

Naran Behera (Died) and anr. Vs. Mohan Jethi and ors.

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SooperKanoon Citation : sooperkanoon.com/524581

Court : Orissa

Decided On : Jun-20-1984

Reported in : AIR1985Ori40; 58(1984)CLT169

Judge : P.C. Misra and ;G.B. Patnaik, JJ.

Acts : [Limitation Act, 1963](#) - Schedule - Articles 64 and 65; Limitation Act, 1908 - Schedule - Articles 142 and 144

Appeal No. : First Appeal No. 143 of 1972

Appellant : Naran Behera (Died) and anr.

Respondent : Mohan Jethi and ors.

Advocate for Def. : S. Misra, Adv. No. 1

Advocate for Pet/Ap. : A. Mukherjee, Adv.

Disposition : Appeal partly allowed

Judgement :

G.B. Patnaik, J.

1. Plaintiffs are appellants against the judgment and decree of the 4th Additional Subordinate Judge, Cuttack, in Title Suit No. 67 of 1970. Plaintiffs' suit is one for declaration of right, title and possession in respect of lots Nos. 1 and 2 of

Schedule A properties and recovery of possession with respect to the house standing on plot No. 2098 included in Lot No. 2 of the Schedule. The total extent of the suit land is Ac. 0.282.

2. According to the plaint case, one Ananda had two sons -- Naran and Alekha. Alekh's son is Ratha (plaintiff No. 2) and Alekh's widow is Saria (defendant No. 6). Naran is plaintiff No. 1 and his son Srikanta is plaintiff No. 3. Naran's first wife is Haramani (defendant No. 5). The further case of the plaintiffs is that after death of Alekh Naran married Alekh's widow Saria. Haramani's father is defendant No. 1 and defendants 2 and 3 are sons and defendant No. 4 is the wife of defendant No. 1. Admittedly, Schedule A properties belong to defendant No. 1 who had mortgaged Ac. 1.021 of land to Anand on 7-3-1933 under the mortgage deed (Ext. 2). Thereafter, defendant No. 1 in order to pay the mortgage dues sold Ac. 0.808 of land out of the mortgaged property to said Ananda for a consideration of Rs. 300/- under the sale deed dt 21-9-1934 (Ext. 3). Ananda died in the year 1939 and Alekh died in the year 1944. According to the plaint case, after Anand's death, plaintiffs are in exclusive possession of the land which Anand had purchased under Ext. 3. One China Jagula Raju had levied an execution case bearing Execution Case No. 245 of 1934 for satisfaction of the decree against defendant No. 1 and put the entire properties under Schedule A, but the properties were released from execution on an objection being filed by plaintiff No. 1 and Alekh under Order 21, Rule 58 of the Code of Civil Procedure bearing Claim Case No. 50 of 1940.

2. After Anand's death, defendant No. 1 filed Title Suit No. 84 of 1942 in the Court of the Munsif, Second Court, Cultack, for a declaration that Ext. 3, the sale deed was benami and for declaration of his title and possession. This suit was dismissed under Ext. 6. Against the said judgment, Title Appeal No. 161 of 1943 had been filed which was also dismissed under Ext. 7. Father having lost the suit, sons (defendants 2 and 3) fought a second round of litigation by filing a suit for a declaration that the sale deed (Ext. 3) was invalid as there was no legal necessity for the sale in question. This suit was numbered as Title Suit No. 304 of 1944 which was dismissed under Ext. 9 and an appeal against the same was also dismissed in Title Appeal No. 359 of 1945, as would appear from the certified copy

of the decree in the said appeal) Ext 12). A third round of litigation was initiated with respect to the self-same properties by the wife of defendant No. 1, namely defendant No. 4, in T.S. No. 218 of 1948 for a declaration that the suit properties were her self-acquired properties and, therefore, defendant No. 1 had no authority to execute the sale deed on 21-9-1934. This suit was dismissed for default on 27-4-1949 (Ext. 10). An application for restoration was filed in Misc. Case No. 61 of 1949 which was dismissed on contest by order dt 25-8-1949 (Ext 11). Against the said order of dismissal the matter was carried in Misc. Appeal No. 130 of 1949 which was dismissed on 23-12-1950 (Ext. 13). Civil Revision No. 75 of 1951 was carried to the High Court but the same was also dismissed on 13-7-1951 (Ext. 14).

