
(1982) 11 OHC CK 0011
In the Orissa High Court
Case No : First Appeal No. 111 of 1970

Baruna Giri and Others

APPELLANT

Vs

Rajakishore Giri and Others

RESPONDENT

Date of Decision : 04-11-1982

Acts Referred:

Limitation Act, 1963 — Article 54, 64, 65

Stamp Act, 1899 — Section 29

Transfer of Property Act, 1882 — Section 53A, 54, 55(1)

Citation : AIR 1983 Ori 107 : (1983) 55 CLT 77

Hon'ble Judges : P.K. Mohanti, J; B.N. Misra, J

Bench : Division Bench

Advocate : R.N. Sinha, for the Appellant; S.C. Mohapatra, for the Respondent

Final Decision : Allowed

Judgement

P.K. Mohanti, J.—This is a plaintiffs' appeal arising out of a suit for declaration of title to and recovery of possession of the suit lands described in Schedule "B" of the plaint.

2. The plaintiffs belong to village Kudarsahi in the district of Singhbhum in Bihar while the defendants belong to village Brahmanpose in the district of Mayurbhanj in Orissa. Distance between the two villages is about 12 miles. The suit lands are situate at the village of the defendants. The case for the plaintiffs was that their forefathers finding it difficult to cultivate the suit lands and being unable to carry paddy from Orissa to Bihar on account of Control Orders imposing restrictions on movement of paddy let out the suit lands to Chandra Mohan Giri, the father of defendants 1 and 2 on Thika basis on a cash rent of Rs. 80/-. Chandra Mohan Giri cultivated the suit lands as a lessee till his death which occurred in January, 1965. He was then in arrears of cash rent for the year 1964-65. So the plaintiff No. 1 Baruna Giri and late Krutibas Giri, the father of plaintiffs 2 and 5 and husband of plaintiffs 6 and 7, requested defendant No. 1 to pay up the arrears and continue cultivation of the suit lands on Thika basis. Defendant No. 1 having

refused to pay, the plaintiffs decided to resume cultivation and accordingly they ploughed the suit lands. But subsequently on 6-5- 1966 when some of the plaintiffs went to sow paddy the defendants 1 and 3 accompanied by a large number of men committed rioting. During the occurrence Krutibas Giri sustained fatal injuries which resulted in his death. As the defendants did not give up possession, the plaintiffs filed the suit for the aforesaid reliefs.

3. The defendants denied, the plaint allegations and contended that the fore-fathers of the plaintiffs entered into a contract to sell the suit lands to Chandra Mohan Giri, who was the manager of the joint family of the defendants, for a consideration of Rs. 400/- and executed a deed of contract on 23-3-1936 and delivered possession of the same on receipt of an advance of Rs. 200/- towards the consideration money. On 9-12-1936 Baruna Giri and Krutibas Giri received the balance consideration of Rs. 200/-but as their co-sharers were residing in the district of Singhbhum and were not available at a time the sale deed could not be executed and registered. Since 23-3-1936 the defendants and their predecessors-in-interest have been possessing the suit lands as of right openly and adversely to the knowledge of the plaintiffs. Late Chandra Mohan Giri filed Money Suit No. 70/43-44 against Siropani Giri for recovery of a loan of Rupees 300/- and obtained a decree on 30-10-1943. Siropani filed a petition (Ext. E) on 12-2-1947 before the S. D. O. Panchpir alleging therein that Chandra Mohan Giri was in possession of the suit lands on the basis of a usufructuary mortgage bond and that although the loan had been paid up he had not delivered possession of the same. This petition was registered as Raj Case No. 446/1946-47. Chandra Mohan Giri filed a counter (Ext. A/2) contending that there was a contract for sale of the suit lands for a sum of Rupees 400/- out of which an advance of Rs. 200/ was paid on the date of the contract, that is, 23-3-1936 and the balance was paid on 9-12-1936 and that he was in possession of the suit lands by virtue of the contract. The S. D. O. directed the parties to approach the Civil Court for appropriate relief. Upon these allegations the defendants contended that they had acquired title to the suit lands by adverse possession.

