

(2009) 04 OHC CK 0005

Orissa High Court

Case No: Second Appeal No. 335 of 1999

Prasanna Kumar Singh

APPELLANT

Vs

Purandar Rout and Others

RESPONDENT

Date of Decision: April 16, 2009

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 100
- Criminal Procedure Code, 1973 (CrPC) - Section 133

Citation: (2009) CLT 122 Supp : (2009) 2 OLR 840 Supp : (2009) OLR 122 Supp

Hon'ble Judges: A.S. Naidu, J

Bench: Single Bench

Advocate: G.S. Namtoar, U.K. Misra, T.K. Mohanty and D.P. Dhalasamanta, for the Appellant; B.H. Mohanty, R.K. Nayak, B. Das, D.P. Mohanty and S.C. Mohanty and S.K. Panda, for the Respondent

Final Decision: Dismissed

Judgement

A.S. Naidu, J.

The Appellant was Defendant No. 3, in T. S. No. 30 of 1982, of the court of the then Sub-ordinate Judge, Keonjhar. In this Second Appeal, the Appellant seeks to assail the judgment and decree dated 12.03.1999 and 24.3.1999 respectively passed by the learned District Judge, Keonjhar in T. A. No. 53 of 1992, confirming the judgment and decree passed by the learned Civil Judge (Senior Division), Keonjhar in T. S. No. 30 of 1982.

2. Respondent No. 1, as Plaintiff, filed the suit inter alia praying for declaration of his right, title and interest over the suit schedule land or on the alternative to declare the right, title and interest of the legal heirs of late Digambar Rout. The further prayer was to evict Defendant Nos. 1 to 3 from the suit land and to put the Plaintiff in possession thereof. There was a further prayer to direct Defendant Nos. 1 to 3 to pull down the brick wall constructed over the suit land at their own cost, within the

time to be fixed by the court, and for other ancillary reliefs.

3. The facts of the case have been elaborately discussed by the courts below in the impugned judgments. Consequently, this Court refrains from delving into detailed facts, but then, only those facts which are necessary for adjudication of this Second Appeal are narrated herein below in brief.

According to the Plaintiff, the suit schedule land appertains to Khata No. 35, Plot No. 257 measuring Ac. 0.03 decimal, was a part of Government land and was settled in favour of his father Digambar Rout by the competent authority way back in the year 1935-36 in Nayabadi Case No. 4 of 1935-36. After the death of Digambar, the Plaintiff and Defendant No. 4 (the other son late Digambar), became the owners and possessed the same. In the year 1962, it is averred in the plaint, there was an amicable partition between Plaintiff and Defendant No. 4 in which the suit land fell to the share of the Plaintiff and he was in exclusive possession of the same and was paying land revenue as well as rent to the Municipality. The suit land was used as a passage from the house of Plaintiff to the main road. The same is adjacent to the residential house of the Plaintiff standing over the Plot Nos. 258 and 259.

4. Defendant Nos. 1 to 3 are no way connected with the family of the Plaintiff, but were adjacent land owners. They had no right over the suit land. Unfortunately, however, on 12th June, 1970 Defendant No. 1 forcibly closed the passage by putting green fence. Consequently, a proceeding u/s 133, Code of Criminal Procedure was initiated and in the said proceeding Defendant Nos. 1 to 3 were directed to remove the encroachment. While matter stood thus, Defendant No. 3, the present Appellant, married the daughter of Defendant No. 4, the brother of the Plaintiff. Taking advantage of the said relationship and absence of the Plaintiff from the village, he managed to get his possession noted in the remarks column of the Record of Rights published by the settlement authorities. It is further alleged that being emboldened by such entry Defendant No. 3 constructed a brick wall on the passage. Having no other alternative, the Plaintiff was constrained to file the suit.

5. After receiving notice, Defendant Nos. 1 and 3 appeared and contested the suit by filing a joint written statement by taking a specific stand that the suit land belongs to them and they were in possession thereof and that the Plaintiff had no right, title or interest over the suit land as the same had been extinguished by long possession of the Defendants. In short, it is averred that the Defendants have perfected the title over the suit lands by way of adverse possession.

