
(1968) 08 OHC CK 0033

In the Orissa High Court

Case No : Second Appeal No's. 491 and 492 of 1964

Mani Charan Swain

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 28-08-1968

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2
Limitation Act, 1908 — Article 142 , 143, 144
Orissa Tenancy Act, 1913 — Section 23, 24, 251, 55

Citation : AIR 1969 Ori 184 : (1969) 35 CLT 191

Hon'ble Judges : G.K. Misra, J

Bench : Single Bench

Advocate : K.M. Swain, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Partly Allowed

Judgement

G.K. Misra, J.—Ka schedule land consists of 0.08 acre out of C. S. plot No. 816 recorded as Gochar in Anabadi Khata No. 501 of village Juna in the district of Cuttack. Kha schedule land consists of 0.05 acre out of C. S. plot No. 738 recorded as Rasta in Sarbasadharan Khata No. 193 of village Purusottampur in the district of Cuttack. Both the plots are contiguous. They are also contiguous to the house and homestead of the plaintiff. Plaintiff's case is that he is in possession of those two plots of lands from 1940 onwards and has acquired title of an occupancy tenant by prescription as against Kujang estate which vested in the State of Orissa on 27-11-52. He has been in possession all through. He wants declaration of title, confirmation of possession and for permanent injunction. The State of Orissa, the Khasmahal Tahasildar, Marsaghai and the S. D. O., Kendrapara, are defendants 1 to 3 respectively. Defendants 4 and 5 are villagers of Juna and defendants 6 and 7 are villagers of Puru-sottampur. The villagers of Juna and Purusottampur were sued under Order 1, Rule 8, Civil Procedure Code. Defendant 5 is dead, but that does not affect the case. The cases of the defendants are identical. Their case is that the disputed Ka and Kha schedule lands are Gochar and Rasta in respect of which no occupancy right can

accrue and that the plaintiff came into possession of the same 7 or 8 years prior to the suit.

The trial Court decreed the suit confirming possession of the plaintiff and issued a permanent injunction. Against the trial Court's decree, defendants 1 to 3 filed one first appeal and the rest of the defendants filed another appeal before the lower appellate Court. Both the appeals were allowed and the suit was dismissed. The lower appellate Court held that by virtue of Section 55 of the Orissa Tenancy Act the plaintiff could not acquire any occupancy right and Section 251, O. T. Act, was a bar to accrual of any right. It further held that the plaintiff was in possession of Ka schedule land from 21-2-43 as per Ex. 7. With regard to Kha Schedule land its finding is that the plaintiff failed to prove adverse possession. Against the two appellate decrees arising out of the same judgment, plaintiff has filed two second appeals.

2. Mr. Swain assails the conclusions of the lower appellate Court as being contrary to law. After having heard him fully I am clearly of opinion that the finding of the learned Sub-Judge regarding Kha Schedule land cannot be assailed. Plaintiff has failed to prove acquisition of title by adverse possession against Kujang estate for more than 12 years prior to the vesting on 27-11-52. The suit with regard to Kha schedule land was rightly dismissed.

3. With regard to Ka schedule property it may be pointed out that the learned Subordinate Judge made a confusion in constituting "Rajasarkar" in the settlement entry as meaning or referring to Government. The word "Rajasarkar" there refers to Kujang estate and not to the Government. There was no pleading that the disputed land belonged to the Government before vesting in 1952. The admitted case of the parties was that before 1952 both Ka and Kha schedule lands belonged to the Kujang estate. Section 55 (c) of the O. T. Act says that no occupancy right shall be acquired in lands recorded as belonging to the Government. As the lands belonged to the Kujang estate, there was no bar to accrual of occupancy right by prescription before 1952. The learned Subordinate Judge should not have allowed himself to be confused by raising imaginary contentions having no relevance to the materials on record. Similarly there was no pleading with reference to Section 251 of the O. T. Act. The ingredients referred to in that section must be proved before it is invoked. Any argument on the basis of this section was therefore inadmissible. The conclusion of the learned Sub-Judge that Sections 55 and 251 were obstacles to the accrual of occupancy right by the plaintiff by prescription was erroneous.

