

(1959) 07 AHC CK 0014
In the Allahabad High Court
Case No : F.A. No 112 of 1949

Ram Nath

APPELLANT

Vs

Mst. Nanhi Begam After Her Yusuf Ali Khan and Others

RESPONDENT

Date of Decision : 29-07-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11, 47, 7

Citation : (1960) 30 AWR 238

Hon'ble Judges : A.P. Srivastava, J

Bench : Single Bench

Advocate : K.C. Saksena, for the Appellant; Satish Chandra, G. Kumar and M.A. Kazmi, for the Respondent

Final Decision : Dismissed

Judgement

A.P. Srivastava, J.—This is a Plaintiff's appeal, that arises out of a suit for possession and mesne profits The property described in Schedule "B" of the plaint is a part of a bigger property mentioned in Schedule "A" which originally belonged to several persons. Smt. Nanhi Begam Respondent No. 1 owned half share in it. Lala Jagan Lal deceased predecessor-in-interest of the Appellant owned one-fourth share. The remaining one fourth share was shared equally by Shah Mohammad Khan and Abdul Wahid Khan. Shah Mohammad Khan filed a suit No. 116 of 1935 in the Munsif's Court against the other co sharers for partition of his one-eighth share in the property. A preliminary decree was passed on the 21st October, 1935 in which the shares of the various co-sharers in the property were declared and actual partition was directed. Quras were prepared and ultimately by a final decree dated the 30th of May 1936 the red Qura was allotted to the Plaintiff of that suit, Shah Mohammad Khan and the green Qura was allotted to Nanhi Begam the present Respondent No. 1. Ja^ran Lal who owned one fourth share was dead by that time and the present Appellant and Respondent No. 24 in whose favour he had executed a will had taken his place. The yellow Qura was allotted to them. Abdul Wahid Khan, the remaining

co sharer, was given the remaining Qura which was of purple (Uda) colour. Shah Mohammad Khan and the heirs of Abdul Wahid Khan who had died by that time took possession of their respective Quras. Mst. Nanhi Begam however continued in possession of the remaining two Quras, viz. the green Qura and the yellow Qura. The Appellant and Respondent No. 24 did not get the decree executed and did not recover possession through court over the yellow Qura allotted to them. They however brought suit No. 86 of 1946 on the 4th of September 1940. The suit was brought in respect of that portion of the property which had been included in the earlier partition suit in the yellow and the green Quras. The Plaintiff's alleged in that suit that the property in the green and the yellow Quras was jointly owned and possessed by them and Smt. Nanhi Begam. They sought the partition of their half share in that property. That suit was contested by Smt. Nanhi Begam on various grounds and was ultimately dismissed on the 29th March, 1947. Soon afterwards on the 20th of October 1947 the Appellant along with Respondent No 24 filed the suit out of which the present appeal has arisen. In this suit they described the entire property which had been divided in four Quras in suit No. 116 of 1935 in Schedule "A". In Schedule "B" they described that part of the property which had been included in the yellow Qura in that suit. After giving the earlier history of the litigation relating to the property they said that in view of the decree in suit No. 116 of 1935 they were really the owners of the property in Schedule "B" (yellow Qura property) and were entitled to possession over the same. As Nanhi Begam had been in wrongful possession of the property they claimed Rs. 600/- as mesne profits from her for the three years preceding the suit. The Defendants who were impleaded in that suit besides Mst. Nanhi Begam were the other persons who had shared the property when it was joint and undivided and some proforma Defendants.

2. The suit was contested by Smt. Nanhi Begam alone. She did not deny that the property in the yellow Qura had been allotted to the Plaintiffs in the earlier decree in suit No. 116 of 1935. But the main pleas which she raised were that as the Appellants had not got that decree executed and had allowed her to remain in possession of the property they had lost their right in the property and the suit was barred by the provisions of Sections 11 and 47 CPC and Article 142 of the Limitation Act.

3. The suit was tried by Sri Khali Ahmad Khan, Civil Judge, Moradabad. He held that the property over which the Plaintiffs claimed possession had been allotted to them in the earlier suit No. 116 of 1935, that the Plaintiffs had never been in possession of the property and it had all along, been in the possession of Smt. Nanhi Begam and that the suit was barred by Section 11 as well as Section 47 Code of Civil procedure. He did not accept the plea that the suit was barred by limitation. Finding that the Plaintiffs were entitled neither to possession nor to mesne profits he dismissed the suit.

4. One of the two Plaintiffs has now come up in appeal and questions the correctness of the decision of the learned Civil Judge.