4. The trial court, on a consideration of the evidence led by the parties, disbelieved, the plaintiffs' case, and held that the defendants have been in possession of the suit lands since 1936 by virtue of the contract, that they claimed hostile title since 1946 to the knowledge of the plaintiffs and by the date of the suit they had perfected their title by adverse possession. Upon such findings the plaintiffs' suit was dismissed.

5. The findings of the trial court about genuineness of the deed of contract and acquisition of title by the defendants by adverse possession are assailed in this appeal as being contrary to law and facts.

6. The deed of contract (Ext. C) is as old as it purports to be. It is a thirty years' old document and has been produced from proper custody. The Court may therefore presume its genuineness u/s 90 of the Evidence Act. It has also been duly proved by D. W. 3 Sartuk Giri. It is in evidence that Ext C was seized by the

police in connection with the occurrence of rioting which took place on 6-5-1966 between the parties and on 7-10-1966 it was admitted, in evidence in Sessions Trial No. 13/34-M of 1965 in the court of the Assistant Sessions Judge of Baripada. It was referred to in the petition dated 16-2-1947 (Ext. E) filed by Siropani Giri in Raj Case No. 446 of 1946-47. It was also relied upon by late Chandra Mohan Giri in his counter (Ext. A-2) filed, in the aforesaid Raj Case. On a reappraisal of the evidence on record we have no manner of doubt in our minds about the genuineness of the deed of contract (Ext. C).

7. The finding of the trial court that the defendants have been in possession since 1936 is not disputed before us. The pertinent question that arises for consideration is whether such possession can be said to be adverse to the plaintiffs. Possession is not adverse when intention to hold adversely is lacking. A person who claims title by adverse possession must show by clear and unequivocal evidence that his possession was adverse to the real owner. Possession to be adverse must be possession by a person who does not acknowledge the owner's title, but denies the same.

A contract for sale has been defined in Section 54 of the Transfer of Property Act as follows:--

"A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property."

Thus it is clear that even after the contract to sell, title clearly resides in the vendor, and even though the proposed vendee has taken possession, his possession is under the contract and is, therefore, clearly permissive. Where, therefore, the origin of possession of the proposed vendee, is proved to be permissive it will be presumed to be so un-less and until something happened to make it adverse.--Vide Sheodhari Rai and Others Vs. Suraj Prasad Singh and Others, . To put it differently, unless the proposed vendee asserts any hostile or overt act to show that he disclaimed the title of the vendor, his possession would not be adverse. The mere fact of long possession is not sufficient to alter the character of permissive possession into an adverse one.

The deed of contract (Ext. C) on the strength of which the defendants claimed to have obtained possession contemplates the execution and registration of a sale deed by the plaintiffs. Thus, the defendants acknowledged and recognised the title of the plaintiffs to the suit property and it is only on that basis that they entered into possession. Possession which is referable to a lawful title can never be considered adverse. In the present case, possession of the defendants is referable to the contract of sale (Ext. C). They are, therefore, not entitled to claim adverse possession. In the case of Annamalai Chettiar v. Murthiah Chettiar ILR (1965) Mad 254 a Division Bench of the Madras High Court held as follows:--

"In the case of an executory contract of sale where the transferee is put in

possession of the property in pursuance of the agreement of sale and where the parties contemplate the execution of a regular registered sale deed the position is different. The purchaser who gets possession in such cases is in possession in a derivative character and in clear recognition of and in acknowledgement of the title of the vendor. The animus of the purchaser throughout is that he is in possession of the property belonging to the vendor, and that the former's title has to be perfected by a duly executed registered deed of sale under which the vendor has to pass on and convey his title.