3. On 25-4-1960, some of the lands purchased by the plaintiffs and some of their ancestral lands were acquired and compensation in respect thereof was received by the plaintiffs in Land Acquisition Case No. 2 of 1957-58 (Ext. 15). Another Land Acquisition Case No. 207 of 1962 in respect of portions of land purchased by the plaintiffs under Ext 3 were acquired and defendant No. 1 being the recorded owner was noticed Defendant No. 1 contested and claimed compensation, but it was decided in favour of the plaintiffs by order dt. 14-11-1964 (Ext. 16).

4. The further case of the plaintiffs is that though plaintiff No. 1 had married defendant No. 5 who is the daughter of defendant No. 1, defendant No. 1 took away his daughter in 1941. After losing three rounds of litigations referred to above, defendant No. 5 started a suit (T.S 76 of 1966) for maintenance and separate residence. By decision dated 30th of June, 1967. (Ext 18) the prayer for maintenance was decreed but since there was no prayer for separate residence, that point was not considered but notwithstanding the same, the plaintiffs permitted defendant No. 5 to stay separately in the house standing on plot No, 2098. Since defendants 1 to 5 made attempts to get their names recorded with respect to the suit house in the Settlement Record-of-Rights, plaintiffs being apprehensive, have filed the present suit for the reliefs as aforesaid

5. Defendants 1 to 5 filed a common written statement wherein the allegations in the plaint were denied and it was asserted that the sale deed dated 21-9-1934 executed by defendant No. 1 in favour of Anand was not for consideration but was

a sham and benami transaction. So far as the earlier litigations referred to in the plaint are concerned it was averred that they were never decided on merits. In para 8 of the written statement a plea of adverse possession was taken and further it was pleaded that the suit was barred by limitation.

6. On these pleadings, the learned Additional Subordinate Judge framed as many as nine issues and on issue No. 6 relating to the validity of sale deed dated 21-9-1934 (Ext 3) held that the findings in O.S. No. 86 of 1942 (Ext. 6) as well as in Title Appeal No. 161 of 1943 (Ext. 7) operated as res judicata and therefore, the said issue did not arise for consideration any further. Issues Nos. 1, 2, 3, 5, 7 and 8 together and the learned Judge came to hold that the plaintiffs were considered were not in possession of any of the suit properties after 1951 and within twelve years before the filing of the suit and, therefore, the defendants having possessed the properties for more than the statutory period of twelve years had perfected their title by way of adverse possession. Issue No. 4 regarding non-joinder and mis-joinder of party was not pressed on these findings, the suit was dismissed

7. Mr. Mukherjee, the learned counsel for the appellants, has raised the following contentions in this appeal: --

(1) The defendants not having taken any specific plea in the written statement as to from which point of time they have been possessing the suit properties with hostile animus, it was not open for the Court to accept the evidence regarding adverse possession;

(2) On the evidence adduced by the defendants, it is not possible for a Court of law to come to a conclusion that the defendants have perfected title by way of adverse possession; and

(3) The learned Additional Subordinate Judge committed serious error in approaching the problem on a wrong legal conception, inasmuch as he held that if the plaintiffs possession was not proved within twelve years from the date of the suit then the plaintiffs must lose the case and this erroneous approach has vitiated the subsequent findings and conclusions of possession and ultimately the judgment itself.

8. Mr. S. Misra 1, the learned counsel for the defendants-respondents, fairly conceded that the Additional Subordinate Judge was not right in holding that the plaintiffs suit would fail if plaintiffs did not establish their possession within twelve years from the filing of the suit, but he submitted that defendants had taken the plea of adverse possession and the conclusion of the Additional Subordinate Judge on that plea was unassailable. Consequently, the plaintiffs' suit had been rightly dismissed on a finding that the defendants had perfected their title by way of adverse possession.

