

HIGH COURT OF ORISSA : CUTTACK
RSA NO.187 OF 2005

In the matter of appeal under Section-100 of the Code of Civil Procedure assailing the judgment and decree passed by the learned Additional District Judge, Berhampur in Title Appeal No.32 of 2002 in confirming the judgment and decree passed by the learned Civil Judge (Senior Division), Berhampur in Title Suit No.88 of 1994.

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Sri Sri Raghunath Mahaprabhu
Bije Sankarpur :::: Appellant.

-:: VERSUS ::-

Smt. Laxmi Panigrahi & Others :::: Respondents.

**Advocate(s) who appeared in Hybrid Arrangement
(Physical/ Virtual) mode.**

Appellant	:::	M/s. B.D. Routray, P.K. Dash, D.K. Mohapatra, D. Mund, D. Routray, S. Das, Advocates.
For Respondents	:::	M/s. G. Mukherjee, Senior Advocate, S.R. Patra, A.C. Panda, P. Mukherjee, Advocates.

CORAM:

MR.JUSTICE D. DASH

Date of Hearing: 07.03.2022 :: Date of Judgment::29.03.2022

D.Dash,J. The Appellant, by filing 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 2nd Additional District Judge, Berhampur in Title Appeal No.32 of 2002. By the

same, the judgment and decree passed by the learned Civil Judge (Senior Division), Berhampur in Title Suit No.88 of 1994 have been confirmed.

The Appellant-Deity as the Plaintiff had filed the suit for declaration of its right, title and interest over the suit land with further prayer for recovery of possession of the same. The suit having been dismissed and the Plaintiff being non-suited thereby, the Appeal under Section-96 of the Code had been filed, which move has also failed. Hence, the present Second Appeal.

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. Plaintiff's case is that the suit land belongs to the Plaintiff-Deity and thus, the Plaintiff-Deity has right, title and interest over the said land which also stands recorded in its name in the recent settlement record with note of possession standing in favour of one Madan Mohan Panigraphi, the predecessors-in-interest of the Defendants. The Defendants having not vacated the suit land despite notice, the suit has come to be filed.

4. The Defendants while traversing the plaint averments have asserted that they since the time of their predecessor-in-interest are in

possession of the suit land since the year 1945 and had constructed a house over the same to the knowledge of the last Mahanta of the Plaintiff-Deity who died in the year, 1964. It is stated that after death of Madan Mohan, his son and thereafter the Defendants are continuing to possess the suit land openly, peacefully and without any interruption in any quarter. So, they claim to have perfected title over the same by way of adverse possession.

5. On the above rival pleadings, the Trial Court having in total framed five issues has gone to answer the crucial issue nos. 1 and 2 as to the right, title and interest of the Plaintiff-Deity over the suit land and the claim of the Defendant that they have acquired the title over the same by adverse possession. Those issues having been answered against the Plaintiff-Deity; the suit was dismissed.

6. The First Appellate Court having taken up those two issues for reconsideration has however held the Plaintiff to be having the right, title and interest over the suit land. But then, upon examination of evidence and there evaluation, it has been held that the Plaintiff-Deity's right to recover the possession of the suit property from the Defendants is barred by limitation as the Defendants have perfected their title over the suit land by adverse possession. In this way, it has

been said that the Plaintiff's-Deity's title over the suit land has stood extinguished.

7. Being aggrieved by the decision of the First Appellate Court, when the Plaintiff has filed this Second Appeal, the Defendants have also advanced a cross-objection under Order-41 Rule-22 of the Code questioning the finding of the First Appellate Court that the Plaintiff had the antecedent title over the suit land.

