
(2011) 02 OHC CK 0010
In the Orissa High Court
Case No : Second Appeal No. 251 of 1992

Narasingha Naik	Vs	APPELLANT
State of Orissa and Others		RESPONDENT

Date of Decision : 17-02-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80

Citation : (2012) 114 CLT 318

Hon'ble Judges : Aruna Suresh, J

Bench : Single Bench

Advocate : B.B. Ratho, for the Appellant; D.N. Mohanty, A.S.C., for the Respondent

Final Decision : Dismissed

Judgement

Aruna Suresh, J.—Impugned in this Appeal is the Judgment & decree of the first Appellate Court dated 18.7.1992 & 22.8.1991 respectively whereby the Judgment & decree passed by Munsif Jeypore (now Civil Judge (Junior Division Jeypore) dated 10.12.89 & 2.1.1990 receptivity were set aside & the suit of the Plaintiff (Appellant herein) was dismissed. Respondent No. 4/a had died during pendency of the appeal Plaintiff did not file any application to bring on record his legal representatives. It is submitted by Learned Counsel for Defendant No. 4 that the appeal abated on his death & therefore, the appeal must fail. His submissions are refuted by Learned Counsel for the Plaintiff. Defendant No. 4/a happened to be the legal, representative of deceased-Defendant No. 4 who died during pendency of the case & therefore, on the application of the Plaintiff, Defendant No. 4/a was arrayed as a legal representative. Undisputedly, on his death the appeal against him stands abated. However, the appeal, as such did not abate on his death as the deceased was non-contesting Defendant & was set ex pert. Besides, no relief had been claimed by Plaintiff against Defendant No. 4/a. He was arrayed as Defendant in the cause title being a proper party & therefore, abatement of appeal qua him does not dis-entitle the Plaintiff to

continue with his appeal against Defendant Nos. 1 & 2.

2. Matrix of the case of the Plaintiff is that he had purchased house site along with thatched house standing thereon as described in Schedule "A" from Biswanath Bali (deceased legal representative 3/a) vide sale deed dated 13.8.1962 (Ext. 6) & another house site along with thatched house standing on the property as Schedule "B" of the plaint from Kalia Challan (Defendant No. 4 since deceased, his legal representatives 4/a to 4/c) vide sale deed dated 23.11.1961 (Ext. 5). The vendors had been in possession of the respective properties since during the time of their ancestors, at least for more than 50 Years & they were in possession at the time of enforcement of the Orissa Estate Abolition Act, 1952 (hereinafter to be referred to as "Act, 1952"). They had sold the suit land to the Plaintiff in the year 1961-62, i.e., after enforcement of the Act. On purchase of the property, Plaintiff came into physical Possession. The survey & settlement operation of the area took place in the year 1965-66 in the absence of the Plaintiff, who generally stays at village Bayaguda at a distance of 13 kms. from Jeypore. The suit land was recorded as "Ghorobari" with classification as "Kochaghor", Tahasildar Jeypore, (Respondent No. 2 herein) initiated two separate encroachment case in the year 1970, i.e., OPLE Case Nos. 72 of 1970 & 41 of 1970 & after hearing, held the Plaintiff as an encroacher vide his common Order Dated 12.6.1971. Against the order Tahsildar Plaintiff preferred an appeal the Court Sub-Divisional Officer, Jeypore, but was unsuccessful. Thereafter, he preferred a revision against the order of the Sub-Divisional Officer, Jeypore dated 4.8.1980 before Additional District Magistrate, which was also rejected on 9.12.1982. Plaintiff preferred 2nd revision before the Revenue Division Commissioner (Southern Division), Berhampur, which was dismissed being barred by limitation. Plaintiff filed a Writ Petition before this Court in OJC No. 904 of 1984. The said petition was dismissed, but the Court granted protection to the Plaintiff till 15.3.1.985 from dispossession. After dismissal of the writ Plaintiff served a notice dated 29.1.1985 u/s 80 of the CPC on the Defendants & thereafter filed Title Suit No. 16 of 1985 in the Court of Munsif, Jeypore Defendant Nos. 3 & 4, the vendors of the suit properties choose not to contest the suit & hence, were proceeded ex parte.

