

**(1969) 09 OHC CK 0020**  
**In the Orissa High Court**  
**Case No : Second Appeal No. 485 of 1964**

|                             |    |            |
|-----------------------------|----|------------|
| Duna Tanka Patro and Others |    | APPELLANT  |
|                             | Vs |            |
| T. Sima Patro and Others    |    | RESPONDENT |

**Date of Decision :** 22-09-1969

**Acts Referred:**

Criminal Procedure Code, 1898 (CrPC) — Section 145  
Orissa Estates Abolition Act, 1951 — Section 8

**Citation :** (1969) 35 CLT 1236

**Hon'ble Judges :** B.K. Patra, J

**Bench :** Single Bench

**Advocate :** G. Rath, D.C. Mohapatra and D. Mohanty, for the Appellant; B.K. Pal, Bijoy Pal and A. Mohanty, for the Respondent

**Final Decision :** Allowed

## Judgement

B.K. Patra, J.—This is an appeal against an appellate judgment of the Subordinate Judge, Berhampur reversing a decision of the Munsif, Aska in a suit brought by the Plaintiff-Appellants for a declaration that they have got occupancy rights over the disputed land and for recovery of possession of the same from Defendant-Respondents.

2. The Plaintiffs brought the suit as representing the villagers of Maharajpur against the Defendants representing the villagers of Jagdalpur. The disputed lands measuring about 5.19 acres, and about 35 acres of land not in dispute in this litigation, were admittedly the Heta lands belonging to Zamindar of Dharakote and are situated on the outskirts of four villages forming a group called Siddhanai group of villages. This group comprises mouzas Siddhanai, Bodogodo Atharango and Maharajpur. Admittedly, mouza Jagdalpur is not one of the villages comprised in this group. There is no dispute that the Zamindar used to lease out the Heta lands to the royats of the villages comprised in Siddhanai group. Later, however, as dissensions grow amongst the royats of the four villages they divided the Heta lands amongst themselves and it is not disputed

that four plots of land comprised in survey Nos. 67, 740, 61 and 1288 fell to the share of the rayats of Maharajpur and they continued to cultivate the same as lessees under the Zamindar. This state of affairs continued till the abolition of the Zamindaries in 1953 and by reason of Section 8 of the Orissa Estates Abolition Act (hereinafter referred to as the Act), the persons in possession of the lands acquired rights of tenancy therein. According to the Plaintiff-Appellants, the lease of Heta Lands which was being obtained from the Zamindar of Dharakote was by the rayats of the aforesaid four villages residing in the said villages and no non-resident rayats had ever any right therein and that in the partition which took place amongst the four villagers, the four plots of lands bearing survey Nos. 67, 740, 61 and 1288 were allotted to the resident-rayats of Maharajpur. The case of the Defendant-Respondents, on the other hand, is that these four plots of land fell to the share of all the persons who own lands in Maharajpur village both resident and non-resident rayats and that as they (Defendants) own almost half the lands of Maharajpur, they were also entitled to a share in a four plots of land in proportion to the lands they held. This is the real contest between the parties. The further case of Defendant-Respondents is that subsequently in the year 1956 there was partition of four plots of lands referred to above between the resident rayats of Maharajpur and nonresident rayats of that village, namely, the Defendants and in the said partition, the two disputed plots of land, namely, plot Nos. 61 and 1288 fell to the share of Defendants and that they are in possession thereof since then. A proceeding u/s 145, Code of Criminal Procedure was instituted by the Police in respect of these two plots of land in which the Plaintiffs and Defendants were parties and the aforesaid proceeding which went up to the High Court ultimately terminated in favour of Defendants who were declared to be in possession of the disputed lands. This is the reason why the Plaintiffs filed the suit giving rise to this appeal claiming the reliefs above mentioned.

3. One of the issues framed in the suit for determination was whether the suit lands belong to the residents of Maharajpur or were they the properties of the persons having rayati holdings at Maharajpur. The learned Munsif held that it is only the resident rayats of Maharajpur who are the owners of suit lands and that the persons having lands in Maharajpur but not residents of that village have no manner of right therein. In view of this finding, he held that the Plaintiffs are the sole-owners of the disputed lands and that the Defendants have no right therein. He also disbelieved the case set up by the Defendants that in a partition between them and the Plaintiffs the disputed lands fell to their (Defendants) share. In view, however, of the fact that the State Government, which is admittedly the superior interest-holder in respect of the suit lands, has not been made a party, the learned Munsif held that the Plaintiff-Appellants should not be entitled to a decree declaring their alleged occupancy rights in the suit lands and therefore refused to give such a declaration.