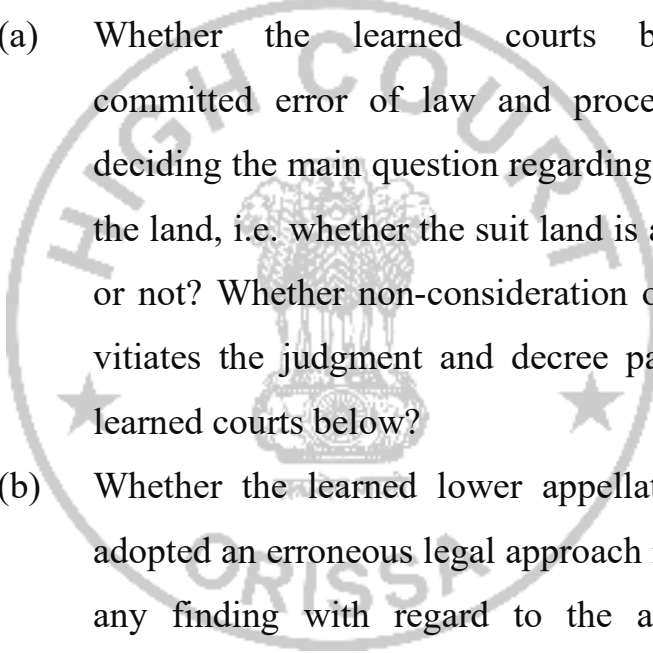
8. Mr. D. Routray, learned Counsel for the Appellant submitted that the findings of the lower Appellate Court being that the Plaintiff has the antecedent title over the suit property; the subsequent finding that the Plaintiff's title over the property stood extinguished for non-filing the suit within the period prescribed under Article-65 of the Indian Limitation Act is unsustainable. He submitted that the principle of acquisition of title over the suit property belonging to the Plaintiff-Deity by way of adverse possession, when are not attracted as the Plaintiff-Deity is a perpetual minor; the lower Appellate Court has fallen in error in holding that the Plaintiff is not entitled to recover the possession of the same from the Defendants. He further submitted that the evidence let in by the Defendants are wholly unsatisfactory in establishing their claim of acquisition of title over the suit property by way of adverse possession. He further submitted

that the very case projected by the Defendants in their written statement that they have perfected the title over the suit property by adverse possession having remained in possession of the same since the time of their ancestors to the knowledge of the last Mahanta of the Plaintiff-Deity, clearly leads to say that they have admitted the title of the Plaintiff-Deity over the suit property and that apart on the face of the recent record of right of the land in suit standing in the name of the Plaintiff-Deity and in the absence of any other evidence being tendered by the Defendants to disprove the title of the Plaintiff-Deity over the suit property, the lower Appellate Court has rightly held that the Plaintiff-Deity had the antecedent title over the suit land.

9. Mr. G. Mukherjee, learned Senior Counsel submitted that the lower Appellate Court ought not to have been swayed away by the record of right, which neither creates nor extinguishes the title over the property in question and merely because the land in suit has been recorded in the name of the Plaintiff-Deity that ought not to have been held to be enough in proving of title over the suit property as resting with the Plaintiff-Deity. He submitted that the Trial Court when upon detail analysis of evidence has recorded the finding that the Plaintiff-Deity has failed to prove its title over the suit property,

the same should not have been set at naught so lightly. He further submitted that the finding of the lower Appellate Court that the suit is barred by limitation being not brought within time period prescribed under Article-65 of the Indian Limitation Act is unassailable.

10. The Appeal has been admitted on the following substantial questions of law:-

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- (a) Whether the learned courts below have committed error of law and procedure in not deciding the main question regarding the status of the land, i.e. whether the suit land is an inam land or not? Whether non-consideration of such issue vitiates the judgment and decree passed by the learned courts below?
- (b) Whether the learned lower appellate court has adopted an erroneous legal approach in not giving any finding with regard to the admission of defendant no.1 regarding possession of the plaintiff, particularly, when defendant no.1 being the plaintiff has filed T.S. No.21 of 1998 and T.S. No.213 of 2001 for eviction wherein she had clearly admitted about the possession of the plaintiff and this fact has not been considered by the learned lower appellate court, hence, the impugned judgment passed by the learned lower

appellate court is not sustainable in the eye of law?

