ORISSA HIGH COURT

Mahadei Bewa

Vs

Keluni Dei

Second Appeal No. 301 of 1959

(J.K. Misra, J.)

08.12.1960

JUDGMENT

J.K. Misra, J.

1. This is a second appeal by the plaintiff and defendant No.2 over a preliminary decree arising out of a suit for partition. The suit property comprises of two plots Nos.72 and 73, measuring 23 acre and 104 acre respectively in Cuttack town - both contiguous the latter plot being to the east and south of the former. To the west of the two plots lies a lane and to the north of the two plots lies the main road. The two plots originally belonged to three brothers - Harekrushna, Udayanath and Krushna. Defendant No.1 purchased the 1/3rd share of Udayanath in 1934, and purchased the 1/6th share of one of the two sons of Harekrushna in 1935. In 1988 the 1/6th share of the other son of Harekrushna was purchased by defdt. No.2, a deity, represented through its marfatdar, then a minor who himself was represented by his mother, the plaintiff. In the same year and shortly after the said purchase, the plaintiff purchased the 1/3rd share of Krushna. Before Harekrushna's sons and brothers sold the suit property, they had a thatched house over plot No.73. In plot No.72 there was a Darchandanadar who was ultimately ejected after purchases by the parties. The original owners had made no partition of the suit property amongst themselves before they sold their respective shares. Defendant No.1, after his purchase of 8 annas share in the suit property, which was earlier to the purchase made by the plaintiff and defendant No.2, occupied the thatched house that stood in plot No.73, the original owner residing far away. He subsequently substantially remodelled the old house and raised some new constructions and also raised a compound wall adjoining the eastern boundary of plot No.72. After the ejectment of the Darchandanadar from plot No.72, the plaintiff raised a thatched shed in a portion of that plot. The plaintiff was in possession of 031 acre, whereas defendant No.1 was to possession of 096 acre out of the two suit plots. Defendant No.2 was not in physical possession of any part of the suit plots at any stage.

2. In the suit for partition, the plaintiff claimed mesne profits from defendant No.1 being in possession of the old house and of a larger area than what was due to his share. The trial court disallowed the plaintiff's claim for mesne profits and passed a preliminary decree for partition directing that the two plots would be treated as a compact area, and defendant No.1's 8 annas

share should be allotted in the eastern-most portion, whereas the plaintiff's 1/3rd share would be allotted in the western-most portion, and that defendant No.2's 1/6th share would be allotted in between them.
Since defendant No.1 had reoriented the old house, the trial court valued the old house at Rs.200/- and directed defendant No.1 to pay the plaintiff and defendant No.2 their respective shares out of the same. It further directed that in case any of the new constructions made by defendant No.1 in plot No.73 fell to the share of the plaintiff or defendant No.2, that construction was to be valued and defendant No.1 was to recover the pries thereof from the party, to whose share that construction would fall. It further laid down that in case any single room or similar structure appertained to the share of two persons and the division could not be made without destroying the intrinsic value of the property, the structure or room, should be allotted to the party to whose share the major part of it appertains, and the other party should be entitled to be compensated to that extent. It may be noted that during the trial of the suit, the plaintiff's share and the share of defendant No.2 were sold to a third person, the deity being represented through the minor marfatdar's natural mother - the plaintiff - in the said sale, and this purchaser wanted to be substituted as a party for the plaintiff and defendant No.2. Shortly thereafter, defendant No.1 purchased the deity's 1/6th share from the deity's minor marfatdar's adoptive father, and defendant No.1 wanted to be substituted for defendant No.2. The trial court did not allow any of the substitution petitions holding that the rival purchaser of the deity's property raised controversial points which were not necessary for determination within the scope of the suit for partition, and it left the respective purchasers to agitate their title in a separate suit in respect of the said 1/6th share. However, the trial Court apportioned the deity's share in the properly in between the plaintiff and defendant No.2, probably with a view that whoever succeeded to the deity's share in future, might not be inconvenienced by the said arrangement.

3. The first appellate Court took the view that the deity's minor marfatdar's adoptive father was his legal guardian, and as such the sale by him of the deity's 1/6th share to defendant No.1 was prima facie valid, and the rival purchaser, if he had any claim over the deity's property, was to agitate his title in a future suit. So, according to the first appellate Court, defendant No.1 was entitled to 2/3rds share out of the suit plots and the plaintiff to 1/3rd share. Even if defendant No.1 was to get 2/3rds share of the suit plot the total area to his share would come to .0856 acre. The first appellate Court observed,

> "The area in occupation of defendant No.1 except the cow-shed and the Bari portion is to be allotted to the share of defendant No.1 and the remaining portion to the share of the plaintiff. In case, defendant No.1 is not found entitled to claim the share of defendant No.2 defendant No.2 be allotted the share to the continuous West of the share of the defendant No.1 and defendant No.1 will pay money compensation to defendant No.2 for its share and no land be allotted to the share of defendant No.2. Out of the excess area of A. O.11 decimals and odd in possession of defendant No.1, the plaintiff will be allotted so much land as is practicable out of the cow-shed and Bari portion (in possession of defendant No.1) and in case it cannot be adjusted in full, the plaintiff will be awarded money compensation for the balance."

