

IN THE HIGH COURT OF ORISSA AT CUTTACK

S.A. NO.223 OF 2001

In the matter of an appeal under section 100 of the Code of Civil Procedure has assailed the judgment and decree passed by the learned Civil Judge, (Senior Division), Koraput in Title Appeal No.07 of 2000 by setting aside the judgment and decree passed by the learned Civil Judge (Junior Division) Koraput, in Title Suit No.11 of 1994.

Prabhudan Khosala (Since dead) Appellants.
by his LRs and Others

-versus-

Smt. Herbina Kartiko (Since dead) Respondents.
by her LRs and Others

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

<i>For Appellants</i>	-	M/s. P.C. Chhinchhani, Advocate
<i>For Respondents</i>	-	M/s. G. Mukherji, Sr. Advocate, S. Patnaik, A.C. Pani, A. Pradhan, S.R. Patra, Advocates.

CORAM:
MR. JUSTICE D.DASH

DATE OF HEARING:: 20.07.2022, DATE OF JUDGMENT::20.10.2022

The Appellants in this Appeal under Section 100 of the Code of Civil Procedure 1908 (for short, 'the Code') have assailed the judgment and decree passed by the learned Civil Judge, (Senior Division), Koraput in Title Appeal No.07 of 2000.

By the same, the Appeal filed by the Respondents being the unsuccessful Plaintiffs in Title Suit No.11 of 1994 in the Court of the

learned Civil Judge (Jr. Division), Koraput under Section-96 of the Code has been allowed. The Trial court having dismissed the suit filed by the Respondents as the Plaintiffs arraigning the Appellants as the Defendants; in the First Appeal, the suit has been decreed in declaring their title over the land under Plot no.820 appertaining to Khata No.246 measuring Ac.0.048 decimals and Plot No.820/1042 under Khata No.64 measuring Ac.0.005 decimals followed by confirmation of their possession over the same.

It is stated here that the Appellant No.1 (Defendant No.1) having died during this Appeal; his legal representatives have come on record and are pursuing this Appeal with other Appellants (Defendant Nos. 2 and 3)

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 Plaintiffs case is that the suit property is their ancestral property and since the year 1926 or even prior to that their ancestors were in continuous possession of the same and thereafter them, the Plaintiffs are possessing the suit properties. It is further stated that they have their residential house over there and their possession have been recognized in various records of the State. In the year 1965, when the settlement operation took place in the area, Kartika Samal, who is the

husband of the Plaintiff No.1 and father of Plaintiff Nos. 2 & 3 who was in-charge of the suit property, could not file necessary objection. So for that reason, the suit property only to the extent of an area of Ac.0.005 decimals was recorded in his favour by a sub-plot No.820/1042. The recording being not correctly made, Kartik had ventilated his grievance before the Settlement Officer in the Rent Settlement Camp, which took place in the year 1979 and continued till the year 1983-84. But the Settlement Authority finally did not listen to that grievance.

It is further stated that a major portion of the suit property was thus recorded in the name of the Defendants although the Plaintiffs were /are in peaceful possession of the same having the title over it. It is thus stated that mere entry of the name of mother of the Defendants in the settlement papers in respect of the balance suit land did neither create title in their favour nor extinguish the title of the plaintiff. It is the stand of the Plaintiffs that the mother of the Defendants had never possessed the said land which was recorded erroneously in her favour and she was moving from place to place as was in service. The Defendants also being in service were residing in different places and as such they were never in possession of the suit property. It is also stated that the Defendant No.2 in connivance with the Settlement Authority got a portion of the suit property recorded in the name of his mother and accordingly had obtained the record of right. The Plaintiffs claim that

till the year 1989, the Defendants had no idea about their right over the suit property and therefore for the first time in the year 1989, they filed an application for demarcation and identification of the suit property. During that official demarcation, it was found that Kartika Samal, the husband of the Plaintiff No.1 was in possession of the suit property right from the year 1926. Thereafter, the Defendant no.1 filed another application for identification of the property and behind the back of Kartika, the said second demarcation was made. When the Tahasil staff found that over the disputed property, the Plaintiffs had their residential house, the Defendants falsely initiated a proceeding under Section-144 of the Cr.P.C. and that was converted to one under Section-145 of the Cr.P.C. which is Misc. Case No.92 of 1989. The Plaintiffs too had filed another application which was numbered as Misc. Case No.80 of 1989. The Sub-Divisional Magistrate in those proceedings under Section-145 Cr.P.C. clubbed together passed an order against the Plaintiffs only in respect of the land under Plot No.820. The matter was then carried in revision vide Criminal Revision Petition No.01 of 1994, which too on 27.08.1994 ended against the Plaintiffs. The matter being taken in the writ application before the High Court, order was passed in expunging the direction relating to the delivery of possession of the suit property in that proceeding. So, the Plaintiffs filed the suit in the year 1994.

