

(2002) 11 OHC CK 0028
In the Orissa High Court
Case No : First Appeal No. 398 of 1977

Bhagwan Agarwalla alias Marwadi (dead) by L.R. and Others	APPELLANT
Vs	
Puranmal Bhut (dead) by L.R. and Others	RESPONDENT

Date of Decision : 26-11-2002

Acts Referred:

Evidence Act, 1872 — Section 116
Limitation Act, 1963 — Article 65
Orissa House Rent Control Act, 1968 — Section 2(4)
Transfer of Property Act, 1882 — Section 107

Citation : AIR 2003 Ori 75

Hon'ble Judges : Pradipta Ray, J

Bench : Single Bench

Advocate : Dayananda Mohapatra, for the Appellant; Bijay Pal, A.K. Mishra, P.C. Panda, S.K. Ojha and P. Das, for the Respondent

Final Decision : Allowed

Judgement

Pradipta Ray, J.—Original appellant, since deceased, as plaintiff instituted Title Suit No. 16/2 of 1975-1 of the Court of the Subordinate Judge, Rairangpur, Mayurbhanj against the original defendants-respondents Nos. 1 and 2, since deceased, for declaration of title in the suit property comprising land and structure, eviction of defendants Nos. 1 and 2. recovery of khas possession, arrear of rents and mesne profits.

2. During pendency of the present appeal, the original appellant and respondents Nos. 1 and 2 died. Their heirs have been substituted in their place.

3. In the plaint the original appellant Bhagwan Agarwalla has claimed that he is the owner of the suit property and the principal defendants Nos. 1 and 2 were inducted by him as tenants therein. According to the said plaintiff, he determined the tenancy on and from October 1, 1974 and asked the defendants 1 and 2 to vacate, but they refused to vacate and denied his title to the suit property.

4. The principal defendants 1 and 2 denied title of the plaintiff and claimed the suit property by dint of their continuous and uninterrupted adverse possession thereof.

5. The Court below has found that the plaintiff was owner of the suit property but held that defendants had acquired prescriptive right due to adverse possession. Trial Court has dismissed the suit.

6. Admittedly suit house belonged to one Maujiram, who was murdered in the said house in 1934. Plaintiff Bhagwan claimed that he was Maujiram's nephew (brother's son) and was adopted by Maujiram in 1928 after death of Maujiram's son and wife. Bhagwan was son of Buxiram, brother of Maujiram. Trial Court has disbelieved the story of adoption; but has found that the plaintiff got ownership of the disputed property by succession in natural course as Maujiram's wife and son predeceased him. After death of Maujiram, plaintiff Bhagwan became the owner of the suit house as his brother's son.

7. In view of the submissions made in this appeal, it is to be determined--

(i) Whether the suit was barred by limitation? and;

(ii) Whether the Respondents (successors-in-interest of the original defendants Nos. 1 and 2) have acquired title to the suit-house by adverse possession?

8. Mr. Pal, learned Advocate appearing for the respondents has contended that the suit itself was barred by limitation as the plaintiff-Bhagwan failed to prove his possession within 12 years prior to institution of the suit. According to Mr. Pal. Article 64 of the Limitation Act, applies to the present suit. Mr. Mohapatra, learned Advocate for the appellants has submitted that the present suit is based on title and as such Article 65 of the Limitation Act is applicable.

9. Requirement of Article 65 of the Limitation Act, 1963 has been explained by the Supreme Court in Annasaheb Bapusaheb Patil and others Vs. Balwant alias Balasaheb Babusaheb Patil (dead) by LRs. and heirs etc., .

10. Present suit is based on title. Plaintiff has claimed that he, as owner of the suit-house Inducted the defendant No. 1 as monthly tenant in the suit house from April 1, 1944. According to the case pleaded in the plaint, defendant No. 1 paid rent till the end of the month of April, 1972. But when the plaintiff applied for mutation, suddenly defendant No. 2 filed an objection on January 29, 1972 and denied title of the plaintiff for the first time.

