

(1963) 10 OHC CK 0007
In the Orissa High Court
Case No : A.H.O. No. 15 of 1962

Smt. Poodipeddi Laxminarasamma

APPELLANT

Vs

Gada Ranganayakamma and Others

RESPONDENT

Date of Decision : 01-10-1963

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 96
Limitation Act, 1908 — Article 144
Transfer of Property Act, 1882 — Section 44

Citation : AIR 1964 Ori 43

Hon'ble Judges : R.L. Narasimham, C.J; R.K. Das, J

Bench : Division Bench

Advocate : M.S. Rao, for the Appellant; N.V. Ramdas, for the Respondent

Final Decision : Dismissed

Judgement

Das, J.—This is a plaintiff's Letters Patent appeal against the judgment dated 22-12-61 of Barman J in Second Appeal No. 179/59.

2. The suit properties which include residential houses belong to defendants 2 to 9 and 14 constituting a Mitakshara joint family and governed by the Hindu Law as prevalent in Madras. The following pedigree would show the relationship of the parties:

SOMAYAJULA	VISWANATHAM	
-----		Chiranjili S.Ramasam
S.Lakhikantam S.V. Subbarao S.krishnulu (died)	(D.4) (died) ((D.14)	
-----		S.Dhankaram (D-7) S.Rama Rao (D-8)
Suryayakantam D.3	S.V. Raman (D.2)	

Chiranjili died without leaving any heir. Viswanathan and his two sons, Ramesam (father of defendant-2 and husband of defendant-3) and Lakhmikantham (D-4) executed a mortgage deed in favour of Gadi Ranga Nayakamma (D. 1) in respect of their 3/5th share in the property. Defendant-1 filed a suit (O. S. No. 6 of

1925) against the aforesaid mortgagors as also against Subbarao (father of defendants 7 and 8 and husband of defendant-9) and defendant No. 14 on the basis of the aforesaid mortgage and obtained a decree on 12-3-25 for sale of 3/5th share of the mortgage property. She put the aforesaid decree into execution and herself purchased the suit property and the other mortgaged properties in court auction sale on 23-4-40. The sale was confirmed on 17-9-41 and symbolical delivery of possession was taken on 29-4-43.

Meanwhile defendant-14 filed another suit (O. S. 303 of 1928) against defendant No. 1 and obtained a decree on 23-1-29 to the effect that the decree passed in O. S. 6025 was not valid and binding against him. On 16-4-55 defendant No. 1 sold her share in the suit-property by means of a sale deed which was registered on 18-4-55. The plaintiff has now filed the present suit on 19-4-55 for partition and specific possession in respect of the house properties mentioned in Schedules A and B of the plaint on the basis of her purchase from defendant No. 1.

3. The objection raised on behalf of the main contesting defendants Nos. 2 to 4, was one of limitation. They also contended that the defendant-1 by the auction purchase got merely a right to sue for partition and such a right not being a transferable one the plaintiff has not acquired any right to SBC. Defendants 10 to 13 contended that the property which the father of defendant-10 purchased from S. Laxmikanto was not the subject matter of the mortgage and they are unnecessary parties. The Courts however found that the suit properly did in fact form a part of the mortgage and the Court sale and they negated the contention of defendants 10 to 13. The Courts below held that the suit was barred by limitation as it was filed beyond 12 years from the date of confirmation of the sale which took place on 26 h April 1940. An appeal was carried to this Court and Barman J. upheld the decision of the courts below dismissing the plaintiff's suit as barred by limitation under Art. 144 of the Limitation Act, but granted leave to appeal as it involved some important question of law. Hence this appeal.

4. It is not disputed that both defendant-1 and the plaintiff are strangers to the family of the defendants 2 to 9 and 14 who constituted a joint family. Mr. M.S. Rao, learned counsel for the appellant contended before us that no question of limitation can arise in such suits, as the purchaser of an undivided interest of coparcener whether in a private or a court sale, in effect, becomes a co-sharer or co-owner and there is no period of limitation prescribed in the Limitation Act for such a co-sharer to file a suit to enforce a partition. He further contended that assuming Article 144 applied to such cases, the period of limitation has to be computed from the date of delivery of the possession given through the Civil Court. According to him the actual physical possession of an undivided interest could not be given under Order 21, Rule 95 C. P. C. and therefore the only way by which such delivery could be given was by way of symbolical delivery of possession as contemplated under Order 21, Rule 96 and since such delivery was

given on 20-4-43 the suit was well within time being filed within 12 years.

