
(2000) 04 CAL CK 0043
In the Calcutta High Court
Case No : S.A. No. 874 of 1962

Nantu Bag and Another

APPELLANT

Vs

Smt. Rasana Bala Dasi and Others

RESPONDENT

Date of Decision : 27-04-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 7
Limitation Act, 1963 — Article 64, 65

Citation : AIR 2001 Cal 53 : 105 CWN 938

Hon'ble Judges : S.N. Bhattacharjee, J; S.B. Sinha, J

Bench : Division Bench

Advocate : B.K. Roy Chowdhury and Rajendra Nath Pande, for the Appellant; Amol Kumar Ghosal and Anath Bandhu Pal, for the Respondent

Final Decision : Dismissed

Judgement

S.B. Sinha, J.—This second appeal has been referred to the Division Bench by an order dated 30th April, 1974 stating :--

"One of the points involved in this appeal is whether a co-shares of an Immovable property is entitled to maintain an action for trespass against a wrong-doer and whether in such circumstances the Court should give the plaintiff-co sharer a decree for joint possession with the trespasser the court should give such a decree for joint possession the other co-sharers who might have been impleaded as pro forma parties in the suit.

My attention has been drawn to various decisions, namely. Krishna Sardar Vs. Sindhu Bala Dasi, and Currimbhoy and Co. Ltd. Vs. L.A. Creet and Others, , which not take consistent view on the points. In my view, the points involves in the appeal are of sufficient importance to be considered by the Division Bench. Therefore, refer the appeal to the Division Bench."

2. The defendant is the Appellant in this appeal.

3. The plaintiff-respondent No. 1 has filed a suit against the appellant herein

claiming inter alia for a declaration that the plaintiff has 1/3rd interest in the suit properties.

4. In the plaint the plaintiff-respondent, inter, alia, contended that she and her two co-sharers who were added as pro forma defendants are in peaceful and joint possession of C. S. plot No. 59. In 1365 B.S. the plaintiff and two co-sharers grew paddy in the suit plot but the appellant herein with the help of his men and labourers forcibly started cutting paddy and thereby dispossessed the plaintiff and pro forma defendant Nos. 2 and 3.

5. In his written statement the defendant, inter alia, raised the plea that the plaintiff and pro forma Defendant No. 2 gave up their life interest in the 2/3rd share of the disputed tenancy in favour of Sital Bag, one of the Co-sharers, who thereby become holder 16 annas share in the disputed tenancy and possessed the properties of the tenancy exclusively.

6. The Appellants claims his right, title and interest through the heirs of the said Sital Bag. pro forma Defendant No. 3, however, did not support the case of the Appellant herein.

7. The questions which arise for consideration in this Second Appeal is as to whether the plaintiff-first respondent being one of the co-owners is entitled to possession of the suit land together with his co-shares or is only entitled to recover possession only in respect of his own share.

8. The learned Counsel appearing on behalf of the appellant submitted that keeping in view the decisions of this court in Joy Gopal Singha and Others Vs. Probodh Chandra Bhattacharjee and Others, , Naresh Chandra Basu Vs. Hayder Sheikh Khan and Others, and Krishna Sardar Vs. Sindhu Bala Dasi, , the plaintiff-first respondent would be entitled to recover possession only in relation to his own share despite the concurrent finding of fact arrived at by the Courts below to the effect that the defendant-appellant is trespasser and does not have any right, title and interest in the suit property.

9. The learned counsel appearing on behalf of the respondents, on the other hand, submitted that during pendency of the suit the plaintiff has purchased the share of other co-owners. According to the learned counsel, the Appellant being a trespasser, the plaintiff will have the right to recover possession in respect of the entire property. Reliance in this connection has been placed on Harhar Bakshi Singh v. Mohammad Usman Khan, reported in (1929) 49 CLJ 43 AIR 1933 85 (Privy Council) Sheotahal Dube Vs. Lal Narain Prasad Chand and Others, and Kanta Goel Vs. B.P. Pathak and Others, .

10. Apart from the fact that the Court can in a given situation in order to shorten litigation and avoid multiplicity of proceedings take into consideration the subsequent event to the effect that the plaintiff first respondent herein now has become 16 annas share, we are of the opinion that in principle also he is entitled to recover possession of the entire land from the Appellant.

11. A co-owner, has a right to possess every inch of land. Both in terms of Articles 64 and 65 of the Limitation Act, 1963 he is entitled to file a suit for possession either on the basis of title or prior possession in the event he is dispossessed by a trespasser.

12. In *Maharajadhiraj of Burdwan, Udaychand Mahatab Chand Vs. Subodh Gopal and Others*, , the law has been stated in the following terms (Para 11):-

"We are unable to appreciate the contention of the appellant that he had acquired a permanent right in the suit lands in view of the fact that he was in exclusive possession of the same for a long time. The appellant had not put forward a plea of adverse possession. Once it is held that he is a co-owner of the lands in question, his possession however long it might be unless it is adverse to the other co-owners cannot confer on him any right."

