

(2003) 04 OHC CK 0063

In the Orissa High Court

Case No : Second Appeal No. 246 of 1986

Rasid Khan, (dead) and after him Khairan Bibi and Others APPELLANT

Vs

Abdul Gaffar Khan (dead) and after him Fogara Bibi and Others RESPONDENT

Date of Decision : 09-04-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2003) 1 OLR 559

Hon'ble Judges : B. Panigrahi, J

Bench : Single Bench

Advocate : S.B. Misra, J.M. Mohanty, S.K. Nayak 2, S. N. Misra, K.K. Rout, R.C. Praharaj and B. Das, for the Appellant; S. Misra-2, R. Ch. Rath, S. Mohanty, A.K. Misra, S. Mantry and S.K. Zulfeeqar, for the Respondent

Final Decision : Dismissed

Judgement

B. Panigrahi, J.—This appeal is directed against the judgment dated decree passed by the District Judge, Balasore dated 3.9.1986 and 10.9.1986 respectively in S.J.A. Appeal No. 48 of 1984-1 confirming the judgment and decree passed by the learned Subordinate Judge. Bhadrak in T.S. No. 146 of 1978-1 decreeing preliminarily the plaintiff's suit for partition.

2. The respondent Nos. 1 and .2 filed a suit being Title Suit No. 146 of 1978-1 for partition of the suit schedule land comprising of two plots, i.e. C. S. Plot No. 994 under khata No. 229 with an area of AO. 173 decimals, a tank and C.S. Plot No. 1000 under Khata No. 475 with an area of A0.050 decimals, a homestead. The case of the plaintiffs is that one Paran Khan had three sons, namely, Karim Khan, Umed Khan and Dhuma Khan each having 1/3rd share. It is further stated that Karim during his life time sold his interest in the suit properties to Mir Kefayat under two sale deeds dated 28.5.1923 and 6.4.1923. The defendants 1 to 4 i.e. the appellants are the sons and defendants 4/Ka, 4/Kha and 4/Ga are the daughters and widow of Umed Khan. Defendants 5 to 12 are the successors-

in-interest of Dhuma Khan. It is alleged that Mir Kefayat sold the properties purchased from Karim to Dhuma in 1957. Thus, Dhuma had 2/3rd interest in the property. It is further stated that Dhuma's son defendant No. 5 transferred his 4/15th interest out of Lot No. 1 to the appellants and again Ac.0.008 dec. representing 1/3rd interest in Lot No. 2 to the appellants. It is alleged that the daughters of Dhuma sold Ac.0.008 dec, the 7/16th interest out of lot No. 2 and their interest of 2/5th out of Lot No. 1 to the plaintiffs in 1978. The appellants transferred their interest in Lot No. 2 which is a homestead land to defendants 10, 11 and 12. Since the appellants did not agree for an amicable partition the plaintiff-respondents were, therefore, obliged to file the suit for partition.

3. The appellants' case in trial Court is that there was a complete partition of the suit land. In the said partition the lands described in Lot. No. 1 had been allotted to their father Umed Khan, who has been recorded having present possession in the Current Settlement Record of Rights. The appellants have strongly refuted the transfer alleged to have been made in favour of Mir. Kefayat. They pleaded that in Plot No. 1000 i.e., in Lot No. 2 Umed and Dhuma had one share, but the appellants were in exclusive possession in exercise of their own right for more than 12 years. They explained that the purchase from defendant No. 2 was meant only a paper transaction. They further claimed that on Plot No. 1000 they have raised construction after obtaining necessary sanction from the Municipal authorities.

4. On a brief resume of the evidence placed before the trial Court it has however, held that the suit property was never partitioned by metes and bounds. It was further held that the appellants did not prescribe their right by adverse possession. The defendants 1 to 4 being aggrieved by and affected with the observation of the trial Court filed an appeal before the learned District Judge, which yielded no other result than dismissal of their appeal.

5. The learned counsel appearing for the appellants has argued with strong intensity of conviction that although in the Record of Right (Ext.3) the names of Mir Kefayat and others along with Umed Khan and Dhuma Khan were noted, but in the remark column the possession of Umed Khan has been alone noted. The appellants being the L. Rs. of Umed Khan, they are therefore, entitled to the suit land. In the Major Settlement the suit land has been recorded in the names of the appellants, but the appellate Court has intelligently avoided to discuss about the same. There were ample evidence placed before the trial Court that there was a partition among the three branches. But the learned trial Court as well as the appellate Court shirked its responsibility to discuss the evidence in detail. The certified copy of the sale deed, Ext.6, executed by defendant No. 5 in favour of defendants 1 to 4 does not specifically describe about Plot No. 994. Therefore, the Court below should have held that it was a sham transaction created only to protect the property of Kasim Uddin. At the best the plaintiffs can argue that Kasim Uddin's share in the said tank is admitted and Kasim Uddin sold his 8 annas interest to the defendants 1 to 4. Kasim Uddin having no share in the

property, the sale by him in favour of defendants 1 to 4 therefore, does not create any interest in latter's favour.

