

IN THE HIGH COURT OF ORISSA AT CUTTACK

RSA No.445 of 2005

In the matter of an appeal under section 100 of the Code of Civil Procedure assailing the judgment and decree passed by the learned Additional District Judge, Jharsuguda in R.F.A. (T.S.) No.1 of 2004 setting aside the judgment and decree dated 29.11.2003 and 10.12.2003 respectively passed by the learned Civil Judge (Junior Division), Jharsuguda in T.S. No.19 of 2002.

Annapurna Bag ***Appellant***

-versus-

Motiram Sahu & Others ***Respondents***

Appeared in this case by Video Conferencing Mode

For Appellant - M/s.Sankarsan Rath & S. Rath,
Advocates

For Respondents - M/s. B.P. Das & P.K. Nayak
Advocates.

CORAM:
MR. JUSTICE D.DASH

Date of Hearing :12.01.2022 :: Date of Judgment:21.01.2022

The Appellant, by filing this Appeal under Section 100 Civil Procedure Code (for short, 'the Code'), has assailed the judgment and decree passed by the learned Additional District Judge, Jharsuguda in R.F.A. (T.S.) No.1 of 2004.

By the said judgment and decree, the First Appeal filed by the present Respondents, who had been unsuccessful in the suit, has been allowed. The judgment and decree dated 29.11.2003 and 10.12.2003 respectively passed by the learned Civil Judge (Junior

Division), Jharsuguda in T.S. No.19 of 2002, filed by the present Appellant as the Plaintiff have been set aside.

The Appellant as the Plaintiff having got the decree against the Respondents-Defendants as to declaration of her right, title, interest and confirmation of possession; has now been non-suited by the lower Appellate Court.

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 one Brundabati, wife of Bansidhar and Rangabati, wife of Hrudananda Naik were the original recorded tenants in respect of the suit land. Brundabati died issueless whereas Rangabati died leaving behind the Plaintiff as her only daughter. The suit property having come from the maternal side of the Plaintiff; she finally succeeded to the same. The record of right was duly corrected by the order passed in Mutation Case No.486 of 1996 and 904 of 1094. The Plaintiff thus remained in peaceful and continuous possession of the suit land by paying rent to the State as its owner. It is stated that she has not transferred the suit land to anybody and it had also never been transferred either by Brundabati or Rangabati to any person in any mode such as sale, mortgage, gift etc. and the possession of the same had never been parted with.

The Defendants are stated to be complete strangers having absolutely no right, title, interest and possession over the suit land. It is alleged that they unauthorizedly trespassed over the suit land and tried to construct a house over the same for running a club. So, the Plaintiff, finding no other immediate alternative, initiated a proceeding under Section 144 of the Code of Criminal Procedure. Initially, an order of restrain was passed but when the proceeding lapsed by efflux of time, the Defendants again made such attempt of putting up construction. So, the suit has come to be filed.

4. The Defendants, while traversing the plaint averments, in their written statement, have taken a positive stand that Brundabati, during her life time, had gifted the suit land in favour of 'Tungi Pada' club on 1.5.1987 and evidencing the same, she had so given in writing on a plain paper, which had been accepted by the villagers. It is stated that said move was for the welfare and benefit of the villagers at large. The Defendants since the date of such gift claim to be in possession of the suit land by constructing a house over it and using the same as their club house. It is stated that the Plaintiff has no right, title, interest and possession over the suit land. An alternative case has been projected by the Defendants that they have perfected their title by way of adverse possession by

remaining in possession of the suit land openly, continuously without any interruption from any quarter for upward of the prescribed period since the date of move, i.e., 01.05.1987 when they got into possession on being so gifted with.

5. On the above rival pleadings, the Trial Court, having framed eight issues, has answered the most important issue such as issue nos.1 and 2 in favour of the Plaintiffs. Accordingly, the suit having been decreed; the unsuccessful Defendants had carried the Appeal under Section 96 of the Code.

6. The lower Appellate Court, on examination of the evidence and upon their evaluation, although has finally found that the evidence let in from the side of the parties on the factum of possession of the suit land is very poor, yet in view of the admission of the Plaintiff that the Defendants are in possession of the suit land on the strength of the plain paper gift, and in the absence of specific denial to this by the Plaintiff, the possession of the Defendants has been reckoned with effect from 01.05.1987. Having said so, the lower Appellate Court has concluded that when the Plaintiff has not tendered any evidence that from such date of possession of the suit land by the Defendants, he has taken over possession nor there is anything in the record to show that the Defendants are dispossessed from the suit land at any time after 01.05.1987, the right, title and interest

of the Plaintiff over the suit land has been held to have been extinguished. It has thus been said that under the circumstance, the mutation entry and in the record of right of the suit land in favour of the Plaintiff would not go to create the right, title and interest over the suit land in favour of the Plaintiff. The claim of the Defendants that they have perfected title by way of adverse possession has accordingly been upheld.

7. The Appeal has been admitted on the following substantial question of law:-

“Whether the finding of the lower Appellate Court that the Respondents-Defendants have perfected their title over the suit land by way of adverse possession by remaining in possession of the same with effect from 01.05.1987, the date when the so-called deed of gift had been executed by Brundabati, which is invalid in the eye of law is legally sustainable?”

8. Learned counsel for the Appellant submitted that the gift said to have been made by Brundabati, the erstwhile owner of the suit land on 01.05.1987 as has been projected through Ext.1, a plain paper document being wholly invalid in the eye of law from its inception, the possession of the suit land by the donees cannot be treated at par with the possession as like a purchaser on the basis of an invalid sale as in this case, the gift being invalid in the eye of law, i.e. to say totally invisible in the eye of law; its acceptance also stands invalid and, therefore, the possession can never be said to be adverse to that of the donor or the person/s claiming

through that donor. He, therefore, submitted that even upon acceptance of the case of the Defendants as laid in the written statement, there can never be a finding that the Defendants have perfected their title over the suit land by way of adverse possession are thereby the title of the Plaintiff over the suit land stood extinguished. He thus submitted that the answer to the substantial question of law must stand recorded in favour of the Plaintiff in decreeing her suit and the judgment and decree passed by the learned Trial court are accordingly to be restored.

