

ORISSA HIGH COURT : CUTTACK

R.S.A. NO. 466 of 2003

From a judgment and decree dated 16.08.2003 and 28.08.2003 respectively passed by Shri S.K. Mishra, learned District Judge, Sundargarh in Title Appeal No. 6 of 1999 reversing the judgment dated 02.02.1999 passed by Shri S.K. Panda, learned Civil Judge (Senior Division), Rourkela in T.S. No.3 of 1994.

Binod Agarwal (dead) after him,
his L.Rs., Puspadevi Agarwal
& five others

..... Appellants

-Versus-

Pradeep Kumar Agarwal
and others

..... Respondents

For Appellants : Mr. S.P. Raju.

For Respondents: M/s. D.K. Mishra,
G.K. Nayak & R. Mahalik
S. Pradhan, P.K. Patnaik,
B. Sahoo, A. Tripathy,
S.S. Ray & P.K. Patel.
(For Respondents 1 to 5 & 9)

M/s. B. Sahoo,
P.K. Patel & A. Tripathy.
(For Respondents 6, 7 & 8)

Decided on 30.01.2012.

P R E S E N T :

THE HONOURABLE SHRI JUSTICE M. M. DAS

M.M. DAS, J.

Though this appeal was filed in the year 2003, but it appears that no steps were taken by the appellants to get the matter listed on board for admission till today.

2. On hearing learned counsel for the appellants, the appeal is found to be involving the following substantial questions of law, on which it is admitted:

- I. Whether the learned lower appellate court has committed an error in holding that the contesting defendants, who are in possession of the suit house, are bound by the sale deed Ext. 8 ?
- II. Whether the learned lower appellate court has erred in law by not accepting the finding of the learned trial court that the suit is hit under Article – 67 of the Limitation Act and, as such, the suit was barred by limitation ?
- III. Whether the judgment of the learned lower appellate court is a nullity, as the legal heirs of the defendant-respondent no.11 were not substituted before the learned lower appellate court ?

Since this is an old appeal, after admitting the appeal, the same was heard on merit, as the respondents-plaintiffs have already entered appearance through their learned counsel, and is disposed of as under.

3. The legal representatives of the original defendant No.1 along with defendant No.2 of the original suit (T.S. No.3 of 1994) have challenged a reversing decision of the lower appellate court (the learned District Judge, Sundargarh) decreeing the plaintiffs-

respondents suit for declaration of title, eviction and for house rent/damages.

4. The present respondents 1 to 9 as plaintiffs had filed the aforesaid suit, which was dismissed by the learned trial court (the learned Civil Judge (Senior Division), Rourkela). The plaintiffs preferred Title Appeal No.6 of 1999, which was allowed and decree was granted as aforesaid.

5. The case of the plaintiffs is that the suit land originally belonged to one Devaki Devi Agarwal, who was the defendant No.11. One Manas Ram Agarwal and his son Babulal Agarwal (defendant No.1) and Radheshyam Agarwal (husband of defendant No.3) occupied the suit property as tenants of Debaki Devi Agarwal. As Manas Ram Agarwal defaulted in payment of monthly rent, Debaki Devi Agarwal (defendant No.11) filed H.R.C. Case No.9 of 1980 in the court of the learned S.D.J.M., Panposh on 07.05.1980 to evict Manas Ram, Babulal and Radheshyam. During pendency of the H.R.C. Case, there was a talk of compromise and on 24.03.1981, the said case ended in a compromise. In the said compromise, it was agreed that the house portion, which has been let out to Manas Ram, marked as '2' in the map annexed to the compromise petition, would be sold to Krishna Devi Agarwal, wife of Babulal Agarwal (defendant No.1) by the land lord (Debaki Devi, defendant No.11) only if Manas Ram and Babulal would vacate the other marked portions, i.e., '1' and '3' (vacant land

shown in the map) on or before 31.03.1981. It was agreed that the sale transaction would take place at a price of Rs.10,000/-. Radheshyam Agarwal, husband of defendant No.3, who was the other tenant in the H.R.C. Case remained absent and an ex parte order of eviction was passed against him on 22.01.1982 in the said H.R.C. Case. But as per the compromise decree of the H.R.C. Case, Manas Ram and Babulal did not vacate and handover vacant possession of the premises marked as 1 and 3.

