

(1997) 07 OHC CK 0007
In the Orissa High Court
Case No : S.A. No. 37 of 1986

Narayan Purohit and Others

APPELLANT

Vs

Jagdish Purohit

RESPONDENT

Date of Decision : 25-07-1997

Acts Referred:

Limitation Act, 1963 — Article 43, 65

Citation : (1997) 07 OHC CK 0007

Hon'ble Judges : R.K. Dash, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

R.K. Dash, J.—This appeal by the Defendants is against the reversing judgment of the learned Subordinate Judge, Boudh passed in title Appeal No. I of 1984. The Plaintiff's suit was one for declaration of title, confirmation of possession and/or recovery of possession and for permanent injunction restraining Defendant No. 1 from entering upon the cultivable land as described in the schedule of the plaint.

2. The Plaintiffs case may be briefly stated:

Plaintiff and Defendant No. 1—are related by blood, their common ancestor being Ratnakar Purohit who had four sons, namely, Krushna Chandra, Garudadhwaja, Somanath and Lokanath. Krushna Chandra Pre-deceased his father, leaving behind his widow and tow daughters who also subsequently died. So, Krushna Chandra's branch is now extinct. The joint family consisted of common ancestor Ratnakar and his four sons as named above. The total extent of landed property owned and possessed by the joint family was Ac. 84.00 dec. After the death of Ratnakar his four sons got themselves separated and amicably partitioned their properties. The present case relates to the properties that fell to the share of Garudadhwaja. It is the Plaintiffs case that Garudadhwaja got Ac.26.03 dec. In his share out of which he disposed of a substantial portion during his life time.

The rest are the subject matter of the present suit as described in the Schedule "B" of the plaint which consisted of two plots i.e. plot No. 231 to the extent of Ac. 1.62 dec. (Agricultural land), and plot No. 283 Ac.0.09 dec. (homestead). Gardudadhawaja s only son Parikhita predeceased him. In the year 1994 Garudadhawaja died leaving behind his widow Brajeswari. On his death the suit properties devolved upon her and she being the exclusive owner was all along possessing the same. But, towards the last part of her life she became mentally and physically weak and was unable to manage the suit properties. So, she permitted her neighbour Kunja Nayak, father of Defendant Nos. 2 to 4 to occupy the homestead land and house standing thereon and left for her father's house at Chandrapur. presently the house is under the possession of Defendant No. 2. So far as the cultivable land is concerned, on Brajeswari's death, Plaintiff being the nearest heir succeeded to the same and has been possessing as owner thereof. Defendant No. 1 who has no manner of right, title and interest in respect of the said agricultural land challenged the Plaintiff's title and obstructed him from harvesting the crops and gave out that he has equal right as that of the Plaintiff. This led the Plaintiff to file the present suit.

3. All the Defendants filed joint written statement. Admitting Brajeswari's title to the suit land, they pleaded inter alia that Defendant No. 1 as nearest heir has succeeded to the suit cultivable land appertaining to plot No. 231. Alternatively, it is urged that by being in possession for long years Defendant No. 1 has perfected title by adverse possession. So far suit homestead land is concerned, they would contended that Brajeswari being the owner sold it to Kunja Mahakud, father of Defendant Nos. 2 to 4, by a plain paper sale deed and since then Kunja had been possessing as owner thereof.

4. Learned Munsif considering the evidence led by the parties decided all the issues against the Plaintiff and dismissed the suit. On appeal, the learned Subordinate Judge on review of the evidence came to hold that the Plaintiff being the nearest heir of Brajeswari, the admitted owner, has title to the suit property. As regards Defendant No. 1's claim of acquisition of title by adverse possession, the appellate Court negatived the same since no acceptable evidence was led in support thereof as required under law. So far claim of Defendant Nos. 2 to 4 in respect of the suit homestead land is concerned the learned Subordinate Judge held that they utterly failed to prove that it had been purchased by their father from Brajeswari. The Court further held that though they are admittedly in possession of the said land, but their such possession being permissive from the very inception, they cannot be said to have prescribed title without there being any evidence as to when they started possessing with hostile animus to the knowledge of the true owner. Consequently, he allowed the appeal and dismissed the suit. Hence, the present appeal.

