

(1968) 08 OHC CK 0009

In the Orissa High Court

Case No : Second Appeal No. 289 of 1964

Sri Gopinath Deb and Others

APPELLANT

Vs

Jagannath Baral and Others

RESPONDENT

Date of Decision : 13-08-1968

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 100(1), 101, 103
Evidence Act, 1872 — Section 32(3)

Citation : AIR 1969 Ori 18

Hon'ble Judges : G.K. Misra, J

Bench : Single Bench

Advocate : B.K. Pal, Bijoy Pal and K. Mohanty, for the Appellant; B. Mohapatra and R.K. Mohapatra, for the Respondent

Final Decision : Allowed

Judgement

G.K. Misra, J.—Hari Baral had three sons, Pira, Madhab and Luxman. Plaintiffs 1, 2 and 3 are the sons of Pira, Madhab and Luxman respectively. Plaintiffs 2 and 3 are natural born sons of plaintiff 1 (sic). The suit was for declaration of title, confirmation of possession, or, in the alternative, for recovery of possession on the following averments; Pira, Madhab and Luxman were members of an undivided joint family and so also the plaintiffs. The suit land appertains to Khata No. 271 of village Billipada and is their ancestral property. The three brothers were in joint possession as members of the undivided family. In 1953 the defendants threatened to forcibly cut and remove paddy from the disputed land raised by the plaintiffs. On an inquiry into the matter, the plaintiffs came to learn that Luxman had executed a registered sale deed (Ex. E) in respect of the suit property in favour of one Hari Das of Kundheibentasai, Puri town, on 8-8-32, and that one Panchu Das, describing himself as the son of Hari Das, executed another sale deed (Ex. D) in respect of the very property to defendant 1 on 10-11-53. Both the registered documents were colourable and fraudulent transactions without receipt of consideration and were not for legal necessity. All through the property was in possession of Pira, Madhab and Luxman. The last

two brothers died in 1944. The sale deed executed by Luxman in respect of the joint family property without the consent of other coparceners, cannot convey any title to the vendee.

Defendant-1 is the deity Sri Gopinath Deb. Defendants 2 to 4 are the Marfatdars of the deity. Ex. D has been purchased in the name of the deity through the Marfatdars defendants-2 to 4. The defence case is that Pira, Madhab and Luxman separated in mess in or about 1930. There was severance of joint status though there was no partition by metes and bounds. The three brothers, however, continued to cultivate their lands jointly and enjoyed the usufructs by dividing the same in three equal shares. Luxman sold his suit land under Ex. E to meet certain necessities of his own. Similarly Ex. D was for consideration. Hari Das remained in possession of the land, got his name mutated in the landlord's sherista and cultivated the land through bhag tenants. After his death, his widow Chandramani and son Panchu Das remained in possession as owners. After the death of Chandramani, Panchu sold the disputed property to defendant 1 for a consideration of Rs. 375. Defendants 2 to 4 are in possession of the disputed land on behalf of the deity.

The trial Court dismissed the suit holding that Luxman was separate from his brothers and that he validly transferred the suit property. It, however, found that the plaintiffs failed to prove that they were in possession. In appeal, the lower appellate court reversed both the findings and decreed the suit. Defendants have filed the second appeal.

2. Before going into the question of title and possession on merit, it would be necessary to state certain facts regarding abatement of the first appeal and the second appeal. The suit was dismissed on 11-8-62. Title Appeal before the District Judge was filed on 26-9-62. Bholi Baral (defendant 3) died on 8-12-62 and his heirs were not substituted. The appeal was allowed on 8-2-64. Adhikari Baral (defendant 2) died on 7-3-64. Defendants filed the second appeal on 7-7-64 impleading all the four sons of Adhikari as legal representatives on filing an application, under Chapter VI, Rule 3 of the Orissa High Court Rules. Admittedly Adhikari had two married daughters who were not impleaded as appellants in the second appeal. Defendants took a ground in the second appeal that plaintiff's appeal abated in the lower appellate Court for not substituting the legal representatives of Bholi Baral. Plaintiffs-respondents have filed an affidavit on 26-2-65 stating that the two daughters of Adhikari Baral had not been substituted and that the second appeal had abated. On 15-3-65 the defendants-appellants filed a rejoinder on affidavit stating that the two daughters were married away and were not residents of the village and not marfatdars of the deity (defendant-1).

Thus plaintiffs contend that the second appeal has abated while the defendants contend that the appeal before the first appellate Court had abated. In course of argument the learned advocates for both parties stated that there was no abatement of the first appeal or of the second appeal due to non-inclusion of

some of the trustees as heirs when the deity was represented by the other trustees. Both of them did not press the question of abatement. In view of the fact that the learned advocates themselves do not press the question of abatement, either of the first appeal or of the second appeal, I do not express any view on the question of abatement. The appeal must accordingly be disposed of on the footing that there was abatement neither of the first appeal nor of the second appeal and this conclusion is reached not by expression of any view on the question of law arising in the facts and circumstances of this case.

