

**HIGH COURT OF TRIPURA
AGARTALA**

RSA No.42 of 2014

Sri Uttam Shil,
son of late Nikhil Shil,
village: Bipin Nagar Colony,
P.O. & P.S. Kakraban, Udaipur,
South Tripura

----Appellant(s)

Versus

1. Sri Balai Chandra Dey,
son of late Prabhat Chandra Dey

2. Sri Kanai Lal Dey,
son of late Prabhat Chandra Dey

-both are resident of village: Bipin Nagar Colony,
P.O. & P.S. Kakraban, Udaipur, South Tripura

----Principal-Defendant-Respondents

3. *

3A. Smt. Shefali Shil,
wife of Sajal Shil

3B. Sri Mamon Shil,
son of Sajal Shil

-both are resident of village & P.O. Kakraban,
P.S. Kakraban, Udaipur, District: Gomati Tripura

4. Sri Kajal Shil,
son of late Nikhil Shil,
village: Poultry Road, P.O. Udaipur Court,
Udaipur, South Tripura.

----Proforma-Defendant-Respondents

[* In view of the order dated 28.05.2015 passed in C.M. Appl. 41 of 2015 arising from this appeal, the respondent No.3 has been substituted as the respondents No.3A and 3B.]

For Appellant(s) : Mr. D.K. Daschoudhury, Adv.

For Respondent(s) : Mr. D. Bhattacharya, Adv.

Whether fit for
Reporting : NO

HON'BLE MR. JUSTICE S. TALAPATRA

Judgment & Order

27.04.2018

Heard Mr. D.K. Daschoudhury, learned counsel appearing for the appellant as well as Mr. D. Bhattacharya, learned counsel appearing for the respondents.

02. This is an appeal by the plaintiff under Section 100 of the CPC from the judgment dated 01.08.2014 delivered in Title Appeal No. 21 of 2013 by the District Judge, South Tripura, Udaipur as it then was. That was an appeal by the plaintiff, which has been dismissed on affirmation of the judgment delivered by the trial court in Title Suit No.24 of 2011.

03. At the time of admitting this appeal, the following substantial questions of law were formulated by the order dated 02.02.2015:

- (i) **Whether there is any admission by the appellant at all in terms of Section 17 of the Evidence Act?**
- (ii) **Whether the possession has been determined by the first appellate court on the basis of such purported admission on perversely reading the materials on record of evidence?**

04. The suit was instituted by the plaintiff-appellant for declaration of title and consequential relief of perpetual injunction. It has been asserted in the plaint that on and from 01.08.1990 the plaintiff-appellant is in possession. On 01.08.1990, the father of the plaintiff-appellant dispossessed

the defendants No.1 and 2, the true owner of the suit land. Thereafter, the plaintiff has been possessing the suit land without any disturbance' and in an uninterrupted manner by exerting interest within the knowledge of the father of the defendants and the defendants and every people in the locality meaning, the possession was open. Despite that no action against them was taken by the defendant No.2.

05. The plaintiff has further contended that his father excavated a pond over the suit land for rearing fishes. Even he planted some fruit bearing trees. The plaintiff and his brothers, the defendants No.3 and 4 were occupying the suit land till institution of the suit. According to the plaintiff, on 31.07.2002, the said possession of his father and the plaintiff alongwith his brother (the defendants No.3 and 4) completed the 12 years and hence, the right of the defendants No.1 and 2 to recover the possession was extinguished in terms of Article 65 of the Limitation Act, 1963 and as such the title in favour of the plaintiff has matured by prescription, inasmuch as by an will, the father of the plaintiff namely Prabhat Chandra Dey gave the ownership of the said land to the plaintiff and his two brothers i.e., defendants No.3 and 4. The defendants No.3 and 4 had left the possession of the suit land leaving the possession exclusively to the plaintiff. It has been admitted by the plaintiff that the name of the defendants No.1 and 2 are available in the Khatian No.1046. There is no dispute that the suit land belongs to the

defendants No.1 and 2. Hence, their name is recorded in the khatian as the rayat. When the defendants No.1 and 2 started circulating the stories about the ownership over the suit land, the dispute was taken to the village elders including the Panchayat. According to him, the Panchayat failed to mitigate the matter and as a result there had been no other alternative but to approach this court.

