

(2017) 10 OHC CK 0003

In the Orissa High Court

Case No : 499 of 2004

Mahendra Kumar Mohapatra, & Ors.

APPELLANT

Vs

Ganesh Chandra Mohapatra (dead) through L.Rs., & Ors.

RESPONDENT

Date of Decision : 23-10-2017

Acts Referred:

[Orissa Prevention of Land Encroachment Act, 1972](#), [Section 16](#), [Section 7](#), [Section 8A](#)

Citation : (2017) 10 OHC CK 0003

Hon'ble Judges : A.K.Rath

Bench : SINGLE BENCH

Advocate : Nirod Kumar Sahu, Bhagyadhar Swain, Pratyusa Naidu, Swayambhu Mishra

Final Decision : Allowed

Judgement

1. This appeal is by the villagers with leave against a reversing judgment.
2. Plaintiff-respondent no.1 instituted O.S.No.248 of 1990-I in the court of the learned Munsif, Bhadrak for declaration of title and permanent injunction impleading respondents 2 and 3 as defendants. The case of the plaintiff is that he is the owner in possession of the suit land. The suit land consists of two M.S.Plots, i.e. plot no. 2797 A0.3 dec. and plot no.2800 A0.5 1/2 dec; in total A0.8 1/2 dec. of land. M.S.Plot no.2797 is a tank. In the remark column of M.S. R.O.R., his name has been recorded. The land has been recorded as "Gochar" under rakhit khata. His land adjoins to the suit land. He is in possession of the suit land along with his land. His cow-shed, dwelling house, medicine shop and one tank and other valuable trees are standing over the suit land. He is in possession of the suit land since the year 1950 peacefully continuously and with the hostile animus to the defendants and as such perfected title by way of adverse possession. Since defendant no.2 initiated an Encroachment Case No.73 of 1998 against him, he instituted the suit for declaration of right, title, interest

and possession over the suit land and for permanent injunction. It is apt to state here that during pendency of the second appeal, respondent no.1 died, whereafter his legal representatives have been brought on record.

3. The defendants 1 and 2 filed written statement denying the assertions made in the plaint. The specific case of the defendants is that the suit land was recorded under Rakhit Khata both in C.S. and M.S. R.O.Rs. M.S.Plot no.2797 appertaining to C.S. Plot no.2457, Ac.6.00 dec. under Rakhit Khata No.1071 and M.S.plot no.2800, Ac.1.00 dec. under Rakhit Khata No.1176 had also been recorded as Gochar. At the time of preparation of M.S. R.O.R. in respect of suit M.S. Plot no.2797, illegal possession of the plaintiff was recorded in the remark column. Encroachment Case No.725 of 1981 was initiated against him for unauthorized encroachment of an area A0.08 dec. of land out of C.S.plot no.2457. He appeared and filed objection. Penalty was imposed on him vide order dated 27.1.1982. The said case is sub-judice. Another Encroachment Case No.860 of 1986 was initiated him for unauthorized construction of a medicine store over M.S.plot no.2800. He appeared, admitted encroachment for which assessment was made and penalty was imposed. He was directed to vacate the encroachment. Accordingly, he vacated the suit land on 31.7.90. Further an Encroachment Case No.730 of 1990 was initiated against the plaintiff for unauthorized construction of a building over M.S.Plot no.2800. He appeared on 10.9.1990 and sought adjournment to file objection. On 24.10.90 the villagers of Shampur filed objection regarding the unauthorized construction of the building by the plaintiff over suit M.S.plot no.2800. The matter was enquired into. It was found that the plaintiff unauthorisedly continued with the construction work in M.S.Plot no.2800 over an area of 60 links x 20 links. He was directed to stop the construction work. He maintained a sphinx like silence. For unauthorized encroachment by the plaintiff, Rs.52.30 paise was imposed as assessment and Rs.500/- towards penalty for the year 1990-91. The plaintiff was also directed to vacate the encroachment portion within 30 days. He received notice for eviction on 1.1.1991. Steps had taken to evict him.

4. Stemming on the pleadings of the parties, the learned trial court struck four issues. Both the parties led evidence, oral and documentary, to substantiate their case. On the analysis of the evidence on record, learned trial court came to hold that the plaintiff was not in possession of the suit land peacefully, continuously for more than a statutory period. He failed to establish that he had acquired title by way of adverse possession. Held so, it dismissed the suit. Felt aggrieved, the plaintiff filed T.A.No.64 of 1993 before the learned Additional District Judge, Bhadrak. The appeal was allowed. The villagers of Shampur, where the suit land situates, filed appeal. By order dated 9.1.2017, this Court granted leave.

5. The case was admitted on the following substantial questions of law :

"1) Whether the plaintiff can maintain a suit for declaration of title on the basis of adverse possession in absence of any hostile animus ?

2) Whether the suit for declaration of right, title and interest on the basis of the adverse possession by the plaintiff is maintainable on the ground that in O.P.L.E. Case No.725 of 1991 he admitted that he was in unauthorized possession of the disputed property and admitted title of the defendant ?

3) Whether the learned Civil Court has jurisdiction to grant declaratory relief in respect of Gochar land in view of embargo under Section 7 of the Orissa Prevention of Land Encroachment Act, 1972 prohibiting settlement of Gochar land ?"