9. Mr. Biraja P. Das, learned counsel for the Respondents submitted that on the basis of the evidence on record, the possession of the Defendants in respect of the suit land having been found from the date of said gift made by Brundabati as the donees and they claiming to be as such since have possessed the suit land for all these period openly, peacefully, continuously without any interruption from any quarter, the lower Appellate Court has rightly dismissed the suit.

10. Keeping in view the submissions made, I have gone through the judgments passed by the Courts below.

11. The gift has been defined in Section 122 of the Transfer of Property Act, 1882 (for short, 'the T.P. Act'). Besides the fact that the gift of immovable property

must have been made voluntarily and without any consideration by the donor to the donee, the other important ingredient stands that it must be accepted by the donees. As provided in Section 123 of the T.P. Act; for making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. Unless the gift of immovable property is made as above, the same is void. The same is also compulsorily registerable notwithstanding the valuation of the immovable property as so provided in Clause (a) of subsection-1 of section 17 of the Indian Registration Act. So, even if a gift of immovable property is made by the donor orally or by executing a document, which has not been registered in accordance with law, a question arises in my mind as to whether its acceptance by the donee would stand as the acceptance as per law and would be so recognized and visible in the eye of law. In my view, in the event, it is said that the acceptance by the donee is recognizable and visible in the eye of law, then only it would be permissible to say that the donees's possession over the suit land as such was as that of the owner of the same having obtained the same under that invalid gift. When the title has not passed on to the donee by virtue of the acceptance of the gift which is invalid; it has to be presumed that possession over the property by its acceptor was not with the assumed status of donee. In the instant case, the so-

called gift from the beginning is invalid and as such not visible in the eye of law to be called/termed as gift. That be so, even if its acceptance is taken for a moment and the so-called donee is said to have possessed the land in question from that date of invalid gift, his or their possession as it is cannot be taken to be in denial of the title of the true owner, i.e., the donor with hostile animus and that nature possession would continue to hold good even when in the place of donor, his or her legal heirs or persons claiming through him or her come to succeed or acquire the property.

12. Having said as above, I am of the view that for the purpose the possessor has to plead and clearly prove that he/they possessed the said land from that day of so called gift by denying the title of the donor exhibiting hostile animus claiming the ownership unto himself/themselves and then it was open, peaceful and continuous for upward of the prescribed period.

In the given case all these facets are also wholly lacking in the pleading of the Defendants and evidence so let in. Therefore, in my considered view, the possession of the donee on the basis of void deed of gift which is not required to be declared so by the Court but it is so from its inception as such is not visible in the eye of law, the question of possession of the suit land by those so-called donees in denial of the title of the donor or persons claiming through her had not arisen and,

therefore, even on the basis of possession of the property being with them taken from the so-called donor on the basis of that void deed of gift which is not recognized in the eye of law for being accepted nor it stands so capable to be accepted by the donee, there can never be acquisition of the title over the suit land by the donees by way of adverse possession. The acquisition of title by adverse possession in the factual and legal settings, would not stand. It is simply for the reason that the most important ingredient as to possession with hostile animus in denial of the title of the true owner clearly lacks.

In case of possession of a purchaser under a void sale when the nature of possession of the land by the said purchaser from that date automatically stands as its owner without any title having come to rest on him from that day, and that can mature after such possession is for more than the prescribed period in open, peaceful and continuous manner, the same can however be not the position in a case of possession of the so-called donee/s under a void deed of gift since the gift is not for any consideration and again depends upon its acceptance which has to be in accordance with law which in such case is not even capable of acceptance. In case of a void gift, under no circumstance, there arises the scope for its acceptance as per law and thus the nature

of possession of the so-called donee cannot be said to be with the assumed status as that of donee/s.

Moreover, here the very case of the Defendants as to acceptance is also quite vague. The gift is said to be in favour of a club, which is not said either to be a society then being represented by someone in particular office or to be company or any other legal entity. It is stated that the villagers were representing the club but who is/are those villagers who received the possession of the property on behalf of the club is not pleaded nor shown in evidence. In view of all these above, the possession of the Defendants over the suit property, if any, has to be termed as permissive at the mercy of the true owner, here the Plaintiff.

13. For the aforesaid, this Court answers the substantial question of law in favour of the Plaintiff and against the Defendants. As a consequence thereto, the findings of the lower Appellate court that the Defendants have perfected their title over the suit land by way of adverse possession by remaining in possession over the same with effect from 01.05.1987, the date when the so-called gift is said to have been executed by Brundabati, which is void and in that way, the title of the Plaintiff over the suit land has been extinguished cannot be sustained in the eye of law.

14. Resultantly, the Appeal stands allowed. The judgment and decree passed by the lower Appellate Court are hereby set aside and the judgment and decree passed by the Trial Court in decreeing the suit granting her the reliefs, as prayed for, are hereby restored.

In the facts and circumstances of the case, no such order as to cost is passed.

As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of the order available in the High Court's website, at par with certified copy, subject to attestation by the concerned advocate, in the manner prescribed vide Court's Notice No.4587 dated 25th March, 2020 as modified by Court's Notice No.4798 dated 15th April, 2021, and Court's Office Order circulated vide Memo Nos.514 and 515 dated 7th January, 2022.

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

Basu