06. By filing the written statement the respondents No.3 and 4 [the defendants No.3 and 4] have categorically denied the claim of the plaintiffs and stated that the suit land belonged to the plaintiffs and he acquired good title and interest over the suit land by way of adverse possession for more than statutory period of 12 years. It is to be recalled here that the defendants No.3 and 4 are full blood brothers who have definite interest over the suit land and according to the plaintiffs' case their father enjoyed the possession over the suit land, but the defendants No.3 and 4 did not give any specific date in their written statement. However, the principal defendants by filing their written statement have totally denied the claim of the plaintiff.

07. The defendants No.1 and 2 have categorically asserted that the plea of the plaintiff that the father of the plaintiff started forcible occupation over the suit land along with his sons with effect from 01.08.1990 is not true and without any foundation. Hence, they denied the said plea. According to them, the claim that the defendants No.1 and 2

have lost the right over the suit land is unsustainable in law, inasmuch as no materials have been placed in the plaint to show that the plaintiff has been adversely possessing the suit land. According to them, the suit land was khas land and in the year, 1959, the suit land was settled by way of allotment in favour of the father of the defendants No.1 and 2 and accordingly, new khatian being No.2174 was opened showing the plaintiff as the rayat in possession.

08. The defendants No.1 and 2 have also denied that the father of the plaintiffs namely, Prabhat Chandra Dey was in exclusive possession over the suit land. The land has been mutated in the name of the defendant No.1 in new R.S. Khatian No.1046 in respect of R.S. Plots No.7222, 7218,7219,7235, 7234 and 7236 which were curved out from the other khatian for a piece of land measuring 0.42 acre. There was an inquiry by a Tehshildar for demarcation of the boundary of the suit land, but the said report could not be admitted following the process as provided under Section 67 of the Evidence Act. The plaintiff has stated that the said report has supported his claim of possession. But since the said report was not admitted in accordance with law and the trial court has not accepted it for purpose of determining the possession.

09. On the basis of the rival contention several issues were framed:

- (i) **Whether the suit is maintainable in its present form and nature?**
- (ii) **Whether the suit is barred by law of limitation?**
- (iii) **Whether the plaintiff is entitled for a decree of right, title, interest and possession over the suit land?**
- (iv) **Whether the plaintiff is entitled for a decree of perpetual injunction against the defendants, their men, agents, etc. restraining them not to enter into the suit land nor to disturb the possession of the plaintiff over the suit land?**
- (v) **Whether the plaintiff is entitled for any other relief or reliefs?**

The trial court by the judgment dated 17.06.2013 dismissed the suit on observing that the plaintiff has failed to prove by the evidence that the plaintiff is possessing the suit land.

10. Being aggrieved by the said judgment dated 17.06.2013 the plaintiff filed the appeal under Section 96 of the CPC being Title Appeal No.21 of 2013 in the court of the District Judge, South Tripura, Udaipur as it then was. The said appeal was dismissed by the judgment dated 01.08.2014, which is challenged in the appeal, by holding that it is admitted that the respondents constructed house within the suit property. The person on adverse possession cannot clamour for in his favour. The appellant (in the first appeal) claimed the title over the suit land and injunction as a consequential relief.

11. Mr. D.K. Daschoudhury, learned counsel appearing for the appellant at the outset submitted that the suit land appertains to Khatian No.1046 of mouja-Kakrabon spread over four plots being R.S. Plot No.7222 (0.08 acre),

7234 (0.04 acre), 7235 (0.12 acre) and 7236 (0.09 acre) total measuring 0.33 acre [out of .42 acre]. Mr. Daschoudhury, learned counsel has submitted that even though the defendants No.1 and 2 have seriously contested the suit by filing the written statement, but there was no admission by the plaintiff about the possession of the defendant or to the effect that they are residing in the constructed homestead over the suit land. The suggestion as made in this respect has been denied by the plaintiff-appellant.

