
(1962) 12 OHC CK 0016
In the Orissa High Court
Case No : Second Appeal No. 276 of 1960

Shyam Sundar Nayak Gountia	Vs	APPELLANT
Budhu Khadia and Another		RESPONDENT

Date of Decision : 07-12-1962

Acts Referred:

Limitation Act, 1963 — Article 142, 144, 149

Citation : (1963) 29 CLT 90

Hon'ble Judges : Das, J

Bench : Single Bench

Advocate : D. Sahu, for the Appellant; R.C. Misra and S.C. Mohapatra, for the Respondent

Final Decision : Dismissed

Judgement

Das, J.—This is a Plaintiff's appeal against the decision of the Additional Subordinate Judge of Sambalpur dated 23-8-1960 setting aside a decision of Sri A.P. Guru, Munsif of Sundargarh dated 20-12-1958 in Title Suit No. 31/57.

2. The suit village Kirabaga adjoins the village Simdega in the district of Sundargarh. The Plaintiff was the Gountia of village Kirabaga and the Defendants (father and son) are the raiyats in village Simdega. The disputed plots 221/1 and 221/2 comprising in area of 2.79 and 1.84 acres respectively were recorded as State Anabadi and Gochar in the Mukherjee settlement of 1936. Though these were recorded as Gochar, according to the Plaintiff they were never used as such, but instead some Bhogra lands of the Plaintiff were being used as Gochar. The Plaintiff therefore appalled to the Revenue authorities to grant him the suit-lands in exchange of an equivalent area of his Bhogra lands which were being actually used for Gochar purposes. To this proposal the Defendants objected. This objection of the Defendants was however overruled and the Board of Revenue in the year 1954 by a letter Ext. I allowed the prayer of the Plaintiff and directed the exchange to be effected. Accordingly the suit-lands were recorded in the Bhogra Khatian of the Plaintiff and an M equivalent area from the plaintiff's Bhogra

lands was cancelled in M. R. Case No. 310 of 1954-55. The Plaintiff thereafter reclaimed the suit-land and brought it under his cultivating possession. On 25-5-1957, the Defendants forcibly dispossessed him and ploughed the suit-lands. Hence the Plaintiff had filed the present suit for declaration of his title and recovery of possession.

3. The case of the Defendants is that they own some raiyati lands adjacent to the suit lands and since about hundred years their fore-fathers reclaimed the suit-lands and were in possession of the same. During the settlement of 1936, they did not insist on their name being recorded under the advice of the settlement Amin who told them that though a portion of the land was sandy they would have to unnecessarily pay rent for the entire area if they were so recorded. He, however, assured them to make necessary records in future. They claim to have perfected their title by adverse possession. Though both the Defendants filed written statements, Defendant No. 1 alone contested the suit. The Defendants alleged that in spite of their objection, the Plaintiff surreptitiously got his name recorded by influencing the revenue officers and that the Plaintiff never possessed the suit-lands and the suit has been brought due to enmity.

4. The trial court found that though there was evidence to show that the suit-lands were in possession of the Defendants for about thirty years, the State being the owner of the land, they could not acquire any title over the same unless they were in possession for sixty years as contemplated under Article 149 of the Limitation Act. He thus negated the defence plea of adverse possession. Though he held that the Plaintiff was never in possession of the suit-lands at any time, yet he gave him a decree on the basis of his title. He thus decreed the Plaintiff's suit against Defendant No. 1 alone.

5. The appellate court, however, reversed this finding of the trial court holding that the possession of the Defendants was more than thirty years and may extend "even to sixty years. He thus chose to accept the version of the Defendants in preference to that of the Plaintiff's and dismissed the Plaintiff's suit. It is against this decision of the lower Appellate court the present appeal has been preferred.

6. It may be mentioned here that out of the three suit-plots there is no dispute regarding plot No. 221/3 which has been allowed in favour of the Plaintiff and there is no cross-appeal by the Defendant. This appeal therefore concerns only the other two plots namely plot No. 221/1 and 221/2.

7. The Plaintiff's specific case is that though the suit-lands were recorded as Government Anabadi Gochar lands in the Mukherjee Settlement of 1936, it was never in fact being so used. On the other-hand it was his own Bhogra lands which were so used for grazing purposes. It is also his case that he reclaimed the suit-lands and came into possession of the same only when the land was settled with him in 1954-55. It is also his case that he was dispossessed by the Defendants on 25-5-1957. He has thus filed the present suit for declaration of his

title and for recovery of possession by ejecting the Defendants.

8. It cannot be disputed that in a suit of this nature it is for the Plaintiff to prove not only his title, but also his possession within 12 years of the suit as contemplated under Article 142 of the Limitation Act. The trial court found title in favour of the Plaintiff but specifically held that the Plaintiff was never in possession of the suit-land. While answering issue No. 2 the trial court held:

It is clear that since the Plaintiff had no possession over the suit-land at any time, there could not have been any occasion for the Defendants to obstruct the Plaintiff in possessing the suit-lands.

