

(1972) 03 OHC CK 0010
In the Orissa High Court
Case No : First Appeal No. 129 of 1968

Raja Sarif

APPELLANT

Vs

Hazi Sayed Musaraf Ali Chisti Bukhari and Others

RESPONDENT

Date of Decision : 20-03-1972

Acts Referred:

Limitation Act, 1908 — Article 142 , 144

Citation : AIR 1973 Ori 50

Hon'ble Judges : B.K. Patra, J

Bench : Single Bench

Advocate : Md. Y.A. Rahim, for the Appellant; B. Harichandan, for the Respondent

Final Decision : Dismissed

Judgement

B.K. Patra, J.—This is an appeal by the plaintiff whose suit for partition and recovery of possession of an eight annas share in the disputed house was dismissed by the Fourth Additional Subordinate Judge, Cuttack.

2. The case of the plaintiff-appellant is that the disputed house was the self-acquired property of his father Dadamohammad Yaqub who died leaving behind him his two sons Md. Yusuf Sarif (deft. No. 1) and Md. Rajak Sarif (plaintiff). It is alleged that in the year 1958, defendant No. 2 was inducted into the suit house as a monthly tenant but the latter in collusion with defendant No. 1 began to lay a claim to the entire house on the strength of a will said to have been executed in his favour by defendant No. 1. On several occasions, the plaintiff called upon his brother defendant No. 1 to partition the disputed house but as he did not pay any heed to the request, the plaintiff was obliged to bring the suit claiming the reliefs above-mentioned.

3. The suit proceeded ex parte against defendant No. 1. Defendant No. 2 who contested the suit in his written statement disputed the plaintiff's claim that Md. Yaqub was the owner of the disputed property. According to him, this property

belonged to defendant No. 1 alone who in 1946 created a valid Wakf in respect of the same and in evidence thereof executed the necessary document in favour of defendant No. 2 on 6-11-1946 and delivered possession of the property to him. Since then deft. No. 2 is in possession of the disputed property which is being used as a place of public religious worship. The plaintiff has no manner of title to any share in the disputed house and he being never in possession of the property the suit is barred by limitation. It has also been asserted that defendant No. 2 has acquired a valid title to the property by adverse possession. An objection was also taken in the written statement that the suit property having been registered by the Board of Wakfs, the suit is bad for non-joinder of the Secretary of the Board of Wakfs. The latter, however, was subsequently implead-ed as a defendant.

4. The trial Court held that the disputed property was the ancestral property of Md. Yaqub and that the plaintiff and defendant No. 1 are his sons. He held that after Yaqub's death, each of his two sons acquired an eight annas interest in the property. He believed that defendant No. 1 had created a Wakf in respect of the disputed house, but held that it is not valid in so far as the eight annas share of the plaintiff is concerned. He, however, came to the conclusion that Article 142 of the old Limitation Act applies to the facts of this case and that as the plaintiff has failed to prove his possession over any portion of the disputed house at any time within 12 years before he instituted the suit on 16-10-1963, the suit is barred by limitation. In the result he dismissed the suit. Hence this appeal by the plaintiff.

5. In Exhibit 8, the current Settlement Khatian published in June, 1932, Md. Yaqub is recorded as the owner in possession of the disputed house. In the year 1949, there was another settlement in respect of the Guttack Town Cantonment Khasmahal in pursuance of the notification of the Government dated 10-5-1949 (Exhibit 6/a). Therein, the name of defendant No. 1 alone was recorded in respect of the disputed property. Relying on this document, it was argued on behalf of the contesting defendant that defendant No. 1 was the sole owner of the disputed property. But it is not explained how defendant No. 1 came to be the owner of the disputed property which in the year 1932 had been recorded in the name of his father Yaqub. There is, on the other hand, considerable force in the argument advanced by the plaintiff that defendant No. 1 being the eldest son of Md. Yaqub and taking advantaged of the admitted fact that Md. Yaqub was serving and was residing at Kharagpur, he (defendant No. 1) got his (defendant No. 1's) name recorded in respect of the disputed property. That apart, D.W. 1 and D.W. 5 have admitted in Court that this house previously belonged to Yaqub. In these circumstances the Court below was right in believing that Md. Yaqub was the owner of the disputed house. Mr. Harichandan appearing for the respondents has also not made any serious attempt to assail this finding of the trial Court.

