

(1969) 10 OHC CK 0001

In the Orissa High Court

Case No : Second Appeal No. 94 of 1965

Durga Charan Naik and Others

APPELLANT

Vs

Banshidhar Naik and Others

RESPONDENT

Date of Decision : 06-10-1969

Acts Referred:

Citation : (1970) 36 CLT 295

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

Bench : Single Bench

Advocate : R.C. Patnaik, for the Appellant; A.K. Rao and M.K.C. Rao, for the Respondent

Judgement

S.K. Ray, J.—Defendants 2 to 7 and a-Ka have filed this appeal from the confirming decision dated 17-11-1964 of Sri K.N. Sarkar, additional subordinate Judge, Balasore, passed in Munsif Appeal No. 39/11 of 1962.

2. One Sadananda Mohapatra died in or about 1911, leaving four sons, viz., Banchhanidhi Shayama Charan, Dheneswar and Damodar Naik. Shortly after the death of Sadananda, his four sons divided in mess and residence and separately possessed different portions of their property, without partitioning them by metes and bound. This amicable separation and possession continued. Thereafter different co-sharers acquired fresh properties. Ka and Ga Soh. lands are the ancestral properties. Soh. Kha lands were jointly acquired by Banchhanidhi and Shayama Charan. Banchhanidhi, the Plaintiff, alleges that he has 1/4th share in Schedules Ka and Ga. and a half share in Kha Soh. lands, and was possessing portions of these lands which are shown in red colour in the rough sketch map appended to the plaint, and Defendant-1 surreptitiously and fraudulently got recorded these lands in his name in the current settlement, and be having found it out, has filed the suit for a declaration that he has got 1/4th share in Schedule Ka and Ga, and a half share in Schedule Kha properties, and for confirmation of his joint possession of Ka and Ga Schedule. along with Defendants-1 to 11, and for confirmation of his joint possession of Kha Schedule. property along with

Defendant-1, and for appropriate injunction against Defendants-1 to 11 restraining them from interfering with his title and possession of the plaint Sch. lands.

3. The original Plaintiff was Banchhanidhi. He having died, his son has been substituted as Plaintiff. Shyama Charan was the original Defendant-1 whose heirs also, upon his death, have been substituted. Defendants 10 and 11 are the sons of Dhaneswar, the third son of Sadananda and Defendant 9 is the son of late Damodar, 4th son of Sadananda. Defendants 2 to 4 are the Sons and Defendants 5 to 7 are the grandsons of late Defendant-1. Defendants 8 to 11 are the alleged co-sharers of Schedule Ka and Go. properties. Defendants 12 to 25 are the pro forma Defendants.

4. Defendants 1 to 7 filed one set of written statement. Defendants 4-Ka and 4-Kha have filed another set and the minor Defendants, 18, 19, 23 and 24 appearing through their pleader guardian, pleaded that the Plaintiff should prove his case. The other Defendants remained ex parte.

5. The substantial defence of the Defendants is that Sadananda died in 1904 leaving four sons. There was separation in mess and status among the members of the joint family in 1908. Before such separation many properties had been acquired for the family mostly in the name of the Plaintiff and his sons and some properties were indiscriminately recorded in the name of the co-sharers in the revision settlement. These properties had been acquired from the joint family contract business. At the time of such separation in mess and residence each and every item of the family property had been divided but it was mutually agreed that they were to possess the lands amicably, roughly in accordance with their shares. Accordingly, the co-sharers are possessing the lands since 1919 exclusively and the current settlement record of rights have been made in accordance with such partition. In the said partition of 1919, the entire suit land had fallen to the share of Defendant-1, and are in his exclusive Khas possession for more than 12 years. In other words, Defendant-1 had acquired title to the suit lands by adverse possession.

The second defence was that the Suit is not maintainable in its present form without bringing a suit for general partition.

6. The trial Court held that there was no previous partition as claimed by the Defendants and the Defendants had acquired no title by adverse possession. The suit, in its present form, is maintainable. The shares claimed by the Plaintiff are correct except in respect of plot No. 2541/3028 (AO 03) of Ka Schedule in which the Plaintiff has no interest. All these findings of the trial Court have been confirmed by the lower appellate Court.

7. The points taken by learned Counsel for the Appellants are: (i) The suit is not maintainable without seeking a general partition; (ii) The Courts below have not given any finding on adverse possession on a consideration of evidence, so also no finding has been given whether the suit-property is joint family property or

not; and (iii) the findings arrived at by the Courts below no injunction can be granted.

