

(2011) 07 GAU CK 0020

In the Gauhati High Court

Case No : Regular Second Appeal No. 12 of 2001

Sri Rakhal Ch. Das

APPELLANT

Vs

Sri Promode Ch. Das, Smt. Niharibala Das, Smt. Gita Das and
Sri Sankar Das

RESPONDENT

Date of Decision : 13-07-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Limitation Act, 1963 — Article 65

Citation : (2011) 4 GLT 141

Hon'ble Judges : A.C. Upadhyay, J

Bench : Single Bench

Advocate : D.R. Choudhury and K.G. Bhowmik, for the Appellant; P. Roy Barman and B. Saha, for the Respondent

Final Decision : Dismissed

Judgement

A.C. Upadhyay, J.—I have heard Mr. D.R. Choudhury, learned Counsel for the Appellant, and Mr. P. Roy Barman, learned Counsel appearing on behalf of the Respondents.

2. This second appeal is directed against the judgment and decree, dated 31.03.2001 and 03.04.2001 respectively, passed by the learned Additional District Judge, Court No. 4, West Tripura, Agartala, in Title Appeal No. 05 of 2000, dismissing the appeal preferred by the Plaintiff-Appellant, against the dismissal of decree passed by the learned trial Court.

3. Brief facts, leading to the filing of this second appeal, may be stated, as follows:

The Plaintiff, Appellant herein, filed a suit in the court of learned Civil Judge, Junior Division, Agartala, West Tripura, stating therein, that in the year 1965, the Plaintiff-Appellant got allotment of lands as elaborately described in Schedule A and B of the plaint. The land was accordingly mutated in his name in Khatian No.

1545 of Mouja-Ghaniagram. After getting the allotment, the Plaintiff-Appellant constructed dwelling hut in the suit land and also planted banana, bamboo and jackfruit trees, etc.

4. The Defendants-Respondents were shown as permissive possessors, in Schedule B of the suit land. In fact, the Plaintiff-Appellant did not permit the Defendants-Respondents to reside in the suit land, but in collusion with the Settlement Department, the name of the Defendant-Respondent No. 1 and the deceased Sudhir Das, were recorded in Column 24 of Khatian No. 1502.

5. After several village meetings, though the Defendants-Respondents assured that they would leave the suit land, but they did not do so. Consequently, the Plaintiff Appellant filed TS No. 44 of 1998, before the learned Civil Judge, Jr. Division, West Tripura, Agartala, praying for a decree declaring his right, title and interest over the suit land and also for recovery of the suit land, as shown in Schedule A and B of the plaint.

6. The Defendants-Respondents contested the suit by filing written statement, stating therein, that they acquired right, title and interest over the suit land by way of adverse possession for more than the statutory period. The Defendants-Respondents denied the right of the Plaintiff-Appellant over the suit land.

7. The case of the Defendants-Respondents Nos. 2, 3 and 4 as stated in the joint written statement, filed together with Defendant-Respondent No. 1, is that deceased Sudhir Das, i.e. husband of Defendant No. 2, and father and father-in-law of Defendants-Respondents No. 2 and 3, got allotment of the land, shown in the plaint about 40 years before. Since then the deceased Sudhir Das had been possessing the suit land with the members of his family by constructing dwelling houses thereon. The Defendants-Respondents also stated that they had been possessing the suit land openly and clearly denying and disputing the right, title and interest of the Plaintiff-Appellant.

8. On the pleadings of the parties, the learned trial Court framed the following issues:

I. Whether the suit is maintainable in its present form ?

II. Whether the Plaintiff has any right, title and interest over the suit land by virtue of the order of allotment ?

III. Whether the Defendant No. 2, 3 and 4 have been possessing the "A" Schedule land denying right, title and interest of the Plaintiff for more than the statutory period of 12 years ?

IV. Whether due to amicable partition of the paternal property between the Plaintiff and Defendant No. 1, schedule "B" land fell in the share of Defendant No. 1 ?