9. Articles 64 and 65 of the [Limitation Act, 1963](#), which correspond to Articles 142 and 144 of the old Limitation Act 1908, have effected a material change in the law, with regard to suits for possession of immovable property. Under the present Act all suits for possession of immovable property have been brought under two categories; (a) suit based only on the right of previous possession and riot on proprietary title; and (b) suit based on proprietary title. In case of suits coming under (b) which are governed by Article 65 of the Limitation Act time runs when the possession of the defendant becomes adverse to the plaintiff. In other words, in suits for possession based on title even if dispossession also is alleged the defendant can succeed only if he proves that his possession had become adverse to the plaintiff beyond twelve years of the suit. The plaintiff need only prove his title and he need not show that he was in possession within twelve years of the suit. In our opinion, the learned Additional Subordinate Judge was in error and Mr. Misra's concession is wholly justified

10. On examining the written statement we find that in para. 8 it has been averred thus :--

'..... Defendant 4 is possessing her purchased lands a portion of which is included in the disputed land. The defendants 1 to 3 are possessing the rest of the disputed land as of right and for more than 12 years to the knowledge of the plaintiffs and all concerned and if their original title be found to have been lost yet by their such exclusive possession they have long acquired valid title by adverse possession which the plaintiffs are not now entitled to displace. The defendant No. 4 and her vendors have also acquired valid title to her lands even by adverse possession as

she and her vendors were in exclusive possession of such land for more than 12 years.

In the face of this averment Mr. Mukherjee is not right in his submission that the plea of adverse possession had not been taken in the written statement. The Additional Subordinate Judge, in our opinion, must be held to be justified in entertaining evidence in support of the plea of adverse possession and considering the same to come to his conclusion.

11. The only question which remains, therefore, for consideration is whether on the evidence adduced by the parties, the defendants have been able to prove the different ingredients of adverse possession with respect to the suit properties or not and since the plaintiffs title to the land has been found, it is for the defendants to prove the extinguishment of such title by perfection of their title by way of adverse possession. Possession in order to be adverse, must be continuous, hostile and open, to the knowledge of the true owner and, therefore, we will have to scrutinise the evidence to find out whether defendants have, been able to prove all these ingredients in the evidence adduced in the case. In assessing the evidence, Mr. Misra for the respondents submits that the consideration should be different with respect to different plots. According to him so far as the house standing on plot No. 2098 is concerned, the plaintiffs admit possession of the defendants, but plead a case of permissive possession, and, therefore, the plaintiffs must establish that the possession of the defendants was permissive in nature and if they fail to prove that, then it must be held that the defendants have perfected their title by way of adverse possession. So far as plots Nos. 1193, 2613 and 2648 are concerned, these plots were the subject-matter of the earlier litigation in S. O. 86 of 1942 wherein there is a finding of plaintiffs' possession and, therefore, with respect to these plots unless defendants prove that subsequent to the said decision, the defendants have again entered into possession with a hostile animus and thereby perfected their title by adverse possession, their case would fail. But so far as plots Nos. 2322, 2302, and 2178 are concerned, these were not the subject matter of the earlier suit and, therefore, the defendants evidence of possession must be considered from a different angle to find out whether they have been able to establish their hostile possession for over a

statutory period or not

12. From a perusal of Ext. 6, the decree in O. S. No. 86 of 1942, we find that plots 1 !93. 2613 and 2648 were the subject-matter of the said litigation apart from several other plots with which we are not concerned in the present suit and the said decree read with the judgment in Title Appeal No. 161 of 1943 (Ext 7). shows that the present plaintiffs' possession with respect to the properties in question was found From a scrutiny of defendants' evidence with regard to possessioa we do not find any specific case to have been made out that the defendants did enter into possession of the said property subsequent to the decree in the earlier suit and, therefore, the defendants' case of adverse possession with respect to these three plots must be held not to have been established in the present case and the plaintiffs' suit must succeed in respect thereof.

13. Mr. Mukherjee, the learned counsel for the appellants, has submitted that it is true that plots 2302 and 2178 have not been mentioned as the disputed plots in Ext 6, but this is an obvious error and a mistake in typing since the area has been correctly mentioned with respect to plot 2158, though he does not dispute that plot No. 2322 does not find place in Ext 6. It is not possible for us to accept this explanation of Mr. Mukherjee, since no evidence has been led by the plaintiffs in this regard and, therefore, we must assume that plots 2302, 2322 and 2178 were not the subject-matter of dispute in O.S. No. 86 of 1942. Accordingly, we must assess the evidence to find out whether their case of perfection of title by adverse possession has been established or not