5. It is also not possible to accept the Appellant's contention that instate of the final partition decree in suit No. 116 of 1936 they and Mst. Nanhi Begam continued to be joint owners of the property. The final decree effectively put an end to the joint ownership of the property anil as a result of it Mst. Nanhi Begam became the sole owner of the green Qura and the Plaintiffs became the sole owners of the yellow Qura. No question of joint ownership remained. Reliance was placed in this connection on certain observations made in the case Santan Narain Tewari Vs. Saran Narain Tewari and Others, . In that case after referring to certain reported decisions I the principle which was deduced from them was formulated as follows:

...but the principle of those decisions appears to have been that a co sharer has got a right to seek fresh partition if for some reason the previous decree for partition becomes unenforceable to that there has not been actually breaking up of the title and possession of the co sharer by actual delivery to each of there of the specific portion of the joint properly allotted to him by that decree.

This principle follows from the fundamental concept of joint ownership and possession giving each joint owner a right to transform this, joint ownership and possession into several and independent ownerships and possession, but this transformation cannot in the eye of law be held to have been brought about unless and until the entire process of transformation starting from the ascertainment of the share of each joint owner and ending in the actual delivery to him of the property given to him forming his share of the joint property, has been gone through; so long as this does not take place; the title and possession of all the co-sharers continues to be joint.

6. The decisions from which this principle was sought to be deduced were those reported in Nasrat Ullah v. Mujib Ullah ILR 13 All. 309 Madon Mohon Mondul and others Vs. Baikanta Nath Mondul and another Mansaram Chakravarti v. Ganeshchandra Chakravarti 17 CWN 521 T.C. Mukerji v. Afzal Beg ILR 37 All. 155 and Dilo Rana and Another Vs. Munshi Kunj Behari Prasad and Others,

7. With profound respect to the learned Judges who decided Santan Narain Tewari Vs. Saran Narain Tewari and Others, one is constrained to observe that the proposition which they were laying down and not in fact follow from the cases from which it was sought to have been deduced and was in any case stated too widely. What the learned Judges appear to have lost sight of was the distinction between an enforceable partition decree and a decree which is not enforceable for some reason or other. All the cases which were relied upon by them were cases in which the previous partition decree was not a complete and enforceable decree in execution of which separate possession could have been obtained. It was on that account that it was held that the property had remained joint and a subsequent suit for partition was maintainable. None of the cases was a case in which an enforceable partition decree had been passed and the decree-holders were permitted to ignore it and to re agitate the matter by claiming fresh partition. Thus, in Nasrat Ullah v. Mujib Ullah ILR 13 All. 309 the property was a

revenue paying properly and the Civil Court had only declared the shares of the various co share is. Actual partition could have been effected only through the revenue court, but that was not done. Another order of partition had also been obtained by another co-sharer but that too had remained unendorsed. In those circumstances it was laid down that:

...When a decree declaring a right to partition has not been given effect to by the parties proceeding to partition in accordance with it, it is competent for the parties or any of them, if they still continue to be interested in the joint property, to bring another suit for a declaration of right to a partition in case their right to partition is called in question at a time when, by reason of limitation or otherwise, they cannot put into effect the decree first obtained.

8. In *Madon Mohon Mondul and others Vs. Baikanta Nath Mondul and another* a partition suit had been filed but had been compromised. An Amin was appointed to effect partition but he had not partitioned the disputed plots. A second suit for partition was therefore held to be maintainable. In this case too, therefore there was no effective prior decree for partition.

9. In *T.C. Mukerji v. Afyal Beg* ILR 37 All. 155 and partition suit had been filed but had been compromised. It had been agreed under the compromise that the Defendant would transfer his rights to the Plaintiff for a consideration. The transfer was however not made and the compromise was not given effect to. The property remained joint. That was why a fresh suit for partition was entertained.

10. In *Mansaram Chakravarti v. Ganesh Chundra Chakravarti* 17 CWN 521 also in the earlier partition suit for some reason the property had not been actually divided by the decree made therein and on that ground it was held that it was open to the joint owners to maintain a subsequent suit for partition.

11. In *Dilo Rana and Another Vs. Munshi Kunj Behari Prasad and Others*, the earlier suit for partition had been allowed to be withdrawn with permission to file a fresh suit and no partition had therefore been ordered therein. A second suit for partition was therefore permitted.