4. The Defendants contested the suit by denying plaintiffs right, title, interest and possession over the suit property. They have denied the case of the Plaintiffs that the suit property is their ancestral property. It is also stated that the settlement entry in respect of the suit land are not erroneous. According to them, at no given point of time, the Plaintiff No.5 was staying on the suit property. It is stated that the land under Plot No.820 and 820/1042 are two different plots. They state that in relation to the property under Plot No.820 appertaining to Khata No.164 measuring Ac.0.048 decimals so many proceedings had been fought out between the parties and in no forum, the Plaintiffs have averred that the above two plots of lands are adjacent to each other and covered by green fence on all side. The Defendants have also stated that the prior to the proceeding under Section-144 of the Cr.P.C. which was converted to under Section-145 of the Cr.P.C. vide Misc. Case no.92 of 1989 holding the Defendant No.1 to be in possession of the land under Plot No.820 measuring Ac.0.048 decimals they were in possession of the said land. That order passed by the Executive Magistrate is asserted to be correct. According to them, as the Plaintiffs are not in possession of the major portion of the suit property, they should have prayed for recovery of possession.

5. On the above rival pleadings, the Trial Court has framed in total six (6) issues.

First coming to issue nos. 1 & 2 as to whether the property in question is the ancestral properties of the Plaintiffs or the Defendants and also the competing claim of the Plaintiffs and Defendants in so far as rival claim as to the possession of the suit properties; upon examination of evidence and their evaluation, the answer has been returned that the Plaintiffs have failed to prove on preponderance of probability that the suit properties their ancestral properties and that they are in possession of the same from the time of their ancestors by leading satisfactory evidence by preponderance probability. It has also been held that the evidence as regards the possession of the suit property by the Plaintiffs are not acceptable. So the Trial Court dismissed the suit.

The First Appellate Court being moved by the unsuccessful Plaintiffs has allowed the Appeal and decreed the suit of the Plaintiffs granting them the reliefs as prayed for as already indicated in the foregoing paragraph.

6. The present Appeal had been admitted to answer the following substantial questions of law:-

“Whether a suit for declaration of title and recovery of possession can be filed under Article- 64 of the Limitation Act basing on previous possession within 12 years from the date of dispossession and under Article- 65 of the Limitation Act, basing on title within 12 years when the possession of the defendants becomes adverse to the Plaintiffs?”

7. Learned Counsel for the Appellants submitted that the suit filed by the Plaintiffs being merely based on previous possession and as they have not proved their title through any document, the suit having not been filed even the period of 12 years from the date of their dispossession, the same should have been dismissed as barred by limitation. In support of the said submission, he invited the attention of the Court to the evidence on record. He submitted that the Trial Court had rightly dismissed the suit; and the First Appellate Court had erred in decreeing the same.

8. Learned Senior Counsel for the Respondents on the other hand supported the findings returned by the First Appellate Court. According to him, the First Appellate Court on proper appreciation of evidence on record is right in granting the reliefs to the Plaintiffs.

9. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below. I have also gone through the plaint and written statements and have perused the evidence both oral and documentary let in by the parties.

10. Having gone through the plaint averments at the risk of repetition, it may be stated here that although the Plaintiffs have claimed the property in suit to be their ancestral property, they are not relying upon any document of title nor are showing the old record of right having the presumptive value on that. They state that during those olden days in the

area concerned, no such Record of Right had been created. Be that as it may, in the present suit, they claim that property in question was in possession of their ancestors from the year 1926 or even before that and that continued and rolled on as such, when it ultimately has come to the hands of the Plaintiffs. The cause of action in the present suit is the order passed by the Executive Magistrate in a proceeding under Section-145 of the Cr.P.C; wherein the Executive Magistrate has declared the possession of the Defendants over a part of the suit land under Plot No.820 appertaining to Khata No.246 measuring Ac.0.048 decimals. It is stated that the land under Plot No.820 and Plot No.820/1042 were initially one plot. The draft record of right accordingly had been published in favour of the Plaintiffs, that had later on been changed when the final records of rights were published in the Hal settlement. In that when the land under Plot No.820 has been recorded in the name of the Defendants; the land under Plot No.820/1042 has been recorded in the name of the Plaintiffs. The Plaintiffs soon after the publication of the said Record of Right have raised the objection to such recordings and litigations since then have cropped up.

