

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No. 31682 of 2011

Laxminarayan Sahu

..... Petitioners

Mr. Ashok Mohanty, Senior Advocate
being assisted by Mr. Trilochan Nanda, Advocate

-versus-

Gokula Sahu and others

.... Opp. Parties

Mr. Soumya Mishra, Advocate

CORAM:

JUSTICE K.R. MOHAPATRA

ORDER

05.09.2022

Order No.

6. 1. This matter is taken up through Hybrid mode.
2. Although I.A. No. 18680 of 2021 is listed for extension of interim order and for fixing an early date of hearing, on consent of learned counsel for the parties, same is taken up for final disposal.
3. Petitioner in this writ petition seeks to assail the order dated 14th October, 2011 (Annexure-4) passed in FAO No.1 of 2007, whereby learned Additional District Judge, Sonapur dismissing the appeal confirmed the order dated 17th January, 2007 (Annexure-3) passed by learned Civil Judge (Senior Division), Sonapur in MJC No.2 of 1999 (arising out of Execution Case No.15 of 1993) dismissing an application under Order XXI Rule 97 CPC.
4. Mr. Mohanty, learned Senior Advocate appearing for the Petitioner submits that TS No.38 of 1961 was filed by one

Kanhu Sahu, the father of Opposite Party Nos.1 and 3 and husband of Opposite Party No.2 against late Pitabasa Sahu (father of present Petitioner) for specific performance of contract. The suit was in respect of 4th Settlement Plot No.2451, Holding No.1627/282, measuring an area Ac.1.440 decimal under mouza Sonapur. The suit was decreed in favour of said Kahnu Sahu. The said judgment and decree passed in TS No.38 of 1961 was put to execution and possession was delivered to the father of Opposite Party Nos.1 and 3 on 21st March, 1964.

4.1 Subsequently, in partition suit, i.e., TS No.20/182 of 1971-73, the land in question was partitioned between the legal heirs of Kanhu Sahu. Final decree was passed on 26th July, 1984 in the said suit. As the final decree was not respected by the parties, Execution Case No.15 of 1993 is filed by the Opposite Parties to execute the final decree and to deliver possession of specific plots allotted to each of the parties to the said suit. When the execution case was posted for delivery of possession, the Petitioner claiming that he is in possession over the suit property filed an application under Order XXI Rule 97 read with Section 47 CPC in MJC No.2 of 1999. The said application being dismissed, the Petitioner filed FAO No.1 of 2007, which was also dismissed vide judgment and order dated 14th October, 2007 (Annexure-4).

5. Learned counsel for the parties do not dispute the aforesaid factual position.

6. Mr. Mohanty, learned Senior Advocate appearing for the Petitioner submits that although in the execution case initiated

pursuant to judgment and order passed in TS No.38 of 1961, possession was held to be delivered to said Kanhu Sahu, but no such delivery of possession had taken place. Pitabas Sahu and after him, the present Petitioner along with his legal heirs continued to be in possession over the land in question. The land in question fell to the share of the Petitioner in the suit for partition in TS No.18 of 1976 and since then the Petitioner is in exclusive possession over the suit land exercising right, title and interest thereon. The Petitioner was neither impleaded as a party in TS No.20/182 of 1971-73 nor in the final decree proceeding arising there from. Thus, the said judgment and decree is not binding on him. It is his submission that considering the averments made in the petition under Order XXI Rule 97 CPC and objection filed therein, learned executing Court framed as many as five issues out of which Issue Nos.3 and 4 are with regard to possession and title of the present Petitioner. But, while adjudicating MJC No. 2 of 1999, the executing Court did not take into consideration the material evidence led by the present Petitioner establishing his possession over the suit land. Although learned executing Court took note of the order dated 18th August, 1979 passed by Tahasildar, Sonapur in Mutation Case No.1940/77, rent receipts under Ext.3/a to 3/m and not final ROR marked as Exts. 4 and 5, but on a misconception that the Petitioner is claiming title by virtue of the mutation record, held that the title of the Petitioner being not established, he is not in possession over the suit land. He further submits that although, it is recorded that possession was made over to Kanhu Sahu pursuant to judgment and decree passed in TS No.38 of 1961, but in fact, father of the Petitioner, namely, Pitabas Sahu and

after him the Petitioner continued to be in possession over the land in question. As such, the Petitioner acquired title by prescription over the suit land. These material aspects were not taken into consideration either by learned executing Court or by the appellate Court while adjudicating the matter. Hence, the impugned order under Annexure-4 is not sustainable.

7. Mr. Mishra, learned counsel for the contesting Opposite Parties submits that although mutation case records give rise to a presumption with regard to possession of the Petitioner over the suit land, but, in view of the decree passed in TS No.38 of 1961 and order of delivery of possession thereto, presumption of possession of father of the Petitioner becomes ineffective. The Petitioner in the petition under Order XXI Rule 97 CPC claimed acquisition of title over the land in question by adverse possession, but there is no averment as to when the Petitioner entered into the said property and whether he was in continuous possession over the suit land or not. The onus is on the Petitioner to strictly prove these two ingredients in order to establish the right, title and interest by adverse possession. Execution Case No.15 of 1993 has been filed as the co-sharers did not respect the final decree passed in TS No.20/182 of 1971-73 for partition. There is no report of the Amin to show that the decree with regard to possession of the land in question could not be delivered to Opposite Parties as it is in possession of the present Petitioner. The plea taken by the Petitioner is a presumptive one, which has already been dislodged by the order of delivery of possession of the land in question to Kahnu Sahu in execution case pursuant to TS No.38 of 1961. Learned executing Court as

well as the Appellate Court has meticulously dealt with the evidence available on record and passed reasoned orders. Hence, the same warrant no interference.

8. Upon hearing learned counsel for the parties, this Court finds that in the execution proceeding initiated pursuant to the decree passed in TS No.38 of 1961, possession was delivered in favour of father of the Opposite Party 1 and 3, namely, Kanhu Sahu on 21st March, 1964. Father of the present Petitioner was a party to the said suit as well as execution proceeding. Thus, the decree as well as the order passed in the said execution proceeding is binding on the legal heirs of said Pitabas Sahu including the present Petitioner. Relying upon the Mutation Case records and orders passed in criminal proceeding under Section 144 Cr.P.C. Ext. 'A' to Ext. 'E', the Petitioner claims to be in possession over the suit property. In view of the specific order of delivery of possession of the land in favour of father of the Opposite Parties, the said presumption gets dislodged. Further, the Petitioner in the petition under Order XXI Rule 97 CPC does not whisper a single word as to when he entered into possession over the suit land and whether he was in continuous possession over the suit land till the aforesaid petition was filed by him. On perusal of the impugned order under Annexure-4, it appears that learned executing Court as well the appellate Court has vividly discussed the materials on record taking into consideration the oral and documentary evidence marked as Exhibits on behalf of the Petitioner. In view of the above, I am not inclined to interfere with the impugned order under Annexure-4.

9. Accordingly, the CMP stands dismissed being devoid of any merit.

10. Interim order dated 14th December, 2011 passed in Misc. Case No.19009 of 2011 stands vacated.

Issue urgent certified copy of this order on proper application.

(K.R. Mohapatra)
Judge



s.s.satapathy