
(2015) 07 OHC CK 0048
In the Orissa High Court
Case No : WP(C) No. 5556 of 2004

Rama Chandra Chaudhury	Vs	APPELLANT
State of Orissa and Others		RESPONDENT

Date of Decision : 22-07-2015

Acts Referred:

Constitution of India, 1950 — Article 226
Orissa Prevention of Land Encroachment Act, 1972 — Section 7, 8-A

Citation : (2015) 07 OHC CK 0048

Hon'ble Judges : Akshaya Kumar Rath, J

Bench : Single Bench

Advocate : K.B. Kar, for the Appellant; P.C. Panda, AGA, S.S. Rao and Deepali Mohapatra, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Dr. Akshaya Kumar Rath, J—In this writ petition under Article 226 of the Constitution of India, challenge is made to the order dated 7.1.2004 passed by the Addl. District Magistrate, Chhatrapur, opposite party No. 4, in OPLE Revision Case No. 6 of 2001, vide Annexure-3; the order dated 19.7.2001 passed by the Sub-Collector, Bhanjanagar, opposite party No. 3, in OPLE Appeal No. 1 of 1999, vide Annexure-6 and the order of eviction dated 27.12.1995 passed by the Tahasildar, Aska, opposite party No. 2, in E.C No. 490 of 1995, vide Annexure-5, respectively. By order dated 7.1.2004, the opposite party No. 4 directed the opposite party No. 2 to take possession of the tank, which is the subject-matter of dispute.

2. Bereft of unnecessary details, the short facts of the case of the petitioner is that the disputed property appertaining to Survey No. 160, Khata No. 19, area Ac.10.52 dec. of Mouza-Punand is popularly known as Laxmi Nrusingha Sagar. The kissam of the land is Jalasaya. In the year 1948, the Tahasildar, Aska, opposite party No. 2, issued notice to the father of the petitioner under Section 7 of the Madras Estates Land Act, 1905 for eviction. In the said notice, others

villagers of village-Punanda were also impleaded as encroachers in respect of other lands, which were in their possession. While the matter stood thus, opposite party No. 2, initiated Encroachment Case No. 490 of 1995 against the petitioner for his unauthorised occupation of the land described above. After hearing the matter at length, opposite party No. 2 came to hold that the petitioner was an Ex-Sarpanch of the Gothagaon G.P. for a petty long time and was managing the Laxmi Nrusingha Sagar. The tank was recorded in Poramboke Khata with description of Jaladhara in the record-of-right published in the year 1948, which is communal in nature. Accordingly, the claim of the petitioner that he has perfected his title by way of adverse possession was negatived. He unsuccessfully challenged the same before the Sub-Collector, Bhanjanagar, opposite party No. 3, in OPLE Appeal No. 1 of 1999. By order dated 19.7.2001, opposite party No. 3 negatived the plea of adverse possession and held that the opposite party No. 2 ought to have passed the order of eviction, instead of rejecting the claim of the petitioner and remitted the matter back to the opposite party No. 2. The revision filed by the petitioner before the Addl. District Magistrate, Chatrapur, opposite party No. 4 was eventually dismissed.

3. Heard Mr. K.B. Kar, learned counsel for the petitioner, learned Addl. Government Advocate for the opposite parties 1 to 4, Miss. D. Mohapatra, learned counsel for the Ghthagam Grama Panchayat and Mr. S.S. Rao, learned counsel for the intervenors-villagers.

4. Mr. Kar, learned counsel for the petitioner, submitted that the notice, vide Annexure-1, indicates that the Tahasildar, Aska, opposite party No. 2, initiated the proceeding under the Madras Estates Land Act against the father of the petitioner in respect of the land in question in the year 1948. The aforesaid notice is clearly indicative of the fact that the father of the petitioner was in possession of the Government land before 1948. After death of his father, the petitioner is also in possession of the tank. Thus the petitioner having been in possession of the tank in question for more than 30 years, opposite party No. 2 ought to have settled the same under Section 8-A of the Orissa Prevention of Land Encroachment Act, 1972 (hereinafter referred to as "the OPLE Act"). He further submitted that the petitioner has perfected his title by way of adverse possession. According to Mr. Kar, the nature of tank is not communal as per the provision of Section 20-B of the Madras Estates Land Act. He submitted that the impugned orders suffer from the vice of non-application of mind and are liable to be quashed.