XX XX XX XX

.....In the instant case the possession of the respondent was in pursuance of and under the agreement of sale, right from the inception, said, therefore, clearly permissive in character besides being in recognition and acknowledgement of the title of the owner

We are of the clear opinion that in the conception of adverse possession there is an essential and basic difference between a case in which the other party is put in possession of the property by an outright transfer, both parties stipulating for a total divestiture of all the rights of the transferor in the property, and a case in which, there is a mere executory agreement of transfer both parties contemplating a deed of transfer to be executed at a later point of time. In the latter case the principle of estoppel which applies between mortgagor and mortgagee or a lessor and lessee clearly applies, estopping the transferee from contending that his possession, while the contract remained executory in stage, was in his own right and adversely against the transferor. Adverse possession implies that it commenced in wrong and is maintained against right. When the commencement and continuance of possession is legal and proper, referable to a contract, it cannot be adverse."

We are in complete agreement with the view taken in the above case.

8. It is contended on behalf of the defendants that there was assertion of hostile title by Chandra Mohan Giri in his counter (Ext. A-2) filed in Raj Case Ho. 446 of 1946-47 and since then their possession became adverse to the plaintiffs. The statement contained in Ext. A-2 carries no denial of the title of the plaintiffs; on the other hand it implies an admission of that title. It is clearly stated therein that Chandra Mohan Giri was in possession on the strength of the contract. A person who admits permissive possession cannot plead a prescriptive title. There is no other evidence to show that the defendants had converted their permissive possession into adverse possession by any overt act showing unequivocally to the plaintiffs that they intended to hold the property as their own or in their own right against the plaintiffs.

9. The next contention is that the possession of the defendants became adverse from the date when their right to sue for specific performance of the contract became barred by limitation. Under Article 54 of the Limitation Act the limitation for specific performance of a contract is three years and limitation is to be

counted from the date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused. It is alleged that the statement of Siropani Giri in his petition dated 16-2-1947 (Ext. A-2) amounted to a denial of the contract and from that date the defendants got notice of the refusal of performance and their right to sue for specific performance became barred three years after 16-2-47, that is to say 16-2-50. It is contended that the possession of the defendants became adverse to the plaintiffs from 16-2-1950 and the present suit having been filed on 21-12-1967 it should be held that the defendants had acquired title by adverse possession. Reliance is placed on the decision in Shiv Kumar v. Ajodhia Nath AIR 1972 J & K 125 (FB) wherein it was observed as follows (Para 8):--

".....Where the time for specific performance of the agreement to sell runs out, the possession of the defendant becomes adverse and, if the vendor allows 12 years to pass from this date then the possession of the defendant would ripen into title by prescription."

We find ourselves unable to accede to the contention that permissive possession of the defendants was converted into adverse possession merely because their right to sue for specific performance became barred. In the first place it was for the defendants to plead and prove how and from what time their possession which was initially permissive changed its character and became adverse. Unless the plea is specifically raised in the pleading, it cannot be allowed to be flung as surprise on the plaintiffs for the first time in appeal. Neither there is any averment in the written statement nor any evidence has been adduced to show when the defendants for the first time noticed or realised that the plaintiffs were not willing to execute and register the sale-deed. The contention that on 16-2-1947 the defendants got notice of refusal of performance is inconsistent with the case pleaded, in the written statement. The allegations made in paragraphs 4 and 13 of the written statement were to the effect that the defendants and their forefathers were in possession of the suit lands adversely to the plaintiffs since the date of contract, that is 23-3-36. Secondly, the defendants were entitled to retain possession u/s 53-A of the Transfer of Property Act even though their right to sue for specific performance was barred or the contract became otherwise unenforceable. See AIR 1957 AP 58 (K. Venkattasubbayya v. K. Rosayya) and AIR 1955 AP 101 (Jahangir Begum v. Gulam Ali Ahmed). The Sight of defence u/s 53-A is Mot lost even though the right to enforce the contract was barred. There is no bar of limitation to a defence. When the right to retain possession exists the owner is not called upon to take any step towards putting an end to it. Hence no presumption arises against him from his acquiescence, nor does the possession become adverse. It is to be noted in this connection that Section 53-A of the Transfer of Property Act is not applicable to the State of Jammu and Kashmir. Thirdly, the possession of the defendants being clearly permissive and, not antagonistic to the plaintiffs it will be so presumed until the contrary is proved by clear and convincing evidence. There is no material on the record to show that the defendants abandoned the idea of

possessing the land in pursuance of the contract and asserted a hostile title. There is nothing to show that their possession at any time was accompanied by some overt act asserting an ownership of an open, notorious and hostile character. The fact that they continued to retain possession of the lands after their right to enforce the contract became barred is not sufficient to show that they held the lands adversely to the plaintiffs. A permissive possession cannot be converted into an adverse possession unless it is proved that the person in possession asserted an adverse title to the property to the knowledge of the owner for a period of twelve years or more--See *The State Bank of Travancore Vs. Aravindan Kunju Panicker and Others*, .