14. There is a lot of controversy with respect to the rent receipts produced by defendant 1, and the evidence is that defendant 1 has paid the rent on behalf of Naraa These receipts range for the period from 1961 to 1968. According to Mr. Mukherjee, therefore, defendant 1 acknowledges the title of the plaintiffs as late as 1961 and, therefore, the question of perfection of title by adverse possession would not arise since the present suit is of the year 1970. For this proposition he relies on two decisions of this Court reported in (1954) 20 Cut LT 386 (Endumuru Nagaya Boitharu v. Potaju Raghunath Boitharu) and (1977) 44 Cut LT 552 : (AIR 1977 NOC 301) (Ushamani Dei v. Gandharba Barik). Mr. Misra for the

respondents, on the other hand, submits that payment of rent in the name of the original owner does not amount to acknowledgment of title and for this proposition he relies on two decisions of this Court reported in (1974) 40 Cut LT 294 (Arjun Samal v. Kailash Chandra Kanungo) and (1982) 53 Cut LT 214 : (AIR 1982 Orissa 73) (Hadibandhu Ho v. Luchia Ho). There is no doubt that there has been a conflict of views on this point and all the four decisions are single Judge decisions of this Court and Mr. Mukherjee, therefore, has pressed to decide as to which view is correct. It is not necessary for us to delve into the same in this case since on analysis of the oral evidence on record we come to a conclusion on the issue of possession.

15. There is no other documentary evidence clinching the issue of possession and, therefore, one has to depend upon the oral evidence in the case. D. W. 1 who is supposed to be a neighbouring owner speaks of possession of defendant 1 and his family with respect to the suit house, obviously the one standing on plot No. 2098. So far as the possession of other properties is concerned, his evidence is rather vague and no specific evidence has been led by him though there is some sort of general statement that defendants possess the suit properties. In cross-examination, he is not able to state the extent of land nor the plot numbers. D. W. 2 is not a witness to prove possession of the defendants over the suit properties, p. W. 3 is defendant 1 himself. He also reiterates the possession with respect to the suit house since the time of his forefathers. In regard to other properties, though he makes a general statement that 'I have been possessing the suit properties all along' no data or detailed particulars have been given either with respect to the plot numbers or area or situation or from the date from which he is in possession. Even in cross-examination, he states :--

'I do not remember if I had filed T. S. 86/42 in the Court of second Munsif, Cuttack, against Naran and Alekh for declaring the sale deed executed by me in favour of Anand to be one benami sale deed and also for confirmation of possession.'

D. W. 4 also speaks of possession of defendants over the suit house and does not speak about the possession with respect to the other properties. D. W. 5 speaks of possession with respect to the suit house.

16. This is all the evidence adduced on behalf of the defendants. In our opinion, even if all the evidence is taken into consideration yet the case of adverse possession with respect to the properties has not been made out excepting with respect to the house standing on plot No. 2098. In this view of the matter, we hold, disagreeing with the finding of the learned Addl. Sub. Judge, on the evidence adduced, that defendants have failed to establish their case of adverse possession with respect to any of the properties included in the suit excepting the house standing on plot No. 2098.

17. So far as the house on plot No. 2098 is concerned, it obviously stands on a different footing. All the defendants have categorically stated that they are in possession of the same openly and with hostile animus to the knowledge of the plaintiffs since their forefathers. Plaintiffs also admit that the house is in possession of the defendants, but make out a case that plaintiffs had given permission and, therefore, the possession must be held to be permissive. We have scrutinized the evidence adduced on behalf of the plaintiffs, but we find that apart from making an averment in the plaint, this part of the plaintiffs' case has not been established through evidence on record and, therefore, we must reject the plaintiffs' plea of permissive possession with respect to the house standing on plot No. 2098 and hold that defendants have been able to establish their title by way of adverse possession with respect to the same.

18. In the result therefore, the judgment and decree of the learned Addl. Sub-Judge with respect to the house on Plot No. 2098 are confirmed and defendants title by adverse possession with respect to the same is declared. So far as all other properties in suit are concerned, the judgment and decree of the learned Addl. Sub-Judge are set aside and plaintiffs' title is declared with respect to those properties and their possession is confirmed.

19. The first appeal is allowed in part but there would be no order for costs.

P.C. Misra, J.

20. I agree.