V. Whether the Plaintiff is entitled to get a decree for delivery of khas possession of the suit land ?

VI. Whether the Plaintiff is entitled to get any other relief ?

9. The Plaintiff-Appellant produced two witnesses in the trial court to establish his case. On the other hand, the Defendants-Respondents also produced two witnesses to substantiate their stand.

10. Upon hearing the learned Counsel for both the parties and on careful perusal of the evidence on records, the learned trial Court, came to a finding that the Plaintiff-Appellant had no right, title and interest over the suit land by virtue of the order of allotment, as his right had extinguished due to adverse possession of the suit land by the Defendants-Respondent, for more than the statutory period. Accordingly, learned trial Court dismissed the suit of the Plaintiff.

11. Being aggrieved, the Plaintiff-Appellant preferred an appeal in the Court of the learned Additional District Judge, West Tripura, Agartala. The First Appellate Court, upon appraisal of the materials and the evidence on records, dismissed the appeal preferred by the Plaintiff-Appellant. As against the order passed by the First Appellate Court, this second appeal u/s 100 CPC was preferred and the appeal was admitted by this Court for hearing on the following substantial question of law:

Whether the learned lower appellate Court erred in holding that though the case of adverse possession pleaded by the Defendants was not proved, the Plaintiff's suit was liable to be dismissed on the ground that it was filed after a lapse of 12 years by invoking Article 65 of the Limitation Act.

12. Mr. D.R. Choudhury, learned Counsel for the Plaintiff Appellant strenuously submitted that the Defendants Respondents, being permissive possessors in respect of the suit land, cannot derive the status of trespassers to claim adverse possession against the Plaintiff-Appellant. Drawing the attention of this Court to the written statement submitted by the Defendants-Respondents, learned Counsel for the Plaintiff Appellant pointed out that the Defendants-Respondents have taken the plea of adverse possession as well as allotment of land, in question, as long as 40 years ago.

13. Learned Counsel for the Plaintiff-Appellant further submitted that the statement of facts available in the records of right would prevail over the oral statement either of the Plaintiff or of the Defendants. Therefore, since the records of right (Khatian) reflect the Defendants-Respondents as permissive possessors in respect of the suit land, they cannot derive the status of trespassers. In support of his contention learned Counsel for the Plaintiff-Respondent has relied on the decision reported in Thakur Kishan Singh (dead) Vs. Arvind Kumar, The relevant observation of the Hon"ble Supreme Court in Thakur Kishan Singh (supra) reads as follows:

5. As regards adverse possession, it was not disputed even by the trial court that the Appellant entered into possession over the land in dispute under a licence from the Respondent for purposes of brick-kiln. The possession thus initially

being permissive, the burden was heavy on the Appellant to establish that it became adverse. A possession of a co-owner or of a licensee or of an agent or a permissive possession to become adverse must be established by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of real owner. Mere possession for howsoever length of time does not result in converting the permissive possession into adverse possession. Apart from it, the appellate court has gone into detail and after considering the evidence on record found it as a fact that the possession of the Appellant was not adverse. The learned Counsel, despite strenuous argument, could not demolish the finding of adverse possession. Attempt was made to rely on the evidence led on behalf of the parties and the evidence of the Commissioner who prepared the map. We are afraid that such an exercise is not permissible even in second appeal, what to say of the jurisdiction exercised by this Court under Article 136 of the Constitution. Further, we do not find that the Appellant has suffered any injustice which requires to be remedied by this Court.

14. Learned Counsel for the Plaintiff-Appellant further relied on a decision of the Hon"ble Supreme Court, reported in *The State Bank of Travancore Vs. Aravindan Kunju Panicker and Others*, to substantiate that records of right is superior to the oral statement.

