

(1978) 08 OHC CK 0013
In the Orissa High Court
Case No : Second Appeal No. 133 of 1974

Budhi Mahal and Others

APPELLANT

Vs

Gangadhar Das and Others

RESPONDENT

Date of Decision : 02-08-1978

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145
Limitation Act, 1963 — Article 142, 144, 64, 65

Citation : (1978) 46 CLT 287

Hon'ble Judges : S.K. Ray, C.J

Bench : Single Bench

Advocate : P.K. Mohanty, for the Appellant; S.C. Basa, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Ray, C.J.—This is a Plaintiffs' second appeal from the reversing decision dated 7-3-1974 of the Subordinate Judge, Bhadrak. passed in Title Appeal No. 30 of 1968, in a suit for declaration of title and confirmation of possession or in the alternative for recovery of possession in respect of Ka schedule land, for recovery of Rs. 100/- from the Defendants as per Kha schedule and for permanent injunction against the Defendants. The suit land enumerated in Ka schedule comprises of 42 decimals appertaining to plot No. 952 under Khata no 447 in mouza Gudpal in touzi No. 123

2. The Plaintiffs' case may be briefly stated: One Nidhi Padhi and his cosharers were recorded landlords in respect of touzi No. 123. The suit land was in possession of one Dina Das, father of Defendants 1 and 2, as the lease of the landlords. In the settlement record-of-rights finally published in 1928 Dina Das was wrongly recorded as a raiyat having Sthitiban Dhalibhag right. Nidhi Padhi and his cosharers, therefore, wanted to oust him from the land. Ultimately, Dina Das surrendered the land to the landlords. The touzi was sold for arrears of land revenue on 29-4-1937 and was purchased by one Sk. Barkatulla (P.W. 1) who got delivery of possession. on 19-3-1938 (Ext. 7). The said auction purchaser

leased out the suit land to Defendant No. 3 on 15.4.1940 by an unregistered" lease deed (Ext. 1) and put him in possession thereof. Defendant No. 3 paid rent regularly to his, landlord, the said Barkatulla. The estate (touzi No. 123) was abolished in the year 1953. Defendant No. 3 possessed the land through his bhag tenants and was paying rent to the Anchal after the abolition of the estate- in 1953. Ultimately, he sold the suit land to the Plaintiffs, 26 in number, on 11.3.1964 (Ext. 4). In the Hal Settlement operation following this conveyance the Plaintiffs were themselves recorded in the Parcha as marfatdars. They also paid rent to the Anchal as per Ext. 3 series for the sale 1370-71 to 1372-73. All these receipts were granted on dares between 20.3.1964 and 20.3.1966. Subsequent to the purchase by the Plaintiffs there was a dispute between them and Defendants 1 and 2 who claimed title and possession as successors in- interest of their father Dina Das. It led to the initiation of a proceeding u/s 145, Code of Criminal Procedure which was numbered as Mise Case No 69 of 1964 in the Court of the Sub-Divisional Officer, Bhadrak. This proceeding ended in declaration of possession in favour of Defendants 1 and 2 which led to the filing of the present suit for the aforesaid reliefs.

3. The Defendants 1 and 2 claimed title to and possession over the suit land as occupancy tenants. They denied that their father ever surrendered the suit land to the landlord Nidhi Padhi and his cosharers. They also denied that Sk. Barkatulla was the auction purchaser of the touzi in question in a revenue sale. They, however, alleged that even though this auction sale is held to be genuine they were in continuous possession of the suit land as tenants notwithstanding such revenue sale. They asserted that the unregistered lease deed granted by Sk. Barkatulla in favour of Defendant No. 3 was a manufactured document for the purpose of this civil suit. In fact, Defendant No. 3 as agent of Sk. Barkatulla collected rent from them in respect of the suit land by granting receipts. Lastly they averred that the suit was barred by limitation as the Plaintiffs and their predecessors-in-interest were out of possession for more than 12 years prior to the institution of the suit.

