
(1953) 11 OHC CK 0003
In the Orissa High Court
Case No : Second Appeal No. 77 of 1949

Gumani Puntia

APPELLANT

Vs

Khetrabasi Puntia and Others

RESPONDENT

Date of Decision : 11-11-1953

Acts Referred:

Limitation Act, 1908 — Article 142, 144

Citation : AIR 1954 Ori 189 : (1954) 20 CLT 68

Hon'ble Judges : Narasimham, J

Bench : Single Bench

Advocate : B.N. Das, S.C. Das, G.K. Misra and B. Dube, for the Appellant; M.S. Rao, for Respondents (Nos. 1 to 4), for the Respondent

Final Decision : Allowed

Judgement

Narasimham, J.—This appeal is by defendant No. 1 against the appellate judgment of the District Judge of Balasore reversing the judgment of the Munsif of Bhadrak and decreeing the plaintiffs' suit for declaration of title and confirmation of possession in respect of about 2.294 acres of raiyati lands situate in villages Ajmatpur and Bargade in Bhadrak sub-division.

2. The disputed properties appertain to khata No. 41 of Ajmatpur and khata No. 119 of Bargada and originally belonged to one Nalu Puntia after whose death in 1924 his widow Mauli Bewa became the limited owner. The total properties which devolved on Mauli Bewa after her husband's death consisted of 3-66 acres of which .01 cent. was homestead in which her residential house was situated. On 21-5-27 Mauli Bewa executed a sale deed (Ext. 6) conveying 3.65 acres of her properties in favour of defendants 3 to 5 who are the sons of her maternal uncle for a sum of Rs. 250/-. By this sale deed, she practically transferred all her properties except .01 cent, containing her residential house.

On 13-5-41 she executed another sale deed (Ext. D) conveying 3.52 acres of her properties to defendant No. 1. This slight difference in area was due to the

Current Settlement which took place in 1924-28. The case of defendant No. 1 was that the first sale deed of Mauli Bewa (Ext. 6) in favour of defendants 3 to 5 was a bogus deed by which no title passed, that Mauli Bewa continued to remain in possession of all the properties of her husband till she transferred them to defendant No. 1 by the sale deed (Ext. D) dated 13-5-1941; but by way of abundant caution defendants 1 and 2 thought it prudent to take two other sale deeds (Exts. 4 and 5) from defendant No. 3 on 13-10-41 conveying the same properties to them. At this stage it may be noted that defendants 3, 4 and 5 are own brothers who were living jointly; defendant No. 3 being the karta of the family residing in the village. Defendants 4 and 5 were taking out their livelihood in Calcutta.

On 24-4-44 the plaintiffs managed to secure another sale deed (Ext. 3) from defendants 4 and 5 by which they conveyed their two-thirds share of the properties to the plaintiffs for a sum of Rs. 250/-. The plaintiffs alleged that by virtue of the sale deed of 1944 from defendants 4 and 5 they were entitled to two-thirds share of the properties and as defendant No. 1 interfered with their possession of the same they filed the suit for declaration of title and confirmation of possession. The cause of action is alleged to have taken place on 22-6-45 and the suit was instituted on 4-12-45.

The learned Munsif held that Mauli Bewa's first sale deed dated 21-5-27 was a bogus sale deed by which no title passed and that she continued to remain in possession of the disputed properties till the execution of her second sale deed dated 13-5-41 (Ext. D) in favour of defendant No. 1. The motive for the execution of such a bogus deed was alleged to be her attachment for the family of defendants 3 to 5 whose father (her maternal uncle) had brought her up from her infancy and given her in marriage. It was suggested that she was anxious that after her death the properties should devolve on her maternal cousins (defendants 3 to 5) and with a view to avoid litigation with her husband's reversioners she executed that sale deed making it appear as if it was executed for legal necessity by a limited owner for consideration. In view of this finding of the learned Munsif, he held that defendants 3, 4 and 5 did not acquire any title to the properties by virtue of Mauli's first sale deed (Ext. 6) and consequently defendants 4 and 5 could not convey any title to the plaintiffs by their sale deed (Ext. 3) dated 24-4-44. Hence, he dismissed the suit.

3. The lower appellate Court, however, held that the first sale deed of Mauli Bewa was a valid sale deed for consideration by virtue of which title to the properties passed to defendants 3 to 5. On the question of possession, it held that the evidence placed by both parties was unworthy of credit. Then relying on the well-known decision of the Privy Council reported in -- "Runjeet Ram Pandey v. Goburdhun Ram Pandey", 14 Moo Ind App 203 (PC) (A), it thought that presumption of possession should follow title and inasmuch as defendants 3, 4 and 5 were held by it to have acquired valid title to the properties by the first sale deed of Mauli Bewa (Ext. 6) they must be deemed to have been in

possession till the execution of the sale deed (Ext. 3) by defendants 4 and 5 in favour of the plaintiffs. Hence it decreed the suit with costs.

