

(2003) 06 OHC CK 0047

In the Orissa High Court

Case No : Second Appeal No. 78 of 1999

Raghunath Bardhan

APPELLANT

Vs

Biswanath Bardhan

RESPONDENT

Date of Decision : 18-06-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 100
Specific Relief Act, 1963 — Section 39

Citation : AIR 2004 Ori 5 : (2003) 3 CivCC 178 : (2003) 96 CLT 246 : (2003) 2
OLR 270 : (2003) 4 RCR(Civil) 501

Hon'ble Judges : A.S. Naidu, J

Bench : Single Bench

Advocate : R. Ch. Mohanty, R.K. Mohanty, D.K. Mohanty and P.K. Rath, for the
Appellant; B.H. Mohanty, D.P. Mohanty, J.K. Bastia, B. Das, R.K. Nayak, S.C.
Mohanty and T.K. Mohanty, for the Respondent

Final Decision : Allowed

Judgement

A.S. Naidu, J.—The facts which have given rise to this appeal are briefly these :

The unsuccessful defendant in a suit for partition is the appellant. The sole plaintiff and the sole defendant represent two branches of the same family. Admittedly they are governed by Hindu Law. They are two brothers, being sons of one late Gandharba Bardhan. A partition was effected by metes and bounds among the several co-sharers" in Title Suit No. 5 of 1962 of the court of the then First Addl. Subordinate Judge, Cuttack. The plaintiff and the defendant being the descendants of a common ancestor were treated to be one unit and they were together allotted Ac. O.118 decimals out of Khata No. 845 and Ac. O.180 decimals out of Khata No. 846 in the final decree proceeding arising out of the said suit, the final decree being sealed and signed on 14th of August, 1963. Subsequently the plaintiff and defendant effected another partition between themselves inter se in the year 1965 by means of a registered partition deed, Ext. 1, dividing the properties allotted to their share jointly in the aforesaid final

decree. By the said partition, the properties described in Schedule-B of the plaint was allotted to the share of the plaintiff and the properties described in Schedule-C of the plaint was allotted to the share of the defendant. It is needless to say that there is absolutely no dispute with regard to the aforesaid allotments and both the parties are enjoying the properties allotted to their shares as the exclusive owners thereof. The dispute in the present case however centres round a strip of land measuring Ac.0.45 decimals left out as common passage for joint use of both the parties in the partition effected among themselves. This common passage appertains to plot No. 1532/3263 of Hal Settlement and is the only subject-matter of dispute. The residential house allotted to the share of the plaintiff admittedly adjoins a public road running on its South, commonly known as "Ajij Khan Lane" ; whereas the house of the defendant abuts the private passage and connects on the Northern side lane commonly known as "Jhanjirmangala Lunia Sahi Lane". According to the plaint case, the plaintiff only used the said Ajij Khan Lane for his egress and ingress; whereas the defendant used the Lunia Sahi Lane abutting his house for egress and ingress. According to the plaintiff, the defendant seldom uses the passage and there is no occasion for the plaintiff also to use the common passage as the house of the plaintiff abuts Ajij Khan Lane. Thus the plaintiff's case is that the disputed strip of land has lost its characteristic of passage by afflux of time and more so the defendant has amalgamated a portion of that strip of land in his homestead by making construction over the same and raising a vegetable garden thereon, and therefore, it is a fit case where the strip of land left out as common passage in the partition effected among the parties as per Ext. 1 should be partitioned between the two branches for inter se convenience.

2. The defendant, however, repudiated the averments made in the plaint and put up a case that the Ajij Khan Lane is the main road and unless he was permitted to approach the said road through the common passage, it would cause irreparable loss and hardship as also inconvenience to him. It was categorically stated that the school bus and other transport were only available at the said Ajij Khan Lane and the children of the defendant had to use the common passage to approach the Ajij Khan Lane for availing transport. It was also stated that a portion of the property abutting the Ajij Khan Lane was also allotted to the defendant and the common passage was the only convenient approach to the said property. The Jhanjirmangala Lunia Sahi Lane is a narrow lane and no vehicle can conveniently approach the said lane and added to it, it would be most inconvenient to the defendant to use the property allotted to his share abutting the said Ajij Khan Lane, if he is not permitted to use the said common passage. The defendant emphatically submitted that considering all these facts and circumstances it was mutually decided that the strip of land which is now in dispute had to be kept as a common passage and the same under no stretch of imagination could be partitioned.

