

(1967) 01 OHC CK 0013

In the Orissa High Court

Case No : Second Appeal No. 192 of 1964

Badridas Goenka and Others

APPELLANT

Vs

Gopal Jew Thakur and Others

RESPONDENT

Date of Decision : 02-01-1967

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 1, 100 , 101

Citation : AIR 1967 Ori 99 : (1967) 33 CLT 995

Hon'ble Judges : G.K. Misra, J

Bench : Single Bench

Advocate : B.K. Pal, Bijoy Pal and A. Mohanty, for the Appellant; R.N. Misra, S.K. Dutta and R.C. Patnaik, for the Respondent

Final Decision : Allowed

Judgement

G.K. Misra, J.—Plots 369 and 370 belong to the plaintiffs. Plot 371, belonging to the defendant, lies adjacent to plaintiffs land to the southwest. plaintiff. purchased their land by a registered sale deed (Ex. 3) on 30-4-1012. A Dharmahala was constructed near about the year 1916 as appears from the plan (Ex. 4). The dispute relates to the south-western wall of the plaff's. kitchen block. A two storeyed kitchen building stands on the wall. The wall had cornices to the western side and built on sufficient foundation protruding by four to five inches over the ground surface. Defendants cut the disputed wall on 7-6-58 and 22-6-58 to the extent of 7" x 10" x5" and cut the cornices and plaster and white-washed the same. plaintiffs. claim title to the wall which they have constructed when the original Dharmashala was built and also by acquisition of title by adverse possession due to long, continuous and undisturbed possessions in their own right, title and interest for over 40 years.

Defendants assert that they constructed the wall and have been in possession of it all through. Thus plaintiffs" title to the wall was challenged. In paragraph 16 of the written statement, the specific case of the defendants was set up as:

The southern boundary wall of the plaintiff's building was raised adjoining the defendant's northern boundary wall and they are two separate walls though adjoining to each other. Similarly the western boundary wall of the kitchen part of plaintiff's building was raised just adjoining the eastern boundary wall of the defendant's building and they are two separate walls though adjoining each other. Hence the plaintiffs neither have nor can they claim any right over the disputed portion of the eastern boundary wall of the defendants.

2. The learned trial court accepted, plaintiff's case in toto and rejected the defence version. It held that the disputed wall was constructed by the plaintiff and that they had acquired title to the wall by prescription, for being in undisturbed possession thereof in their own right, title and interest for more than the statutory period. In appeal, the learned District Judge took a contrary view on the first finding and held that the defendants constructed the disputed wall and the plaintiff had no title to it. As to the question of acquisition of title by adverse possession, he found as follows:

An alternative case of adverse possession is no doubt made in paragraph 10 of the plaint but no issue on that point has been framed. The learned lower court has not given any alternative finding on this question.

He accordingly did not go into the question of acquisition of title by the plaintiff by prescription.

3. Mr. Pal raised two contentions:

(i) The learned District Judge committed error of record in saying that the trial court did not record a finding on the question of adverse possession. As there was clear pleading on the question of adverse possession and the parties went into trial with full knowledge of that question, the lower appellate court should have recorded a finding on it even in the absence of a specific issue on the point and,

(ii) The District Judge committed error of record and misdirected himself in overlooking certain admitted features in recording the finding that the disputed wall was constructed by the defendants. The finding is hit by Section 100(1)(c) C. P.C. inasmuch as he committed a substantial defect in the procedure which has produced error in the decision of the case upon merits and that such a finding is not binding on this court in second appeal.

