
(2010) 06 OHC CK 0008
In the Orissa High Court
Case No : O.J.C. No. 2777 of 1998

Banamali Ojha

APPELLANT

Vs

Musi Mallick and Others

RESPONDENT

Date of Decision : 24-06-2010

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 —
Section 36, 37
Registration Act, 1908 — Section 17, 49
Transfer of Property Act, 1882 — Section 118, 53(A), 54

Citation : (2010) 110 CLT 582

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

Bench : Single Bench

Final Decision : Dismissed

Judgement

A.S. Naidu. J.

1. The Petitioner seeks to assail the Order Dated 28.1.1998 passed by the Commissioner, Consolidation, Board of Revenue, Orissa, in R.C. Nos. 3/1997 & 4/1997. The said revisions were u/s 36 of the Orissa Consolidation of Holdings & Prevention of Fragmentation Land Act, 1972 (hereinafter called as the "Consolidation Act").

2. For appreciating the inter se controversy, it would be prudent to refer to some of the facts, which are relevant :

Nilei @Nilamani Ojha was the father of the Petitioner. He was the recorded owner in respect of lands appertaining to C.S. Khata No. 229, Plot No. 1539 measuring Ac.0.23 decs. The said land corresponds to Consolidation Khata No. 225, Plot No. 999 having area of Ac.0.24 des.

3. Similarly, Bhaskar Mallick, the predecessor-in- interest of Opp. Party Nos. 1 to 3 was the recorded owner in respect of Ac.0.14 decs of land appertaining to C.S.

Khata No. 115, Plot No. 856, corresponding to Consolidation Khata No. 275, Plot No. 850 having an area of Ac.0.15 decs.

4. According to the parties, on the basis of an unregistered exchange deed executed on 27.5.1955 both the plots were exchanged inter se between Nilei @ Nilamani Ojha & Bhaskar Mallick. In other words by means of the aforesaid unregistered exchange deed Nilei @ Nilamani Ojha became the owner of Plot No. 656 & Bhaskar Mallick became the owner of C.S. Plot No. 1539.

5. After the mouza in which the lands are situated, was brought within the purview of Consolidation Act, by issuance of a notification, both the parties on the basis of exchange deed filed objections to record the exchanged plots in their favour respectively. The Consolidation Officer after hearing parties did not accept the unregistered exchange deed & rejected both the objection cases. According to the Consolidation Officer, the valuation of the lands being more than Rs. 100, no exchange or transfer of right was permissible by means of a unregistered deed.

6. In the year 1991 the final Record of Rights was published. Bhaskar Mallick gave up possession over plot No. 1539. Ac.0.23 decs which merged with the Chaka of Nilei @ Nilamani Ojha. The Petitioner's family also gave up possession of plot No. 856 having an area of Ac.0.14 decs with a condition that they may be permitted to possess the said plots for a period of one year i.e. till completion of construction of their own house.

Dispute started when Petitioner did not vacate the possession & continued to occupy the plot forcibly. Consequently, T.S. No. 151/ 1993 was filed in the Court of Civil-Judge (Sr. Division), Jagatsingpur with a prayer to evict the Petitioner from the suit plot & to hand over possession thereof to the contesting Opp. Parties. Unfortunately, as Consolidation Act was under operation in the Mouza, the suit abated. After dismissal of the suit, Petitioner filed Consolidation Revision No. 745/1993 u/s 37 of the Consolidation Act. The Commissioner after hearing parties, remitted the revision to the Consolidation Officer with direction to examine the validity of the unregistered exchange deed, in the absence of plea of adverse possession. The Consolidation Officer held that the possession being permissible in nature cannot be treated as adverse.

7. Being aggrieved by the said order, Opp. Parties 1 to 3 preferred appeals before the Deputy Director, Consolidation which were registered as Appeal Nos. 11 & 12 of 1996. The Deputy Director dismissed both the appeals on the ground that the exchange was made by mutual consent & as such the parties cannot back out.

8. Being aggrieved by the order of the Deputy Director Opp. Parties 1 to 3 preferred Consolidation Revision before the Commissioner which was registered as R.C. Nos. 3/1997 & 4/1997. Commissioner declined to accept the theory of mutual exchange & directed to record Plot No. 580 having an area of Ac.0.15 decs in favour of the Petitioner & plot No. 999 having an area of Ac.0.24. decs in favour of Opp. Parties 1 to 3. The said order is assailed in this Writ application.

9. Mr. Kar, Learned Counsel appearing for the Petitioner, drawing attention of this Court to the deed of exchange, a copy of which is filed & marked as Annexure-1, submitted that by mutual consent the parties exchanged their lands & started possessing the lands which were allotted to them in exchange. The said action amounts to a contract & a party can defend their possession under a contract in consonance with Section 53A of the Transfer of Property Act. Further, according to Mr. Kar the unregistered document is admissible & can be considered for collateral purpose of proving possession. In short, according to Mr. Kar, though by virtue of the unregistered deed no title passed, a party in possession of the lands by virtue of the exchange deed continuously, would acquire title after the stipulated period of twelve years.