3. Defendant Nos. 1 & 2 have controverted the claim of the Plaintiff contending, inter alia that Biswanath Bali & Kalia Challan or their ancestors never possessed the suit land either prior to the abolition of Jeypore Zamindary or subsequent thereto. The suit property was part & parcel of Jeypore Estate which vested in the State Government in 1952 by virtue of the Act, 1952, free from all encumbrances & therefore, the State Government has absolute right, title & interest in it. The Plaintiff encroached the suit land in the year 1962 & when this was detected, Encroachment Case Nos. 72 of 1970 & 41 to 1970 were started against him. The sale deeds, it any cannot confer any title on the Plaintiff over the suit property as the same belonged to the State Government. It is further averred that there was never any house over the suit land when the survey & settlement operation in Jeypore town took place in or about 1962. However,

Plaintiff encroached upon the suit land & constructed a Kacha house to claim a title in the suit Property. Plaintiff was asked to vacate the possession of the suit land, but he failed & therefore, vacation Order Dated 12.8.1977 was issued by the Tahasildar, Jeypore. The further case of Defendants is that since plaintiff has no right title & interest over the suit property he is not entitled to declaration of the title over the property described in Schedule "A" & "B" of the plaint.

4. Trial Court settled seven issues considering the pleadings of the parties.

5. The Trial Court while holding that the sale deeds, Exts. 5 & 6 executed in favour of the Plaintiff were not proved in evidence as the Plaintiff failed to prove title of the vendors in the suit property, concluded that the Plaintiff was in adverse possession of the suit property & had perfected his title & deceased the suit of the plaintiff against Defendant Nos. 1 & 2 on contest & against Defendant Nos. 3 & 4 ex parte. The Trial Court declared the title of the Plaintiff over the suit land & injected the Defendants from claiming any title in their name & also from interfering with peaceful possession & enjoyment of the suit property by the Plaintiff.

6. Defendants 1 & 2, State of Orissa & others challenged the order of the Munsif dated 19.2.1989 in Appeal No. 8 of 1990 filed before the Additional District Judge Jeypore. The said appeal was allowed & the Judgment & decree passed by Munsif, Jeypore was set aside & the suit of the Plaintiff was dismissed vide Judgment & decree date 17.8.1992 & 22.8.1992 respectively with the observation that Plaintiff had failed to establish that he had perfected his title over the suit land by adverse possession.

7. Aggrieved by the impugned Judgment & decree of the Appellate Court, plaintiff has filed this Second Appeal.

8. In the appeal the Plaintiff raised number of issues. However, during course of hearing on admission, it was canvassed that the observation of the first Appellate Court that the Respondents failed to establish the possession of the vendor at the time of sale of the suit land to him & therefore, there was no continuity of possession/adverse possession, is error on record. The appeal was admitted only on this ground on 31.3.2008.

9. While arguing on merits; Counsel for the Plaintiff made it clear that challenge to the findings of facts of the Trial Court as well as to the first Appellate Court are not pressed in this appeal as the Plaintiff has lost both in the Trial Court as well as the Appellate Court because he had failed to prove title of the vendor, who had executed the sale deeds in his favour.

10. Mr. B.B. Rath, Learned Counsel for the Plaintiff has submitted that Biswanath Bali & Kalia Challan were in continuous & uninterrupted possession of the suit property for long period since before enforcement of the Act, 1952 & after purchase of the property, Plaintiff stepped into their shoes & continued in possession of the suit property, that since the predecessors in interest of the

Plaintiff were in hostile possession of the suit property for a period of more than 30 years against Defendant Nos. 1 & 2 & had acquired titled in the suit property & after purchase of the suit property from Defendant No. 3 & 4, he had acquired perfect titled the impugned property. He has further submitted that possession of the Plaintiff was also protected by this Court while dismissing the Writ Petition till 8.4.1985 it is submitted that Plaintiff has been shown as encroacher in the suit land since the year 1961-62 when he purchased the property from the vendors & he has been paying holding tax electricity dues & water charges as per the demand made by the Jeypore Municipality since the year 1972-7-4, that the Tahasildar has also held the Plaintiff to be encroacher while disposing of the encroachment case opened by him against the Plaintiff & his findings were based on the enquiry report of the Revenue Inspector, Town date 23.10.1976.

