
(2018) 01 OHC CK 0041

In the Orissa High Court

Case No : 23 of 1998

State of Orissa and another

APPELLANT

Vs

Dukishyama Behera and others

RESPONDENT

Date of Decision : 10-01-2018

Acts Referred:

[Orissa Prevention of Land Encroachment Act, 1972](#), [Section 16](#), [Section 7\(2\)\(b\)](#), [Section 8\(a\)](#)

Citation : (2018) 01 OHC CK 0041

Hon'ble Judges : A.K.Rath

Bench : Single Bench

Advocate : Swayambhu Mishra, Nibash Chandra Mishra

Final Decision : Allowed

Judgement

1. This is a defendants' appeal against reversing judgment.

2. The plaintiffs-respondents instituted the suit for declaration of right, title, interest, confirmation of possession and permanent injunction. The case of the plaintiffs was that they were occupancy raiyats of village Durgapur. They possess the land less than one acre. Plaintiffs 1 and 2 were in possession of "A" schedule land. Plaintiff no.3 was in possession of "B" schedule land since 1940. They used to grow crops and enjoy usufructs. They had constructed the house on a portion of the suit land. It was further pleaded that the suit land had been described as Chotta Jungle in 1962 settlement. In the consolidation R.O.R. the same had been recorded as Abad Yogya Anabadi. While the matter stood thus, Encroachment Case nos.107 of 73-74, 103 of 73-74, 253 of 90-91 and 254 of 90-91 had been initiated against them, wherein penalty was imposed. In the year

1990, the standing crops were put to auction. They being the illiterate persons participated in the auction and became the highest bidder. The R.I.

submitted the report against them. Thereafter they had been evicted. But the same was a mere paper transaction. They are still in possession of the

suit property with the knowledge of the defendants for more than forty years and have acquired occupancy rights over the suit schedule land.

When defendant no.2 threatened to dispossess them, they instituted the suit seeking the relief mentioned supra.

3. The defendants entered appearance and filed a written statement denying the assertions made in the plaint. The case of the defendants was that

the plaintiffs had been evicted in Encroachment Case Nos. 107 of 73-74 and 103 of 73-74. They put their L.T.I. on the case record, whereafter

the case was closed. When they encroached upon the suit land again, Encroachment Case Nos. 254 of 90-91 and 253 of 90-91 had been

initiated against them. The usufructs of the encroached land were put to public auction. Again the plaintiffs encroached upon the suit land and

started construction of a house over the same. Encroachment Case No.43 of 1991-92 had been initiated against them. The same was sub-judice.

It was further pleaded that in Encroachment Case No.107 of 73-74, plaintiff no.1 submitted a written statement stating, inter alia, that in the year

1971 while he was cultivating the land of one S.N.Mohapatra inadvertently occupied 50 dec. of land adjoining the land of Sri Mohapatra, which

was lying fallow. Plaintiff no.1 applied for settlement of the land by way of lease. However, he vacated the land. They were not in possession of the

suit land. They were evicted from the case land on 21.6.1982. The plaintiffs had not acquired occupancy rights. The kism of the land was Chotta

Jungle in 1962 settlement, but in 1990 the status had been changed to Abad Yogy Anabadi. The suit land adjoins to Banki N.A.C. It was further

pleaded that the entire suit land comprising an area A 9.12 dec. is used by the villagers at the time of festival for public purpose. A temple is

situated adjoining to the suit land.

4. On the inter se pleadings of the parties, the learned trial court struck four issues. Parties led evidence, oral and documentary, to substantiate their

cases. The learned trial court came to hold that the plaintiffs were not occupancy raiyats under the State. Held so, it dismissed the suit. Aggrieved

by the said judgment and decree, the plaintiffs filed T.A.No.1 of 1997 before the learned Civil Judge (Sr.Division), Banki. The appellate court held

that since the plaintiffs were in possession of the land for more than forty years by the time encroachment cases had been initiated, the Tahasildar

should have referred the matter to the Sub-Divisional Officer under Section 8 (a) of the O.P.L.E.Act for settlement of the land. The plaintiffs are

fishermen. They are scheduled caste persons and as such entitled for settlement of the land under the provisions of O.P.L.E.Act. The plaintiffs had

established their rights as tenants. They were in possession of the suit land for more than forty years and, as such perfected title by way of adverse

possession. Held so, it allowed the appeal.

5. The appeal was admitted on the substantial questions of law enumerated in ground nos.2(a), (b) and (c) of the appeal memo. The same are:

a) Whether the learned lower appellate court was correct in decreeing the adverse possession in favour of the plaintiff-appellants in view of the

fact that they have admittedly suffered from eviction orders under the provisions of the O.P.L.E.Act in 1982 and have admittedly in prescribed title

by adverse possession thereafter ?

b) Whether the learned lower appellate court erred in law in entertaining to the suit of the plaintiffs in view of the bar contained under Section 16 of

the O.P.L.E.Act ?

c) Whether the learned lower appellate court was correct in decreeing the plaintiffs-appellants suit in view of the fact that the issues raised can be

substantially decided by the authorities under the O.P.L.E.Act and therefore, the present claim is barred under Section 11 Explanation VIII of the

C.P.Code ?

6. Heard Mr.Swayambhu Mishra, learned A.S.C. for the appellants and Mr.Nibash Chandra Mishra, learned Advocate for the respondents.

