
(2021) 11 OHC CK 0057
In the Orissa High Court
Case No : AHO No. 67 Of 2000

Raghunath @ Raghu Barik And Others	APPELLANT
Vs	
Hemalata Barik And Others	RESPONDENT

Date of Decision : 09-11-2021

Acts Referred:

Arms Act, 1959 — Section 29(b)

Citation : (2021) 11 OHC CK 0057

Hon'ble Judges : Dr. S. Muralidhar, CJ; B.P. Routray, J

Bench : Division Bench

Advocate : S. Mishra, Maheswar Mohanty

Final Decision : Allowed

Judgement

B.P. Routray, J

1. The present appeal has been directed against the judgment dated 24th March, 2000 of the learned Single Judge in First Appeal No.289 of 1979 whereby the judgment and decree dated 10th September, 1979 of the learned Subordinate Judge, Keonjhar in T.S. No.19 of 1977 was set aside.
2. The present Appellants were the Defendants in the learned trial court and the Respondents were the Plaintiffs. For convenience, the parties are referred with their status as they were before the learned trial court.
3. The Plaintiffs filed Title Suit (TS) praying for declaration of their title, confirmation of possession and permanent injunction. The claim of the Plaintiffs is based on their adverse possession over Schedule-A properties.
4. The parties in dispute are the descendants of the common ancestor, namely, Sadhu Barik. He had three sons, namely, Sibanath, Jayi and Ninuha. The Defendants belong to the branch of Sibanath, Plaintiffs Nos.1 to 6 belong to the branch of Jayi and Plaintiff No.7 is the daughter of Ninuha.
5. Learned trial court framed five issues which are as follows:

" 1. If the suit was maintainable ?

2. If the Plaintiffs have cause of action to file the suit?

3. If the Plaintiffs have acquired title over the suit lands by adverse possession ?

4. If the suit is barred by the principles of res-judicata ?

5. To what relief, if any, the Plaintiffs are entitled ?"

6. By judgment dated 10th September, 1979, learned trial court dismissed the suit. For Issue No.5, regarding res judicata the learned trial court negated the plea of the Defendants. On Issue No.3, learned trial court held that the Plaintiffs have failed to prove acquisition of title by way of adverse possession. At para 25 of the judgment, it was held as follows:

"On an analysis of the facts and circumstances dealt above it is found that the Plaintiff have failed to prove their possession over the suit lands for more than twelve years prior to the institution of the suit continuously, peaceably without interruption and showing hostile animus to the Defendants. Accordingly, I hold that the Plaintiffs have not acquired title over the suit land by way of adverse possession and answer this issue in the negative against the Plaintiffs and in favour of the Defendants."

7. The Plaintiffs came in First Appeal No.289 of 1979 and the learned Single Judge in the impugned judgment dated 24th March, 2000 reversed the finding of the learned trial court to decree the suit in favour of the Plaintiffs. It has been observed by the learned Single Judge at paragraph 5 that, "The trial court discarded the case of the Plaintiffs mainly on the ground that the evidence of the Plaintiffs had not received any independent corroboration and there was discrepancy in the evidence relating to the date from which the Plaintiffs remained in possession."

It is further observed at paragraph 6 that, "There is clear evidence on record to indicate that the Plaintiffs have remained in possession at least from the year 1963-64, if not earlier. Of course, the Plaintiffs and the other two witnesses examined in support of their possession clearly state that the Plaintiffs continued to remain in possession even from 1953. However, the documentary evidence on record adduced on behalf of the Plaintiffs in the shape of various settlement papers clearly point out that the Plaintiffs were in possession at least from the year 1963-64."

Accordingly learned Single Judge came to the finding as follows:

"P.Ws.3 and 4 have categorically corroborated the statement of Plaintiffs relating to their possession. The documentary evidence in the shape of various settlement papers has also corroborated the case of the Plaintiffs. Since the present Plaintiffs were claiming possession on their own right at least from the year 1963-64, such possession became adverse to the interest of the present Defendants. There is no evidence on record to indicate that the possession of the

Plaintiffs had been effectively interrupted at any point of time and the act of Defendants in forcibly removing the unripe paddy in one year must be taken to be a sporadic act of trespass. It is thus quite apparent that by the time of filing the suit, the Plaintiffs had already perfected their title by adverse possession."

