ORISSA HIGH COURT

Udayanath Sahu

Vs

Ratnakar Bej

Second Appeal No. 66 of 1964

(G.K. Misra, J.)

02.01.1967

JUDGMENT

G.K. Misra, J.

1. Bisi Bej died 25 years ago. He had three sons Rajan, Ratnakar (Plaintiff 1) and Indramani. Rajan and Indramani died about 12 years ago respectively. Defendant 2 is the son of Rajan. Plaintiff 3 is the widow and plaintiff 2 is the son of Indramani. On 19-5-58 defendant 2 transferred the disputed property to defendant 1 by a registered sale deed (Ex. C) for Rs. 995. Plaintiffs assail this alienation as not binding on them as the family was an undivided joint family. Defendant 1 contested the suit alleging that plaintiffs and defendant 2 were separate, there was a partition by metes and bounds soon after the death of Bisi, the disputed land fell to the share of defendant 2's father who was in exclusive possession of the same and the sale was valid.

2. Both the courts below found that the defence story of partition by metes and bounds had not been established. Mr. Mohanty did not assail this concurrent finding. He, however, contended that there were enough materials on record to establish severance of joint status and that on such a finding the alienation would be valid. Mr. Sahu, on the other hand, contends that there being no plea in the written statement that there was severance of joint status, such a contention is not tenable once the case of partition by metes and bounds is not established. He also contends that on the materials on record there is no severance of joint status and that the appellant court's finding on this point is a pure finding of fact binding on this Court in second appeal. His further contention is that even if there be a finding that there was severance of joint status and the alienation is valid, defendant 1 is liable to be evicted from the homestead under Section 44 of the Transfer of Property Act. Each of these contentions requires careful examination.

3. In the written statement defendant 1 did not take any plea that there was severance of joint status. The learned lower appellate court has recorded a finding that there was no severance of joint status. Even if such a plea had not been taken in the written statement, a finding thereon can be recorded if the materials on record justify it. Certain materials may not justify a conclusion regarding a completed partition but may be sufficient for a finding regarding severance of joint status. The objection of Mr. Sahu that in the absence of such a plea in the written statement the

courts below had no jurisdiction to go into that question is not legally tenable. In *Raghavamma v. Chenchamma*[1], such a question had not been initially taken but was for the first time advanced before the High Court in first appeal. The question was examined both in the High Court as well as in the Supreme Court. Mr. Sahu's objection on this score must be rejected.

4. Mr. Mohanty contends that the finding of the lower appellate court that there was no severance of joint status is based by an error of record and non-consideration of material evidence. In support of severance of joint status he relies on the following pieces of evidence :

(i) Ex. E. a registered sale-deed dated 24-12-55 executed by defendant 2 in favor of Pahali Behara transferring 15 decimate and 19 biswas of land for Rs. 60;
(ii) Ex. G. a registered mortgage bond, dated 9-6-58 executed by plaintiff 1 in favor of Madha Bej (D. W. 2);
(iii) Distribution of Jajmans for performance of barber-service into three shares in the family;
(iv) Separate kitchen and separate residential houses with different sadar doors; and
(v) Demarcation of agricultural lands conveyed by the impugned sale deed (Ex. C) into three portions by intervening ridges.

5. The question whether there was severance of joint status in the family is essentially a question of fact and binding on this Court in second appeal unless the finding is contrary to law. It is necessary to see if the learned lower appellate Court bestowed consideration over the aforesaid materials and whether its finding is vitiated in any manner.

6. The impugned sale deed (Ex. C) was executed on 19-5-58. The question for con sideration is whether there was severance of joint status in the family by that date. The presumption is that the joint family continued. The onus is on defendant 1 to prove that there was severance of joint status by 19-5-58. It is to be noted that Ex. C does not purport to convey one-third interest in the land covered by the sale deed. Whatever was transferred was transferred as a whole. By itself it is a strong piece of evidence to show that there was no severance of joint status. Even the residential house was transferred as a whole with the trees standing on the land.

