
(2014) 11 OHC CK 0033
In the Orissa High Court
Case No : R.F.A. No. 155 of 2009

Babaji Nayak and Others

APPELLANT

Vs

Govt. of Orissa

RESPONDENT

Date of Decision : 28-11-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80

Citation : (2015) 120 CLT 190 : (2015) 1 ILR 409 : (2015) 1 OLR 1022

Hon'ble Judges : D. Dash, J.

Bench : Single Bench

Advocate : M.K. Rath, H. Pati and M. Bhagat, for the Appellant; Rati Mohanty, Addl. Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

D. Dash, J.—The unsuccessful plaintiffs are the appellants before this Court. They challenge the judgment and decree passed by the 2nd Additional Civil Judge (Sr. Division), Bhubaneswar, Khurda in C.S. No. 370 of 2005 dismissing their suit for declaration of right, title, interest and confirmation of possession with permanent injunction filed against the respondent. For the sake of convenience, to avoid confusion and for clarity, the parties hereinafter have been referred to as they have been arrayed in the court below.

2. Plaintiffs' case

One Parima Nayak had two sons, namely, Chintamani and Sridhar. Plaintiff No. 1 is the son of Chintamani whereas the other plaintiff is the daughter of Sridhar. Chintamani and Sridhar are dead.

The suit land under Hal Khata No. 619, Plot No. 672 measuring an area Ac.0.480 dec. in Mouza-Chandrasekharapur under New Capital in the district of Khurda (erstwhile district of Puri) corresponding to Sabak Khata No. 303, Plot No. 590 measuring an area of Ac.0.43 dec. originally was lying barren. Parima Nayak during his lifetime started possessing the said land and planted mango and other

valuable trees over there. It is stated that he enjoyed the said property without any hindrance from any side. On his death, sons of Chintamani and Sridhar stepped into the shoes of Parima and as such continued to remain in possession. It is stated that they continued to possess the said land by looking after the trees standing over there and further planting some more fruits bearing trees. In course of time, those trees received some set back. So they cultivated Mandia, Maka, Kolatha and also other rabi crops and different kinds of vegetables over the suit land. It is said that they had no other land and were depending upon the suit land and the cultivation made thereon when nobody posed any problem for the same. They used the suit land as their own. It is further stated that Parima was a landless poor illiterate rustic villager belonging to scheduled caste community. In order to maintain himself as well as his family members, he cultivated that barren land and after him his sons continued to do so making further development and then their heirs.

Such possession and enjoyment is said to be within the knowledge of the State, i.e., the defendant and the general public, more particularly, the villagers. It is further stated that during settlement operation, in the record prepared in the year 1931 under the O.T. Act, the suit lands stood recorded in the name of one Madhusudan Deb (Zamindar). But there remained note of possession in favour of two sons of Parima, namely, Chintamani and Sridhar. This record of right is said to have been published on 07.02.1931 being made effective from 07.03.1931. The note of possession continued to remain and no step was taken for its deletion at any point of time. So, it is claimed that at least from that time onwards the possession of Chintamani and Sridhar cannot be denied and stood recognized as adverse and in denial of the title of the true owner in assertion of right of ownership unto themselves. When the position stood thus, in the current settlement operation, the land has been wrongly recorded in the name of the defendant without the knowledge of Chintamani and Sridhar, the old illiterate rustic villagers. This record of right was published in the year 1988. Chintamani and Sridhar died in course of time. The plaintiffs being their legal heirs stepping into their shoes continued to possess the suit land and maintained it as before. In February, 2002 the plaintiffs having got the certified copy of the record of right came to know about such wrong recording though they were under an impression that the record of right must have been standing in the name of their father. So, they approached the Tahasildar and the settlement authorities who having assured to do the needful at last asked the plaintiffs to approach the civil court. Therefore, serving notice upon the defendant-State under section 80, C.P.C., the suit has been filed. To sum up, the case of the plaintiffs is that by virtue of their long, continuous and uninterrupted possession of the suit land since the time of their grandfather, Parima for much more than the statutory period as its owner denying the title of the true owner with necessary hostile animus claiming title unto themselves, they have perfected their title over the suit land by adverse possession.

3. The State-defendant contested the suit. While traversing the plaint averments,

it has been stated that the land stands under the classification of "Unnata Jojana Jogya" in the name of the defendant under Rakhit Khata No. 472 as per the settlement record of 1973-74 and that corresponds to the land under Sabik Khata No. 303 in the name of the Zamindar Madhusudan Dev under classification as "Puruna Padia". It is stated that after vesting of the intermediary interest, the property vested with the defendant free from all encumbrances and the same thus got recorded in the name of the defendant in successive settlements. The possession of Parima and then on his death by his two sons Chintamani and Sridhar and thereafter that of these plaintiffs have been seriously refuted that it is out and out false in order to grab the valuable land belonging to the State. It is also stated that the facts pleaded as regards plantation of trees taking care of those and then going for cultivation over the said land are all false, imaginary. Thus, it is stated that the question of perfection by title by adverse possession in respect of the suit land does not arise in the facts and circumstances of the case and it is out and out a false story sought to be projected to achieve the sole objective of grabbing the public property.

