Smt. Raj Rani and Another

Vs

Kailash Chand and Another

Civil Appeal No. 1984 of 1968

(CJI M.H. Beg,, P.S. Kailasam JJ )

17.02.1977

JUDGMENT

BEG, C.J. –

1. This is the defendant's appeal by special leave against the judgment and decree of the Allahabad High Court decreeing the suit of the plaintiff-respondent for partition and separate possession of 2/3 share of House No. 397 in Katra, Allahabad. The plaintiff claimed to be the sole heir of the auction purchaser of the house in October, 1937, at a Court sale in execution of a mortgage decree. The house had been mortgaged by Sharda Prasad representing the line of one son of Kalyan Chand, the common ancestor and original owner, and Sheo Shankar and Sangam Lal representing the line of another son of Kalyan Chand, Kripa Shanker, now represented by the two appellants, his widow and son, was said to be a minor, and, although, his brothers acted on his behalf, the defendants alleged that the loan and the mortgage were not binding upon him for want of legal necessity. Shital Prasad, a son of Kalyan Chand, was not a party to the mortgage deed. Hence, Shital Prasad's share could not be said to have been sold. On September 12, 1938, symbolical possession was taken by the auction purchaser, and, again in 1946, in proceedings for execution of a decree. But, the house continued to be in the occupation of Kripa Shanker, the husband of the appellant Raj Rani and the father of the appellant Kali Charan. Devika Rani, widow of Shital 1/3 of the house, after her objections under Order XXI, Rule 100 of the Code of Civil Procedure had been dismissed, and obtained a decree from the appellate Court on January 22, 1941, with the result that Shital Prasad's 1/3 share went out, had not been impleaded in the suit now before us. In 1945, the respondent-auction purchaser (now represented by son, respondent 1) had filed a suit against Kripa Shanker an another for a declaration of his rights in respect of 2/3 share in another house and the ejectment of Kripa Shanker and Prayag Das from that house. Although that suit was in respect of another house, the defendants alleged that, in that suit, the auction purchaser had said that the house in dispute in the case now before us was also in possession of Kripa Shanker as a trespasser. Kripa Shanker died in 1953 leaving the appellants in possession as his heirs.

2. The suit now before us was filed on August 10, 1959. It was alleged there that, although the auction purchaser had obtained possession of the whole house, yet, Smt. Devika Rani, the widow of Shital Prasad having continued in possession over 1/3 share, her claim to that portion had been accepted so that it was no longer in dispute. But, it was alleged that the auction purchaser has been in possession over 2/3 part of the house together with Devika Rani who had 1/3 share in the house. It was also alleged that, after the death of Devika Rani, one Sankata Prasad, defendant 3, had started giving himself out as the owner of 1/3 share on the basis of a gift-deed of 1953 in his favour, and that, defendant 1, Raj Rani, had been giving out that Sankata Prasad had executed a sale-deed in favour of Kripa Shanker, defendant 2. In para 8 of the plaint, however, it is alleged : "The

defendants had no concern with the 2/3 share in the said house themselves or through any other person nor were they ever in possession or in occupation of any part of the above said house as owners". It is also alleged in the plaint that the plaintiff auction purchaser's son had been, and, before him, the auction-purchaser had been in possession of the house. Furthermore, it is alleged, that "Raj Rani had, in collusion with Sankata Prasad, defendant 3, obtained a false sale-deed in favour of defendant 2 in respect of the 1/3 share of the said house and misled some tenants in the said house and illegally prevented them from paying to the plaintiff his share in the rent". The plaintiff, therefore, claimed to be entitled to recover the rents also of amounts wrongly realised by the defendants 1 and 2, the appellants before us. In paragraph 10 of the plaint, it was stated that the defendants did not pay any taxes to the Municipal Board which had to file suits for their recovery which was decreed. The plaintiff, however, alleged that he had paid up the decretal amounts in excess of the 2/3 share which belonged to the plaintiff. The plaintiff also alleged that he was being obstructed in looking after the house and realising rents. Hence, according to the plaintiff, he had to serve a notice dated April 23, 1959, asking the defendants to partition the property. The plaintiff alleged that the cause of action "accrued to the plaintiff firstly in 1956 and after that on the end of each month when the defendants illegally received plaintiff's share in the rent from the tenants and did not pay to the plaintiff and then on November 15, 1958 when the plaintiff had to pay excess amount to the Municipal Board on account of the defendants and then on April 23, 1959, and, lastly, in May, 1959, when the defendants refused to partition the plaintiff's share in the said house, within the jurisdiction of this Court and this Court has the jurisdiction to try this suit".