8. The law on adverse possession is no more *res integra*. The Supreme Court in the case of *Karnataka Board of Wakf vs. Government of India and others*, (2004) 10 SCC 779, at paragraph 11 have held that:

"11. In the eye of law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "*nec vi, nec clam, nec precario*", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. (See *S.M. Karim v. Bibi Sakina*, AIR 1964 SC 1254, *Parsinni v. Sukhi*, (1993) 4 SCC 375 and *D.N. Venkatarayappa v. State of Karnataka*, (1997) 7 SCC 567). Physical fact of exclusive possession and the *animus possidendi* to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession. [*Mahesh Chand Sharma (Dr.) v. Raj Kumari Sharma*, (1996) 8 SCC 128.]"

9. The Supreme Court in the case of *Ravinder Kaur Grewal vs. Manjit Kaur*, (2019) 8 SCC 729 while deciding as to whether the Plaintiff can claim title on the basis of adverse possession have held at paragraph 60 that;

"60. The adverse possession requires all the three classic requirements to co-exist at the same time, namely, *nec vi* i.e. adequate in continuity, *nec clam* i.e. adequate in publicity and *nec precario* i.e. adverse to a competitor, in denial of title and his knowledge. Visible, notorious and peaceful so that if the owner does not take care to know notorious facts, knowledge is attributed to him on the basis that but for due diligence he would have known it. Adverse possession cannot be decreed on a title which is not pleaded. *Animus possidendi* under hostile colour of title is required. Trespasser's long possession is not synonymous

with adverse possession. Trespasser's possession is construed to be on behalf of the owner, the casual user does not constitute adverse possession. The owner can take possession from a trespasser at any point in time. Possessor looks after the property, protects it and in case of agricultural property by and large the concept is that actual tiller should own the land who works by dint of his hard labour and makes the land cultivable. The legislature in various states confers rights based on possession."

10. The Supreme Court in the case of Brijesh Kumar and another vs. Shardabai (Dead) By Legal Representatives and others, (2019) 9 SCC 369, have observed at paragraph 13 that;

"13. Adverse possession is hostile possession by assertion of a hostile title in denial of the title of the true owner as held in M. Venkatesh v. BDA, (2015) 17 SCC 1. The respondent had failed to establish peaceful, open and continuous possession demonstrating a wrongful ouster of the rightful owner. It thus involved question of facts and law. The onus lay on the respondent to establish when and how he came into possession, the nature of his possession, the factum of possession known and hostile to the other parties, continuous possession over 12 years which was open and undisturbed. The respondent was seeking to deny the rights of the true owner. The onus therefore lay upon the respondent to establish possession as a fact coupled with that it was open, hostile and continuous to the knowledge of the true owner. The respondent-plaintiff failed to discharge the onus. Reference may also be made to Chatti Konati Rao v. Palle Venkata Subba Rao, (2010) 14 SCC 316, on adverse possession observing as follows: (SCC p. 322, para 15)

"15. Animus possidendi as is well known is a requisite ingredient of adverse possession. Mere possession does not ripen into possessory title until the possessor holds the property adverse to the title of the true owner for the said purpose. The person who claims adverse possession is required to establish the date on which he came in possession, nature of possession, the factum of possession, knowledge to the true owner, duration of possession and that possession was open and undisturbed. A person pleading adverse possession has no equities in his favour as he is trying to defeat the rights of the true owner and, hence, it is for him to clearly plead and establish all facts necessary to establish adverse possession. The courts always take unkind view towards statutes of limitation overriding property rights. The plea of adverse possession is not a pure question of law but a blended one of fact and law."

11. In the case of L.N. Aswathama and another vs. P. Prakash, (2009) 13 SCC 229, the Supreme Court have held in paragraph 17 that;

17. The legal position is no doubt well settled. To establish a claim of the title by prescription, that is, adverse possession for 12 years or more, the possession of the claimant must be physical/actual, exclusive, open, uninterrupted, notorious and hostile to the true owner for a period exceeding twelve years. It is also well

settled that long and continuous possession by itself would not constitute adverse possession if it was either permissive possession or possession without animus possidendi. The pleas based on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. Unless the person possessing the property has the requisite animus to possess the property hostile to the title of the true owner, the period for prescription will not commence. (Vide P. Periasami v. P. Periathambi, (1995) 6 SCC 523, Md. Mohammad Ali v. Jagadish Kalita, (2004) 1 SCC 271 and P.T. Munichikkanna Reddy v. Revamma, (2007) 6 SCC 59. "