4 The Plaintiffs got a decree in the trial Court. On appeal by the Defendants the Subordinate Judge, Bhadrak, confirmed the decision of the trial Court. Thereafter the Defendants came up to this Court in Second Appeal No. 96 of 1970. This Court allowed the appeal and remanded the matter to the first appellate Court for a fresh disposal in accordance with law and directed that special attention should be given to the story of surrender put up by the Plaintiffs and a finding thereon should be expressly given.

5. The first appellate Court after remand held that the story of surrender was not true. During the period between the alleged surrender and the date of sale to the Plaintiffs, Dina Das and after him his sons the Defendant were in actual physical possession, and that the title to the suit land as tenant was with the Defendants. He, therefore, held that the Plaintiffs failed to prove either their title or their possession or of their predecessors-in-interest at any time before the suit. He

accordingly dismissed the suit.

6. There is no dispute that touzi No. 123 was sold in revenue auction on 29-4-1937 and purchased by Barkatulla (P.W. 1), and that he got delivery of possession of the same on 19-3-1938. The first contention of the learned Counsel for the Appellants is that the lower appellate Court erred in law in putting the onus on the Plaintiffs to prove their possession within 12 years of suit, as under Article 65 of the Limitation Act the Plaintiff in a suit for ejectment is required only to prove his title and not his possession within 12 years of the suit in order to succeed. If the Defendants want to defeat the Plaintiffs they have to prove adverse possession of 12 years. This principle is correct. The present suit was filed on 19-7-1965 after the new Limitation Act came into force. Articles 142 and 144 of the old Limitation Act have been replaced by Articles 64 and 65. The law, as it stood, appeared to favour a trespasser as against an owner because in an ejectment suit by the owner of the property it was not sufficient for him to establish his title, but he had also to further establish that he was in possession of the property within 12 years before the date of the institution of the suit. Article 65 of the new Limitation Act relates to suits for possession based on title and provides that the period of limitation is 12 years from the date when possession of the Defendants becomes adverse to the Plaintiff. The Plaintiff will succeed if he proves his title without being required to prove his possession within 12 years of the suit. If the Defendant wants to defeat the rights of the Plaintiff, he has to establish his adverse possession for a period of 12 years which will have the effect of extinguishing the title of the owner. The defence plea that the Plaintiffs suit must be held to be barred by limitation on account of their failure to prove possession within 12 years of suit is not a sound one. What the learned lower appellate Court meant was that the Plaintiffs' title which rested on the title of Defendant No. 3 was in dispute and to establish the title of Defendant No. 3 the Plaintiffs had to prove that Dina Das surrendered his land to the then landlord and thereby had delivered possession of the suit land to his landlord who, consequently, was in khas possession of the same by the time of revenue auction sale of the touzi. Onus was, thus, heavy on the Plaintiffs to prove the case of surrender by Dina Das strictly which is intimately connected with the question of possession. In that context the first appellate Court said that the onus was heavy on the Plaintiffs to prove their possession and its decision cannot be said to be vitiated on account of that observation.

7. With regard to surrender, the first appellate Court has given very careful consideration to the evidence and the circumstances bearing on the point. His finding that the Plaintiffs have failed to prove that Dina Das had surrendered his land to Nidhi Padhi, his landlord, is reasonable and cogent and cannot be attacked as perverse. The circumstances on which he relied are very weighty ones and I would indicate a few of them. The surrender was an oral one. Before surrender, Dina Das was in possession. The evidence has been led that he was compelled to surrender his land to the landlord. It was, thus, not a voluntary surrender. No date or year of such surrender has been disclosed in the plaint and

such omission affects the genuineness of the story of surrender especially when P.W. 6 who is Plaintiff No. 7 in the suit has proved such surrender by deposing that Nidhi Padhi dispossessed Dina Das. It is admitted by P.W. 6 that though Nidhi Padhi is dead, his cosharers-agmates are alive and yet none of those agmates has been examined in support of the story of surrender. It is further significant to note that Nidhi Padhi after having obtained surrender of the land from Dina Das should have refrained from taking additional precaution of getting a document from him in evidence of such surrender. If surrender was a fact, there will be records in the ex-landlord's sherista to prove it, but no attempt has been made for production of such records.