10. The aforesaid submissions are strongly repudiated by Mr. Samantaray, Learned Counsel appearing for Opp. Parties 1 to 3. According to him, the valuation of the property being more than Rs. 100 no right, title & interest shall pass by means of a deed nomenclatured as a deed of exchange. In consonance with Section 118 of the T.P. Act when two persons mutually transfer the ownership of one thing for the ownership of another, neither thing nor both things being money or the transactions is called an "exchange". An exchange can be affected only in the manner provided for in the transfer of such property by sale or other means.

Section 54 of the Transfer of Property Act defines the word "sale", According to the said Section "sale" is a transfer of ownership in exchange for a price paid or promised or part paid or part promised. Such transfer so far as tangible immovable property of the value of Rs. 100 & upwards can be made only by a registered instrument. of course in a case where valuation of the tangible of immovable property is less than Rs. 100 transfer can be effected either by registered instrument or by delivery of property.

Section 49 of the Registration Act deals with effect of non- " registration of documents required to be registered. Such documents confers no title being contrary to the provisions of Section 49 read with Section 17 of the Act.

11. In order to appreciate the inter se controversy, this Court diligently heard Learned Counsel for the parties & also perused the pleadings as well as the documents annexed thereto meticulously. There is no dispute between the parties that the father of the Petitioner was the recorded owner having valid right, title & interest over Ac.0.23 decs. of land appertaining to Plot No. 1139 of C.S. Khata No. 229 corresponding to Plot No. 999 of Consolidation Khata No. 225 having an area "of Ac.0.24 decs. There is also no dispute that the ancestors of Bhaskar Mallick were the absolute owner in respect of Ac.0.14 decs appertaining to Plot No. 856 & C.S. Khata No. 115 corresponding to Ac.0.15 decs. out of Plot No. 580 of Consolidation Khata No. 275. Admittedly, there is no registered document executed by any of the parties, parting their right, title & interest in respect of the lands of which they were the absolute owners. The Petitioner claims title over the disputed lands by virtue of an unregistered deed of

exchange dt. 27.5.1955 Mr. Kar fairly admits that even though by means of such unregistered deed of exchange, no title was covered, but as the Petitioner was in possession of the lands continuously on his own right & to the knowledge of all concerned for more than twelve years, they have accrued valid, right, title & interest over the same.

12. The only question which needs to be determined in this Writ application is as to whether by virtue of the unregistered deed of exchange coupled with possession, the Petitioner can claim title. So far as the validity of the unregistered deed of exchange is concerned, there is no second thought that the property could not have been vested with the Petitioner in the absence of a valid transfer. In consonance with Section 54 of the T.P. Act, there could be no transfer or exchange, except under a registered document. Thus, the plea of the Petitioner that he had acquired title by virtue of the deed of exchange can not be sustained.

13. The only other question which needs to be considered is as to whether the Petitioner was in possession of the lands in dispute & if so from which date & as to whether he has acquired title by adverse possession. Relying upon the decision of the Allahabad High Court in the case of Salamat Uz. Zamani Begam v. Mesha Allah Khan and Ors. reported in 1917 (XL), Mr. Kar submitted that if the transaction has been completed & by arrangement arrived one of the parties is in possession of the lands, he should not be dispossessed. The facts of the said case are completely different. Even accepting the argument of Mr. Kar that unregistered deed of exchange executed in the year 1955 can be utilized for collateral purposes, this Court finds that possession was delivered in course of consolidation proceeding only in the year 1991. The impugned order further reveals that the Petitioner was permitted to occupy the lands for specified period, i.e. till he constructs his house. Law is well settled that if a person is allowed or is permitted to occupy a piece of land, his induction being permissive in nature, he cannot claim adverse possession. That apart, a suit was filed in the year 1993 to dispossess the Petitioner. The suit abated as the consolidation proceedings were in progress. Perusal of the orders passed by the consolidation authorities also reveal that the Petitioner at no point of time claimed title by adverse possession. It is no more *res integra* that a person claiming title by adverse possession, is required not only to plead the same but also adduce evidence & prove the said plea. The Consolidation Officer has arrived at a conclusion that the Petitioner had never claimed title by adverse possession nor there is any evidence to reveal that the Petitioner had satisfied the basic ingredient to prove adverse possession.

14. In view of the aforesaid clear findings & position of law, this Court finds that the revisional authority has not committed any illegality or irregularity. That apart, while exercising jurisdiction under Articles 226 & 227 of the Constitution of India, this Court does not sit on appeal, over the decision of the Courts below or Tribunal. It only exercises its power of superintendence. The said power has to be exercised sparingly & only in special circumstances in appropriate cases, if

the Court finds an apparent error or that the finding of fact has been arrived at by non- consideration of material evidence. The order passed by the Courts below does not suffer from any such patent illegality or error. This Court is therefore not inclined to interfere with the same. The Writ application is accordingly dismissed.