12. In the case of M. Siddiq vs. Suresh Das, (2020) 1 SCC 1, the Constitution Bench of Supreme Court held that the plea of adverse possession is founded on the acceptance that ownership of the property vests in another, against whom the claimant asserts possession to the title of the other. The Supreme Court held as follows:

"1142. A plea of adverse possession is founded on the acceptance that ownership of the property vest sin another against whom the claimant asserts a possession adverse to the title of the other. Possession is adverse in the sense that it is contrary to the acknowledged title in the other person against whom it is claimed. Evidently, therefore, the plaintiffs Suit 4 ought to be cognizant of the fact that any claim of adverse possession against the Hindus or the temple would amount to an acceptance of a title in the latter. Dr. Dhavan has submitted that this plea is a subsidiary or alternate plea upon which it is not necessary for the plaintiffs to stand in the event that their main plea on title is held to be established on evidence. It becomes then necessary to assess as to whether the claim of adverse possession has been established.

1143. A person who sets up a plea of adverse possession must establish both possession which is peaceful, open and continuous possession which meets the requirement of being nec vi nec clam and nec precario. To substitute a plea of adverse possession, the character of the possession must be adequate in continuity and in the public because the possession has to be to the knowledge of the true owner in order for it to be adverse. These requirements have to be duly established first by adequate pleadings and second by leading sufficient evidence. Evidence, it is well settled, can only be adduced with reference to matters which are pleaded in a civil suit and in the absence of an adequate pleading, evidence by itself cannot supply the deficiency of a pleaded case. Reading Para 11(a), it becomes evident that beyond stating that the Muslims have been in long, exclusive and continuous possession beginning from the time when the Mosque was built and until it was desecrated, no factual basis been furnished. This is not merely a matter of details or evidence. A plea of adverse possession seeks to defeat the rights of the true owner and the law is not readily accepting of such a case unless a clear and cogent basis has been made out in the pleadings and established in the evidence.

1147. In Supt. & Remembrancer of Legal Affairs v. Anil Kumar Bhunja, (1979) 4

SCC 274, R.S. Sarkaria, J. speaking for a three-Judge Bench of this Court noted that the concept of possession is "polymorphous" embodying both a right (the right to enjoy) and a fact (the real intention). The learned Judge held: (SCC p. 278, para 13)

"13....It is impossible to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the contexts of all statutes. Dias and Hughes in their book on Jurisprudence say that if a topic ever suffered from too much theorizing it is that of "possession". Much of this difficulty and confusion is (as pointed out in Salmod's Jurisprudence, 12th Edn., 1966) caused by the fact that possession is not purely a legal concept. "Possession", implies a right and a fact; the right to enjoy annexed to the right of property and the fact of the real intention. It involves power of control and intent to control. (See Dias and Hughes, *ibid.*)

These observations were made in the context of possession in Section 29(b) of the Arms Act, 1959.

1148. In *P. Lakshmi Reddy v. L. Lakshmi Reddy*, AIR 1957 SC 314, Jagannadhadas, J. speaking for a three-Judge Bench of this Court dwelt on the "classical requirement" of adverse possession: (AIR pp.317-18, para 4)

"4. Now, the ordinary classical requirement of adverse possession is that it should be *nec vi nec clam nec precario*. (See *Secy, of State for India in Council v. Debendra Lal Khan*, 1933 SCC OnLine PC 65 IA at p.82). The possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor."

The Court cited the following extract from U.N. Mitra's Tagore Law Lectures on the Law of Limitation and Prescription: (AIR p.319, para 7)

"7. ..."An adverse holding is an actual and exclusive appropriation of land commenced and continued under a claim of right, either under an openly avowed claim, or under a constructive claim (arising from the acts and circumstances attending the appropriation), to hold the land against him (*sic*) who was in possession. (Angell, Sections 390 and 398). It is the intention to claim adversely accompanied by such an invasion of the rights of the opposite party as gives him a cause of action which constitutes adverse possession." 6th Edn. Vol.I, Lecture VI, at p.159.

This Court held: (AIR p.319, para 7)

"7....Consonant with this principle the commencement of adverse possession, in favour of a person implies that the person is in actual possession, at the time, with a notorious hostile claim of exclusive title to repel which, the true owner would then be in a position to maintain an action. It would follow that whatever may be the animus or intention of a person wanting to acquire title by adverse possession his adverse possession cannot commence until he obtains actual possession with the requisite animus."