10. Being confronted with the above difficulty, the learned counsel for the defendants contended that the defendants are entitled to the benefit of Section 53-A of the Transfer of Property Act. One of the essential conditions for the application of Section 53-A is that the transferee must plead and prove that he has performed or is willing to perform his part of the contract.

It is contended on behalf of the appellants that the defendants have not performed their part of the contract inasmuch as the balance consideration of Rs. 200/- was never paid. D. W. 3, Sartuk Giri, gave evidence that on the date of execution of the agreement, a sum of Rs. 200/- was paid and four or five months thereafter Baruna Giri (P. W. 4) and Kirti Giri received the balance of Rs. 200/-. In his counter (Ext. A-2) late Chandra Mohan Giri asserted; that the total consideration of Rs. 400/- was paid in two equal instalments on 23-3-1936 and 9-12-1936. The statement of late Chandra Mohan Giri contained in Ext. A-2 is admissible u/s 13(b) read with Section 21 (3) of the Evidence Act. P. W. 4 Baruna Giri, who is plaintiff No. 1 in the suit and is also a party to the deed, of contract was confronted with his signature on the deed of contract, but he avoided to see the document and stated that being illiterate he could not identify the signature. He was also confronted with his signature on an application dated 11-4-1947 filed by him for adjournment of Raj Case No. 446 of 1946-47 but he avoided to see the petition and to identify his signature. On a review of the evidence on record, we are satisfied that consideration of Rupees 400/- was fully paid.

11. It is next contended by Mr. Sinha that even assuming that full consideration was paid. Section 53-A cannot be availed, of by the defendants. His argument is twofold. In the first place, it is contended that there is no plea raised in the written statement that the defendants are entitled to protection u/s 53-A. Secondly, there is neither any averment in the written statement nor is there any evidence on the record to show the defendants performed or were willing to perform their part of the contract. It is accordingly urged that the defendants should not be allowed to avail themselves of the provisions of Section 53-A.

12. Mr. S.C. Mohapatra. the learned counsel appearing for the defendants-respondents, however, contended that his clients are entitled to claim the benefit of Section 53-A even in the absence of a pleading on the point of part performance as also on the question of their readiness and willingness. In

support of his argument, he relied on a Full Bench decision of the Calcutta High Court reported in Piru Charan Pal and Another Vs. Sunilmoy Nemo and Another, It appears, however, that the defendants in that case had pleaded all the ingredient facts necessary for the purpose of Section 53-A, but there was no specific mention of that section in the written statement. In the particular facts of the case, their Lordships held (Para 9):---

".....In the instant case, as aforesaid, the defendants having stated all ingredient facts for the purpose of Section 53-A, in our view, the defendants were entitled to raise the defence u/s 53-A, even though there has been no mention of that section in the written statement"

13. In the present case, there is no plea raised in the written statement that the defendants are entitled to avail themselves of Section 53-A. There is also no averment that they had performed or were willing to perform their part of the contract. No issue was raised on the point and no evidence was also adduced to show that the defendants had performed or were willing to perform their part of the contract. In a decision of this Court reported in AIR 1973 Orissa 21 (Sadhob Bhotra v. Hori Bhotra) Hon"ble R.N. Misra, J. (as he then was) held as follows:--

