
(1961) 08 RAJ CK 0002
In the Rajasthan High Court
Case No : Second Appeal No. 315 of 1955

Shyamsunder

APPELLANT

Vs

Mst. Chand Bai and Others

RESPONDENT

Date of Decision : 16-08-1961

Acts Referred:

Limitation Act, 1908 — Section 14, 9

Citation : AIR 1962 Raj 96 : (1961) RLW 638

Hon'ble Judges : I.N. Modi, J

Bench : Single Bench

Advocate : Chandman Lodha, for the Appellant; Kistoor Mal Singhvi, for the Respondent

Final Decision : Dismissed

Judgement

I.N. Modi, J.—This is a defendant's second appeal in a suit for possession which has been decreed against him by both Courts below. The plaintiff respondent Girdharilal having died during the pendency of this appeal, his sons Manoharlal and three others have been substituted in his place.

2. The case out of which this appeal arises has had a chequered history. The parties are admittedly descendants of a common ancestor. Kishenlal father of the defendant appellant Shyamsunder brought a suit for partition against the plaintiff in 1962 Samwat in the civil court of Thikana Banera. The parties referred the matter to arbitration as a result of which a decree based on an award was passed on Fagun Sudi 3 Smt. 1962 (i.e., some time in 1905 A. D.) The award held among other things, with which we are not concerned, that that portion of the suit house which was built by Kishenlal and in which he resided was to go to him and the rest was to go to Girdharilal, plaintiff here. Unfortunately neither the arbitrators nor the Court specified which, part of the property had been built by Kishen Lal or was occupied by him, and, therefore, to go to him. Be that as it may, the plaintiff took out execution of this decree and he received possession of two Talias (open pieces of land) and two rooms vide the report Ex. P-2 dated the

26th July, 1931. Kishenlal went up in appeal against that order which was dismissed by the Mahedraj Sabha by its judgment dated the 19th December, 1931. Thereafter Kishenlal died and Girdharilal continued his efforts for securing possession of the rest of this property in execution and was successful.

Once again, Shyam Sunder, the present appellant, being son of the deceased Kishenlal, went up in appeal to the High Court of the former State of Udaipur and this time he was successful. It was held by that High Court that the decree passed by the trial Court was not executable inasmuch as the exact portions which were to go to Kishenlal and Girdharilal respectively had not been specified therein and a direction was given that it would be open to the latter to bring a fresh suit to have such property specified by a decree of the Court. This decision was given on the 21st August, 1936. The plaintiffs case further is that in the meantime Shyamsunder took forcible possession of the Talias and the rooms aforesaid in 1931, possession whereof had been made over to Girdharilal in execution proceedings vide Ex. P-2 dated the 26th July, 1931.

In these circumstances, Girdharilal brought the present suit on the 19th June, 1945, on the allegations which I have set out above, and his case was that the apartments showed in yellow in Ex. P-5 Were the only ones in which Kishenlal used to live and which had been built by him and should go to him or his son Shyamsunder according to the award, and that the former should be put in possession of the rest of the apartments which were marked in red on the same plan. The defendant resisted the suit. His main pleas were that he and his ancestors were the owners of the entire suit property and that the suit was barred by the doctrine of res judicata and further that the suit was barred by limitation. Both Courts below have decreed the plaintiff's suit. This is how the defendant has now come up in second appeal to this Court.

3. I may state at once that so far as the concurrent decision of the two Courts below is concerned as to which apartments of the suit property were built by Kishenlal and in which he lived, that is a finding of fact, and it is not open to any further challenge in this second appeal, and I hold accordingly.

