

IN THE HIGH COURT OF ORISSA AT CUTTACK

RSA No.49 of 2007

In the matter of an appeal under section 100 of the Code of Civil Procedure assailing the judgment and decree dated 04.11.2006 and 17.11.2006 respectively passed by the learned Additional District Judge, Rairangpur in R.F.A. No.06 of 2006 confirming the judgment and decree dated 14.02.2006 and 03.04.2006 respectively passed by the learned Civil Judge, Senior Division, Rairangpur in T.S. No.52 of 1995.

Arjun Mohanta (Since Dead) *Appellants*
through his L.Rs

-versus-

Bhubaneswar Mohanta *Respondents*

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

For Appellants - M/s.N.C. Pati, Miss.B. Pati
S.Mishra, A. Das, N. Singh,
B.Das & B.K. Swain.

For Respondents - M/s.P.K. Routray, B.G.Mishra,
N.K. Deo, R.K. Rout
A. Routray, A. Routray,
J. Bhimsen
(For R.1 & 2)

CORAM:
MR. JUSTICE D.DASH

Date of Hearing : 04.03.2022 : Date of Judgment:14.03.2022

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 passed by the learned Additional District Judge, Rairangpur in R.F.A. No.6 of 2006.

By the said judgment and decree, the Appeal filed by these Appellants (Defendants) under section 96 of the Code has been dismissed and the judgment and decree passed by the learned Civil Judge, Senior Division, Rairanghpur in T.S. No.52 of 1995 have been confirmed.

The suit filed by the Respondents as the Plaintiff has been decreed by declaring their title over the suit land with further order of recovery of possession of the same in their favour followed by issuance of permanent injunction.

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 state that the land described in Schedule-B of the plaint which has been the subject matter of the suit is the self-acquired property of late Jethu Mahanta, the father of Plaintiff No.1. It is stated that one Raghu was the common ancestor of the parties and he had three sons, namely, Mansarm, Charan and Laxmiram who were living in joint family. Asadhu, Jethu and Kartik are the three sons of Laxmiram whereas Plaintiff Nos.1 and 2 are the son and daughter of Jethu and Defendant Nos.1, 2, 2(a), 3 and 9 are the descendents of Asadhu. Other Defendants, i.e., Defendant Nos.4 to 8 are the descendents of Kartik.

After the death of Laxmiram, the grandfather of the Plaintiffs and Defendants, Asadhu the father of Defendant No.1 filed a suit for partition, i.e, T.S. No.49 of 1953 in the Court of the learned Sub-Judge, Baripada and therein he sought for partition of their ancestral property left behind by the common ancestor, namely, Renghu. The suit was decreed by allotting shares to the respective branches. The Plaintiffs'

father and the father of Defendant Nos.4, 5 and 5(a) were parties in the said suit of the year 1953 as Defendant Nos.9 and 10. The decree for partition being passed, all the three brothers, namely, Asadhu, Jethu and Kartik accordingly continued to possess their respective shares separately as owner thereof and lived in separate mess and estate. After partition, the father of Plaintiff No.1 had purchased 9 Gunthas 6 Biswas 16 Gandas of land from one Surendra Mallick by registered sale deed dated 16.03.1959 in the name of Plaintiff No.1 representing himself to be the guardian. He took the delivery of possession of the suit land and continued to possess the same which the Plaintiff No.1 came to possess. It is stated that they have a kacha house over a portion of the same. In the Hal Settlement, said land has been recorded in the name of Plaintiffs under Khatian No.213. Asadhu, the father of Defendant Nos.1 and Kartik, the father of Defendant Nos.4 and 5, who were staying at village Shyamsundarpur had some disputes with the local Tribals. Therefore, finding the villagers to be inimical disposed towards them, they decided to leave the village. Thereafter, they approached their brother Jethu, the father of the Plaintiffs to permit them to remain in his house. Being so permitted by Jethu and Plaintiff No.1, Asadhu and Kartik constructed kacha house on the vacant portion of the Schedule-B land with the understanding and assurance that they would be vacating the said land as and when required by the father of the Plaintiffs or the Plaintiffs. Kartik having remained for some years, vacated the land twenty-five (25) years prior to the filing of the suit. The vacant portion thus remained in possession of the Plaintiffs.

In the year 1985, the Plaintiffs asked Defendant No.1 and the father of Defendant No.3 to vacate the suit land in fulfilling the assurance given at the time when they had been so allowed/permitted to

possess. They, however, refused to do so and instead advanced their own claim over the property in question saying that it is their exclusive property. Being thus aggressive, they also forcibly took over the possession of the land which had been vacated by Karitk. So, ultimately, the suit has come to be filed.

4. The Defendant Nos.1 to 3, while traversing the plaint averments, have denied the fact asserted by the Plaintiffs that Schedule-B property is the self-acquired property of Plaintiffs and their father. They have admitted that Asadhu had filed T.S. No.49 of 1953 and that was only to carve out his share over the ancestral property wherein final decree was accordingly passed on 24.09.1957. It is stated that Asadhu and Kartik had never stayed at village Shyamsundarpur and they were all along residing on the homestead land situated by the side of river Khadakhei. Because of the situation coming up on account of unprecedented flood in the year 1927, Asadhu, Jethu and Kartik were compelled to shift to safer place. Accordingly, in the year 1930, they purchased the suit land orally from Surendranath Mallick. Kartik although right at that point of time, could not contribute anything towards the consideration money but that had been made good by him later. Since the date of said purchase, it is stated that the three brothers remained in possession over respective portions. Kartik thereafter shifted to Village Nuagaon and then he handed over the portion of the land in his possession to the Defendants. During the settlement operation, the Defendant No.1 had represented for separate recording as per the possession, which the Authority did not consider as then the Plaintiff No.1 produced the registered sale deed and stated all about the purchase of the entire land. The Defendants, therefore, claim that they have been in possession of the land under Hal Plot No.1145 and 1146 covering an area of Ac.0.14 decimals since

1930-1933 as of their own rights. Having said so, they have also projected a case of acquisition of the title over the said land by way of adverse possession.