15. Though the learned Counsel for the Plaintiff-Appellant strenuously submitted that the Defendants-Respondents came to occupy the land as permissive possessors, but could not substantiate as to how the Defendants-Respondents had come to the suit land as permissive occupants. Rather the finding recorded by the learned First Appellate Court clearly reveals that the Plaintiff-Appellant himself admitted that the Plaintiff Appellant did not permit the Defendants-Respondents to reside in the suit land but in collusion of the settlement staff, the Defendant-Respondent No. 1 and deceased Sudhir Das were shown as permissive possessors of the suit land. The Plaintiff Appellant in his deposition has further admitted that after two years of allotment of the suit land, the Defendants-Respondents No. 2, 3 and 4 had been possessing 0.06 acres of land (i.e land under A Schedule) forcibly. Thereafter, after about 12/13 years, his brother i.e. Defendant-Respondent No. 1, Pramode Ch. Das had been possessing the suit land. Therefore, when Plaintiff himself did not admit the content of the document in his oral evidence, to establish the Defendants as permissive occupants, even if it is a written document it would not fetch any meaning in favour of the Plaintiff. Thus, decision of *The State Bank of Travancore v. Arvindan Kunju Panicker & Ors*(supra) can not be applied to save the Plaintiff-Appellant in the instant case.

16. Learned Counsel for the Respondent submitted that from the evidence on record, it clearly transpires that the Defendants-Respondent, though they were shown in the Khatian as "permissible occupants", they were in fact in possession of the suit land adversely to the interest of the Plaintiff-Appellant. The Plaintiff-Appellant admittedly had full knowledge of such adverse possession by the

Defendants, since admittedly the Defendants came to occupy the suit land forcibly, immediately after two years from the date of allotment in the name of the Plaintiff. This fact has been admitted in his evidence by the Plaintiff-Appellant that the Defendants-Respondents forcibly occupied the plot of land. Learned Counsel pointed out that there is no denial of the fact that the Plaintiff-Appellant had the knowledge that the Defendants-Respondents by refusing to recognize the right of the Plaintiff-Appellant as owner of the suit land, came into possession of the suit land and possessed it adversely to the interest of the owner i.e. the Plaintiff-Appellant. Thus, the Defendants-Respondents continued to remain in possession of the suit land for clearly more than 12 years.

17. Now the question, which arises for consideration, is whether the Defendants-Respondents have been able to establish adverse possession in terms of the provisions of Section 65 of the Limitation Act, 1963?

18. Hon'ble Supreme Court in Chatti Konati Rao and Others Vs. Palle Venkata Subba Rao, underlining the law relating to adverse possession observed as follows:

What is adverse possession, on whom the burden of proof lie, the approach of the court towards such plea etc. have been the subject matter of decision in a large number of cases. In the case of T. Anjanappa and Others Vs. Somalingappa and Another, it has been held that mere possession however long does not necessarily mean that it is adverse to the true owner and the classical requirement of acquisition of title by adverse possession is that such possessions are in denial of the true owner's title. Relevant passage of the aforesaid judgment reads as follows:

20. It is well-recognised proposition in law that mere possession however long does not necessarily mean that it is adverse to the true owner. Adverse possession really means the hostile possession which is expressly or impliedly in denial of title of the true owner and in order to constitute adverse possession the possession proved must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action.

13. What facts are required to prove adverse possession have succinctly been enunciated by this Court in the case of Karnataka Board of Wakf Vs. Government of India and Others, It has also been observed that a person pleading adverse possession has no equities in his favour and since such a person is trying to defeat the rights of the true owner, it is for him to clearly plead and establish necessary facts to establish his adverse possession. Paragraph 11 of the

judgment which is relevant for the purpose reads as follows:

11. 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. 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 Vs. Mst. Bibi Sakina, , Parsinni (Dead) by Lrs. and Others Vs. Sukhi and Others, and D.N. Venkatarayappa and another Vs. State of Karnataka and others, 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. Dr. Mahesh Chand Sharma Vs. Smt. Raj Kumar Sharma and others,

14. In view of the several authorities of this Court, few whereof have been referred above, what can safely be said that mere possession however long does not necessarily mean that it is adverse to the true owner. It means hostile possession which is expressly or impliedly in denial of the title of the true owner and in order to constitute adverse possession the possession must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The possession must be open and hostile enough so that it is known by the parties interested in the property. The Plaintiff is bound to prove his title as also possession within 12 years and once the Plaintiff proves his title, the burden shifts on the Defendant to establish that he has perfected his title by adverse possession. Claim by adverse possession has two basic elements i.e. the possession of the Defendant should be adverse to the Plaintiff and the Defendant must continue to remain in possession for a period of 12 years thereafter. Animus possidendi as is well known a requisite ingredient of adverse possession. Mere possession does not ripen into possessory title until possessor holds 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 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. Plea of adverse possession is not a pure question of law but a blended one of fact and law.

