
(1980) 07 OHC CK 0016
In the Orissa High Court
Case No : First Appeal No. 28 of 1972

Simakurty Satyanarayana and Another	APPELLANT
Vs	
G. Panalal Sahukar and Others	RESPONDENT

Date of Decision : 04-07-1980

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, Order 20 Rule 18

Citation : AIR 1980 Ori 169 : (1980) 50 CLT 168

Hon'ble Judges : R.N. Misra, J; N.K. Das, J

Bench : Division Bench

Advocate : Y.S.N. Murty, for the Appellant; N.V. Ramdas, B.R. Rao and B.L.N. Swamy, for the Respondent

Final Decision : Dismissed

Judgement

R.N. Misra, J.—This appeal by defendant No. 2 in a suit for partition assails the decree of the learned Subordinate Judge at Jeypore granting the plaintiff a decree both for partition as also mesne profits.

2. The disputed property is a rice mill which once belonged to the members of the family consisting of defendants 1 to 14. Defendant No. 15, a stranger happens to be the purchaser of 1/5th share from the disputed property and the plaintiff subsequently purchased the remaining 4/5th share therein in satisfaction of his decree put into execution. Upon the executing court refusing to put the plaintiff in possession on the ground that he was a part purchaser and his remedy lay in asking for partition, the plaintiff sued for partition of his 4/5th share and asked to be put in possession. He also laid claim for mesne profits from the date of his purchase on 28th of January, 1967.

3. The second defendant alone entered contest and inter alia raised two pointed contentions namely,

(i) a suit for partition of a single item of joint family property was not maintainable unless general partition was claimed; and

(ii) Since the property was in possession of coparceners and plaintiff was not entitled to immediate possession upon his purchase until he had sued for partition, no mesne profits were payable.

4. The learned trial Judge did not accept these pleas and has decreed the suit for partition of plaintiff's 4/5th share and has found defendant No. 15 to be entitled to the remaining 1/5th share. He also decreed the claim for mesne profits and directed a commissioner to do the accounting and in due course final decree to be prepared.

5. Defendant No. 2 has appealed and both the contentions raised in the written statement as indicated above are re-canvassed.

6. As it appears, 1/5th share in the property had been purchased in court auction by the 15th defendant in E. P. No. 129 of 1957 on 3-4-1965 and the sale was confirmed by the court on 12-3-1966. The remaining 4/5th share in the property was purchased by the plaintiff on 28-1-1967 in execution case No. 4 of 1958. When plaintiff applied for delivery of possession of the entire mill with the consent of defendant No. 15, the second defendant resisted the prayer on the footing that plaintiff had not purchased the entire property and could not take delivery of the entire mill. From the judgment of the trial Court, it is clear that defendant No. 15 had not yet taken possession of the property though his purchase had become final and the original owners are still in possession of the mill. Mr. Murty for the appellants invokes the principle laid down by the Supreme Court in the case of Sidheshwar Mukherjee Vs. Bhubneshwar Prasad Narain Singh and Others, in support of his contention that plaintiff was not entitled to mesne profits. The Supreme Court indicated :--

"... .The suits out of which these appeals arise were instituted by the plaintiff in the partition suit against the first party defendants for recovery of his 4 annas share of the income or profits of the properties specified in the schedules to the plaints and which were included admittedly in his purchase, on the allegation that the defendants first party appropriated the entire profits to themselves and refused to give the plaintiff his legitimate share. The High Court has held that this claim of the plaintiff must fail. All that he purchased at the execution sale was the undivided interest of the coparceners in the joint property. He did not acquire title to any defined share in the property and was not entitled to joint possession from the date of his purchase. He could work out his rights only by a suit for partition and his right to possession would date from the period when a specific allotment was made in his favour. In our opinion, this is the right view to take and Mr. Daphtary, who appeared in support of the appeals could not satisfy us that in law his client was entitled to joint possession on and from the date of purchase..... "

The ratio of the aforesaid case has been followed by the Supreme Court in the subsequent case of Mamidi Venkata Satyanarayana Manikyala Rao and Another Vs. Mandela Narasimhaswami and Others, While examining the legal position in a

different background in the second case the Court pointed out:--

". .Now, it is well settled that the purchaser of a coparcener's undivided interest in joint family property is not entitled to possession of what he has purchased. His only right is to sue for partition of the property and ask for allotment to him of that which on partition might be found to fall to the share of the coparcener whose share he had purchased. His right to possession "would date from the period when a specific allotment was made in his favour : Sidheshwar Mukherjee Vs. Bhubneshwar Prasad Narain Singh and Others, at p. 188 Sidheshwar Mukherjee Vs. Bhubneshwar Prasad Narain Singh and Others, at p. 491). It would, therefore, appear that Sivayya was not entitled to possession till a partition had been made.

Mr. Rao for the plaintiff-respondent concedes that the law on the question is as laid down in the two decisions referred to above. He, however, relies on the position that the purchase by the plaintiff as also defendant No. 15 was of the undivided interest of the entire body of coparceners. Under Hindu Law, no coparcener is in a position to indicate which specific property would be his unless there be a general partition and allotment of specific property to the share of particular coparceners. From this rule has followed the legal concept accepted in a series of authorities that until there is partition and allotment of specific properties to the share of the different members of the coparcenery, an alienee of specific coparcenery property cannot claim possession thereof. The ratio of the Supreme Court decisions referred to above is essentially an extension of the same principle. The position would be very different when the share of all the coparceners is sold in court auction, as in the instant case. The learned Subordinate fudge referring to the view indicated by Mitra on "Co-ownership and Partition" has stated:--

".... This observation of the learned author is consistent with the principle of Hindu Law which provides that the whole body of coparceners are competent to alienate the coparcenery property so as to pass a good title to the alienees. In other words, if the property is purchased from the whole body of coparceners then in that case it ceases to be joint family property and the purchaser acquires title to the same from the date of his purchase. "

We are inclined to agree with the learned Subordinate Judge and would hold that the ratio indicated in the two Supreme Court decisions would be wholly inapplicable to a situation where the court sale is of the property of the entire body of coparceners.

7. As already indicated, the entire property had been sold by court auction in two different sales. 1/5th interest had been sold in favour of the 15th defendant and subsequently the remaining 4/5th share was sold in favour of the plaintiff. The entire body of coparceners was the judgment-debtors and their right, title and interest had been conveyed to the auction-purchasers. This feature is an answer against the dual contention canvassed in appeal.

By the time the relevant auction sale was made, the remaining 4/5th joint interest had been sold. With the sale of 4/5th share, the entire property came to be sold and nothing of the coparcenery interest in the property survived. The bar that a stranger purchaser cannot enter into possession when the remaining property was with the coparceners has no application in this setting. With the relevant purchase, the mill came to be owned by the plaintiff and the defendant No. 15 -- two, strangers. The doctrine advanced by Mr. Murty in the premises did not apply. We are inclined to take the view that the learned Subordinate Judge has come to the correct conclusion both in granting a decree and in allowing mesne profits to be collected after calculation in the final decree proceeding.

8. There is no merit in the appeal and the same is accordingly dismissed. In the peculiar facts of the case we think it appropriate to require both parties to bear their own costs in this Court.

Das, J.

I agree.