

(2017) 12 OHC CK 0056

In the Orissa High Court

Case No : 127 of 1989

Sri Jagannath Jena and others

APPELLANT

Vs

State of Orissa and another

RESPONDENT

Date of Decision : 06-12-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 7 Rule 3](#)

Citation : (2017) 12 OHC CK 0056

Hon'ble Judges : A.K. Rath

Bench : SINGLE BENCH

Advocate : Amiya Kumar Mohanty, Swayambhu Mishra

Judgement

1. Plaintiffs are the appellants against a reversing judgment. The suit was for declaration of title, confirmation of possession and permanent injunction.

2. The case of the plaintiffs was that the suit plot was recorded in the name of Bhagabat Gumansingh, father of plaintiff no.4 and grand-father of plaintiff nos.1 to 3 in the settlement record of right published in the year 1917-18. In a family partition, the same fell to the share of the plaintiffs. The suit land was recorded in the name of the State in 1932 settlement. Encroachment Case No.193/1976 was initiated by the Tahasildar, Nayagarh, defendant no.2, against them. In the said case, the plaintiff no.4 appeared and stated that he was the owner of the land. But then order of eviction was passed and fine of Rs.5/- was imposed. They filed appeal, which was dismissed for non-prosecution. They have constructed five rooms and are residing there. They are in possession of the suit land peacefully, continuously and with the hostile animus to the defendants for more than 30 years and as such perfected title by way of adverse possession. With this factual scenario, they instituted the suit seeking the reliefs mentioned supra.

3. The defendants entered contest and filed written statement denying the assertions made in the plaint. The case of the defendants was that the suit plot had been recorded as "Jalasaya". The same is a Government land. Since the

plaintiffs were unauthorised occupation of the Government land, Encroachment Case No.193/1976 was initiated against them by the defendant no.2. Order of eviction was passed and fine of Rs.5/- was imposed. They filed L.E. Appeal No.2 of 1977. Plaintiffs were not in possession of the land prior to 1975.

4. On the interse pleadings of the parties, learned trial court struck six issues. Parties led evidence, oral and documentary, to substantiate their cases. Learned trial court came to hold that the plaintiffs have right, title and interest over the suit land. Held so, it decreed the suit. Assailing the judgment and decree of the learned trial court, the defendants filed T.A. No.4 of 1986 before the learned Subordinate Judge, Nayagarh. The appeal was allowed.

5. The second appeal was admitted on the following substantial questions of law.
"1) Whether the appellate court has interpreted Exts.1 and 2 in their proper perspective ?

2) Whether the appellate court has committed an error on the face of record by giving the finding that the Jalasaya comprises of an area of 50 decimals when the defendants have categorically submitted that the Jalasaya is only 10 decimals ?

3) Whether the finding of the appellate court regarding the adverse possession can be sustained as correct."

6. Heard Mr. Amiya Kumar Mohanty-A, learned counsel for the appellants and Mr. Swayambhu Mishra, learned Additional Standing Counsel for the respondents.

7. Mr. Mohanty-A, learned counsel for the appellants submits that the suit land originally belonged to Bhagabat Gumansingh. In the record of right of the year 1917-18, the name of Bhagabat Gumansingh had been recorded. There was a family partition between the co-sharers. The suit property fell to the share of plaintiff no.4. Notwithstanding erroneous entry in the record of right in the year 1932 settlement, the plaintiffs remained in possession of the suit land peacefully, continuously and with the hostile animus to the defendants for more than the statutory period and has perfected title by way of adverse possession. The defendants in their evidence have admitted that the plaintiffs are in possession of the suit land. He further contends that the commissioner had submitted a report in favour of the plaintiffs. But then the learned appellate court rejected the same on jejune grounds.

8. Mr. Mishra, learned A.S.C. for the respondents submits that the suit land has not been correctly described in the plaint. No effective decree can be passed. The suit land was recorded in the name of the Government in 1932 settlement. The kissam of the land was "Jalasaya". Since the plaintiffs were unauthorised occupation of a portion of the Government land, Encroachment Case No.193/1976 was initiated against them. Order of eviction was passed and fine was imposed. The plaintiffs filed appeal. The same was dismissed for non-prosecution. He further contends that learned appellate court has rightly

discarded the report of the commissioner, since there are several discrepancies in the report.

9. Order 7 Rule 3 C.P.C. postulates that where the subjectmatter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaint shall specify such boundaries or numbers.

10. The plaintiffs had described the suit land in the following manner. SCHEDULE "Mouza-Baulasahi, Khata No.226, Plot No.554, Ac.0.10 1/2 dec. to the North out of Ac.0.50 dec."

The name of district has not been mentioned. The boundaries of the suit plot have not been furnished. Thus, no effective decree can be passed.

11. In 1932 settlement, the suit land had been recorded in the name of the Government. The apex Court in the case of Shri Raja Durga Singh of Solon vs. Tholu and others, AIR 1963 SC 361, held that where a new entry is substituted for an old one it is that new entry which will take the place of the old one and will be entitled to the presumption of correctness until and unless it is established to be wrong or substituted by another entry.

12. Learned appellate court came to hold that the commissioner was not supplied with any map of 1932 settlement. In the report, he had not indicated the method adopted during survey. Rightly the learned appellate court rejected the report of the commissioner.

13. Burden of proof lies on the person who claims to acquire title of the land by way of adverse possession. Adverse possession is not a pure question of law, but a blended one of fact and law.

14. In Karnataka Board of Wakf vs. Govt. of India and others, (2004) 10 SCC 779, the apex Court observed as under :- "In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Nonuse 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.

The court further observed that 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." (emphasis laid)

15. The date of entry into the suit land has not been mentioned. Mere possession of the suit land for long time is not suffice to hold that the plaintiffs have perfected title by way of adverse possession, unless the classical requirements of adverse possession *nec vi, nec clam, nec precario* are pleaded and proved.

16. On a threadbare analysis of the evidence on record and pleadings, learned appellate court came to hold that plaintiffs have not perfected title by way of adverse possession. There is no perversity in the said finding. The substantial questions of law are answered accordingly.

17. In the wake of aforesaid, the appeal, sans merit, deserves dismissal. Accordingly, the same is dismissed. There shall be no order as to costs.