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(2008) 08 OHC CK 0151

In the Orissa High Court

Case No : W.A. No. 58 of 2007

Guru Charan Patnaik — APPELLANT

Vs

The Consolidation Commissioner and Others — RESPONDENT

Date of Decision : 13-08-2008

Acts Referred:
Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 — Section 9(3)

Citation : (2008) 08 OHC CK 0151

Hon'ble Judges : B.S. Chauhan, C.J;B.N. Mahapatra, J

Bench : Division Bench

Advocate : C.R. Nanda, Nilamadhab Praharaj, P. Das, M.C. Behera and A.B. Parida, for the Appellant;

Final Decision : Dismissed

Judgement

B.S. Chauhan, C.J.—This appeal has been filed against the judgment and order dated 30.7.2007 passed by the learned Single Judge in OJC No. 3788 of 1994, by which the judgments of the Authorities under the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972, (hereinafter called ''the Act'') have been affirmed.

2. Appellant claims that in the year 1955, when he was in service paid the money to his two brothers i.e. Pravakar and Bhaskara to purchase the suit property from Brajananda Biswal and Jadumani Biswal. The property was purchased vide Regd. Sale deed dated 18.1.1955 in the names of the said two brothers though he had paid the entire sale consideration. After retirement in 1960,Appellant came to his village and ousted his two brothers from possession and continued to have exclusive possession of the land and thus acquired the title by adverse possession also.

3. In Consolidation proceedings in 1982, the land was shown in private Respondents'' names. Appellant filed objection u/s 9(3) of the Act on the ground that initially private Respondents were merely benami owners and subsequently

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Appellant also acquired the title by adverse possession. The objections were rejected vide judgment and order dated 30.6.1982. Against the said judgment Appellant''s appeal was dismissed by the Deputy Director Consolidation vide judgment and order dated 30.3.1982. Against the said judgment the Revisional Authority i.e. Consolidation Commissioner vide judgment and order dated 31.3.1994 rejected the revision on the ground of limitation as petition was barred by 812 days. The learned Single Judge dismissed the writ petition affirming the said judgments and orders.

4. The learned Single Judge rejected the theory set up by the Appellant that he had exclusively contributed the consideration towards the sale price of the said property and the opposite parties were merely benami owners of it or that the property was purchased from the funds of the joint family nucleus taking into consideration the provisions of law.

5. On the issue of adverse possession, the learned Single Judge has discussed the facts in detail and recorded the following finding:

Adverse possession is essentially a hostile possession, possession in denial of the title of the true owner. There is a basic distinction between an adverse possession as between strangers and ouster and exclusion of co-owners. In the case of adverse possession as against strangers, it is sufficient that such possession is overt and without any attempt of concealment, so that person against whom time is running with the exercise of due vigilance could be aware of what is happening. On the other hand, the possession of one co-owner is presumed to be on behalf of all co-owners in view of the unity of title and possession. Because of this presumption of joint ownerships in the case of co-owners, the law requires to constitute ouster, i.e., proof of something more than mere exclusive possession. Along with exclusive possession, there must be a hostile, open denial and open refutation of other co-owners'' right to the latter''s knowledge. The co-owner in exclusive possession cannot render his possession adverse to the other co-owner merely by any secret or hostile animus on his own part in derogation of other co-owners'' title.

6. Learned Counsel for the Appellant tried to challenge the said finding. However, we do not see any reason whatsoever to interfere with the impugning judgment as the finding so recorded by the learned Single Judge is in consonance with law.

7. Adverse possession means a hostile possession, I.e. possession in denial of the title of the true owner. To claim Successfully the adverse possession, vesting of title in the possessor should be there. More so, the possession must be actual, physical, exclusive, hostile and continued during the statutory period of limitation. Adverse possession is the possession over the land on his own behalf by a person other than the real owner having a right of immediate possession. There must be an intention to hold it adversely. Adverse possession must be adequate, in continuity and publicly to establish title. It is an open avowed claim. Possession, which was adverse at the time of commencement, may cease to be

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so before completion. Nature of possession depends upon the character and condition of the land as it is capable of enjoyment. Even delivery of symbolic possession is sufficient to interrupt adverse possession.

8. Possession is not the same thing as user. User, to form basis of adverse possession, must be in the nature of ownership. A possession should not be permissive as it is settled law that the possession follows the title in case of waste and the vacant land. If, in its inception, the possession was permissive then person claiming adverse possession has to establish as at what point of time it changed the character and became adverse. Flimsy and temporary structure by neighbourer for storing straw on land for number of year when land is not in much use by the true owner, does not create adverse possession. (Vide Prem Raj v. Jeth Mal 1980 WLN (UC) 424; AIR 1926 615 (Lahore) ; and Lala Asa Ram and Another Vs. Lala Ram Chander, .)