12. Mr. Daschoudhury, learned counsel has submitted further that on a keen reading of the documents it would be apparent that there is no such admission. On the contrary, it has been strongly denied that the plaintiff-appellant was not in a possession over the suit land since 01.08.1990 defying the right of the true owner. Mr. Daschoudhury, learned counsel appearing for the appellant has submitted that the record of right prepared in the year 1989 cannot be relied for coming to an inference to the effect that the name of the plaintiff or the defendants No.3 and 4 were not included in the column for showing the possession of the third party, but in some cases the record of rights (ROR) cannot be the final evidence for purpose of determining the possession when the ROR is not properly revised based on the field survey. In this respect, Mr. Daschoudhury, learned counsel has contended that even a person in peaceful possession is entitled to retain

his possession. Mr. Daschoudhury, learned counsel has relied on some reports which according to this court, do not have any relevance in the context of the case.

13. From the other side, Mr. D. Bhattacharya, learned counsel appearing for the respondents has quite succinctly submitted that the plaintiff-appellant has miserably failed to prove that he was in possession. According to him, not only in the ROR, even no evidence has been placed by the plaintiff-appellant to prove that he is in possession. Mr. Bhattacharya, learned counsel has submitted that the plaintiff-appellant did not refer to the outcome of the suit being Title Suit 07/2003 [in the court of the Civil Judge, Junior Division, South Tripura, Udaipur as he then was]. In that suit, by the judgment dated 17.06.2004 it was declared that the plaintiffs [the defendants No.1 and 2 in the present suit] are entitled to get perpetual injunction restraining the defendants in that suit from taking entry into the suit land or from disturbing the plaintiff in peaceful possession of the suit land.

14. On comparison of the schedule of the suit land in Title Suit No.07/2003 and the Title Suit No.24/2011, it appears that one plot being R.S. Plot No.7222 measuring 0.08 acre are common in both the suit and as such the claim of adverse possession over that plot can hardly be maintained for the reason that by the judgment and decree

dated 17.06.2014 [Exbt.D] title and confirmation of possession has been made in respect of R.S. Plot No.7222.

The said plot measures 0.08 acre whereas the total suit land is 0.33 acre. While that aspect of the matter was being considered by this court, it appeared that only on R.S. Plot No.7222, measuring 0.08 acre there was some construction and pond. The others are orchard etc. However, R.S. Plot No.7235 measuring 0.02 acre, has been shown as the bastu. But there is no reference to any structure.

15. Both the courts below, according to Mr. Daschoudhury, learned counsel, have committed a common mistake by treating the examination-in-chief of PW-2 as admission of the possession by the defendants No.1 and 2 on the suit land. But there is no such admission by the plaintiff in the cross-examination. For reference, the relevant part of the plaintiff's cross-examination is extracted hereunder:

"It is not a fact that we are not possessing the suit land since 1-8-1990 forcibly and illegally dispossessing the defendants. It is not a fact that my father and proforma defendants did not excavate a pond in the suit land and did not rear fishes there, or that did not plant fruit bearing trees or that did not grow green vegetables there. It is not a fact that on 31-7-02 the illegal possession of the father of the plaintiff, plaintiff and proforma defendant did not become ripened. It is not a fact that on and after 31-7-02 we did not acquire right, title, interest over the suit land by way of adverse possession. It is not a fact that the defendant Nos. 1 and 2 did not possess the suit land. It is not a fact that the contents of Para No.8, 9 and 10 in my examination in chief is not true or that it is contradictory. It is not a fact that we managed to prepare one false report in connivance with the Tahashildar of the Kakraban Tahashil vide Exhibit-2."

16. Having read that part of the cross-examination Mr. Daschoudhury, learned counsel appearing for the appellant has submitted that both the courts below has read

that part perversely. For purpose of re-verification the attention has been drawn to the observation of the trial court which reads as under:

"Whereas in his cross-examination he stated that he can not say the respective Dag numbers of the suit land. He also stated the boundary of the suit land. He knew that the defendants have their houses over the suit land. He cannot say the respective Dag numbers of the boundary over which the defendants' houses are there."