4. Though the suit was brought for the purpose of confirmation of possession it is, in essence, a suit for recovery of possession. The lower appellate Court completely overlooked this aspect of the case chiefly because it failed to read the evidence of plaintiff No. 2 (P. W. 1) carefully. This witness admitted in cross-examination that defendant No. 1 possessed all the lands of Mauli after he obtained the second kabala from her on 13-5-41. He further admitted that defendants 3 to 5 gave up possession of the suit lands at about that time. The plaintiffs' kabala was executed only in 1944 (Ext. 3). When one of the plaintiffs himself admitted frankly that from 1941 the disputed properties passed into the possession of defendant No. 1 the suit becomes merely a suit for recovery of possession by a person who claims a superior title to the same. The plaintiffs' vendor defendant No. 4 (P. W. 3) was living in Calcutta at all relevant times and he frankly admitted in cross-examination that he could say nothing about possession of the disputed properties inasmuch as he was not living in the village.

Doubtless, defendant No. 3 who was the karta of the family consisting of himself and defendants 4 and 5 was competent to give evidence on the question of possession. But he was not examined as a witness by either party. But in view of the frank admission of plaintiff No. 2 that defendant No. 1 obtained possession of the disputed properties in 1941 and the further admission by his vendor (p. w. 3) that he has no knowledge of possession of the disputed properties the plaintiffs' claim that they obtained possession by virtue of the kabala (Ext. 3) could hardly stand. As a matter of fact, by virtue of that kabala they would have got only two-thirds of the undivided share of the three brothers (defendants 3, 4 and 5). But if, as admitted by plaintiff No. 2, their vendors had lost possession as early as 1941 the suit becomes clearly a suit for declaration of title and recovery of possession and not a suit for confirmation of possession.

5. Hence, even if it is accepted for the sake of argument that Mauli Bewa conveyed valid title to defendants 3, 4 and 5 by her sale deed dated 21-5-27 the question arises as to whether the plaintiffs and their predecessors-in-title (defendants 4 and 5) were in possession within twelve years of the institution of the suit.

6. The lower appellate court's analysis of the evidence adduced by the parties on the question of possession is very unsatisfactory. He has completely overlooked the fact that, as already pointed out, plaintiff No. 2 himself admitted that defendant No. 1 somehow obtained possession when he took the second kabala from Mauli Bewa on 13-5-41. If defendants 3, 4 and 5 were really in possession on that day it is inexplicable as to how defendant No. 1 could obtain possession by virtue of the second kabala from Mauli.

The lower appellate court also failed, to give due importance to the series of rent-receipts which show unmistakably that Mauli paid rent for the disputed properties

till 1941 (Exts. B series, C series, E series and L series). Some of these rent-receipts (Exts. E, E-1, E-2 and E-3) were of the years 1934 and 1935. If the first kabala was a genuine document and possession had passed to the vendees (defendants 3 to 5) by virtue of that kabala as early as 1927, it is not likely that rent-receipts would continue to be granted in the name of Mauli and the vendees would not take prompt steps to get their names mutated in the A landlord's sheresta. As a matter of fact, mutation was made only as late as 1939. The learned lower appellate court brushed aside all the rent-receipts by saying that most of them appeared to have been written in the same ink, at the same time and by the same person. This sweeping observation only shows that it has not cared to see the rent-receipts. Some of these rent-receipts (Ext. L series and Ext. E series) which have been proved by the plaintiffs themselves appear to be very old, even to the naked eye, and they could not have been written by the same person who wrote the other rent-receipts.

7. The lower appellate court further completely failed to attach proper significance to Exts. G and H. The first plaintiff obtained a S. C. C. decree in suit No. 19931 of 1937 in Calcutta (see Ext. G) against Mauli Bewa in respect of a money claim. After getting the decree transferred to the court of the Munsif of Bhadrak for execution, he applied on 4-7-38 (see Ext. A) for attaching the disputed properties representing to the court that they were the properties of Mauli Bewa. Thereupon Mauli Bewa got the ex parte decree set aside taking the help of the father of defendant No. 1. If as now stated by the plaintiffs, Mauli Bewa lost all interest in the properties as early as 1927 and plaintiff No. 1 was fully aware of the sale he would not have applied to the executing court for attachment of the very same properties representing that they continued to remain with Mauli as late as 1937.

His explanation is that as the settlement khatian stood in the name of Mauli Bewa he thought that he could proceed against Mauli's properties for the execution of the decree. This explanation can hardly stand scrutiny. As stated by him, he knew that Mauli had sold away her lands. He was anxious to realise his decretal money by attaching her properties. He is also a man of Ajmatpur village. He would not be such a simpleton as to apply to the executing court for attachment of the properties she had sold away to a third party long before he obtained a decree against Mauli Bewa. On the other hand, this circumstance itself shows that plaintiff No. 1 knew fully that notwithstanding the sale-deed of 1927 Mauli Bewa continued to remain in possession and was believed by all the people of the village to be the owner of the properties.