4. That first contention is unassailable. In paragraph 10 of the plaint, there was a clear averment that the plaintiff were in possession of the disputed wall since the construction of the Dharmashala building in the year 1916 and that they had got indefeasible title to the suit property being in possession of the same openly, peaceably and adversely to the entire world for more than 40 years. In the written statement defendants claimed that they were all through in possession and not the plaintiffs. Evidence was led on this question and parties fought out the suit, each party repelling the claim of possession of the other. The learned

trial court in paragraph 8 of the Judgment recorded a finding on the question of adverse possession which may be quoted in his own words:

Assuming for the sake of argument that the plea taken by the defendants in course of evidence be accepted, yet they cannot lay any claim on the disputed wall. If his forefathers allowed the Dharmashala to be construed led over their wall and the defdt. is not aware of the condition on which it was allowed to be done, it cannot but be found that the plaintiff. with full knowledge of the forefathers of the defendants have asserted their right of possession over the disputed wall and their possession is more than 12 years before the institution of the suit inasmuch as the Dharmashala has been constructed at least since 1915.

The learned District Judge committed an error of record in saying that trial court did not record any finding on the question of adverse possession. He also committed an error of law in observing that this question did not require examination in the absence of an issue. In *Nedunuri Kameswaramma Vs. Sampati Subba Rao*, their Lordships observed thus:

"No doubt no issue was framed and the one which was framed could have been more elaborate. But since the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case or that there was that mistrial which vitiates proceedings"

The aforesaid observations have full application to the facts and circumstances of this case. There was pleading on the point. Both the parties entered into evidence with full knowledge of the respective cases that each party claimed exclusive possession of the disputed wall for over the statutory period. The learned lower appellate court should have recorded a finding on the question of acquisition of title by adverse possession. Even assuming that the disputed wall had been constructed by the defdts., plaintiff". suit is bound to succeed if the question of adverse possession is decided in their favour. The case must be remanded to the lower appellate court for determination of this vital issue

5. The finding of the lower appellate court that the defdts. and not the plaintiff constructed the disputed wall is essentially one of fact. Mr. Pal however, placed reliance on Section 100(1)(c), C. P. C in contending that the learned lower appellate court committed a substantial defect in the procedure inasmuch as he overlooked material admissions by defendant-2 (D. W 3) and that such omission has produced an error in the decision of the case upon merits. Some of the essential features on which Mr. Pal placed reliance may be noticed.

(i) Though the defendants came forward with a specific case that the disputed wall constitutes two walls the eastern part of it belonging to the plaintiffs and the western to the defdts., defdt. 2 admitted that the disputed wall is one and the same and it does not constitute two separate wells. Defendants' positive case being that the plaff/s kitchen block stood on the disputed wall, plaintiff". title to the wall should have been upheld on the basis of the admission.

(ii) Defdt. 2 admitted that in 1930 the back rooms excepting the wall towards the Dharmashala which was constructed before 1919, were all demolished.

(iii) Defdt. 2's admission is to the effect, "Our forefathers allowed Dharmashala to be constructed on our wall". "I cannot say on what condition they allowed the construction of the Dharmashalla."

(iv) Defdt. 2 admitted to the effect, "The three storeyed building of Goenka Dharmashala rests on the disputed wall. I cannot say if the beams and rafters of the Dharmasala rest on the disputed wall".

The evidence including the aforesaid features, relevant to the question of adverse possession, is also relevant to the question of construction of the disputed wall. The learned advocates for the parties frankly stated that expression of any view on the aforesaid features might influence the decision of the lower appellate court on the question of adverse possession also. That being the position, the finding on the question of construction is set aside and the lower appellate court would go through the entire evidence and record A finding on the question as to who constructed the disputed wall.

I refrain from expressing any view on the aforesaid features.

6. The position may be summed up. The case would go back to the lower appellate court subordinate to it. Parties would not be permitted to lead any further evidence. The following three questions would be determined in the appeal.

(i) Was the disputed wall constructed by the plaintiff, for the defendants?

(ii) Have the plaintiff, acquired title to the disputed wall by prescription, if they had not constructed it?

(iii) Did the defendants cause injury to the wall? If so, what would be the quantum of damages? To what reliefs the plaintiff. are entitled?

7. In the result, the judgment of the lower appellate court is set aside and the suit is remanded to it for disposal in accordance with law and the observations made above. Costs to abide the result.