But none of these contentions of Mr. Rao can however be accepted, as we shall presently see. No doubt, there is no law of limitation for a co-parcener who files a suit for partition and separate possession of his share of property unless of course his right is lost either by ouster or exclusive possession for the statutory period of 12 years. But the position is well settled by authorities that the purchaser of a co-parcenary interest of a Hindu Joint family, whether in a private or a court-sale, does not stand in the same position as a co-parcener himself and he is not entitled to joint possession with other co-sharers. Such a purchaser merely acquires a right to compel a partition which the coparcener whose right he purchased had (See Hindu Law by Mulla, 12th Edition, p. 388).

5. In a case reported in Sidheshwar Mukherjee Vs. Bhubneshwar Prasad Narain Singh and Others, their Lordships were of the view that the purchaser of an undivided interest of a co-parcener did not acquire title to any definite share and was not entitled to joint possession from the date of his purchase. He would only work out his rights by a suit for partition and his right to possession would date from the period when specific allotment is made in his favour.

6. In a case reported in Jagdish Pandey Vs. Rameshwar Chaubey and Others, the same principle was enunciated. Their Lordships held that when a co-parcener alienates his share in certain specific family property, the alienee does not acquire any interest in the said property but only an equity to enforce his right in a suit for partition and to have the property alienated for the alienees' share if possible. Such an alienee has no right to possession and no status of a tenant-in-commom. Such transferee only acquires an equity and it is only a right in persona and not a right in rem and the transferor remains a co-parcener until partition is effected. Same was the view taken by a Division Bench of the Madras High Court in the case reported in V.C. Thani Chettiar and Another Vs. Dakshinamurthy Mudaliar and Others, . It is unnecessary to cite other decisions on the point. Thus, there can be no dispute over the legal position that by merely obtaining a symbolical delivery of possession the defendant-1 does not become entitled to joint possession with the other co-parceners in respect of the purchased property. It is not the case of the appellant here or his vendor defendant-1 that they at any time in fact participated in the enjoyment of the suit-property or that the other co-parceners admitted their right of possession. It must, therefore, be held that neither the plaintiff nor the defendant-1 was ever in possession of the suit properties.

No doubt Section 44 of the Transfer of Property Act provides that when one of the several coparceners transfers his share the transferee steps into the shoes of the transferor and acquires the transferee's right to joint possession and to enforce a partition of the same. But that section also clearly provides that when a transferee of a share of a dwelling house belonging to an undivided family is not a member of the family, nothing in the section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house. The rules of

Hindu Law however are not affected by this section. In fact these are saved by the very words of the provisions of that section which says;

"Subject to the conditions and liabilities affecting at the date of the transfer the share or interest so transferred".

Section 44 of the Transfer of Property Act cannot be of any assistance to the plaintiffs as admittedly the suit properties are the dwelling houses belonging to the joint family and the defendant No. 1 or the plaintiff only purchased an individual interest therein.

7. The decree-holder in this case no doubt made an application and obtained a symbolical delivery of possession of a share in suit property. But such a delivery cannot have any effect in view of the substantive position of Hindu Law that such a sale cannot create any right in favour of the purchaser to entitle him even to joint possession along with the co-parceners. In a case of the Madras High Court reported in *Yelumalai Chetty v. Srinivasa Chetty* ILR Mad 294 where a purchaser of a share of a member of an undivided Hindu joint family obtained delivery of possession through court u/s 318 (corresponding to Order 21, Rule 95), their Lordships held that such a purchaser acquires a right only to sue for partition and for delivery of what may be allotted as the share of such undivided member and the Court cannot on mere application for execution make an order u/s 318. This view was also accepted in the aforesaid decision of the Madras High Court reported in (S) AIR 1955 Mad 288.

8. It was rightly conceded by Mr. Rao that there was no legal bar for the plaintiff or for matter of that for defendant No. 1 to file a suit for partition even without obtaining delivery of possession either actual or symbolical. Thus there cannot be any question of computing the period of limitation from the date of delivery of possession in 1943. It is not disputed that there is no specific provision in the Limitation Act which prescribes limitation for suits of this nature. There are, however, authorities to show that such suits are governed by Art. 144 of the Limitation Act. In the aforesaid case of the Madras High Court in (S) AIR 1955 Mad 288, their Lordships held that a suit for possession of immovable property brought by an alienee of an undivided share from a co-parcener of a Hindu Joint family will be governed by Art. 144.

