

Item-10. 09-09-2022

SA 3 of 2022
CAN 2 of 2021

^{sg}

Ct. 8

Haramani Saha Sarkar & Ors.
Versus
Sri Sri Ishwar Radha Ballav Jiu Thakur & Ors.

The appeal was listed yesterday for admission. The appellants are not represented nor any accommodation is prayed for on behalf of the appellants.

The appeal is directed against a judgment and decree dated 22nd September, 2016 passed by the learned Additional District Judge, Raiganj, Uttar Dinajpur thereby affirming the judgment and decree dated 31st August, 2010 passed by the learned Civil Judge (Junior Division), Raiganj in a suit for declaration and permanent injunction.

The plaintiffs filed a suit for declaration based on possession. The plaintiffs alleged that the plaintiffs are the owners and possessors of the suit property i.e. “Nichahar Pukur” and till the date of filing of the suit, they were in possession of the same openly, adversely, continuously ousting the defendants and their sebaits and had acquired the good valid title upon the suit property. The plaintiffs alleged that there is an erroneous recording in the LRROR showing the said portion as ‘Dala’. The plaintiff alleged that they used to carry pisci culture in the said suit property and also cultivated in the Bockchara. Prsently the plaintiffs are using the entire property as “tank fishery” and the names have been duly recorded in the LRROR. However, the portion over which there are now carrying on pisci culture was erroneously recorded as ‘Dala’. The said portion is part and parcel

of the bank fishery and ought to have been recorded in the said plot. The plaintiffs alleged that the said classification as Dala and separate recording in separate bata plot was/is not correct. The defendants contested the suit by filing the written statement. The defendants specifically contended that the plaintiffs have no right, title, interest and possession over and in respect of the said property. It was alleged that Pasupati Sarkar and Bhupati Sarkar had no right, title, interest and possession upon the suit property and the recording of their names in the LRROR is totally erroneous. It was further alleged that the plaintiffs in their plaint also admitted the same but they did not implead the concerned BL&LRO as well as the State of West Bengal as parties in this suit. It was contended that the suit property originally belonged to Sri Sri Iswar Radhaballav Jiu Thakur (hereinafter referred to as 'deity'). The defendants categorically denied that sebaits of the were dispossessed and Pasupati and Bhupati were in possession over the suit property for more than 12 years openly, adversely and continuously. In the ROR, the names of Pasupati and Bhupati were recorded as forceful possessors.

On the basis of the pleadings, the trial court framed following six issues:

- 1. Is the suit maintainable in its present form?*
- 2. Have the plaintiffs any cause of action in filing the suit?*
- 3. Is the suit barred by limitation?*
- 4. Have the plaintiffs any right, title and interest and possession over the suit property?*
- 5. Are the plaintiffs entitled to get the decree for permanent injunction as prayed for?*

6. *To what other relief, the plaintiffs are entitled?*

It is elementary that he could allege classification of title by adverse possession. He who asserts classification of title by adverse possession. The burden of proof lies upon him. Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when the possession becomes adverse, so that the starting point of limitation against the party affected can be found. [See AIR 1964 SC 1254(1256)]

It is also the duty of the party claiming adverse possession must clearly state when adverse possession commenced and nature of possession. P.W.-1 in his evidence has categorically stated that:

“About 65 years ago my forefather dispossessed the defendants from the suit tank and the said fact came to my knowledge through Pasupati Sarkar and Bhupati Sarkar.

I can not say the actual date and year when the sevayits of the deity tried to take possession of the tank but failed.”

The entry in the record of rights does not create any title in favour of any person. It is true that it raised a presumption based on possession but it does not automatically follow that the possession was hostile as it does not confer any right, title and interest of the person in possession. The record of right shows the forceful possession. It does not automatically ripen into title. The entry is made on the basis of the possession. The party challenging an entry must adduce evidence to rebut the presumption of its correctness. The plaintiffs could not establish their title to by claiming of erroneous recording in the LRROR in respect of the property in question as the evidence on record would show that the deity has a clear right over the said property.

Exhibits 2 and 3 clearly established that the suit plots belonged to the deity. Exhibit 3 establishes that the record of rights stands in the name of deity. PW-1 in his evidence has candidly admitted that he has no document as foundation of the entry in column 23 of the RS khatian No. 1/2 of Maghiaparah Mouza.

