

(1971) 01 OHC CK 0008
In the Orissa High Court
Case No : Second Appeal No. 293 of 1967

Biswanath Rana and Others

APPELLANT

Vs

Laxman Rana and Another

RESPONDENT

Date of Decision : 19-01-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2
Evidence Act, 1872 — Section 18
Orissa Tenancy Act, 1913 — Section 22, 23, 4

Citation : (1971) 01 OHC CK 0008

Hon'ble Judges : R.N. Misra, J

Bench : Single Bench

Advocate : B. Naik, for the Appellant; S. Misra, P.C. Misra and B. Nayak, for the Respondent

Final Decision : Dismissed

Judgement

R.N. Misra, J.—The plaintiffs who sued for a declaration that they were tenants of the disputed property along with the defendant No. 1 are appellants against the reversing decision of the learned Subordinate Judge, Bhubaneswar. The plaintiffs claim that they and the defendant No. 1 are brothers and all of them constituted a Hindu Mitakshara joint family. The defendant No. 1 was the eldest brother and was acting as Karta of the family. The joint family possessed the properties for a long time as Bhag tenants under one Radhamani Dei who was holding the properties as Khanja Kharposh granted by the Ruling Chief of the Ex-State of Khandapara. Several claimants came up raising claims in respect of the lands in dispute after the merger of the ex-state of Khandapara with the State of Orissa. Board of Revenue of the State of Orissa decided that all the cultivating tenants had acquired occupancy right in respect of the Khanja Kharposh lands in their possession. With a view to dispossessing the plaintiffs as also the defendant No. 1, the Khanja Kharposh holder initiated proceedings u/s 145 Cr. P. C. as also under the Orissa Tenants Relief Act of 1955. All these proceedings, however, terminated against the Khania Kharposh holder. The plaintiffs and the defendant No. 1

continued to possess the lands. The plaintiffs applied to get their names recorded as occupancy ryots in Miscellaneous Case No. 9 of 1961-62. The defendant No. 1 with a view to depriving the plaintiffs of their rights objected and ultimately succeeded to get the lands recorded in his name alone by order of the Revenue Officer dated 16-3-1963. The plaintiffs, therefore, instituted the suit on 19-11-1963 for a declaration that they are occupancy tenants along with the defendant No. 1.

2. The defendant No. 2 is the Collector of Puri and the defendant No. 1, as already stated, is the brother of the plaintiffs. The main plea in the defence case is that the defendant No. 1 alone was possessing the disputed property all through and had, therefore, come to be recorded as occupancy ryot and the property admittedly belonged to the State of Orissa who have settled the same with the defendant No. 1. The plaintiffs had, therefore, no cause of action.

3. The learned trial Judge came to find that the plaintiffs and the defendant No. 1 were joint cultivators of the disputed property and were, therefore, entitled to a declaration that they were occupancy tenants of the disputed property.

4. The learned Subordinate Judge on appeal came to hold that the Civil Court had no jurisdiction to entertain the present litigation and that the plaintiffs had failed to establish that in the disputed property they had any joint interest along with the defendant No. 1. He accordingly reversed the decree of the trial court and dismissed the suit. The plaintiffs are in appeal against this reversing decision.

5. Ext. 3 is the petition filed by three persons u/s 9 (1) of the O.T.R. Act. 5 of 1955. It was alleged that those three persons were the tenants under one Lotia Dei who was said to be the landlord of the disputed property. The original Khanja Kharposh holder was one Mahendra Singh. Upon his death Radhamani became entitled to the grant and on her death the property had come to her daughter-in-law Lolita. The opposite parties of the said O.T.R. proceeding including the present plaintiffs were alleged never to be the tenants of the disputed property. But as in a proceeding u/s 145, Cr. P. C. these opposite parties including the present plaintiffs had raised a claim of tenancy, the proceeding under the O.T.R. Act was instituted. Ex. 6 is the final order in the said proceeding.