11. The Defendants in their written statement are stating nothing about their title. In traversing the plaint averments, they state the following facts:-

“It is submitted by the Defendant that as the Plaintiffs without any manner of right, title or interest over the Plot No.820 of Khata No.164 created disturbance on the peaceful possession of the Defendant, the Defendant No.1 filed a case before the Sub-Divisional Magistrate, Koraput against Plaintiffs along with Samual Kartik. The Plaintiff No.4 also filed another petition under Section-144 Cr.P.C. before the Hon’ble S.D.M., Koraput. As the cause of action of both the case were same and as the Defendant No.1 claimed for only Ac.0.048 decimals, both the case were clubbed and the said case was heard vide M.C. No.92/89 only for Ac.0.048 decimal of Khata No.164 of Plot No.820 and which Defendant now also claimed for the same land in this suit. After due enquiry by the Hon’ble Executive Magistrate, Koraput, the Hon’ble Magistrate held that the Defendant No.1 is in possession over the said land. Against the order of the Executive Magistrate, the Plaintiff No.4 preferred revision before the Hon’ble Sessions Judge, Jeypore in Cr.R.P 1/94 and the Hon’ble Sessions Judge after having gone through the details of the case dismissed the revision and was held that the Defendants are in possession over the land.”

From the above, it stands crystal clear that these Defendants are not advancing the claim of having title over the suit land and they simply state to have been in possession of the same which they assert to have rightly declared by the Executive Magistrate in a proceeding under Section-145 o the Cr.P.C. So, it would not at all be incorrect to say that here in the suit both sides claim the suit land to be in their respective long possession.

12. At this stage, it is of great significance to mention that although in a proceeding under Section-145 of the Cr.P.C., the Executive Magistrate is called simply to rule upon as to which of the parties before it was in possession of the immovable property which is the subject matter of the proceeding as on the date of the preliminary order and in case of alleged dispossession as to which of the parties was in possession within two months next before the passing of the preliminary order with the dispossession having taken during then but not before; in our given case, however, the Executive Magistrate having declared the possession of the Defendants over the property in question, despite there being no claim of dispossession from the side of the Defendants by the adversary i.e. the Plaintiffs, had directed for delivery of possession which in other words for restoration of possession of the land involved in that proceeding in favour of the Defendants. Finally this Court being moved; the said part of the order of restoration of possession by delivery has been held to be bad and rightly quashed.

13. In the backdrop of the above, the suit at hand is clearly one under Article-64 of the Limitation Act. In such a suit, the Plaintiffs have to prove their possession and dispossession within a period of 12 years from the date of filing of the suit. The Plaintiffs in the present case have not pleaded dispossession. But, when by the order of the Executive Magistrate in the proceeding under section-145 of the Cr.P.C., the

Defendants have been declared to in possession that order, in the eye of law, the same tantamounts to dispossession at the hands of the Defendants who have been successful therein the proceeding under Section-145 Cr.P.C. for the purpose of this suit banking upon Article-64 of the Limitation Act. Thus, in this suit, the Plaintiffs are required to simply prove their possession and that need not be even being the owner, but as exercising the right as such being in possession which holds good against the whole world except the true owner because Article-64 of the Limitation Act governs the suit filed by a person holding possession. The base test is to determine whether Article-64 of the Limitation Act gets attracted is to see whether the Plaintiffs have alleged in the plaint their possession and dispossession within a period of 12 years from the date of institution of the suit. As already stated, the dispossession under Article-64 of the Limitation Act here in the case is the date of order of the Executive Magistrate and therefore, here when the Defendants are not advancing any claim of title and they simply say about their prior possession, the only thing required to be examined is whether the finding of the First Appellate Court that the Plaintiffs since the time of their ancestors were in possession of the property in suit till the order of Executive Magistrate in that proceeding under Section-145 Cr.P.C. can be sustained or not. The result of to this test would answer

the substantial question of law and produce the result of the Second Appeal.

14. Before undertaking the exercise as aforesaid, the settled position of law holding the field needs to be visited first.

Article-64 of the Limitation Act 1963 which was previously Art.142 of the Limitation Act 1908 is restricted to the suits for possession or dispossession or discontinuance of possession. In order to bring a suit within the purview of that Article, it must be shown that the suit is in form as well as in substance based on the allegation of the plaintiff having been in possession and having subsequently lost the possession either by dispossession or by discontinuance. Article 65 of the Limitation Act 1963 which was previously Art.144 of the Limitation Act, 1908 on the other hand, is a residuary article applying the suits for possession not otherwise provided for. The suit based on the plaintiff's title in which there is no allegation prior to possession and subsequent dispossession alone can fall within Art.65. The question whether the Article of the limitation applicable to the particular suit is Art.64 or Art.65 has to be decided by referring to the pleadings. Thus, it is clear that in determining whether the suit is based on possession or title and as to whether Art.64 or Art.65 of the Limitation Act 1963 would be attracted, the court should take into account the averments all made in the plaint as a whole. However, it is not the form of the allegation but

the substance of the averments that would decide the applicability of Art.64 or Art.65. It is, therefore, very much clear that Art.64 does not apply to any suit which in form or in substance is a suit for possession based on title. It is restricted to suits based only on possession.

