suit land inclusive of the total area measuring (30 feet x 60 feet) from Janaki Pasupalak under Registered Sale Deed No.4642 dated 27.10.1992

on payment of due consideration. Said portion is also marked as CDEF in the plaint schedule. Subsequently the Plaintiff No.2 sold 15 feet x 60 feet out

of said 30 feet x 60 feet marked as CDGH and the plan attached to the plaint under the Registered Sale Deed on payment of consideration. It is

stated that said purchased land which is part of the suit land is found to be in exclusive possession of Janaki Pasupalak who delivered same to Plaintiff

No.2. This portion of land has been mutated in the name of Janaki Pasupalak vide Plot No.610/2363 appertaining to Khata No.282. Since portion of

this 15 feet x 60 feet suit land has been wrongly recorded in the name of one Amita Mahapatra vide Khata No.1030/622 and Plot No.2363/2864, the

Plaintiff No.2 as a matter of abundant caution joined as co-vendor through his agent Nimain Ch. Sabat. When Plaintiff No.1 acquired the said 15 feet

x 60 feet land from Plaintiff No.2 under the above Registered Sale Deed, the Plaintiff No.1 along with her husband continued to possess the entire suit

land measuring 45 feet x 60 feet by putting fenced iron wire but on 7.5.1995 the Defendant Nos.1 and 2 forcibly dispossessed the plaintiffs from the

said suit land. So, the Plaintiffs filed the suit for recovery of vacant possession from the suit property measuring 15 feet x 60 feet covered under Plot

No.610/2363 pertaining to Khata No.282 marked as CDGH with consequential reliefs of mandatory injunction and to pay damages to the Plaintiffs.

CASE OF THE DEFENDANTS

3. The Defendant Nos.1 and 2 refuting the averment of the Plaintiffs stated that one Krushna Chandra Panda was the owner of the suit land including

other lands which constituted a part of Hatibandha filled with water. It is the case of the defendants Nos.1 and 2 that during 1977 and 1978 Krushna

Chandra Panda made two rows of plots on the said bandha and sold same to several persons including Smt. Janaki Pasupalak and Rama Chandra

Pasupalak, the vendors of Plaintiff Nos.1 and 2. During the year 1980, he also made a third row of plots on the remaining undisputed portion of the

said land and sold them to several persons including Sunita Padhy, the vendor of Defendant No.2 and Amita Mohapatra and her mother Saraswati

Devi.

4. It is averred, inter alia, that the suit land being the plots in the third row of the plots, said Krushna Chandra Panda sold same in favour of Sunita

Padhy under the Registered Sale Deed No.495/1985 dated 6.2.1985 and delivered possession of the same to her. In turn the suit land was sold by

Sunita Padhy to Defendant No.2 under the Registered Sale Deed dated 4.3.1987 on payment of consideration being followed by delivery of

possession. Since Defendant No.2 along with her husband are in possession of it since the date of purchase, the suit land has been mutated in favour

of Defendant No.2 vide order dated 30.3.1993 passed by the Tahasildar, Berhampur in Mutation Case No.1036 of 1987.

5. According to the Defendants, the final R.O.R. has been corrected assigning new plot numbers and the said decision is binding on Janaki Pasupalak

and Rama Chandra Pasupalak who have filed objection in the said Mutation proceeding claiming right, title and interest thereon.

6. Be it stated that, the Sale Deed by Krushna Chandra Panda in favour of Janaki Pasupalak and Rama Chandra Pasupalak do not cover the suit land

and Plaintiffs and the Defendant No.3 were never in possession of the suit land. The Record-of-Right prepared in favour of Janaki Pasupalak and

Ram Chandra Pasupalak is wrong because the total area as mentioned in the Record-of-Right exceeds the area purportedly purchased by Ram

Chandra Pasupalak and Janaki Pasupalak. It is the further case of the contesting Defendants that Ram Chandra Pasupalak and Janaki Pasupalak

purchased sites in the first row and in the second row which are adjoining each other and purchased suit site is not at all covering the present suit land.