The O.T.R. Collector came to find that the opposite parties including the present plaintiffs were in possession of the disputed property and he dismissed the petition by his order dated 10-8-1957 (Ex. 6). The final order in the proceeding u/s 145 Cr. P. C. is Ext. 7. The order is dated 20-8-1956. The present plaintiffs along with the defendant No. 1 were admittedly parties to the said proceeding. Possession of the plaintiffs along with others was declared by the final order. The said 145 proceedings had been contested by the plaintiffs and the defendant No. 1 together. The vakalathnama (Ext. 8) establishes this fact. The written statement on behalf of the members of the second party is Ext. 9. It is true that the present plaintiffs had not signed the said written statement but the defendant No. 1 had signed it. Paragraph 2 of the written statement asserted;

"That the members of the second party have been in cultivating possession of the disputed land for the last 20 years and have been paying Sanja to the recorded holder, the last of whom was Radha Dei who died on 14-4-51."

In paragraph 5 of the said written statement it was again asserted:

"That in pursuance of this order of the Collector, the authorises attempted to put the disputed land to auction last year but the members of the 2nd party asserted that they had acquired occupancy right over the land and so the Government refrained from taking over actual possession of the land."

In paragraph 7 it was further said:

"That the members of the second party have acquired occupancy right over the land by continuously cultivating it under a tenure holder for more than 12 years. The plaintiffs contended relying on these documents that the defendant No. 1 had admitted the plaintiffs to be in cultivating possession as tenants along with him and on his admission the plaintiffs are entitled to a decree. The learned appellate judge negated this contention by saying:

"Assuming that plaintiffs 1 and 2 and defendant No. 1 were merely impleaded omitting plaintiff No. 3 for some reason, or other and as such the members of the second party filed one common vakalat as per Ext. 8, and even though they filed one written statement as per Ex. 9 stating that the members of the second party have been cultivating the disputed land for the last 20 years and paying sanja to the recorded holder, no advantage can be taken of the same so as to construe the same as an admission against the defendant No. 1 or to prove the possession of the plaintiffs. The learned advocate for the appellants rightly argued that impleading of plaintiffs 1 and 2 in that criminal case was not a volition of defendant No. 1 nor was he in a position to raise the question of defect of parties in that proceeding, as Lalita with many others tried to pounce upon the land and as such, (sic) the moment defence required merely a common resistance by the members of the second party whoever might have been impleaded and even if any of them might not have cultivated. As has been argued by the learned advocate for the appellants relying on *Bhinka and Others Vs. Charan Singh*, , the Magistrate purporting to act u/s 145 Cr. P. C. does not decide a party's title or right to possession and it is merely a police order awaiting a further decision in the Civil Court for the matter of title. Likewise, the learned advocate rightly relied on AIR 1955 Pat 229 where it is laid down that a party is not bound by an admission in his pleading except for the purposes of the suit in which the pleading is delivered and it frequently happens that a party is prepared in a particular suit to deal with the case on a particular ground and to make an admission but such an admission is not binding in any other suit and certainly not for all time. So the written statement of that criminal case as per Ex. 9 cannot operate as an admission against the defendant No. 1 nor can the same be relied upon by the plaintiffs to prove their possession."

This reasoning of the learned appellate judge appears to be wholly out of place.

The plaintiffs 1 and 2 and the defendant No. 1 had appeared together under a common vakalatnama, and one joint written statement by the members of the second party had been filed. It is true that the plaintiffs had not signed the written statement. Even if the plaintiffs and the defendant No. 1 and many others had been arrayed as members of the second party not out of their volition it was open to them to have contested the proceedings separately. If a joint appearance was effected and a common defence was raised, it was by their choice and ultimately, if there be an admission in the written statement, it would certainly be available to the plaintiffs to be used in this case.

An admission in the pleading is certainly available to be used. The view taken by the Patna High Court in the unreported decision does not lay down the law correctly and the principle stated therein has not received the approval of their Lordships of the Supreme Court. The admission contained in a pleading of a former litigation, it is indeed an admission in the true sense. Is certainly available to be used for all purposes and it cannot be kept out by saying that it was an admission in a former litigation and was meant for that proceeding alone and cannot be taken to be an admission binding in any other suit or for all times to come. Such a distinction is not open in law to be made. If it is an admission, it is so and is certainly an admission for all times to come. Unless explained away properly an admission is the best available support for the adversary. As was indicated by their Lordships of the Supreme Court in the case of Narayan Bhagwantrao Gosavi v. Gopal Vinayak Gosavi AIR 1960 SC 100. I would accordingly hold that the admission of joint cultivation made in the written statement of the proceeding u/s 145 Cr. P.C. is available to support the claim in the suit.

