

(2002) 12 OHC CK 0032
In the Orissa High Court
Case No : Second Appeal No. 202 of 1996

Shyam Sundar Mallik and Another	Vs	APPELLANT
Baidhara Mallik and Others		RESPONDENT

Date of Decision : 06-12-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Partition Act, 1893 — Section 4
Transfer of Property Act, 1882 — Section 44

Citation : (2003) 95 CLT 20

Hon'ble Judges : L. Mohapatra, J

Bench : Single Bench

Advocate : P. Kar, M.K. Mohanty, A.K. Mohanty, for the Appellant; B. Baug, B.R. Das, N.N. Mohapatra and P.K. Rath, P.K. Bhuyan, A. Dash, P.K. Samal and A.K. Sahoo, P. Mishra, K.K. Sahoo, R. Khatun, (For Respondents 1 to 6) and S.K. Bal, [For Respondent No. 7(b)], for the Respondent

Final Decision : Dismissed

Judgement

L. Mohapatra, J.—Plaintiffs are the appellants before this Court.

Learned Subordinate Judge, Balasore decreed the plaintiffs' suit in part preliminarily rejecting prayer for partition in respect of "Kha" schedule property, allowing claim of defendants 1 to 6 for repurchase of share of defendant No. 7 under "Kha" schedule property from the plaintiffs. So far as "Ga" schedule properties are concerned, prayer for partition was allowed and plaintiffs were declared to have 1/6th share of defendant No. 7. In appeal preferred by the plaintiffs the said decree was modified to the extent that the defendants 1 to 6 will have right of pre-emption in respect of "Gha" schedule property measuring Ac. 0.50-1/2 decimal from "out of plot No. 552 and Ac. 0.06-1/2 decimals from out of plot No. 555 under Khata No. 298.

2. Case of the plaintiffs is that one Banei Mallick is the common ancestor who had three sons, namely Suduri, Rathi and Sero. The aforesaid three sons were

amicably possessing their joint family properties separately since 1920 and were also separate in mess. According to their separate possession three branches of Suduri, Rathi and Sero were recorded having 1/3rd interest each in respect of the properties for the current settlement record of rights. After death of Suduri, Rathi and Sero their successors in interest respectively were possessing lands and accordingly the properties came into possession to the successors in their respective branches who are parties before this Court. The appellant had purchased 57-1/2 decimals of land by a registered sale-deed from respondent No. 7 and continued to reside in his father-in-law place leaving his ancestral properties and remained in possession of the same after such alienation. The lands possessed by the appellants and respondents 1 to 6 were joint without any demarcation line in between. Out of the lands purchased by the appellants plot No. 552 measuring Ac. 0.06-1/2 decimals of land and plot No. 555 measuring Ac. 0.05-1/2 decimals of land under Khata No. 298 have been indicated as "Ga" schedule and are homestead which was alienated by defendant No. 7 in favour of the appellants. Case of the plaintiffs-appellants is that since the respondents created disturbance in their peaceful possession they had no other option except to file suit for partition of "Kha" schedule land portion of which were alienated to the appellants by respondent No. 7 which is also subject matter of "Ga" schedule property.

3. The contesting respondents filed their written statement stating that they are entitled to repurchase "Gha" schedule property from the appellants which had been purchased from respondent No. 7. Their further claims is that the lands purchased by the appellants which are subject-matter of "Gha" schedule property consists of house and homestead and they are entitled to repurchase the same u/s 4 of the Partition Act.

4. On the basis of the pleadings as aforesaid the learned Subordinate Judge framed nine issues and held that there was severance of joint family status amongst three branches and there was no partition by metes and bounds. Trial Court further held that the plaintiffs stand on the footing of defendant No. 7 from the time of execution of the sale deed by defendant No. 7 in their favour in the year 1961 and continued to be so as there has been no partition among the three branches by metes and bounds. Trial Court further held that so long as their ouster is not established by defendants 1 to 6 with sufficient materials and cogent evidence the rights of the plaintiffs over their respective share of properties cannot be denied. It was also held that the defendants 1 to 6 have right to repurchase the lands purchased by the appellants from defendant No. 7 from out of plot Nos. 552 and 555 which form part of dwelling house u/s 4 of the Partition Act. So far as "Ga" schedule properties are concerned, trial Court held that the plaintiffs are entitled to get declaration to have 1/6th share of Kangali in their favour and accordingly decreed the suit in part.

In appeal the lower appellate court confirmed the finding of the trial Court so far as "Kha" schedule property is concerned, but modified the decree in respect of

"Ga" schedule property and held that the defendants 1 to 6 will have right of pre-emption in respect of the lands out of plot No. 552 and 555 as mentioned above and dismissed the appeal with the aforesaid modification.

5. At the time of admission of the Second Appeal this Court formulated the following substantial questions of law for adjudication.

