

IN THE HIGH COURT OF ORISSA AT CUTTACK

RSA No.200 of 2002

In the matter of appeal under Section-100 of the Code of Civil Procedure assailing the judgment and preliminary decree dated 22.06.2002 and 27.06.2002 respectively passed by the learned District Judge, Bhadrak in T.A. No.13 of 1989 confirming the judgment and decree dated 19.12.1988 and 07.01.1989 respectively passed by the learned Sub Judge, Bhadrak in T.S. No.73 of 1980-I.

Sri Kulamani Patra (since dead) by Appellants
L.R.s.

-versus-

Sri Bhaskar Ch. Mallik & Others Respondents

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

For Appellants - M/s. N. K. Sahu, B. Swain &
N.K. Das
(Advocate)

For Respondents - M/s. K.N. Jena, B.P. Bal
D. K. Mohapatra, A.K. Sahu,
M. Ganguli & D.P. Mohapatra

CORAM:
MR. JUSTICE D.DASH

Date of Hearing : 23.06.2022 : Date of Judgment:04.07.2022

D.Dash,J. The Appellant (Since Dead), by filing this Appeal, under Section-100 of the Code of Civil Procedure, 1908 (for short, 'the Code'), had assailed the judgment and preliminary decree dated 22.06.2002 and 27.06.2002 respectively passed by the learned District Judge, Bhadrak in T.A. No.13 of 1989.

It may be stated here that during pendency of the Appeal, the Appellant (Defendant No. 13 before the Trial Court and Appellant No. 7 before the First Appellate Court), having died, his legal representatives have come on record and are pursuing this Appeal.

The mother of the Respondent Nos. 1 and 2 with her sister who is the mother of Respondent No. 3 had filed the suit for partition, correction of the major settlement record of right and mesne profit. They had claimed 1/12 share each out of the suit properties measuring Ac. 0.50 decimals. The suit having been preliminarily decreed the present Appellant (Defendant No.13) and others had filed the Appeal under Section 96 of the Code which too has been dismissed.

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. The Plaintiff's case is that one Gangadhar Mohanty was the recorded owner in respect of the suit properties. He died in the year 1942 leaving behind his widow Tira and two sons namely, Mayadhar and Gayadhar who are Defendant Nos. 2 and 3. After the death of Gangadhar, Tira inherited with her two sons inherited 1/3rd share each. As per the law prevailing at that time Tira's interest was limited. Tira died in the year 1978 which is long after the coming in the force of the Hindu Succession Act, 1956 (for short called as the H.S. Act). So the limited interest that Tira was having when she succeeded to the property on the death of her husband matured to absolute after the H.S. came into force. On her death, her 1/3rd share devolved upon her Class-1 heirs who are her sons i.e. Defendant Nos. 2 and 3 and two daughters namely, Jani

@ Jana and Jadi who are the Plaintiffs, whose legal representatives are now on record.

It is stated that there was mutual partition in respect of all the properties except the suit properties. The Plaintiffs, however, came to know subsequently that Defendant No. 3 who had 1/3rd share in the suit land has mortgaged scheduled land measuring Ac. 01.10 decimal to Defendant No.1 and he on the basis of the mortgaged deed filed the mortgaged suit without impleading all the heirs of Gangadhar especially Tira and on the basis of the mortgaged decree, the Defendant No.1 got the said mortgaged land put to sale. It is stated that there has been purchase of the mortgaged land by the Defendant No.1 in the Court sale. The Defendant No.1 even though took half of "Ga" scheduled land yet in the Major Settlement record he got the full plot recorded in his name and in the name of Defendant Nos.4 to 6. Over and above the same, the Defendant Nos.7 to 9 claim to have purchased half share from Defendant No.3 out of the suit land. The Plaintiff's in the suit claim that they have got 1/2 share each and the suit being liable to be partitioned in metes and bounds, the same be so ordered.

4. The Defendant No.1 in his written statement stated that the death of the father of the Plaintiff was not in the 1942 and Tira, the mother of the Plaintiff's had no share and she also did not die in the year 1978. It is further stated that original Defendant No.1 took mortgage of Ac. 01.10 decimal of land from C.S. Khata No. 188 and filed a mortgaged suit bearing No.7 of 1967. Having obtained a mortgaged decree for sale this property was put to sale and he purchased the same and took the delivery of possession and accordingly in the Major Settlement record of right got the land recorded in his name. It is stated that he has been possessing the same for more than 12 years and as such he has acquired

title by virtue of such long possession. It is specifically stated that Gangadhar died prior to 1937 and as such neither Tira nor the Plaintiffs have any shares in the suit land.

5. Defendant Nos.7 and 8, 11 to 13 in their written statement have stated that the Defendant No.13 has mortgaged portion of the suit land with the land Mortgage Bank, which is therefore a necessary party. It is further stated that all the ancestral properties are not in the hotchpotch and therefore, the suit cannot proceed. They state that the father of the Plaintiffs died prior to 1937 and Defendant No.2 and 3 became the heirs and thus Defendant No.3 has sold his share to them and they are in possession and have got the land recorded in their name.

6. On the above rival pleadings, the Trial Court framed as many as seven issues. First of all coming to answer Issue No.7 which is crucial one as to share of the Plaintiffs have their rights over suit property as claimed, upon examination of evidence and their evaluation, the finding has been returned that Gangadhar died in the year 1942 and Tira died long thereafter in the year 1978 that is after coming into force of the H.S. Act. So it has said that Tira has 1/3rd share of the suit land belonging to her husband and after her death, Plaintiffs are entitled to 1/12 share each. The Trial Court then has negated the case of the Defendant's that they have acquired title over the suit land by way of adverse possession. The suit has accordingly been preliminarily decreed.

