

07. 15.05.2014

I have already heard learned counsel for the appellant on the admission of the Second Appeal.

It is to be found out as to whether the Second Appeal involves any substantial question of law. The Second Appeal is against the confirming judgment and decree passed by the learned first appellate court. The suit is basically for declaration of the plaintiff-appellant's right, title, interest and confirmation of possession over the suit land and for permanent injunction against the State of Odisha and the Tahasildar, Berhampur from interfering with appellant's possession.

Plaintiff's case, in short, is that prior to 1949 his father began to possess the suit land raising crops and constructing a dwelling house thereon. Though it was recorded as "Tank Paramboke" it was converted to agricultural land and house site. In the year 1961 plaintiff-appellant's father alienated his right and interest in the property in favour of the appellant and since then the appellant has been in continuous possession of the land. However, in the year 1970, the local Revenue Inspector reported that the appellant had encroached the land. On that report L.E.C. No.578 of 1971 was initiated. Initially, on 12.06.1984, the Tahasildar had recommended for settlement of the land in favour of the appellant but subsequently, on 23.09.1986, the Tahasildar passed order for eviction. In appeal and thereafter the revision against the said order the appellant having failed, he filed the suit. In the suit a prayer has also been made to declare the order passed in the LEC as null and void.

Both the learned courts below have recorded concurrent finding that appellant's plea that prior to 1949 his father was in possession of the land is not established and that it was in or around the year 1971 the appellant encroached the suit land.

At this stage, it is worth-mentioning that prior to this Second Appeal, the appellant had come before this Court in Second Appeal (S.A. No.9 of 2001) and while disposing of that Second Appeal, the following substantial questions of law were framed:

- 1) Whether in view of Section-16 of the O.P.L.E. Act, the suit of the present nature would be a bar?
- 2) Whether the learned courts below have committed an error of law in not consideration the case by applying the doctrine of lost grant by taking into consideration the alleged long possession of the appellant-plaintiff over the disputed property?

The first question was answered in favour of the appellant and it was held that the suit was maintainable. In that Second Appeal, this Court set aside the judgment and decree of the learned lower appellate court and remanded back the matter for disposal of the appeal afresh with a direction that the appellant's claim over the suit schedule property should be examined by applying the doctrine of lost grant. Accordingly, the learned lower appellate court has disposed of the appeal afresh observing, inter alia, that the claim of title by lost grant is

neither pleaded nor proved. It further observed that in the facts and circumstances, presumption of lost grant is not available in favour of the appellant.

The appellant has proposed the following substantial questions of law to be framed in this Second Appeal:

- 1) Whether the learned courts below were correct in holding that the acquisition of right by lost grant the period of limitation is 60 years when the so called L.E.C. Case No.678 of 1971 started by then the Section-28 of Limitation Act was amended and 60 years was reduced to 30 years under the Easements Act?
- 2) Whether the learned courts below were correct in applying the principles and provisions of Easements and Licence Act when the same is not strictly attracted for the theory of lost grant as it does not create an easement but only evidence of long user of the possession and right is desired?
- 3) Whether the learned courts below were correct in holding that the proceeding, i.e., L.E.C. Case No.578 of 1971 is maintainable when a “tank” is not covered by the definition of “Govt. land” in land settlement Rules, Orissa and as such it cannot interrupt running of adverse possession?
- 4) Whether the learned courts below were correct in negating the plea of adverse possession of the plaintiff basing on the order passed in the

O.P.L.E. proceeding which was started in the year 1971 and the eviction order passed on 18.09.1986 when the physical possession continued till filing of the suit in the year 2000 and admittedly no physical eviction was done in view of AIR 2001 SC pg.700?

Question Nos.2 and 3 are on the application of the theory of lost grant. Nowhere, the learned appellate court has held that the acquisition of the right by lost grant requires more than 60 years of continuous and uninterrupted enjoying of the property. That apart, the learned lower appellate court has committed no error in applying the principles and provisions of easement while determining the plaintiff's claim an application of the lost grant theory. It is well settled that even if a person cannot be entitled to a declaration of his right of easement under the Easements Act and the Limitation Act, he may claim the relief on lost grant basis. But one has to plead and prove facts from which the court can presume that there was a grant which is lost. This is otherwise known as easement from time immemorial. Therefore, the principles of easement can be made applicable to assess evidence on record to find out whether the theory of lost grant is applicable to the case.

Question Nos.3 and 4 above are irrelevant for the purpose of Second Appeal and those questions cannot be said to be involved in the case at hand.

Having gone through the materials available on record and having heard the submissions made by the learned counsels for the appellant, this Court does not find any substantial question of law involved in this Second Appeal. Hence, the Second Appeal is not admitted and the appeal memo stands rejected.

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R. Dash, J.