Thus on the anvil of the above settled position, in the given case, if the possession of the Plaintiffs is found out then the doctrine that title follows possession can be banked upon and that has to be seen only upon evaluation of the evidence.

15. The evidence thus obtained being traversed through, it is seen that the Defendant No.1 examined as D.W.1 has stated that Plot No.820/1042 and Plot No.820 are contiguous plots bifurcated from Plot No.820. He admits that the Plaintiffs are in possession of the Plot No.820/1042. This being his evidence, the Defendants case that Plot No.820 does not abutt Plot No.820/1042 has to be taken to be falsehood. The Trial Court has found that the Plaintiffs were in possession of the property prior to 1955 by relying upon the evidence of P.W.1, the wife of Kartik Samal. The evidence on record would show that the P.W.1 shifted to Government quarter and therefore their dwelling house standing from the time of their ancestors was damaged without being under occupation of any one and now one room being renovated, its existence is over the bifurcated plot i.e. Plot No.820/1042. In this context, the evidence of D.W.1 that there is no green fence in between

Plot No.820 and 820/1042 and to the east, the Plot No.820 which is an open space is certainly relevant and that has been rightly taken note of by the First Appellate Court by drawing necessary inferences.

In that proceeding under Section-145 of the Cr.P.C. on an application by the Defendants, demarcation had been carried out in the field. This shows that the Defendants were uncertain with regard to the land which by then stood recorded in their name and the record area stands where as also its boundary which is very important. The Revenue Inspector had demarcated the land in presence of the Defendants. It is admitted by D.W.1 that he was having no paper relating to the Plot No.820 or having the connection with any matter relating to the suit land prior to the publication of the final record of right, Ext.H. When the fact remains that, he has not so stated, the deposition of that witness in the prior proceeding which has been admitted in evidence and marked Ext.-17 reads that after retirement he was living in the house of one Mangala Baug and immediate prior to that he was residing at Mathili for 10 to 12 years and before that he was at Patangi and after retirement, he is residing with his brother Sigfried Khosla in a separate house. There being no structure on the disputed land as deposed to by the D.W.1, his admission as above, rather demolishes the evidence in so far the claim of the Defendants as to possession of the suit land is concerned. The Amin who had demarcated the land in his report which has been

admitted in evidence and marked Ext.9 and the Revenue Inspector in his report under Ext.11 have so indicated. It may be stated that they had gone to the field pursuant to the said order passed by the Executive Magistrate in view of the acceptance of the move from the side of the Defendants in seeking identification of the land in question. It being the evidence on record about the existence of mud walled house having tin roof over that site; the Defendant No.1 in his evidence in that proceeding has stated that no structure was there on the disputed land. From all these, the First Appellate Court having said that the Defendant No.1 was not aware even about the location of the plot as per Ext.A and H till 09.06.1989; and when it has found upon discussion pointing the material evidence as have been overlooked by the Trial Court; the First Appellate Court did commit no mistake in so saying. Then it appears from the judgment of the First Appellate Court, that there has been extensive discussion of evidence in respect of the possession of the property in question. Upon thread bare examination of evidence and their critical evaluation, the finding has been arrived at that the Plaintiffs being in possession of the suit property, unreasonably and without any justification their possession in that proceeding under Section-145 of the Cr.P.C. has not been found. The First Appellate Court is also found to have pointed out as to how and where the Trial Court has got confused and went wrong in not properly appreciating the evidence for arriving

conclusion at its level which thus cannot sustain. This Court is of the view that the evidence on record are sufficient to establish the long standing prior possession of the Plaintiffs over the suit land. The Defendants having failed to prove their case of prior continuous possession till the order was passed by the Executive Magistrate, it has to be held that the First Appellate Court is right in decreeing the suit in granting the reliefs to the Plaintiffs. The decision cited by the learned Counsel for the Appellants in case of ***Smt. Shanta Bai Vrs. District Collector, Hyderabad and Another***, 1995 AIHC 1752 is of no aid to the case/claim of the Defendants in seeking the indulgence of this Court in seisin of the Second Appeal to set aside the judgment and decree passed by the First Appellate Court and restore those passed by the Trial Court for the reason that in that cited case, the Plaintiffs had filed the suit for declaration of her title being in possession of the same for more than 80 years and as such claiming to have acquired title over the property by way of adverse possession the suit had been instituted which in view of the failure of the Plaintiff therein to establish had rightly been dismissed which is not so in the case at hand upon to decide the competing claim of possession.

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

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