Subject to these modifications, the appellate Court otherwise confirmed the decree of the trial court.

4. One of the main objections in the present appeal is about the way in which the appellate Court dealt with the share of defendant No.2. It may be noted that defendant No.2's marfatdar, who was a minor for some period, became major in 1952 while the suit was pending, and since then he directly represented the deity. The plaintiff's case about the deity's property was that it was her property, purchased benami in the name of her son defendant No.2's marfatdar, and that there was no deity in existence. The rival transfer of the deity's property involved several complicated questions, and the trial court did rightly exercise its discretion in leaving that aspect of the litigation out of the scope of the present suit. Order 22, Rule 10 Civil Procedure Code provides that in case of devolution of an interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved. As has been laid down in *Chacko Pyli v. Varghese*[1]*,*

> "Where the transfer inter vivos is pendente lite, the transferee has no right to insist upon being impleaded in addition to or instead of the transferor. It was a matter in the discretion of the court, whether to implead him or not, even if the transfer had been brought to the notice of the court and application made for bringing in the transferee by either of the parties to the transfer."

Under the doctrine of lis pendens, a property in suit cannot be transferred or otherwise dealt with by any party to a suit or proceeding, so as to affect the right of any other party thereto under any decree or order that may be made in such suit, except under the authority of the Court. In the circumstances, the appellate Court had no jurisdiction to interfere with the discretion exercised by the trial court. Even if the appellate Court did want to go into the question, it went only halfheartedly by saying that the sale in favour of defendant No.1 was prima facie valid. If the appellate Court thought that a decision was necessary on the point, it should have gone into the rival claims of both the parties. In the circumstances, the appellate Court's finding that defendant No.1 is the purchaser of defendant No.2's 1/6th share cannot be maintained, since there has been no proper adjudication on that account.

5. The next point dealt by the appellate Court was that even if defendant No.2 had his share still retained in the property, he should not be given any actual share, and he should be allowed the money value thereof. Defendant No.1 was conseious? is that he had purchased only eight annas share in the property. If he extended his construction or possession to such an extent as to cover the major part of the suit land, he did so at his own risk and had no apparent *bona fides* for his activities. There is no equity in favour of defendant No.1 to be allotted defendant No.2's share in the land, compensating defendant No.2 with the price thereof. The appellate Court relied on *Ashanulla v. Kali Kinkur*[2]*,* which lays down:

> "If a property can be partitioned without destroying the intrinsic value of the whole properly or of the shares, such partition ought to be made; but where
> partition cannot be made without destroying the intrinsic value of the property,
> then a money compensation should be given."

in depriving defendant No.2 of any actual allotment on the spot. The circumstances of the

Calcutta case are different where original houses were there and the question was as to how to partition them amongst the different partners. But here was a case where defendant No.1, with his eyes open, sought to extend his constructions covering more areas than he was normally entitled to have to his share.

6. The next direction of the appellate Court that the plaintiff, if necessary, might be compensated with money in case any part of the excess area in defendant No.1's possession cannot be conveniently allotted to the plaintiff detrimental to defendant No.1's interest, is similarly based on the said Calcutta decision. But, as I have pointed out, the theory laid down there cannot extend to a case of the present nature.

7. In the circumstances, the modifications suggeted by the appellate Court to the preliminary decree passed by the trial court cannot stand at all and they must have to be rejected. Now, the preliminary decree passed by the trial court has to be considered. No doubt, the trial court sought to allot the westernmost portion of the two plots to the plaintiff, the middle portion to the defendant No.2, and the easternmost portion to defendant No.1. It has been found by both the Courts that defendant No.1 has substantially remodelled the old house and raised many new constructions together with a compound wall in plot No.73, mostly in its northern portion. The ordinary principle that has to be followed in partition is that possession of the parties should be respected as far as practicable. If the easternmost half of the suit land is allotted to defendant No.1, some of his valuable constructions would apparently fall in the share of defendant No.2. The trial Court has been of the view that for those constructions, defendant No.2 and the plaintiff, if any falls to her share, shall have to compensate defendant No.1 by money. There is no apparent justification in compelling the plaintiff or defendant No.2 to pay compensation for any construction of defendant No.1, that may fall within the area to be allotted to them, which they may not be in a financial position to meet, and which they may not need in their own interest. If, in the allotment, any of the constructions of defendant No.1 falls to the share of any of the other two parties all that defendant No.1 is entitled, is to get his construction and building materials removed from the said area, and he is entitled to no further equity in view of the fact that without any partition or the consent of others he went on building constructions over the joint property of the parties. On the other hand, it would be equitable if as much of the constructions, as had been raised by defendant No.1, can be allotted to his share without affecting the just claim of the other parties. This can be done by apportioning that part of plot No.73 to the share of defendant No.1 when is covered by the existing boundary wall raised by him on the western side, and the northern boundary and also the eastern boundary of plot No.73 as they exist; only the southern boundary of that area has to be so aligned as to make out his total area (8 annas share) to .0635 acre out of the total area of 127 acre. This will not affect the interest of other parties, since the residual of plot No.73 will have an outlet to the lane on the western side, whereas plot No.72 has its outlet both to the west and to the north. Since defendant No.2's share is a bone of contention, it can be so aligned as to touch the southern boundary of the area to be allotted to defendant No.2 forming a contiguous strip having the eastern boundary of plot. No.73 as its eastern boundary and the southern boundary of plot No.73 as its southern boundary with outlet towards the lane. After carving out such an area from plot No.73 in favour of defendant No.2, the rest of plot No.73 and the whole plot No.72 may be conveniently allotted to the share of the plaintiff.

