

IN THE HIGH COURT OF JUDICATURE AT PATNA

Second Appeal No.338 of 2008

(Against the judgment and decree dated 28.08.2008 passed by Additional District Judge F.T.C. V, Munger in M.T.A. No.23 of 2004 dismissing the appeal and confirming the judgment and decree dated 04.03.2004 passed by Munsif I, Munger in Title Suit No.23 of 1997).

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Sukhdeo Goswami

.... Defendant-Appellant-Appellant/s
Versus

Om Prakash Sao & Ors

.... Plaintiff-Respondent-Respondent/s

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Appearance :

For the Appellant/s : Mr. Md. Waliur Rahman
Mr. Nishant Kumar Sinha

For the Respondent No.1 : Mr. Harshwardhan Sahay

For the Respondent Nos. 3 and 4: Mr. Krishna Kant Tiwari

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO
C.A.V. JUDGMENT

Date: 18-01-2017

1. The defendant-appellant-appellant has filed the present second appeal against the judgment and decree dated 28.08.2008 passed by the learned Additional District Judge, F.T.C. V, Munger in M.T.A. No.23 of 2004 whereby the learned lower appellate court has dismissed the appeal and thereby confirmed the judgment and decree passed by the trial court dated 04.03.2004 passed by Munsif I, Munger in Title Suit No.23 of 1997 decreeing the plaintiff-respondent's suit.



2. This second appeal was admitted on 09.07.2009 and the following substantial questions of law were formulated:

(I) Whether the suit filed by the plaintiff for declaration of title and recovery of possession in the year 1997 was barred by limitation in view of the case of the plaintiff itself that she had been dispossessed forcibly in the year 1979 by the defendants?

(II) Whether both the courts have committed serious error of law in holding that the defendants could not have acquired title by adverse possession in view of the litigations between the parties prior to the dispossession of the plaintiff?

(III) Whether the plaintiff is entitled to the benefit of Sections 14 and 15 of the Limitation Act in view of the fact that there is no pleading or proof of any bonafide civil proceeding by her for recovery of possession over the suit house?

(IV) Whether T.S. No.84/79 filed by the son of defendant nos.1 and 2(against whom alone the dispossession has been alleged) can be used as sufficient circumstance to attract the provisions of Section 14 of the Limitation Act to the benefit of the plaintiff?

3. The plaintiffs filed the Title Suit No.23 of 1997 praying for declaration of right and for recovery of her possession alleging that the suit property originally belonged to Punit Goswami and Mangal Goswami who mortgaged the property on 09.06.1958. They continued to reside in the suit premises on monthly rent of Rs.15/-. However, subsequently they redeemed the mortgage by depositing the money under Section 83 T.P. Act in Misc. Case No.56 of 1962.



Because they had not paid the rent, the plaintiff filed Money Suit No.115 of 1962 which was decreed and execution Case No.87 of 1965 was filed by the plaintiff. In the execution case, the suit property was attached and auction sold which was purchased by the plaintiff. The defendant Nos.1 and 2 filed application under Order 21 Rule 58 C.P.C. being Misc. Case No.1 of 1965 which was dismissed for default and the restoration application i.e. Misc. No.73 of 1966 was also dismissed. Then the defendants filed Title Suit No.106 of 1966 for setting aside attachment and sale which was also dismissed on 23.08.1971. Title Appeal No.48 of 1971 was also dismissed on 20.12.1976. The execution case was revived and delivery of possession was effected on 26.08.1979.

4. The further case of the plaintiff is that defendant No.1 and 2 set up their minor sons, defendant Nos.3 to 5 and got filed Title Suit No.84 of 1979 against the plaintiff and they forcibly entered into the house in suit on 18.09.1979. Criminal case was filed and they were convicted. On filing criminal appeal, the appeal was dismissed. The plaintiff filed petition in the aforesaid criminal case i.e. complaint case No.263(c)/79 for restoration of possession but it was dismissed. Title Suit No.84 of 1979 filed by the defendant No.s3 to 5 was decreed on 27.03.1989. However, the plaintiff filed appeal being Title



Appeal No.21 of 1989 and the appellate court allowed the appeal and set aside the judgment and decree passed by the trial court. Therefore, the plaintiff filed the suit for declaration of title and recovery of possession.

