

HIGH COURT OF ORISSA, CUTTACK

R.S.A. No. 457 OF 2005

From the judgment and decree dated 06.12.2003 and 20.12.2003 respectively passed by the learned Civil Judge (Senior Division), Talcher in Title Suit No. 57 of 1998.

Smt. Tribeni Biswal.

.....

.....

Appellant

Versus.

State of Orissa & others

.....

Respondents

For Appellant : M/s. P.K.Khuntia, Maheswar Mohanty,
advocates.

For Respondents : Mr. R.P.Mohapatra,
Addl. Standing Counsel.

.....

PRESENT :

THE HON'BLE MR. JUSTICE D.DASH

Date of hearing : 17.04.2015 : Date of judgment: 30.04.2015

This appeal has been filed challenging the judgment and decree passed by the learned Additional District Judge, Talcher in R.F.A. No.3 of 2004 confirming the judgment and decree passed by the learned Civil Judge (Sr. Division), Talcher in Title Suit No.57 of 1998. The plaintiff has been unsuccessful in both the courts and her suit has been dismissed.

2. For the sake of convenience, in order to clarity and avoid confusion, the parties hereinafter have been referred to as they have been arrayed in the court below.

3. The appellant as the plaintiff claims to have purchased Ac.1.19 decimals of land as described in the plaint indicating the survey numbers from Lalita Mohan Acharya by registered sale dated 02.09.1995. It is her case that she has been possessing the suit land measuring Ac.0.05 dec. since then and it was under the possession of said Lalita Mohan Acharya from the time of last sabik settlement of the year 1932. The land purchased by the plaintiff was mutated and she received the ROR for the same. It is further stated that she constructed an outhouse as a part of the dwelling house over the suit land and used it as ingress and egress to the public road. It is also pleaded that the vendor of the plaintiff was using the same as a passage to the land from the public road. The plaintiff admits that the suit land is a piece of Government land. About fifteen years prior to the filing of the suit a permanent compound wall was built on the eastern line of the said bigger plot segregating the suit land outside the compound and there remained no way to enter the suit land except the entry only for the plaintiff. It is stated that since the time of the vendor the land belonging to the State has been in her possession and thereafter it has been in possession of the plaintiff. So for such open, peaceful and continuous possession asserting the right as of owner claiming title and denying the title of the true owner, it is stated that the title of the State stood extinguished so far as the suit land is concerned and the plaintiff thus seeks declaration of title over the suit land having acquired the same by way of adverse possession.

4. The State contested the suit. It is stated that the suit land has no relationship with the purchased land of the plaintiff and it is the Government property. The purchased land of the plaintiff was recorded in the name of the vendor of the plaintiff and it was having its boundary. It is stated that the plaintiff overnight constructed an outhouse over the suit land to grab the same and it is not the ingress and egress/passage for the plaintiff to go to his purchased land. The possession of the suit land by the vendor of the plaintiff is stoutly denied. It is stated that in the year 1995 when the plaintiff amalgamated the suit land with this purchased land immediately an encroachment case has been registered against the husband of the plaintiff who admitting himself to be an encroacher in the said proceeding has paid a fine of Rs.50/- and there he had never claimed that the land was under possession of Lalita Mohan Acharya or his wife, the present plaintiff. It is thus stated that the plaintiff had absolutely no right over it and the aim is to grab the suit which is a public property and since the husband has admitted the title of the State by paying fine, the wife has been set up as the plaintiff.

5. On such rival pleadings, the trial court framed eleven issues and has rightly taken up issue no.4 concerning the title of the suit land first since the answers to the other issues are all dependent upon the same. Finally the trial court on evaluation of evidence and testing those in the touchstone of the settled law holding the field has answered the same in the negative against the plaintiff. Accordingly, the answers to the other

issues have been rendered. The lower appellate court took up that issue no.4 as the point for determination in the appeal. On reappraisal of the evidence and discussing the position of law, it has also independently arrived at the same answer as has been given by the trial court. Thus, the concurrent finding of the courts below stand that the plaintiff has failed to prove her case of acquisition of title by adverse possession and that has been called in question in the present appeal.

6. The appeal has been admitted on the following substantial question of law:

“Whether the findings rendered by the courts below that the plaintiff has failed to establish her case of acquisition of title by adverse possession is perverse being the outcome of wholly improper appreciation of evidence as well as for non-examination of the same in the light of settled position of law?

7. Learned counsel for the appellant at the outset presses the petition under Order 6, Rule 17 read with section 151 of the Code of Civil Procedure numbered as Misc. Case No.693 of 2014. The amendment is sought for introduction of five paragraphs in the plaint. A bare reading of those paras reveals that some new facts are now going to be stated just in order to counter the grounds and nullify the reasons found out by the courts below on evaluation of the evidence in ultimately holding that the plaintiff has failed to prove her case. It can never be said that these facts were not within the knowledge of the plaintiff from the beginning. It is again said by introducing altogether a new story that in the current

settlement operation the area of the Government land has been increased and that has gone by way of reduction from the area of the plaintiff that too at this highly belated stage. Lastly, the very purpose of such amendment as stated in the said petition is as under:

“That though the above facts have been elaborately discussed in the plaint, still not specifically discussed as in exchange the plaintiff's are A.O.05 dec. is merged with Govt. land but in exchange the plaintiff's plot i.e. Plot No.397/1 A.O.05 dec. has not reflected in the plaintiff's R.O.R.”