17. In the judgment of the first appellate court it has been further observed that:

"While deciding the issues, Learned Civil Judge (Sr. Division) discussed the oral evidence of the parties given. Plaintiff in his evidence admitted that defendants had their house over the suit land. Plaintiff of this case also stated that he cannot say respective dag number or boundary over which the defendants' house were constructed. The version of the plaintiff is supported by other four witnesses i.e. PW2, 3, 4 and 5. These witnesses also not aware about dag and khatian number of the suit land."

According to Mr. Daschoudhury, learned counsel there is no admission in this regard and this is a complete misreading of the evidence.

18. Mr. D. Bhattacharya, learned counsel appearing for the respondents while strongly opposing the contention advanced by Mr. Daschoudhury, learned counsel has submitted that the plaintiff-appellant has failed to prove the possession as open and hostile to the true owner. The incidence of dispossession as claimed to have occurred on 01.08.1990 has not been proved at all. If the plaintiff and the defendants No.3 and 4 have surreptitiously entered into the said plot that will not help them to get a declaration from the court that their possession was hostile and beyond the prescription. As such they cannot be protected by a decree of

perpetual injunction. That apart, Mr. Bhattacharya, learned counsel has referred a part of the judgment of the trial court where the trial court has observed that on perusal of Exhibit-1, it revealed that the defendants No.1 and 2 are the Rayati owners and possessors of total 0.48 acres of land spread over six Plots. Out of the six Plots, Hal Plot Nos.7222, 7234, 7235 and 7236 are the suit Plots in the suit. There is no mention in Exhibit-1 that the plaintiff is possessing any part of the suit land as a forceful occupier since 1990 till date. According to Mr. Bhattacharya, learned counsel, the records are inadequate to establish the claim of the adverse possession but the oral evidence as adduced by the plaintiff is the replica of the version of the PW-1 and as such the court cannot place any reliance on those.

19. As stated earlier Mr. Daschoudhury, learned counsel at the very outset has submitted that since the Khatian No.1046 [Exbt.-C] was published on 22.05.1989, there cannot be any entry regarding the possession between the plaintiff and the defendants No.3 and 4 for obvious reason as they came into the possession over the suit land on 01.08.1990 through their father.

20. Be that as it may, now the pertinent question is whether there was any admission. In terms of the Section 17 of the Evidence Act, this court does not find any admission by the plaintiff inasmuch as the admission should mean a statement made by a party to the proceeding, or by an agent

of any such party, whom the court regards, under the circumstances of the case, as expressly or impliedly authorized by him to make them, is called admission. It means that admission must be definite and unambiguous. But no such statement is available by the plaintiff-appellant in this regard.

However, the main and pertinent question which remain to be examined is that whether or not irrespective of the opinion and in view of the judgment dated 17.06.2004 [Exbt.D] read with the Khatian No.1046 [Exbt.C], whether this court can declare the adverse possession in respect of the schedule-C land. The answer must be in the negative as the revisional plot No.7222 has already been declared by the process of the court in Exbt.-D that the defendants No.1 and 2 not only the true owner but they are in possession against the said judgment though the plaintiff and the defendants No.3 and 4 were the party in the said suit but they did not advance any further action.

21. As consequence thereof, the said judgment has become final and the court cannot take a contrary view over the same issue. As such, the prayer in respect of the R.S. Plot No.7222 cannot be separately considered in the suit. Moreover, in proof of the possession, as has been asserted by the plaintiff-appellant it has been asserted that they have constructed the house on the suit land. As there is no construction as per the ROR, except on the plot No.7222,

this claim cannot be entertained, in absence of evidence in contradistinction.

22. In view of this, this court does not find any element of possession over the plots forming the suit land described under the schedule. The basis of some several statements it is very difficult for a court to come to a conclusion that the possession is adverse and the right of the true owner has extinguished in view of the provision of Article 65 of the Limitation Act. Moreover, in this appeal, the finding is concurrent.

23. Having observed thus, this appeal appears bereft of merit and accordingly the same is dismissed.

Prepare the decree accordingly.

Send down the records thereafter.

JUDGE

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