

IN THE HIGH COURT OF ORISSA AT CUTTACK

SA No.301 of 1988

In the matter of an appeal under section 100 of the Code of Civil Procedure assailing the judgment and decree dated 27.09.1988 and 06.10.1988 respectively passed by the learned Additional District Judge, Jeypore in Title Appeal No.5/88 (19/87 of D.J) setting aside the judgment and decree passed by the learned Additional Munsif, Umerkote in Title Suit No.4 of 1986.

Hari Kolar & Others

....

Appellants

-versus-

Dosa Majhi & Others

....

Respondents

**Appeared in this case by Hybrid Arrangement
(Virtual/Physical Mode):**

For Appellants - Mr.Manoj Mishra, Sr. Advocate
Mr.T.Mishra, S.S. Parida,
S. Das, B.S.Tripathy and
S.K. Mishra (Advocates)

For Respondents - Mr.J.Patnaik, Sr. Advocate
Mr.B.S.Rayaguru, B.B. Ray,
H.C. Boxipatra, H.M. Dhal
(Advocate)

CORAM:

MR. JUSTICE D.DASH

Date of Hearing & Judgment : 09.03.2022

The Appellants, by filing this Appeal under Section 100 of the Code of Civil Procedure (for short, 'the Code') have assailed the judgment and decree dated 27.09.1988 and 06.10.1988 respectively passed by the learned Additional District Judge, Jeypore in Title Appeal No.5/88 (19/87 of D.J).

By the same, the First Appellate Court, having allowed the First Appeal, has set aside the judgment and decree passed by the learned Additional Munsif, Umerkote in Title Suit No.4 of 1986.

The Trial Court having dismissed the suit, the unsuccessful Plaintiff had carried the Appeal under Section 96 of the Code. That having been allowed, now the unsuccessful Defendants are before this Court in the present Appeal in assailing the judgment and decree passed by the First Appellate Court in favour of the Respondents (Plaintiffs) by declaring their right, title and interest over the suit properties and directing the Appellants (Defendants) for delivery of possession of the same.

2. For the sake of convenience, in order to avoid confusion and bring in clarity, the parties hereinafter have been referred to, as they have been arraigned in the Suit.

3. The Plaintiff's case is that the Defendants is the son of Kecha Kolar, who is the son of Nadi Kolar @ Gountia. Nadi Gountia and Surupsing Gountia were two brothers. Both of them are dead. Defendant No.3 is the son of Surupsingh whereas Defendant No.2 is the son of Nadi. The subject matter of the suit is a tank which in course of time, has undergone change to a major extent being filled up where cultivation activity is going on and on a small part, water still stands being accumulated and thus is used as tank.

It is stated by the Plaintiff that said tank had been excavated by their ancestors Dhono Majhi and they were enjoying the same all along. It is thus stated that the said tank is in their peaceful possession since the time of their ancestors. The tank in question, however, was recorded in the name of Surupsing and Nadi in the record of right which the

Plaintiffs could not know as they are illiterate. In spite of such recording, there was, however, never any demand from the side of those recorded tenants to take possession of the suit tank nor they had made any such attempt in that regard. Only sometime in the year 1974, when the subject matter of the suit was in peaceful possession and enjoyment of the Plaintiffs, when they could come to know that the suit land has been recorded in the name of Surupsingh and others, they filed one Mutation Case. The Defendants thereafter in the year 1979 having no right, title, interest and possession over the suit tank forcibly came to catch the fishes and hence dispute arose between the parties. The matter being reported at the local police station, one proceeding under section 145 Code of Criminal Procedure (in short, 'the Cr.P.C.') was started and the subject matter of the suit was kept under attachment under section 146 of the Cr.P.C. The enquiry commenced before the Executive Magistrate, in Misc. Case No.39 of 1979 and finally, order has been passed that the Defendant No.1 Hari Kolar is in possession of the subject matter of the suit as on the date of passing of the preliminary order and accordingly, he was delivered with the possession. This gave rise to the cause of action for the Plaintiffs to file the suit seeking declaration of their right, title and interest and recovery of possession.