4. That being so, learned counsel pressed two contentions before me with which I proceed to deal now. The first was that the plaintiff should have filed a suit for partition and not for possession based on ownership in the manner in which he has done, and, therefore, this suit should have been dismissed by the Courts below on this ground alone. I have carefully examined this contention and find no force in it. There is no doubt that the appellant's father Kishen Lal had himself brought in earlier suit for partition between the parties some time in Section 1962, and that suit was finally decided on the basis of an award. Again, I have no doubt that so far as the suit property is concerned, the award of the arbitrators, which in its turn appears to have been based on an earlier award of Smt. 1959 was that that portion of the property which was built by Kishenlal and in which he lived should go to him and the remaining part thereof should go to Girdharilal. A decree was passed accordingly by the trial Court. As I have already

stated, neither the arbitrators nor the Court considered it necessary at that time to precisely specify which were the apartments which had been built by Kishenlal and in which he used to live with the result that it became possible for the present appellant after the death of his father to contend that the decree as it was passed in the suit of 1962 could not be executed being uncertain. In fact, this objection prevailed in the High Court of the State of Udaipur as it then was and the plaintiff was left free to file another suit to have the necessary specification made of such properties, and it was in response to this direction that the plaintiff brought the present suit. The question which arises in these circumstances is whether the suit of the plaintiff as it had been framed is not well-founded.

5. Now the correct legal position in this regard, broadly speaking, seems to be that where an earlier suit for partition has ended in a decree, but for some reason or another there has been no partition by metes and bounds and it is not possible to give effect to that decree and the parties continue in joint possession even thereafter a second suit for partition does lie. The principle is that so long as a property is jointly held, until that time a right to partition continues intact, or, in other words a right to partition is a continuous and a recurring right and cannot be lost by mere non-exercise of it. Thus partition suits stand on a footing of their own, just, if I may say so, as redemption suits do. But this principle must be read as subject to an important qualification and that is that any questions of right or title which might have been finally decided in the earlier suit cannot be allowed to be reopened in the second suit except perhaps where a case of fraud or the like may be alleged and proved, with which type of case we are not concerned. The point to note is that the earlier decree would operate as *res judicata* only to the extent pointed out above but not otherwise and where the earlier decree is not enforceable, a second suit for possession by partition will be perfectly maintainable so long as the parties' joint interest continues. See *Nasratullah v. Mujibullah*, ILR 13 All 309 *Bisheshar Das v. Ram Prasad*, ILR 28 All 627 *Jagu Babaji v. Balu Laxman*, ILR 37 Bom 307 *Jagmohini Dasi v. Shiba Gopal*, AIR 1920 Cal 108 and *Radhey Lal v. Mulchand*, AIR 1924 All 905.

6. Let us apply these principles to the present case. The earlier partition decree was held to be unexecutable by the highest Court in the former State of Udaipur, and the parties are still interested in the suit property. Therefore I hold that the plaintiff can maintain a second suit for partition. Then it was definitely decided in the earlier suit that the appellant's father Kishenlal was entitled to only that portion of the suit house which was built by him and in which he lived and it was also held that to the rest of the property the defendant Girdharilal was entitled. This finding relating as it does to a matter of substantive right between these very parties or their predecessors-in-interest must have the force of *res judicata* in the present suit. The net result thus is that the present suit as framed by the plaintiff being for possession based on the declaration of title which had been made in his favour in the first suit is perfectly maintainable. It must follow that the contention of learned counsel that the plaintiff should have in any case filed a

fresh suit for the partition of the entire properties which were at one time joint family properties cannot be accepted as tenable. I may also point out that there is no allegation in this case on the side of the defendant that there are any other properties which are still jointly held between the parties and which should have been included in this suit for possession. This contention has, therefore, no force and I hereby overrule it.

7. It was next contended by learned counsel that, even if I held that the present suit was maintainable, the Courts below were certainly wrong in not throwing it out on the ground of limitation. Now the position, so far as the law of limitation in the former State of Udaipur was concerned, was this. Admittedly there was no law of limitation as such in that State upto the year 1932. For the first time the "Kanun Miyad, Mewar" was brought into force on the 1st July, 1932. Section 22 of this Act provided that suits for which no period of limitation was prescribed by any circulars etc. previously,--and it is nobody's case that a period of limitation was prescribed for a suit of this kind before the said Act was brought into force,--could be brought within eight years of the enforcement of this Act; and if a longer period was prescribed for the institution of such a suit by the Act, then Within such period. It is further admitted that the period of eight years prescribed by Section 22 was extended by another year with the result that the present suit should ordinarily have been filed on the 1st July, 1941.