11. To determine applicability of a particular Article of the Limitation Act, statements made in the plaint are to be looked into. Averments in the plaint clearly indicate that plaintiff filed the suit on the basis of his alleged title as successor-in-interest of Maujiram. Article 65 is thus applicable. As laid down by the Supreme Court in Annasaheb Bapusaheb Patil and others Vs. Balwant alias Balasaheb Babusaheb Patil (dead) by LRs. and heirs etc., under Article 65 burden is on the defendants to prove affirmatively that their possession was hostile and

amounted to denial of the owner's title to the disputed property.

12. There is no dispute that the defendant No. 1 Puranmal Bhut and his family have been in possession of the suit house at least from 1944. According to the defendants, they entered the suit house in 1937 as it was lying abandoned and vacant, but the plaintiff pleaded that the defendant No. 1 was inducted as a tenant in 1944.

13. Defendant No. 1, Puranmal has exhibited Chowkidari tax receipts granted from 1941 to support his case for entering the suit house before 1944. Trial Court has relied upon such tax-receipts to hold that defendant No. 1 got into the suit house before alleged induction as tenant in 1944. Trial Court has not scrutinized the said chowkidari tax receipts properly and has failed to appreciate the nature and purpose of levying chowkidari tax. Firstly, exhibited chowkidari tax receipts did not bear the holding number or any particulars which can relate those receipts to the suit house. Secondly, chowkidari tax was being levied on the house-holders living in a particular village for meeting the cost of maintaining chowkidars for protection. Undisputedly defendant No. 1 came to the mouza/village and was residing there. Thus, realisation of chowkidari tax from defendant No. 1 did not prove that he was occupying the suit house. As already pointed out chowkidari tax receipts do not contain any particulars sufficient to relate it to suit house. Chowkidari tax receipts do not take the defendants beyond the admitted position that defendant No. 1 came to the said mouza and was residing therein.

14. The defendant No. 1, Puranmal has adduced oral evidence to prove his occupation from 1937. The plaintiff has also examined several witnesses to prove his case of induction of the defendant No. 1 as a tenant in the suit house. Defendant No. 1's story about the manner of entry into the suit house is very unusual and improbable. Defendant No. 1 was not a vagabond or a street-dweller, He was a business man. He came to the mouza/village, took a house on rent for residence and was running his business. No respectable man would suddenly enter a vacant house belonging to others without prior permission and start living there. Defendant No. 2 has deposed as D.W. 2. he was only 15 to 16 years old in 1937. Defendant No. 1, who was the head of the family, had not given evidence on the ground of age and ill-health. D.W. 2 himself stated that before entering the suit house they discussed with Janaki Babu, who was a relation of the plaintiff. He had further stated that they did not ascertain or know that Janaki Babu was incharge of the suit house. It is unbelievable that the defendants discussed with Janaki Babu and others, but could not know that Janaki Babu was a relation of Maujiram. Mangtu Ram Agarwalla, son of Janaki Das deposed as P.W. 7. He has stated that the defendant No. 1 came to his father and wanted the house on rent and on such request Janaki Babu called the plaintiff from Chainbasa and the defendant No. 1, Puranmal was inducted in the suit house as a tenant at a monthly rent of Rs. 29/-. The story as pleaded by the plaintiff appears to be more probable, although it is not possible to conclude definitely that Puranmal was inducted as tenant.

15. Even assuming that the defendant No. 1 entered the suit house not as a tenant, but still he would have to prove that he was occupying the suit house denying title of the owner thereof, As already stated, the chowkidari tax receipts cannot be related to the suit house, The Panchayat tax and land revenues were undisputedly paid showing Maujiram as the owner of the suit house, Documentary evidence do not indicate that the defendant No, 1 ever denied title" of the owner of the suit house and claimed any hostile title thereto. Only in 1972 the defendant No, 2 filed objection to the plaintiffs application for mutation claiming title by adverse possession. Mere possession is not adverse possession, There is no evidence of any overt-act till 1972 to constitute an adverse claim. Payment of panchayat tax, land revenue and even NAC tax in the name of Maujiram is prima facie acknowledgement of the title of the owner of the suit house.

