

(2019) 02 OHC CK 0057
In the Orissa High Court
Case No : R.S.A. No.396 Of 2004

Nabin Chandra Mohanta (Since Dead) Through L.Rs.	APPELLANT
Vs	
State Of Orissa And Others	RESPONDENT

Date of Decision : 22-02-2019

Acts Referred:

Orissa Prevention Of Land Encroachment Act, 1972 — Section 16
Code Of Civil Procedure, 1908 — Order 41 Rule 27

Citation : (2019) 02 OHC CK 0057

Hon'ble Judges : Dr. A. K. Rath, J

Bench : Single Bench

Advocate : N.C. Panigrahi, N.K. Tripathy, Sagar Panigrahi, R.P. Mohapatra, Samapika Mishra

Final Decision : Dismissed

Judgement

Dr. A.K. Rath, J

1. This appeal at the plaintiff's instance assails the affirming judgment of the District Judge, Sundargarh in T.A. No.11/1999.

2. The case of the plaintiff was that the suit land was originally a Goda land adjacent to his residential house. The same was not road. It was

wrongly recorded as Grama Rasta (village road) in the Hal ROR. The road is adjoining to the suit land and completely separate. His father

converted the same into the thrashing floor and in possession of the same to the knowledge of all since September, 1955. Thereafter he is in peaceful

possession of the same. Encroachment Case No.2999 of 1991 was initiated against him. He filed show-cause and prayed to settle the land in his

favour on realization of back rent, royalty and penalty in view of the long possession for more than thirty years. In the remarks column of the ROR, his

possession has been reflected. He is in possession of the suit land for more than thirty years and acquired title. While the matter stood thus, the

Tahasildar, Bonai in Encroachment Case No.627 of 1996 passed orders of eviction on 24.10.1996. Felt aggrieved, he filed Revenue Appeal No.5 of

1996 before the Sub-Collector, Bonai, which was dismissed on 4.4.1997. With this factual scenario, he instituted T.S. No.14 of 1997 before the Civil

Judge (Sr. Divn.), Bonai for declaration of title by way of adverse possession and confirmation of possession.

3. The defendant no.1 entered contest and filed written statement denying the assertions made in the plaint. It was pleaded that the plaintiff was in

illegal possession of the land, for which, Encroachment Case No.627 of 1996 was initiated against him. Earlier another Encroachment Case No.2999

of 1991 was initiated against him by the Tahasildar, Bonai. It is subjudice. In the remarks column of the ROR, his note of possession had been

reflected. The plaintiff was not in possession of the suit land for more than thirty years. He had not perfected title by way of adverse possession.

Revenue Appeal No.5 of 1996 filed by the plaintiff before the Sub-Collector, Bonai was dismissed on 4.4.1997.

4. The defendant nos.2 and 3 filed written statement pleading inter alia that the suit land is a road used by the public. The same is not adjacent to the

plaintiff's house. The suit land has been recorded correctly as Gramya Rasta in the ROR. Since the plaintiff encroached upon the Government

land, Encroachment Case No.627 of 1996 has been initiated against him. The villagers have objected the illegal possession of the plaintiff. The

encroachment is objectionable. Neither the father of the plaintiff, nor the plaintiff were/are using the suit land for thrashing floor. The suit land is lying

vacant. Villagers are using the same. Father of the plaintiff and the plaintiff were influential persons and managed to record the suit land in the

remarks column of the ROR. In the encroachment case, the plaintiff had prayed for settlement of the land. The villagers had objected to the same.

The plaintiff had not acquired title by way of adverse possession.

5. Stemming on the pleadings of the parties, the trial court struck ten issues. Parties led evidence, oral and documentary. On an anatomy pleadings and

evidence, the trial court came to hold that ROR has been rightly published in the name of the Government. The villagers used the suit land as road.

The suit is bad for non-joinder of necessary party. The suit is hit under Sec.16 of the O.P.L.E. Act. Held so, it dismissed the suit. Plaintiff has failed to

establish that he has perfected title by way of adverse possession. The unsuccessful plaintiff filed T.A. No.11 of 1999 before the District Judge,

Sundargarh, which was eventually dismissed. It is apt to state here that during pendency of the appeal, the plaintiff-appellant died, whereafter the legal

heirs have been substituted.

6. The second appeal was admitted on the following substantial questions of law.

â??A. Whether the documentary evidences such as, the ROR (Ext.1), the village map (Ext.2), the notice issued by the Revenue Officer in Encroachment Case (Ext.3),

the ordersheet (Ext.4) in Encroachment Case No.2999/91 together with the evidences of P.Ws.1 and 2 clearly establish that the plaintiff has acquired right, title and

interest over the dispute land being in possession for more than 30 years, i.e., prior to the year, 1955 and has thus acquired title against the State Government under

Article 112 of the Limitation Act, 1963 ?