4. The last question for consideration is whether the plaintiff has acquired occupancy right in Ka schedule land. The genuineness of Ex. 7 is beyond reproach and is not questioned. Order dated 21-2-1943 shows that the plaintiff filed an application for settlement of rent regarding Ka schedule land from 1347-48 Sal corresponding to 1940-41 and that he had already grown Harada on the land and had excavated a tank and that his tenancy should be recognised. Along with the oral evidence which was to the effect that the plaintiff was in

possession by digging tank, growing cocoanut trees and doing other acts, the learned Sub-Judge utilised Ex. 7 as fixing the terminus of plaintiffs operation from 21-2-43. The document was misconstrued. It clearly recites that the plaintiff was in possession from 1940-41. In the absence of any other evidence, it obviously refers to the beginning of the agricultural year in 1940-41 which commenced from 13th April. Evidence is abundant that the plaintiff is in continuous possession from 1943 onwards till the date of the suit in 1956. Read with Ex. 7 conclusion is irresistible that the plaintiff was in possession of the disputed land from the beginning of the agricultural year of 1940 till the date of the vesting on 27-11-52. This period is more than the prescriptive time of 12 years. Plaintiff was, therefore, in possession of Ka Schedule land in exercise of his own right, title and interest as an occupancy tenant for more than 12 years. His assertion that he is the settled raiyat of the village even before 1940 is not disputed. The learned Sub-Judge's finding that the plaintiff was in possession for 10 years before vesting is contrary to law and the clear recitals in Ex. 7 and is accordingly set aside.

5. The learned Sub-Judge negated the plaintiff's case of prescription on another ground, namely, that by his application dated 21-2-43 plaintiff admitted the title of Kujang estate and where title is admitted, there cannot be any adverse possession against the owner. The learned Sub-Judge's view is contrary to law. He has failed to keep in view the distinction between adverse possession against the proprietary interest and against the tenant's right. Here what the plaintiff claims is not the proprietary right of the ex-landlord, namely, Kujang estate. He admits to be a tenant under the Kujang estate but says that he acquired occupancy right by being in possession for more than 12 years prior to the vesting. A person prescribing tenant's interest and asking the landlord to accept rent does not act against the hostile animus which continues to run despite the willingness to pay rent. The learned Judge missed this fine distinction. The aforesaid view gets full support in a clear analysis in Mathura Prasad Singh Vs. Emperor,). At page 361 their Lordships observed thus --

Reliance has been placed upon the fact that defendants admit that after the death of the original grantee they continued to pay rent to the landlord and the landlord granted marfatdari receipts to them. Now, such payment of rent by the defendants was in no way inconsistent with their claim of adverse possession. What they were claiming was the status of a permanent makoraridars. As the permanent mokararidars they were liable to pay rent and payment of rent under such circumstances would not in any way derogate from their position of being in adverse possession. The adverse possession claimed by the defendants was of a limited nature. The possession was not adverse to the proprietors absolutely. That adverse possession of a limited nature can be claimed by a person in possession, recognised by a number of decided cases and is settled by authorities.

6. To sum up, if Ex. 7 in its true meaning is considered with the oral evidence on

record, conclusion is irresistible that the plaintiff prescribed a tenant's interest in respect of the suit Ka schedule land by being in possession for more than the prescriptive period prior to the date of vesting. Secondly, the application by the tenant to the landlord to recognise him as a tenant by acceptance of rent does not militate against the case of adverse possession of the limited interest of tenancy.

7. In the result, plaintiff's suit with regard to Ka schedule land succeeds and with regard to Kha schedule land fails. The second appeals are allowed in part as indicated above. In the circumstances, parties to bear their own costs through out.