11. He has further submitted that in a bonafide dispute between the Government & private persons in respect of immovable property, Government cannot take any unilateral decision in its own favour that the property belonged to it & the Government has to establish its title in the property, but until that is done, the Plaintiff cannot be evicted summarily. He has argued that limitation to file such suit can also be calculated by taking together adverse possession of two or more trespassers if one trespasser derives its interest from the other. Once the Plaintiff has acquired title by adverse possession in the suit property, Defendants cannot be permitted to take possession of the same. He has emphasized that despite the order of ejectment passed by the Tahasildar, the Plaintiff continued in possession of the suit property & mere passing of order of ejectment, which was not executed & acted upon, neither caused Plaintiffs dispossession not his continuation of possession & that the Plaintiff's possession being continuous, his adverse possession after lapse of statutory period of limitation within which Defendants could have enforced their right in the property & claimed possession from the Plaintiff in accordance with law, has perfected his title in the suit property. He has relied upon Jamuna Devi Vs. Girija Devi and Others, , to support his submissions.

12. Submissions made by Learned Counsel for the Plaintiff have been refuted by Mr. D.N. Mohanty, Learned Additional Standing Counsel for the contesting Defendants. It is argued that the Plaintiff has to affirmatively prove his possession for over statutory period & presumption & probability cannot be substituted for evidence. He has not at all proved that he is in continuous possession of the suit property & also that dispossession is hostile to the actual owner & mere continuous possession for long period does not entitle him to claim title over the suit land by adverse possession. He has further submitted that the Appellate Court rightly re-assessed the oral evidence as well as documentary evidence produced by the parties while coming to the conclusion that the Plaintiff failed to prove his adverse possession in the suit property. Permissive possession cannot be considered as adverse possession unless it is proved by the Plaintiff that he has been in possession & has been asserting adverse title to the knowledge of the true owner over a period 30 years as per Article 112 of the

Limitation Act. He has submitted that findings of the Appellate Court while allowing the appeal of the Defendants are based on oral & document evidence of the parties. He has urged that the appeal therefore, should be dismissed.

13. Plaintiff has claimed that he is in continuous physical possession of the suit property since its purchase in the year 1961-62. As per his case, the vendors were in continuous possession of the suit property even before enforcement of the Act, 1952. However, the Plaintiff has not produced any evidence oral or documentary or even examine the vendors as his witnesses to prove that they were in continuous possession of the suit property & that their possession was hostile to the actual owner, i.e., State. The evidence adduced on record only indicate that Defendant Nos. 3 & 4 were in possession of the suit property when they sold it in favour of the Plaintiff. Mere possession does not establish that their possession was hostile to the actual owner. Learned Counsel for the Plaintiff has submitted that since this report pertains to the Plaintiff, it clearly establishes that the Plaintiff is in continuous possession of the suit property for last more than 40 years & has acquired title in the suit property by adverse possession. Ext. 1 is the certified copy R.O.R. prepared on 19.7.1984. As per this document, Plaintiff is shown as encroacher in the suit property. Much emphasis has been placed on Ext.4, i.e., the order of the Tahasildar dated 25.10.1976. In this order, Tahasildar, Jeypore while referring to the report of the Revenue Inspector dated 23.10.1976 prepared by him after local enquiry, noted that the suit land has been continuously under Plaintiffs possession since 40 years. The encroacher in this order is named as Narasingha Nayak, the Plaintiff. This order was passed in Encroachment Case No. 72 of 1970 & 41 of 1970. Annexed to this order is the enquiry report dated 23.10.1976 prepared by the Revenue Inspector, Town. In the report, he has indicated that on enquiry it was seen that the properties mentioned in the sale deed, tally with the encroachment case. This enquiry report pertains to Narasingha Nayak, Plaintiff, in respect of the suit property. He is shown to have purchased the impugned property from Defendants No. 3 & 4. This report does not indicate that Revenue Inspector. Town on enquiry had found that the suit land had been continuously under Possession for 40 years. Hence, the observations made by the Tahasildar in this order Ext. 4 that suit land has been in continuous possession for over 40 years are not found in the enquiry report. Basis of the aforesaid Judgments is not known. I find no force in this argument. Fact remains, as per the case of the Plaintiff himself, he took possession of the land in 1961-62 by virtue of the sale deeds, Ext. 5 & 6. Therefore, the report submitted by Revenue Inspector. Town or the observation made by the Tahasildar in his Order Dated 25.10.1976 not in any manner indicate that the Plaintiff has been in continuous physical possession of the suit property through his predecessors over a period of more than 40 years. The enquiry report does not reveal that prior to the Plaintiffs taking over possession of the suit property, Kalia Challan & Biswanath Bali were in continuous physical possession of the impugned property since before 1952. It is not known who was in actual physical possession of the property for 40 years before the Plaintiff

