
(1973) 11 OHC CK 0004
In the Orissa High Court
Case No : Second Appeal No. 404 of 1971

Baidyanath Misra

APPELLANT

Vs

Lokanath Rath alias Misra

RESPONDENT

Date of Decision : 27-11-1973

Acts Referred:

Limitation Act, 1963 — Article 113
Orissa Estates Abolition Act, 1951 — Section 8A

Citation : (1974) 40 CLT 643

Hon'ble Judges : S.K. Ray, J

Bench : Single Bench

Advocate : G. Rath and R.K. Patra, for the Appellant; R.K. Mohapatra, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Ray, J.—The Plaintiff in a suit for partition has filed this second appeal from the reversing decision of the lower appellate Court. The Plaintiff and Defendant are the uterine brothers and members of one family as will be seen from the genealogy reproduced herein below:

Ananta Misra (wife) Mukta

Lokanath Baidyanath Udayanath

(Defendant) (Plaintiff) (died-1948)

Mukta's father and grandfather are respectively Harihar Rath and Gopinath Rath. Anata Misra, the father of the parties, died 45 years back and their mother Mukta died about 20 years ago. The Plaintiff filed the suit for partition in respect of "Ka" Schedule property of which "Kha" Schedule property is a part. "Kha" Schedule property was undisputedly the property of Mukta. There was, in fact, a partition 10 the year 1942 amongst the three brothers, namely, the Defendant, Plaintiff and late Udayanath. In evidence thereof a partition deed was registered which has been proved in this case as Ext. 1. The Plaintiff, in this suit, has sought

to ,reopen that partition on the ground that the said partition had been effected under a mistaken notion of the parties as to the statue of the Defendant m the family. Udayanath having died in 1948, his widow Hrudamani having died a civil death by remarriage in 1949, the Plaintiff also wants his share in the properties left by him.

2. The facts leading to the Plaintiff's aforesaid claim may now be set out in a little more detail. It is alleged that "Kha" Schedule lands were acquired by their mother Mukta by purchase from her mother Durga Bewa and maternal grandmother Maguni. Before the first partition in 1942, the three sons of Ananta were having jointly and the Defendant being the eldest member of the family was the karta. In the 1928 Settlement, the Defendant duly recorded all the joint family properties in the names of the Plaintiff and the Defendant. The Plaintiff was serving at Tata and was, therefore, remaining away from village. He found that the Defendant was trying to appropriate the joint family usufructs and, therefore, he desired a partition in 1942. In that partition, the Defendant represented that he was the adopted son of his maternal grandfather Harihar Rath who was the owner of "Khan Schedule properties, and on the faith of that representation "Khan Schedule properties were allotted to him and he did not take a share in the joint family properties in "Kan Schedule which were" divided between the Plaintiff and Udayanath. After the death of Udayanath on 17-7-1948, the properties allotted to his share were inherited by his widow Hrudamani, who in the year 1949, remarried. The Defendant, there after, forcibly possessed the lands of Udayanath and refused the Plaintiff's claim to the same. This led the Plaintiff to file O.S. No. 39 of 1954 for a declaration of his title to Udayanath's properties and for possession of the same. This litigation ultimately terminated in this High Court where, by the judgment dated 23-12-1963, it was declared that the Defendant was not the legally adopted son of Harihar Rath and that he also was entitled to a share in the joint family properties. It is, therefore, asserted that the 1942 partition having been vitiated on account of the fraudulent misrepresentation of the Defendant that he was the adopted son of Harihar Rath, it was liable to be re-opened. The Plaintiff has, therefore, prayed for partition of his half share in "Ka" Schedule and in case, such partition is not feasible, then the entire "Khan Schedule properties may be partitioned allotting moiety share to him.

3. The Defendant's case is that Since he was in service and well-placed in life and joint family properties were meagre he did not claim any share therein in the 1942 partition. Most of the lands in Khata 149 belonged to his mother Mukta who had recorded the same in his name in R.S. and he is in possession of the same since then and rest of the land in that khata had been purchased with his own earnings. He also claims holding numbers 152, 182, 260, 112, 183 and 21 as his separate properties, some of which had been purchased in the name of his wife and on her death he has become the owner in possession of those properties as her heir. With regard to the properties allotted to Udayanath in the 1942 partition, his case is that Hrudamani, the widow of Udayanath, had orally gifted

away the lands to him before her remarriage in 1949 and, since then, the Defendant is possessing the same exclusively in his own right. Thus, he being in possession of the same for more than twelve years, he acquired title thereto by adverse possession.

4. The trial Court excluded holding numbers 112, 182, 183, 21 and 260 from partition on the ground that they were the self-acquired properties of the Defendant. That findings was not challenged in the lower appellate Court and has thus became final. The lower appellate Court held that holding No. 152 was also the separate property of the Defendant. That finding does not appear to be affected with any infirmity and must, therefore, be upheld. Thus, even if the Plaintiff succeeds In re-opening the first partition of 1942 and a fresh partition is ordered, nevertheless, the holding numbers 152, 182, 260, 112, 183 and 21 must be excluded on the ground that they are the self-acquired and separate properties of the Defendant. The lower appellate Court has further found that holding numbers 149 and 259 are the properties of Mukta Dibya. In respect of these holdings the Defendant also claims to be in possession in his own right for more than 12 years and, it is claimed that if all other defences of his failed, he should succeed on the ground that he has acquired title thereto by adverse possession.

