
(1987) 05 OHC CK 0005
In the Orissa High Court
Case No : A.H.O. No. 30 of 1976

Ratnamani Mandal and Others	Vs	APPELLANT
Daniel Mandal and Others		RESPONDENT

Date of Decision : 04-05-1987

Acts Referred:

Citation : (1987) 64 CLT 757

Hon'ble Judges : R.C. Patnaik, J;B.K. Behera, J

Bench : Division Bench

Advocate : R.K. Mohapatra, K.B. Kar, U.C. Panda and B. Routray, for the Appellant; B.B. Mohanty and Bhagyadhar Das, for the Respondent

Final Decision : Dismissed

Judgement

R.C. Patnaik, J.—In this appeal under the Letters Patent, the short question that falls for consideration is ?whether a suit for partition at the instance of holder of subordinate interest lies against the holder of superior interest.?

2. Jacob, the grant-father of Plaintiff and father of Defendant No. 1, was the Derpatadar of the disputed property. After his death, the holding was jointly recorded in the names of the Plaintiff and Defendant No. 1 as Darpatadars in the Record-of-Right of the year 1932. Both of them jointly paid rent to the patadar Manmohan Das Jachuk. Later on, Defendant No. 1 purchased the patadari interest from Manmohan Das Jachuk. It was asserted by the Plaintiff that despite the purchase of patadari interest alone by Defendant No. 1 they continued to jointly possess the holding and in the Khasmahal record of 1949, both of them were recorded as Darpatadars. The other Defendants had no interest in the holding.

3. Defendant No. 1 alone contested the suit. The main contention ws that being the sole Patadar he had constructed a house of the disputed land. Hence, the Plaintiff was not entitled to any relief. The learned Judge (Hon?ble S. Acharya, as he then was) neatly summarised the case as follows:

Plaintiff and Defendant No. 1 were admittedly the Darpatadars in respect of the

sit holding. In 1949 Khasmahal settlement the property was recorded in the names of the Plaintiff Defendant No. 1. So also were their names recorded in the municipal records. Before the learned Judge the question whether the Plaintiff as Darpatadar could institute a sit for partition against Defendant No. 1, the Patadar, when there was no unity of title was raised. In support of the contention reliance was placed upon a Single Judge decision of this Court in Atul Krishna Ghose and Ors. v. Munshi Syed Mukaram Ali, where it was held as follows:

It is a necessary condition for the maintainability of a suit for partition that there must be unity of title and unity of possession....

The learned Judge held that by the purchase of the superior right of Patadar by Defendant No. 1, the Plaintiff's subordinate right of Darpatadar was not destroyed or extinguished. He relied upon a decision of the Privy Council in Bhagwat Sahai v. Bipin Behari Mitter ILR 37 Cal. 918, and held that having regard to the facts and circumstances, balance of convenience was in favour of allowing partition, and the Patadari right of Defendant No. 1 could not stand in the way of the Plaintiff getting the relief.

4. Mr. R. K. Mohapatra, the learned Counsel for Privy Council in Bhagwat Sahai v. Bipin Behari Mitter ILR 37 Cal. 918; Atul Krishna Ghose and Ors. v. Munshi syed Mukaram Ali, 10 (1944) C.L.T. 66; Mukunda Lal Pal Chowdhry and Anr. v. I. Lehurauz and Ors. ILR 20 Cal. 379; Hemadri Nath Khan v. Ramani Kanta Roy ILR 24 Cal. 575 (P. B) the Appellants, has vehemently urged that having regard to the rule laid down by this Court in Atul Krishna Ghose and Ors. v. Munshi syed Mukaram Ali, 10 (1944) C.L.T. 66; the learned Judge was in error in granting partition when unity of title, one of the two elements necessary for granting partition, was wanting. As in an appeal under the Letters Patent from the judgment of a Single Judge in First Appeal the Bench would be slow to disturb the finding of fact, the decision of the learned Judge was not seriously challenged on factual aspects.

5. There is no dispute, therefore, that the Plaintiff and Defendant No. 1 were Darpatadars in respect of the suit holding.

Later on Defendant No. 1 acquired the Patadari interest. But the question is if after acquisition of Patadari interest by Defendant No. 1, the Plaintiff who was a joint owner and was in joint possession with Defendant No. 1 and could have instituted a sit for partition against Defendant No. 1 before the latter acquired Patadari interest. Would he be denuded of the right to seek partition? On the basis of Atul Krishna Ghose and Ors. v. Munshi Syed Mukaram¹ (supra) it was contended that unless there is unity of interest, a suit for partition is not maintainable. What is the logic?