Since the purchased site of Ram Chandra Pasupalak and Janaki Pasupalak measures total 90 feet x 75 feet which was sold by them to five

purchasers under registered sale deeds, namely, Tarini Charan Panigrahi on 1.8.1992, Kalicharan Padhi on 4.8.1992, Manohar Padhi on 25.7.1992,

Kailash Chandra Padhi on 24.7.1992 and to one Narasingha Padhi on 24.7.1992 respectively, thus, there is no land left for sale to Plaintiffs. The

Defendant Nos.1 and 2 claim that Krushna Panda sold 45 ft. x 70 ft. to Smt. Sunita Padhi, a vendor of the Defendant No.2 in the third row under

Registered Sale Deed No.495/1985 and also had sold 22 ½ ft. x 70 ft. to Sunita's sister Amita Mahapatro which is adjoining to said land of 45 ft.

x 70 ft. After purchase, the Mutation proceeding went on and there Ram Chandra Pasupalak and Janaki Pasupalak have raised objection but

overlooking their objection, the learned Tahasildar directed to record the suit land in favour of Defendants 1 and 2 and no appeal has been preferred

against said Mutation proceeding, rather during pendency of the Mutation proceeding they have sold the suit land to Plaintiffs for which the Plaintiffs

are also bound by the decision of the Mutation proceeding. Thus, there is no cause of action for filing of the suit in respect of the suit land. Hence, the

learned Courts below have passed the order rightly dismissing the suit of the Plaintiffs.

THE DECISION OF THE TRIAL COURT

7. Learned trial court has framed the following issues:(1) Whether the plaintiff has any manner to right, title and interest over the suit land?

(2) Whether there is any cause of action for the suit?

(3) Whether the plaintiff is entitled to vacant possession of the suit land ?

(4) To what relief, the plaintiff is entitled to ?

(5) Whether the plaintiffs are aware of the mutation case about the time of their purchase of the suit land ?

(6) Whether the Court fee paid is correct ?

(7) Whether the suit is undervalued ?

(8) Whether the suit is bad for mis-joinder of parties ?

8. Learned trial court while answering the Issue No.1 which is the vital issue, observed that Ram Chandra Pasupalak and his mother Janaki Pasupalak

having no balance land in their hands from out of the total purchased properties,

made void sale of said suit land in favour of the Plaintiffs. As such, the Plaintiffs cannot derive any right, title and interest over the suit properties. Very interestingly it has been observed by the learned trial court that there is no dispute about the identity of the suit land although the plaint and the written statement described the suit land in their respective convenience manner. While answering Issue No.5, the learned trial court held that knowing very well about pendency of the Mutation Case, the present Plaintiffs purchased the suit land. Thereafter the learned trial court answered all the issues against the Plaintiffs and finally dismissed the suit on contest.

DECISION OF LOWER APPELLATE COURT

9. The learned appellate court while answering the issues observed basing on the evidence of P.W.7 that the vendor of the Plaintiffs have no balance of land in their hand to transfer the suit land in favour of the Plaintiffs and as such Plaintiffs have no right, title and interest over the suit land. On the other hand, he agreed with the findings of the learned trial court.

10. Learned appellate court also found that the Record-of-Right being prepared in excess of land which is not sold under the Registered Sale Deed in question. Thus, it is the settled principle that the record of right neither creates nor extinguishes the title. Basing on the evidence of P.Ws. 1 and 2, the learned lower appellate court rejected the claim of the Plaintiffs. Finally the petition being filed under Order-XXVI, Rule-9 C.P.C. for demarcation of the suit land by Survey knowing Commissioner, the learned lower appellate court rejected the same petition by observing that as there is no land left for sale, the question of identity of the same does not arise. However, learned lower appellate court concurred with all the findings of the learned trial court and dismissed the appeal.

SUBSTANTIAL QUESTIONS OF LAW

11. This Second Appeal has been admitted on the following substantial questions of law:

â??(i) Whether the findings of the learned Courts below that plaintiffsâ?? vendors had no more land with them to alienate the same to the plaintiffs is based on conjectures and surmises and if so whether it vitiates the findings of the learned Courts below ?

(ii) Whether the learned lower Appellate Court has committed illegality by rejecting the Appellants's application under Order-XXVI, Rule-9, C.P.C.

?

(iii) Whether the findings of the learned Courts below on plaintiffs's right, title and interest is not sustainable in the absence of adjudication upon the

core issue as to whether the suit land is part of the land purchased by the plaintiffs vendors vide R.S.D. Nos.140 and 141 dated 19.1.1978 ?