8. The next question that was raised on behalf of the appellants was regarding the allotment of share in the compensation for the old house that had been remodelled by defendant No.1. It was

sought to be urged that the old house had been virtually existing with very minor improvements. This is a question of fact, and both the Courts have held that the old house is not virtually there in its original state, and in its place there has been a remodelled construction with substantial alterations. Even if the old house would be existing and if it could not be adjusted to three shares conveniently, it can be, on the basis of ILR 10 Cal 675 (referred to above), the subject matter of valuation, and parties, who were not having their share in the old house, were normally to be compensated to the extent of their loss. Since both the courts have held that the valuation of the old house, as it stood before remodeling, was Rs.200/-, no point of law arises to disturb that finding.

9. The next question is regarding mesne profits that was claimed by the plaintiff for defendant No.1 enjoying the old house and a greater part of the suit land. In refusing the claim for such mesne profits, the trial court was of the view that in a suit for partition where joint possession has been claimed, the question of mesne profits cannot at all arise, and further was of the view that since all the constructions had been raised by defendant No.1, the plaintiff could not claim any share is the profits arising out of such constructions. The appellate Court observed, relying on *Shiva Narain Mahton v. Chandra Sekhar*[3], and *Nathuram Agarwalla v. Abdul Latif*[4], that

> "if a co-sharer does not take any steps to recover possession of the land from the other co-sharers, he should not be allowed a decree for mesne profits". The plaintiff claimed mesne profits from the date of the institution of the suit (17-3-45) and not for the prior period. If the claim for mesne profits would have related to any period prior to the suit, then the question of whether the plaintiff had taken any steps to recover possession within such period would have been a relevant consideration.

No doubt, "mesne profits" as defined by Civil Procedure Code cannot be claimed in a suit of such nature, when there is no case of any wrongful possession, and when the possession of one co-owner is deemed to be on behalf of the other co-owner. By 1945, since when the share in profits was claimed by the plaintiff, the old house was no longer in existence there, and it had been converted and remodelled by defendant No.1. In such a case, though the plaintiff or defendant No.2 was not entitled to any share in the rent that has accrued or that can be deemed to have accrued from the remodelled and reconstructed house of defendant No.1, still then they were entitled to a share from the ground rent, whatever its worth was. I would, in this connection, refer to the following passage from *Basavayya v. Guravayya*[5],

> "The question of profits or mesne profits arises in (1) Suits for ejectment or recovery of possession of immovable property from a person in possession without title, together with a claim for past or past and future mesne profits, (2) Suits for partition by one or more tenants-in-common against others with a claim for account of past or past and future profits, and (3) Suits for partition by a member of a joint Hindu family with a claim for an account from the manager.....In the second case, the possession and receipt of profits by the defendant not being wrongful, the plaintiff's remedy is to have an account of such profits making all just allowances in favour of the collecting tenant-in-common.....Order 20, R.12, Civil Procedure Code deals with the first class of suit above referred to, while Order 20 Rule 18 deals with the second and third categories." His Lordship in *Ram*

Narain v. Ramji Prasad[6], expressing agreement with the aforesaid Madras decision, observes,

"Even if there is no agreement between the parties regarding the profits accruing during the pendency of the suit may be made even after the passing of the preliminary decree".

In the present case, as I have said, the original house no longer existed and so the plaintiff and defendant No.2, are not entitled to any share in the rents that defendant No.1's building might have fetched. But then defendant No.1 was in possession of .096 acre of land out of the suit land, whereas his legitimate share was .0635 acre. For his excess enjoyment he was to compensate the other parties by way of ground rent of whatever worth the same might be. The same has to be determined in course of the proceedings of the final decree and necessary direction for payment by defendant No.1 has to be made in favor of the appellant on that account.

10. In the result, the appeal is allowed with costs of this Court, and the decrees passed by the courts below are modified to the extent indicated above. The order of the appellate Court regarding costs of courts below stands.
Appeal allowed.

Cases Referred.

[1] AIR 1956 Trav Coc 147 (FB)
[2] ILR 10 Cal 675
3 AIR 1933 Pat 616
4 AIR 1935 Cal 478
[5]3 AIR 1933 Pat 616
[6] AIR 1956 Pat 244