8. The record-of-rights (Ext. A) of the year 1928 proves that Dina Das was the Sthitiban Dhulibhag tenant. That entry raises a presumption of possession in favour of the Defendants. To rebut this presumption of possession P.W. 6 who is Plaintiff No. 7 has deposed that Dina Das gave up possession immediately after the final publication of the record-of-rights. Thereby he reinforces the presumption that Dina Das was in possession on the date of final publication of the record-of-rights, but was subsequently dispossessed about one year thereafter. In the 145 proceeding the Defendants 1 and 2 were found in possession on the date of preliminary order. Plaintiffs have to establish, by cogent and unimpeachable evidence surrender and consequent delivery of possession by Dina Das as, otherwise, this failure will affect the quality of evidence of possession by Defendant No. 3 in the intervening period between 1940 (year of lease) and the date of sale to the Plaintiffs. As already observed, it is in this context that the first appellate Court said that the onus lies heavily on the Plaintiffs to prove possession. Now coming back to the question of possession flowing from surrender it will be seen that according to the Plaintiffs' witnesses the suit land was cultivated by P.W. 6 as a bhag tenant under Padhi landlords before auction sale and after auction sale, P.W. 1 the auction purchaser, allowed him to continue as a bhag tenant under him till the lease of the suit land was granted to Defendant No. 3 by Ext. 1 dated 15-4-1940. P.W. 6's evidence has been discarded on the ground of omission to aver in the plaint that one of the Plaintiffs i.e., P.W. 6 was in possession of the suit land even prior to the date of the lease in favour of Defendant No. 3. This fact has not only apparent importance with reference to the question of possession. but also tremendous importance in relation to the question of surrender. On the other hand, what has been directly asserted by some of the Plaintiffs in 145 proceeding and indirectly in the plaint is that Padhi landlords, after the alleged surrender of Dina Das, were in khas possession of the suit land, and that the auction purchaser landlord after purchase of the mouzi in revenue sale possessed the suit land through some bhag-tenants. The plaint is also silent about P.W. 6 being in possession as bhag-tenant of the suit land under P.W. 1 who was the auction purchaser. It is not possible in these circumstances to criticise the first Appellate Court for discarding P.W. 6. On the contrary there was no other alternative for him but to discard that evidence as untrue. The further circumstance on which the first appellate Court

has relied in this connection is the absence of rent receipts or any paper showing payment of bhag dues by P.W. 6 to Nidhi Padhi or P.W. 1.

Ext. 1 is the unregistered lease deed granted by P.W. 1 to Defendant No. 3 and Ext. 2 is a rent receipt bearing no date showing payment of rent for the period from 1941 to 1943. These two documents are alleged to have been proved by P.W. 1 who, when confronted with these documents, confessed that he was unable to read them or identify them on account of loss of his eye-sight. This testimony casts doubt on proper proof of these documents. But since these documents have been admitted without objection, it is not possible to discard them on the ground that they have not been admitted at all. The position of law is clear that a document can be treated as duly admitted where its admission without being proved is not objected to by any party affected. Mode of proof being a question of procedure, may be waived and if this is done,