6. Subsequently, Manas Ram Agarwal, Babulal Agarwal, his wife Krishna Devi and Radheshyam Agarwal filed Title Suit No.23 of 1983 on 27.01.1984 for specific performance of contract against Debaki Devi and Ganga Devi Agarwal, who is the mother of the plaintiff-respondents No.1 to 8, with the prayer to purchase all the premises marked 1, 2 and 3, of the map attached to the said compromise petition. Both Ganga Devi and Debaki Devi were made parties to the suit purportedly with a view to purchase all the three parts from both the ladies. The said suit was dismissed on 07.07.1986 for default. After dismissal of the suit for specific performance of contract, no attempt was made to restore the suit. Ganga Devi purchased the plot marked as '1' vide registered sale deed dated 07.03.1981 and purchased plot marked as '3' vide registered sale deed dated 17.07.1987. After Title Suit No.23 of 1983 was dismissed on 07.07.1986, Ganga Devi purchased the suit property

marked as '2' vide registered sale deed dated 17.07.1987. The said property marked '2' is the suit property in the present lis. After the death of Ganga Devi on 03.02.1993, the plaintiffs succeeded to the suit property. The defendants on 01.11.1993 through their Advocate Sri G.B. Nanda claimed adverse possession over the suit property. Hence, the plaintiffs filed the present suit No.3 of 1994.

7. The defendants Babulal and his wife Krishna Devi filed written statement with the plea that their possession is protected under Section 53 (A) of the T.P. Act and they have acquired title by way of adverse possession and the suit is barred by the law of limitation.

8. The learned trial court framed the following issues:-

- I. Whether the suit as laid is maintainable in law ?
- II. Whether the suit is barred by law of limitation ?
- III. Whether the defendants have vacated 2 (two) portions of the entire tenanted premises in accordance with the compromise petition ?
- IV. Whether the defendants are protected under Section – 53 (A) of the Transfer of Property Act ?
- V. Whether the possession of defendants is permissive or adverse ?
- VI. Whether title to the suit house as passed to Ganga Devi or her successors in interest ?
- VII. Whether there is relationship of land lord and tenant between the parties ?
- VIII. Whether the plaintiff has any cause of action ?
- IX. To what relief the plaintiff is entitled ?

9. The learned Civil Judge (Senior Division), Rourkela passed the judgment on 02.02.1999 dismissing the suit on the following findings:

The defendants vacated the marked portions (1) and (3) in pursuance of the compromise decree dated 24.03.1981, but did not vacate the portion marked (2), which is the subject matter of the present suit. The defendants are not protected under Section 53 (A) of the T.P. Act. There exists no relationship of landlord and tenant between Debaki Devi (defendant No.11) and the defendants (1 to 10) as the same has been determined by virtue of the compromise decree dated 24.09.1981. Possession of the defendants is permissive and they have not perfected their title by adverse possession. The purchase by Ganga Devi from Debaki Devi (defendant No.11) by registered sale deed dated 17.07.1987 (Ext.8) cannot be effective and complete, as it was not backed by delivery of possession. There was no attornment in favour of Ganga Devi for which, she (or subsequently the plaintiffs) cannot derive any title. The plaintiff's suit is barred by limitation under Section 67 of the Limitation Act, as the suit was filed on 25.01.1994 and tenancy was determined on 24.03.1981, the date of compromise.