B. Whether the learned appellate court is legally correct saying that there is a general law in Civil Jurisprudence that a property like a road, â??gocharâ?, cremation

ground etc. cannot be acquired by possession ?

C. Whether both the courts below have committed error of fact while saying that the suit land is a â??sarbasadharana rastaâ? while the ROR, the Aminâ??s report

and the notice issued by the Revenue Officer in the Encroachment case clearly show that through in the Sabik record, the suit land was recorded as a â??rastaâ?, yet

in the Hal Record, the same has been described as â??goda dulâ?? land ?

D. Whether both the courts below are right in saying under Issue No.5 that the suit is liable to be dismissed for non- joinder of the brother of the plaintiff as a party to

the suit, even though the interest of the brother of the plaintiffs appellants is not adverse to each other ?

E. Whether the courts have rightly decided issue No.8 by giving a finding that the suit is barred under Section 16 of the Orissa Prevention of Land Encroachment

Act, 1972 although the plaintiff has filed the present suit for declaration of right,

title and interest over the suit land by way of adverse possession ?

F. Whether the learned District Judge was justified in rejecting the petition filed by the appellants under Order 41, Rule 27 of the C.P.C., 1908 for acceptance of the

Aminâ??s report which clearly states that the plaintiff is in possession of the suit land since the year, 1955 and when admittedly no objection was filed by the respondents to the said petition ?

G. Whether the suit for declaration of title on the basis of adverse possession is maintainable ?â??

7. Heard Mr. N.C. Panigrahi, learned Senior Advocate along with Mr. N.K. Tripathy and Mr. Sagar Panigrahi, learned Advocates, for the appellants

and Mr. R.P. Mohapatra, learned A.G.A. along with Miss Samapika Mishra, learned A.S.C. for the respondent no.1. None appeared for the respondent nos.2 and 3.

8. Mr. Panigrahi, learned Senior Advocate, argued with vehemence that the kissam of the land was Goda-2, which means Taila Class-III rainfed. The

same was not village road. The father of the plaintiff occupied the suit land in September, 1955. Thereafter the plaintiff is in possession of the suit land

peacefully, continuously and with the hostile animus of the defendant no.1 and as such perfected title by way of adverse possession. Initiation of

encroachment case against the plaintiff is bad in law. Notwithstanding the order of eviction passed in encroachment case, the suit is maintainable. The

findings of the courts below that the suit is hit under Sec.16 of the O.P.L.E. Act and the plaintiff had not perfected title by way of adverse possession

are perverse. He further submitted that in the event the suit is decreed, the same will enure to the benefit of the other co-sharers. The plaintiff filed an

application under Order 41 Rule 27 C.P.C. for additional evidence. The appellate court rejected the same on untenable and unsupportable grounds.

The courts below brushed aside the ROR. He further submitted that in *Gurdwara Sahib vs. Gram Panchayat Village Sirthala* and another, (2014) 1

SCC 669, no issue was raised with regard to maintainability of the suit by way of adverse possession. The finding of the Apex Court that the plaintiff

cannot seek a declaration to the effect that such adverse possession has matured into ownership is an orbiter. According to Mr. Panigrahi, the Apex

Court in the cases of *Des Raj and others vs. Bhagatram (Dead)* by LRs. and

others, (2007) 9 SCC 641, Hemaji Waghaji Jat vs. Bhikhabhai

Khengarbhai Harijan and others, (2009) 16 SCC 517, Krishnamurthy S. Setlur (Dead) By LRs. vs. O.V. Narasimha Setty and others, (2007) 3 SCC

569 and Balakrishnan vs. Satyaprakash and others, AIR 2001 SC 700, had the occasion to deal with Sec.27 as well as Articles 64 and 65 of the

Limitation Act of the Limitation Act. It was held that adverse possessee acquires the title that is extinguished by his adverse possession.

9. Per contra, Mr. Mohapatra, learned A.G.A. for the respondent no.1, submitted that the suit land is Government land. The same was not in

occupation of the father of the plaintiff or the plaintiff at any point of time. The nature of the suit land is communal. The plaintiff was in illegal

possession of the land, for which, encroachment cases had been initiated against him. In the encroachment case, the plaintiff had made an application

to settle the land in his favour. The element of hostile animus is absent. The plaintiff was not in possession of the suit land for more than thirty years.