As already stated above, the present suit was brought on the 19th June, 1945. Both Courts below, however, held that the plaintiff was entitled to the benefit of Section 9 of the Kanun Miyad Mewar which corresponds to Section 14 of the Indian Limitation Act. It is strenuously contended before me on behalf of the defendant appellant that the plaintiff is not entitled to the benefit of this section because no ground for exemption from the ordinary limitation was mentioned in the plaint and further that the plaintiff had failed to show precisely when he had filed his execution petition to execute the decree of 1905 and how long it remained pending. It is true that the plaint was drafted in a rather haphazard manner in the present case, but it seems to me that it would be hardly fair and just to apply those standards to the plaints drafted in the former Mewar State, which one may be disposed to apply to plaints drafted in these days. Then there is no doubt whatever that the plaintiff had obtained possession of certain apartments namely two Talias and two rooms in execution proceedings on the 25th or 26th July, 1931. This clearly shows that the plaintiff must have taken out execution by or before 25/26 July 1931.

It was never seriously disputed, nor indeed it is disputable, that the defendant's father Kishenlal then went in appeal from the order of the executing court to the Mahedraj Sabha which appeal was dismissed. This decision was given on the 19th December, 1931. The plaintiff's case is that thereafter Kishenlal died, and Girdharilal continued to press for possession of the remaining property and the executing court allowed it to him. The present appellant being the son and successor of Kishenlal then went in appeal to the High Court of Udaipur and that

Court held by its judgment dated the 21st August, 1936, that the decree of which Girdharilal sought execution was inexecutable; and it was further held that the decree-holder would be free to bring a fresh suit to have the properties which were to go to Kishenlal or to the former specified. Having regard to the aforesaid history of the case, I think that no serious fault can be found with the Courts below when they held, firstly, that the plaintiff Girdharilal was seeking execution of his decree passed by the trial court in his favour in 1905, at least from the period extending from the 25th/26 July 1931, to the 21st August, 1936, when the matter was finally decided against him by the Udaipur High Court, and secondly, that in doing so the said Girdharilal was prosecuting a civil proceeding based on the same cause of action with due diligence and in all good faith in another court

I have also no doubt that, having regard to the entire circumstances of this case, it should be perfectly legitimate to hold that the Court in which the plaintiff Girdharilal was seeking remedy was unable to give him any relief on account of a defect of jurisdiction. As I understand the matter the effect of the judgment of the Udaipur High Court clearly was that as the decree which the plaintiff was seeking to execute was not executable, it had no jurisdiction to give the relief the plaintiff was seeking, and this in my judgment amounted to a defect of jurisdiction, nothing more and nothing less. I may also point out that the words "another civil proceeding" occurring in Section 14 of the Limitation Act or the like words occurring in Section 9 of the Kanoon Miyad Mewar of 1932 will include execution proceedings in another suit. The expression "civil proceeding" is of wide import, and, again, no distinction can properly be made as to the applicability of the principle underlying Section 14 between the steps which a litigant has to take after he has obtained a decree and those which he takes prior to it. See *Sri Rajah Tyada Pusapati Simhadriraju Dakshinakavata Dugarajulum Garu and Another Vs. The Unlimited Aryan Bank of Vizagapatam*, and *Abhoy Kanta Gohain Vs. Gopinath Deb Goswami and Others*, It, therefore, the period during which the plaintiff was seeking to execute the decree in the earlier suit, to wit, from the 25th July, 1931 to 21st August, 1936, is deducted from the period of limitation prescribed for the present suit, as it should be, this suit unquestionably falls within limitation. I hold accordingly.

8. In the result, this appeal fails and is hereby dismissed with costs.