12. These cases were therefore not authorities for the proposition that after a partition suit had ended in a final and executable decree, the parties to it could instead of having separate possession over their shares by getting the decree executed by pass the decree and ignoring it file a second suit for partition. It had also not been laid down in any of those cases that a final decree for partition did not bring the joint ownership of the co sharers to an end and that they could claim to be co-sharers in spite of it. When in a suit for partition the property is divided by metes and bounds and a decree is passed specifying the portions over which each co-sharer can take exclusive possession as his separate property how can it be said that the property still remained the joint property of the parties. There thus appears to be no warrant for the proposition that the joint ownership continues till separate possession is delivered to each co sharer of the portion forming his share. The joint ownership in my opinion comes to an end as soon as

the final partition decree is passed and it becomes open to each co-sharer to take possession over his shares by getting the decree executed.

13. The learned judges in *Santan Narain Tewari Vs. Saran Narain Tewari and Others*, also failed to consider the effect of Section 47 CPC on the latter suit for partition. How could such a suit be maintainable if the same relief could be had by getting the earlier decree executed.

14. It is, therefore, not possible to accept the contention that in spite of the earlier partition decree of 1936 the Appellant and Mst. Nanhi Begam continued to be joint owners of the yellow and the green Quras and a second suit for partition and possession could be maintained by the Appellants on that basis.

15. It has also to be borne in mind that in the earlier suit No. 86 of 1946 the Appellants had put up the case that the properties in the yellow and the green Quras jointly belonged to them and Mst. Nanhi Begam had claimed a partition of their share on this basis. That stand of theirs was negated in that case and the suit was dismissed. The decree was not challenged in appeal and was allowed to become final. The Appellants cannot avoid the decree now by saying that the decision was incorrect in law. An incorrect decision if it becomes final is as much binding as a correct one.

16. It has also to be remembered that the present suit is not a suit for partition. The only property in dispute here is the property described in Schedule "A" i.e. the property of the yellow Qura. Over that portion the Plaintiffs sought exclusive possession on the ground that they were its sole owners and the Defendants Mst. Nanhi Begam had no right or interest in it. The property in the green Qura is not in dispute in this case. There can, therefore, be no question of the Plaintiff's claiming any partition of the property in the green and the yellow Quras in the present suit, Learned Counsel urged that a suit for possession could be converted into a suit for partition and placed reliance on *Gangaram Ram Chandra v. Butrusao and Ors.* AIR 1952 Nag. 202. That case is however clearly distinguishable. The only thing laid down in that case was that if a person claimed possession over an entire property but was found to be entitled only to a share in it he could be allowed to claim that share by partition. In accordance with the principle laid down there, therefore, if the Plaintiffs were claiming the entire yellow Qura property in the suit but were for some reason found entitled only to a share in that property they could be allowed to claim that share only. But that decision does not permit them to claim in this suit that the green Qura property should also be brought in the hotchpot and divided in equal shares along with the yellow Qura property.

17. In the partition suit No. 116 of 1935 an effective executable decree was passed in favour of the Plaintiffs and they could in execution of that decree take exclusive possession of the yellow Qura property which they now claim. They did not take any steps to have the decree executed and allowed their remedy in execution to get time barred. As they did not get actual possession of the

property otherwise too and they were not dispossessed subsequently no fresh cause of action arose which could entitle them to maintain the suit. It was however urged that even without disclosing a fresh cause of action the Plaintiffs could maintain a suit for possession on the basis of the decree in suit No. 116 of 1935, provided their suit was filed within 12 years of that decree. Reliance was placed in support of this contention on a decision of Misru, J. in *Hamid Ali Khan v. Shanti Devi* 1950 AWR (HC) 272 LB. In that case relying on certain English decisions and some observations made by the learned Single Judge who decided the case of *Dhanraj Singh v. Lakhrani Kanwar* ILR 38 All 509 Misra, J. held that a suit could be maintained on the basis of a judgment. It is regrettable that the attention of the learned Judge was not drawn to the observations of the Division Bench which considered the Letters Patent Appeal in that case or to a latter case of this Court reported in *Ramanand and Ors. v. Jai Ram and Ors.* ILR 43 All 170. In *Dhanraj Singh v. hakhrani Kunvar* ILR 38 All 509 it had been found as a fact that after the earlier decree for possession the plain tiff had obtained actual physical possession over the property and had subsequently been dispossessed, he was, therefore, held to have a fresh cause of action. Dealing with the argument that without proving possession and dispossession, a suit could be maintained on the basis, of the earlier judgment, it was observed by the Division Bench that:

The learned Judge of this Court, however, seems to have held that the Plaintiff's cause of action merged in the decree and then to have considered that it is always, open to a decree-holder to bring a suit on the decree at any time within twelve years, notwithstanding that the decree has become, incapable of execution by lapse of time. This dictum, if correct, would mean that suit after suit could be brought upon barred decrees. If this is, correct law, it is very alarming, situation. It is difficult to understand why the Legislature should have expressly limited the time within which a decree can be executed and at the same time allow decree holders to bring suits upon decrees thereby putting the parties to extra expense and vastly extending limitation. With regard to ordinary decrees we think that Section 47, which provides that no separate suit shall be brought in respect of matters relating to the discharge of decrees prevents a fresh-suit being brought upon a decree.