3. The defendants-appellants had denied any concern with the mortgage. Apparently, their case was that as the husband of Raj Rani, appellant 1 and the father of Kali Charan, appellant 2, was a minor at the time of the alleged mortgage and his brother, not having borrowed the money for any legal necessity, could not bind Kripa Shanker or his heirs. Furthermore, the defendants pleaded that, even if the house had been sold in execution of the mortgage decree, the defendants-appellants "having been openly denying the rights of the plaintiff and had been in adverse possession and occupation of the property for more than 12 years so that even if the plaintiff or his predecessors had any right, it had been extinguished by the operation of law of limitation".

4. The first question, on pleadings set out above, for the trial Court to determine was : has the plaintiff come with a plea of dispossession by the defendants so that Article 142 of the old Limitation Act was applicable to the case, or, had the defendants, having set up the plea of adverse possession, to establish an ouster in order to discharge their burden of proof under Article 144 of the Limitation Act ? In view of Section 3 of the old Limitation Act, it was incumbent on the Court to determine whether the suit was filed within time, even if the plea of limitation had not been taken, when the question had been raised. Section 3(1) provided :

> 3(1). Subject to the provisions contained in Sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence.
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> The correct procedure for the Court to adopt was not only to frame an issue on the question of limitation but to determine whether it was governed by Article 142 or by Article 144 of the Limitation Act. The trial Court did frame an issue indicating that Article 142 was applicable. This was issue No. 2 framed as follows :
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> Whether the suit is within limitation ?

5. The trial Court observed : "It is also true that if the suit of the plaintiff is not established to be within limitation, that is to say that, if the possession of the plaintiff is not even within 12 years, the suit must fail as the rights of the plaintiffs would be deemed to have been extinguished by the adverse possession of defendants 1 and 2 or, their predecessor-in-interest, namely, Kripa Shanker". All this shows that the trial Court was applying Article 142 of the old Limitation Act. We do not, however, find any finding given by the trial Court on the question whether, and, if so, when and how, the plaintiff was in actual or constructive possession of any part of the house. If Article 142 applied, it meant that the plaintiff had admitted dispossession. If this was the case, the following finding by the trial Court on the title of the plaintiff seems to us to be premature :

> Now it will be noted that there has not been any partition between the plaintiff on the one hand and the other one third share holder Smt. Deoki or their successor-in-interest on the other hand. Smt. Deoki was admittedly a relation of Kripa Shanker and there is noting unusual if Smt. Deoki had allowed Kripa Shanker to continue to live in the suit premises under the protection of her 1/3 share. The consistent Municipal receipts, the litigation with tenants, and over all the title deeds of the plaintiff; they all go to lend support to the plaintiff's case.

6. In the first appeal against that judgment, it was again not decided anywhere what Article of the Limitation Act applied to the case. It appear to us that the appellate Court had also not come to the grips with the real question to be determined. It said :

