

**(1998) 09 OHC CK 0006**

**In the Orissa High Court**

**Case No : Second Appeal No. 48 of 1985**

Braja Kishore Swain

APPELLANT

Vs

Dambaru Dhar Swain and Others

RESPONDENT

**Date of Decision :** 09-09-1998

**Acts Referred:**

Evidence Act, 1872 — Section 21

**Citation :** (1998) 2 OLR 399

**Hon'ble Judges :** D.M. Patnaik, J

**Bench :** Single Bench

**Advocate :** D.K. Mohapatra and N.K. Sahu, for the Appellant; B.H. Mohanty, for the Respondent

**Final Decision :** Allowed

## Judgement

D.M. Patnaik, J.—This appeal is against the reversing judgment of the lower appellate Court. The trial Court dismissed the plaintiff's suit for declaration of right, title and interest claimed on the basis of adverse possession. The lower appellate Court reversed this finding holding that the plaintiff successfully proved title by adverse possession.

The only substantial question of law formulated for consideration by this Court is whether the lower appellate Court committed gross error in accepting the case of adverse possession claimed by the plaintiff on the basis of the admission of the defendants in the previous sessions trial.

2. The plaintiff and the defendants are admittedly co-sharers in respect of plot Nos. 1337 and 1341. It is the admitted case of the parties that disputed plot No. 1338 belongs to Mayadhar Dhal whose sons are defendants 4 to 6 and they are in no way related to the family of the plaintiff and the other defendants. It is also the admitted case of the parties that plot No. 1 338 situates on the adjacent western side of plot Nos. 1337 and 1341. There was dispute over the possession of plot Nos. 1337 and 1341 and because of such dispute, parties were involved in

a murder case. While it is the case of the plaintiff that there was an amicable settlement between the parties in the year 1961 and after such settlement he purchased a portion of plot No. 1337 from his other co-sharers by registered sale deed in the year 1961. By that time an old thatched house which was standing over plot No. 1337 also covered a portion of plot No. 1338 on its north-western portion and since the year of purchase i.e. 1961 the plaintiff and his other brothers, defendants 7 to 9 possessed the land over plot No. 1338 along with plot No. 1337 and, therefore, they prescribed the title by adverse possession.

The case of the contesting defendants 1 and 2 is that the murder case arose when the question of thatching the roof of the house over plot Nos. 1337 and 1341 arose. In other words, according to their case, the house that stood over plot No. 1338 exclusively belonged to Mayadhar Dhal and after him, the said plot has been in possession of his sons, defendants 4 and 5 and there was no house which covered both plot Nos. 1337 and 1338. It is their further case that, in the year 1972 this disputed portion with house was sold by one of the sons of Mayadhar Dhal to defendant No. 2 Bhagaban Dhal and neither the plaintiff nor his brothers at any time purchased the land with the house nor at any time had possessed the same.

3. The trial Court dismissed the suit holding that the plaintiff failed to prove acquisition of title by adverse possession by any cogent evidence. It also gave a reason that since there was a scramble for possession over the land and the house over plot Nos. 1337 and 1341 admittedly amongst the co-sharers, in the absence of a case of ouster the plaintiff failed to prove acquisition of title by adverse possession. The lower appellate Court, on the other hand, held that the possession of the plaintiff was admitted by the defendants in their evidence in the sessions trial. Those depositions have been marked as Exts. 11,12 and 13.

4. Mr. Mohapatra, learned counsel for the defendant-appellant has strenuously urged relying on the decision reported in 18 (1913) Ind Cas 869, Dwarakanath Choudhury and Ors. v. Shashti Kinkar Banerjee and Ors., that to hold that a person has acquired title by adverse possession, the test is whether the person who sets up a case of adverse possession is able to show that he held for himself, and if he did so, the mere fact that there was acquiescence or consent on the part of the other person concerned can make no difference.

Relying on the case reported in AIR 1915 PC 7, B.G. Tilak v. Shrinivas Pandit and Ors., the learned counsel further submitted that, on general principles it would appear to be sound that if a witness is under cross-examination on oath he should be given the opportunity, if documents are to be used against him, to tender his explanation and to clear up the particular point of ambiguity or dispute.