4. The Defendants, while traversing the plaint averments in denying the factual aspects as set out in the plaint, have projected their case that they are in possession and enjoyment of the property in question since the time of their forefathers. The possession is said to be all along peaceful and without any interruption. It is thus stated that the property in question, therefore, had been rightly recorded in the name of Defendant No.1 and he has been paying the land revenue to the State. They state that the Plaintiffs have no right, title and interest over the suit

land and are thus not entitled to be restored with the possession of the same.

5. The Trial Court, on the above rival pleadings, has framed five issues. The crucial among those is issue no.3 where the Plaintiffs have perfected their title over the suit property by way of adverse possession. Answering the same, the Trial Court has returned the same against the Plaintiffs. This answer has practically led the Trial Court to dismiss the suit.

The Plaintiffs being non-suited, having carried the Appeal, have been successful in getting the above finding of the Trial Court set at naught and an answer in their favour when the First Appellate Court has held that the Plaintiffs have perfected title over the suit property by virtue of adverse possession and accordingly, it has held that even though the Defendants have been delivered with the possession of the property pursuant to the order passed by the Executive Magistrate in a proceeding under section 145 of the Cr.P.C; the same is liable to be restored in favour of the Plaintiffs.

6. The Appeal has been admitted on the following substantial question of law:-

“(a)Whether without pleading acquisition of title by adverse possession, the Plaintiffs could be granted a decree for declaration of title and other consequential reliefs in respect of the suit land on the basis of adverse possession.

7. Mr.Manoj Mishra, learned Senior Counsel for the Appellants submits that the well reasoned finding on that crucial issue which had been recorded by the Trial Court upon just and proper appreciation of evidence on record, has been over turned by the First Appellate Court without providing any justifiable reason. In this connection, he has

invited the attention of the Court to the relevant paragraphs, i.e., paragraphs 6 to 8 of the judgment of the First Appellate Court. It is submitted that as per the settled position of law, after the revolutionary changes brought in the Limitation Act, 1963 by introduction of Articles 64 and 65, whole scenario in such type of suits have changed. He submits that as per the earlier position of law, a title holder seeking a decree for possession was not only under the obligation to establish his title over the property but also to prove that he was in possession of the property at any point of time within the period of 12 years next before the date of institution of the suit. According to him, this has now been that in the event the Plaintiff establishes his title over the property, when the possessor claims acquisition of title by way of adverse possession, he is to establish that he has been in open, peaceful, continuous and uninterrupted possession of the property for upward of the prescribed by the time of filing of the suit and that to his possession all through must have been in exercise of the right as that of the owner exhibiting hostile animus and more importantly to the knowledge of the true owner. He thus submits that the burden of proof now heavily rests upon the possessor to establish all these facets by leading clear, cogent and acceptable evidence so as to establish his claim of acquisition of title by adverse possession and then only it can be said that the title of the true owner in so far as the property in question has been extinguished. All these aspects, according to him, have not been taken care of by the First Appellate Court and without due application of mind to the evidence as also sidelining the settled law, the finding has been so rendered in favour of the Plaintiffs. He, therefore, contends that the substantial question of law be answered as against the case/claim of the Plaintiffs.

8. Mr.B.S.Rayaguru, learned counsel for the Respondents submits all in favour of the finding recorded by the First Appellate Court. According to him, the order passed in the proceeding under section 145 Cr.P.C. declaring the possession of the Defendants over the suit property has no such legal impact on the decision of the Civil Court even on that particular aspect of possession and, therefore, the First Appellate Court has rightly not held the same to be the conclusive proof of possession of the Defendants. He submits that the evidence on record having been dully scanned, the First Appellate Court has rightly said that the Plaintiffs have acquired title over the suit property by virtue of their open, peaceful and continuous possession and enjoyment for upward of the prescribed period prior to the initiation of the proceeding under Section 145 of the Cr.P.C. He submits that now even the possession of the Defendants for the period of attachment and thereafter have to enure to the benefit of the Plaintiffs. It is submitted that the finding of the First Appellate Court being based on just and proper appreciation of the evidence on record and free from any perversity; this Appeal bears no merit.