> It was alleged that Kripa Shanker had taken possession over the house. The learned counsel for the appellant argued that these documents showed that Kripa Shanker was in possession over the entire house and that Bhagwan Das never obtained actual possession over it and only symbolical possession was delivered to him in this suit. It must be borne in mind that Bhagwan Das was owner to only 2/3rd share and 1/3rd belonged to Smt. Deoki, who was real aunt of Kripa Shanker, and, unless Bhagwan Das had got his share partitioned, he could not obtain actual possession over any portion of the house and as such only symbolical possession was delivered to him. The question only is whether he remained in joint possession or not? It is contended from the side of the appellants that he was not in possession and Kripa Shanker was in adverse possession at least from 1945, and that this suit was filed in 1959, that is after more than 12 years when the defendant appellants had already perfected their title by adverse possession. This symbolical possession was delivered on November 21, 1946. This suit was filed in 1959 that is more than 12 years after and, therefore, there is force in the contention that it must be proved that Bhagwan Das was in joint possession. Bhagwan Das was a co-sharer along with Smt. Deoki. Smt. Deoki's share ultimately came to the defendant appellant in 1957 and as such in 1957 the defendant appellant became co-sharer with the plaintiff respondent. In 1957, 12 years had not passed and even if it is assumed that Bhagwan Das or the plaintiff-respondent was not in joint possession, their right and not ceased in 1957. It was observed by the Supreme Court of India in the case P. Lakshmi Reddy v. L. Lakshmi Reddy (AIR 1957 SC 314 : 1957 SCR 195)," the burden of making out ouster is on the person claiming to displace the lawful title of co-heir by his adverse possession'.

7. If the plaintiff's assertion was that the defendants had dispossessed him it did not matter whether the defendants represented a co-sharer or not. In that event, the plaintiff's case would certainly be deemed to be one in which the assertion of dispossession was there. In the case before us, it appears

that the rights of Kripa Shanker, on the plaintiff's assertion that he had been a party to the mortgage, had come to an end by the sale of his rights in the property and delivery of possession to the auction purchaser. His heirs could only be in adverse possession and not holding through Kripa Shanker on the plaintiff's own assertions. In fact, they have not claimed to be holding through Kripa Shanker. In any event, the allegations in the plaint appear to us to amount to an allegation that, be asserting their own ownership and inducing the tenants not to pay rents to the plaintiff, the defendants had dispossessed the plaintiff. In such a case, even if a defendant in actual possession could be deemed to be initially a co-sharer, the plaintiff would be really asserting that the co-sharer had dispossessed or ousted him. Hence, an ouster having been admitted in the plaint, the burden would lie upon the plaintiff of proving his case that the ouster had taken place within twelve years. On any other view, the distinction between Articles 142 and 144 of the former Limitation Act, which is important in this case, would vanish.

8. In a case between co-sharers, Bindhyachal Chand v. Ram Gharib Chand (AIR 1934 All, 993 : 1934 ALJ 961 : 1934 All LR 1127), a Full Bench of the Allahabad High Court had examined the difficulties which arise when a co-sharer sues another on the allegation that he had been dispossessed. Sulaiman, C. J., pointed out that Article 144 was a residuary article which applied to suits for possession of immovable property which could not fall elsewhere. As regards the distinction between Articles 142 and 144, he observed (at p. 997) :

> No doubt in many cases the distinction is very fine, and the line of demarcation between dispossession and adverse possession is thin. But, the question in each case is one of burden of proof, and it is incumbent on the plaintiff, when he admits his dispossession, to establish his possession within twelve years.

He went on to point out (at p. 998) :

> Ordinarily, the possession of one co-owner, who is entitled to joint possession of the whole property, is referable to his title, and he cannot ask the Court to presume that his possession was illegal or adverse to the other co-owner. It follows that if one co-owner is in actual possession of the joint property, and the other co-owner is either absent or is not in actual possession, the latter would still be in constructive possession of his property through his co-owner. There would be prima facie no case, where the possession of one co-owner was illegal and was, necessarily adverse to that of the other co-owner. The presumption would be that they are both in joint possession. But, it cannot be denied that one co-owner can dispossess another co-owner and can exercise adverse possession over a joint property. If, therefore, the plaintiff, a co-owner, admits that he had been dispossessed and that, at any rate, for a short period prior to the suit, the possession of his co-owner was adverse to him, then he cannot fall back on a mere presumption of joint possession in his favour and succeed without showing any other circumstances whatsoever.