The above is not properly understandable. However, the purpose as it is culled out may be to make elaboration. There is no explanation that in spite of due diligence the plaintiff has not been able to seek the introduction of these facts by such amendment for such a long period stretching over a period of more than fifteen years. Although the introduction of these paragraphs in the plaint as part of the pleadings would not change the nature and character of the suit but it would ultimately lead to a de novo trial of the suit which is highly prejudicial to the defendants to the advantage of an indolent plaintiff to wipe out the grounds taken by the courts below and reasons assigned while addressing the evidence to negate the plaintiff's claim. Introduction of such facts in the plaint at this stage in my considered view is not permissible in the eye of law which rather would run counter to the purpose and objective behind the engraftment of the said provision contained in Order-6, Rule-17 in the Code. There is total lack of due diligence and the proviso

introduced under Order-6, Rule-17 of the Code squarely comes into play and also stands on the way of grant of the prayer. Therefore, the petition for amendment of the plaint under Order-6, Rule-17 of the Code filed by the plaintiff-appellant is devoid of merit and is accordingly rejected. The Misc. Case as above thus stands dismissed.

8. Learned counsel for the appellant submits that the finding in respect of issue no.4 is perverse. According to him, Lalita Mohan Acharya was in possession of the suit land since 1932 and by the year 1995 he had already acquired title by adverse possession. So, Lalita Mohan Acharya having delivered the possession of the suit land to the plaintiff, she can well be said to have acquired title over the same. This aspect, according to him, has not been touched by the courts below and the principles of 'tacking' have not been correctly applied.

9. Learned counsel for the State while submitting that the concurrent findings of fact are not liable to be disturbed by this Court in seisin of the second appeal since nothing has been shown that either material evidence have been overlooked or that inadmissible evidence have been taken into consideration so as to say that the conclusion arrived at by the courts below is not acceptable under any circumstance.

10. Ownership of Lalita Mohan Acharya in respect of land measuring Ac.1.19 dec. as per the description given by the plaintiff is not in dispute. The basic of claim of the plaintiff is that the possession over the suit land by her vendor since the year 1932. No documentary

evidence is there in support of the same. The vendor or any of his heirs have not been brought to the witness box. There is no document to show that such possessory right of the vendor of the plaintiff, if any, over the suit land was also transferred by way of execution of any document so as to attract the principle of 'tacking'. The plaintiff states to have been in possession for just nine years prior to her deposing in the court and that apart also is unable to say since which year her vendor had been in possession till he sold. The courts below have found on fact by appraisal of evidence that the plaintiff has not been able to prove the factum of possession of the suit land of her vendor since the year 1932 as pleaded in the plaint by leading clear, cogent and acceptable evidence. The plaintiff in view of the settled principles of law relating to tacking is not entitled to get the benefit of long possession of the vendor if any in relation to the suit land, as on her own showing when she claims to have purchased the land from Lalita Mohan Acharya the same does not include the suit land. He has not been able to prove that such possessory right of her vendor was also transferred by any document or otherwise in her favour. So, accepting her possession from the year 1995, by the time of suit the period falls short of the prescribed period of 30 years for the purpose of acquisition of title by adverse possession so far as this land belonging to the State is concerned.

Another interesting feature that springs up in the case is that here the husband of the plaintiff in the encroachment proceeding has

paid fine admitting his status so far as the suit land is concerned as that of a rank tress passer liable to be evicted and to have remained at the mercy of the owner. The act of payment of fine, itself, shows the admission of title of the true owner. So for, whatever length of time the possession of the suit land might have been, on payment of fine the person paying the same cannot fall back and take the benefit of his prior possession, if any, so as to claim the benefit of acquisition of title by adverse possession as on the date of payment of fine, he in terms admitted the title of the true owner instead of objecting to the initiation of the encroachment case on the ground of extinguishment of title of the State and to have rested on him. In the instant case, nothing is stated by the plaintiff with regard to the initiation of the encroachment case against her husband. The proceeding of the encroachment case has been proved by the defendants and marked as Ext.B. It is not the case of the plaintiff that her husband used to reside under different roof having adverse interest to that of plaintiff and that with an aim or for the purpose of causing deprivation to the plaintiff, he had done so nurturing that deliberate intention. Furthermore, it is interesting to note that the plaintiff herself has proved notices of the encroachment proceeding which rather shows her knowledge about the same and her relationship as such.

All these above, go to whittle down the very foundation of the claim of the plaintiff. The concurrent findings of the courts below are thus found to be based on due and proper appreciation of evidence in the

backdrop of rival pleadings and settled position of law. The substantial question of law framed at the time of admission of the appeal is accordingly answered.

10. In the result the appeal stands dismissed and in the facts and circumstances without cost.

.....
D. Dash, J.

Orissa High Court, Cuttack
Date 30th April, 2015/Himansu.