

(1988) 08 OHC CK 0045

In the Orissa High Court

Case No : Second Appeal No's. 264 and 270 of 1980

Indumati Dibya

APPELLANT

Vs

Sashimani Dibya and Others
 Sashimani Dibya and
Others Vs Indumati Dibya

RESPONDENT

Date of Decision : 29-08-1988

Acts Referred:

Transfer of Property Act, 1882 — Section 45

Citation : (1989) 1 OLR 94

Hon'ble Judges : D.P. Mohapatra, J

Bench : Single Bench

Advocate : Shri Akhil Mohapatra, in S.A. 264/80 and S. Misra-2, in S.A. 270/80, for the Appellant; S. Misra-2 in S.A. 264/80 and Akhil Mohapatra in S.A. 270/80, for the Respondent

Final Decision : Allowed

Judgement

D.P. Mohapatra, J.—Both the contesting parties in the suit have filed second appeal being aggrieved by the judgment and decree of the lower appellate Court decreeing the Plaintiff's suit in part. While Second Appeal No. 264 of 1980 has been filed by Defendant No. 1 Second Appeal No. 270 of 1980 has been filed by the heirs of the Plaintiff Biswanath Mohapatra who were substituted in his place in the lower Appellate Court. Since the cases are Closely linked with each other they were heard together with consent of the learned Counsel for the parties and they are being disposed of by this judgment.

2. Biswanath Mohapatra filed Original Suit No. 166 of 1975-1 in the court of the Munsif Puri for partition of the property described in schedule "Ka" to the plaintiff between himself and Defendant No. 1 Indumati Dibya claiming half share there in and for a declaration that the properties described in Schedules "Kha" and "Ga" of the plaint are the properties of himself and Defendant No. 1 and Defendants 2 to 7 have no manner of right over it. Indeed, the properties described in Schedule "Ka" include the properties in Schedules "Kha" and "Gal"

of the plaint. Shorn of unnecessary details the case of the Plaintiff was that the "Ka" schedule property was jointly purchased by himself and Gangadhar Mohapatra, husband of Defendant No. 1, by two registered sale deeds dated 15-4-44 and 2-4-50 from Satyabadi Sarangi and Gopinath Mohapatra respectively. The sale deeds are marked as Exts. 1 and 2 in the suit. After purchase of the property both the Plaintiff and Gangadhar Mohapatra remained in joint possession of it and after the death of Gangadhar, about 10 years before filing of the suit, the property was jointly possessed by the Plaintiff and Defendant No. 1. In the last settlement in 1967 the property was recorded jointly in the names of the Plaintiff and Defendant No. 1. Plaintiff's further case was that taking advantage of his absence from the village as he has been serving at Brajarajnagar for the last twenty years, Gangadhar sold the "Kha" and "Ga" schedule lands to Defendants 2 to 7 by the registered sale deed dated 24-4-50 (Ext. A). But by such sale the purchasers did not acquire any right, title, interest or possession over the lands. As Defendant No. 1 did not agree to partition of the "Ka" schedule property on demand and threatened to dispossess the Plaintiff from the land the filed the suit for the reliefs noticed earlier. Plaintiff Biswanath Mohapatra and Gangadhar Mohapatra are related as cousins.

3. Defendant No. 1 alone filed written statement and contested the suit. Her case in brief, was that the "Ka" schedule property was the salt acquired property of Gangadhar alone long prior to the purchase there had been a partition in the family and Gangadhar had separated from the Plaintiff and his brother Lingaraj. Gangadhar had paid the entire consideration money for the "Ka" schedule lands purchased under the sale deeds, Ext. 1 and 2, was in exclusive possession of the said lands and was paying rent for it. Regarding inclusion of the name of the Plaintiff in the sale deeds the case of Defendant No. 1 was that it was done to facilitate the proposed exchange of four decimals of land purchased under the aforesaid sale deeds with three and half decimals of land in plot No. 1348 which had fallen to the share of the Plaintiff and which was lying adjacent to the land of Gangadhar. According to Defendant No. 1. since the Plaintiff insisted that his name should be included in the sale deeds Gangadhar had agreed to such inclusion nominally for the purpose of exchange. On these facts Defendant No. 1 claimed exclusive right title, interest and possession over "Ka" schedule property as the sa If-acquired property of Gangadhar. Alternatively she took the plea that assuming that the Plaintiff had any interest in the suit property on the strength of the sale deeds (Exts. 1 and 2) he was ousted from the same by long and continuous possession of Gangadhar, after him by Defendant No 1 and therefore Defendant No. 1 had acquired right, title and interest over the entire land by adverse possession. It was contended by Defendant No. 1 that Gangadhar had been dealing with "Ka" schedule land as his property by constructing a house in the entire suit plot No. 1352 and by selling the "Kha" and "Ga" schedule lands to Defendants 2 to 7 to the knowledge of the Plaintiff. According to the Defendant No. 1, Gangadhar died sometime in 1962.