8. The question of maintainability was specifically raised in the Courts below, and the trial Court has, on a consideration of Judicial decisions on the point, held that the suit is maintainable in its present form. The question of maintainability acquires importance on the hypothesis that the suit-lands are the joint family properties, and have not been the subject matter of any partition by metes and bounds and that the Plaintiff is in exclusive possession of some portions of the suit-land and is in joint possession with other co sharers in respect of some other properties. In the absence of any division by metes and bounds every co-sharer is the owner of every inch of the joint family property though his share may be a fraction of the whole, and if such a co-sharer is in exclusive possession of a portion of the joint family property, can he resist the claim of the other co-sharers to joint possession with him in respect of the property of which he is in sole possession, or can he sue for maintaining his exclusive possession against his co-sharers without suing for general partition.

9. Dealing with the rights of co-sharers in regard to joint family property in the exclusive possession of one such co-sharer, Sir Barnes Peacock gave the opinion of the Board in the case of *Robert Watson Co. v. Ram Chand Dutt* 17 J.A. 110, as follows:

It appears to their Lordships that, in a case like the present, an injunction is not the proper remedy. In India a large proportion of the lands, including many very large estates, is held in undivided shares, and if one share-holder can restrain another from cultivating a portion of the estate in a proper and husband like manner, the whole estate may, by means of cross-injunctions, have to remain altogether without cultivation until all the share-holders can agree upon a mode of cultivation to be adopted, or until a partition by metes and bounds can be effected—a work which, in ordinary course, in large estates would probably occupy a period including many seasons. In such a case, in a climate like that of India, land which had been brought into cultivation would probably become waste or jungle, and greatly deteriorated in value. In Bengal the Courts of justice, in cases where no specific rule exists, are to act according to justice, equity and good conscience, and if, in a case of share-holder holding lands in common, it should be found that one share-holder is in the act of cultivating a portion of the lands which is not being actually used by another it would scarcely be consistent with the rule above indicated to restrain him from proceeding with his work, or to allow any other share-holder to appropriate to himself the fruits of the other's labour or capital.

Similar question again arose before the Privy Council in the case of *Midnapur Zamindary Co. Ltd. v. Naresh Narayan Roy* 51 J.A. 293. There the Privy Council said as follows:

Where lands in India are so held in common by co-sharers, each co-sharer is

entitled to cultivate in his own interests in a proper and husband like manner any part of the lands which is not being cultivated by another of his co-sharer, but he is liable to pay to his co-sharers compensation in respect of such exclusive use of the lands. Such an exclusive use of lands held in common by a co-sharer is not an ouster of his co-sharer from their proprietary right as co-sharers in the lands. When co-sharers cannot agree how any lands held by them in common may be used, the remedy of any co-sharer who objects to the exclusive use by another co-sharer if lands held in common is to obtain a partition of the lands. No co-sharer can, as against his co-sharers, obtain any jote right, a right of permanent occupancy, in the lands held in common nor can he create by letting the lands to cultivators as his tenants any right of occupancy of the lands in them.

It appears from these two decisions of the Privy Council that a co-sharer may be in exclusive possession of the joint family property and that such exclusive possession would not amount to an ouster of the co-sharers from their proprietary right as a co-sharer, and if a co-sharer in exclusive possession cannot agree how the lands held by them in common may be used, the remedy for the other co-sharere is to file a suit for general partition. They also further defined the limits of the co-sharers.

10. It would therefore appear that theoretically it is open to a co-sharer to maintain his exclusive possession against another co-sharer and to that end may pray for relief for such injunction. The question so as to what relief a co-sharer objecting to the exclusive possession of another co-sharar of apart of the joint family propriety is entitled would depend upon the facts and circumstances of each case and the right to relief for injunction may be granted or withheld according as the circumstances of a case may justify. The factors like on which said the balance of convenience would He in granting or refusing relief of injunction and whether any material or substantial injury is being caused to the Plaintiff who is suing for injunction to protest his exclusive possession against his co-sharers which cannot be compensated or vice versa, must always enter into consideration in determining whether relief of injunction is to be granted or not. In my view, therefore, the present suit is maintainable in law, and the number of decisions which I need not deal with cited at the bar on behalf of the Appellant, do not lay down any proposition which would militate against the maintainability of the present suit. On the -contrary, they appear to support the view that such suits as the present are maintainable.

11. Even though I agree that the suit is maintainable, nevertheless in view of the fact that the question of adverse possession has not been discussed and appropriate findings given thereon by the lower appellate Court the case must go back to him for rehearing of the appeal and giving his findings on the issue of adverse possession and on other issues categorically and thereafter dispose of the appeal in accordance with law.