6. It is equally not disputed that under the Muhammadan Law, a son has no right during his father's lifetime to any interest in the father's property. There is

satisfactory evidence on record to establish that Md. Yaqub died in the year 1950. It has been so alleged in the plaint and all that defendant no. 2 stated in his written statement is that he did not admit this allegation. The plaintiff examined as P.W. 2 and his witness P.W. 1 have both stated that Md. Yaqub died in the year 1950. There is no clear evidence on the defendant's side that Yaqub's death took place earlier than 1950. That being the position, defendant No. 1 had no manner of right in 1946 to alienate any portion of the disputed - house and consequently the trust alleged to have been created by him in 1946 must be held to be invalid. The question then arises whether having regard to the finding that no valid trust has been created by defendant No. 1 in respect of any portion of the disputed property, the plaintiff who acquired an eight annas share in the disputed house after the death of his father can recover that share after partition. The answer to the question would depend upon whether the interest inherited by the plaintiff still subsists in him. The finding of the learned trial Court, as already indicated, is that as the plaintiff has failed to prove that he was in possession of his share in the disputed property within twelve years preceding the institution of the suit, his claim for partition and possession of his share is barred by limitation. The suit having been filed on 16-10-1963 is to be governed by the Indian Limitation Act, 1908. The questions, therefore, that arise for consideration are (1) whether the suit is governed by Article 142 of the old Limitation Act; and (2) if Article 142 does not apply, but Article 144 applies, whether defendant No. 2 has succeeded in establishing that he has acquired a valid title to the suit property by adverse possession.

7. Article 142 of the old Limitation Act would apply only in those cases where the plaintiff alleges possession and dispossession or discontinuance of possession. There is no such allegation in the plaint in this case and the plaintiff on the basis of his title has claimed recovery of possession of his share after partition. As the prayers for partition and separate possession of an undivided share are composite in nature, Article 144, which provides for a suit for possession of immovable property not otherwise specifically provided for, would govern the suit. The starting point of limitation for the purpose of this article is the date when possession of the defendant becomes adverse to the plaintiff. The suit in this case is not for possession simpliciter but for partition and separate possession of the share which the plaintiff claims on the basis of his title. None of the articles of the Limitation Act seems to directly take within it a suit of that nature. It is, however, obvious that the suit is also in essence for recovery of immovable property, though in order to grant that relief something has to precede that. It is only when the relief of partition is granted that it will be possible to divide the shares by metes and bounds and the share of the plaintiff would be delivered to him. A case in point is *V.C. Thani Chettiar v. Dakshinamurthy Mudaliar* AIR 1955 Mad 288 That was a case arising out of a suit instituted by the purchaser of a share of some of the coparceners of a Hindu joint family claiming to be put in possession of a definite piece of a family property. A Bench of the Madras High Court relying on *Bai Shevantibai Vs. Janardan R.*

Warick, held that Article 144 would apply to such a suit. It appears to me, therefore, that the proper article applicable to this case is Article 144 and not Article 142 of the [old Limitation Act.

8. The question then is whether by the time the suit was filed, defendant No. 2 had acquired a title to the entire disputed house including the share of the plaintiff by adverse possession. The case of defendant No. 2 was that defendant No. 1 had created a trust in respect of the disputed house in 1946 and that since then he (defendant No. 2) is in possession of the property. But it is now found that defendant No. 1 had no more than an eight annas share in the property. It is, therefore, contended by the appellant that defendant No. 2 in whichever capacity he may be in possession of the property is vis-a-vis the plaintiff in the position of a co-owner, and consequently his possession can never be adverse to the plaintiff unless ouster is proved. Support for this proposition is sought for from the decision of the Supreme Court in Mohammad Baqar and Others Vs. Naim-un-Nisa Bibi and Others, where it was held that as under the law possession of one co-sharer is possession of all co-sharers, it cannot be adverse to them unless there is a denial of their right to their knowledge by the person in possession, and exclusion and ouster following therefrom for the statutory period, The same view was taken by Bose, J. in Md. Aminuddin v. Md. Abdur Rahman (AIR 1941 Nag 343). The principle underlying the rule of adverse possession as between co-owners was stated by Lord Buckmaster in Hardit Singh v. Gurmukh Singh AIR 1918 PC 1 in these terms:

"Uninterrupted sole possession of such property, without more, must be referred to the lawful title possessed by the joint holder to use the joint estate, and cannot be regarded as an assertion of a right to hold it as separate, so as to assert an adverse claim against other interested members."

The sole possession of a co-owner, although of the whole property, is therefore referable to the lawful title in the absence of evidence to the contrary. But even as between co-owners where possession has continued for a considerable period of time exclusively with one co-owner and prima facie to the exclusion of the other co-owners, the above principle can hardly be applied--(See AIR 1947 P.C. 15, Munnalal v. Mst. Kashibai) which was followed in Ishak Ali Vs. Mst. Unnasbi Porthahin and Others, . If the above is the position even when co-owners are concerned, it is doubtful if this principle has any application to a case where sole possession is with one who is not in fact a co-owner, but who has obtained possession of the whole property from a co-owner, by virtue of a transfer or otherwise. For this purpose, he must be treated as a stranger to the co-owners. Adverse possession as between strangers has only to be adequate in continuity, in publicity and in extent to show that it is adverse to the other party, It is sufficient if such possession was overt and without any attempt at concealment so that the person against whom time was running ought, if he exercised due vigilance, to be aware of what is happening. The possession of a stranger of a joint property is prima facie adverse and satisfies these elements of adverse

possession and there is no reason why he should be denied the benefit of such possession as against him who claims to be the co-owner of the property.

9. Unfortunately in this case, the trial Court has not recorded any finding on the claim of adverse possession made by defendant No. 2 because that Court being of opinion that Article 142 of the old Limitation Act applies to the facts of this case confined himself only to the question whether the plaintiff had established that he was in possession of the disputed property at any time within 12 years preceding the institution of the suit. I have, therefore, carefully looked into the evidence adduced by the parties on the question of possession and am satisfied that defendant No. 2 has succeeded in proving that since more than 12 years preceding the institution of the suit, the entire disputed house is being publicly used as a place for reading Quoran, for Fatiha and Urs and is being treated as Wakf property. This has been deposed to by defendant No. 2 (D.W. 8) and his witnesses Md. Fazil (D.W. 1), a retired Government servant and the Mutawalli of Mehbub Sobhani Dargha of Buxi Bazar, Nazu Mohammad (D.W. 2) who is sixty years old and who has got his house about 300 yards off from the disputed house, Mobarak Ali (D.W. 3) aged about 53 years and owner of a biscuit factory at Cut-tack and Sayed Wahab Manswar (D.W. 5), aged about 62 years and who is the Mut-walli of Mastan Dargha at Buxi Bazar. D. Ws. 1, 3 and 5 have also supported the assertion made by defendant No. 2 that at the time of creation of the Wakf, the disputed house was in a dilapidated condition and that after he obtained possession of the same, he had repaired and reconstructed the house. In support of defendant No. 2's assertion that he had repaired the disputed house, he has produced in Court Ext. L the permission granted by the Municipality and the site plan Ext. L-I, both of which were proved by the Municipal Tax Collector W. 7. That the disputed house has been repaired is also deposed to by the plaintiff P. W. 2 and his three witnesses P. Ws. It 3 and 4. While it is stated by the plaintiff that the repairs were made by his brother defendant No. 1 and P. W. 1 professed ignorance as to who effected the repairs, P. Ws. 3 and 4 stated categorically that it is defendant No. 2 who had effected all the repairs to the disputed house 8 to 10 years before they deposed in Court in 1966. So far as the possession of defendant No. 2 of the disputed house is concerned, the plaintiff and all his witnesses admit that it is being used as a public place for religious worship. P. W. 1 stated that defendant No. 2 is in possession of all the rooms in the disputed house except one small room which according to him is occupied by the plaintiff. But immediately thereafter it was elicited from him that for the last 3 or 4 years the plaintiff is staying in a rented house at Buxi Bazar market and prior to that he was staying at Kharagpur. Although the plaintiff stated that besides defendant No. 2 he is also staying in the suit house, he admitted in cross-examination that he lives in Buxi Bazar market in Government quarters. Thereafter, in an attempt to reconcile the statements it is stated by him that he stays in the rented house during day time and stays in the disputed house during night. Regarding the use of the disputed house as a place of public worship, the plaintiff himself stated thus:

"D. W. 2 has kept Abdul Rauf in the suit house but I cannot say in what capacity he has been kept in the suit house. I cannot say if Rauf is staying in the suit house for the last 16 years. Rauf reads the Quoran in the suit house. D. 2 also reads the Quoran and gives Fatiha in his room. At times also D. 2 performs "Quawali" in his room when there is congregation of Mohammadans. "Quali" is performed individually or in congregation.

xx xx xx Xx XX XX I have not entered into the 3 inner rooms and so I cannot say what happens there. Before six years I never came to Cuttack. I have not enquired as to what is being done in the 3 inner rooms. I have not paid rent or tax of the suit house. I have not contributed anything towards the cost of repair of the suit house.

XX XX XX XX The villagers attend the religious ceremonies in the suit house. Outsiders also come when called. The people call the suit house "Khankah." I never objected to the reading of Quoran publicly in the suit house since I came to Cuttack or at any time in my life."

"I cannot say who was staying in the suit house before I came to Cuttack six years ago,"

P. W. 3 admits that defendant No. 2 has repaired the suit house and is residing there for the last about 7 to 8 years. P. W. 4 says that defendant No, 2 is residing in the suit house for the last ten years,

10. Ext. C is an entry in the Zama-bandi Register of the Khasmahal which shows that in 1959, defendant No. 2 got his name mutated in respect of the disputed house in place of defendant No. 1, who, as has already been stated, had got his name recorded in the 1949 settlement. This mutation was done on the basis of an order Ext, 2 passed in Mutation Case No. 86 of 1958-59, That order was passed on the application dated 30-7-1958 filed by defendant No. 2 in the Khasmahal office (Ext. 1). It was stated in that application that the disputed house had been willed away in his favour by defendant No. 1 under the Will dated 6-11-1946 (Ext. A). D. W. 6 had proved that Ext. A is in the hand-writing of Udayanath Mohapatra. It is contended on the appellant's side that Ext. A is neither genuine nor valid and that it is only for the first time in the year 1959 that defendant No. 2 advanced a claim to the disputed property on the basis of a forged document and that the very fact that there is not a single scrap of paper relating to the period prior to 1959 to support the case of defendant No. 2 would indicate that it is only for the first time that year that he occupied the suit house, Having regard to the evidence on record and the circumstances of this case, this contention appears to me to be devoid of any merit. Apart from the oral evidence on the defendant's side, which completely supports the case of defendant No. 2 that he has been in possession of the disputed house since more than 12 years before the institution of the suit, some of the plaintiff's own witnesses have stated that defendant No. 2 has been using the disputed house as a place of public worship since about 10 years before they deposed in Court and this takes

one to the period prior to 1959. Coupled with it is the fact that the plaintiff has never stayed there and there is evidence to show that his brother defendant No. 1 had left for Pakistan sometime about the year 1947. Having regard therefore to the evidence and circumstances, the claim of defendant No. 2 that he is in possession of the disputed house since more than 12 years before the institution of the suit in his capacity as Mutawalli has been fully established. It must, therefore, follow that the suit is barred by limitation.

11. In the result, I would uphold the judgment and decree passed by the learned Subordinate Judge and dismiss this appeal. In the circumstances, there will be no order as to costs.