4. On such rival pleadings, the trial court has framed necessary issues. The principal one is the issue relating to the right, title, interest and possession over the suit land as claimed to have been perfected by the plaintiffs by way of adverse possession fulfilling all the requirements of law. Although three issues have been framed but for all practical purpose those intermingle with the above issue. So, the trial court appears to have rightly taken up those three issues together for decision. The answer in the ultimatum has been rendered against the plaintiffs that they have not perfected right, title and interest over the suit land by way of adverse possession and they were/are also not in possession of the suit land.

5. Learned counsel for the appellants submitted that overwhelming evidence being there on record as regards the factum of possession of the suit land right from the time of Parima and followed up till now by the plaintiffs, the trial court has erred in law by not taking those into consideration in their proper prospective and rather in a half hearted manner has examined the evidence and the outcome is completely the erroneous answer leading to an unmerited dismissal of the claim of the plaintiffs. He further contended that their being note of possession in the name of the predecessors-in-interest of the plaintiffs, the same ought to have been given its due weightage with the presumption of correctness being attached to it and in that event the burden was on the defendant to dislodge the said presumption which in the case has not been done. So, the continuity of possession by the successors-in-interest is also to be presumed in view of the oral evidence of the plaintiffs that they are now in possession. It is submitted that the trial court failed to consider those aspects and thus the finding is unsustainable and it ought to have been given favouring the plaintiffs claim and entitlement to the reliefs as prayed for. Therefore, he urged that the plaintiff's suit is to be decreed.

6. Learned counsel for the State supported the finding of the trial court. According to her, the plaintiff's have utterly failed to establish mandatory legal requirements as regards the establishment of the claim over the suit land by way of perfection of title by adverse possession. She further submitted that the physical possession in the case resting with the plaintiffs has not been proved by adducing clear, cogent and acceptable evidence and then it has not been shown to be open, continuous, peaceful, without any interruption and to the knowledge of the true owner that too by denying the title of the said owner with hostile animus. Thus, she contended that the trial court did commit no error in rendering the answer to the issues against the plaintiff resulting in the dismissal of the suit.

7. Keeping the rival submission in mind, this Court is now called upon to judge the defensibility of the finding of the trial court upon examination of the evidence on record in the touchstone of the respective pleading of the parties. Before taking up that exercise it is felt appropriate to take note of the position of law.

The position of law is too settled that a person who sets up a case of perfection of right, title and interest over a piece of immovable property by adverse possession and thereby seeks to deprive the true owner asserting whatever right, title and interest he had, since been extinguished, the burden squarely rests on him to establish not only to prove the factum of physical possession for upward of the statutory period but also the fact that such possession for such length of time over the prescribed statutory period at the minimum has all along right from the inception been in fulfillment of the legal requirements, i.e., Nec-vi, Nec-clam, Nec-precario, i.e. peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner.

So, in a claim of acquisition of title by adverse possession the party, who pleads the same in staking the claim over the subject matter of a suit or proceeding either as a plaintiff or defendant, he is under compulsive legal obligation to establish those above mentioned aspects by clear, cogent and acceptable evidence, since in such cases, the original rightful owner is being deprived of his property not only by virtue of his inaction and remaining in slumber but also in the hands of a wrong doer whose action beginning with wrong in this way is being declared as to have become right and thus is legalized.

8. In Parsinni (Dead) by Lrs. and Others Vs. Sukhi and Others, , the Apex Court held that:

".....The burden undoubtedly lies on them to plead and prove that they remained in possession in their own right adverse to the respondents. The party claiming adverse possession must prove that his possession must be "nec vi, nec clam, nec precario" i.e., peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner."

XX XX XX

"The concept of adverse possession contemplates a hostile possession, i.e., possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person who does not acknowledge the other's rights, but denies them." For deciding whether the alleged act of a person contributed adverse possession, the animus of the person doing those acts is the most crucial factor.

The judgment of the Privy Council in the case of "Ejaz Ali Qidwai v. The Special Manager, Court of Wards, Berhampur Estate, AIR 1935 PC 530, having been referred to by the Apex Court the following passage has been quoted:

"The Principle of law is firmly established that a person who bases his title on adverse possession, must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed." Thus, for deciding whether the alleged acts of a person constitute adverse possession, the animus of the person doing those acts is the most crucial factor.

In the case of Thakur Kishan Singh (dead) Vs. Arvind Kumar, , the Apex Court, in para 5, held as follows:

".....5. As regards adverse possession, it was not disputed even by the trial court that the appellant entered into possession over the land in dispute under a licence from the respondent for purposes of brick kiln. The possession thus initially being permissive, the burden was heavy on the appellant to establish that it became adverse. A possession of a co-owner or of a licensee or of an agent or a permissive possession to become adverse must be established by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of real owner. Mere possession for however length of time does not result in converting the permissive possession into adverse possession."