It is next to be seen whether the suit has been filed within time. According to Col. 3 of Art. 144 time begins to run from the date when the possession of the defendant becomes adverse to the plaintiff. As stated above, neither defendant No. 1 nor the plaintiff were in possession of the share of the suit property at any time. The possession of other co-sharers, viz. the non-alienating members of the family cannot be deemed to be in possession on behalf of the plaintiff alienee. If such co-sharers are in the possession of the property even after the sale of the plaintiff, they must be held to have done so adversely to the plaintiff. Even the possession of the alienor himself will also affect adversely the purchaser from the date of the sale. In a case reported in *Muttuswami v. Ramkrishna* ILR Mad G92 in

a suit where the plaintiff was a stranger purchaser of certain properties of the joint family and filed a suit for recovery of possession of his purchased property, their Lordships held that the proposition that the possession of one of the coparceners is the possession of all, for purposes of limitation has no application as between a purchaser from one coparcener and the other members of the family. The same was also the view expressed by the Calcutta High Court in a case reported in *Ram Lakhi v. Durga Charan Sen* ILR Cal 680.

That the rule of adverse possession may also apply to an undivided interest in the immovable property cannot be disputed in view of the decision of the Privy Council reported in AIR 1950 44 (Privy Council) . There the question was whether Art. 144 applied to an undivided interest in the family and their Lordships held that the said Article certainly extends the conception of adverse possession to include an undivided interest in the Immovable property as well as the property itself. It is the case of the plaintiff that he purchased the suit property on court sale in 1941. If that was so his right to sue accrued immediately after the sale in his favour and from that date the judgment-debtor is supposed to have lost his interest in the property and if he was in possession of the same, it was clearly in adverse to the purchaser. In that view of the matter, there is no question of the limitation running not from the date of the sale but from the date of the alleged symbolical delivery of possession in 1943. Once Art. 144 applies and the symbolic possession alleged to have been made in 1943 is held to be without any effect, the suit must be clearly held to be barred by limitation.

9. Mr. Rao relied upon the following decisions in support of his contentions, viz. *M.R. Sethuratnam Iyer and Others Vs. Chinna Solan*, ; *Jog-gobundhu Mitter v. Purnanand* ILR Cal 530 and *Harimohan v. Baburali* ILR Cal 715. In a single Judge decision of the Madras High Court reported in AIR 1930 Mad 206 in a suit for possession, it was held by the learned Judge that a fresh cause of action would arise from the date of symbolical delivery of possession even though the decree-holder did not obtain actual physical possession. That case, however, was distinguished by the aforesaid Division Bench decision of the Madras High Court in (S) AIR 1955 Mad 288 referred to above, and their Lordships held that that was a case where symbolical delivery of possession could have been given and in their opinion the principles of that decision cannot apply to a case where there can be no delivery of possession either symbolical or actual in pursuance of the sale on an undivided interest of the joint family property as in this case.

In the case reported in ILR Cal 530 the suit of the plaintiff was to recover possession on the allegation that one of the defendants dispossessed him after he obtained possession through court and was enjoying the usufruct of the property by the receipt of rent etc., until ousted by the defendant. In the case reported in ILR Cal 715 the plaintiff's case was that he having obtained symbolic possession had gone to take actual possession and was obstructed by the defendants. Those cases are therefore clearly distinguishable. None of these

cases is a case of this nature where there was any transfer of the co-sharer's interest. These decisions, therefore, cannot be of any assistance to the appellant.

In the result, therefore, the decision of the learned single Judge of this Court must be held to be correct. The appeal is thus without any merit and is dismissed with costs.

Narasimham, C.J.

10. I agree. The parties are Andhras who were governed by the Madras School of Hindu Law during the relevant period.

It is well settled that under that School the purchaser of the undivided interest of a co-parcener does not acquire a right of joint possession with the other co-parceners but only acquires a right to compel partition which the coparcener whose interest he has purchased might have compelled had he been so minded, before the sale of his interest took place -- See Mulla's Hindu Law, 12th Edition pages 388, 329. Hence limitation would run from the date of confirmation of the sale and not from the date of symbolical possession under Order 21, Rule 96, C. P. C. -- as he was not entitled to any such possession under the Hindu Law.

The point is fully covered by the decision of the Madras High Court reported in (S) AIR 1955 Mad 288 as pointed out by my learned brother.