3. The question for consideration in this appeal is whether the plaintiffs have title to the disputed land and possession within 12 years of the suit. The title of Haridas on the strength of Ex. E has been questioned on the only ground that at the time of transfer, Pira, Madhab and Luxman were members of an undivided joint family and Luxman had no right of transfer without the consent of the other coparceners. The finding of the lower appellate Court that there was no severance of joint status amongst the three brothers is a pure finding of fact not assailable in second appeal. This finding is based on the evidence of P. W. 1 (Plaintiff-1), P. W. 2 (widow of Luxman) and P. W. 3 (an outsider). D. Ws. 1 to 3 are utter strangers to the family of the plaintiffs and have no idea whether Pira, Madhab and Luxman were joint or separate. Mr. Pal assails this finding of fact mainly on the basis of Ex. C dated 15-4-36, a deposition of Madhab in Cr. Case No. 6 of 1936 in which he was the complainant. As would appear from the judgment (Ex. B) in that criminal case, the accused were bhag tenants of Haridas and trespassed into the land in possession of Madhab. They cut away paddy grown by the complainant from the southern portion of plot No. 1574. It would appear from the plaint schedule that a portion of plot No. 1574 is the suit land. In Ex. C Madhab stated thus-

"Myself and Jagannath live joint and Luxman lives separate."

On the basis of this statement Mr. Pal contends that there was severance of joint status in the family and the learned Sub-Judge having failed to consider the bearing of this document, his finding is contrary to law and is not binding on this Court in second appeal. This contention raises the questions whether Ex. C is admissible in evidence, and, if so, what is its probative value.

4. In *Bhagwati Prasad Sah and Others Vs. Dulhin Rameshwari Kuer and Another*, their Lordships held that statements of a particular person that he is separated from a joint family of which he was a coparcener and that he has no further interest in the joint property or claim to any assets left by his father would be statements made against the interest of such person, and after such person is dead, they would be relevant u/s 32(3). Evidence Act. The assertion that there was separation not only in respect of himself but amongst all the coparceners would be admissible as a connected matter and an integral part of the same statement. It is not merely the precise fact which is against interest that is admissible, but all matters that are involved in it and knit up with the statement.

On the aforesaid position of law, the statement of Madhab in Ex. C that Luxman was separate from the (family?) is admissible. On such a statement Madhab would not be entitled to get the property of Luxman on his death by survivorship, but the property would be inherited by the widow of Luxman. It goes against Madhab's pecuniary and proprietary interest and is admissible u/s 32(3) of the Evidence Act.

Mr. Mohapatra, however, contends that the statement of Madhab in Ex. C has no probative value as it was a false statement made by him for success in the criminal case. In Ex. C Madhab made a further statement thus:

All the lands between Luxman and ourselves are divided. The share of Luxman in some places is to the north and in some places to the south. We have a registered deed of partition, I cannot say if the direction of the land assigned to Luxman is mentioned therein.

It is no party's case that there was partition by metes and bounds in the family evidenced by a registered partition deed. Clearly such a statement was false. The bhag tenants of Haridas were accused in the criminal case. If Madhab admitted that he was joint with Luxman, the accused could have been acquitted on the ground that the case involved a bona fide dispute. It was therefore in the interest of Madhab to assert that the land trespassed upon by the accused was in his possession and did not fall within the area transferred by Luxman under Ex. E. Mr. Mohapatra's contention has considerable force. Madhab had a motive to make a false statement that there was a registered partition deed. No reliance can be placed on Ex. C. The attack on Ex. C being the sole basis of Mr. Pal's contention challenging the finding of the learned Sub-Judge on the question of severance of joint status, the finding of fact cannot be assailed in second appeal.

5. As a result of the aforesaid discussion, the finding that Pira, Madhab and Luxman were members of an undivided joint family cannot be assailed. It follows as a corollary that Ex. E cannot transmit a valid title to Haridas.

6. The next question for consideration is whether the plaintiffs have successfully proved possession within 12 years of the suit. The learned Subordinate Judge recorded his ultimate finding thus:

The finding of possession though not so satisfactory on either side has to be accepted in the light of title to the property; as such it is found in favour of the plaintiffs.

Mr. Pal attacks this finding as being contrary to law on two grounds. Firstly, if the evidence of possession for the plaintiffs was unsatisfactory, title cannot be resorted to buttress the case of possession in the facts and circumstances of this case. Secondly, the learned Sub-Judge failed to appreciate the import of the rent-receipts filed by the parties and did not give due weight to them and his finding is accordingly vitiated.