4. The learned Munsif considering the evidence led by the parties decided the

material issues; viz. issue Nos. 4, 5 and 6 holding that Defendant No. 1 had perfected her title over the suit land by way of adverse possession and on the basis of the said finding dismissed the suit.

5. On appeal by the Plaintiff, the lower Appellate court on independent assessment of the materials on record differed from the findings arrived at by the trial court and came to hold as follows:

(a) The story that the name of the Plaintiff was mentioned as a purchaser in Exts. 1 and 2 to facilitate the exchange appears to be a concocted story and it is not supported by any believable evidence.

(b) The Plaintiff was not a minor boy incapable of earning anything to enable him to pay the share of consideration money under Exts. 1 and 2.

(c) Under Exts. 1 and 2 the Plaintiff acquired right, title and interest in respect of half share in "Ka" schedule lands.

(d) The Plaintiff has got not only right, title and interest in the purchased property but he is so entitled to partition of the suit land and cannot be said to have been ousted by Defendant No. 1 nor can it be said that the Defendant No. 1 perfected her title over the suit land by adverse possession against the Plaintiff.

(e) Plaintiff's right, title and interest over "Kha" and "Ga" schedule property sold by Gangadhar to Defendants 2 to 7 is deemed to have been extinguished as the sale was to his knowledge and Defendants 2 to 7 had perfected their title over the "Kha" and "Ga" schedule land by adverse possession against the Plaintiff.

(f) Plaintiff is therefore entitled to partition of "Ka" schedule land excluding "Kha" and "Ga" schedule properties.

On the aforesaid findings the lower Appellate court, as noticed earlier, decreed the Plaintiffs suit in part.

6. At the hearing of the cases, the learned Counsel appearing for the parties have reiterated the stand taken by their respective clients in the lower Appellate court. While it was the contention of the learned Counsel for the Plaintiff that the plea of adverse possession of Defendants 2 to 7 over "Kha" and "Ga" schedule properties ought not to have been accepted by the lower Appellate Court, it is contended by the learned Counsel for the Defendant No. 1 that the plea of ouster ought to have been accepted by the court below.

7. From the discussions and the finding indicated in the proceeding paragraphs it is clear that the lower Appellate court on appreciation of the materials on record rejected the plea taken by Defendant No. 1 that her husband Gangadhar had paid the entire consideration money for purchasing the "Ka" schedule property and the name of the Plaintiff was included in the sale deeds merely for the purpose of facilitating the proposed exchange of a portion of the purchased land with the land that had fallen to the share of the Plaintiff. Though the learned Counsel for Defendant No. 1 raised a contention that the finding of the lower

Appellate court regarding payment of consideration is perverse, he signally failed to support the said contention by any convincing material. I have carefully perused the judgment of the lower Appellate court I find no irregularity, illegality or misconception in appreciating the evidence in the case. In my view, the findings of fact arrived at by the court, noticed earlier, are not vitiated on any acceptable ground and therefore they cannot be assailed in second appeal. The lower Appellate court was also right in applying the principles embodied in Section 45 of the Transfer of Property Act to hold that in the facts and circumstances of the case both the Plaintiff and Gangadhar who had jointly purchased the property in Schedule "Ka" shall be presumed to be equally interested in the said property. As a necessary corollary to this, the decision of the court below that the Plaintiff is entitled to half share in "Ka" schedule property has to be confirmed.