6. The learned appellate judge has negatived the contention of the plaintiffs that their claim receives support from the O.T.R. proceedings. The lower appellate court has held that on a perusal of the schedules of lands, the disputed property was not in dispute in the O.T.R. proceedings. The learned counsel for the appellants challenged this finding of the lower appellate court. But I do not find any positive material to take another view than what has been taken in the appellate court. I would, therefore, hold that the O.T.R. proceedings and orders passed therein are of no assistance to the plaintiffs.

7. The learned appellate judge thereafter proceeded to consider the claim of acquisition of occupancy right and stated:--

"Even if the decision of the criminal case was in favour of the 2nd party members per Ex. 7, on 20-8-1956 it cannot automatically enure conferment of occupancy rights even on plaintiffs 1 and 2 who were members of 2nd party therein. As has been argued by the learned advocate for the appellants, this was merely a right to possession subject to acquisition or enforcement of title. The learned advocate drew my attention to several parts of plaint narrations where the plaintiffs have stated that they were merely cultivating as bhag-tenants and admittedly they had no other better right of cultivation. The proprietor of the land having a

limited maintenance right and the character of the land being resumable any such right of possession must extinguish the moment the lands are resumed or conferred with occupancy right."

The learned appellate judge referred to the order of the Board of Revenue (Ex. E) and examined this point at some length and ultimately came to hold that the acquisition of occupancy right was only by the defendant No. 1 and he was entitled to have such separate acquisition. Conferment of the right of occupancy on the defendant No. 1 did not enure to the benefit of the plaintiffs 1 and 2.

8. M. Naik, learned counsel for the appellants places reliance upon the revenue law obtaining in the ex-State areas of Khandapara and contends that under the law, by mere occupation for 12 years occupancy right can be acquired, Reliance is placed on Appendices J and K to the Final Report of the Survey and Settlement of Khandapara Feudatory State 1928-1931. The material portion is to the following effect -

"Tenants are either (1) occupancy tenants, (2) non-occupancy tenants or (3) tenants at will. Occupancy rights are a question of fact, of the length of possession, and have nothing to do with residence or non-residence in the village. A tenant acquires occupancy rights by holding land in a village for 12 years continuously, either in his own person or partly in his own person and partly as heir to a previous cultivating raiyat. Such occupancy right accrues in respect of all land held in the village irrespective of the length of time a particular plot may be held, nr of cnanges in the identity of the holding i. e. an occupancy raiyat for any part of a village acquires occupancy rights immediately in any subsequently acquired land within that village. occupancy rights can be acquired either by Thani or Pahi or Chandana tenant and whether rent is paid in cash or kind. The spirit of Sections 23 and 24 of the Orissa Tenancy Act is followed in Khandapara except that the term "Settled Raiyat" is not used. Tenants at will are those holding land by year to year lease or cultivating land on Sanja or Dhulibhag or other similar conditions and liable to eviction at the end of the agricultural year. Non-occupancy raiyats are those falling in neither of the above classes. The rights of the 3 classes of tenants are as laid down in the Orissa Tenancy Act.....,"

The aforesaid extract would clearly show that to acquire occupancy right, continuous cultivating possession of 12 yearn is necessary and it can be acquired either by a Thani or Pahi or Chandana tenants. A tenant at will by remaining in possession for 12 years cannot acquire the occupancy right. The provisions of the Orissa Tenancy Act in the matter of acquisition of occupany right are made applicable and the settled position in law is that an annual teant is not entitled to acquire occupancy right by being in possession for twelve continuous years as such tenant. The position in regard to Khandapara does not appear to be different. Thus it cannot be held that the plaintiffs acquired the status of occupancy raiyats by merely being in cultivating possession for 12 years or more. The plaintiffs have not been able to show any other method of acquisition of the

occupancy right except mere cultivating possession. The Settlement of occupancy right was confined to the defendant No. 1 alone and as such the plaintiffs cannot take advantage of such a settlement. The learned appellate judge was right when he came to hold that such an acquisition can be made by a coparcener and when made with the intention of being separate property, the property so acquired would also be a self acquisition of single coparcener.

9. On this analysis it follows that though some of the reasonings of the lower appellate court were inapt and cannot be sustained, the ultimate conclusion is not open to reversal.

I would accordingly uphold the appellate judgment and dismiss this appeal. Parties would, however, bear their own costs throughout.