SUBSTANTIAL QUESTION OF LAW NO.(I)

12. On perusal of pleadings of the Plaintiff-Appellants it reveals that the dispute relates to a piece of homestead land measuring Ac.45 feet x 60 feet

under Plot No.610/2362 pertaining to Khata No.734 and Plot No.610/2363 pertaining to Khata No.282. It is also revealed from the pleadings of the

Plaintiffs that one Krushna Panda was the original owner of the suit property. Janaki Pasupalak and Rama Chandra Pasupalak had purchased the

vacant land measuring 45 feet x 75 feet and 10 feet 6 inch x 75 feet each under two Registered Sale Deed No.140 dated 19.1.1978 and No.142 dated

19.1.1978 on payment of consideration from Krushna Panda. It is the further case of the Plaintiffs-Appellants that the appellant No.1 has acquired her

portion of suit land 30 feet x 60 feet from Ram Chandra Pasupalak and Janaki Pasupalak under Registered Sale Deed No.4643 dated 27.10.1992 for

valuable consideration out of the aforesaid two suit plots and the same has been demarcated as ABCD attached to the plaint schedule. Plaintiff No.2

acquired 30 feet x 60 feet by purchasing the same from Janaki Pasupalak under Registered Sale Deed No.4642 dated 27.10.1992 on payment of

consideration out of Suit Plot No.610/2363 pertaining to Khata No.282. Since Plaintiff No.2 is the sister of Plaintiff No.1, she made agreement with

the Plaintiff No.1 to sell 15 feet x 60 feet out of her acquired suit land and accordingly delivery of possession was made. Later on the Plaintiff No.1

acquired same from Plaintiff No.2 under Registered Sale Deed No.4496 of 2000. It is also the case of the Plaintiffs that Janaki Pasupalak being in

exclusive possession of the said suit land delivered possession to plaintiff No.2 on the date of sale. Record-of-Right also stands in the name of Janaki

Pasupalak and Rama Chandra Pasupalak but this 15 feet x 60 feet of the suit plot was wrongly recorded in favour of Amita Mohapatra vide Plot

Nos.2363/2864 pertaining to Khata No.1030/622. But one Nimai Ch. Sabat being

the power of attorney holder of Amita Mohapatra admitting the property of Pasupalak became witness to the sale deed. Thus, the Plaintiff No.1 along with her husband possessed the entire 45 feet x 60 feet suit land and fenced the area by iron wire.

13. Defendant Nos.1 and 2 refuting the allegation made in the plaint admitted in their pleadings that Krushna Panda sold the plaint schedule land to

Sunita Padhy vide Registered Sale Deed No.495 of 1985 and she in her turn sold the same to Defendant No.2 by Registered Sale Deed No.888/1987

and she got possession from Sunita Padhy. Defendant No.2 got her name mutated vide Mutation Case No.1063 of 1987 in her name under Khata

No.1030/87 and Plot Nos.2362/3209 Ac.0.045 and 2363/3210-Ac.0.026 total measuring Ac.0.071 decimals. According to the Defendants the

description of the lands as per plaint schedule is imaginary and incorrect. It is also pleaded by the Defendant Nos.1 and 2 that the vendors of the

Plaintiffs had no right, title and interest over the suit land sold to Plaintiff Nos.1 and 2 although Record-of-Right issued wrongly in favour of

vendorâ??s of the Plaintiffs. Here Defendant No.1 is the husband of Defendant No.2. Since the Defendant Nos. 1 & 2 are not in wrong possession

of the suit plot but have got valid title, the allegations of the Plaintiffs are evasive. The suit plot with excessive area has been sold by said

Pasupalaksâ?? family to Plaintiff Nos.1 and 2. That fact has been also decided in the Mutation Case. They took the further plea that Krushna

Chandra Panda was the original owner of the suit plots in two rows and sold them to several persons. In 1980 he made third row of plots and also sold

them to several persons. According to these Defendants the suit land is in the third row plots which Krushna Chandra Panda sold to Sunita Padhy, the

vendor of the Defendant No.2. By the by they admitted that the claim of the suit land as per the plaint schedule lies in the first row and second row.

14. The aforesaid claim and rival claim is peculiar enough to fix up the onus but the Courts below have held that since the Plaintiffs have claimed right,

title and interest, the entire onus lies on the Plaintiffs to prove the same. Section 102 of the Evidence Act enshrines that the burden of proof in a suit or

proceeding lies on that person who would fail if no evidence at all were given on either side. So, the onus lies on the Plaintiffs to discharge the onus.