7. Ex. E is the registered sale deed dated 24-12-56 executed by defendant 2 in favour of Pahali Behera, a stranger to the family. This document does not recite that there was severance of joint status in the family. Ratnakar Bej (plaintiff 1) has been described as having lands in the northern boundary of lot No. 1 of the lands covered by this sale deed. The total area of this lot is 32 decimals out of which 10 decimals and 10 biswas had been sold. Reliance is placed on this document showing admission of defendant 2 that he had one third interest in the entire plot and for the further fact that the description of one of the family members as being the owner of the adjoining land is indicative of a disruption in status in the family. Though there is no recital in Ex. E that there was separation or disruption in joint status in the family, the very act of transfer amounts to an admission on the part of defendant 2 that he had a right of transfer. Such a right of transfer without the consent of other coparceners is permissible in a Mitakshara joint family only on the hypothesis that there was either severance of joint status or partition by metes and bounds. This admission is not, however binding on the plaintiffs unless defendant 2 is a person jointly

interested with them. In this case, the interests of the plaintiffs and defendant 2 are in conflict. The case of the plaintiffs is that the joint family did not disrupt by 19-5-58 while the case of defendant 1, the transferee from defendant 2, is that there was severance of joint status by then. So far as defendant 1 is concerned, defendant 2 is bound by his own admission. The admission cannot, however, be invoked against the plaintiffs. Defendant 2 was not the karta of the family. An admission by a Karta is binding on other members of the family except in certain circumstances. The other members of the joint family are not bound by the admission of any other member, senior or junior, who is not the Karta of the family. The point is elementary. *Nagendra Nath v. Lawrence Jute Co., Ltd*[2]*.,* The statement of defendant 2 in Ex. E that he had a right of transfer and that the owner of the northern boundary is plaintiff 1 is not binding on the plaintiffs. Ex E must, therefore, be ruled out of consideration. That apart, the materials on record do not sufficiently clarify the position if the northern boundary land exclusively belongs to plaintiff 1 in which the family has no interest, or whether it is a part of the plot of which a portion was conveyed by defendant 2 in Ex. E. Ex. G is a simple mortgage bond dated 2-6-52 executed by plaintiff 1 in favour of Madha Bej (D. W. 2). Lot No. 1 in Ex. E corresponds to Lot No. 5 in Ex. G. On the aforesaid fact it is contended that when plaintiff 1 himself mortgaged his one-third interest in some lands conveyed by Ex. E, severance of joint status is established. It is unnecessary to go into the details. It would be sufficient to say that Ex. G is subsequent to the impugned sale deed. The subsequent act of the plaintiffs is inadmissible for determination of the question of severance of joint status in the family on the crucial date. Ex. G must, therefore, be ruled out of consideration.

8. The question of distribution of Jajmans in the matter of performance of barber's service was fully examined by the learned lower appellate court. It took into consideration the evidence of P. W. 2 and D. W. 4 and found that the factum of division of the seba was only for the sake of convenience and did not establish severance of joint status. This finding is a pure finding of fact and cannot be interfered with in second appeal.

9. The learned Judge also fully discussed the question of existence of separate kitchen and separate residential houses with sadar doors and concluded that it was done only for the sake of convenience. This finding is also a question of fact and cannot be interfered with in second appeal.

10. The last piece of evidence relied upon is that the agricultural lands conveyed in the impugned sale deed were demarcated by intervening ridges. Reliance is placed on the evidence of D. W. 5, an advocate, who was deputed as a Pleader Commissioner. His report is marked Ex./H/5. Though the learned lower appellate court did not
examine this report in connection with severance of joint status, he discussed it in connection with the question of partition by metes and bounds. Plaintiff's case in this regard is that defendant 1 is an influential man and after the purchase be put intervening ridges to create evidence of partition by metes and bounds. Ex. H/5 is admissible only to show that on the date of local inspection on 6-8-58, about three months after the impugned sale, there were intervening ridges in the disputed agricultural lands and is no evidence of the fact of existence of ridges prior to the impugned sale deed. The Commissioner was not asked to give a report as to whether there were intervening ridges in respect of undisputed agricultural lands belonging to the family. In the absence of such a direction and report, the Commissioner's report regarding existence of intervening ridges in the disputed agricultural lands is not decisive of the question. Plaintiff's case