16. Mr. Pal, appearing for the respondents has referred to a decision of this Court in Arjun Samal v. Kailash Chandra Kanungo 40 (1974) CLT 294 : 20 (1954) CLT 586 in which it has been observed:--

"With great respect, I am unable to agree with this wide proposition. Merely because a party files receipt in support of his case that he made payment in the name of the person in whose name the record stands, it does not follow that the title of the other party has been acknowledged."

In Arjun Samal (supra) this Court has not laid down any law that payment in the name of the owner of a property cannot be an acknowledgement of the title of the said owner. The ratio of the said decision is that it depends upon facts and circumstances of a particular case whether payment in the name of the owner is an acknowledgment of his title. The law appears to be that the payment of rents or tax in the name of the real owner is to be treated as an acknowledgement of the title of the real owner unless the person paying the same gives acceptable explanation to show that such payment was made under compelling circumstances and he never meant to acknowledge the title of the real owner. In the present case, there is nothing on record to support the defence case that the defendants were possessing the suit house claiming hostile title or committed any overt-act amounting to denial of title of the real owner, The trial Court has misinterpreted and misapplied the decision reported in 40 (1974) CLT 294 (supra),

17. In the present case, the plaintiff has sued the defendants for eviction alleging them to be the tenants, As the notings in the diaries could not be accepted as evidence of payment of rent, the plaintiff has failed to prove the relationship of landlord and tenant conclusively, It has been held by the Court below that Bhagwan, the plaintiff became the owner of the suit house by succession after death of Maujiram. A Full Bench of the Allahabad High Court in Qadir Bux Vs. Ramchand and Others, has laid down that where a plaintiff claimed possession against a defendant alleging him to be his tenant and failed to prove the tenancy set up by him, his suit could not be dismissed merely on the ground that he

failed to prove that the defendant was his tenant. The Court would have to consider whether the defendant was able to prove adverse proprietary possession. It has also been laid down in the said judgment in Qadir Bux (supra) that if a plaintiff sues for possession against a defendant claiming to be his tenant and fails to prove the tenancy. Article 144 of the old Limitation Act (Article 65 of the Limitation Act. 1973) will apply.

18. As already pointed out the defendants in the present case have failed to prove the ingredients constituting adverse possession. Their own acts in absence of any explanation show that they were acknowledging the ownership of Maujiram in the suit property till 1972 when the defendant No. 2 for the first time claimed title and opposed the prayer for mutation made by the plaintiff-appellant. The trial Court has failed to apply the legal tests for accepting a possession as adverse possession.

19. From the evidence on record it is not possible to come to any definite conclusion that the defendants 1 and 2 were inducted as tenants or not. Whatever may be the nature of occupation the defendants have not asserted independent title over the suit property before 1972. The plaintiff has claimed arrear rents and/or mesne profits. There is no conclusive proof of the alleged tenancy and as such there cannot be any decree for arrear rents. It is also an admitted position that land revenue and other taxes relating to the suit property were being paid by the defendants and they maintained the house for all these years. This Court is thus not Inclined to grant any decree for arrear rents or for any occupation charges prior to the institution of the suit. However, the present appellants (successors of the original appellant) are entitled to a decree for mesne profits from the date of the institution of the suit till delivery of possession at the rate to be determined by the trial Court upon holding appropriate enquiry.

20. For the foregoing reasons judgment and decree of the Court below is set aside. Title of the present appellants to the suit property is declared. The plaintiffs are held to be entitled to recover possession of the suit property. If the respondents do not vacate the suit property within three months from the date of this judgment, the appellants may execute the decree to recover possession of the suit property. The appellants also get a preliminary decree for mesne profits from the date of institution of the suit till delivery of possession of the suit property to the appellants at a rate to be determined by the trial Court upon enquiry. Trial Court will hold an enquiry as to the mesne profits and pass a final decree for mesne profits as expeditiously as possible.

Appeal is thus allowed.

No order as to costs.