But the facts as depicted above, the suit plot as per Plaintiffs being acquired from

Krushna Chandra Panda through their vendor Pasupalaks whereas the defendants took the plea that the suit plot from said Krushna Chandra Panda has been sold in third row to their vendor. Both the parties have also led oral and documentary evidence to prove their respective plea. In such circumstances, Section 103 of the Evidence Act says the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

15. It is reported in *Nanda Kishwar Bux v. Gopal Bux*; A.I.R. 1940 Privy Council 93 where Their Lordships observed that the question of onus of proof is of no great importance, if both sides have entered into evidence. But in the instant case, both the Courts below have put the onus on the Plaintiffs only to prove the particular fact of their title and possession thereon as same relates to Issue No.1. Since both the parties have led evidence, the Courts below ought to have left both parties to prove their respective plea instead of putting sole onus on the Plaintiffs to prove such issue.

16. The Courts below while assessing the evidence of Plaintiffs have failed to notice the source of title acquired by Krushna Chandra Panda although the material is available. P.W.8, who is the father guardian of Ram Chandra Pasupalak, reveals that vide Ext.12 Swarnamayee Panigrahi sold the suit plot along with other properties in favour of Krushna Panda from whom he purchased immovable properties including suit plot as father guardian in favour of his son Ram Chandra Pasupalak, who was minor by then under the Registered Sale Deed No.142 dated 19.1.1978 vide Ext.9. Ext.12 itself shows that on 12.8.1961 Krushna Chandra Panda purchased 150 cubits x 150 cubits in the suit mouza. Under Exhibits 9 and 14 Krushna Chandra Panda has sold out of his purchased land with an area of 10 feet 6 inches x 75 feet from the south and 45 feet x 75 feet each to Ram Chandra Pasupalak and Janaki Pasupalak. The Records-of-Rights exhibited show that they have been also recorded in the name of these Pasupalaks. The Record-of-Right also shows that they are issued by the Assistant Settlement Officer on 18.1.1980. It is the contention of the learned counsel for the defendants that these Records-of-Right cannot be said to be correct for the simple reason that the area sold on the sale deed has been excessively recorded under these Records-of-Right. The Courts below have also come to such

finding. It is the evidence of P.Ws.7 and 8 that as per the Record-of-Right and the sale deeds they have purchased the suit land vide Ext.10. Under Section 21 of the Orissa Survey Settlement Act, the Record of Right prepared is presumed to be correct until contrary is proved. On the other hand, the onus lies on the defendants to prove that such R.O.R. is incorrect.

In this regard, the Courts below have not placed their attention. On the other hand, it has been discussed by the Courts below that the R.O.R. neither create nor extinguishes right, title and interest. There is no second opinion about such principles of law but when the Record-of-Right is challenged, presumption has to be rebutted by the person who claims as such. On the other hand, the defendants have to rebut the presumption. But both the Courts below have not discussed about the evidence of defendants to rebut the presumption.

17. Learned counsel for the defendants submitted that the defendants have taken the plea that they have mutated land in their favour ignoring the R.O.R. issued under the Orissa Survey Settlement Act and the Rules. But at the same time the Plaintiffs have also pleaded and led evidence that such order of mutation has been set aside by the learned Commissioner, Land Records & Settlement, Orissa, Cuttack in M.R.C. No.36 of 1998 vide Ext.6.

There the learned Commissioner, Lands Records and Settlement clearly observed that under Rule 34 (e) of the O.S.S. Act enshrines that dispute as raised after publication of record-of-rights is confined to such event after the record-of-rights published but not the fact before publication of the record-of-right. It is also revealed from the evidence of both the parties that the said decision has been challenged before this Court but nobody has produced any judgment of this Court setting aside the order of M.R.C. Case No.36 of 1998. On the other hand, the defendants have also filed revision petitions vide RPC Nos.371 of 1999 and 372 of 1999 stating that the excess land as per the R.O.R. beyond the sale deeds of the Plaintiffs be corrected. Learned Commissioner, Land Reforms directed for ignoring the excess possession of land if made without entitlement. Thereafter it is not known what happened to those orders as none of the parties have produced materials. These materials as discussed above have not been taken into consideration by both the Courts below. On the other hand, the presumption under the R.O.R. issued by the Settlement authority till remained

unrebutted.