8. It was, however, urged that the finding about possession by the lower appellate court was a finding of fact even though it might have failed to give due importance to certain essential features in the evidence and that this court could not set aside such a finding. But the lower appellate court's finding on the question of possession is not in favour of the plaintiffs' side. After a cursory discussion of the oral and documentary evidence it has observed :

"The oral evidence, as I have observed, is highly unsatisfactory and therefore, the evidence adduced by both parties with regard to possession is unworthy of credit."

Even if this finding be taken as binding on this court, from the discussion of the evidence as given by the lower appellate court itself it is clear that it was referring to the evidence regarding possession of the disputed properties from 1927 till 1941. This inference arises from the admission made by plaintiff No. 2 (p. w. 1) in his cross-examination to the effect that from 1941 defendant No. 1 obtained possession of the disputed properties. The lower appellate court has not noticed this admission of p. w. 1; but the evidence of possession which it discussed related to a period prior to 1941. Hence, the finding of the lower appellate court as far as I could make out is as follows :

Defendants 3 to 5 obtained valid title to the properties by virtue of the first kabala (Ext. 6) dated 21-5-27 executed by Mauli Bewa in their favour. The evidence, oral and documentary, as to whether Mauli continued to remain in possession after that date or else whether her vendees obtained possession was highly unsatisfactory. The admitted position is, however, that from 1941 when Mauli executed the second sale deed in favour of defendant No. 1 the latter obtained possession. The plaintiffs never obtained possession of the disputed properties by virtue of her kabala (Ext. 3) inasmuch as they purchased an undivided share in the joint family property and being unable to obtain possession they had to bring the present suit. The lower appellate court clearly refers to the struggle for possession between the plaintiffs and defendants 1 and 2 which indicates that the plaintiffs did not obtain even joint possession after 1944.

9. Hence, even if it be assumed that the plaintiffs acquired good title to the properties inasmuch as their vendors (defendants 4 and 5) validly purchased the same from Mauli Bewa in 1927 a question arises as to whether in view of the unsatisfactory nature of the evidence which has been held to be "unworthy of credit" by the lower appellate court regarding possession of the disputed properties by the plaintiffs" vendors from 1927 till 1941 and the admitted possession that from 1941 till 1944 at any rate, defendant No. 1 was in possession the lower appellate court was justified in applying the presumption that possession follows title.

10. The law on the subject has been clearly laid down in a Full Bench decision of the Patna High Court in -- Raja Shiva Prasad Singh Vs. Hira Singh and Others, , where it was held that in a suit for ejectment the plaintiff's suit must fail even though he might have established his title if the evidence of possession adduced by both parties is found to be unworthy of credit. It was pointed out that in such cases the primary burden of showing that the plaintiff was in possession of the property within twelve years of the commencement of the suit was on the plaintiff and hence if the evidence of possession was rejected as unworthy of credit "the party upon whom the burden lies can be in no better position than if

he had called no evidence at all". The position would have doubtless differed if the evidence on the question of possession led by both parties, though not unworthy of credit was evenly balanced and the court finds it difficult to prefer one and reject the other. In such instances the presumption that possession follows title may be applied as a presumption of fact. But where, as in the present case, the evidence of possession is held to be unworthy of credit no such presumption can be made.

This decision was followed in a recent decision of the Patna High Court in -- Harnandan Singh and Others Vs. S.M. Ramananddi Kuer, . which has been followed by some other High Courts (see -- Rakhal Chandra Ghose and Others Vs. Durga Das Samanta and Another, & -- Suna Pana Chena Voona Sevugan Chetty and Others Vs. Koovanna Kana Nana Kana Kannappa Chetty (died) and Others, . In a Pull Bench decision of the Madras High Court reported in -- The Official Receiver of East Godavari Vs. Chava Govindaraju and Another, , the same principle was followed. Therefore, on the finding of the lower appellate court the plaintiff's suit must fail.

11. Mr. M. S. Rao however urged that the aforesaid principle should not be applied to the present case inasmuch as the plaintiffs did not, in express terms, pray for recovery of possession and moreover, the lower appellate court has not come to a finding that defendant No. 1 obtained possession of the disputed properties in 1941. This argument has been already met. No express finding is required in respect of a fact admitted by one of the plaintiffs himself (p. w. 1) in his cross-examination. It is true that the lower appellate court has not expressly referred to this admission; but I have already shown that its entire discussion (oral and documentary) on the question of possession related to a period prior to 1941. In essence, the suit is one for recovery of possession and the principles laid down in the aforesaid Pull Bench decision of the Patna High Court would apply with equal force.

12. I would, therefore, allow the appeal, set aside the judgment of the lower appellate court and restore the judgment of the learned Munsif with costs throughout.