

(2012) 02 CHH CK 0049
In the Chhattisgarh High Court
Case No : S.A. No. 361 of 2003

Smt. Padma and Others

APPELLANT

Vs

Smt. Dr. Purnima Bajpayee and Others

RESPONDENT

Date of Decision : 16-02-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2012) 2 CG.L.R.W. 54

Hon'ble Judges : Nawal Kishore Agarwal, J

Bench : Division Bench

Advocate : Prafull Bharat, for the Appellant; Abhay Tiwari, for the Respondent Nos. 1 to 4 and Shri Akhil Agrawal, Panel Lawyer, for the State, for the Respondent

Final Decision : Dismissed

Judgement

Nawal Kishore Agarwal, J.—This is defendant's Second Appeal filed u/s 100 of CPC against the judgment and decree dated 12-3-2003 passed by the 1st Additional District Judge, Bastar, in Civil Appeal No. 26-A/02. Facts in brief are as under:

- (i) Original plaintiff-Prabhat Bajpayee filed a suit for declaration of title; rectification of sale deed, possession and mense profits.
- (ii) According to plaintiff, he purchased the suit land bearing Khasra No. 50 Area 2 Acres situated in Village Shasankachora from defendants No. 1 & 2 for a sale consideration of Rs. 3,000/- vide registered sale deed dated 18-5-1977 and obtained its possession.
- (iii) In the year 1994, he came to know that in the sale deed the name of village has wrongly been mentioned as Hatkachora in place of Shasankachora. Vide notice dated 25-11-1994 he asked defendants No. 1 & 2 for rectification of above mistake. No reply was given by the defendants.

(iv) The suit land stands mutated in plaintiff's name vide Assistant Settlement Officer's order dated 5-1-1995.

(v) In the month of June, 1995, the defendants dispossessed the plaintiff.

(vi) By filing written statement, while not disputing execution of sale deed dated 18-5-1977 in plaintiff's favour, the defendants denied receipt of sale consideration of Rs. 3000/- and delivery of possession. According to the defendants, due to non-payment of sale consideration, they did not hand over the possession of the suit property to plaintiff and had perfected their title by prescription, i.e., by way of adverse possession.

(vii) Counter claim seeking relief of declaration based on adverse possession was also preferred by defendants No. 1 & 2.

(viii) During pendency of suit, the original plaintiff Prabhat Bajpayee died and his legal representatives were brought on record.

(ix) The trial court framed issues. The parties led their evidence.

(x) The trial court holding defendants No. 1 & 2 had perfected their title by prescription, i.e., by way of adverse possession, decreed defendants' counter claim and dismissed the plaintiffs' suit.

(xi) The plaintiff preferred first appeal. The first appellate Court reversed the finding of the trial Court, allowed the plaintiffs' appeal and dismissed the defendants' counter claim. Hence, this Second appeal.

(xii) During pendency of the appeal, appellant No. 1- Rup Singh died and his legal representatives were brought on record.

2. This Court, vide its order dated 31-7-2007 admitted the appeal on the following substantial question of law:

Whether the lower appellate court while reversing the finding recorded by the Trial court that the defendants had perfected the title over the suit land by adverse possession has committed any perversity?

3. Shri Prafull N. Bharat, learned counsel appearing for the appellants would submit: the title of the suit land vested in Prabhat Bajpayee, i.e., the original plaintiff, the moment when the sale deed was executed by the appellants in his favour but the appellants did not hand over its possession to the plaintiff for want of payment of consideration and since then they are in continuous and peaceful possession of the suit land against the interest of the plaintiff and had perfected their title by way of adverse possession. The learned trial Court had rightly held so. However, the learned appellate Court, relying upon inadmissible testimony of Mohan Panigrahi (PW/2) and Dhaniram (PW/4) and upon void ab-initio mutation order passed by the Settlement Officer in the year 1995, has illegally reversed the finding and thus has fallen in error in allowing the plaintiffs' appeal and decreeing the plaintiffs' suit.

4. Per contra, Shri Abhay Tiwari, learned counsel appearing for respondent No. 1 to 4 supported the judgment and decree impugned and submitted: the learned first appellate Court has rightly decreed the plaintiffs' suit. There is no perversity, illegality and absurdity in the finding recorded by the learned first appellate Court. No substantial question of law arises for determination in the instant appeal and the appeal deserves to be dismissed.

5. I have heard the counsel appearing for the parties, perused the records of both the courts below and the judgment and decree impugned.

6. Vide sale deed dated 18-5-1977, ownership of suit land was transferred by the appellants in favour of Prabhat Bajpayee (original plaintiff), is not in dispute.

7. Appellants/defendants' case is that they did not hand over the possession despite execution of sale deed and remained in peaceful and continuous possession over the suit property hostile to the true owner, i.e., plaintiff for a period of more than 12 years (1977 to 1995) and had perfected their title by way of adverse possession.

8. As per Article 65 of the Limitation Act, the suit for possession of immoveable property or any interest therein based on title can be filed within a period of 12 years when the possession of the defendants becomes adverse to the plaintiff.

9. The Supreme Court, in the case of Indira Vs. Arumugam and Another, has held: when the suit is based on title for possession, once the title is established on the basis of relevant documents and other evidence, unless the defendants prove adverse possession for the prescriptive period, plaintiff cannot be non-suited. The Supreme Court has further held in para 4 and 5 of its judgment as under:

4. The aforesaid reasoning of the learned Judge, with respect, cannot be sustained as it proceeds on the assumption as if old Article 142 of the earlier Limitation Act was in force wherein the plaintiff who based his case on title had to prove not only title but also possession within 12 years of the date of the suit. The said provision of law has undergone a metamorphic sea change as we find under the Limitation Act, 1963 Article 65 which reads as under:

5. It is, therefore, obvious that when the suit is based on title for possession, once the title is established on the basis of relevant documents and other evidence unless the defendant proves adverse possession for the prescriptive period, the plaintiff cannot be non-suited.