13. A co-owner even in respect of a tenanted premises can issue a notice in terms of Section 106 of the Transfer of Property Act and further can file a suit for ejectment, the only requirement, therefore, being that the other co-owners may be impleaded as a party to the suit so that their right to deal with property in any other manner may not be disputed as for example, when an interest has been created in the tenant by the other co-owners.

14. In *Kanta Goel Vs. B.P. Pathak and Others*, , the Division Bench has held (Para 7) :

"This Court in *Sri Ram Pasricha Vs. Jagannath and Others*, clarified that a co-owner is as much as owner of the entire property as any sole owner of the property is : "Jurisprudentially, it is not correct to say that a co-owner of property is not its owner. He owns every part of the composite property along with others and it cannot be said that he is only a part owner or a fractional owner of the property. It is therefore, not possible to accept the submission that the plaintiff who is admittedly the landlord and co-owner of the premises, is not the owner of the premises within the meaning of Section 13 (1) (f), it is not necessary to establish that the plaintiff is the only owner of the property for the purpose of Section 13 (1) (f) as long as he is a co-owner of the property, being at the same time acknowledge landlord of the defendants. "That case also was one for eviction under the rent control law of Bengal. The law having been thus put beyond doubt, the contention that the absence of the other co-owners on record disentitled the first respondent from suing for eviction, fails, We are not called upon to consider the piquant situation that might arise if some of the co-owners wanted the tenant to continue contrary to the relief claimed by the evicting co-owner."

15. We, in view of the aforementioned Supreme Court decision, hold that the plaintiff, in view of the fact that the other co-owners had not raised any objection as regard eviction of the appellant herein, would be entitled to recover possession of the suit property in its entirety. Such recovery of possession, however, would enure of the benefit of all the co-owners.

15A. The law since coming into force of the Limitation Act, 1963 has undergone a sea change. Whereas in terms of Articles 142 and 144 of the Limitation Act, 1908 the plaintiff was required not only to prove his title but also possession within 12 years from the date of filing of the suit; in terms of Articles 64 and 65 of the Limitation Act, 1963 plaintiff once proves his title and/or possession it is for the other side to show that he has acquired title by adverse possession.

16. Articles 64 and 65 of the Limitation Act, 1963, if so construed, in our considered view, lead to only one conclusion, viz. in a case where the plaintiff proves his title, or possession in respect of the property, the relief prayed in the plaint can be denied to him only in the event the defendant proves title by adverse possession or proves better title in the suit land. At one point of time the Court used to insist that in a case of sharer dispossession a person may take recourse to the provision of Section 9 of the Specific Relief Act equivalent to Section 6 of the Specific Relief Act, 1963. However, now a suit for possessing title may also be maintainable (see : Lallu Yeshwant Singh v. Rao Jagdish Singh reported in AIR 1968 SC 620).

17. The interpretation of the word "possession" is no longer understood as real possession must be held to embrace within its fold constructive possession or even right to possess. Once right of possession is established, in case of any dispossession by a rank trespasser the plaintiff will be entitled to recover possession.

18. In a case as in the instant one the plaintiff has pleaded title along with other co-owners and such title having been proved, he must be held to have filed a suit in a representative capacity and in absence of any disagreement to the contrary by any other co-owner would be entitled to recover possession In respect of the entire property which would of course enure to the benefit of the other co-owners also.

19. It is a case where a suit has been filed by the plaintiff on the basis of mere dispossession on the ground that he was in exclusive possession thereof. In the plaint the plaintiff has categorically stated that he along with the pro forma defendants were the owners in respect of the properties in question and they have been dispossessed by the defendant-appellant. The defendant-appellant on the other hand raised a plea of right to possess the said land through one of the pro forma defendants, viz. defendant No. 3, such a plea having been negatived, the issue as to whether the defendant No. 1 claims right to possess the land In derogation to the interest of the plaintiff and other co-sharers must also be held to have been negatived by the learned Courts below. In that view of the matter there cannot be any doubt whatsoever that the plaintiff would be entitled to recover possession in respect of the entire property.

20. The decision cited by the learned counsel for the appellant are distinguishable on facts apart from the change in the statutory law as indicated hereinbefore.

21. In Joy Gopal Singha and Others Vs. Probodh Chandra Bhattacharjee and Others, , a Division Bench of the Calcutta High Court was considering a question as to whether the plaintiff therein was "entitled to recover possession when he could prove his title only to the extent of 4 annas share. The court held that he did not have such right.

22. The decision of the Court in Krishna Sardar Vs. Sindhu Bala Dasi, upon which reliance has been placed by the learned counsel appearing on behalf of the appellant following Naresh Chandra Basu Vs. Hayder Sheikh Khan and Others, and Joy Gopal Singha and Others Vs. Probodh Chandra Bhattacharjee and Others, is distinguishable as therein a question arose as regard doctrine of part performance as envisaged u/s 53A of the Transfer of Property Act. In that case although the co-sharer of property was made pro forma defendant but he died during the pendency of the appeal and the second appeal abated so far as he is concerned. It was in that situation, the Division Bench of this Court had followed the said decision. Such is not the position here.