6. Heard Mr.Nirod Kumar Sahu, learned Advocate along with Bhagyadhar Swain, learned Advocate for the appellants and Ms.Pratyusa Naidu, learned Advocate for respondent no.1 and Mr.Swayambhu Mishra, learned A.S.C. for respondents 2 and 3.

7. Mr.Sahu, learned Advocate for the appellants submitted that the plaintiff was a rank trespasser. Encroachment cases were initiated against him by the Tahasildar, Dhamnagar. Order of eviction was passed. He did not challenge the same. The plaintiff is not in possession of the suit land for more than thirty years peacefully, continuously and with the hostile animus to the defendants. In paragraph-8 of the plaint, the plaintiff has stated that after receiving notice in Encroachment Case no.73/90, he for the first time came to know that he was in possession of the suit land. The suit was instituted in the year 1990. Thus, the assertion of the plaintiff that he has perfected title by way of adverse possession is not correct. He further submitted that kissam of the land is Gochar. Proviso to Sec. 7 of the Orissa Prevention of Land Encroachment Act ("O.P.L.E.Act") is a bar for settlement of Gochar land. Thus the civil court has no jurisdiction to grant declaratory relief in respect of Gochar land. He relied on a decision of this Court in the case of Prafulla Ku. Mohapatra Vrs. State of Orissa and others, 2015(II) CLR-785. The learned A.S.C. supported the stand of the learned counsel for the appellants.

8. Per contra, Miss.Naidu, learned counsel for respondent no.1 submitted that the plaintiff is in possession of the suit land since 1950. A part of the residential building is standing over the suit plot. He is in possession of the suit land peacefully, continuously and with the hostile animus to the defendants and as such perfected title by way of adverse possession. Initiation of encroachment cases are bad in law. Notwithstanding the bar contained in Sec.16 of the O.P.L.E.Act, the Civil Court has jurisdiction to entertain the suit for declaration of title. There is no prohibition to grant declaratory relief in respect of Gochar land. On an analysis of the evidence on record and pleadings, the learned appellate court came to hold that the plaintiff acquired title by way of adverse possession. There is no perversity or illegality in the findings of the learned lower appellate court.

9. The Privy Council in Secretary of State v. Mask & Co., AIR 1940 Privy Council 105, held :

"....It is settled law that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

10. In *State of Orissa v. Bhanu Mali (Dead) Nurpa Bewa and others*, 1996 (I) OLR 460, a question arose that whether the decision of the Revenue Officer in the proceeding under the O.P.L.E. Act will operate as *res judicata* in the subsequent suit filed by the plaintiff for declaration of title and recovery of possession. This Court held that the decision of the Revenue Officer in the proceeding under the O.P.L.E. Act can neither operate as *res judicata* nor Sec.16 thereof can stand as a bar relating to the question of title in the subsequent civil suit by the plaintiffs. Thus, notwithstanding the bar contained in Sec. 16 of the O.P.L.E. Act, the civil court has jurisdiction to adjudicate the complicated question of title.

11. This Court had an occasion to deal with the scope and ambit of the second proviso to Sec. 7 of the O.P.L.E Act in *Prafulla Ku. Mohapatra (supra)*. This Court held that second proviso to Sec. 7 of the O.P.L.E. Act stipulates that no such settlement shall be made if the land is recorded as Gochar. Sec. 8-A has to be harmoniously read with Sec. 7 of the O.P.L.E. Act. Even if a person is in unauthorized occupation of Gochar land for more than 30 years, the same cannot be settled under Sec. 8-A of the O.P.L.E. Act.

12. Adverse possession is a mixed question of fact and law. In the celebrated judgment, the Privy Council, in *the Secretary of State Vrs. Debendra Lal Khan*, A.I.R. 1934 Privy Council 23, held that the classical requirement of adverse possession is that the possession should be *nec vi nec clam nec precario*. Their Lordships quoted with approval the decision in the case of *Radhamoni Debi Vrs. Collector of Khulna (1)*, 140 of 27 I.A. at page 140 that "the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor".

13. In *Karnataka Board of Wakf vs. Govt. of India and others*, (2004) 10 SCC 779, the apex Court observed as under :-

"In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "*nec vi, nec clam, nec precario*", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is

adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.

The court further observed that plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession." (emphasis laid)

14. Admittedly, kissam of land is Gochar. Since the plaintiff was in unauthorized occupation of the land, the Tahasildar, Dhamnagar had initiated three different encroachment cases at a different point of time. In Encroachment Case nos.725 of 1991, 860 of 1986 and 73 of 1990, spate of orders were passed. The same had been exhibited as Exts.A to C. The order-sheets reveal that the plaintiff had vacated the land in presence of the Tahasildar, Dhamnagar, but then again he occupied the land, for which subsequent cases were initiated. Order of eviction was passed. In paragraph-8 of the plaint, the plaintiff has pleaded that he came to know for the first time that he was in possession of the suit land after receipt of notice in Encroachment Case No.73 of 1990. There is no element of hostile animus. The plaintiff is a rank trespasser. Mere possession of the suit land for long time is not suffice to hold that the defendant has perfected title by way of adverse possession, unless the classical requirements of adverse possession *nec vi, nec clam, nec precario* are pleaded and proved. The substantial questions of law are answered accordingly.

15. A priori, the judgment and decree of the appellate court is set aside. Consequently, the suit is dismissed. The appeal is allowed. No costs.