
(1971) 10 OHC CK 0007
In the Orissa High Court
Case No : Second Appeal No. 29 of 1967

Laxmidhar Behera

APPELLANT

Vs

Upendra Behera and Others

RESPONDENT

Date of Decision : 07-10-1971

Acts Referred:

Limitation Act, 1908 — Article 142 , 144

Citation : (1971) 37 CLT 1203

Hon'ble Judges : B.K. Patra, J

Bench : Single Bench

Advocate : R.C. Patnaik, for the Appellant; D.S. Nanda, for the Respondent

Judgement

B.K. Patra, J.—The unsuccessful Plaintiff in the Courts below is the Appellant (sic). He brought the suit for declaration of his title to three decimals of land covered by portions of plot Nos. 411 and 415 appertaining to khata No. 56 of village Ana and for confirmation of his possession therein, or in the alternative, for recovery of possession.

2. These two plots of land admittedly belonged to one Paramanand Behera. After his death, his son Padmanabha Behera sold the two plots of land by two separate sale deeds Executed on 4-4-1948 and 16-2-1951 to the Plaintiff. The Plaintiff's case is that after he purchased the land, he excavated a tank on plot No. 415 and in a part of plot No. 411 and enclosed the tank by a fence. It is alleged by him that on 26-5-1961, the Defendants- who were sued as representing the villagers of Ana out the western side of the fence and made attempts to lay & road on the western side embankment of the tank thereby encroaching on the disputed two bits of land. The Plaintiff, therefore, instituted the suit on 28th of June, 1962 claiming the reliefs above mentioned and for an order of injunction restraining the Defendants from laying & road on the disputed property. The Defendants resisted the suit contending inter alia that a road has been existing on the disputed land since more than sixty years and that this road which connects the village Ana with the Bhadrak. Anandapur road on the north is being

used by the villagers since then. The Plaintiffs predecessors-in-title were thus not in possession of the disputed bits of land since the last sixty years and the Plaintiff was never in possession thereof.

3. The learned Munsif thought that although the Defendants had not in the written statement specifically claimed any customary right of passage over the disputed land, they have pleaded all the ingredients necessary to establish the customary right of way, and that therefore, the written statement should be construed to mean that Defendants ha claimed such a right. After discussing the evidence on record the learned Munsif held that the Defendants had succeeded in establishing that the road has been there at least since the year 1921, that it is absolutely necessary for the villagers and that the right claimed by them is certainly reasonable. Having record to this finding regarding the existence of the road since 1921 and its user by the public he thought that since then the Plaintiff is out of possession of the disputed three decimals of land. That being so, even if it is held that the Defendants had not succeeded in establishing customary right, still the suit would be barred by limitation under Article 142 of the Limitation Act, 1908. In the result he dismissed the suit.

4. On appeal by the Plaintiff, the learned Subordinate Judge agreed with the munsif that the road is in existence since 1921 and is being need by the villagers, and that consequently, the Plaintiff was out of possession of the same, with the result that the suit must be held to be bared by limitation under Article 142 of the Limitation Act, 1908. In regard to the question of customary right, he recorded the following finding:

Even though the Defendants have not pleaded custom in so many words, by necessary implication custom must be deemed to have been pleaded. The Defendants are residents of village Ana and have no private interest in the suit road. They pleaded a public right of way for the village Ana. Though the claim of the Defendants in this respect has been improperly worded, there is no doubt relating to the nature of the right claimed by the Defendants. As already shown the Defendants have proved long, continuous and open user of the suit road for 8 very long time. In my view, therefore, they have established a custom.

In the result, he dismissed the appeal.

5. The concurrent findings of the Courts below that a road exists on the disputed land since at least the year 1921 and that the villagers have been using that road, is binding on me in second appeal and Mr. R.C. Patnaik, learned Advocate for the Appellant has also Dot made any attempt to assail that finding. It is, however, contended by him that in view of the averments in the plaint, the case would not be governed by Article 142 of the Limitation Act, 1908, but would be governed by the residuary Article 144. He has drawn my attention to paragraphs 2 and 3 of the plaint and stated that what an the Plaintiff has stated there is that the villagers had put earth on the disputed land on 25.3.1961 and bad collected morum and stones there with a view to lay a road and that he has nowhere

