

(1995) 01 OHC CK 0014
In the Orissa High Court
Case No : Second Appeal No. 11 of 1985

Nirakar Das

APPELLANT

Vs

Gourhari Das and Others

RESPONDENT

Date of Decision : 18-01-1995

Acts Referred:

Evidence Act, 1872 — Section 101, 3
Limitation Act, 1963 — Article 64, 65

Citation : AIR 1995 Ori 270 : (1995) 1 OLR 526

Hon'ble Judges : A. Pasayat, J

Bench : Single Bench

Advocate : P.K. Patnaik, for the Appellant; Mahadev Misra and P.K. Nanda, for the Respondent

Judgement

A. Pasayat, J.—Nirakar Das, plaintiff No. 1 having failed to get relief in the Courts of Munsif, Kendrapara, and Subordinate Judge, Kendrapara, has filed this second appeal.

2. His case in brief is as follows:

One Kelei alias Kinu Das, husband of Kanchan Dibya, defendant No. 3 sold A0.04 decimals of land from northern portion of the suit plot measuring A0.10 decimals of which he was the owner to defendants Nos. 1 and 2, Gourhari and Bansidhar, who are respondents Nos. 1 and 2 respectively in this appeal. On rest A0.06 decimals of land to the southern portion of the suit plot, a house is standing. Kinu died in the year 1967 leaving behind his widow Kanchan. She transferred the said A0.06 decimals of land along with the house standing thereon, and some other land over which there is no dispute in favour of plaintiff No. 1, and Brahmananda Das and Kalpataru Das, plaintiffs Nos. 2 and 3 (pro forma respondents Nos. 4 and 5 in this appeal) on 8-12-1976 for a consideration of Rs. 1,000/-, and delivered possession of the property to the vendees. Since defendants Nos. 1 and 2 tried to create disturbance over the possession of the plaintiffs by filing of the suit for partition, demarcation of their share of A0.06

decimals with house by a Civil Court Commissioner, and delivery of separate possession was necessary. Gourhari and Bansidhar filed a joint written statement. According to them, about six months after her marriage Kanchan deserted Kinu as the latter was suffering from leprosy, and led an immoral life as a concubine. They had purchased A0.04 decimals from Kinu. On 3-12-1964 an unregistered deed of agreement to sell A0.05 decimals of land was executed by Kinu for which consideration was fixed at Rs. 500/-. Possession was also delivered and since 3-12-1964 they were in possession uninterruptedly to the knowledge of the plaintiffs openly, peacefully without any interruption and having continued for more than the statutory period of 12 years, had acquired title by adverse possession. In the current settlement records the disputed plot has been recorded in their names and they have got the parchas and are paying rent. Defendant No. 3 has no subsisting interest in respect of the disputed plot after death of her husband and the sale deed executed by her is fraudulent, and did not convey title to the plaintiffs in any manner.

3. The Courts below essentially arrived at two conclusions. Firstly it was held that since 3-12-1964 defendants 1 and 2 were in possession and by the time of execution of sale deed on 8-12-1976, twelve years had elapsed, and therefore, they had acquired title by adverse possession by the time of execution of the sale deed. Secondly, it was held that the evidence established that the sale deed was invalid because Kanchan had no transferable right to be conveyed by sale.

4. Mr. P. K. Patnaik, learned counsel for appellant submitted that the conclusions of the Courts below relating to adverse possession are not sound in law. The agreement for sale only conferred a right to have a sale deed executed in future and the agreement itself did not create any title. Even if possession was given, same was a permissive possession and therefore, period covered by permissive possession cannot be taken note of while considering the case of adverse possession. There can be no hostile animus in case of permissive possession. It is also submitted that it was not open to defendants Nos. 1 and 2 (respondents 1 and 2 herein) to raise any dispute about validity of the sale deed, particularly when defendant No. 3 Kanchan did not contest the claim of the plaintiffs. The conclusion that the sale deed was invalid is not supportable by any material.