Further relying on Sita Ram Bhau Patil Vs. Ramchandra Nago Patil (Dead) by Lrs. and Another, , Mr. Mohapatra submitted that since admissions are not conclusive proof of facts admitted, such admissions are not conclusive proof of facts admitted, such admissions will be considered in regard to firstly, what weight is

to be attached to such an admission and to find out this it has to be found out whether the admission is clear, unambiguous and is a relevant piece of evidence and secondly, if the said admission is to be used against the maker and the witness is under cross-examination on oath, he should be given an opportunity to tender his explanation and to clear up the point of ambiguity or dispute.

Mr. B.H. Mohanty, learned counsel for the plaintiff-respondent supported the judgment of the lower appellate Court.

5. The onus of proving adverse possession is on the plaintiff. His specific case is that he acquired title in respect of plot No. 1337 on the basis of the sale deed from the co-sharers that was executed in the year 1961 pursuant to amicable compromise between the co-sharers and thus when he started possessing plot No. 1337 from the year 1961 over which the house in question was standing, he also started possessing the portion of plot No. 1338 which was covered by the house in question. To make it clear, his case is adversely possessing the disputed land over the portion of plot Nos. 1337 and 1338 since 1961. It is the admitted case of both the parties that the house in question was damaged in the year 1955 and the co-sharers of both the branches constructed the same. There is no positive evidence from the side of the plaintiff which he was bound to prove that the thatched house of which the plaintiff took possession also covered the disputed portion of plot No. 1338. This could have been done by proper identification of the disputed land. This the plaintiff has not done and the pleader commissioner's report Ext. 10 is of no use since the same does not relate to the identification of the disputed land as claimed by the plaintiff.

Secondly, the plaintiff has not stated any thing in his examination-in-chief that as to how he possessed the suit land since admittedly, according to him, this was lying vacant for a considerable years. In the cross-examination he stated that he possessed the suit land by growing vegetables. There is no corroborative evidence as to this act of possession and the period of possession.

6. So far as the substantial question of law is concerned, this appeal has been admittedly only on that point. The lower appellate Court dealing with the evidence of defendant No. 10 in the Sessions Trial Case No. 3-C of 1971 held that the evidence of defendant No. 10 was marked as Ext. 11 which shows that the residential house of Dambaru, (i.e. the plaintiff) existed to the east of the disputed house and the village lane adjoins to the west of the disputed house. From this the lower appellate Court came to a finding that the disputed house stands on the north-western corner of plot No. 1338 adjoining the village road to the north and the village lane to the west.

Dealing with the evidence of the father of defendant No. 1, P.W. 2 in the Sessions Trial, the lower appellate Court observed that his deposition was marked as Ext. 12 and in that deposition the father of defendant No. 1 admitted that the plaintiff and his co-sharers were possessing the disputed house. He also recorded that the defendant who was examined himself as P.W. 7 in the Sessions Trial stated in

the deposition (marked Ext. 13) that the disputed house was the joint Choupadhi house of the plaintiff and his co-sharers. To this admission, the lower appellate Court jumped to the conclusion that the defendants admitted the possession of the plaintiff. This is obviously a wrong appreciation of evidence as well as a wrong application of the principle of proving a particular fact by admission. Law is well settled, as has been rightly argued by Mr. Mohapatra that an admission is not the conclusive proof of fact admitted and that, any admission that brings out an ambiguity, opportunity must be given to the party making such admission to explain such ambiguity or to explain under what circumstances he made such admission. Be that as it may, in my view, the statements of the defendants in the Sessions Trial that the plaintiff was in possession of a particular house did not themselves prove adverse possession particularly when it is the admitted case of the parties that the plaintiff and the defendants 7 to 9 were joint owners in respect of the land and the house standing over plot Nos. 1337 and 1341 for which there was long standing dispute which ultimately led to the death of two persons for which there was a trial of a murder case. No material has been placed or proved to accept the case of the plaintiff that a portion of their house also stood and/or covered the south-western portion of plot No. 1338 that admittedly belonged to Mayadhar Dhal. In the absence of any such cogent evidence with regard to ingredients of adverse possession, the lower Court has rightly dismissed the plaintiff's suit and this decision has been erroneously reversed by the lower appellate Court for the reasons that is, not sustainable in the eye of law.

7. In the result, the appeal succeeds. The judgment of the lower appellate Court is set aside and that of the trial Court is upheld. No cost.