9. Keeping in view the submission made, I have carefully gone through the judgments passed by the Courts below. I have also perused the pleadings, i.e, the plaint and written statement and have travelled across the evidence both oral and documentary let in by the parties.

10. In exercise to find out the answer to the substantial question of law, by addressing the rival submission of the learned counsel for the parties, the settled position of law first be stated.

The party to a litigation, who seeks to assert his claim over the immovable property as to have acquired title by way of adverse

possession is under the legal obligation to plead and prove the classical requirements, i.e, *nec vi, nec clam and nec precario*. He has to prove that he was in possession of the immovable property openly and peacefully stretching over the prescribed period. It has also to be proved that such possession was without any interruption from any quarter and he having denied the right, title and interest of the true owner from a particular date has been possessing the land for more than the period prescribed in exercising all the rights as that of the owner to the knowledge of that true owner. Decisions are at galore that all such facets are to be clearly pleaded in the plaint and then to be proved through clear, cogent and acceptable evidence. Where a party sets up the case of acquisition of title over a piece of immovable property by way of adverse possession, it goes without saying that he thereby admits the title of the true owner as on that day he begins to possess and accordingly begin to possess the suit land denying the title of the true owner. The order passed by the Executive Magistrate in the proceeding under section 145 of the Cr.P.C. here is admissible to only show that the Defendants were in possession of the property at the initiation of the proceeding under section 145 of the Cr.P.C. and thereafter, they have been in possession after the decision was rendered therein when they were delivered with the possession of the property under attachment in that very proceeding. So, here the Plaintiffs are under legal obligation to plead and prove that they had been in possession and enjoyment of the suit property for more than the prescribed period prior to the initiation of the suit nad that said possession for all these period was open, peaceful and continuous in denial of the title of the Defendants exercising all such rights over the property in question which the Defendants were having.

11. Coming to the pleadings, first it is seen that the Plaintiffs at paragraph-5 of their plaint have specifically pleaded that Dhono Majhi, their ancestor had excavated the tank and as such the tank was being possessed and enjoyed by them. They have further pleaded that the subject matter of the suit was not recorded in their name but it was so recorded in the name of Surupsingh and Nadi Gountia, who are the ancestors of the Defendants. While pleading that sometime in the year 1974, they had applied for mutation of the suit property and they having stayed there upto the year 1978, their enjoyment of the suit property is said to be peaceful. All these plaint averments being given a close reading, this Court finds that the pleadings are not at all adequate to project a case of acquisition of title of property by adverse possession. When the Plaintiffs themselves have stated to have been in possession of the suit property since the time of their ancestor, who had excavated the tank in question, the question of their claim of title over the same by way of adverse possession does not arise as the basic element that the possessor must possess the immovable property where he has no right and knowing that the property belongs to someone-else remains wanting.

It is the settled position of law that once pleadings on such factual setting are not there, the evidence let in are not to be looked into. Moreover, even if for a moment it is accepted that the Plaintiffs are in possession of the property for more than the period as required that itself would not enure to their benefit to establish a case of acquisition of title by adverse possession when all other required ingredients, as discussed above, have not been established. So, here the possession of the Defendants over the suit property having been declared in a proceeding under section 145 of the Cr.P.C. and the Plaintiffs having failed to

establish their claim of acquisition of title by way of adverse possession prior to the initiation of the proceeding under section 145 of the Cr.P.C., they are to be non-suited.

The aforesaid discussion and reasons thus provide answer to the substantial question of law against the case/claim of the Plaintiffs, which in turn, runs in favour of the Defendants. The judgment and decree passed by the First Appellate Court are thus liable to be set aside and those passed by the Trial Court are to be restored.

12. In the result, this Appeal stands allowed. The judgment and decree passed by the First Appellate Court are hereby set aside and those passed by the Trial Court stand restored. In the facts and circumstances, there shall, however, be no order as to cost.

**(D. Dash),
Judge.**