18. It is the plea of the defendants that these Janaki Pasupalak and Ram Chandra Pasupalak have no land to alienate to the present appellants

because they have disposed of all the lands to five purchasers, namely, Tarini Charan Panigrahi on 1.8.1992, Kalicharan Padhi on 4.8.1992, Manohar

Padhi on 25.7.1992, Kailash Chandra Padhi on 24.7.1992 and Narasingha Padhi on 24.7.1992 but have not pleaded how much land has been sold to

each of the persons by Janaki Pasupalak and Ram Chandra Pasupalak. Both the Courts below have only relied on the statement of P.W.7 while

coming to a conclusion that P.W.7 has suppressed to state the name of all the purchasers. After going through the evidence of P.W.7 at para-13 it

only appears in the following manner:

â??It is a fact that the lands of my mother and myself (totaling 90 feet x 75 feet) has been sold away. I cannot say if they have been sold to five

persons-Tarini Panigrahi, Kali Charan Padhi, Manohar Padhi, Kailash Ch. Padhi and Narasingha Padhi. To my knowledge, Talrini, Mahapatra and

Kali are in possession of the said lands. It is not a fact that Kailash and Narasingha are in possession of any portion of the said plotsâ??.

So, P.W.7 has clearly denied about the sale of land to Kailash and Narasingh. When there is a denial fact being suggested byÂ defendants, the

question of suppression of facts cannot be presumed by the Courts below. Apart from this, P.W.8 is the father of P.W.7 and P.W. 8 has actually

purchased land in the name of P.W.7 while P.W.7 was minor. In such context, evidence of P.W.8 is more important but the Courts below have not at

all discussed the evidence of P.W.8. P.W.8 has got clear knowledge about acquiring of land and the real location of the and. When the disputed

portion is 15 feet x 60 feet being part and parcel of the suit land, the findings of the learned Courts below that the Pasupalaks have no land to sell to

the Plaintiffs is a finding based on no facts. On the other hand, the finding of the learned Courts below without discussing the documents and the

discussion made herein above about appreciation of evidence of P.W.7 on wrong premises do not allow the plea of Respondents to be proved. Since

the concurrent findings of the learned Courts below on this substantial question of law do not convey the disposal of the Issue No.1, the Court is of the

view that same finding on Issue No.1 is to be set aside.

19. With regard to Substantial Question of Law No.(ii), the learned lower appellate Court has observed in the following manner:-

“At this stage it is necessary to take into consideration a petition under Order-XXVI, Rule-9 C.P.C. filed by the appellants. In view of my

agreement with the finding of the Court below that the vendors of the plaintiff had no residue land in their hands at the time without having executed

the sale deeds in favour of the plaintiffs, this petition merits no consideration and the same even if allowed would not serve any purpose at all so far as

the issues are concerned. As in this case even before going to the question of identity of the suit land to find out as to whether the land claimed by the

plaintiffs is the lands claimed to have been purchased by the defendant No.2, conclusion is required to be arrived at that the vendors had with them at

least the land to the extent of lands covered under the sale deeds in favour of the plaintiffs that they executed. In that view of the matter, the petition

stands rejected.”

The aforesaid observation of the learned Appellate Court clearly shows that the petition for Order 26 Rule 9 filed by the appellants at the stage of

appeal has been rejected mainly on the ground that the vendors of the Plaintiffs have no any land in their hands for sale to the Plaintiffs. Further the

learned Appellate Court is of the view that before the question of identity of land arises, the conclusions should be arrived at whether the vendors had

the land to the extent covered under the Sale Deed in favour of the Plaintiffs lies with them before sale.

20. In the aforesaid para it has been already observed that both the Courts below without proper appraisal of the evidence on record and without

dealing with the evidences of the defendants adduced to prove their plea has come to a conclusion that the vendors of the Plaintiffs had no land for

sale. Such finding is not agreed to in the Second Appeal. Moreover, the identity of the land is not questioned by the learned trial court as it has been

observed by it that the suit land has been clearly identified. If the suit land has been clearly identified, why there is no any observation by the Courts

below that the suit land is the land claimed by the defendants? Hence it is not possible to hold that the identity of the suit land is not the issue in this

case. Moreover, in para-3 of the written statement, the contesting defendant Nos.1 and 2 have clearly averred that the rough sketch map attached to

the plaint schedule is not correct description of the land in question and also an imaginary one.

21. When both the parties claim the suit land and R.O.R. has been already published, the fact that the vendors of the Plaintiffs had no such land to sell

which has not been established by the defendants, the identity of the suit land is the crux of the matter for necessary

an adjudication of the rights of the parties over the matter. Order 26 Rule 9 of CPC speaks like this:

9. Commissions to make local investigations.-In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of

elucidating any manner in dispute, or of ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net

profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the State Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by

such rules.