6. As regards the Lot No. 1 the Record of Right stood in the name of Umed Khan and Dhuma Khan with 9 annas share of Umed Khan and 7 annas share to Dhuma Khan out of 7 annas share of Dhuma, Kasim Uddin got 2/5th share whereas the defendants 6,7 and 8 got 1/5th share each. The plaintiffs having purchased the interest of defendants 6, 7 and 8 can only claim 3/5th of 7 annas share of Dhuma. Both the Courts below have significantly failed to discuss at length about the evidence of D. Ws. 1, 2 and 3 to prove exclusive possession of defendants 1 to 4 over the tank and its embankment and the passage running through Plot No. 994 leading to the main road.

7. Mr. Misra, learned counsel appearing for the plaintiff- respondents had advanced an inexorable plea that since both the Courts below have already disbelieved the plea of partition taken by the appellants, this Court need not take the trouble of discussing the same issue once again. It is nonetheless true that the party who takes the plea of prior partition has not only to plead such fact in the written statement but shall prove by placing unequivocal evidence that such partition in fact had taken place. In this case the defendants 1 to 4 who are appellants here significantly failed to place trustworthy evidence of unimpeachable character that such partition had taken place.

8. It has been further submitted that Karim sold his interest in the suit properties to Mir Kefayat under sale deeds dated 6.4.1923 and 28.5.1923. After such deed of conveyances were created in favour of Mir Kefayat his name found place in the R.O.R. in Ext.3 which suggest that such sale deeds were acted upon accordingly the name of the purchaser was recorded in the R.O.R. The purchaser Mir Kefayat again sold the property to Dhuma under the sale deed dated 29.2.1957. Thus Dhuma became the owner of 2/3rd interest. After the death of Dhuma his son Kasimuddin Khan, defendant No. 5, had sold 4/15th interest in the entire property whereas defendants 7,8 and 9 became the owners of 2/5th interest over the entire property. Defendants 7 to 9 again sold the property to the plaintiff- respondents in the year 1978 representing 2/5th interest from Lot No. 1 and 0.008/16th in Lot No. 2. Defendant No. 5 also transferred his 4/15th interest out of lot No. 1 to the appellants and again 0.008-one-third decimal in lot No. 2 to them. The appellants in their turn transferred their interest in lot No. 2 homestead to defendants 10 to 12. So the appellants have 3/ 5th interest in lot No. 1 whereas the plaintiffs have 2/5th interest in the same lot No. 1. In lot No. 2 the plaintiffs' interest is 8-7/ 16th.

9. In order to appreciate the contention of both parties, it is however necessary to quote the genealogy which practically has been admitted by both parties.

Genealogy Paran Khan _____|_____ |
| Sakina Bibi Lachiman Bibi _____|_____ | | | | | Karim
Khan Dhuma Khan Umed Khan _____|_____ | =Daulat Bibi | |

| | | Sirajuddin Abdul Abdul | | Rahman Gafar | | (D.6) (P.2) (P.1) |
_____ |

_____ | | | | | |
| | Rasid Okil Dukha Noor Lajo Bibi Saidum Bibi | Mohammad | (D.1) (D.2)
(D.3) (D-4) (D-4/Uan) (D-4/Uan) _____ |

_____ | | | | |
Kasimuddin Kalsum Bibi Hazara Bibi Khairun Bibi (D.5) (D.7) (D.8) (D.9) | |
_____ | | | | Hakimuddin

Kalimuddin Basiruddin (D.10) (D.11) (D.12) While deciding the rights of both parties, it has to be considered whether Karim Khan who was admittedly one of the co-sharers had alienated his interest to Mir Kefayat by a registered sale deed dated 28th May, 1923. In this regard, both the Courts accepted the sale deed by which Karim Khan had transferred his interest in favour of Mir Kefayat. So far as the interest of Karim Khan is concerned, there has been no dispute raised by the appellants. It is further admitted that Paran had three sons, namely, Karim Khan, Umed Khan and Dhuma Khan, each representing 1/3rd interest. Therefore, the interest possessed by Karim Khan passed on to Mir Kefayat by such sale deed.

10. Although the appellants have taken a plea of pre-partition stating that lot No. 1 fell to the share of Umed, but both the Courts below held that the appellants could not satisfy by placing any worthy and unimpeachable evidence that lot No. 1 had fallen to the share of Umed. Therefore, it can safely be concluded that lot No. 1 continued and used as joint property belonging to the plaintiffs and defendants 1 to 4.

11. Dhuma again purchased the land from Mir Kefayat on 19.12.1957 vide Ext.5 subsequently the daughters of Dhuma who are added as defendants 7 to 9 sold some land under the sale deeds dated 3.5.78 vide Ext. 1 and 2.11.78 vide Ext.2.