5. The lower appellate Court has dismissed the suit for partition on the finding that the Defendant has been in possession of the properties of his mother Mukta and of Udayanath as his own for more than 12 years and the Plaintiff not hading brought his suit within three years from the date of the decision of the Munsif in the earlier suit O.S. 39 of 1954, where the Defendant's adoption was held to be invalid, as provided under Article 113 of the new Limitation Act, he must be non-suited. With regard to Udayanath's properties, the Defendant having been in forcible possession of the same with effect from the year 1949 disclaiming overtly the interest of the Plaintiff therein, must be deemed to be in adverse possession and the continuity of such possession cannot be broken by reason of the decree passed by the High Court in O.S. 39 of 1954 declaring the Plaintiff's right in the same unless he got joint possession in pursuance of that decree and since there was no such delivery of possession to the Plaintiff, the Defendant has perfected his title by adverse possession.

6. It appears that in the 1942 partition some of Mukta's properties had been allotted to Udayanath's share and the rest of her properties were taken by the Defendant and the parental joint family properties of the parties were divided between the Plaintiff and Udayanath. Whatever may have been the representation by the Defendant at that time, he allowed Mukta's properties to be put into the hotchpots and a portion of it to be allotted to one of the brothers, the rest of Mukta's property being exclusively allotted to him towards his share on the ground that he was the adopted son of Harihar Rath. That representation was made patently for the purpose of allotting particular properties to him; other wise, allotment of some of her properties to Udayanath cannot be explained on

any other basis. If, as is now made out, the Defendant had been excluded from his share in the joint family properties on the ground that he was the adopted son of Harihar, he would have walked out from the family by taking all the properties of Mukta without allowing any part of it to Udayanath. Further, in maintaining the parity in the shares of the Plaintiff and Udayanath, the allotment of a small portion of Mukta's property to Udayanath has been taken into account. Thus, the necessary and inevitable conclusion is that by allowing such allotment of a part of Mukta's properties, the Defendant must be deemed to have put the entire properties in the hotchpot. In that view, once a partition has been effected in 1942, it cannot be reopened except under certain circumstances under which a partition can be reopened in law. The conditions under which a partition can be reopened are when there was a fraud resulting in unfair or unequal distribution or it was prejudicial to the interests of a minor coparcener or when it took place in the absence of an adult coparcener or for other allied causes. See *Chinna Venkata v. Venkata Rama* AIR 1957 A.P. 93. The same view has been taken by the Patna. High Court in the case of *Chhatradhari Mahton and Others Vs. Akleshwar Mahton and Others*, where the learned Judges have said:

...Where there has been once a partition, either proved or admitted, the presumption is that it was a complete partition both as to parties and as to property and that there is no presumption in such a case that any property was excluded from partition. The presumption, however, is rebuttable and its strength must necessarily depend upon the circumstances of each case.

The present suit for re-opening partition does not appear to come within any of the excepted principles envisaged by judicial decisions as indicated above. No fraud was committed in the 1942 partition by the Defendant. His adoption by his maternal grandfather fell through on account of a legal infirmity that the adoptee being the daughter's son of the adoptor and the parties being Brahmins, such adoption was invalid in law. Apart from that, as already stated, it appears from what happened in the 1942 partition that Mukta's properties which the Defendant was exclusively possessing and which were recorded in his own name both in the R.S. and the C.S. had been allowed to be partitioned along with the paternal properties and a part of it was, in fact, allotted to Udayanath. In view of these facts, there is no case for reopening the prior partition. Further, it appears from the Plaintiff's deposition in O.S. 39 of 1951 that he disclaimed all interest in Mukta Dibya's properties. He stated

All those lands of my mother were recorded in the name of Defendant No. 1 in the R.S. and C.S. Defendant No. 1 has been possessing and enjoying these lands. I have or had no interest in the lands purchased by my mother.

In view of that categorical statement of the Plaintiff in the prior suit, the Defendant must, in the alternative, be held to have acquired title to the properties of Mukta by adverse possession.

7. Coming to Udayanath's properties, it would be seen that the joint family had

stood disputed after 1942 partition. As a result of such partition, the property that was allotted to Udayanath became his separate property. After the death of Udayanath, Defendant came into possession of his property either by way of gift from his widow or otherwise. But the fact is that he was in exclusive possession of Udayanath's property since 1949 in his own right, when Hrudamani, the widow of Udayanath, remarried. The Plaintiff has admitted in his deposition as follows:

Till the remarriage of Hrudamani, Lokanath (Defendant) was possessing all the properties of Udayanath. After remarriage of Hrudamani, I asked Defendant to deliver possession to me. He did not recognise my right and refused to deliver possession. So I filed the suit. Till now all the properties of Udayanath are being possessed by the Defendant.

In view of this categorical admission of the Plaintiff, I do not find any lacuna in the finding of the lower appellate Court that the Defendant had also perfected his title to the properties of Udayanath by adverse possession.

8. It also appears from the record that most of the suit lands appertained to Makadami interest and that interest having vested in the State, they have been settled with the Defendant as a result of his claim made under the provisions of the Orissa Estates Abolition Act. For the same reason, the Plaintiff having omitted to prefer any claim u/s 8-A of the Orissa Estates Abolition Act, his title thereto, if any, must be taken to have been extinguished by operation of law.

9. It is true that the plea of ouster has not been specifically pleaded in the written statement, but he has expressly stated that he has been in possession of the disputed properties for over twelve years in his own right peacefully and overtly and without any interruption and, as such, he acquired title thereto. This plea, as against the Plaintiff, clearly intimates him that this pleading is nothing but a pleading of ouster though loosely worded as "adverse possession".

10. For the aforesaid reasons, I have no doubt in my mind that the decision of the lower appellate Court has been correctly arrived at. The appeal, therefore, fails, and is accordingly dismissed. But in the circumstances of the" case, parties will bear their own costs throughout.