6. Such a logic which found favour with the Bench of the Calcutta High Court in Mukunda Lal Pal Chowdhry and Anr. v. I. Lehurauz and Ors. ILR 20 Cal. 379, did not find favour with Macferson and Jenkins, JJ., who, therefore, referred the matter to a Full Bench. A Five Judges Bench of the Calcutta High Court in

Hemadri Nath Khan v. Ramani Kanta Roy ILR 24 Cal. 575 (P. B), delivered the judgment. The facts are almost similar, the difference being whereas in the present case the holder of the subordinate interest sought partition, in the Calcutta case, the holder of the superior interest filed the suit for partition. The facts of the Calcutta case briefly stated are:

The Plaintiff was the proprietor of the entire estate. His father had given a putni lease of an undivided 6 annas share of the estate to the predecessors-in-interest of the Defendants. The Plaintiff alleged that though the land was held jointly, both he and Defendant collected separately from the tenants their respective shares of the rent. Difficulty and inconvenience had arisen in the management of the property. He, therefore, used to have his 10 annas share divided by metes and bounds from the 6 annas share of the putnidars. It was contended, that the Plaintiff being zamindar and the Defendant Patadar and as such owner subordinate to the remainder, the suit for partition was not maintainable.

7. It was observed by the Full Bench that as a general rule, every joint owner of property should be held entitled to obtain partition, or in other words to be placed in a position to enjoy his own right separately and without interruption or interference by his co-sharer. It was against good sense, if not also against good morals, to compel joint owners to hold a thing in common. But there were exceptions in qualification depending upon the nature of the thing owned jointly, the nature of the interest of the party claiming partition, the nature of the terms and conditions on which the different joint owners hold their respective interest, if partition would impair the value of any of the shares into which it is to be divided; where the Plaintiff has limited interest in point of time partition would not be of permanent effect, whether the temporary advantage to be secured to the Plaintiff was sufficient to outweigh the disadvantage of subjecting the other co-owners to expenses and trouble and when result is not enduring etc..

8. The interest that the Plaintiff has in this case is not of a temporary and qualified character such as it would make it undesirable to have a partition against the Patadar and to subject him to the trouble and expenses in the partition proceeding. The Full Bench discountenanced the rule that 'as a general proposition of law, there can be no partition as between parties, the interest of one of whom is subordinate to that of the others?' and observed that in each case the Court must determine whether having regard to the nature of the interests owned by the parties and all other circumstances necessary to be taken into consideration the 'balance of convenience was in favour of allowing partition and if it determined that question in the affirmative, the mere fact of the parties owning interests which are not co-ordinate in degree, ought not to be a bar to partition. This principle their Lordships held was in accord with the rules of justice, equity and good conscience.

Similar question arose before the Privy Council in *Bhagwat Sahai v. Bipin Behari Mitter*, Approving Council in the decision of the Full Bench in *Hemadri Nath Khan's* case⁴, their Lordships; of the Privy Council observed:

The right of partition exists when two parties are in joint possession of land under permanent titles, although their titles may not be identical.

9. In course of hearing, we made a query from the counsel for the Appellant as to what right was available to the Plaintiff in the circumstance? of the case. He was the Darpatadar along with Defendant No. 1 and was entitled to enjoy the property. If Defendant No. 1 interfered with his possession, he could have been entitled to carve out his share and enjoy the same separately. Why should the position change without anything more merely because his co-sharer Darpatadar acquired the superior right of patadar. On what logic he should lose the right of enjoying his share .separately? We are not impressed by the ratio laid down in Atul Krishna?s casel, if that were to Jay down a general proposition applicable to all situations. We would rather respectfully follow the dicta of Banerjee, J. in the Full Bench case. referred to above. Only such exceptions as have been enumerated therein in the Full Bench opinion can disentitle the co-sharer holding inferior right to seek partition vis-a-vis the person holding the superior right.

10. We, therefore, see no merit in the contentions advanced by the learned Counsel for the Appellants. We uphold the decision of the teamed? Single Judge and dismiss the appeal under Letters Patent, with costs.

B.K. Behera, J.

11. I agree.