9. Courts have to bear in mind, while deciding the case of adverse possession, the distinction between possession and permissive use of the suit property. User must be in the nature of ownership to form basis of possession. Adverse possession must be unequivocal. Adverse possession without any legal origin, continuity, publicity in extent, contingent and hostile to the others. (Vide (1934) 66 MLJ 134 (Privy Council)).

10. Adverse possession is possession by a person asserting interest against the true owner who is entitled to repudiate and to recover immediate possession. (Vide Collector of Bombay Vs. Municipal Corporation of The City of Bombay and Others,). The proper test and requirement of adverse possession are that the person asserting such a right has to prove that he has been in hostile possession for more than the statutory period. (Vide Constitution Bench judgment of the Hon''ble Supreme Court in Gurbinder Singh and Another Vs. Lal Singh and Another,).

11. The law laid down therein has been that in such circumstances, as the possession goes with the title, the presumption is that the possession has been with the owners throughout. More so, their adverse possession depends upon the nature of animus possidendi though no particular form of expression "animus" is necessary. Therefore, mental element must be present for establishing adverse possession. (Vide AIR 1947 19 (Privy Council)).

12. In M. Arthur Paul Ratna Raju and Others Vs. Gudese Garaline Augusta Bhushanabai and Another, , it has been held by the Hon''ble Supreme Court that adverse possession becomes effective when the title of the real owner is extinguished on account of adverse possession for the prescribed period.

13. In State of Rajasthan Vs. Harphool Singh (Dead) Through His L.Rs., the Supreme Court held that the adverse possession, being a hostile user, involves, expressly or impliedly, the denial of title of the true owner and the burden is always on the person, who asserts such a claim, to prove by clear and unequivocal evidence that his possession was hostile to the real owner and in

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deciding such a claim, the Courts must have regard to the animus of the person doing those acts. There must be legally acceptable evidence and the necessary legal ingredients of adverse possession to substantiate the claim of such a party. Some concrete title of the nature of occupation, with proper proof thereof, would be absolutely necessary and mere vague assertions cannot, by themselves, be substituted for such concrete proof required for open and hostile possession. Lackadaisical findings cannot be recorded upon mere surmises and conjectures in a case of adverse possession for the reason that the person claiming adverse possession must show the possession to be overt and without any attempt of concealment so that the person, against whom time is running, if he exercises due diligence, should be aware of what is happening. While deciding the said case, the Court placed reliance upon its various earlier judgments, including Annasaheb Bapusaheb Patil and others Vs. Balwant alias Balasaheb Babusaheb Patil (dead) by LRs. and heirs etc., ; and the judgment of the Privy Council in Debendra Lal Khan (supra).

14. In P. Lakshmi Reddy Vs. L. Lakshmi Reddy, , the Hon''ble Supreme Court held that for determining the issue of adverse possession adverted to, the ordinary classic requirement that it should be nec vi, nec clam, nec precario-that is, the possession required must be adequate, in continuity, in publicity and in extent to show that it is possession adverse to the competitor.

15. In Syndicate Bank v. Prabha D. Naik and Anr. (2001) 4 see 713, the Supreme court held that adverse possession is akin to prescription, but distinguished it explaining that the prescription relates to intangible rights such as easement; whereas the adverse possession applies to an interest in the actual title of the property.

16. In Mool Chand Bakhru and Another Vs. Rohan and Others, , the Supreme Court held that the plea of acquisition of title by adverse possession cannot be available to a party claiming to be in possession of the suit property either by the permission of the owner or in part performance of an agreement to sell. While deciding the said case, the Apex Court placed reliance upon its earlier judgment in Mohan Lal (Deceased) through his Lrs. Kachru and Others Vs. Mirza Abdul Gaffar and Another, , wherein it was held that since the Respondents therein were claiming to be in possession of the property in part performance of agreement to sell, the acquisition of title by adverse possession was not available to him. Similar view has been reiterated in Darshan Singh and Others Vs. Gujjar Singh (Dead) by Lrs. and Others, .

17. While asserting the adverse possession, the party has to plead when adverse possession started. (Vide S.M. Karim Vs. Mst. Bibi Sakina,).

18. There is nothing on record to show that the findings recorded by the statutory authorities as well as by the learned Single Judge are perverse being based on no evidence or contrary to the evidence on record. The findings of the learned Single Judge do not warrant any interference in this appeal.

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19. Thus, the appeal lacks merit and is dismissed.

B.N. Mahapatra, J.

20. I agree.

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