"(i) Whether in view of the finding of the learned trial Court to the effect that the plea of ouster of the defendant No. 7 has not been established by the defendants 1 to 6, the plaintiffs stood on the footing of the defendant No. 7 by virtue of the registered sale deed dated 18.4.1961 coupled with the fact that the defendants No. 1 to 6 tolerated the plaintiffs as co-sharers in possession for more than 27 years and assuming but not admitting that the plaintiffs are strangers to the defendants No. 1 to 6, the plaintiffs transferors became co-owners with the defendants No. 1 to 6 since 18.4.01 and if such possession and enjoyment of the property by the plaintiffs disentitles the defendants 1 to 6 after along lapse of more than 27 years to exercise the right u/s 4 of the Partition Act.

(ii) Whether in view of the concurrent findings that there was only severance of status and there was no partition by metes and bounds of the properties amongst the three branches and in view of the statements of the defendants No. 3 quoted herewith "The plaintiffs are our brothers. I cannot say the extent of homestead possessed by the plaintiffs or the branches of Magu and Gobinda. I cannot say in whose names our homestead was recorded in C.S.R. I.O.R. or M.S.R.O.R. Till now the branches comprising of Magu and Gobinda one branch, Hadi, Nidhi, Chinta, Mohan one branch and our branches are all joint", the question for determination is if the defendants are entitled to seek relief u/s 4 of the Partition Act, when the plaintiffs are in joint possession of their purchased land since 1961.

(iii) Whether in view of suit plot No. 555 is a wet (Jala land) Sarada, I revealed from the R.O.R. of Section 4 of the Partition Act is applicable in respect of that plot.

(iv) Whether the approach of the forums below in appraisal of the materials on record is against the principles, u/s 4 of the Partition Act and if so if the defendants 1 to 6 are protested u/s 4 of the Partition Act."

6. At the time of hearing of this appeal learned counsel appearing for the appellants did not press the appeal on the aforesaid substantial questions of law formulated by the court and only raised one substantial question of law which is formulated hereunder.

"Whether in view of the decision rendered by this Court in the case of Mathuri Sahu Vs. Sridhar Panda and Others, the defendants 1 to 6 have no right of pre-emption in respect of the portion of the land purchased by the plaintiff-appellants from defendant No. 7 from out plot Nos. 552 and 555 as decreed by the lower appellate Court"

7. Sri Kar, learned counsel appearing for the appellants did not press the appeal on the substantial questions of law formulated by this Court and rightly said that the substantial questions of law formulated at the stage of admission relate to finding of fact and both the Courts below having found against the plaintiffs on such facts, there was hardly any scope of this Court to interfere with such concurrent finding of fact.

So far as the substantial question of law raised at the time of hearing of the appeal is concerned, referring to the decision in the case of *Madhuri Sahu v. Sridhar Panda and others* (supra), Sri Kar submitted that the plaintiff-appellants having remained in possession of the suit land along with homestead for a period of 27 years along with defendants 1 to 6, it cannot be said that they are any more strangers to the family and they have to be treated as co-sharers. No decision contrary to the view taken in the aforesaid case has been cited by the learned counsel for the respondents. However, in this connection, reference may be made to Section 4 of the Partition Act as well as Section 44 of the Transfer of Properties Act. Section 4 of the Partition Act and Section 44 of the Transfer of Properties Act are attracted only when the share/portion of undivided family dwelling house is transferred. A stranger purchaser has no right to joint possession of an undivided family dwelling house and his remedy is to seek for partition and separate possession. In the case of *Babulai vrs. Habibnoor Khan*, reported in AIR 2000 S.C. 2684 the Apex Court held that Section 4 of the Partition Act can be invoked as weapon by a co-sharer only when the stranger purchaser seeks partition. Same view has also been taken by the Apex Court in the Case of *Gautam Paul v. Debi Rani Paul*, reported in AIR 2001 S.C. 61 In view of the aforesaid law laid down by the Apex Court the only scope for a co-sharer to seek relief u/s 4 of the Partition Act shall arise when the stranger purchaser files a suit for partition. In the event a stranger purchaser does not file any suit for partition for years together, it may not be open for a co-sharer to seek for relief u/s 4 of the Partition Act. This question was also dealt with by this Court in the Case of *Smt. Hemalata Pati v. Motiranjana Das* in Misc. Appeal No. 786 of 2000 disposed of on 1.11.2002 which arose out of a petition for injunction and this Court referring to the aforesaid two decisions of the Apex Court and other decisions also held that Section 4 of the Partition Act confers a right on the co-sharer to repurchase, but such rights can only be exercised when the stranger purchaser files suit for partition or seeks for separate possession. Since right of co-sharer to repurchase arises only after a stranger purchaser files a suit for partition or seek for separate possession, mere possession of the stranger purchaser for a considerable length of time will not put him in shoes of a co-sharer and therefore mere possession of the appellant over the homestead and house standing on the plot nos. 552 and 555 will not confer right on them to continue in possession when defendants' co-sharer exercise the right to repurchase same. In view of the reasons stated above I respectfully differ with the views taken in the decision reported in *Vol. Mathuri Sahu Vs. Sridhar Panda and Others*,

8. Accordingly, I do not find any merit in the appeal and the same stands

dismissed.