10. Against the judgment of the lower court, the plaintiff filed appeal in the court of the learned District Judge, Sundargarh bearing Title Appeal No.6 of 199. In the said appeal, the

defendants/respondents did not file any Cross Appeal. So far as the finding on Section 53 (A) of the T.P. Act and on permissive possession, given by the learned Civil Judge (Senior Division), Rourkela is concerned, the learned lower appellate court gave the following findings :-

Non-delivery of possession cannot be fatal to Ganga's purchase under Ext.8, as Debaki (defendant No.11) had transferred both her title as well as the right to seek possession, attornment is irrelevant to the present dispute, as absence of attornment can give a right to challenge the landlord's title. The suit is not barred by limitation because, on 24.3.1981, there was a compromise in the H.R.C. Case, on 22.1.1982, the H.R.C. Case was decreed, on 27.1.1984, T.S. No. 23 of 1983 was filed for Specific Performance of Contract, on 7.7.1986, T.S. No. 23 of 1983 was dismissed, on 15.7.1987, Ganga purchased the suit property vide Ext.8, on 1.11.1993, defendant gave reply to the plaintiff's lawyer's notice refusing to vacate the suit property on the plea of adverse possession, on 24.1.1994, the suit was filed and as there is no relationship of landlord and tenant, Article 67 of the Limitation Act does not apply as the present case is based on Article 65 of the Limitation Act and denial of title commenced from the date of filing of T.S. No. 23 of 1983.

11. The sale-deed Ext.8, has been thrown away by the learned trial court on two counts, such as, (i) there has been no delivery of possession and, (ii) there has been no attornment.

12. The sale deed Ext.8 clearly reveals that it is a transfer of all right, title, interest including the right to evict the tenants and get possession. Hence, the issue of delivery of possession becomes otiose. (See ***Hari Chand L. Sharna Mal. V. Gordhan Das Faqir Chand Vaish and others***, AIR 1957 Punjab 238). So far as attornment is concerned, the said question is irrelevant to the present case, when the defendants themselves claim title to the suit property and clearly assert (in paragraph 15 of the written statement) that there is no relationship of landlord and tenant between the parties, the requirement of attornment also becomes otiose. The main ground on which, the plaintiff's suit was dismissed and was reversed in appeal, is the ground of limitation. It is contended that Article 67 applies, when the landlord is obliged to take possession from the tenant, whose tenancy has been determined. In the instant case, the tenancy alleged to have been determined on 24.03.1981, when the H.R.C. case was compromised and the instant suit was filed on 24.01.1994, purportedly beyond time. This contention is wholly misconceived on the face of it. The defendants having clearly denied their status as tenants, cannot fall back on Article 67 to defeat the plaintiff's claim, otherwise also on 24.03.1981, when the compromise

was effected, cannot be construed as a date, when the tenancy was determined in terms of Section 111 of the Transfer of Property Act. The compromise itself is a conditional one, namely, giving vacant possession followed by sale of property. Therefore, in consonance with Section 111 (b) of the T.P. Act, tenancy did not terminate, as the event stipulated did not happen. It is only when the defendants filed a suit for specific performance of contract (T.S. No.23 of 1983) on 27.01.1984, the tenancy came to an end and a fresh title was claimed. Therefore, from that date, the suit was within time even otherwise.

13. On the aforesaid facts, with regard to the first question is concerned, the learned courts below having found that the possession of the defendant No.3 is permissible in nature, the learned lower appellate court is right in holding that Article 67 of the Limitation Act has no application to the present case.

14. The learned lower appellate court has, therefore, rightly held that Article 65 of the Limitation Act will govern the case. From the impugned judgment of the learned lower appellate court, it is clear that the learned lower appellate court after analyzing the law with regard to passing of title on a sale deed, has rightly interpreting the same, and came to the conclusion that the plaintiffs have acquired valid title over the suit property and thus, the defendants are bound by the sale deed executed in favour of the predecessor-in-interest of the plaintiffs.

15. With regard to the question whether the judgment of the learned lower appellate court is a nullity on account of non-substitution of the legal heirs of the defendant-respondent No.11, it would be seen that the order dated 10.04.2007 passed in this Second Appeal has clinched this issue against which, the appellants preferred LPA No.38 of 2007, which being dismissed on 03.08.2008, the matter was carried to the apex Court in SLP (C) No.20949 of 2009 and was dismissed by the apex Court on 13.08.2009.

16. In view of the above, the Second Appeal is devoid of merit and is accordingly dismissed, but in the circumstances without cost.

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M. M. Das, J.

**Orissa High Court, Cuttack.
January 30th, 2012/Biswal**