The aforesaid provision is an enabling provision to adjudicate the dispute in proper manner. It is not meant for collection of evidence but it is meant for

adjudication of rights of the parties with proper perspective. Here, in the matter the Plaintiffs allege that their vendors had acquired the suit land from

Krushna Chandra Panda who has purchased the same from Swarnamayee Panigrahi. The R.O.R. also reveals the quantum of the suit land and same

has not been challenged. On the other hand, the defendants submit that their vendors have purchased the suit land along with other properties from

another vendor who has purchased the same from Krushna Chandra Panda. When the defendants have asserted about the non-existence of the suit

land and it is not available from the evidence on record of both the parties that the vendor had no such land as pleaded by the defendants, the

existence of the suit land or identification of suit land should be made by local investigation. Therefore, the petition under Order 26 Rule 9 CPC ought

to have been allowed by the appellate Court for adjudication of the appeal. Hence, the observation of the learned appellate court by rejecting the

application under Order 26 Rule 9 is illegal being not agreed with.

22. The next substantial question of law No.(iii) is that whether the findings of

the learned Courts below on plaintiffs' right, title and interest is not sustainable in the absence of adjudication upon the core issue as to whether the suit land is part of the land purchased by the plaintiffs vendors vide R.S.D. Nos.140 and 141 dated 19.1.1978. Such substantial question of law has been already discussed being covered by the observations made in the aforesaid two substantial questions of law inasmuch as the Court is of the view that the Plaintiffs' vendors had purchased the suit plot, same has already been recorded under the provisions of the Orissa Survey and Settlement Act and it has been alienated to the Plaintiffs whereas defendants have not proved the plea that the vendors of the Plaintiffs have sold the excessive land. However, the only way to find out the existence of the suit land to be found by deputing the Survey Knowing Commissioner as observed above.

CONCLUSION:

23. It is reported in (2008) 8 SCC 671; Haryana Waqf Board v. Shanti Sarup & others where Their Lordships observed in the following manner:

¶6. ¶ In our view, this aspect of the matter was not at all gone into by the High Court while dismissing the second appeal summarily. The

High Court ought to have considered whether in view of the nature of dispute and in the facts of the present case, whether the Local Commissioner

should be appointed for the purpose of demarcation in respect of the suit land.

7. For the reasons aforesaid, we are of the view that the High Court ought to have considered this aspect of the matter and then to decide the second

appeal on merits. Accordingly, we set aside the judgment and decree passed in the second appeal and the second appeal is restored to its original file.

8. The High Court is requested to decide the second appeal in the light of the observations made herein above within six months from the date of

supply of a copy of this order to it. The appeal is thus allowed. There will be no order as to costs.¶

24. With due respect to the aforesaid decision, it appears that in that case dispute was raised by the parties before the Court whether the respondents

had encroached upon any land belonging to the appellant-Board. Admittedly in that case application under Order 26 Rule 9 of the CPC was filed

before the trial court and the same was rejected. Again same petition was filed before the appellate court stating that the trial court did not take into

consideration the pleadings of the parties. Thereafter the matter came to High Court where the Second Appeal was dismissed without entering into the issue with regard to identity of the land. In that point of view, the Honâ??ble Apex Court made open remand of the matter with a direction to the High Court to decide the appeal on merit including appointment of the local Commissioner for demarcation of the suit land as observed therein. In the instant case, same question of law is raised as to necessity of appointment of the Survey Knowing Commissioner under Order 26 Rule 9 of the CPC which was rejected by the learned Appellate Court in summary manner. Hence, following the aforesaid decision of the Honâ??ble Supreme Court since the identical facts and circumstances are available here, the judgment and decree passed by the learned appellate Court is set aside and the matter be remitted back to the learned lower appellate Court who would depute the Survey Knowing Commissioner and obtain his report and allow both the parties to argue on the report of the Survey Knowing Commissioner. The cost of the Survey Knowing Commissioner would be apportioned by both the parties. The report would be considered by the learned appellate court while disposing the appeal on merit after hearing both the parties on the evidences already adduced by both the parties keeping in mind the observations made herein above. The entire exercise of the learned appellate court is to be completed within a period of two months from today. The Second Appeal is disposed of accordingly.