But in view of his finding that the Plaintiff-Appellants were in possession of the lands on the date of abolition of Dharakote estate, he held that Plaintiffs acquired a right of tenancy therein by operation of Section 8 of the Act and as such are

entitled to recover possession of the same from Defendants and passed a decree accordingly.

4. On appeal, the learned Subordinate Judge on an exhaustive consideration of the evidence oral and documentary on record arrived at the conclusion that the Defendants who won Jeraiti lands in village Maharajpur were cultivating the Rata lands along with the rayats of Maharajpur and accordingly acquired a tenancy right in respect of the same when the Zamindary was abolished, and in view of his further finding that so far as the disputed plots are concerned, the Defendants are in possession thereof, he allowed the Appeal and dismissed the suit. The Plaintiffs have come up to this Court in second appeal.

5. Mr. G. Rath, learned Advocate for the Appellants, assails the judgment on the following grounds:

(1) Ext. A has not been properly proved and therefore, the finding of the learned Subordinate Judge that the residents of Jagdalpur village owning Jeraiti Lands in Maharajpur village are entitled to a share-in the Heta Lands which" has fallen to the share of Maharajpur village which is based on Ext. A is vitiated.

(2) The impact of Section 8 of the Orissa Estates Abolition Act has not been considered by the appellate Court.

(3) The Munsif has disbelieved the Defendants case that there was a partition of survey Nos. 67, 740, 61 and 1288 between the resident non-resident rayats of Maharajpur village. The Subordinate Judge has not disturbed this finding. Assuming, therefore, that Jagdalpur resident owning Jeraiti lands in Maharajpur do have an interest in the Heta Lands of Maharajpur, the position is that both the resident and non-resident rayats of Maharajpur are jointly entitled to the aforesaid four plots of land which include the disputed lands and that therefore the learned Subordinate Judge was not justified in dismissing the suit in toto, but should have passed a decree allowing the Plaintiffs to possess the disputed lands jointly with the Defendants.

6. Regarding the first point, the contention of the learned Advocate for the Appellants appears to be well-founded. Ext. A is a notice dated 14-11-1937 purported to have been issued by the Dharakote estate to certain persons mentioned therein stating that the Heta lands situated in sidhanai village had been leased out in 1937 in the name of Duna Jagannath Patro of Maharajpur and that the due share of Raj-bhag should be paid to him. The persons addressed include three persons of Jagdalpur village which admittedly is not within the Sidhanai group. There is no dispute that if Ext. A is a genuine document and is legally admissible in evidence, it would considerably strengthen the case of the Defendant-Respondents. This document is purported to have been issued by one B. Misra, the Sheristadar of the Dharakote estate. All that is proved about this document is that d.w. 6 has come and deposed that this document was scribed by one Narain Panda and signed by one Basudeb Misra. This witness admitted that he has no personal knowledge regarding this document. Where the

correctness of the contents of a document produced in Court is in issue, that should be proved by calling the executor of the document as a witness. It is not enough to merely prove the signature or the hand-writing of the person who is alleged to have executed that document. The contents of the document cannot be proved by a witness who, though acquainted with the signature or the hand writing of the persons who signed and wrote the document, has no personal knowledge whatsoever about the contents. Ext. A is therefore to be excluded from consideration while determining the question whether the Defendants have any interest in Heta lands falling to the share of Maharajpur village.

7. But the finding of the learned Subordinate Judge on this issue is not entirely based on Ext. A. In arriving at the conclusion, the learned Subordinate Judge has also relied on oral evidence and also on documents admitted in the case on both sides. He has taken into consideration and discussed the documentary evidence on which parties have relied, and the oral evidence adduced on both sides, and after discussing the evidence from all its aspects, he has given reasons why he preferred to accept the evidence let in on the Defendants' side that the non-resident rayats of Maharajpur have got an interest in the Heta lands that fell to the share of Maharajpur village. One of the important considerations which weighed with the learned Judge to arrive at the conclusion which he did was that at the time of division of Heta lands amongst the four villages comprised in Sidhanai group, the basis that was adopted was the extent of Jeraiti lands in each village. He therefore, held that being the basis of division, it is only natural that the owners of Jeraiti lands in a particular village whether residents or non-residents would have interest in the Heta lands. This and the other reasons on which the conclusion is based cannot at all be said to be perverse so as to justify interference in Second appeal. This case has therefore to be decided on the footing that the Defendants who are non-resident rayats of Maharajpur village have along with the resident-rayats an interest in survey Nos. 67, 740, 61 and 1288 which, it is the common case of both parties fell to the share of the Maharajpur village in the partition that was effected amongst the four villages comprised in Sidhanai group.