- (c) Since the learned lower appellate court has found the title in favour of the plaintiff-deity, but by erroneous legal approach and by applying the provisions of section-65 of the Limitation Act has erroneously held that the title of the plaintiff is extinguished. Therefore, the substantial question of law is whether the findings of the learned courts below with regard to extinguishments of title of the plaintiff in respect of the suit land is at all sustainable, particularly since the plaintiff is a deity and no claim of adverse possession is permissible against the deity, who is always a minor?

In order to answer the above substantial questions of law so as to dispose of the Appeal as well as the cross-objection by addressing the rival contentions, this Court is called upon to judge the sustainability of the answers given by the First Appellate Court on the points formulated by it for determination as provided in Order-41 Rule-33(a) of the Code.

11. The Plaintiff-Deity claims to be having the title over the suit land. The documentary evidence tendered from their side is the Inam Register-Ext.6 and the relevant entry corresponding to the suit land vide Ext.6/a, which disclose that the land in question had been

shown in entry in Inam T.D. No.2540 in the said Inam Register; which have further been fortified through Yadast record of the recent settlement as admitted in evidence and marked Exts.7 and 7/a and the cist receipts given in respect of the suit land had been admitted in evidence marked as Ext.2-r, 2-s and 2-t. The position stands that subsequent to the abolition the estate, the land in question stands recorded under rayati status vide Ext.1 in the recent settlement in the name of the Deity. True it is that the land being Inam land, no such documentary evidence has been tendered from the side of the Plaintiff-Deity to support of the settlement of the same in favour of the Plaintiff-Deity after vesting of the estate with the State free from all encumbrances by virtue of operation of law; however fact stands that in the settlement operation, the land has been recorded under rayati status in the name of the Plaintiff-Deity. Although that document itself is not conclusive to say that the Plaintiff-Deity is the title holder of the said property as the settled position stands that the ROR entries do not create or extinguish the title yet in the absence of any such evidence to counter the same when has not been proved from the side of the Defendants, the presumption attached to the said record of right would continue to hold the field. In such state of affairs in the evidence, the First Appellate Court in my considered

view has rightly recorded the finding of the title over the property in question in favour of the Plaintiff-Deity by taking note of the fact that the Defendants have not been able to lead any sort of evidence indicating that such preparation of the record of right is without any basis, and thus the Defendants have failed to prove to be having a better title by leading any such evidence. Thus, the finding of the First Appellate Court on the question of title over the suit property as resting with the Plaintiff-Deity being affirmed, now the question falls for answer as to whether finding of the First Appellate Court that the Defendants have acquired title over the said property by way of adverse possession can stand to judicial scrutiny.

12. As per the settled position of law, here the Plaintiff-Deity having thus, established its title over the suit land; it is for the Defendants to plead and prove that by virtue of their open, peaceful, continuous and uninterrupted possession over the suit property for upward of the period prescribed in exercising all the rights of ownership and exhibiting hostile animus denying the title of the Plaintiff-Deity to its knowledge, they have so acquired the title over the suit property by way of adverse possession and thereby the title of the Plaintiff-Deity over the same has since been extinguished.

13. In the eye of law, an owner would be deemed to be in possession of the property so long as there is no intrusion. Non-use of the property by the owner even for a long time, won't affect his title. But the position stands altered when another person takes the possession of the property and asserts a right over it. It is well settled that adverse possession is hostile possession by clearly asserting hostile title in denial of the title of the true owner. The party who claims adverse possession must prove that his possession is *nec vi, nec clam and nec precario* i.e. peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that the possession is adverse to the true owner. It must start with a wrongful dispossession of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. So, the physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors which are to be accounted for in cases of this nature. Therefore, a person who claims adverse possession should show (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading

adverse possession has no equities in his favour. Since he is trying to defeat the rights of true owner, it is for him to clearly plead and establish all those facts necessary to establish his adverse possession by clear, cogent and acceptable evidence.

14. The Defendants in their written statement at paragraph-3 have pleaded that Madan Mohan Panigrahi, the father-in-law of the Defendant No.1 had been in exclusive possession and enjoyment of the suit property for his habitation and was living there from the year 1945 or so. Since then he has been in exclusive possession and enjoyment as the owner by constructing a small thatched house thereon which has been subsequently replaced by a well built house with compound wall, so, it is said that in course of exclusive possession and enjoyment with right, title and interest, said Madan Mohan acquired the right over the same. It is alleged that the record of right is a mistaken entry with the remark that the father-in-law of the Defendant No.1 is in unauthorized possession which fortifies the claim of possession.