19. The Defendants need not prove facts admitted by the Plaintiff. In the instant case, the basic requirement for exulting adverse possession by the Defendants, has been admitted by the Plaintiff. Bearing in mind, the principles of Chatti Konati Rao and Ors. v. Palle Venkata Subba Rao (supra), when we proceed to consider the facts of this case, we find that Defendants have admittedly come to occupy the suit land by denying the right of the titleholder i.e. Plaintiff-Appellant. The Defendants possessed the suit land adversely to the interest of the Plaintiff-Appellant after two years of the orders of allotment in the name of the Plaintiff. The facts and circumstances discussed above clearly shows that Defendants-Respondents proved that they have perfected their title by adverse possession over the suit land, by forcibly residing in the suit land for more than 12 years, denying the right of the true owner. The cause of action for filing the suit by the Plaintiff-Appellant arose in the year 1985. However, the Plaintiff-Appellant filed the suit in the 2000 for recovery of possession and eviction of the Defendants Respondents long after 12 years. There is evidence to show that the Defendants asserted hostile title to the suit property to the knowledge of the true owners at all the time before the present suit.

20. Learned Counsel for the Appellant submitted that permissive possession couldn't be converted into an adverse possession, unless it is proved that the person in possession asserted an adverse title to the property, to the knowledge of true owners, for a period of twelve years or more. On appraisal of the record of the case, it is noticeable that the key question was as to whether the Defendants were permissive occupants or not? After going through the judgments of both the learned court below and the materials on record, it is apparent that except an entry in the Rayati Khatian that the Defendant/Respondents are "permissible occupants", there is no iota of evidence from the Plaintiff-Appellant to support his stand that the Defendants came to occupy the land as the permissive occupants. Obviously, a permissive possession cannot be converted into an adverse possession, unless it is proved that the person in possession asserted an adverse title to the property in question to the knowledge of true owners, for a period of twelve years or more. Very interestingly, the Plaintiff stated that he did not permit the Defendants to occupy the suit lands and also never claimed the Defendants as permissive occupants in his evidence on record. Nevertheless, in order to be a permissive occupant, there has to be prima facie proof of coming into possession as permissive occupants. The evidence adduced by the Plaintiff branded the Defendants as trespassers into his land. Technically, permissive possessor of the land has to have initial permission

of the true owner. The Plaintiff Appellant could not assert and prove as to how and when the Defendants came to occupy his land as permissive occupants. In the case cited by the learned Counsel for the Plaintiff Appellants in Thakur Kishan Singh (*supra*), the party claiming adverse possession admitted initial permissive occupation. In the instant case, neither the Defendants, nor the Plaintiff ever admitted permissive occupation of the suit land by the Defendants. Rather the entry in the record of right speaks of "permissible occupation" and not "permissive occupant" as sought to be read in the instant case. Neither the revenue officials were examined to clarify as to when and how the entry was made, nor the Plaintiff explained how the Defendants were permissible occupants. Rather, the Plaintiff himself in cross-examination admitted that the Defendants came to occupy the suit land denying his right and title over the suit land.

21. In view of the above discussion, I am of the considered view that there is no scope to disturb the concurrent findings of the learned court below. Accordingly, the second appeal stands dismissed, confirming the judgment and decree of the trial Court, dated 04.02.2000 made in T.S. No. 44 of 1998, and the judgment and decree of the first Appellate Court, dated 03.04.2001 made in T.A No. 05 of 2000. No costs.