6. On the basis of the pleadings, ten issues were framed by the trial court. In order to substantiate the case, the Plaintiff got examined three witnesses and exhibited 12 documents. The contesting Defendants also examined three witnesses and exhibited two documents.

7. After vivid discussion of the evidence both orally and documentary, the trial court held that the suit was maintainable that it was properly valued and was not barred

under the principles of estoppel, waiver and acquiescence. Under Issue No. 7 the trial court, after discussion the basic ingredients of the adverse possession, vis-a-vis the evidence adduced by the parties, came to a clear conclusion that Defendant Nos. 1 to 3 had failed to discharge their onus to prove that they had perfected title over the suit land by way of adverse possession. It was further held that the Defendant Nos. 1 to 3 had dispossessed the Plaintiff only on 12th June, 1970 and possessed the land forcibly from that date, thus, they have not perfected title by way of adverse possession, the suit having been filed on 14th May, 1982. The trial court further held that the Plaintiff and legal heirs of Defendant No. 4 had subsisting title over the suit land and that the Defendant Nos. 1 to 3 had forcibly obstructed the passage of the suit land with effect from 12th June, 1970 and decreed the suit declaring the right, title and interest of the Plaintiff and Defendant Nos. 4 (a) to 4 (i) over the disputed property and directed to pull down the brick wall and to evict the Defendant Nos. 1 to 3 from the suit land. The trial court also directed to delete the note of possession of Defendant Nos. 1 to 3 from the Record of Rights.

8. The said judgment and decree was assailed by the present Appellant and Defendant No. 1-Chanchala Singh in the court of District Judge, Keonjhar in Title Appeal No. 53 of 1991. Learned District Judge after threadbare discussion of the evidence, both documentary and oral, held that the plea of adverse possession advanced by Defendant Nos. 1 to 3 was not established as required under law. The appellate court confirmed all the findings given by the trial court and dismissed the appeal with cost.

The said confirming judgment and decree is assailed in this second appeal by Defendant No. 3 along. While admitting the Second Appeal this Court observed that the questions indicated in paragraph-10 (a), (b) and (c) of the memorandum of appeal raised substantial questions of law, which need to be determined in the appeal. The said grounds are stated herein below:

(a) Whether the disputed land in question is to be recorded only in the name of the Respondent No. 1, when the learned trial court in answer to its issue No. 5 has concluded that the Plaintiff and the legal heirs of the deceased. Defendant No. 4, Defendant No. 4/b to 4/I and Kanchanbala Rout and Defendant No. 4/a have equal share out of the suit land and they have got subsisting title over the suit land and the Plaintiff along has no subsisting title over the suit land.

(b) Whether the Plaintiff's claim over the disputed land can be ignored when his wife Bijaya Laxmi Singh being the daughter of late Jogendra Rout is also a legal heir to the common ancestor late Digambar Rout and as yet no legal partition has been made over the joint property of Digambar Rout.

(c) Whether the learned Civil Judge (Senior Division), Keonjhar, could give title to any body when the Hon"ble Court has directed for a suo motu proceeding but no notice was issued or received by the Plaintiff to show cause in the revision and the Hon"ble

Court High Court's order was not given any effect.

9. In course of hearing, Mr. Namtoar, learned Counsel appearing for the Appellant took pains to convince this Court to go through the pleadings and evidence, though law is well settled that this Court while dealing with a Second Appeal and exercising its jurisdiction u/s 100, CPC has to confine itself only to the substantial questions of law involved and should be slow to interfere with pure questions of facts.

According to Mr. Namtoar, the lands in dispute originally belonged to Digambar, who had two sons being the Plaintiff and Defendant No. 4. Though a plea had been taken by the Plaintiff to the effect that there was amicable partition of the suit property, the said plea was negated by both the courts below. Defendant No. 4 died during the pendency of the litigation and his sons and daughters were substituted. According to Mr. Namotoar, one of the daughters of Defendant No. 4 having married the Appellant and as she had inherited the property, being one of the successor's of Defendant No. 4, the courts below have committed grave illegality in coming to the conclusion that the Plaintiff alone has title over the property and Defendant Nos. 1 to 3 should remove the brick wall standing over the passage.