15. The Defendant No.1 being examined as D.W.1, mentioning her age is to be 51 years at the time of examination has stated that at the time of her marriage, there was a thatched house over the suit land wherein her father and husband were residing and she also

resided therein. The house being demolished during last Super Cyclone, she has stated to have been residing thereafter in another house of her own in the said street. It has further been stated that a portion of the suit house has been tenanted to one Krushna Chandra Samantaray; wherein he is running a hotel. She has stated to have no knowledge as to who was the erstwhile owner of the suit land. The pleading and the evidence on record are thus, found to be wholly deficient so as to sustain the claim as to acquisition of title over the suit land by virtue of adverse possession. The foundational facts for establishment of such a claim have neither been pleaded in clear terms nor proved through clear, cogent and acceptable evidence.

Furthermore, it being the clear position of law that the doctrine of adverse possession is available in respect of the properties over which the true owner has the right of voluntary alienation. Here the Plaintiff-Deity being a perpetual minor when had/has no voluntary alienable right over the property and / or endowment and when the trustee is conferred with the right to alienate the same for and on behalf of the Plaintiff-Deity only for the necessity of the Deity and its welfare with prior sanction of the Commissioner of Endowments as provided in Section-19 of the Hindu Religious Endowments Act (for short hereinafter called as 'the OHRE Act'), the very claim of

the Defendants as to acquisition of title over the suit land belonging to the Plaintiff-Deity by way of adverse possession is not cognizable in the eye of law.

16. The aforesaid discussion and reasons, thus, provide the answers to the substantial questions of law running in the direction of setting aside the finding of the First Appellate Court that the Defendants have acquired title over the suit land by virtue of adverse possession and that thereby the title of the Plaintiff-Deity over the suit land has been extinguished. Said finding of the First Appellate Court is thus held to be unsustainable. Based on the finding of the First Appellate Court that the Plaintiff-Deity has the title over the suit land which has been held to be well in order; it is thus held that the suit filed by the Plaintiff-Deity for the reliefs claimed has to be decreed. Accordingly, the right, title and interest of the Plaintiff-Deity over the suit schedule land being so found; it is held that the Plaintiff-Deity is entitled to a decree of recovery of possession of the suit land from the Defendants.

17. In the result, the Appeal stands allowed and the cross-objection is hereby dismissed. There shall however be no order as to cost.

The right, title and interest of the Plaintiff-Deity over the suit schedule property are hereby declared and a decree of recovery of possession over the suit schedule property from the Defendants is passed in favour of the Plaintiff-Deity. The Defendants are hereby directed to give delivery of vacant possession of the suit schedule property to the Plaintiff-Deity on or before 30th June, 2022. In the event, the Defendants fail to vacate the suit schedule property within the time as stipulated above, the Plaintiff-Deity is at liberty to take recourse for recovery of the possession of the suit schedule property through the process of the Court.

The Plaintiff-Deity is entitled to receive the compensation amount awarded towards the acquisition of the portion of the suit land which has been disbursed in favour the Defendants pursuant to the order passed by this Court on 14th January, 2010 keeping lien over the Term Deposit in the name of Defendant No.1 lying with the State Bank of Hyderabad. The Defendants are hereby directed to deposit the said amount with the Trial Court on or before 30th April, 2022; whereupon the Trial Court would release the lien over the Term Deposit in the name of the Defendant No.1 which has been so kept by virtue of the order of this Court and that would cease to so operate. On the failure of the Defendants to refund the compensation

amount as aforesaid within the time as stipulated above, the Plaintiff-Deity is at liberty to move the Trial Court to get the said sum encashed from the term deposit standing in the name of Defendant No.1 with State Bank of Hyderabad for its onward payment in favour of the Plaintiff-Deity in its Bank Account by pressing into service the lien and exercising that right as such.

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

Narayan