".....I think there is good basis in the contention of Mr. Murty that in absence of a specific plea raised in the written statement that the defendant was entitled to protection u/s 53-A of the T.P. Act, the lower appellate court was not justified in applying the provision of that section. It is true that there is nothing on record to show that the defendant had yet something more to do for the performance of which his readiness and willingness had to be indicated. But if the plea had been raised it was open to the plaintiff to counteract the same by pleading the non-application of the section since dispute touching upon fact can be raised. Without such a plea being raised, to allow such a plea to be raised for the first time in appeal is certainly providing a handicap to the other party in the litigation. The learned appellate Judge was, therefore, not justified) in appeal to introduce and rely upon the plea of Section 53-A of the T. P. Act"

In AIR 1947 188 (Nagpur) Mr. Vivian Bose, J. held as follows:--

".....it must be shown that the party relying on Section 53-A has either fulfilled, or is prepared to fulfil, his part of the bargain. Now this readiness and willingness must be pleaded. It is a prerequisite to the application of the section. Until it is pleaded no reply is possible...."

The above decision of Mr. Vivian Bose, J. was followed by the Madhya Pradesh High Court in the case of Bhagwandas Parsadilal Vs. Surajmal and Another, . In a subsequent decision of the same High Court reported in Devisahai Premraj Mahajan Vs. Govindrao Balwantrao and Others, it was held as follows (Para 29):--

"It is true that as observed by Mudholkar, J. in Sobharam Jiwan v. Tolaram Sitaram AIR 1952 Nag 244, as also in Narayan Pandurang v. Guru Prasad Narayan AIR 1952 Nag 246, it is necessary for a person relying on part

performance to plead that he has either fully performed the contract, or if any part of it remains unfulfilled, he is willing and ready to perform that part. The matter cannot be left to surmise or conjecture, but has to be pleaded and established....."

Similar view has been taken in a Full Bench decision of the Kerala High Court in the case of Illikkal Devaswom Vs. Pottakkatt Narayanan Raghavan and Another, .

14. No doubt the entire consideration had been paid, but the next step in the performance of the contract was the execution of the sale deed. It was the duty of the defendants to propose a proper draft of the sale deed and submit it to the plaintiff as contemplated u/s 55(1)(d) of the T. P. Act. Under the provisions of Section 29 of the Stamp Act the expenses for the sale-deed were to be borne by the purchaser. Until the defendants paid the money for the stamp duty, the sale-deed could not be executed. By virtue of the combined effect of Section 55(1)(d), T. P. Act and Section 29(c), Stamp Act it was the duty of the defendants to propose a draft of the sale deed and to express their readiness and willingness to pay the money and to call upon the plaintiffs to execute the sale-deed--See ILR (1975) Cut 993 at page 998, Bhimasen Mohapatra v. Bhabani Mahapatrani. In para 14 of the written statement it was stated as follows:--

"..... But as the executants of the agreement for sale were residing in the District of Singhbhum and as all of them were not available at a time the registered sale deed could not be executed by them and as the land remained in possession of Chandramohan and the members of his family no required steps were taken for a registered sale deed....."

This shows that instead of complying with the requirements of Section 55(1)(d) of the T. P. Act and Section 29(c) of the Stamp Act, the defendants remained contented with possession of the land. Had it really been a fact that the defendants were ready and willing to perform their part of the contract, instead of sitting quiet for such a long time they would have sent a written notice calling upon the plaintiffs to execute the sale deed. Their failure to send such a notice shows that they were not ready and willing to perform their part of the contract. We accordingly hold that the defendants are not entitled to the benefit of Section 53-A, T. P. Act

15. It was next contended, by Mr. Mohapatra that as the plaintiffs had voluntarily executed the contract, received the entire consideration money and put the proposed vendees in possession pursuant to the contract, they cannot be allowed to repudiate the fiduciary obligation arising out of the contract and to dispossess the prospective vendees after a long lapse of time. He placed reliance on a Full Bench decision in the case of Ghulam Qadir v. Ghulam Hussain AIR 1973 J&K 11 wherein it was held as follows :--

"..... where the plaintiff voluntarily executes a contract of sale, puts the proposed vendee in possession of the property and receives the entire consideration money, there is no special equity in his favour to allow him to turn

round and claim the property after a long time merely because the price of the property has increased. He cannot be allowed to repudiate the fiduciary obligation arising out of the contract nor can the court aid him to commit fraud by dispossessing a prospective vendee who has done all that was required of him to do for purchasing the property.