3. On the basis of the pleadings of the parties, the trial court framed as many as nine issues and after discussing the evidence, both oral and documentary, came

to the conclusion that the defendant had the necessity to use the common passage to approach the Ajij Khan Lane, though the plaintiff might not have the necessity to use the same to approach the Jhanjirmangala Lunia Sahi Lane. The trial court took into consideration the fact that the children of both the families had to come to Ajij Khan Lane to catch the school bus and water pipe line to the defendant's house also passed through that lane. On the basis of such findings the trial court concluded that the suit strip of land had not lost its characteristic of common passage and the defendant had the necessity to use the same. The trial court on the basis of the spot-map exhibited in the case as also the other evidence observed that as the suit passage was not having equal breadth throughout, dividing it into two equal shares would be practically not possible and dismissed the suit.

4. Being aggrieved by the said decision of the trial court, an appeal, being Title Appeal No. 81 of 1967, was filed by the plaintiff before the District Judge, Cuttack which was heard and disposed of by the First Additional District Judge, Cuttack. The lower appellate court, however, did not agree with the conclusion arrived at by the trial court and allowed the appeal directing that the disputed property should be partitioned inter se between the plaintiff and the defendant. What weighed in the mind of the lower appellate court, as it appears from para-7 of the judgment, is that the defendant had not only raised a garden, but had also made certain construction over the disputed land and on account of such construction, the land had lost its characteristic of a common passage and there was no impediment for partitioning the same. The lower appellate court fortified its conclusion on the basis of the fact that admittedly the plaintiff was not using the passage and that on a portion of the disputed land construction had been raised. Hence, according to the lower appellate court, the defendant should not also come over the South side of the disputed land by using it was a common passage. In short, the lower appellate court has come to the conclusion that as the defendant by making certain construction had changed the nature and character of the common passage abutting his land, it would not be equitable to permit him to use the common passage abutting the land of the plaintiff.

5. The said reversing judgment and decree of the lower appellate court passed in T.A. No. 81 of 1996 are impugned in this Second Appeal.

6. On the basis of the pleadings and the evidence, both oral and documentary, the moot question of law which needs to be determined in the present case is as to whether the strip of land kept joint for being used as a common passage by the parties, in a completed partition effected by themselves in accordance with law, can be partitioned at a subsequent stage at the instance of one of the parties.

7. As stated above, undisputably parties to the suit are governed by Hindu Law. Stake's Collection on Hindu Law Mitakshara Chapter 1 deals with "Assets not liable to partition". The relevant paragraph reads as follows :

"Other things" exempt from partition have been enumerated by Manu.

Clothes, Vehicles, Ornaments, Prepared Food, Women, Sacrifices and Pious acts as well as the common way are declared not liable to distribution.

Vijnaneswara while dealing with each of the aforesaid items ruled that "the common way or road for ingress and egress to and from the house, garden or the like is also indivisible."

The commentary makes it quite clear that a particular land kept reserved for common passage and/or treated as a common way or road for ingress and egress cannot be divided. Thus there is no doubt, on the authority of Mitakshara Law and the Vyavahara Mayukha by which we are bound, that the lane which was reserved as a common passage at the time of partition between the parties is not divisible.

Article 303 of the Mulla's Hindu Law deals with properties liable for partition. Under the head "property indivisible from its nature" it stipulates that where property is in its nature indivisible for instance, in the case of animals, furniture, etc., it may be sold and its value distributed, or it may be valued and retained by one coparcener exclusively and the amount credited to his share. In the case of a well, it may be enjoyed by co-parceners in turn, or jointly, Where a strip of land is reserved as a common passage by a decree in a suit for partition for the use of the co-parceners, none of them is entitled to a partition of that strip.

Mayne's Hindu Law, in Chapter XV, deals with partition. Para-438 thereof stipulates the property indivisible by its nature, such as, apparel, carriages, riding horses, ornaments, dressed food, water, pasture ground, roads, female slaves, etc.

The ground of such exemption seems to be that they are things which could not be divided in specie.

8. The discussions made above leads to an irresistible conclusion that under the Hindu Law, both ancient and modern, a passage or a common road for ingress and egress is inpartible and indivisible. Under the provisions of the Hindu Law, if a particular passage is kept joint in a partition legally entered into, the presumption is that it would continue joint and undivided even after the partition. The same view has been taken in the case of Shantaram Balkrishna Vs. Waman Gopal Wadekar, and has been approved in the case of Dina Nath and Another Vs. Mansa Ram, .