5. The defendants besides taking ornamental pleas mainly contended that the plaintiff's suit is barred by law of limitation. According to the defendants the plaintiff himself pleaded that he was dispossessed in September, 1979, therefore, the suit for recovery of possession should have been filed within 12 years but the suit has been filed by the plaintiff in August, 1997.

6. Both the courts below decreed the plaintiff's suit recording finding that the suit is not barred by law of limitation.

7. As stated above, four substantial questions of law have been formulated. From perusal of the same, it appears that all the substantial questions of law are interlinked and are dependent on each other. The main substantial question of law is substantial question no.I. The other substantial questions of law are covered by this substantial question of law.

8. The learned counsel, Mr. Waliur Rahman for the appellant submitted that the plaintiff himself clearly admitted in the plaint that he was dispossessed on 18.09.1979 whereas the suit has



been filed for declaration of title and recovery of possession in the year 1997 beyond 12 years. Admittedly, therefore, the defendant continued in possession for more than 12 years, as such, the defendant has acquired title by adverse possession. Since the defendant dispossessed the plaintiff in 1979, the limitation period will start from the date of dispossession and the defendant will acquire title by adverse possession after expiry of 12 years.

9. On the other hand, the learned counsel for the respondents submitted that the appellant himself had filed suit for declaration of title being Title Suit No.106 of 1966 and after dismissal of the said suit by the appellate court on 20.12.1976 they again filed suit for declaration of title and possession being Title Suit No.84 of 1979 and they dispossessed the plaintiff after filing the suit. Therefore, the appellant dispossessed the respondents claiming title on the suit property. Therefore, the limitation will not start from the date of dispossession. The question of title was involved in the suit filed by the defendant. The present plaintiff was claiming title on the basis of auction sale and both the parties were fighting the case regarding title and possession, therefore, there is no question of acquiring title by adverse possession arises.

Substantial question of law no.I:



10. It is admitted fact that plaintiff has pleaded that the defendant filed the suit and on the next date dispossessed the plaintiff-respondent. Admittedly, the suit was filed by the plaintiff for declaration of title over the suit premises.

11. Article 65 of the Limitation Act reads as follows:

65. For possession of immovable property or any interest therein based on title. Explanation.- For the purposes of this article- (a) Where the suit is by a remainderman, a reversioner(other than a landlord) or a devisee, the possession of the defendant shall be deemed to become adverse only when the estate of the remainderman, reversioner or devisee, as the case may be, falls into possession; (b) Where the suit is by a Hindu or Muslim entitled to the possession of immovable property on the death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the female dies; (c) Where the suit is by a purchaser at a sale in execution of a decree when the judgment-debtor was out of possession at the date of the sale, the	Twelve years	When the possession of the defendant becomes adverse to the plaintiff.
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purchaser shall be deemed to be a representative of the judgment-debtor who was out of possession.		
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12. The Hon’ble Supreme Court in the case of **Karnataka Board of Wakf v. Government of India & Ors., 2004(3) PLJR 245(SC)** has held that a party claiming adverse possession has no equity in his favour. The plea of general title and adverse possession are mutually inconsistent and the latter will never operate unless the former is relinquished. There must be intention to dispossess the true owner.

13. In view of this decision of the Supreme Court, the plea of title and adverse possession cannot stand together and claim of adverse possession will not operate unless the claim of title is relinquished. The appellant herein had filed the suit in the year 1979 for declaration of title. It means that the appellant was claiming title and considering himself to be the owner, dispossessed the respondent who is plaintiff. Therefore, his position is as owner thereof. The claim of adverse possession will operate on the date when the appellant will relinquish his claim of title as both are inconsistent. On the date of dispossession he was claiming to be the owner of the property. Claim of adverse possession pre-supposes that the title with respect to the



property is with the other and not with the person claiming adverse possession. In the present case, when the appellant himself was claiming title and he dispossessed the respondent in 1979, how on the date of dispossession it will be accepted that he dispossessed the plaintiff admitting the plaintiff to be the owner of the property. In my opinion, therefore, here the animus possidendi i.e. intention to dispossess the true owner is lacking.