Unfortunately, this aspect of the matter was missed by the learned Judge and, therefore, the entire reasoning for disposing of the second appeal has got vitiated. Only on that short ground and without expressing any opinion on the merits of the question of law framed by the learned Judge for disposing of the second appeal, this appeal, is allowed. The impugned decision rendered is set aside and the second appeal is restored to the file of the High Court with a request to proceed further with the hearing of the appeal with respect to the

substantial question aforementioned in accordance with law. No costs."

10. Therefore, once the plaintiff proves his title, the burden shifts on the defendants to establish that they had perfected their title by adverse possession. This aspect of the matter has since been considered by the Supreme Court in the case of Saroop Singh Vs. Banto and Others, wherein the Supreme Court in paras 28 to 30 has held as under:

28. The statutory provisions of the Limitation Act have undergone a change when compared to the terms of Articles 142 and 144 of the Schedule appended to the Limitation Act, 1908, in terms whereof it was imperative upon the plaintiff not only to prove his title but also to prove his possession within twelve years, preceding the date of institution of the suit. However, a change in legal position has been effected in view of Articles 64 and 65 of the Limitation Act, 1963. In the instant case, the plaintiff-respondents have proved their title and, thus, it was for the first defendant to prove acquisition of title by adverse possession. As notice hereinbefore, the first defendant-appellant did not raise any plea of adverse possession. In that view of the matter the suit was not barred.

29. In terms of Article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendant's possession becomes adverse. (See Vasantiben Prahladiji Nayak and Others Vs. Somnath Muljibhai Nayak and Others,

30. "Animus possidendi" is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. (See Md. Mohammad Ali (Dead) by Lrs. Vs. Sri Jagadish Kalita and Others,

11. The Supreme Court in a recent decision rendered in the case of L.N. Aswathama and Another Vs. P. Prakash, has held: "long and continuous possession by itself would not amount to adverse possession if it was either permissive or without animus possidendi. To establish a claim of title by prescription, possession of the claimant must be physical/actual, exclusive, open, uninterrupted, notorious and hostile to the true owner for a period exceeding twelve years and observed in para 17 as under:

17. The legal position is no doubt well settled. To establish a claim of 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 (Dead) by Lrs. Vs. P. Periathambi and Others, , Md. Mohammad Ali (Dead) by Lrs. Vs. Sri Jagadish Kalita and Others, and P.T. Munichikkanna Reddy and Others Vs. Revamma and Others,

12. It is also evident from the recital of the sale deed that the possession of the suit property was handed over by the appellants to plaintiff. A presumption, therefore, can be drawn in favour of plaintiff regarding his possession over the suit property. It is also trite law, possession follows title.

13. Burden of proof lies on the defendants will not be discharged by merely saying that they did not hand over the possession to the plaintiff. It is one thing to say, for want of consideration, the sale is void but to prove adverse possession against the purchaser, heavy burden lies on the vendor/defendants.

14. To prove the above fact, defendants examined Bhup Nath (D.W. 1) and Raju (D.W. 3). Rup Singh, allegedly main executant of the sale deed, did not enter into witness box. During partition proceedings in the year 1991 between Rup Singh and Bhup Nath, it was admitted by Bhup Nath (D.W. 1) that they sold two acres of land to plaintiff. According to him, sold land has to be reduced from the share of Rup Singh but Rup Singh was not ready for it, and therefore, a dispute between them is pending. He further stated that he came to know about the mistake in the sale deed regarding mentioning of village Hatkachora in place of Shasankachora in the year 1994, i.e., the same year in which the plaintiff came to know about the above mistake. Therefore, it is difficult to accept the defendants' possession as physical/actual, exclusive, open, uninterrupted, notorious and hostile to the plaintiff for a period exceeding 12 years.

15. The other witness Raju (D.W. 3) also states in para 26 of his statement as under:

16. One other witness Ramprasad (D.W. 4) stated that Rup Singh told him, for want of payment of consideration, he has taken back the possession of the suit land meaning thereby possession was earlier handed over to the plaintiff and then it was taken back. As per the plaintiff's case, the defendants dispossessed him in the month of June, 1995.

17. As per evidence, mutation order passed in favour of plaintiff by the Settlement Officer, though was in the knowledge of the appellants, but was not challenged by them. Therefore, the above order due to trivial error of mentioning of village Hatkachora in place of Shasankachora cannot be termed as void.

18. In view of above, the appellants/defendants utterly failed to prove their title based on adverse possession.

19. The findings recorded by the trial Court, on the face, appear to be de hors the evidence and without any basis. There is no plaintiff's admission available on record regarding appellants' continuous possession since 1977, on which, the

trial Court has based its finding.

20. After going carefully through the evidence, I do not find any inadmissibility in the statement of Mohan Panigrahi (P.W. 2) and Dhaniram (P.W. 4) and in my opinion, the first appellate Court has correctly decided the issue of adverse possession and has rightly decreed plaintiffs' suit, which is a suit for possession based on title.

21. Considering every aspect of the matter, in the considered opinion of this Court, the appellants/defendants failed to prove their case of adverse possession and the substantial question of law formulated is answered accordingly.

22. The appeal, therefore, fails and is dismissed.

23. No order as to costs. A decree be drawn accordingly.