9. In order to wriggle out of the aforesaid position of Hindu Law, Mr. B. H. Mohanty, learned counsel for the respondent, forcefully submitted that by efflux of time there have been substantial changes and the passage which was kept joint in the registered partition deed for common use, has lost its characteristic, inasmuch as the defendant-appellant has obstructed a portion of the passage by making construction and raising a kitchen garden over the same. Thus, according to Mr. Mohanty, the ratio of the decisions supra would not apply to the present

case, in view of the changed circumstances and the rule of Hindu Law ought not to be strictly applied in the present condition. But a reading of the provisions of Hindu Law applicable to Mitakshara and the rule regarding indivisible property, interpreted by different authors, is so simple and plain that I do not see how it could be said to make any difference if the characteristic of a land is sought to be changed by one of the joint owners. The only exception, according to me, when a common passage can be partitioned is only by consent of all the parties. Law is well settled that if there is any breach of terms by any of the parties who tries or has raised construction by obstructing a common passage, the remedy open to the other side is a suit for mandatory injunction with a prayer for issuing direction to the party to restore the land to its original condition. In fact, in the present case the plaintiff-respondent had invoked such remedy and had filed a suit for mandatory injunction with a prayer to direct the defendant-appellant to remove the encroachment from the common passage. The said suit was registered as T.S, No. 59 of 1985 in the court of the First Munsif, Cuttack. The First Munsif rightly decreed the suit and issued mandatory injunction directing to restore the passage to its original condition by his judgment dated 23rd October, 1989. Admittedly the plaintiff had also initiated Execution Case No. 169 of 1990 to give effect to the decree, but subsequently it appears he did not pursue the matter and filed the present suit.

10. Section 39 of the Specific Relief Act, 1963 clearly stipulates that to prevent the breach of an obligation if it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of and also to compel performance of the requisite acts. This Section is similar to Section 55 of the 1877 Act. The Madras High Court interpreting Section 55 of the 1877 Act held in the case of *Varanasi Subayya v. Varanasi Somalingam*, AIR 1920 Mad 223, as follows :

"Where a lane is a common property of two persons and one of them puts on obstruction on it which has the effect of making it less convenient for the other co-owner, the only remedy open to the other is to sue for a mandatory injunction for restoration of the land to its original condition."

11. The plaintiff-respondent having resorted to Section 39 of the Specific Relief Act and having obtained a decree of mandatory injunction directing the defendant-appellant to remove the encroachment, cannot once again approach the court seeking partition of the common passage which has been kept joint by a registered partition deed.

12. The trial court on analysis of the evidence has arrived at the following finding of fact :

"There is no obstruction on the portion of the land of the passage on the side of the plaintiff's land. From the evidence discussed above, it is apparent that the defendant's family is still using the Ajij Khan Road by passing over the portion

towards South."

This finding of fact has not been varied by the lower appellate court. At the other hand, the lower appellate court has arrived at the conclusion that the defendant and his children were using the common passage adjoining the plaintiff's land till date, though the plaintiff was not using the common passage adjoining the defendant's land. This being a finding of fact, cannot be interfered with in a Second Appeal. Consequently, it can be safely held that the common passage has not lost its characteristic altogether and it still continues to be a common passage of the parties.

13. In view of the aforesaid clear position of law, I am not persuaded by the argument advanced by Mr. B. H. Mohanty. Admittedly in the present case, there was a partition by metes and bounds by the registered partition deed, Ext. 1. In the said partition, the disputed property which was a strip of land having uneven breadth was kept joint as a common passage. The defendant, as has been held by both the courts, is using the passage for his ingress and egress to approach the Municipal road. Thus the purpose of the common passage is not frustrated. But then if the plaintiff is obstructed from using the passage which lies adjacent to the defendant's land, it would be open to the plaintiff to get such obstruction removed. In view of the rule of Hindu Law upon which I base my decision, it is not open to the plaintiff to claim partition of the said common passage, which according to me is one of the species of the indivisible property.

14. I would, therefore, allow this Second Appeal, set aside the impugned judgment and decree of the lower appellate court and dismiss the plaintiff's suit. However, in the peculiar facts and circumstances of the case, parties are to bear their own costs throughout.