5. Learned Counsel for Defendants assailing the judgment and decree of the first appellate Court contended that on Garudadhawaja's death in 1944 the suit property devolved upon Gangadhar, father of Defendant No. 1, and not upon

Brajeswari, his predeceased son's widow, since Hindu Women's Right to Property Act, 1937 was not then applicable to the Ex-state of Boudh. He further submitted that Defendants are admittedly in possession of the suit land and their initial entry being in assertion of hostile title, the learned Court below should have held that they have perfected their title by prescription.

On the other hand, learned Counsel for the Plaintiff supporting the judgment of the first appellate Court urged that altogether a new plea of devolution of the suit property on the death of rightful owner has been taken by the Defendants in the present second appeal and the same being impermissible under law cannot be entertained. So far alternative plea of acquisition of title by adverse possession is concerned, the learned first appellate Court having made a thorough scrutiny of the evidence has negated the same and this Court while sitting in second appeal cannot reappraise the evidence and come to a different finding.

6. For answering the question regarding devolution of the suit property on the death of Garudadhwaja, at the outset reference may be made to the pleadings of the parties. Plaintiff's case in paragraph 4 of the plaint is that Brajeswari being the widow of Garudadhwaja's predeceased son Parikhita, succeeded to all the properties of Garudadhwaja as sole surviving heir. This part of the Plaintiff's case stands admitted by Defendants in paragraph 4 of their written statement. The claim of Defendant No. 1 however, is that upon death of Brajeswari he being her next heir succeeded to all her properties. So far as Defendants 2 to 4 are concerned, their case is that their father Kunja Mahakud purchased the suit homestead land from Brajeswari under an unregistered sale deed in 1950 and since then their father and after him they have been possessing the same as owners. This being the sum total case of the Defendants, altogether a new plea has been taken in the present Second Appeal that Hindu Women's Right to Property Act, 1937 (for short, "the Act") having no application to the Ex-state of Boudh, the properties of Garudadhwaja did not devolve upon his son's widow Brajeswari but upon Gangadhar, his brother's son. In my opinion, such a new plea cannot be entertained in the second appeal. Assuming for the sake of argument, as submitted by Shri B.H. Mohanty, learned Counsel for Defendants, that the Act had no application to Boudh area, in view of law of succession according to old Hindu Law properties of Gardudhwaja will not devolve upon Gangadhar, father of Defendant No. 1, the reason being that it is neither pleaded nor sufficient evidence has been led to show that at the time when Garudadhwaja died Gangadhar was alive. Plaintiff and Defendant No. 1 are brother's son and brother's son's son respectively of Garudadhwaja. According to Article 43 of the Hindu Law by Mulla brother's son succeeds before brother's sons' son. In that view of the matter, even if the case of the Defendants regarding line of succession as aforesaid is accepted, still then upon Garudadhwaja's death, his properties devolved upon Plaintiff and not upon the father of Defendant No. 1.

7. The next question arises whether the Defendants have perfected their title to the suit properties by adverse possession. Under Article 65 of the Limitation Act, 1963, in a suit for possession based on title, even if dispossession is admitted, the Defendant can succeed if he proves that his possession became adverse to the Plaintiff beyond 12 years of the suit. Once Plaintiff's title is established, he is not required to prove that he was in possession within 12 years of the suit. Until the Defendant establishes loss of Plaintiff's title on account of the Defendant being in adverse possession for more than the statutory period, the Plaintiff is entitled to succeed on the basis of his antecedent title. The present suit for possession being based on title, is governed by Article 65. In the preceding paragraph, I have held that on the death of the owner, the suit properties devolved upon the Plaintiff and not upon the father of Defendant No. 1. In view of this, the question arises whether the Defendants could be held to have acquired title by adverse possession. For answering this, at the out-set, it is necessary to refer to the pleadings wherein in paragraph 11 a cryptic statement has been made that Defendant No. 1 has been possessing the suit agricultural land adversely since long. It is the basic principle of law that the party who pleads properties title, must set-out all material facts in the pleading. In the present case all the material facts have not been pleaded by Defendant No. 1 in the written statement and moreover, no clinching evidence has been led in support thereof. In that view of the matter, the Defendant No. 1 cannot be held to have acquired title to the suit agricultural land by adverse possession. So far as Defendant Nos. 2 to 4 are concerned, they have claimed to have derived title to the suit homestead land by virtue of purchase only and not by adverse possession. But curiously enough, the learned trial Court in paragraph 35 of the judgment held that they being in possession of the homestead land for last thirty years, have prescribed title by adverse possession. Such a finding in my opinion, being unsustainable cannot be upheld.

In the result, the appeal fails and the same is dismissed. No costs.