18. The question was considered at length in the subsequent case of *Ramanand and Ors. v. Jai Ram and Ors.* ILR 43 All 170 and there it was definitely laid down:

We have given our best consideration to the question before us and we are of opinion that, both on authority and on a correct interpretation of Section 47 CPC the present suit was, not maintainable. Stripped of all unnecessary details, the relief claimed by the Plaintiffs, in substance, amounts to asking for the fruits of a decree which they are unable to execute owing to lapse of time. The suit in effect, does raise a question relating to the execution, discharge or satisfaction of the former decree and cannot be "determined by a separate suit." The Plaintiffs claim in reality is that they obtained a decree for possession of this property, the

Defendants have not given them possession in spite of the said decree and therefore the court should compel the Defendants to carry out their obligation under that decree. In our opinion such a suit falls clearly within the purview of Section 47 and if it did not, we fail to see what other form of suit would.

19. The observations apply with, full force to the present suit. The Plaintiffs here were granted a decree for possession by partition and if they had got that decree executed they could have obtained possession over the yellow Qura property now in dispute. For reasons best known to them they did not get the decree executed and allowed it to get time barred. They cannot now be allowed to maintain a fresh suit for possession on the basis of the earlier decree. Such a suit must be held to be clearly barred by Section 7 Code of Civil Procedure.

20. The decision in the earlier suit No. 86 of 1946 would also bring in the bar of Section 11 Code of Civil Procedure. In that suit in respect of this very property the Appellants claimed possession by partition. In that suit they could have claimed possession also. On account of the dismissal of the suit it must be held that their claim for possession too was constructively put forward and rejected. The learned Civil Judge thus appears to be right in his conclusion that the suit of the Plaintiffs so far as possession was concerned was not maintainable in view of Sections 47 and II Code of Civil Procedure.

21. It was however contended on behalf of the Appellant that even if the Plaintiffs claim for possession had become barred, they could in any case claim mesne profits because Mst. Nanhi Begam had really been in unlawful possession of the yellow Qura property without any title. She could not claim to have perfected her title by adverse possession because the suit had been filed within 12 years of the date of the earlier partition decree in suit No. 116 of 1936. Her possession over the property being unlawful she was liable to pay mesne profits to the Plaintiffs. In putting forward this contention, the learned Counsel for the Appellant did not keep in mind the principles on which mesne profits are awarded. Mesne profits are allowed by way of restitution. When a person is kept out of possession of his property justice requires that he should not only get it back but that he should also get all the profits which he would have realised had he been in possession and the trespasser should not get any advantage out of his wrongful act. The right to be in possession is therefore the basis of the right to claim mesne profits. If a person has on any occasion lost his right to be in possession he can have no claim to mesne profits, As was laid down in *Abdul Ghafoor v. Raja Ram* ILR 23 All 252.

The object of a suit for mesne profits is to compensate the owner of land for being kept out of possession and deprived of the profits of the land. The measure of compensation is ordinarily the loss which he has suffered. If he is placed in the same possession as if he had all along been in possession that is all he is ordinarily entitled to and it is not reasonable that he should receive any additional benefit, or that the person in wrongful possession should not make compensation but be fined as well.

22. In AIR 1935 379 (Lahore) it was laid down:

It is only the person who is entitled to actual possession, that can legally claim profits.

23. The Plaintiff could, therefore, claim mesne profits only if they were entitled to possession but had been kept out of the same. In the present case the Plaintiff's right to claim possession became barred in 1939 when the three years limitation for getting the decree in suit No. 116 of 1935 executed expired. Thereafter they lost their right to get possession over the property and if Mst. Nanni Begam remained in possession of the property after that date, her possession could not be held to be unlawful. She could be held liable to pay mesne profits to the Plaintiffs only if her possession was unlawful and the Plaintiffs were entitled to remain in possession but had been kept out of it. That being not the case the Plaintiffs' claim for mesne profits was as much liable to be rejected as their claim for possession.

24. The suit of the Plaintiffs must be held to have been rightly dismissed. The appeal has no force and is dismissed with costs.