8. So far as the second point is concerned, the learned Munsif has taken Section 8 of the Orissa Estates Abolition Act into consideration and held that on the basis of his finding that the Plaintiffs alone were in possession of the lands at the time of abolition of the Zamindari, that they acquired a right of tenancy in the lands by operation of Section 8 of the Orissa Estates Abolition Act. Although the learned Subordinate Judge has not made any specific reference to the said Act, the fact that on the basis of his finding that the Defendants are in possession of the lands, the dismissed the suit shows clearly that he proceeded on the footing that Section 8 applied and that the persons in possession of the lands at the time of abolition of the estate acquired no tenancy right therein. The applicability of Section 8 of the Act is not challenged in this Court by any of the parties.

9. So far as the third point raised by Mr. Rath is concerned, it is a fact that the

learned Subordinate Judge has not given any categorical finding that in a subsequent partition between the resident and non-resident-rayats of Maharajpur, the disputed two plots of land had fallen to the share of the Defendant Respondents. But his finding is that the Defendants are in possession of the disputed lands. In fact, their possession was declared in a proceeding u/s 145, Code of Criminal Procedure and the allegation of the plaint is that the Defendants are in possession since before the institution of the suit. On the basis of findings given by the appellate Court, the legal position is that the Plaintiffs and the Defendants are co-owners in respect of all the four plots comprised in survey Nos. 67, 740, 61 and 1288. Out of these four plots, the disputed plots 61 and 1288 are in possession of the Defendants and survey Nos. 67 and 740 are undisputedly in possession of the Plaintiffs. There cannot be any dispute that in this view of this position, the Plaintiffs are not entitled as prayed for by them to exclusive possession of the two plots of lands. The question is whether, in the circumstances, they are at least entitled to get joint possession of these two plots of land along with Defendant-Respondents. The position is well settled that a co-sharer can only sue for partition if the other co-sharer is in possession of joint property not exceeding his share. He cannot sue for recovery of possession. In *Ramchandra Saha and Others Vs. Lakshmi Kanta Saha and Others*, , Bench of Calcutta High Court held that where one co-sharer is in sole occupation of a portion of a joint property but his possession is not hostile or inconsistent with the joint ownership of the other co-sharer, the latter is not entitled to get a decree for khas possession of such property. It is true that in the present case, the Defendant-Respondents are claiming exclusive possession over the disputed property but, that is on the basis of the case set up by them that originally it as joint property and that in a partition effects in 1956 between them and Plaintiffs, these two plots of land were allotted to their share. If the case relating to partition fails, the parties are relegated to the position of co-owners in respect of not only the two disputed plots of land but also of the other two plots 67 & 740 which according to Defendants, had fallen to the Plaintiff's share. It cannot, therefore, be said that the Defendant-Respondents are claiming title in themselves hostile to that of the Plaintiffs. The Privy Council in *Midnapur Zamindary Co. Ltd. v. Kumar Naresh Narayan Roy and Ors.* AIR 1924 P.C. 144, has held that where lands are held in common by co-sharers, each co-sharer is entitled to cultivate lands which is not being cultivated by the other co-sharers and that such exclusive use of land held in common by a co-sharer does not amount to an ouster of his en-sharers from the latter's proprietary rights as co-sharers in the land. It is argued that the Plaintiffs being co-sharers in respect of the disputed lands with Defendants, they, are entitled to a decree for joint possession. There would have been some force in this argument had the present suit comprised all the properties in respect of which the Plaintiffs and Defendants are co-owners but the facts are that the Plaintiffs ate in exclusive possession of the other two plots of land, namely survey Nos. 67 and 740 which are part of the joint property. The Plaintiffs have nowhere said that they are prepared to jointly possess these two plots of land along with Defendants. The argument of Mr. Rath

for the Appellants that the Defendants, if so advised, may file a separate suit claiming joint possession in respect of plot Nos. 67 and 740 does not appear to me to be an equitable course to follow in the circumstances of this case. The right of the Plaintiff-Appellants would in my opinion be sufficiently safeguarded by giving them a declaration that the possession of the Defendant Respondents in the lands dispute will be that of co-sharers subject to adjustment at the time of partition. Such a course was followed by Division Bench of the Lahore High Court in Sukh Dev v. Paisi.

10. In the result, this appeal is allowed to the extent that instead of the suit being dismissed, the Plaintiff-Appellants are granted a declaration that the possession of the Defendant-Respondents in the disputed lands would be that of co-sharers subject to adjustment at the time of partition. In the circumstances, I direct that the parties should bear their own costs of this Court.