

HIGH COURT OF ORISSA : CUTTACK
SA NO.180 OF 1987

In the matter of appeal under Section-100 of the Code of Civil Procedure assailing the judgment and decree passed by the learned District Judge, Balasore in M.A. No.42 of 1977, by confirming the judgment and decree passed by the learned Munsif Balasore passed in Title Suit No.120 of 1972.

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Smt. Phuleswari (Since Dead)
Through her LRs & Others

:::: Appellants.

-:: VERSUS ::-

Srikanta Pal (Since Dead)
Through his LRs & Others

:::: Respondents.

**Advocate(s) who appeared in this case by Hybrid Arrangement
(Virtual/ Physical) Mode.**

For Appellants

... M/s. N.K. Sahu, B. Routray,
U.K. Samal, R.K. Dash, K.B. Kar,
P.C. Rout, Advocates.

For Respondents

... M/s. R.K. Mohanthy, Sr. Advocate,
D. Mohanty, S. Mohanty,
A. Mohanty, D. Vardwaj, N. Behuria,
C.R. Pattnaik, Advocates.

CORAM:

MR.JUSTICE D. DASH

Date of Hearing : 21.04.2022 :: Date of Judgment :: 04.05.2022

D. Dash, J. The Appellants, by filing this Appeal, under Section-100 of the Code of Civil Procedure (for short, 'the Code') has assailed the judgment and decree passed by the learned District Judge, Balasore in M.A. No.42 of 1977.

By the same, the Appeal filed by the present Appellants being the unsuccessful Plaintiffs before the Trial Court under Section-96 of the Code has been dismissed and thereby the judgment and decree passed by the learned Munsif, Balasore in Title suit No.120 of 1992 have been confirmed by way of dismissal of the suit filed by these Appellants (Plaintiffs) as against the Respondents (Defendants).

During pendency of this Appeal, Respondent No.1 (Defendant No.1) having died; his legal representatives have come on record. Similarly the Respondent No.11, 14 and 22 having died during the present Appeal, their legal representatives are now on record.

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 Trial Court.

3. One Surendra Nath Das as the original Plaintiff had filed the suit for declaration of title, confirmation of possession and in the alternative for delivery of possession of the suit properties described in Schedule-KA of the plaint with further declaration that the orders passed in the proceeding under Section-145 of the Code of Criminal Procedure (for short called as ‘ the Cr.P.C.’ in Criminal Misc. Case Nos. 27, 28 and 29 of 1970 are erroneous and an injunction restraining the Defendants from

taking possession of the suit property on the basis of the orders passed in those proceedings under the Cr.P.C.

It is their case that the suit land measuring Ac.5.89 decimals in four plots appertaining to Khata No.73 of Tauzi No.3741 in mouza Hasimpur belonged to Ex-Zamindars, Bhagaban Chandra Das and others of Balasore Town. Purchase of those lands with the land under undisputed Plot No.143 was made by Ex-Landlord, Rai Bahadur Biswanath Parida after four to five years of publication of record of current settlement. They had constructed a Kacheri house on the land under Plot No.143 where their employees were staying for collection of rent. The land under the suit plots which adjoin the land under undisputed Plot No.143 were lying fallow and uncared for. Biswanath having his house at a distance of 5 miles from the disputed plot could not exercise full control by way of possession of the land and also the land under undisputed Plot No.143. As a result, the house standing on the land under Plot No.143 collapsed and all those lands were lying unutilized. Plaintiffs case is that as their ancestral house at village Chhot Kanhanpur under the jurisdiction of Baliapal P.S. completely got raised to the ground due to cyclone in the month of October, 1942; Surendra Nath, the original plaintiff approached Biswanath Parida and his son Kailash Parida for being granted with the lease of the same land for his

residential and agricultural purpose. Accordingly, Surendra obtained the land under disputed plot along with the undisputed plot No.143 from Biswanath under an Amalnama executed by him on payment of Salami. Surendra then constructed a house over the land that Plot No.143 and resided there with the members of his family. He when renovated the tank standing over the land under Plot No.141 and did pisciculture, raised vegetable on the ridges and grew paddy on the land under dispute appertaining to Plot No.142 by converting the same to the agricultural land and as the house standing on the Plot No.143 was not sufficient for the accommodation of the members of his family, he too constructed another house on the undisputed north-western 17 decimals of the land under disputed Plot No.142 in the year, 1964. Surendra Nath, the original Plaintiff by putting fence all around resided thereon with the members of his family. He used to pay rent for all these lands and obtained rent receipts from the Ex-Landlord, Biswanath Parida and his son Kailash Parida. When the Surendra Nath, the original Plaintiff thus being in possession of the suit land openly, peacefully and without any interruption from any quarter since the year, 1942. In connection with an enquiry by police concerning the suit property, he could knew that Defendant No.8 who is the son-in-law of Kailash who is the son-in-law of Ex-Landlord, Biswanath had executed sale-deeds on 26.05.1967