The learned Trial Judge has, in our view, rightly relied upon the decision of the Hon'ble Supreme Court (1981) 2 SCC 101 (AIR 1981 SC 707) and 37 CWN 810 (811), in which it is clearly stated that:

“Mere possession by a person for any length of time would not raise an inference that such possession was in fact ‘Adverse’ against the real owner unless there is a manifest hostile animus to the knowledge of the real owner.

If the foundation is found to be rotten; the presumption arising from the record-of-rights would be more than rebutted.”

This judgment was assailed in the appeal. The Appellate Court on appreciation of the evidence has concurred with the findings arrived at by the learned trial court. The pleadings before the learned Appellate Court as alleged that they are not only the owner by virtue of the Exhibits 1, 2, 2(1), 2(2), 2(3) and 2(4) but also by virtue of their right of adverse possession. However, sometime before the Appellate Court they have conceded that the original owner was the deity and the predecessor in interest forcibly dispossessed the sebaits and taken over forcible possession and same are reflected in Exhibit 2 series as “Jor Dang” which means taking possession by force (*Zabardasti Kabza*). The documents exhibited by the appellants would show that their forefather were land grabber who captured the land of a

deity by force. The records also revealed that Pashupati Sarkar was in police and thereafter in court also and who by using his influence dispossessed the sebaits of the deity. Pashupati after illegally grabbing the property transferred the same knowing fully well that he is not the owner of the property. The pleadings could not establish their title in the property. It is elementary that a person cannot transfer better title, which he or she does not possess (*Nemo dat quod non habet*).

In view of the evidence that the predecessor in interest had no title to the suit property. All subsequent transfers are illegal is no title could have based in law in favour of the subsequent transfers. Moreover, entering the name in the LRROR does not create any title. Admittedly, the predecessors in interest were not having any title and as such, the transfer was sham, fictitious and well motivated. The learned trial court as well as the First Appellate Court has come to a finding that the appellants have failed to prove *animus possitendi*. In the case of Karnataka Board of Wakf vs. Govt. of India reported in (2004) 10 SCC 779 formulated the following principles that are required to be followed in establishing a plea of adverse possession:

- “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 other party*
- d) how long his possession has continued*
- e) his possession was open and undisturbed*
- adverse possession has no equity in his favour”*

In paragraphs 34 and 35 of the aforesaid judgment, the Hon’ble Supreme Court has taken note of the fact that the good as it exists is extremely harsh for the true owner. For the purpose of

brevity and convenience, the said paragraphs are reproduced hereinbelow:

“34. Before parting this case, we deem it appropriate to observe that law of adverse possession which ousts and owner on the basis of inaction within limitation is irrational, illogical and disproportionate. The law as it exists is extremely harsh for the true owner and a windfall for a dishonest person who had illegally taken possession of the property of the true owner. The law ought not to benefit a person who in a clandestine manner takes possession of the property of the owner in contravention of law. This is substance would mean that law gives seal of approval to the illegal action or activities of a rank trespasser or who had wrongly taken possession of the property of the true owner.

35. We fail to comprehend why the law should place premium on dishonesty by legitimizing possession of a rank trespasser and compelling the owner to loss its possession only because of his inaction in taking back the possession within limitation.”

The said view was also expressed in subsequent judgments, namely, 2011 (8) SCJ 995; 2012 (2) ADL(SC) 101; 2012(1)RCR(Civ.)17; 2011(11) Scale 266; 2011(10)SCC 404, in which it has been observed 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 ask the judiciary to place its stamp of approval upon the conduct that ordinary Indian citizen could find reprehensible.”

In *Gurudwara Sahib vs. Gram Panchayat Village Sirthala and Anr.* reported in 2013(7) Supreme 202, it has been held that even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has

matured into ownership.

The Trial Court as well as the First Appellate Court on appreciation of the oral and documentary evidence, in our view has correctly applied the law in the facts and circumstances of the case. The concurrent findings of facts arrived at on the basis of the evidence on record cannot be said to be perverted.

On such consideration, we do not find any reason to admit the appeal. The appeal does not involve any substantial question of law. The second appeal stands dismissed at the admission stage.

(Uday Kumar, J.)

(Soumen Sen, J.)