1149. In *Karnataka Board of Wakf v. Union of India*, (2004) 10 SCC 779, S. Rajendra Babu, J. speaking for a two-Judge Bench held that : (SCC p.785, para 11)

"11.....Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed."

The ingredients must be set up the pleadings and proved in evidence. There can be no proof sans pleadings and pleadings without evidence will not establish a case in law.

1150. In *Annakili v. A. Vedanayagam*, (2007) 14 SCC 308, this Court emphasized that mere possession of land would not ripen into a possessory title. The possessor must have animus possidendi and hold the land adverse to the title of the true owner. Moreover, he must continue in that capacity for the period prescribed under the Limitation Act."

(emphasis in original)

13. In the present case, the Appeal has been allowed by the learned Single Judge holding that the Plaintiffs are in continuous possession over the disputed properties at least from the year 1963-64. It is important here to relook into the evidence of P.W.1, 3 & 4. Admittedly, the Plaintiffs have not pleaded any specific date in the plaint or even the year specifically from which they remained in possession of the disputed properties. The learned Single Judge has observed that it is apparent from the pleadings of the Plaintiffs that they claimed to be in possession even during the life time of Sibanath.

The earlier suit in OS No.5/1949-50 was filed by the predecessor-in-interest of the Plaintiffs claiming partition over the present disputed properties which was dismissed by judgment dated 11th August, 1950 (Ext.B). This was appealed against and the matter was remanded back by the learned Appellate Court. After remand it was finally dismissed by judgment dated 29th January, 1953. As seen from that judgment dated 29th January, 1953, the Plaintiffs claimed their possession and prayed for partition. It is the case of the Plaintiffs that they continued in possession of the disputed properties even after dismissal of the said suit in 1953. The point emerges here that once the Plaintiffs have claimed for partition of the properties, they admit their possession as joint along with the Defendants over the disputed properties. Thus their possession over the disputed properties, if any, cannot be treated as exclusive and hostile against the Defendants.

14. It is the specific case of the Plaintiffs that they were never dispossessed and continued the possession even after dismissal of the suit in 1953. Therefore, it is not their case that they entered into possession on any day after dismissal of the suit on 29th January, 1953, rather they claim to be in continuous possession during the life time of Sibnath. The settled law, as discussed above, is that, the possession of the claimant must be actual, exclusive, open, uninterrupted, notorious and hostile against the true owner for the prescribed period. Their claim of continuous possession from the life time of Sibnath and prayer for partition in earlier suit (OS No.5/1949-50) establishes the fact that, their possession, if any, was not exclusive or hostile against the true owner. Further, in absence of specific pleadings by the Plaintiffs as to any particular date or year of entering into possession (initial possession) over the disputed properties, the very ingredient to claim adverse possession is found lacking. In absence of the same, the finding of the learned Single Judge to the effect that apparently the Plaintiffs are in possession even during life time of Sibnath will not satisfy the requirement and would no-way benefit the plaintiffs to establish their claim of adverse possession over the disputed properties.

15. It is necessary on the part of the Plaintiffs to establish their initial date of possession over the disputed properties hostile to the knowledge of the true owner. So far as certain settlement documents as produced by P.W.7 are concerned, the same cannot be counted to the benefit of the Plaintiffs. It is for the reason that, those documents relate to the Mutation Case and the Tahasildar, Champua has finally dropped the Mutation Case, after the same was remanded back by the appellate court, on the ground that the notification for further settlement operation has been issued vide Revenue Department Notification dated 4th December, 1975. Therefore, all such finding given by the Tahasildar including the findings based on inquiry report obtained in the said mutation case has been set aside by the SDO on appeal who remanded the matter back to the Tahasildar for fresh adjudication. So no finding of the Tahasildar taken in the earlier order can be used in favour of the Plaintiffs to establish their forceful possession or hostile possession over the disputed properties.

16. For the reasons stated above, we are unable to agree with the finding of the learned Single Judge in reversing the judgment and decree of the learned Subordinate Judge. The same is accordingly set aside.

17. In the result, the judgment and decree of the learned Subordinate Judge, Keonjhar dated 10th September, 1979 passed in TS No.19/1977 is restored.

18. The Appeal is allowed, but in the circumstances without any cost.

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