which are void and inoperative. It was then known that he executed three invalid, inoperative and void sale-deeds on dated 26.05.1967 in favour of Defendant No.1 in respect of Schedule-Kha land which is a part of Schedule-Ka land for a consideration of Rs.550/-, in favour of Defendant No.2 in respect of Ga Schedule land out of Ka Schedule land for consideration of Rs.550/-; and in favour of Defendant No.3 through Marfatdaar, there Defendant No.7 in respect of Gha Schedule land out of Ka Schedule land for consideration of Rs.400/-. The sale-deeds as alleged by the plaintiffs are without actual payment of consideration. The original Plaintiff then could know that at the time of the vesting of the estate, Kailash Parida submitted Ekpadia in the name of his son-in-law, Defendant No.8 in respect of those lands conveyed under the sale-deed. Be that as it may, the Defendants having never possessed those lands in any manner at any point of time in the proceeding under Section-145 of the Cr.P.C. vide Criminal Misc. Case Nos. 27, 28 and 29 of 1970, their possession was erroneously declared. Those orders being challenged in the Criminal Revision; the Revisional Court refused to interfere with the same. The Defendants when being emboldened by such order threatened to create disturbance in the peaceful possession of the suit land by the original Plaintiffs, the suit has come to be filed. It is stated that Surendra, the original plaintiff by virtue of Amalnama by Ex-

Landlord and by way of adverse possession has been the owner in possession of the suit land.

4. The Defendant Nos. 1 & 2 in their written statement had pleaded inter alia that Kailash Chandra Parida settled land measuring Ac.5.49 decimals including the disputed land with the house, tank and trees standing thereon in favour of his son-in-law of Dibakar Chand, Defendant No.8 on fixation of rent as Rayat. When Defendant No.8 was in possession of the land as its owner, the original Plaintiff having lost his home and hearth at his native village requested Kailash Chandra Parida under whom he was employee for providing him accommodation for his stay with family members in the Kacheri Ghar situated on the land under undisputed plot No.143 which by then had already been in possession of the Defendant No.8 on being acquired. Thus, with the permission of Defendant No.8, Surendra Nath with his family resided in that Kacheri ghar by carrying out necessary repair and it was in or about the year, 1957. At the time of vesting, the Ex-Landlord, Kailash submitted "Rafa (Ekpadia)" in the name of Defendant No.8 in respect of the disputed land along with other undisputed lands which had been settled in his favour as rayat. The Defendant No.8 while being the owner in possession of those lands used to pay rent either personally or some time through original Plaintiff. In course of time, the Defendant No.8

being not able to generate any profitable income from those lands sold the same to Defendant No.1 to 7, who came to possess the same. The original Plaintiff Surendra Nath having failed to purchase those lands then created disturbance in the possession of those lands by the Defendants for which proceeding under Section-145 of the Cr.P.C. were initiated. But ultimately, those have been rightly decided in favour of the Defendants declaring their possession and entitlement to possess the same.

The Defendant Nos. 3 to 7 having supported the case of the Defendant Nos. 1 and 2 asserted themselves to be the owner in possession of the disputed land on the strength of three sale-deeds dated 26.05.1967, when the other Defendants i.e. Defendant No.8 has not filed the written statement.

5. With the above pleadings, the Trial Court in total framed eight issues. Taking up issue nos. 5, 6 & 7, which are the crucial issues concerning right, title and interest of the Plaintiffs over the suit land and the effect of the orders passed in the proceedings under Section-145 of the Cr.P.C. and their value in the eye of law as also the legal weightage of documents of lease etc. produced by the Plaintiff in support of their claim over the properties upon examination of evidence and their evaluation has found that the documents proved from the side of the

Plaintiffs in order to establish their right, title and interest over the suit properties are all forged and fabricated and ingeniously created by the original Plaintiff, Surendra Nath. Coming to answer other questions as to whether the original Plaintiff Surendra shall be deemed to be a tenant under the Ex-Landlord by virtue of so called acceptance of rent from him; on an in-depth study of evidence and detail analysis of the same, the finding has been recorded that Surendra Nath having not been settled as rayat in respect of the suit land and was mentioned in the Rafa was required to be demanded to pay any rent to the State after vesting of the estate. Then the claim of the Plaintiffs to have acquired title over the suit land by adverse possession has also been negated. Holding that the Plaintiffs have utterly failed to establish their right, title, interest and possession over the suit land, the Trial Court has refused to hold that the order passed in the proceedings under Section-145 of the Cr.P.C. would continue to hold the field as amongst the parties.