came into possession of the suit property. These documents, Therefore, do not in any manner come to the rescue of the Plaintiff to prove that his predecessors in interest were in actual physical possession of the suit property over long period & since after purchase of the property he is in possession of the same & therefore, even if the encroachment of the suit land by his predecessors & by him thereafter are clubbed together, the period of limitation for filling the suit for possession by Defendants 1 & 2, i.e. 30 years cannot be said to have expired at the time of filling of the suit & therefore, Plaintiff cannot claim that he has acquired title in the suit property by adverse possession. Similarly, other documents like holding tax paid to the municipality indicating his possession since after the year 1974 till 1988 do not prove adverse possession of the Plaintiff in the suit property over a period of 30 years.

14. As discussed above, there is no evidence available on record to indicate that the vendors of the property were in actual hostile possession of the suit property for long period of 40 years before 1952 to the knowledge of the real owner, i.e. when the Act, 1952 came into force.

15. The concept of adverse possession contemplates hostile possession, i.e., possession, which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person, who does not acknowledge the other's right but denies them. The principle of law is firmly established that a person, who bases his title on adverse possession must show by clear & unequivocal evidence that this possession was hostile to the real owner & amounted to denial of his title to the property claimed. For deciding whether the alleged acts of a person constituted adverse possession, the animus of the person doing those acts is the most crucial factor. Adverse possession is commenced in wrong & is aimed against right. A person is said to hold the property adversely to the real owner when that person in denial of the owner's right excluded him from the enjoyment of this property. Mere wrong continuous possession for any length of time unless such possession clearly amounts to adverse possession for a period of 30 years will not be sufficient in a suit against the Government. The concept of adverse possession has been elaborately dealt with by the Apex Court in T. Anjanappa and Others Vs. Somalingappa and Another, in the following manner:

12. The concept of adverse possession contemplates a hostile possession i.e. a possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person who does not acknowledge the other's rights but denies them. The principle of law is the established that a person who bases his title on adverse possession must show by clear & unequivocal evidence that his possession was hostile to the real owner & amounted to denial of his title to the property claimed. For deciding whether the alleged acts of a person constituted adverse possession, the animus of the person doing those acts is most crucial factor. Adverse possession is commenced in wrong & is aimed against right. A person is said to hold the property adversely

to the real owner when that person in denial of the owner's right excluded him from the enjoyment of his property.

13. Possession to be adverse must be possession by a person who does not acknowledge the other's rights but denies them:

24. It is a matter of fundamental principle of law that where possession can be referred to a lawful title, it will not be considered to be adverse. It is on the basis of this principle that it has been laid down that since the possession of one co-owner can be referred to his status as co-owner, it cannot be considered adverse to other co-owners. (*Sri Bidya Devi v. Prem Prakash*).