5. Per contra learned Addl. Government Advocate appearing for the opposite parties 2 to 4 as well as Mr. Rao, learned counsel appearing for the interveners-villagers supported the orders passed by the opposite parties.

6. Miss. D. Mohapatra, learned counsel for the Gothagam Gram Panchayat-intervenor, drawing my attention to Annexure B/5 to Misc. Case No. 5039 of 2013 submitted that the tank was put to auction by the Sarpanch, Thengapadar G.P on 28.12.1963. The petitioner participated in the auction and the same was

settled in his favour. She further submitted that on 9.6.1986, the petitioner along with other villagers sent a letter to the B.D.O., Seragada requesting the latter to award the work to one Rajan Nahak for renovation of tank. On 3.1.1991 the petitioner also sent a letter to the B.D.O., Seragada to issue work order for renovation of tank in his favour.

7. The scope and jurisdiction of the High Court in a writ of certiorari is no more res integra. The Constitution Bench of the apex Court, in the case of Syed Yakoob Vs. K.S. Radhakrishnan and Others, AIR 1964 SC 477 : (1964) 5 SCR 64 of the report, held as follows:--

"(7) The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Art. 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals; these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or in excess of it, or as a result of failure to exercise jurisdictions. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court. This limitation necessarily means that findings of fact reached by the inferior Court or Tribunal as a result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was" insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Art. 226 to issue a writ of certiorari can be legitimately exercised (vide Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others, AIR 1955 SC 233 : (1955) 1 SCR 1104), Nagendra Nath Bora and Another Vs. The Commissioner of Hills Division and Appeals, Assam and Others, AIR 1958 SC 398 : (1958) 1 SCR 1240 and

Kaushalya Devi and Others Vs. Bachittar Singh and Others, AIR 1960 SC 1168 . It is, of course, not easy to define or adequately describe what an error of law apparent on the face of Kaushalya Devi and Others Vs. Bachittar Singh and Others, AIR 1960 SC 1168 .

(8) It is, of course, not easy to define or adequately describe what an error of law apparent on the face of the record means. What can be corrected by a writ has to be an error of law; but it must be such an error of law as can be regarded as one which is apparent on the face of the record. Where it is manifest or clear that the conclusion of law recorded by an inferior Court or Tribunal is based on an obvious misinterpretation of the relevant statutory provision, or sometimes in ignorance of it, or may be, even in disregard of it, or is expressly founded on reasons which are wrong in law, the said conclusion can be corrected by a writ of certiorari. In all these cases, the impugned conclusion should be so plainly inconsistent with the relevant statutory provision that no difficulty is experienced by the High Court in holding that the said error of law is apparent on the face of the record.

xxx xxx xxx"

8. On the anvil of the decisions cited supra, the case of the petitioner is required to be examined.

9. In the celebrated judgment, the Privy Council in Secretary of State for India in Council vs. Debendra AIR 1934 23 (Privy Council) held that the classical requirement of adverse possession is that the possession should be nec vi nec clam nec precario. Their Lordships quoted with approval the decision in the case of Radhamoni Devi v. The Collector of Khulna and others, Indian Appeals 1900 Vol. XXVII at page 140 that "the possession required must be adequate in continuity, in publicity, and in extent to shew that it is possession adverse to the competitor".

10. The decision in P. Lakshmi Reddy Vs. L. Lakshmi Reddy, AIR 1957 SC 314 : (1957) 1 SCR 195 , adverted to the ordinary classical requirement, that is the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. It was also observed therein 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 required animus.