10. This submission is strongly repudiated by Mr. Mohanty, learned Counsel appearing for Respondents. According to Mr. Mohanty, the Specific plea taken by Defendant Nos. 1 to 3 in the written statement was that they had acquired title by adverse possession. The courts below after vivid discussion of the evidence have negated the said plea. Question of adverse possession being a pure question of fact, the concurrent findings of the courts below may not be interfered with, by this Court. According to Mr. Mohanty, the plea taken in the second appellate stage to the effect that the Appellant had married one of the daughters of the Defendant No. 4, the brother of the Plaintiff, and that she had a share in the property cannot be decided in the present suit. Thus, this is a fit case where, the appeal should be "dismissed.

11. Heard learned Counsel for the parties at length, perused all the pleadings carefully and also went through the evidence meticulously. According to Defendant Nos. 1 to they had acquired title over the disputed property by adverse possession. They set up a plea that they had purchased the suit land by oral sale in the year 1930 and are in the possession thereof all through, through, but then records reveal otherwise. It appears that the suit plot was settled. in favour of the father of the Plaintiff-Digambar Rout in Nayabadi Case No. 4 of 1935-36. so far as the plea of oral sale is concerned, there is no evidence worth the name, that apart, the valuation of the property being more than Rs. 100/-, the plea of oral sale cannot be accepted.

12. Law is settled that onus lies on the person, who puts forth title by adverse possession. Adverse possession means hostile possession. Thus, the person claiming adverse possession is bound to prove with clear and unequivocal evidence

that his possession was adverse to the real owner and that too with his knowledge. Mere possession without hostile animus cannot constitute to be adverse possession. There must be clear and cogent evidence that the possession was hostile to the real owner and was adverse to his title. In the case in hand, Ext. A is an entry in the Yadasta, It reveals that there is a note of possession of Defendant/ios. 2 and 3 from the year 1930. However, there is some discrepancy with regard to the plot number, Ext.A relates to plot No. 354 whereas the disputed land corresponds to plot No. 257. Thus, the said entry along cannot be relied upon to ascertain possession. The oral evidence adduced by Defendant Nos. 1 and 3 are also very much shaky. The trial court, in Para-10 of the judgment, has elaborately discussed the oral evidence and has arrived at a conclusion that Defendant Nos. 1 and 3 failed to discharge the onus that they have perfected the title over the suit land by adverse possession. After going through the discussions made, this Court finds no reason to differ from it and declines to interfere with the same.

13. The trial court has declared the right, title and interest of Plaintiff and Defendant Nos. 4 (a) and 4(b) to 4 (i), the legal heirs of Jogendra Rout, original Defendant No. 4, and Kanchanabala Rout, who is the legal heir of Digambar Rout the said conclusion is just and in consonance with the evidence on record. The said decree has been confirmed by the appellate court. Thus, the substantial question framed under question No. 10 (a) stands answered.

14. So far as substantial question No. 10 (b) is concerned, after going through the judgment of both the courts below, this Court finds that the suit land, as per decree, now stands recorded jointly in the names of the Plaintiff and Defendant No. 4's legal heirs. If in fact, Defendant" No. 3, the Appellant, has a share out of the said land through his wife, it would be open for him to work out the same in accordance with law. In the present suit filed by the Plaintiff, no relief whatsoever cannot be granted to Defendant No. 3.

15. So far as substantial question No. 10 (c) is concerned, it appears that the proceeding which came before this Court earlier was one u/s 133, Code of Criminal Procedure The said proceeding had absolutely no nexus with the civil suit, which was filed by the Plaintiff for declaration of right, title and interest, eviction of Defendant Nos. 1 to 3, removal of. unauthorized construction and for recovery of possession. That apart, as the dispute was agitated before the civil court, the proceeding initiated u/s 133, Code of Criminal Procedure and orders passed in the said proceeding became redundant.

16. In view of the discussion made above, this Court is satisfied that the Second Appeal has no merit as the conclusions arrived at by the courts below are just, proper and in consonance with law. Consequently, this Court is not inclined to interfere with the impugned judgments and decrees passed by the courts below, the Second Appeal accordingly stands dismissed. Parties to bear their own costs of this appeal.