14. Adverse possession is that form of possession or occupancy of land which is inconsistent with the title of the rightful owner & tends to extinguish that person's title. Possession is not held to be adverse if it can be referred to a lawful title. The person setting up adverse possession may have been holding under the rightful owner's title e.g. trustees, guardians, bailiffs or agents. Such persons cannot set up adverse possession:

14. Adverse possession means a (hostile possession) which is expressly or impliedly in denial of title of the true owner. Under Article 65 (of the Limitation Act) burden is on the Defendants to prove affirmatively, A person who bases his title on adverse possession must show by clear & unequivocal evidence i.e. possession was hostile to the real owner & amounted to a denial of his title to the property claimed. In deciding whether the acts, alleged by a person constitute adverse possession, regard must be had to the animus of the person doing those acts which must be ascertained from the facts & circumstances of each case. The person who bases his title on adverse possession, therefore, must show by clear & unequivocal evidence i.e. possession was hostile to the owner & amounted to a denial of his title to the property claimed.

15. Where possession can be referred to a lawful title, it will not be considered to be adverse. The reason being that a Person whose possession can be referred to a lawful title will not be permitted to show that his possession was hostile to another's title. One who holds possession on behalf of another, does not by mere denial of that other's title make his possession adverse so as to give himself the benefit of the statute of limitation. Therefore, a person who enters into possession having a lawful title, cannot divest another of that title by pretending that he had no title at all. (*See Annasaheb Bapusahe Patil v. Balwant*, SCC. P.554 paras 14-15).

15. An occupation of reality is inconsistent with the right of the true owner. Where a person possesses property in a manner in which he is not entitled to possess it, & without anything to show that he possesses it otherwise than an owner (that is, with the intention of excluding all persons from it, including the rightful owner), he is in adverse possession of it. Thus, if A is in possession of a field of B's he is in adverse possession of it unless there is something to show that his possession is consistent with a recognition of B's title. (*See Ward v.*

Carttar). Adverse possession is of two kinds, according as it was adverse from the beginning, or has become so subsequently. Thus, if a mere trespasser takes possession of A's property, & retains it against him, his possession is adverse ab initio. But if A grants a lease of land to B, or B obtains possession of the land as A's bailiff, or guardian, or trustee, his possession can only become adverse by some change in his position. Adverse possession not only entitles the adverse possessor, like every other possessor, to be protected in his possession against all who cannot show a better title, but also, if the adverse possessor remains in possession for a certain period of time produces the effect either of barring the right of the true owner, & thus converting the possessor into owner of depriving the true owner of his right of action to recover his property & this although the true owner is ignorant of the adverse possessor being in occupation (See *Rains v. Buxton*).

16. Adverse possession is that form of possession or occupancy of land which is inconsistent with the title of any person to whom the land rightfully belongs & tends to extinguish that person's title, which provides that no person shall make an entry or distress, or bring an action to recover any land or rent, but within twelve years next after the time when the right first accrued, & does away with the doctrine of adverse possession, except in the cases provided for by Section 15. Possession is not held to be adverse if it can be referred to a lawful title.

17. According to Pallock, "In common Speech a man is said to be in possession of anything of which he has the apparent central or from the use of which he has the apparent power of excluding others".

18. It is the basic principle of law of adverse possession that (a) it is the temporary & abnormal separation of the property from the title of it when a man holds property innocently against all the world but wrongfully against the true owner, (b) it is possession inconsistent with the title of the true owner.

19. In Halsbury's Laws of England, 1953 Edn., Vol. I it has been stated as follows:

At the determination of the statutory period limited to any person for making an entry or bringing an action, the right or title of such person to the land, rent or advowson, for the recovery of which such entry or action might have been made or brought within such period is extinguished & such title cannot afterwards be reviewed either by re-entry or by subsequent acknowledgment. The operation of the statute is merely negative, it extinguishes the right & title of the dispossessed owner & leaves the occupant with a title gained by the fact of possession & resting on the infirmity of the right of the owners to eject him.

20. It is well-recognised preposition in law that mere possession however long does not necessarily mean that it is adverse to the true owner. Adverse possession really means the hostile possession which is expressly or impliedly, in dental of title of the true owner & in order to constitute adverse possession the possession proved must be adequate in continuity, in publicity & in extent so as

to show that it is adverse to the true owner. The classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open & continuous. The possession must be open & hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action.

16. Plaintiff has utterly failed to discharge his onus of proving possession of his predecessors as well as his possession in the impugned property as the same was hostile over a period of more than 30 years to the true owner, i.e., the Government & that Defendants & knowledge that the possession of the Plaintiff & un-contesting Defendants was open & hostile as they claimed & asserted that they are the owners of the impugned property & that hostile possession continued over a period of 30 years as against the Government.