7. In order to appreciate the aforesaid contentions, it would be profitable to

examine the relevant evidence on the question of possession. Plaintiff 1 is P.W. 1. P.W. 2 is the widow of Luxman. She does not say a word about possession. She said that she had not seen the properties of her husband and his brothers. P.W. 3 is alleged to be an independent witness. He could not give the area of the suit land nor its boundary. He does not know if there is any dispute between the parties regarding the suit land. He claims to have his own lands two kiaries away from the suit land. When asked whether he could show the settlement Patta for his own land, he admitted that he had no Patta. Plaintiffs filed 12 rent-receipts (Exs. 2 to 2-K). Khata No. 271 has a total area of 10-39 acres and the rent payable is Ks. 24-13-. Exs. 2 to 2-K show that under them rent amounting to Rs. 8-4-4 pies was being paid in respect of one-third share of the whole. Luxman Baral paid under Exs. 2 to 2G while plaintiff 1 paid rent under Exs. 2-J to 2-K. As these rent-receipts do not show that the entire rent for the Khata was paid thereunder, they have no evidentiary value to prove that the rent for the suit land was being paid under those receipts.

These are all the evidence on behalf of the plaintiffs regarding possession. The learned Subordinate Judge without critically examining the evidence on the plaintiffs' side observed thus:

Apart from the party witnesses, namely, P.W. 1 and P.W. 2, the independent witness having lands near the suit lands, is examined, as P.W. 3 who speaks of plaintiffs' case and supports too.

It is clear that the learned subordinate Judge committed an error of record in saying that P.W. 2 was a witness to possession. He committed another error in not examining how far P.W. 3 was reliable. The trial Court had disbelieved P.W. 3. As has already been indicated P.W. 3 is a person having no idea of the suit land. Regarding rent-receipts for both sides, the learned Judge observed thus:

The rent-receipts are filed as per Ex. 2 series from 1936 to 1962 on plaintiffs' side and on defence side Ex. A series from 1947 upto 1960, for various years are filed. They don't lead to any satisfactory conclusion.

For reasons already discussed, the learned Judge was correct in saying that Ex. 2 series are not of any evidentiary value as they do not show that the rent for the suit land was paid under them. The only evidence of possession on behalf of the plaintiffs is that of plaintiff 1 alone. Even if the evidence on behalf of the defendants is unsatisfactory, plaintiffs' suit is bound to fail as the evidence on their behalf is worthless.

8. Defendants have examined three witnesses. They have filed rent-receipts Ex. A series. Exs. A-15 to A-17 dated 20-9-47, Exs. A-6 and A-7 dated 25-7-50 and Ex. A-8 dated 8-11-50 show that Haridas, the father of the defendants' vendee Panchu Das, paid rent in respect of Order 45.1/3 decimals in Khata No. 271 the exact area as purchased under Ex. E. Exs. A-3 to A-5 dated 27-4-52, Exs. A-1 and A-2 dated 14-11-52 and Ex. A dated 9-9-53 show that Panchu Das was paying rent for the suit land. Ex. A-14 dated 30-4-56, Ex. A-13, dated 31-3-57,

Ex. A-9 dated 5-2-58, Ex. A-12 dated 9-2-59 and Ex. A-11 dated 19-1-60 show that defendants were paying rent under these receipts. These rent-receipts establish that for more than 12 years before the suit defendants and their predecessors-in-interest have been paying rent of the disputed land. The learned Subordinate Judge's observation that these rent-receipts do not lead to any satisfactory conclusion is not correct. As the learned Subordinate Judge has discarded the evidence of D. W. 3, who has got land near the suit land, I do not want to place reliance on his evidence purely on the question of assessment of evidence. The result is that there is evidence of plaintiff-1 asserting possession on behalf of the plaintiffs and the evidence of defendant-2 (D. W. 2) asserting possession of the defendants and their predecessors for more than 12 years. Though the rent-receipts by themselves cannot prove possession, they are not wholly irrelevant. They constitute some evidence of possession based on the theory that no person would go on paying rent for the land unless he is in possession of it. Weighing the evidence on either side, the evidence of D.W. 2, corroborated by the rent-receipts Ex. A series, is better than that of P.W. 1. Plaintiffs' suit therefore, fails. Even assuming that the evidence of possession is worthless on either side, plaintiffs' suit should equally fail,

9. The next question for consideration is whether the finding of fact recorded by the lower appellate Court on the question of possession should be disturbed in second appeal. As I have already indicated, it committed an error of record in relying on the evidence of P.W. 2 as if she deposed to the factum of possession. He accepted the evidence of P.W. 3 as an independent witness without perusing his evidence that he had no idea of possession. He discarded the rent-receipts Ex. A series pertaining to the suit land as having no evidentiary value. A finding of fact thus based on commission of error of fact and ignoring essential pieces of evidence is not binding on this Court in second appeal. u/s 103, C.P.C. the High Court may determine any issue of fact necessary for the disposal of the appeal if it has been wrongly determined by the lower appellate Court by reason of any illegality, commission, error or defect, as is referred to in Sub-section (1) of Section 100. Commission of an error of record and overlooking important pieces of evidence amount to defect in procedure which has produced an error or defect in the decision of the case upon merits. Such finding of fact is not binding in second appeal.

In conclusion, as the plaintiffs have failed to prove their possession within 12 years of the suit, the suit must fail

10. In the result, the judgment of the lower appellate court is set aside and the plaintiffs' suit is dismissed. The second appeal is allowed with costs throughout.