8. The question that remains for decision is whether the lower Appellate court rightly held that the Plaintiff has lost his right title and interest in "Kha" and "Ga" schedule properties since Defendants 2 to 7 have perfected their title to the same by adverse possession. In support of this findings as it appears from the judgment, the lower Appellate court solely relied on the decision of the Madras High Court in the case of Thiagaraja Pillai Vs. Appavoo Pillai and Others, , wherein it was held that where a purchaser of property held in common by several tenants in common purchases it from one of such tenants-in-common openly and with the knowledge of the other co-tenants, he must be taken to have repudiated the title of the others, there and then, and possession becomes adverse from the time of his purchase in my view the decision is distinguishable on facts and the principle laid down therein has no application to the present case In that case the entire property of the tenants-in-common was purchased and it was held that since the date of purchase the purchaser dealt with it as his own property openly with the knowledge of other co tenants Indeed he had built a house on the entire property. From these facts, the Court inferred that the purchaser must be taken to have repudiated the title of the other co-tenants, there and then, and possession becomes adverse from the time of his purchase. In the present case, the lower Appellate court has neither discussed any evidence nor has given any specific finding as to the manner Defendants 2 to 7 dealt with the "Kha" and "Ga" schedule properties after their purchase from Gangadhar. No material has been indicated to establish that such user by the purchasers was to the knowledge of the Plaintiff. On the other hand in the case of Parbati Dei v. Markanda Behera and Ors. reported in 36 (1990) CLT 1231 this Court laid down the principle that until a denial of title or ouster is established, there can be no adverse possession by one co-owner and there is no difference in principle whether a person is the original co-owner or has become a co-owner by virtue of a transfer In that case R.V. Misra J. (as he then was) quoted with approval the following passages from two decisions, one of this Court and the other of the Patna High Court In Bhimayya v. Kundana Bibi, 22 CLT 51 a Division Bench of this Court held as follows:

The only point for consideration in the second appeal is whether on the evidence adduced in the case the lower appellate court was justified in holding that a case of ouster was made out. In the deposition in the present litigation the Plaintiff stated that he was never in possession of the suit house and that Defendant No. 3 was in possession ever since the date of his purchase on 3-10-1934.

Doubtless, this admission of the Plaintiff by itself would not suffice to show that he lost his title by ouster. It is well known that as between co sharers mere possession by one co-sharer would not constitute ouster unless there is some material to justify an inference that he either expressly or by implication refused to allow the other co-owner to be in possession or to participate in the enjoyment of the joint property. This principle of ouster as amongst the original co-sharers applies with equal force as against the alliances from the co-sharers also.

The other passage was from the Division Bench decision of the Patna High Court in the case of Dipnarain Rai and Others Vs. Pundeo Rai and Others, where in it was observed as follows:

As regards co-owners, the law is that there can be no adverse possession by one co-owner unless there has been a denial of title and an ouster to the knowledge of the others and the same principle applies to the case of a transferee from a co-owner who professedly takes a transfer of the whole property from him. There can be no difference in principle whether a person is the original co-owner or has become a co-owner by virtue of transfer.

With respect, I am of the view that the principles laid down in the aforesaid decided cases apply to the present case. It has been held by the lower Appellate court, as noticed earlier, that the Defendant No. 1 failed to establish her plea of ouster adverse possession over "Ka" schedule property. Therefore, the lower Appellate court clearly erred in holding that Defendant 2 to 7, purchasers from the husband of Defendants No. 1, had perfected their title to "Kha" and "Ga" schedule properties by adverse possession. Further, Defendants 2 to 7 neither filed written statement nor contested the suit. Therefore the question of the plea of adverse possession or ouster being raised by them and leading any evidence in support of such plea did not arise at all. On the aforesaid analysis, I am of the view that the lower Appellate court erred in excluding the "Kha" and "Ga" schedule properties from partition.

9. On the discussions in the foregoing paragraphs, Second Appeal No. 264 of 1980 filed by Defendant No. 1 is dismissed and Second Appeal No. 270 of 1980 filed by the Plaintiffs is allowed. The Plaintiff's suit for partition is decreed. The properties in "Kha" and "Ga" schedules will be adjusted towards the share of the Defendant No. 1, as far as possible, in the final decree proceeding. Parties are to bear their respective costs of these appeals.