He further submitted that the suit for declaration of title on the basis of adverse possession is not maintainable. He placed reliance on the decision of

the Apex Court in the case of Bangalore Development Authority vs. N. Jayamma, (2017) 13 SCC 159 and the decisions of this Court in the cases of

Laxmi Charan Das vs. State of Orissa and another, 2018 SCC OnLine Ori.286 and Bisikesan Naik vs. State of Orissa and another, 2018 SCC OnLine

Ori.239 .

10. In Gurdwara Sahib, the plaintiff-appellant filed the suit for decree of declaration to the effect that it had become the owner of the suit property by

adverse possession, correction of ROR and permanent injunction. The suit was partly decreed by the trial court granting relief of injunction. The first

appeal against that part of the judgment, whereby relief of declaration was denied was dismissed by the Additional District Judge. In the second

appeal, the relief of declaration by way of adverse possession was denied holding that such a suit is not maintainable. The second appeal was

dismissed. The matter travelled to the Apex Court. The Apex Court held:

“8. There cannot be any quarrel to this extent that the judgments of the courts below are correct and without any blemish. Even if the plaintiff is found to be in

adverse possession, it cannot seek a declaration to the effect that such adverse

possession has matured into ownership. Only if proceedings are filed against the appellant and the appellant is arrayed as defendant that it can use this adverse possession as a shield/defence.â?? (emphasis laid)

11. The submission of Mr. Panigrahi that no issue was raised and finding is obiter is difficult to fathom. In no uncertain terms, the Apex Court held

that even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into

ownership. Only if proceedings are filed against the appellant and the appellant is arrayed as defendant that it can use this adverse possession as a

shield/defence. The same is ratio decidendi. The High Court is bound under Article 141 of the Constitution of India. The Apex Court further held that

as the appellant is in possession of the suit property and has been granted the decree of injunction, it obviously means that the possession of the

appellant cannot be disturbed except by due process of law. There is no quarrel over the proposition of law.

12. In none of the judgments cited by Mr. Panigrahi the issue with regard to declaration of title by way of adverse possession had been raised and

decided by the Apex Court. The maintainability of a declaratory suit at the instance of a plaintiff, adverse possession was not the issue. Thus the

decisions in the cases of Des Raj and others (supra), Hemaji Waghaji Jat (supra), Krishnamurthy S. Setlur (Dead) By LRs. (supra) and Balakrishnan

(supra) are distinguishable. In Gurdwara Sahib (supra), the issue directly arose for consideration.

13. In State of Orissa vs. Sudhansu Sekhar Mishra, AIR 1968 SC 647, the Constitution Bench of the Apex Court held that a decision is only an

authority for what it actually decides. The essence in a decision is its ratio and not every observation found therein nor what logically follows from the

various observations made in it. It is not a profitable task to extract a sentence here and there from a judgment and to build upon it.

14. In State of Orissa vs. Bhanumali (Dead) Nurpa Bewa and others, AIR 1996 ORISSA 199, a question arose that whether the decision of the

Revenue Officer in the proceeding under the Orissa Prevention of Land Encroachment 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

Orissa Prevention of Land Encroachment 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. But then, in view of the decision of the Apex Court in the case of Gurdwara Sahib (supra), the plaintiff

cannot maintain the suit for declaration of title by way of adverse possession.

15. The matter may be examined from another angle. The date of entry into the suit land has not been mentioned. In the proceeding under the OPLE

Act, the plaintiff had filed an application for settlement of the land in his favour. Thus the element of hostile animus is absent.

16. The appellate court has rightly rejected the application of the plaintiff filed under Order 41 rule 27 C.P.C. to admit the Amin's report as

additional evidence holding that the report is not conclusive. The document is not relevant to decide the real issue in controversy. The same has no

direct bearing to the main issue. The appellate court is fully justified in holding that the property which is earmarked for community like gochar,

cremation ground, no adverse possession can be declared. The nature of property is communal.

17. RSA No.281 of 2003 and S.A. No.314 of 2000 were dismissed by this Court on the ground that the date of entry into the suit land has not been

mentioned and the plaintiff has paid the penalty in the encroachment case. In Bangalore Development Authority, the Apex Court delved deep into the

matter and enunciated the principles of adverse possession.

18. Adverse possession is not a pure question of law, but a blended one of fact and law. Both the courts concurrently held that the plaintiff has not

perfected title by way of adverse possession. There is no perversity in the same. The substantial questions of law are answered accordingly.

19. As a sequel to the above discussion, the appeal, sans merit, deserves dismissal. Accordingly, the same is dismissed. There shall be no order as to

costs.

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