7. Mr.Swayambhu Mishra, learned A.S.C. submits that the plaintiffs were unauthorized encroachers. In encroachment proceedings, they had been

evicted. Furthermore, in the auction of usufructs, the plaintiffs participated and became the highest bidder. They were not in possession of the suit

land for more than thirty years. The date of entry into the suit land had not been mentioned in the plaint.

8. Mr.Nibash Chandra Mishra, learned Advocate for the respondents submits that

the plaintiffs were in possession of the suit land since 1940.

They were the settled raiyats of village. They used to raise paddy crops. They became the occupancy raiyats. Initiation of encroachment

proceedings against the plaintiffs are bad in law. Drawing attention of this Court to Section 7 (2)(b) of the O.P.L.E. Act 1972, Mr. Mishra, learned

Advocate submits that where any land is in unauthorized occupation of a homesteadless person, which is being utilized by him as homestead, the

Tahasildar shall, instead of evicting such person, settle the same with him, so, however, that the land so settled with him shall not exceed one-tenth

of an area. The plaintiffs made an application to the Tahasildar for lease of the land under Ext.1. The same was pending. The Tahasildar instead of

referring the matter to the S.D.O. for settlement of the land under Section 8(a) of the O.P.L.E. Act passed order of eviction. Elaborating the

submission, he submits that the plaintiffs are poor fishermen. They are homesteadless persons. Their residential house is standing over a portion of

the suit schedule land. In such a contingency, the land ought to have been settled in their favour. He further submits that the learned appellate court,

on a threadbare analysis of the evidence on record and pleadings, allowed the appeal. There is no perversity or illegality in the said findings.

9. In *State of Orissa Vrs. Bhanu Mali (Dead) Nurpa Bewa and others*, 1996 (I) OLR 460, a question arose that whether the decision of the

Revenue Officer in the proceeding under the O.P.L.E. Act will operate as res judicata in the subsequent suit filed by the plaintiff for declaration of

title and recovery of possession. This Court held that the decision of the Revenue Officer in the proceeding under the O.P.L.E. Act can neither

operate as res judicata nor Sec.16 thereof can stand as a bar relating to the question of title in the subsequent civil suit by the plaintiffs. Thus,

notwithstanding the bar contained in Sec. 16 of the O.P.L.E. Act, the civil court has jurisdiction to adjudicate the complicated question of title.

10. The suit was instituted in the year 1991. It is pleaded that the plaintiffs were in possession of the suit land from the year 1940. Plaintiff nos.1

and 3 were sixty years at the time of institution of the suit. Plaintiff no.2 was 35 years. Plaintiffs 1 and 3 were born in the year 1931. Thus plaintiff

nos.1 and 3 were in possession of the suit land when they were nine years old. With regard to plaintiff no.2, he was born in the year 1956, i.e., he

was in possession of the land sixteen years prior to his birth. It is highly inconceivable.

11. The plaintiffs had taken a plea that they were occupancy raiyats, but then they made an application to the Tahasildar for settlement of the land

stating therein that they were in possession of the suit land for more than thirty years. The plea is mutually destructive. Claim of title to the property

and adverse possession are in terms of contradictory. The apex Court in the case of Mohan Lal (deceased) through his LRs. Kachru and others

Vrs. Mirza Abdul Gaffer and another, (1996) 1 SCC 639 held:

As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right

thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title

or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years, i.e., up to completing the period of his

title by prescription nec vi nec clam nec precario. Since the appellant's claim is founded on Section 53-A, it goes without saying that he admits by

implication that he came into possession of the land lawfully under the agreement and continued to remain in possession till date of the suit. Thereby

the plea of adverse possession is not available to the appellant.

12. In Annasaheb Bapusaheb Patil and others Vrs. Balwant alias Balasaheb Babusaheb Patil (dead) By Lrs. and heirs and others, (1995) 2 SCC

543, the apex Court made an in-dept analysis of claim of title and claim to adverse possession over the property. The apex Court in paragraph-15

of the said report held :

Where possession can be referred to a lawful title, it will not to be considered to be adverse. The reason being that a person whose possession

can be referred to a lawful title will not be permitted to show that his possession was hostile to another's title. One who holds possession on behalf

of another, does not by mere denial of that other's title make his possession adverse so as to give himself the benefit of the statute of limitation.

Therefore, a person who enters into possession having a lawful title, cannot divest another of that title by pretending that he had no title at all.

13. In consolidation R.O.R., the kisam of the land had been described as Abad Yogya Anabadi. Since the plaintiffs were in unauthorized

occupation of the suit land, Encroachment Case nos.107 of 73-74, 103 of 73-74, 253 of 90-91 and 254 of 90-91 had been initiated against them

at different point of time. The order of eviction was passed and penalty imposed. The R.I. put the standing crops to auction in the year 1990.

Plaintiff no.1 participated in the auction and became the highest bidder. The R.I. submitted its report stating that the plaintiffs had been evicted from

the suit land. The suit land is adjacent to a temple. The people of the locality observe the functions and ceremonies on the same. The learned

appellate court did not delve deep into the matter. Merely because the plaintiffs' application was pending before the authority, the same was not

per se a ground to decree the suit. The plaintiffs had failed to prove that they were occupancy raiyats.

14. There is no pleading that the plaintiffs were in possession of the land peacefully, continuously and with the hostile animus to the defendants, but

then the learned appellate court travelled beyond its jurisdiction and rendered finding on adverse possession. The substantial questions of law are

answered accordingly.

15. In the wake of aforesaid, the judgment of the learned appellate court is set aside and that of the learned trial court is confirmed. The appeal is

allowed. Consequently, the suit is dismissed. There shall be no order as to costs.