While the appellate court held on this issue:

I am inclined to believe the defence possession over the suit-land and may be even to the extent of sixty years.

In view of this concurrent finding of both the courts below, it must be held that the Plaintiff was not in possession of the suit-land within 12 years from the date of the suit. This by itself would have been sufficient to dismiss the Plaintiff's suit on a clear finding of fact.

9. Mr. Sahu, learned Counsel for the Appellant, however, contended that this is not a suit under Article 142 of the Limitation Act so as to entail its dismissal on the failure of the Plaintiff to prove his title and also possession within 12 years from the date of the suit. But this being a suit where the Defendants have claimed title by adverse possession, Article 144 of the Limitation Act applies and as such the onus is upon the Defendants to prove their adverse possession. It is well-settled that the Plaintiff in a suit for ejectment, must succeed on the strength of his own title and this can be done by adducing sufficient evidence to discharge the onus which is on his irrespective of whether the Defendant has proved his case or not. A mere destruction of the Defendant's title in the absence of the establishment of his own title carries the Plaintiff nowhere; vide *Moranmar Bacillios Cathlicos and Anr. v. The Most Rev. Mar Poulos Athanasius and Ors.* AIR 1954 S.C. 526. In support of his contention Mr. Sahu, however, relied upon a decision of the Privy Council reported in (1934) 66 MLJ 431 (Privy Council) where their Lordships have held that where there is no doubt that the title to the land is in the Plaintiffs, the onus is on the Defendants to prove adverse possession relied upon by him. This decision also cannot be of any assistance to the Plaintiff in view of the clear finding of both the courts that the Defendants were in possession for more than 12 years prior to the institution of the suit. Thus even on the basis of Article 144 of the Limitation Act the Defendants have been found to have successfully discharged that onus and have proved adverse possession for the statutory period, since they have proved that they have been in cultivating possession of the suit-land prior to 1936 settlement. According to the Plaintiff the suit-land having been recorded in the record of rights as Anabadi Gochar in the year 1936, the presumption would be that the land was found not to be under cultivation at the time of the settlement

and falsifies the contention of the Defendants that the suit-lands were under their cultivating possession. The presumption regarding the correctness of the settlement entry is after all a rebuttable one. The story of their possession even prior to the settlement of 1936 has been accepted by both the courts below, and it is no longer open to the Appellant to agitate that question.

10. The only other question that arises for consideration is whether the sixty years rule as contemplated under Article 149 would apply, of the 12 years limitation under Article 144 would be applicable. The Limitation Act came into force in the ex-State of Gangpur, comprising the present district of Sundargrh, on 1-1-1939 sometime after the settlement of 1936 by which date the Defendants have been found to be in possession. There is nothing on record to show if there was any law in force in Gangpur prohibiting the acquisition of title by adverse possession of the land held by the State. That apart the question is whether the sixty years rule provided under Article 149 of the Limitation Act has any application to the present case.

11. Mr. Misra, learned Counsel for the Respondents contended that Article 149 applies only to such as were brought by the State or on its behalf and not to suits brought by persons deriving title from the Government as now claimed by the Plaintiff and in support of his contention he relied upon a number of decisions to which I shall presently refer.

12. In the case reported in *Kutha Perumal Rajali v. The Secretary of State* ILR Mad. 245 a their Lordships held that the Plaintiff is not entitled to claim the enhanced period provided by Article 149 of the Limitation Act merely because he derives his title by purchase from Government as it was not a suit brought by or on behalf of the Secretary of State.

13. In the Privy Council case reported in *Jagadindranth Ray v. Hemanta Kumari Devi* ILR Cal. 129 their Lordships held that the sixty years period of limitation provided by Article 149, Schedule II of the Limitation Act is not applicable to a suit brought by a person claiming title under settlement patta from the Government.

14. In a case reported in *Annada Mohan Roy Chowdhury Vs. Kina Das and Others*, a Division Bench of the Calcutta High Court held that where a purchaser of a land from the Government sued to recover possession within sixty years, but after more than 12 years of the commencement of adverse possession although within 12 years of purchase the suit is barred as Article 144 applies and there was only 12 years" limitation and not sixty years under Article 149.