In an other decision in case of T. Anjanappa and Others Vs. Somalingappa and Another, , it has been held that mere possession, how-so-ever long, does not necessarily mean that it is adverse to the true owner and in order to constitute adverse possession, the possession must be proved to be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. It was further held that classical requirement is that such possession is in denial of true owners' title and must be peaceful, open and continuous.

Also in Govindammal Vs. R. Perumal Chettiar and Others, , it is held that there must be a hostile, open possession, denial and repudiation of rights of competitor and this denial and repudiation must have been brought home to the knowledge of the competitors.

9. The plaintiffs have not pleaded in the plaint from which year or even approximately from which time Parima began to possess the suit land and also when he died and so also when his two sons, namely, Chintamani and Sridhar

began to possess, at least to show as to for how many years Parima remained in possession and then for what length of time his two sons possessed and since when for what length of time these plaintiffs are in possession. It is simply stated that the land belonged to the State-defendant and was lying barren and Parima began to possess it by planting some fruit bearing and other trees which were taken care of. Neither it has been pleaded nor it has been stated in evidence as to where Parima was then residing and so also where Chintamani and Sridhar were residing with their family at least to show that they had some reason or scope to possess having a purpose behind it. Simply, it has been evasively pleaded that the possession continued. Now, let us have a glance at the evidence of P.W.1 who is one of the plaintiffs.

9(a). P.W.1, the plaintiff No. 1 has proved two records of right. He has stated that though the land was recorded in the name of defendant a note of possession remained in the name of his father and uncle. Here, it is for the first time introduced in the evidence that since 1931 they have been possessing the suit land. He further states to have taken no steps for correction of record of right. When he has stated that he has been staying at distance of about 200 to 300 feet away from the suit land he has not stated as to if the suit land adjoins the land over which his house is situated. Most importantly, he has stated that he had/has no knowledge if the suit land belonged to one Madhusudan Dev and if the same vested with the State who became the right owner. Next, he admits that he is not a landless person when their averment in the plaint is completely otherwise. Therefore, accepting for a moment that the plaintiffs since the time of their ancestor remained in possession of the suit land, it is not found to be in denial of the title of the true owner and to the knowledge of the true owner. If the person in possession is not aware as to who is the owner, then where arises the question of denial of the title of the true owner and also that the possession was with and in exercising all those rights of the true owner. The plaintiff having deposed to have not known whether the State is the owner of the property, their possession for any length of time descending down from the hands of their ancestors puts them nowhere in so far as their claim is concerned and it has to be thus deemed to be that of mere trespassers or squatters. Even the entry of forcible possession in the record-of-right although carry evidentiary value but said entry cannot lead to a presumption as regards continuity of possession fulfilling all other legal requirements for perfection of title by way of adverse possession.

9(b). With the above when the evidence of P.W.2 is seen, it again reveals a picture as if Parima Nayak, the grandfather of the plaintiffs had acquired the land. In Para-3 of his deposition he has stated that "though before 1931 deceased-Parima Nayak acquired the land, after his death Chintamani and Sridhar became the full owner of the suit land from 1931". This completely gives an axe blow to the trunk of the case of the plaintiffs cutting it across. If Parima Nayak had acquired the land, no such mode of acquisition is pleaded or proved, so as to say that the property has devolved upon these plaintiffs. This acquisition

of land has time and again been repeated by the P.W.2 during his examination on oath. He has further avoided to say as to from which year the fathers of the plaintiffs possessed the suit land. The evidence of P.W.3 is that the plaintiffs are in possession of the suit land since the time of their father by growing Rabi crop. His evidence is that for more than 100 years the possession has remained in the hands of the ancestors of the plaintiffs and it was known to the defendant that the plaintiffs are the owners.

The decisions cited by the learned counsel for the appellants in case of Radhamani Dibya and Others Vs. Braja Mohan Biswal and Others, ; Dandapani Naik Vs. State of Orissa and Another, ; Jagabandhu Sahu and Others Vs. Commissioner of Land Records and Settlement and Others, ; Baikunthanath Barik (dead) after him Hemalata Barik and Others Vs. Nilamani Barik (dead) after him Smt. Sabitri Barik and Others, and Special Secretary to Govt. in General Administration Deptt. and Another Vs. Shri Bansidhar Naik, are all distinguishable in the facts and circumstances as also the evidence on record as discussed so as to come to the aid of the case of the plaintiffs.

In view of above discussion of evidence and pleadings as well as the reasons, the plaintiffs are found to have failed to discharge the burden of proof resting on them to establish their claim of perfection of title over the suit land by way of adverse possession.

Therefore, even on independent examination of the evidence in the touch stone of the pleadings and the settled law for answering those issues, this Court's answer remains the same as it has been rendered by the trial court. Thus the same is hereby affirmed.

In the result, the appeal stands dismissed and in the circumstances without cost.