

(1956) 03 OHC CK 0002

In the Orissa High Court

Case No : Second Appeal No. 13 of 1953

Silda Majhi and Others

APPELLANT

Vs

Anadi Majhi and Others

RESPONDENT

Date of Decision : 09-03-1956

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 145
Limitation Act, 1963 — Article 41, 47

Citation : (1956) 22 CLT 516

Hon'ble Judges : Narasimham, J

Bench : Single Bench

Advocate : S.C. Ghose, for the Appellant; G.K. Misra, for the Respondent

Final Decision : Dismissed

Judgement

Narasimham, J.—This is an appeal by Defendants 1 to 5 against lower court decisions of the to lower Courts decreeing the Plaintiffs' suit for recovery of possession of the properties described in Schedules "A" and "B" of plaint. The two Plaintiffs" are the sons of two brothers named Kurtji and Keshab. The Defendants all are the sons of one Narasingha who have another brother Kunja and Keshab, The Plaintiffs" Case was that the joint family properties had been partitioned during the life time of their brothers and by virtue of that partition, the raiyati lauds of the joint family in holding No. 13 were allotted in equal shares amongst the brothers and Bhogra land were also similarly partitioned. But in the record-of-rights, the properties were entered in the name of Naraingha alone. Plaintiff No. 1 however claimed that notwithstanding the entry in the record of rights, he was in continuous possession of the property described in Schedule "A" which fell to his father"s share. Similarly, Plaintiff No. 2 stated that he was in possession of the property described in Schedule "B" excepting a small portion that was surrendered to the Court. As there was a trouble from the other side leading to a proceeding u/s 145 Code of Criminal Procedure, the present suit was brought for declaration of title and referred possession.

2. The Contesting Defendants however urged that the entire flatting No. 13 was allotted exclusively to Narsingha's share and that consequence to Plaintiffs have no title to the same. They also claimed to be inclusive possession of the properties.

3. Both the Courts concurrently held that the Defendants' case about, holding No. 13 having been allotted exclusively to Narasingha could not be believed and that the holding had been partitioned amongst the father of the parties and the Plaintiff were in possession of their respective coming to this conclusion, they were mainly influenced by the fact the in a previous suit amongst some of the parties (Title Suit No. 65 of 1941-42) the division of holding No. 13 into six quall shares was decided. Doubtless, this may not operate as *res judicata*, but still it is an important piece of evidence. Moreover, in a deed of surrender executed by Defendant No. 1 himself the share of Plaintiff No. 2 in the disputed properties was conceded. There was also sufficient evidence of possession on behalf of the Plaintiffs which was accepted by both the Courts of fact. I therefore see no reason to disturb the finding of fact that holding, No. 13 had been partitioned during the life time of the fathers of the parties and that the Plaintiff, were in exclusive possession of the share as described in the plaint.

4. After the filing of the Second Appeal in this Court, Respondent No. 1 (Plaintiff No. 1) died and steps for self situation of his representatives wire not taken though sufficient opportunity was given. The Court therefore, by its order dated 17.2.56. held that the appeal abated as against him. This abatement of the appeal in respect of Plaintiff No. 1 would necessarily result in the appeal abating as a whole. Because, though Plaintiffs 1 and 2 claimed separate parts of the original joint family property as described in Schedules "A" and plaint; their claim was based on partition during the life time of their fathers and uncles, whereas the Defendants' case was that the entire holding fell to the separate of their father Narasingha at the time of partition. The lower appellate Court's judgment is now final and conclusive so far as Schedule "A" property is concerned. If, therefore, it is disturbed in respect of Schedule "B" property on the finding that holding No. 15 was allotted to Narasingha, there will be a clear conflict in the decisions of two Courts.

5. Apart from these considerations, on merits of the case, I see no reason to disturb the finding of the two lower Courts.

6. The only important question of law that was seriously pressed in this Court was about the applicability of Article 41 of the Limitation Act. The order of the Magistrate u/s 145 Code of Criminal Procedure was passed on 27-6-47.

The suit under appeal was instituted on 2-8-52. If Article 47 of the Limitation Act be held to apply, the suit is clearly barred by limitation. But the learned lower appellate Court rightly held that the order of the Magistrate in Section 145 Code of Criminal Procedure proceeding cannot be said to be an order respecting possession of immovable property binding on the Plaintiffs (who were the first

party). Abruptness, they were some observations in the judgment to show that the Magistrate not prepared to accept the evidence of possession adduced by the first party and was inclined to believe, the evidence of the second party on the question of possession. But in the operative portion of the order he directed both parties to go to the Civil Court. He did not declare possession of the properties in favour of the second party, nor did he direct that their possession could not be disturbed until eviction in due court of law. A final order in terms of Section 145 Code of Criminal Procedure was not passed. Any casual observation in the judgment about possession would not be an order respecting possession of immovable property binding on the parties in a proceeding u/s 145 Code of Criminal Procedure. If fair construction of the order of the Magistrate would show that he practically dropped the proceeding u/s 145 Code of Criminal Procedure leaving it to the parties to fight out their litigation in the Civil Court. I would therefore in agreement with the lower Courts hold that Article 47 of the Limitation Act has no application. The appeal is dismissed with costs.

Appeal dismissed.