11. Thus the test of nec vi, nec clam, nec precario i.e., "not by force, nor stealth, nor the license of the owner" has been an established notion in law relating to the whole range of similarly situated concepts such as easement, prescription, public dedication, limitation and adverse possession as held by the apex Court in P.T. Munichikkanna Reddy and Others Vs. Revamma and Others, AIR 2007 SC 1753 : (2007) 6 JT 86 : (2007) 6 SCALE 95 : (2007) 6 SCC 59 : (2007) 5 SCR 491 : (2007) AIRSCW 2897 : (2007) 3 Supreme 751 .

12. Long and continuous possession by itself would not constitute adverse possession as held by the apex Court in the case *Md. Mohammad Ali (Dead) by Lrs. Vs. Sri Jagadish Kalita and Others*, (2003) 8 JT 26 : (2004) 137 PLR 255 : (2003) 8 SCALE 356 : (2004) 1 SCC 271 : (2003) 4 SCR 325 Supp .

13. 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 firmly established that a person who bases his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and 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 and 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 as held by the apex Court in the case of *T. Anjanappa and Others Vs. Somalingappa and Another*, (2006) 102 CLT 683 : (2006) 5 CTC 378 : (2006) 8 JT 382 : (2006) 8 SCALE 624 : (2006) 7 SCC 570 : (2006) 5 SCR 200 Supp .

14. Admittedly the petitioner was the Ex-Sarpanch of Gothagaon G.P. where the property situates. The tank is recorded in Poramboke Khata with description of Jaladhara in the record-of-right published in the year 1948, which is communal in nature. By no stretch of imagination the land with communal nature can be settled Section 8-A of the OPLE Act. Second proviso to Section 7 of the OPLE Act stipulates that no such settlement shall be made if the land is set apart for the common use of villages.

15. Indisputably the State is the paramount owner of the tank. The question is as to whether its title has been extinguished and the petitioner had acquired and perfected title to the same by adverse possession? In order to substantiate such a claim of adverse possession the ingredients of open, hostile and continuous possession with the required animus should be proved for a continuous period of 30 years.

16. This Court fails to understand as to how a person basing on his title by way of adverse possession would participate in the auction of the tank on 28.12.1963. The list of persons who had participated in the auction shows that the petitioner has signed in the same. Further on 9.6.1986 the petitioner along with others requested the B.D.O., Seragada to issue work order to one Rajan Nahak for renovation of tank. On 3.1.1991, vide Annexure-C/5, the petitioner himself requested the authorities for renovation of the tank. Thus the petitioner has utterly failed to substantiate the claim of adverse possession.

17. Letters, vide Annexures B/5 and C/5, have been suppressed by the petitioner. There is no averment in the writ petition regarding participation of the

petitioner in the auction of the tank held on 28.12.1963 and the letter sent by him vide Annexure-C/5. The writ is a discretionary as well as an equitable remedy. The petitioner has approached the writ court with a pair of unclean hands.

18. In Dr. Buddhi Kota Subbarao Vs. K.Parasaran and others, (1996) 6 AD 133 : AIR 1996 SC 2687 : (1996) CriLJ 3983 : (1996) 3 Crimes 143 : (1996) 7 JT 265 : (1996) 5 SCALE 797 : (1996) 5 SCC 530 : (1996) 4 SCR 574 Supp , the apex Court held that no litigant has a right to unlimited drought on the Court time and public money in order to get his affairs settled in the manner as he wishes. However, access to justice should not be misused as a licence to file misconceived or frivolous petitions.

19. Bibel says "if the salt loses its flavour, how shall it be seasoned ?" (Mathew 5:13 of the New Testament). Romans say "who will guard the Praetorian Guard".

20. The petitioner has tried to grab the valuable property of the Government by advancing frivolous plea. He was the Ex-Sarpanch of the Gothagaon G.P. and was managing the affairs of the tank. Thus instead of "Rakhyak" he became "Bhakyak".

21. The writ petition sans merit deserves dismissal. Accordingly, the same is dismissed with costs of Rs. 1000/- (rupees one thousand).