

(2004) 08 JH CK 0070
In the Jharkhand High Court
Case No : Misc. Appeal No. 53 of 2003

Sk. Jahir @ Bhutku and Others

APPELLANT

Vs

Sk. Mahboob and Others

RESPONDENT

Date of Decision : 17-08-2004

Acts Referred:

Citation : (2004) 4 JCR 177

Hon'ble Judges : Narendra Nath Tiwari, J

Bench : Single Bench

Advocate : Shamim Akhtar, for the Appellant; Jay Prakash Jha, for the Respondent

Final Decision : Allowed

Judgement

Narendra Nath Tiwari, J.—This appeal has been preferred by the proforma defendant-respondent-appellant. The plaintiff filed the suit for partition claiming their 4/5th share in the suit property. The case of the plaintiff-respondents in brief was that they are the descendants of one common ancestor Ashique Mandal. Ashique Mandal had two sons, Gudri Mandal and Badri Mandal. The suit khata was recorded in the names of Gudri Mandal and Badri Mandal, but their respective separate possession was recorded in the remarks column of the record of rights. The suit lands are the lands exclusively shown in possession of Gudri Mandal. According to the plaintiff, Gudri had five daughters, namely, Madni, Ashni, Sadni, Nazinan and Lukho. The plaintiffs claimed to be the descendants of Madni, Sadni, Nazinan and Lukho and the defendants first party (not the appellants here) were, the descendants of Ashni and Madni. The appellants are the descendants of Badri Mandal whose land has not been included in the suit. They were made proforma defendants in the suit. After the death of Gudri Mandal, the plaintiffs being his heirs, succeeded to the suit property and were in possession of the same. Subsequently they felt difficulty in enjoyment of the usufruct of the suit land. Hence, the instant suit was filed for the relief as aforementioned.

2. The defendants first party appeared, but did not contest the suit. The appellants who were the proforma defendants filed written statement and contested the suit. According to the appellants, Gudri died in the year 1948. All the five daughters of the deceased Gudri Mandal and Badri Mandal (his surviving brother) thereafter succeeded to the property of Gudri Mandal and performed Chalisa of Gudri Mandal in the house in which the plaintiffs and the defendants first party had taken part, It was further stated that the said heirs of Gudri had demanded share which was flatly refused saying that they have got no share and interest. Even after the said denial the descendants of Badri Mandal remained in exclusive possession of the suit property openly and adversely and with notice and knowledge of all concerned. According to the defendants-appellants, the suit is thus also barred by limitation as the same is not filed within 12 years from the date of refusal of the plaintiffs claim in the year 1948.

3. Both the parties, adduced their respective evidences before the trial Court. The learned trial Court framed several issues which were as follows :--

(i) Is the suit as framed maintainable?

(ii) Have the plaintiffs got any cause of action for the suit?

(iii) Is the suit barred by limitation?

(iv) Is there unity of title and possession over the suit land?

(v) Are the plaintiffs entitled to a decree of partition over the suit land? If so to what extent?

4. After considering the evidences and materials on record, issue Nos. 3, 4 and 5 along with other issues were decided against the plaintiffs. It was held that the plaintiffs failed to prove joint possession of the suit property and that there was no unity of title and possession over the suit land and that the plaintiffs are not entitled to decree for partition. It was also held that the suit is barred by limitation. With the said findings ultimately the suit was dismissed by the judgment and decree dated 29.6.2000 by Sub-Judge 1st, Godda.

5. Being aggrieved by the said judgment and decree, the plaintiffs filed appeal in the Court of the 1st Additional District Judge, Godda which as registered and Title Appeal No. 21/2000, 1/2001. The said appeal was ultimately came to be heard and decided by the 1st Additional District Judge, Godda. The learned Additional District Judge after hearing the parties concluded that the trial Court should have framed two more issues regarding the date of birth of Gudri Mandal and regarding adverse possession and ouster. On that basis the judgment and decree of the trial Court was set aside and the appeal was allowed remanding the matter to the trial Court for framing the said two issues also and deciding the suit along with the said issues.

6. This appeal is against the said order of remand passed by the lower appellate Court. Earlier when the appeal was listed, notice was issued to the respondents.

The respondents thereafter appeared through Mr. Jay Prakash Jha, Advocate. When this appeal was called out the learned counsel appearing on behalf of the parties agreed that this appeal may be finally disposed of at this stage and, accordingly, this order is being passed.

7. Mr. Shamim Akhtar, learned counsel appearing on behalf of the appellants, contended that the lower appellate Court has committed serious error of law in remanding the case to the trial Court for framing the issues regarding the death of Gudri Mandal as well as regarding adverse possession and ouster without, appreciating the facts involved in the case and the evidences on record. According to the learned counsel, no such issues are required to be framed and to be decided in the instant case in view of the fact that it was a suit for partition and the main issue to be decided is as to whether there was unity of title and possession between the parties and whether the plaintiff was entitled to the relief for partition of the suit land. The learned trial Court framed all the appropriate issues and the parties had ample opportunity to address on the same and adduce evidences in support of their respective claims. Learned counsel further submitted that all the relevant materials are available on record and the appeal being continuation of the suit, there was no impediment even for framing and deciding the issues by the lower appellate Court itself. Learned counsel further submitted that the suit is of the year 1998 and the matter has sufficiently protracted and in such circumstance there was no justification in remanding the suit to the trial Court" even for the purpose intended by the lower appellate Court.

8. Mr. Jay Prakash Jha, learned counsel appearing on behalf of the plaintiffs-respondents, on the other hand, submitted that there is no illegality or irrationality in the judgment of the learned lower appellate Court who has remanded the suit after setting aside the judgment and decree of the trial Court for fresh decision after framing the said two issues also. According to him both the parties have been given opportunity to establish their respective claims by producing evidences and thus the said order of remand is not illegal and/or in any way prejudicial to the appellants.

9. Having heard the learned counsel for the parties and after perusal of the records, I find that there is substance in the submissions of Mr. Shamim Akhtar, learned counsel appearing for the appellants. The trial Court has framed specific issues regarding unity of title and possession, limitation and also as to whether the plaintiffs were entitled to the relief for partition in the instant case. The instant suit is a simple suit for partition and on the basis of the pleadings and the materials on record, relevant issues were framed by the learned trial Court, for the purpose of decision of the suit. The parties had ample opportunity to place all the evidences and in fact the parties adduced evidences in support of their respective claims. All the issues including those framed by the learned lower appellate Court could have been decided on the basis of the pleadings, evidences and material on record. The appellate Court has got all the powers and

jurisdiction of the trial Court and in that view the appellate Court could have considered and decided all the relevant issues by himself in order to avoid further delay as well as rigour to the parties.

10. Under the said circumstance, this Court is of the view that the title appeal should be finally decided by the lower appellate Court himself on merit by giving opportunity of hearing to the parties afresh. The impugned judgment dated 12.9.2001 passed in Title Appeal Nos. 21/2001, 1/2001 is, thus, set aside and this appeal is allowed with the observations and directions aforesaid.