15. Mr. Misra contended that it is not always possible to give the best evidence of possession stretching over a period of sixty years and when the Plaintiff gave evidence of possession for a very long period, the onus is on the State to prove the contrary. In support of his contention he relied on a case reported in *Venkataraman Ayyar and Anr. v. Secretary of State* ILR Mad. 362. There the Plaintiff was in possession of some tank and the adjoining land belonging to the

Secretary of State for a period of about thirty or forty years. The Collector leased out the flowers of certain plants standing on the bank of the tank. The Plaintiff prayed for a declaration that he is the owner of the tank and for recovery of possession and for damages against the Secretary of State for India. It was held that when the plaintiffs have proved to have spent money on the said tank in clearing the site etc. and also proved to have been done for thirty or forty years, the presumption is to be that they had done so for more than the statutory period and the burden will be on the Crown to explain such acts and to prove possession within the statutory period. The mere entry as Poramboke in the settlement registers is insufficient to prove the title of the Government without proof of acts of ownership. This decision was cited to make out a case that even thirty years possession by the Defendants is sufficient to raise a presumption of possession for the full statutory period even though Article 149 is applied. In such a case it is for the State to prove and explain such acts of possession of the Defendant and prove their possession within the statutory period. In view of the aforesaid decision it must be held that the sixty years' rule has no application to the present case and the 12 years rule available under Article 144 would be applicable to this case. I have said that both the courts below have found that the Defendant was in possession of the suit-lands at least for a period of thirty years prior to the commencement of the suit and that the Plaintiff was never in possession. In view of this finding the Defendants must be held to have proved their possession for the statutory period and to have acquired the right of adverse possession on the suit lands.

16. It was contended by Mr. Sahu learned Counsel for the Appellant that the land was a waste and jungle land and as such was incapable of cultivation and in such a case possession may be inferred from the title itself. It cannot be disputed that the Defendants have lands adjacent to the disputed land and they were in cultivating possession of the same. Their definite evidence is that though a portion of the suit land was sandy it was capable of yielding some crops. The Plaintiff (P.W. 3) himself admitted that though the suit-land was sandy, on some portions of it some Kulthi, Fulchi and so also paddy of the variety of Jaldubi and Agnijal could be grown. This sufficiently destroys the Plaintiff's contention that the suit land was absolutely a waste land. In fact, according to the evidence of the Defendants which has been accepted by the courts below the land was under cultivation of the Defendants even though it was recorded as Gochar. It was never used as Gochar is also the admitted case of the Plaintiff himself. It is not understood if the land itself was lying fallow and recorded as such why some other lands of the Plaintiff was being used for grazing purposes. This rather supports the defence story that the suit-land was under some sort of cultivation. In a case of this nature where clear evidence of cultivation and possession is available and the Plaintiff's story of possession has been rejected by the courts below, inference of possession for title will not be available.

17. Mr. Sahu relied upon a decision in *Maharaja Sudhanshu Sekhar Deo v. Haribansha Singh Deo* ILR 1960 Cutt 395 where their Lordships held "that it

cannot be laid down as a rule of universal application that in a suit for ejectment on the ground of dispossession, the presumption of possession arising from admitted or proved title is not at all available. It is incontrovertible that ordinarily in a suit for ejectment the Plaintiff must prove his antecedent title and possession within the statutory period. But cases may arise where possession may be inferred only from title and other circumstances of the case; even though the evidence may not conclusively establish actual physical possession. The presumption of possession arising from title is not available where the land is capable of actual possession by cultivation or otherwise, and there is no evidence of possession or the evidence adduced is unworthy of credit".

18. At the cost of repetition it may be said that in the present case not only it has been found that the land is capable of actual possession by cultivation, but evidence regarding possession has also been given on both sides, and it has been found in favour of the Defendants by both the courts below. This decision therefore cannot be any help to Mr. Sahu. On the other hand it goes counter to his contentions. No doubt, where the land is of such a nature where it is absolutely waste jungle or submerged under water or otherwise incapable of cultivation, inference of possession may be drawn from the title itself. But as I have said the present case is not of that nature.

19. It was further contended on behalf of the Appellants that the Defendants at best were cultivating the disputed land as tenants under the State and in fact were willing to be recorded in the settlement papers as such and in any case there is nothing to show that they advanced a hostile title against the landlord openly and to his knowledge, for a period of 12 years so as to entitle him to claim right of adverse possession. It is the admitted case of the Plaintiff that the land was recorded as State Gochar and as such the village community were directly interested the said land. When the Defendants took possession of the land and cultivated the same, their action amounted to an immediate deprivation of the villagers from the use of the land as Gochar. It must be taken also to have been done to the knowledge of the entire body of villagers and in view of the nature of possession it cannot be doubted that the act was openly done. It may just be possible that on account of this possession by the Defendants, the villagers were obliged to use the land of the Plaintiff by way of Gochar. Under the circumstances it cannot be doubted that the Defendants exercised a hostile title on the suit-lands to the knowledge of all concerned.

20. Learned Counsel for the Appellant contended that no right of adverse possession can be acquired on communal lands but he was unable to cite any authority in support of such a contention and in view of the aforesaid position, it is unnecessary to examine that question here.

21. No other point arises in this appeal for consideration. In view of the aforesaid discussions the Plaintiff's suit is bound to fail.

22. In the result, the appeal is dismissed with costs.