6. The First Appellate Court being moved by the unsuccessful Plaintiffs on detail analysis of the evidence on record and appreciation of the same at its level has agreed when the findings recorded by the Trial Court in entirety and therefore has dismissed the Appeal.

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

- (i) Whether the First Appellate Court has adopted an erroneous legal approach with regard to possessory title of the Plaintiffs?

At this stage, it may be mentioned that earlier the Appellate Court had disposed of the Appeal on 05.04.1979 by reversing the judgment passed by the Trial Court and decreed the suit of the Plaintiffs. So, the Defendants had carried Second Appeal bearing No.109 of 1979. In the Second Appeal, the Appellate Court's judgment and decree being set aside, this Court while upholding the findings of the Trial Court that none of the parties has proved right, title and interest over the suit property; held the finding of the Appellate Court as to the possession of the Plaintiff as not sustainable. With such conclusion, this Court had remanded the Appeal to the First Appellate Court to dispose of the Appeal in accordance with law after hearing the parties by recording the finding on the question of possession.

8. Mr. N.K. Sahoo, learned Counsel for the Appellant submitted that the finding of the First Appellate Court that the Plaintiff has miserably failed to establish that the original Plaintiff Surendra Nath has remained in possession of the suit property in exercising his right at any point of time is wholly contrary to the evidence on record. He submitted that the finding of the First Appellate Court that Surendra Nath was residing in the Kacheri house which is the undisputed property and thereby they

were enjoying fruits from the trees standing on the suit property is not the outcome of just and proper appreciation of evidence and it suffers from perversity. He further submitted that the overwhelming evidence of possession of the suit land by the Plaintiff ought not to have been so lightly ignored. It was also submitted that even on the basis of the evidence that Surendra Nath was in possession of the suit property taking it for a moment that it was not as of right; the possession of the Defendants as fugitive trespassers having no right ought to have been prevented by declaring the possessory title over of the Plaintiff over the suit land.

10. Mr. R.K. Mohanty, learned Senior Counsel for the Respondents placing the judgments of the First Appellate Court has submitted that on detail analysis of evidence, the conclusion as to possession of the suit property having been rightly arrived at, this Court in the absence of any perversity therein should not interfere with the same and in this connection, he has placed the settled position of law that a person in settled possession of the land stretching over a long period is only be said to be having the possessory title as against all others even at times as against the true owner and here the First Appellate court having found that is original Plaintiff, Surendra Nath was in possession of the house standing over the land under undisputed Plot No.143 was merely looking

after the land and plucking mangoes from the trees standing on the land which are lying by the side of the land under undisputed plot can never be said to be in settled possession so as to be said to have acquired possessory title over the suit land as against the Defendants.

11. Keeping in view the submissions made, I have carefully read the judgment passed by the Courts below. I have also gone through the plaint, written statement as well as the evidence on record both oral and documentary.

In the given case, the Plaintiff has been found as having failed in proving his title and that answer has been sealed from being opened any more by the judgment in the earlier Second Appeal No.109 of 1979.

The concept of settled possession and the right of the possessor to protect his possession against the owner has come to be settled by a catena of decisions and the cases of *Munshi Ram and Ors. Vs. Delhi Administration*; (1968) 2 SCR 455, *Puran Singh and Ors. Vs. The State of Punja*; (1975) 4 SCC 518 and *Ram Rattan and Ors. Vs. State of Uttar Pradesh*; (1977) 1 SCC 188 are among those.

In *Munshi Ram & Ors.'s* case (supra), it was held that no one, including the true owner, has a right to dispossess the trespasser by force if the trespasser is in settled possession of the land and in such a case

unless he is evicted in the due course of law, he is entitled to defend his possession even against the rightful owner. But merely stray or even intermittent acts of trespass do not give such a right against the true owner. The possession which a trespasser is entitled to defend against the rightful owner must be settled possession, extending over a sufficiently long period of time and acquiesced to by the true owner. A casual act of possession would not have the effect of interrupting the possession of the rightful owner. The rightful owner may re-enter and re-instate himself provided he does not use more force than is necessary. Such entry will be viewed only as resistance to an intrusion upon his possession which has never been lost. A stray act of trespass, or possession which has not matured into settled possession, can be obstructed or removed by the true owner even by using necessary force.