9. The following observations of the learned Chief Justice are also useful (at p. 998) :

> Personally speaking, I do not think that the plaintiff can be clearly drafting his plaint evade the burden of proof which Article 142 casts upon one who is suing for possession on the ground of dispossession. When a plaintiff falsely alleges that he is in possession and wants a relief, to which the owner in possession is entitled, e.g., for partition, injunction, joint possession, etc., and it is found that he was in fact not in

> possession but had been dispossessed, technically speaking, the suit would fall under Section 42, Specific Relief Act and would be dismissed on the ground that he had omitted to ask for a consequential relief and had failed to prove his case. But, a Court may allow him to change his ground and give him a decree for possession, treating his claim as one for recovery of possession on the basis of dispossession, provided he succeeds in showing that his dispossession took place within 12 years.

10. It seems to us that, in the case now before us, the High Court, on a second appeal to it, also failed to determine the crucial question of actual or even constructive possession of the plaintiff within twelve years. It said :

> The argument advanced before me is that after the decree in suit 57 of 1945 the possession of Kripa Shanker became adverse and, as the suit for partition was not filed within 12 years of the date of the decree, the suit was barred by limitation. A large number of authorities were cited before me on the point. It was urged that if a member of an undivided Hindu family sells his undivided share and the alienee does not bring a suit for partition and possession over his share within 12 years of the date of the alienation the possession of the alienor and all the other coparceners would be adverse and the suit for partition after the expiry of 12 years from the date of the alienation would be barred by time. Some of the authorities cited by the learned counsel for the appellant, to which I do not consider it necessary to refer, would seem to support his contention. Learned counsel for the respondent, however, has cited before me the latest case of the Supreme Court in Manikayala Rao v. Narasimhaswami (AIR 1966 SC 470 : (1966) 1 SCR 628).

11. The case relied upon by the High Court is distinguishable on two grounds : firstly, it was not a case where the plaintiff, on the pleadings in the plaint could be fairly said to have admitted dispossession or ouster by setting up that the alleged co-sharer in possession was denying the rights of the plaintiff; and, secondly, delivery of symbolical possession there was said to have interrupted adverse possession which could, therefore, not be continuously for twelve years. In the case before us, even if a symbolic delivery of possession to a co-sharer could be said to have interrupted any adverse possession, that interruption took place beyond 12 years. Hence, it was the duty of the plaintiff to have shown by cogent evidence how, by receipt of rent or an admission by the defendants or otherwise, he or his predecessor-in-interest could be deemed to be in actual or constructive possession as an owner or as a co-sharer with the defendants over the house in dispute.

12. We may observe that the difficulty in deciding the question whether Article 142 or Article 144, Limitation Act applies to a case, which really depends upon an interpretation of the pleadings, was sought to be removed in the Limitation Act of 1963 by a more clarified position in Articles 64 and 65 of Limitation Act of 1963. The reasons given for this change were :

> Articles 142 and 144 of the existing Act have given rise to a good deal of confusion with respect of suits for possession for owners of property. Article 64 as proposed replaces Article 142, but is restricted to suits based on possessory title so that an owner of property does not lose his right to the property unless the defendant in possession is able to prove adverse possession.
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> In other words, in cases governed by the former Limitation Act, at any rate, a plaintiff admitting dispossession, in suits based on title, had to prove that he was in

> actual or constructive possession within twelve years. Hence, the change in law. We do not, however, propose to examine or lay down here the exact position under the amended law of limitation under the Act of 1963.

13. The result is that, in the case before us, the plaintiff had to prove that he was in actual or constructive possession with twelve years. It would be enough if he establishes that he was in constructive possession within twelve years by receipt of rent or otherwise. There is no finding to that effect given by the High Court or by the subordinate Courts.

14. We, therefore, allow this appeal, set aside the judgment and orders of the High Court and of the first appellate Court. We send the case back to the first appellant Court, which is the final Court of facts, to determine, on the evidence already on record, whether the plaintiff was in actual or constructive possession within twelve years of the filing of the suit. If the plaintiff can establish that, the suit will have to be decreed. Otherwise, the suit must fail. The costs will abide the results.

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