5. Faced with above rival pleadings, the Trial Court having fanned in total thirteen (13) issues, upon examination of the evidence and their evaluation, has answered all those in favour of the Plaintiffs and the suit has accordingly been decreed.

The Defendants having suffered from the said judgment and decree had carried the Appeal, which has also been dismissed.

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

“Whether the learned courts below are justified in holding that the defendants are in permissive possession when admittedly the plaintiff has failed to prove the period of commencement of such permissive possession, more so, when the defendants have proved documents showing that they along with the predecessor in interest of the plaintiffs were paying the rent for the suit land and assessment by the Municipality was made separately in the names of all the three brothers (predecessors of the defendants and plaintiffs) with regard to their residential houses over the said land and it is admitted that they are in possession over the suit property?”

7. Learned counsel appearing for the Appellants submitted that on the face of the long possession of the suit land by the Defendants when the Plaintiffs have failed to prove that the possession of the Defendants commenced with prior permission, with reference to a particular time, on the face of the evidence that the Defendants have been paying rent and holding tax; the Courts below have erred in decreeing the suit granting all the reliefs as claimed by the Plaintiffs. He submitted that

simply being swayed away by the registered sale deed (Ext.1). the Courts below, instead of analyzing the evidence keeping in view the settled law, have held the Plaintiffs to be entitled to the decree as prayed for. He, therefore, submitted that on just and proper analysis of evidence and testing the facts and circumstances emanating from the evidence let in by the parties in the touch stone of the settled principle of law, the substantial question of law must find its answer against the case/claim of the Plaintiffs and their suit is thus liable to be dismissed.

8. Learned counsel for the Respondents submitted all in favour of the findings recorded by the Courts below. According to him, as per the settled position of law when the Plaintiffs have proved their antecedent title over the suit land and the Defendants have not been able to prove their claim of competing title over the said land; the burden of proof lies upon the Defendants to establish that they have perfected their title by adverse possession and in that event only they can thwart the suit. He submitted that for the purpose, they are under legal obligation to plead and prove all those facts in support of the ingredients required as to establishment of the claim of acquisition of title over the suit land by adverse possession. He further submitted that the Plaintiffs having established their title over the suit land, have no further obligation to prove as to when the Defendants were first permitted to possess the suit land and so possessed and its entirely for the Defendants to prove their case of acquisition of title by adverse possession so in showing that the title of the Plaintiffs over the said land stood extinguished so as to non-suit them. He submitted that nothing on the above score having either been placed or let in evidence by the Defendants, they have to suffer for their such failure.

9. In our present exercise to find out the answer to the substantial question of law by addressing the rival submission, it be first stated that the Plaintiffs have established their title over the suit land by the proving the fact that it was purchased by registered sale deed. So, the precise question that falls for determination is as to whether the Defendants can defend their possession in so far as the suit land is concerned in the move made by the Plaintiffs to evict them therefrom.

It may again be stated that the Defendants have miserably failed to prove the oral sale as pleaded by them to nullify the effect of the registered sale deed standing in favour of the Plaintiffs, which has been admitted in evidence and marked Ext.1.

Fact, however, stands that the Defendants are in possession of the suit land. How they came to possess, however, when as pleaded by the Plaintiffs on one hand and the Defendants on the other differ as to basic structure. When the Plaintiffs say that the Defendants possessed the suit land being so permitted; the Defendants claim the same on the basis of their own right. Having said so, although it is said that houses etc. were constructed and they continued to stay there for all these period, yet absolutely nothing is pleaded in the written statement that said nature of possession either shortly after the commencement or at any later point of time took a sharp shift/departure in exhibiting the hostile animus in denial of the title of the Plaintiffs and therefrom onwards exercising all the right as owners; in other words the possession from some point of time started to run with animus possidendi. Having not so pleaded, those aspects are also not emanating from the evidence. In the given situation, Plaintiffs having not so pleaded and proved with reference to a particular time that the Defendants possession was permissive in nature, by virtue of the subsequent act/conduct of the Defendants in merely

making the payment of rent cannot be taken to be in the direction of exercising the right of ownership and rather, that would enure to the benefit of the title holder that it was for and on behalf of the title holders. Similarly, the payment of holding tax in respect of the houses to the Notified Area Council, in the facts and circumstances, is of no such legal significance to be taken note of for the purpose of non-suiting the Plaintiffs in recording the finding that the Defendants have thereby acquired title over the property in question by virtue of adverse possession.

10. The aforesaid discussion and reasons thus provide the answer to the substantial question of law in favour of the Plaintiffs and that leads to hold that the judgments and decrees passed by the Courts below are well in order and the Plaintiffs' suit granting the reliefs, as prayed for, has been rightly decreed, which are thus hereby confirmed.

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

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