For these reasons we find that even though the possession of the defendant may be permissive, since the plaintiff has received the entire consideration money and allowed the position to be changed to the prejudice of the defendant, he will be estopped from repudiating the sale transaction and recovering possession from the defendant. On this ground, alone, in our opinion, the defendant is entitled to succeed."

Their Lordships relied on two decisions of the Bombay High Court in the cases of Venkatesh Damodar Mokashi v. Mallappa Bhimappa Chikkalki AIR 1922 Bom 9 (2) and Babu Apaji Potdar v. Kashinath. Sadoba Gulmire AIR 1916 Bom 1 (FB). These two decisions of the Bombay High Court appear to have proceeded on the English equitable principles of part performance before Section 53-A was incorporated in the T. P. Act by the T. P. Amendment Act 20 of 1929. The English doctrine of part performance was embodied, in Section 53-A of the T. P. Act in a modified form. After Section 53-A was enacted the only case in which the English doctrine of equity of part performance could be applied in India is where the requirements of Section 53-A are satisfied. By virtue of this section, part performance does not give rise to an equity as in England but to a statutory right. Cases are now governed not by the English equitable doctrine of part performance, as before, but by the statutory provisions in Section 53-A. This section has not been incorporated in the J. & K. T. P. Act. Therefore, the doctrine of part performance as embodied in Section 53-A, T. P. Act was not applicable to that State. In this connexion reference may be made to para. 10 of the decision in Shiv Kumar v. Ajodhia Nath AIR 1972 J & K 125 (FB). The benefits of this section can be availed of by a person if the requirements of that section are satisfied. In the instant case we have arrived at the conclusion that the defendants are not entitled to avail of the provisions of Section 53-A as they failed to satisfy the requirements. The equitable doctrine of estoppel is also not applicable to the facts of this case. It applies where a person has by his conduct led another person to believe in the existence of a fact and the latter has in such belief acted so as to alter his position. Since there was no mistaken belief as to the ownership of the land, there is no basis for the equitable doctrine of estoppel. The Full Bench decision of the J. and K. High Court referred, to above is not of assistance to the contention of Mr. Mohapatra;

It appears that against that Full Bench, decision a review petition was filed and it was decided by a Full Bench of the same High Court in AIR 1978 J & K 88 (FB), Ghulam Hussain v. Ghulam Qadir. Their Lordships while dismissing the review petition as not maintainable observed as follows:--

"..... The earlier judgment which apparently was given on the peculiar facts of

the case, may require reconsideration but, I am afraid, it cannot be interfered with under Order 47, R. 1, C. P. C." (Para 7)

It was further observed as follows :--

"..... Therefore, the judgment of the Full Bench under review will be deemed to have decided the peculiar facts of that case and shall not be construed to have laid down any broad and general proposition of law in favour of the doctrine of equitable estoppel or part performance." (Para 16)

In view of what has been stated above, the contention of Mr. Mohapatra is without any force.

16. The present suit having been filed after the Limitation Act, 1963 came into force, the law enacted therein would apply to suits filed, thereafter. In the case of a suit for possession based on title, the plaintiff has no longer to prove that he was in possession of the property for a period of twelve years. The present suit is based on title and is governed by Article 65 of the Limitation Act, 1963. It was for the defendants to establish that their possession has been adverse for the requisite period of twelve years. The defendants have failed to establish their case of adverse possession. We have also found that they are not entitled to invoke the provisions of Section 53-A, T. P. Act. The plaintiffs having proved title to the property are entitled to the possession thereof. But they must refund the sum of Rs. 400/- which they had received in pursuance of the contract of sale.

17. In the result, the appeal be allowed and the plaintiffs' suit be decreed for the reliefs claimed in the plaint. The title of the plaintiffs to the suit property is declared and they are entitled to recover possession through Court. They must, however, refund the sum of Rs. 400/- (four hundred) to the defendants before taking delivery of possession. Parties are left to bear their own costs throughout.

B.N. Misra, J.

I agree.