12. It has been stated by the plaintiff-respondents that defendant No. 5 had sold the properties to defendants 1 to 3 which was recorded in the R.O.R. vide Ext.3. It is claimed by the appellants that their names have been recorded in the present R.O.R. but it is found that in the appeal being No. 443 of 1978 it was directed that such entry is subject to the decision by the competent Court. Since these developments had taken place during the pendency of the suit, therefore, even if such entry is made in their favour, it shall not militate against the interest of the plaintiffs.

13. From the fact-situation placed in the record it has been emerged that Mir Kefayat was recorded in the C.S. record of rights along with the ancestors of the appellants and the plaintiff- respondents as well as vide Ext.3. It is true that the name of Umed Khan has been noted to have been in possession of Plot No. 173.

14. Learned counsel appearing for the appellant has vehemently contended that both the Courts have lost sight of the fact that Umed Khan and thereafter his successors have been continuously in possession of such plot in exclusion of other co-sharers. Therefore, they have acquired a right by ouster. In support of

his contention reliance was placed in *Alli Babi and Others Vs. Krishna Sahu and Others*, . It is true that the presumption of joint family is available under Hindu Law but the same doctrine is not available to Muslims. The R.O.R. stands jointly recorded in favour of *Mir Kefayat, Umed Khan and Dhuma Khan* in respect of Plot No. 994 with others. In the R.O.R. the names of other co-owners were also recorded. Therefore, it does not detract the right of recorded owners to raise a presumption of jointness and only to infer that Umed Khan was in exclusive possession. In this regard reliance can be placed on a judgment reported in *Karbalai Begum Vs. Mohd. Sayeed and Another*, wherein it has been held :

"It is well settled that mere non-participation in the rent and profits of the land of a co-sharers does not amount to an ouster so as to give title by adverse possession to the other co-sharers in possession. Indeed even if this fact be admitted, then the legal position would be that Mohd. Bashir and Mohd. Rashid, being co-sharers of the plaintiff, would become constructive trustees on behalf of the plaintiff and the right of the plaintiff would be deemed to be protected by the trustees. The learned counsel appearing for the respondent was unable to contest this position of law. In the present case, it is therefore manifest that the possession of the defendants, apart from being in the nature of constructive trustees, would be in law the possession of the plaintiff."

15. Merely because one of the co-sharers was shown to be in possession and the profits of lands has not been given to others, it would not raise a presumption that they had lost their right over such property. Be it noted here that plot No. 9-94 is a tank. Therefore, possession of Umed Khan will always construe to be the possession of others in the light of the principle enunciated by the Supreme Court that possession of a co-sharer or a co- heir is presumed to be that of other co-sharers of co-heirs.

16. In view of the judgment of the Supreme Court there appears to have little doubt that even assuming that Umed was in possession of the tank, such possession shall enure to the benefit of other co-sharer/co-owners. Both the Courts have concurrently held that such possession can be construed to have been in joint possession of the plaintiff-respondents. The plaintiff-respondents have relied upon the sale deed dated 12.2.1957 vide Ext.5 which has been proved by P.W.2 as an attesting witness and an identifier to the document. In this document the recitals find mention vide Ext.6. Hence both the Courts below held such document to be a genuine one. Thus the Courts below held that defendants 1 to 4, who are appellants here are estopped from claiming exclusive title over lot No. 1.

17. D.W. 1 who is a deed writer proved the sale deed Ext. B under which defendants 5, 7 and 9 sold the land appertaining to lot Nos. 1 and 2 of the suit lands to defendants 10 to 12. Defendants 5, 7 and 9 did not assail the execution. They have sold to defendants 10 to 12 under the sale deed dated 2.11.78 vide Ext. B. The appellants sold Ac 0.0025 decimals to defendants 10 to 12 vide Ext. A. They also admit such transaction.

18. Therefore, in view of the aforesaid discussions, agreeing with the observation of both the Courts below I hold that the appeal is devoid of merit and is accordingly dismissed but without costs.

19. The suit is preliminarily decreed by declaring the plaintiffs $\frac{2}{5}$ th interest, defendants 1 to 4 including respondents 4/ka, 4/kha and 4/ga $\frac{3}{5}$ th interest in lot No. 1 and the other defendants have no interest over such land. Further the plaintiff-respondents have interest of $\frac{0.008-7}{16}$ decimal out of lot No. 2 whereas defendants 10 to 12 had $\frac{0.004-19}{16}$ decimal. The other defendants cannot claim any interest over such property. In the ROR lot No. 1 has been shown to be a tank. In the absence of any amicable partition, it is left to either party for carving out his/their interest. by filing an application for deputation of a Commissioner for partition and separate possession. In so far as lot No. 1 is concerned, it can only be put to division after the commissioner ascertained that there has been no tank in existence.