In *Puran Singh and Ors.'s* case (supra), the Hon'ble Apex Court clarified that it is difficult to lay down any hard and fast rule as to when the possession of a trespasser can mature into settled possession. The 'settled possession' must be (i) effective, (ii) undisturbed, and (iii) to the knowledge of the owner or without any attempt at concealment by the trespasser. The phrase 'settled possession' does not carry any special charm or magic in it; nor is it a ritualistic formula which can be confined in a strait-jacket. An occupation of the property by a person as an agent or

a servant acting at the instance of the owner will not amount to actual physical possession. The Hon'ble Court laid down the following tests which may be adopted as a working rule for determining the attributes of 'settled possession':-

- i) that the trespasser must be in actual physical possession of the property over a sufficiently long period;
- ii) that the possession must be to the knowledge (either express or implied) of the owner or without any attempt at concealment by the trespasser and which contains an element of animus possidendi. The nature of possession of the trespasser would, however, be a matter to be decided on the facts and circumstances of each case;
- iii) the process of dispossession of the true owner by the trespasser must be complete and final and must be acquiesced to by the true owner; and
- iv) that one of the usual tests to determine the quality of settled possession, in the case of culturable land, would be whether or not the trespasser, after having taken possession, had grown any crop. If the crop had been grown by the trespasser, then even the true owner has no right to destroy the crop grown by the trespasser and take forcible possession.

In the cases of *Munshi Ram and Ors.*(supra) and *Puran Singh and Ors.* (supra), the Court has approved the statement of law made in *Horam Vs. Rex*; AIR 1949 Allahabad 564, wherein a distinction was drawn between the trespasser in the process of acquiring possession and the trespasser who had already accomplished or completed his possession wherein the true owner may be treated to have acquiesced in; while the former can be obstructed and turned out by the true owner even by using reasonable force, the latter, may be dispossessed by the true owner only by having recourse to the due process of law for re-acquiring possession over his property.

The First Appellate Court on the question of possession of the suit land by Surendra Nath has initiated the discussion at para-7 of its judgment and concluded it at para-18, wherein the First Appellate Court has made an in-depth study of the evidence of each of the witnesses examined from the side of the Plaintiff. Examining the evidence of P.W.1, first of all having given clear and cogent reason and then further analyzing the documentary evidence which are proved, it has been said that his evidence is far from convincing. Then coming to the evidence of P.Ws. 3, 4 & 5, the First Appellate Court has not been able to persuade itself to accept the claim of possession of the suit land by the Plaintiffs and for this the First Appellate Court has also found out the support from

the evidence of the witnesses examined from the side of the Defendants. Next proceeding to analyze the documentary evidence, the final conclusion has been that the oral and documentary evidence read as a whole go to show that the Plaintiffs have miserably failed to establish their possession over the suit property at any time in exercise of any right whatsoever which they claim. Taking the evidence into account it has found that the original Plaintiff was staying on the Kacheri house standing on the undisputed plot and was enjoying the fruits from the trees on the suit property situated by its side.

The First Appellate Court has rightly in my view declined to say that all said acts would not amount to possession of the suit property by the Plaintiffs qualifying all those are needed to be in settled possession and not only insufficient but also are far from satisfactory so as to successfully pass out for conferment of the right to protect their possession as possessors. This Court having bestowed thoughtful and anxious consideration upon the same and on thorough scrutiny of the entire evidence is not in a position to ascertain any sort of perversity in the appreciation of the evidence. Having said as above, when in the proceedings under Section-145 of the Cr.P.C., the possession of party/parties has been found out by the learned Executive Magistrate that they were in possession of the suit property as on the date of passing of

the preliminary order or within two months next before the same, with such unsatisfactory evidence being let in by the Plaintiff as to their claim of possession over the suit land; the orders passed in those proceeding are to hold the field as amongst the parties.

For the above discussion and reasons, the answer to the substantial question of law is returned by saying that the First Appellate Court has not adopted any erroneous legal approach as to negate the case of possessory title of the Plaintiffs over the suit land.

12. In the result, the Appeal stands dismissed. There shall however be no order as to cost.

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

Narayan