alleged that he was Actually dispossessed from The land. Although in paragraph 6(ka) of the plaint be prayed for declaration of his title and confirmation of his possession of the disputed land he prayed in paragraph 6(kha) that if it is proved that he has actually been dispossessed from the disputed land, delivery of possession should be given to him. Reading carefully the averments made in paragraphs 2 and 3 of the plaint I find that a clear averment of dispossession has been made therein. It is stated in paragraph 3 of the plaint that all over the disputed land which is 60 cubits long and ten cubits wide the Defendants had spread earth. This clearly constitutes dispossession. Dispossession in Article 142 means forcible dispossession or caster and by spreading earth over the disputed land with a view to construct a road thereon the Plaintiff has been prevented from possession of that land. That obviously explains why the Plaintiff has prayed in the alternative that possession of the disputed land should be delivered to him. That apart, even assuming that there was no allegation of dispossession involved in paragraph 2 and 3 of the plaint, I am of opinion that the contention of the learned Counsel for the Appellant that the Court in discovering the Article of the Limitation Act applicable to the suit is tied to the statements in the plaint cannot be accepted. In order to determine the particular Article applicable to the suit, it is the duty of the Court to consider the facts and circumstances admitted and proved in the case. Where there is no allegation of dispossession in the plaint, yet, if the facts proved show that the Defendant entered the land while it was in the possession of the Plaintiff, the Article that would be applicable would be Article 142. To hold otherwise would be to allow unfettered freedom to the Plaintiff to avoid the operation of Article 142 by a clever drafting of the plaint. It would be assured to hold that a Plaintiff can at his sweet will avoid the operation of Article 142 by framing a suit in such a manner as if there was no dispossession. I am not unaware of the fact that in some cases a view has been taken that Article 142 cannot apply to cases in which the Plaintiff has not alleged in the plaint that he has been dispossessed from the land sometime before the suit and that in such cases it is not Article 142, but Article 144 that would apply. No decision, however, of this Court has been cited before me where such a view has been taken. It appears to me that the view of the Appellant that is pressed before me on this point is against the plain language of Article 142. That article applies to suits for possession when the Plaintiff while in possession of the property has been dispossessed or has discontinued possession, that is, when on facts proved in any particular case it is found that the Plaintiff while in possession has been dispossessed or has discontinued the possession. To accept the argument of the learned Counsel for Appellant that Article 142 would apply only where on the face of the plaint there is an allegation of dispossession would be reading into the article words which are not there. I draw support for the this view from a Full Bench decision of the Allahabad High Court in Bindhyachal Chand and Others Vs. Ram Gharib Chand and Others, . Although in that case the Plaintiff in his plaint admitted that he, as disposed, Sulaiman, C.J. who spoke for the Bench while discussing the scope of Article 142 of Limitation Act, 1908, observed thus at page 997:

It would therefore follow that an owner of property starts with The presumption in his favour that he is in possession of his property. But where the Plaintiff admits that he has been dispossessed by the Defendant or, at any rate, it is found in the case that he has been dispossessed and is not possession at the time when he brings the suit, then he cannot start with the presumption in his favour that the possession of the property was with him. He would have no right of action unless he claims within the period of limitation prescribed therefore. He has to bring his suit within twelve years of the date on which he was dispossessed or when he discontinued his possession.

Later in the same page his Lordship observed:

It would in every case be question of fact whether the Plaintiff had proved his possession, actual or constructive, within the period of twelve years; If the Court after considering all the evidence and circumstances were to record a finding that the Plaintiff had failed to prove his possession, constructive or Actual, within 12 years, then the suit must fail, even though the Court does not record a definite finding that the Defendant had established his adverse possession for more than twelve years.

It should be remembered that Article 144 is only a residuary article applicable to suits for possession of immoveable property and not otherwise especially provided for in the Act. Where there is no other special article applicable, the omnibus Article 144 would apply and then the twelve years would begin to run from the date when the possession of the Defendant became adverse to the Plaintiff. If, however, there is a special article which applies, Article 14.4 would completely be excluded and would not be applicable. As already indicated, I construe the averments made in paragraphs 2 and 3 of the plaint to mean that at least on 26-5-1961 the Plaintiff was dispossessed from the disputed property. Even assuming that these averments would not lend themselves to such a construction, yet there is a concurrent finding of the Courts below that the road on the disputed land is in existence since the year 1921, and that the villagers have been using that road.

6. It is then argued by Mr. Patnaik that the Plaintiff being one of the villagers and as such has been using the road on the disputed land, it cannot be said that he has been wholly dispossessed from the disputed land at any time so as to attract the applicability of Article 142. Such a contention can never be accepted. Possession in the eye of law consists of the fact of physical occupation and the mental Act of holding the subject of possession to the exclusion of others. The unity of these two elements namely, occupation and animus possidendi is recognized as constituting possession in the eye of law. When the road was laid on the disputed land round about the year 1921, the Plaintiff's predecessor-in-interest who was then the owner of the land was deprived of his exclusive possession. So long as the unauthorized occupation of the land by the villagers continued, the owner was not at a liberty to deal with the property in the manner he liked which is one of the essential ingredients of possession.

Merely because like all other villagers be walked over the road which was laid on the disputed land, it cannot be said that his possession over the land continued. There is consequently no force in the contention put forward by Mr. Patnaik that despite the existence of the road on the disputed land, the Plaintiff's possession over the same remained intact in the circumstances, by reason of Article 142 of the Limitation Act, 1908, the suit is barred by limitation.

7. In view of this finding, it is unnecessary to deal further with the question whether on the averments made in the plaint, the Defendants are deemed to have set up a case of acquisition of customary right of user of the disputed land as a Rasta.

8. In the result, this appeal fails and is dismissed, but in the circumstances, without costs either here or in the Courts below.