that these ridges were put subsequent to the impugned sale deed may not be ruled out. That apart, the learned Judge fully considered the Commissioner's report and was of opinion that it was not of much help to decide the question whether there was partition by metes and bounds as alleged by defendant 1. This is also essentially a question of fact and cannot be interfered within second appeal.

11. Mr. Mohanty's criticism that the learned lower appellate court committed errors of record and did not consider material pieces of evidence is not justified. The finding of the lower appellate court that there was no severance of joint status in the family is well founded and cannot be assailed in second appeal.

12. The findings that there was neither partition by metes and bounds nor severance of joint status in the family are enough for dismissal of the second appeal. A contention has. however, been advanced by Mr. Sahu that even if there was severance of joint status, defendant 1 was liable 1o be evicted from the house and the homestead under Section 44 of the Transfer of Properly Act. Admittedly the residential house stands on plot No. 592. Plot No. 593 is the adjoining Bari. Mr. Mohanty contends that if there be a finding that there was no severance of joint status, defendant 1 was entitled to one-third share of the disputed, properties and could not be evicted from the disputed houses and Bari by the plaintiffs under Section 44 of the T. P. Act.

13. The aforesaid contentions require examination of the scope and ambit of Section 44 of the T. P. Act. The section deals with transfer by co-owners. It runs thus :

> "Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and in so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house."

The second part of the section is relevant. Mr. Mohanty does not dispute that the second part of the section would apply to the transferee if he files the suit in the role of the plaintiff. He, however, contends that the section has no application where the transferee figures as the defendant and has taken possession of the properly. The distinction, so raised, is not warranted by the language of the section. All that the section says is that the transferee of a share of a dwelling house belonging to an undivided family must not be a member of the family. Whether the family is divided or not must be judged qua the dwelling house Defendant 1 is admittedly not a member of the family. If there had been severance of joint status and no partition by metes and bounds, defendant 1 would be a transferee of a share of the dwelling house belonging to an undivided family. If these conditions are fulfilled, the first part of the section is made inapplicable and an embargo is put on the transferee from getting joint possession or other common or part enjoyment of the house. This is a legal bar.

In imposing the ban the section does not make a distinction between a plaintiff and a defendant.

If the transferee gets into possession of a share in the dwelling house, the possession becomes a joint possession and is illegal. Courts cannot countenance or foster illegal possession. The possession of the defendant transferee in such a case becomes illegal. Plaintiffs co-owners are entitled to get a decree for eviction or even for injunction where the transferee threatens to get possession by force. If there had been a finding that there was severance of joint status but no partition by metes and bounds, defendant 1 was liable to be evicted from the residential houses and Bari under Section 44 of the T. P. Act. Mr. Mohanty's contention gets some support from *Jogendra v. Adhar*[3], This decision was, however, dissented from by the subsequent decisions of the same Court see *Lalbehari v. Gourhari Dawn*[4], and *Paresnath v. Kamalkrishna*[5], *Uma Shankar v. Mst. Dhaneswari*[6], and *Bhikari v. Dharmananda*[7] are in accord with the view I have taken. The applicability of section 44 of the T. P. Act is, however, not called for in this case on the finding that there was no severance of joint status. Plaintiff's suit was rightly decreed.

14. In the result, the appeal fails and is dismissed, but in the circumstances, there will be no order as to costs of this Court.

Appeal dismissed.

Cases Referred.

[1] AIR 1964 SC 136
[2] AIR 1921 Cal 197
[3] AIR 1951 Cal 412
[4] AIR 1952 Cal 253
[5] AIR 1958 Cal 614
[6] AIR 1958 Pat 550
[7] 20 Cut LT 462