17. As discussed above, Plaintiff has failed to prove that the un-contesting Defendants were holding possession of the property in the suit openly claiming themselves to be the owner of the same to the knowledge of the actual owner & thereafter by the Plaintiff, who derived his title from them in the years 1961-62. Even if continuous possession of the un-contesting Defendants as well as that of the Plaintiff is tagged together, Plaintiff, cannot succeed because hostile uninterrupted possession over 30 years is not proved. Plaintiff has been claiming his possession over the suit land as owner by virtue of having acquired title from his predecessors in interest on the basis of sale deeds, Ext. 5 & 6. Even if his possession presumably is treated as hostile from the date of purchase & physical possession of the suit property in the year 1961-62 till filing of the suit in 1985 in denial of the title of Defendants No. 1 & 2, then his hostile possession was for 23-24 years, but not more than 30 years i.e., the challenge to his possession was made by the State in the written statement filed in the suit by disputing the claim of the Plaintiff as owner by adverse possession. Under these circumstances, none of the judgments relied upon by Learned Counsel for the Plaintiff, are of any help to him though the proposition of law laid down in the said cases is not in dispute.

18. The first Appellate Court has discussed the oral as well as documentary evidence of the parties in detail. It has also taken into consideration the observation & assessment of evidence, consideration & findings made by the Trial Court while decreeing the suit of the Plaintiff. While allowing the appeal, it observed:

There is no other evidence on record to be considered for proving the possession of the Plaintiff's vendors over the suit properties either before the date of vesting of the said property & subsequently thereto. The oral evidence of P.W.s. 2, 3 & 4 as stated is not at all cogent convincing & clinching to come to a definite conclusion that the vendors of the Plaintiff were in possession of the suit lands having houses thereon before or after the date of vesting of estate on

29.12.1952. The Learned Munsif without considering oral & documentary evidence in its legal perspective has wrongly recorded finding that the vendors of the Plaintiff possessed the suit lands prior to Abolition of Jeypore Zamindary & subsequent thereto & that the Plaintiff perfected his title to the said lands by adverse possession on the date of suit. Admittedly, Plaintiff is possessing the suit land as per A & B Schedule since 1961-1962, i.e. from the date of his purchase vide registered sale deeds Ext. 5 & 6. He has failed to prove the possession of his vendors on the dates they sold the suit lands to him vide registered sale deed Ext. 5 & 6. Thus the Plaintiff has failed to establish that he perfected his title over the suit lands by adverse possession. The contention of the Learned Counsel for the Plaintiff-Respondent No. 1 that the vendors of the Plaintiff had already acquired title by adverse possession by the date of vesting of the State & thereafter & that the Plaintiff acquired title to the suit lands by purchase vide Ext. 5 & 6 cannot be entertained when the Plaintiff has not established the possession of his vendors by the date of his purchase. Thus the finding of the Learned Munsif that the Plaintiff has perfected his title over the suit lands by adverse possession has to be vacated on reappraisal of evidence both oral & documentary & for the reasons indicated in the preceding paragraphs. Hence, I come to an irresistible conclusion that the Plaintiff has failed to established that he perfected his title over the suit lands as per "A" & "B" Schedule by adverse possession. On such conclusion the Judgment & decree of the Learned Munsif are to be set aside by allowing the appeal.

19. I do not find any illegality or, infirmity in the findings of the Appellate Court that the Plaintiff had failed to prove that he had perfected his title over the suit land by the adverse possession. The law governing principles of adverse possession have been covered & applied by the Appellate Court to the facts & circumstances of the case in its true meaning. Therefore I do not find any reason to Interfere in his findings. The Appellate Court had rightly held that the Plaintiff had failed to established continuous possession of the vendor at the time of sale of the suit land in his favour & therefore, there was no continuity of possession over a period of 30 years to entitle the Plaintiff to declaration that he had acquired title over the suit property by adverse possession. In view of my discussions as above, I find no merits in the appeal & the same is accordingly dismissed. There are no order as to costs.