7. The First Appeal filed by the Defendants being aggrieved by the said judgment and preliminary decree passed by the Trial Court has not yielded any fruitful result. Hence, the present Appeal.

8. This Appeal has been admitted on the substantial questions of law as enumerated in ground No. A, B and F of the Memorandum of Appeal which read as under:

“(A) Whether the learned Courts below have committed serious error of law and procedure in coming to a finding that “There is no question of perfection of title by adverse possession unless ouster is pleaded and proved. Any length of possession will not amount to the adverse possession and it is also not the plea of the Defendants, since they only claim adverse title” although the law is well settled that where the strangers have been inducted in to possession and consequently, the possession of the co-owners terminated would be sufficient to put the other co-owners to notice of the conduct of the alienating co-owners. Therefore, ouster would be to their notice and the possession of transferee would be adverse from the date of possession.”

In view of the aforesaid settled position of law, the learned Courts below should have held that since one of the co-owners Defendant No.3 had alienated the disputed property in favour of the Appellant by executing a registered sale deed on 01.08.1967 and delivered possession to him, and from that date, the Appellant is in continuous possession over the same for the statutory period of Twelve years within the knowledge of the transferor co-owner, the possession of the transferee purchaser, became adverse to other co-owners, since they have not brought the suit within twelve years of the alienation, and should have dismissed the plaintiffs suit.

B) Whether the learned Courts below have committed serious error of law and procedure in not framing an issue with regard to the question of adverse possession, although the Appellant has specifically pleaded in the written statement that he is possessing the land in dispute from the date of purchase under Ext.D and also mutated his name in the revenue record, and paid rent to the Govt. from the date of purchase and the M.S., R.O.R has been prepared in his name and as such he has perfected his title by adverse possession. Non consideration of the aforesaid vital issue

vitiates the entire judgment and decree passed by the Courts below and the same are liable to be set aside.

F) Whether the learned Courts below have committed serious error of law and procedure in coming to a finding that the Bank is not a necessary party in the suit and as such the suit is not bad for non joinder of necessary parties “although the Appellant has specifically pleaded in the written statement and also adduced the evidence, that the property purchased by him, is mortgaged in the land development Bank, in absence of any evidence to the contrary, the learned Courts below should not have come to such a conclusion, although it is the settled law, that any joint family property alienated by a co-owner or mortgaged it before a third party the stranger purchaser is a necessary party in a partition suit filed by another co-owner and thus non impletion of the mortgagee Bank as a party in the suit, vitiates the entire judgment and decree passed by the Courts below and the same is liable to be set aside.”

9. Learned counsel for the Appellant submitted that the Courts below have committed grave error in saying that in the particular case there can be no claim over the suit land as to perfection of title by the Defendants since ouster has not been pleaded and proved. He submitted that even though in clear words it is not so indicated in written statement yet the facts and circumstances emerging from the evidence on record clearly establish a case of ouster and Plaintiffs acquisition of title over the suit land by adverse possession. He further submitted that the Courts below who have held that one of the co-owners that is Defendant No.3 when has alienated the dispute property in favour of the Defendant No.13 by executing registered sale deed on 01.08.1967 followed by delivery of possession, the institution of the suit long after expiry of 12 years is not permissible in law and it is squarely barred by limitation. He submitted that merely because of Plaintiffs have sought for partition, the Courts below have gone wrong in not holding the suit is barred by

limitation when it essentially to nullify the sale deed dated 01.08.1967 and when their title over the property in the suit has already been extinguished by virtue of acquisition of title over the suit land by the Defendant No.13 by way of adverse possession.

10. Learned Counsel for the Respondents submitted all in favour of the judgments having rendered by the Courts below. According to him, the Courts below have rightly negated the claim of the Defendant No.13 that he has acquired title over the purchased land by way of adverse possession. It was submitted that he having purchased the property from one of the co-owners as per the settled possession of law, stepped into the shoes of the said co-owner and as such his possession has to be taken for and on behalf of other co-owners and it is only when he pleads and prove ouster, the Court can decline the Plaintiff to be granted with any relief in respect of the suit property. So, it was submitted that the Defendants having not at all done as aforesaid in the present case; the Courts below are right in preliminarily decreeing the suit.

11. Keeping in view the above submission, I have carefully read the judgments passed by the Courts below.

12. The three substantial questions of law essentially revolve round the claim/case of the Defendant No.13 that he has perfected title over the suit land by way of adverse possession. He being the purchaser of the property from co-owner as per the settled law he stepped into the shoes of the co-owner and therefore his possession of the purchased property would in law be taken to be for and on behalf of the co-owners. Therefore, it is essential that first of all his vendor must plead and prove the ouster and if they have acquired title over the said sold land by way

of adverse possession then the purchaser can say that he having continued has the exclusive title over the property.

Secondly, the vendor that is Defendant No.13 too can independently succeed in pleading ouster and proving the same. In the case given case, the Courts below have arrived at conclusion that the Defendant No.13 has neither taken the plea of ouster in the written statement as is required under law by stating all such detail particular, facts nor has tendered the evidence in fulfilling all the ingredients so as to ultimately succeed in establishing his case that he has acquired title over the purchased suit property by way of adverse possession. The discussion of evidence made by the Courts below being gone through in side by side look into, the evidence on record; this Court finds that conclusions arrived by the Courts below are found to be well in order.

The aforesaid discussion and reasons provide answers to the substantial questions of law in favour of the confirmation of the judgments and preliminary decrees passed by the Courts below, declining to accept the claim/case of the Defendant No.13.

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

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