14. The Hon'ble Supreme Court in the case of **P.T. Munichikkanna Reddy and others v. Revamma and others, 2007(6) Supreme Court Cases 59** has held that adverse possession in one sense is based on the theory of presumption that the owner has abandoned the property to the adverse possessor on the acquiescence of the owner to the hostile acts and claims of the person in possession. In view of this decision, merely because the defendant came in possession forcibly, it cannot be said that the defendant acquired title by adverse possession.

15. In **AIR 2012 Supreme Court 559(State of Haryana vs. Mukesh Kumar and Ors.)**, the Supreme Court has held that “adverse possession allows a trespasser - a person guilty of a tort, or even a crime, in the eyes of law - to gain legal title to land which he has illegally possessed for 12 years. How 12 years of illegality can suddenly be converted to legal title is, logically and



morally speaking, baffling. This outmoded law essentially asks the judiciary to place its stamp of approval upon conduct that the ordinary Indian citizen would find reprehensible. The doctrine of adverse possession has troubled a great many legal minds. We are clearly of the opinion that time has come for change.” Here, in the present case, the defendant-appellant dispossessed the plaintiff-respondent in the year 1979 claiming himself to be the owner of the property. Therefore, his possession is referable to his title and not to the title of present plaintiff-respondent. As soon as his claim of title was dismissed by appellate court in T.A. No.21 of 1989, by judgment dated 20.12.1996, his possession became possession of a trespasser and not more than that. The present suit has been filed in the year 1997. Therefore, the plaintiff’s suit can never be said to be barred by law of limitation.

16. The Hon’ble Supreme Court in **2009(4) PLJR 111(SC)(L.N.Aswathama & Anr. v. P. Prakash)** has held that long and continuous possession by itself would not constitute adverse possession if it was either permissive possession or possession without animus possidendi to establish claim of title by prescription. Possession of claimant must be physical, actual, exclusive, open, uninterrupted, notorious and hostile to true owner for a period exceeding 12 years. In the present case, when the appellant



dispossessed the plaintiff in the year 1979, the possession of the appellant was with intention to possess the property as owner and was not with intention to possess forcibly dispossessing the true owner. In other words, the appellant never admitted the title of the plaintiff and, therefore, there is no question of intention to dispossess true owner arises. At paragraph 17, it has again been reiterated by the Supreme Court that 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.” In the present case, the appellant dispossessed claiming title on himself, as such, the requisite animus to possess the property hostile to the title of the true owner is lacking because he is claiming possession on the basis of his own title. Same view has been taken by this court also in **2014(3) PLJR 297(Jai Prakash & Ors. v. Raj Kumar Prasad & Ors.)**.

17. In view of my above discussion, I find that the suit filed by the plaintiff-respondent in year 1997 was not barred by law of limitation. Substantial question of law no.I is answered against the appellant.

Substantial question of law no.II

18. In view of the above discussion of various decisions of



the Supreme Court, I find that the defendant has not acquired title by adverse possession. Thus, substantial question of law no.II is also answered against the appellant.

Substantial question of law nos.III & IV

19. Both these substantial questions of law do not arise for consideration in the present second appeal because it has already held by me that the plaintiff's suit filed for declaration of title and recovery of possession is within time and defendant failed to prove prescription of title by adverse possession.

20. The Hon'ble Supreme Court in the case of **Salem Advocate Bar Association v. Union of India, 2005(6) Supreme Court Cases 344** has held that "many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs are awarded against the unsuccessful party. Unfortunately, it has become a practice to direct parties to bear their own costs. In a large number of cases, such an order is passed despite Section 35(2) CPC. Such a practice also encourages the filing of frivolous suits. It also leads to the taking up of frivolous defences. Further, whenever costs are awarded, ordinarily the same are not realistic and are nominal. When Section 35(2) provides for costs to follow the event, it is implicit that the costs have to be those which are reasonably incurred by a successful party except in those cases where the court in its



discretion may direct otherwise by recording reasons therefor.” In the present case, the present appellant dragged the matter upto the High Court and has been able to remain in possession for the last more than 10 years.

21. In the result, this second appeal is dismissed with cost of Rs.10,000/- to be paid by the appellant to the plaintiffs-respondents within two months failing which the plaintiffs-respondents are at liberty to realize the cost through the process of the court.

(Mungeshwar Sahoo, J)

Saurabh/-

AFR/NAFR	AFR
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