23. In Harhar Bakshi Singh v. Mohammad Usman Khan, reported in (1925) 90 IC 804, the Judicial Commissioner of Oudh Court had held that one co-sharer can sue a trespasser in ejectment on behalf of himself and his other co-sharer.

24. The same view has been taken in Naresh Chandra Basu Vs. Hayder Sheikh Khan and Others, wherein it has been held that a tenant in common is entitled to recover possession as against a trespasser but he cannot recover possession of the whole from a Trespasser in a suit for ejectment.

25. In Jarman Gomez Vs. Ram Kumar Kaibarta and Others, it has categorically been held that a co-sharer landlord who had made the other co-sharer landlords pro forma defendants, was competent to maintain a suit for ejectment and he was entitled to get a decree for recovery of possession to the extent of his share jointly with the pro forma defendant in the suit.

26. In Sheotahal Dube Vs. Lal Narain Prasad Chand and Others, , Sen J. had held :--

"Indeed, it was unnecessary to go into these questions because the plaintiff was entitled to a decree for possession of the entire property claimed by ouster of the defendant who was a rank trespasser for the obvious reason that the plaintiff was a co-sharer with his brother Raj Bhadur Chand and his causing Bir Bhadur Chand. Where property is held in coparcenary or in co-ownership, it is open to any one of the co-sharers to maintain a suit for possession of the entire property against a trespasser. The reason for the rule is that in the absence of a partition, the right of each co-owner extends to the whole property jointly with the other co-owners and that the attempt to reclaim the property is for the obvious advantage of all the co-sharers."

27. Yet again, in Pal Singh Vs. Sunder Singh (Dead) by Lrs. and Others, , the Apex Court reiterated that when the other co-owner did not object to the eviction

of a tenant in a suit instituted by one co-owner, such suit can be decreed. If co-owner can file a suit for eviction as against a tenant, there is no reason why such a suit shall not be maintainable at the instance of the co-owner against a trespassers. This aspect of the matter, albeit in a different context, has also been taken into consideration by a Division Bench of this Court in *Subhas Choudhury v. Kantilal Paul*, reported in ILR (1998) 2 Cal 128.

28. The law on this question is no longer *res Integra*, in view of the decisions of the Supreme Court of India. The Apex Court in *Sri Ram Pasricha Vs. Jagannath and Others*, held that a co-owner has a legal right to possess every inch of land and in that sense he is the owner of the property.

29. The aforementioned decision of the Apex Court has also been followed by the Supreme Court in *Kochkunju Nair Vs. Koshy Alexander and Others*, wherein the law has been laid down in the following terms (Paras 9 & 10) :--

"Ownership imports three essential rights, namely right to possession, right to enjoy and right to dispose of if an owner is wrongly deprived of possession of his property, he has a right to be put in possession thereof. All the three essentials are satisfied in the case of co-owner of a land. All co-owners have equal rights and co-ordinate interest in the property, though their shares may be either fixed or indeterminate. Every co-owner has a right to enjoyment and possession equal to that of the other co-owner or co-owners. Each co-owner has, in theory, interest in every infinitesimal portion of the subject matter and each has the right, irrespective of the quantity of his interest, to be in possession of every part and parcel of the property, jointly with others (vide *Mitra's Co-ownership and Partition* 7th Edn.)

A three-Judge Bench of this Court has held in *Sri Ram Pasricha Vs. Jagannath and Others*, that a co-owner owns every part of the composite property along with others. The following statement of law has been made by their Lordships :

"Jurisprudentially it is not correct to say that a co-owner of a property is not its owner. He owns every part of the composite property along with others and it cannot be said that he is only a part owner or a fractional owner of the property. The position will change only when partition takes place."

30. Keeping in view the aforementioned dicta of the Apex Court it must be held that the decisions of this Court which have taken a contrary view stand overruled.

31. Another aspect of the matter cannot also be lost sight of i.e. as regard the effect of such a decree. A co-owner cannot claim a specific demarcated area unless partition takes place amongst themselves. When delivery of possession is sought to be given in respect of the share of the plaintiff alone, the executing court would not be able to demarcate the area in respect whereof such delivery of possession is to be made. Furthermore, the trespasser in such a case, can contrary to the principles of joint ownership and joint possession amongst the co-owners claim adverse possession against the other co-owners.

32. The reason behind impleading all the co-owner is that a decree may not be passed in favour of one co-owner without the consent of the other owner and/or in derogation of any interest which other co-owner might have created in favour of the third party. But where all the co-owners are parties to the suit either in the category of the plaintiff or pro forma defendant and no relief is claimed against them the court's hands are not fettered in granting such a decree keeping in view the provisions of Order 7 Rule 7 of the CPC in view of the well settled principles as regard the right of one co-owner vis-a-vis the others.

33. For the reasons aforementioned we are of the opinion that the judgment and decree passed by the Ld. Court below is unassailable. This appeal being devoid of any merit is dismissed. However, in the facts and circumstances of this case there will be no order as to costs.

S.N. Bhattacharjee, J.

34. I agree.