that can be no subsequent objection. Objection to relevancy may, however, be raised even though evidence was admitted in the trial Court without tender. But where evidence is statutory made inadmissible, it cannot be rendered admissible by consent. When a document is admitted without objection it would follow that the entire contents of the document are admitted. In this case, though Exts. 1 and 2 are admissible pieces of evidence, no reliance can be placed thereon in support of the Plaintiffs' case by reason of the admission of P.W. 1 himself that he was unable to read them, and that he has no definite knowledge about the suit land. The genuineness of Ext. 1 has also been seriously challenged. There is one important circumstance referred to by the first appellate Court which casts grave doubt on its genuineness which is this. P.W. 2 in 1968 has declared his age to be 40 years. Therefore, in 1940 he was a minor of 12 years old. It is neither the case of the Plaintiffs nor is there any evidence that the lease hold property was delivered to some-body on behalf of P.W. 2 or that the premium was received from some guardian of his. Another additional circumstance which greatly probalises this part of the defence case is that it was not filed in the 145 proceeding but came to right first time in this civil litigation. Similarly, Ext. 2 also was not filed in the 145 proceeding. That being a rent receipt was an important piece of evidence relating to possession and should have been filed in the 145 proceeding. Non-filing of that document in that proceeding leads to the only irresistible conclusion that these two pieces of document (Exts. 1 and 2) were not in existence prior to 145 proceeding. The Revenue Inspector who submitted a report to the Tahsildar, Bhadrak on the petition of Defendant No. 1 regarding collection of produce rent in respect of the suit land was examined as d. w. 5. He has deposed that he visited the spot on 15-5-1964 to enquire into the petition of Defendant No. 1. P.W. 2 (Defendant No. 3) appeared before him during enquiry but could not produce any document regarding patta. In his report (Ext. D) he has stated that Defendant No. 3, the grandson of Barkatulla, the auction purchaser, was collecting the produce rent from Defendant No. 1 upto the date of vesting and that during his enquiry no patta was shown to him either by the auction purchaser or by Defendant No. 3 in proof of the latter having got

lease of the suit land in the year 1940. Another circumstance is that Ext. 2 is a single receipt for the years 1941-42 and does not bear any date. No explanation, however, is forthcoming as to what happened to the rent receipts of other years during which P.W. 2 (Defendant No. 3) asserts to be in possession of the suit land till the date of sale in favour of the Plaintiffs. Despite assertion of P.W. 2 that he paid rent after abolition of the estate to the Anchal, Ext. 3 series do not beat that out. These Ext. 3 series as already stated, have been granted during the period from 20-3-1964 to 20.3.1966 and all these receipts stand in the name of Defendant No. 3 even though he had parted with the land in favour of the Plaintiffs under Ext. 4. The absence of any Anchal receipts between 1953 when vesting took place and 1964 when sale took place in favour of Defendant No. 3 has been explained by the Revenue Inspector in his report Ext. D, to the effect that it was Defendant No. 1 who was paying rent and no question of granting receipts to Defendant No. 3 consequently arose; In view of this evidence and the circumstances strongly militating against the Plaintiffs' case of surrender and possession and grant of lease under Ext. 1, the first appellate Court has categorically found that the story of surrender by Dina Das to Nidhi Padhi is not true, that P.W. 2 (Defendant No. 3) was never in possession of the suit land till 1964 and that he had not acquired title to the suit land as the story of lease under Ext. 1 in favour of Defendant No. 3 is unacceptable for the aforesaid reasons and the title of sthitiban raiyat remained with Dina Das until his date and thereafter was inherited by Defendants 1 and 2. In view of the subsisting title of Defendants 1 and 2 in the year 1964, the Plaintiffs have acquired no title under their conveyance. Thus, this categorical finding of the first appellate Court regarding title rendered against the Plaintiffs is cogent and reasonable and, accordingly, unassailable in a second appeal, even though a different view with regard to the same was possible. In result, the other contentions raised by the learned Counsel for the Appellants become redundant and need not be considered. The first appellate Court was justified in dismissing the suit on account of failure of the Plaintiffs to prove their title. Incidentally he has given a finding that the Plaintiffs have also failed to prove their possession. In my opinion, the second appeal is, thus concluded by finding of fact on the sole question of title.

For the aforesaid reason, I must hold that there is no merit in this appeal which is dismissed with costs.

Appeal dismissed.