5. Mr. Mahadev Misra, learned counsel appearing for respondents 1 and 2, however, submitted that when there is a denial to execute a sale deed, after execution of a deed of agreement, hostile animus begins and the starting point of adverse possession commences. According to him, the Courts below on analysis of evidence have correctly come to hold that the sale deed was a sham one, and had no validity in the eye of law. These conclusions essentially being based on fact are not available to be interfered with in an appeal u/s 100 of the Civil P. C. 1908 (in short, "CPC").

6. So far as the question relating to the starting point of period necessary to constitute adverse possession is concerned, the plaintiffs' stand is on terra firma. When the possession is permissive on the basis of an agreement to sale, it has

no hostile animus attached to it. Permissive possession and hostile animus operate in conceptually different fields. Adverse possession designates a possession in opposition to the true title, and real owner and implies that it commenced in wrong and is maintained against right. (See *Alexander v. Polk* 39 Miss. 755). It is possession inconsistent with and in denial of the right of the landlord to the premises. See *Moses v. Lovegrove*(1952) 1 TLR 1324 : (1952) 1 All ER 1279 : 1952-2 QB 533. Possession commencing with the permission of the owner does not become adverse by a mere change in the mental attitude of the person in possession. When the origin of the entry is permissive, there is a presumption that the possession is continuing as permissive. When the original entry was permissive, it is for the person setting up hostile title to prove which date the permissive possession became hostile. Failure to do so would show that the possession continued to be permissive. Permissive possession never becomes hostile possession, till there is assertion of a hostile possession to the knowledge of the owner. When a party accepts that possession was given on the basis of agreement to sale, the possession can never be adverse. It is permissive possession and the party cannot set up his own adverse title. Both Articles 64 and 65 of the Limitation Act, 1963 are rules of limitation, the only difference being that in the former onus lies on the plaintiff to prove his possession within 12 years, while in the latter it is for the defendant to prove when his possession became adverse. The possession to become adverse must be actual, visible, exclusive, hostile and continued during the time necessary to create a bar under the statute of limitation. The possession required must be *nee vi nec clam nec precario*. A permissive possession cannot be converted into an adverse possession unless it is proved that person in possession asserted an adverse title to the property to the knowledge of the true owner for 12 years or more. Permissive possession is not adverse till adverse possession is asserted. The undisputed position is that the possession of defendants 1 and 2 as claimed by them had its foundation on the unregistered deed of agreement to sale dt. 3-12-1964. The starting point of period for adverse possession could not have coincided with said date. In order to establish that the defendants I and 2 acquired title by adverse possession, they were required to show that twelve years prior to 8-12-1976, their hostile animus had started and continued uninterruptedly. So long as the proposed vendor did not deny his obligation to execute the sale deed on the basis of the unregistered agreement to sale, the question of any adverse possession did not arise. The Courts below were, therefore, in error in holding that defendants 1 and 2 had acquired title by adverse possession.

7. The other question is whether there was scope for an adjudication about validity of the sale deed. There can be no dispute that the plaintiff has to establish his own case. He has to stand or fall on the basis of evidence led by him. Merely because defendant does not establish his case, plaintiff does not automatically succeed. Significantly defendant No. 3 did not contest the proceeding. The fact that a sale deed had been executed was not in dispute. What was in dispute, as raised by defendants 1 and 2, was that the transaction

was sham. The Courts below concluded lack of title of defendant No. 3 on the basis of materials relating to possession of defendants 1 and 2. Plaintiffs' case was not accepted as it was held that defendant No. 3, the vendor, had no transferable title or interest or right over the suit property because of acquisition of title by adverse possession.

As indicated above, the conclusions are patently erroneous. The conclusion about the sale deed being sham essentially was arrived at by the Courts below with reference to defendants 1 and 2's case relating to possession. The Courts below have not considered the question of validity of sale deed in the proper perspective. In the fitness of things, as suggested by learned counsel for parties, that aspect should be considered afresh by the trial Court. It shall also consider the plea of plaintiffs that defendants 1 and 2 cannot raise a plea relating to validity of the sale deed in the absence of any challenge by defendant No. 3, in addition to the effect of evidence fed by the parties relating to the sale deed.

The appeal is accordingly disposed of. No costs.