ORISSA HIGH COURT

Bhim Singh

Vs

Ratnakar Singh

Second Appeal No. 335 of 1966

(R.N. Mishra, J.)

11.08.1970

JUDGMENT

R.N. Mishra, J.

1. The defendants 7 and 10 are in appeal against a confirming judgment of the learned First Additional Subordinate Judge of Cuttack in a suit for permanent injunction restraining those two defendant-appellants from jointly possessing the disputed house along with the plaintiff and the defendants 1 and 2.

2. The plaintiff claimed that he and the defendants 1 and 2 are the descendants of Arta. The defendants 3 and 12 are the descendants of Fakir and Khosali. The plaintiff and the defendants 1 and 2 have no connection with the other defendants. Plot No. 1619 accommodates the family residential house and plot No. 1618 is the Ban. There is a tank on plot No. 1630 adjacent to the further north of plot No. 1618. All these three plots, namely, plots Nos. 1618, 1619 and 1630 constitute the homestead. In the current settlement record-of-rights, Lofan, Jogi, Bhogi and Bhikari were recorded in respect of half share and the defendants 3 and 12 were recorded in respect of the other half in these plots. The plaintiff alleges that there had been a complete partition between Arta and the ancestors of the defendants 3 and 12 in regard to plots Nos. 1618 and 1619. The tank had not been partitioned, but for convenience, the eastern ghat was being used by the plaintiff and the defendants 1 and 2 while the northern ghat was being used by the defendants 3 to 12. The defendant No. 1 alienated his 1/3rd share in the properties now in dispute along with other properties to defendants 7 and 10 under a registered sale deed dated 4-10-1955, for an alleged consideration of Rs. 1,000/-. These transferee-defendants are about to take forcible possession of a part of the homestead on the plea that it represents the 1/3rd share sold to them. The transferee defendants are strangers and are not entitled to joint possession with the plaintiff and are also not entitled to interfere with the possession of the plaintiff.

3. The defendants 7 and 10 only contest. It is contended that the suit in its present form without asking for declaration of title was not maintainable. The purchaser defendants had already taken possession and therefore, there can be no injunction against them. According to the written statement, the defendants 3 to 12 and the plaintiff and the defendants 1 and 2 are members of one

family they having come from the common stock. Between the descendants of Arta, i.e., the plaintiff and the defendants 1 and 2, there had been an amicable arrangement and they were living separately since long and had also separated their residence, each living in a different house unconnected with the other. The defendant No. 1 had thus alienated his separate interest as well as his separate house in the year 1955 in favor of the alienee-defendants and ever since then, the alienees were in possession after making alterations and additions and even constructing a new structure. As the defendants 7 and 10 are not strangers to the family and as the plaintiff has a separate house, the defendants contend that the plaintiff has no cause of action.

4. The learned trial Judge came to find that the defendants 7 and 10 were not entitled to joint possession with the plaintiff in respect of the disputed homestead and they were thus liable to be ejected. He also found that there was no complete partition by metes and bounds between the plaintiff and the defendants 1 and 2 and they were all having a joint interest. The defendants 7 and 10 had purchased a part and parcel of the joint undivided dwelling house. The plaintiff was thus entitled to the benefit under Section 44 of the Transfer of Property Act.

5. The learned trial Judge, however found that the plaintiff and all the defendants came from the same common ancestor. On these findings he decreed the suit.

6. The defendants 7 and 10 appealed and that appeal of theirs came to be disposed of by learned First Additional Subordinate Judge. In the appellate court, the finding of the trial court that the parties were descendants from a common ancestor was not challenged. In view of non-challenge on that question it was contended on behalf of the appellants that they not being strangers to the family, the suit was liable to be dismissed. The learned appellate Judge ultimately came to hold that the decree of the trial court was correct and the plaintiff was entitled to the relief prayed for. He, therefore, dismissed the appeal.

7. Against this confirming judgment of the appellate court, the defendants 7 and 10 are appellants here.

8. Several questions have been canvassed by Mr. Pal, learned counsel for the transferee defendants. On the finding that the plaintiff and the defendants 1 and 2 on one hand and the defendants 3 to 12 on the other, come from the same ancestor, Mr. Pal contends that the provisions of Section 44 of the Transfer of Property Act would not apply to the present case and the purchaser defendants cannot be restrained from their joint possession. He next relies on the averments of Paragraphs 3 and 4 of the plaint which would go to show that defendants 7 and 10 were admitted to have an ascertained but undivided share in the disputed property. He next contended that as there was no one single house and the parties had raised their independent residential houses, the provisions of Section 44 of the Transfer of Property Act cannot apply. Again, the courts below have gone wrong in directing ejectment when the plaintiff never sued for that relief.

9. The learned trial Judge came to hold :-

> "In such circumstances when there is no documentary evidence of the relationship of the parties and the old people of the village have died, the defendants cannot produce proper

> evidence on the same point. In these circumstances I accept the contention of the defendants to the effect that all the parties are descendants of one common ancestor. In such circumstances, it is now to be decided whether defendants 7 and 10 are strangers to the family of the plaintiff."

10. The learned appellate judge has stated :-

> "The findings of the learned Munsif that the parties are descendants of a common ancestor is not challenged."

It would, therefore, follow that the parties are descendants from a common ancestor.

11. Section 44 of the Transfer of Property Act provides :-

> "Where one of two or more co-owners of immoveable 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 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."

12. In order to find out whether any relief under Section 44 of the Act can be had by the plaintiff, it would be necessary to ascertain whether the disputed property constituted a dwelling house and whether the same belonged to an undivided family. It would also be necessary to find out as to whether the transferee defendants are or are not members of the undivided family.

13. Let me first proceed to examine the meaning of "family", thereafter to examine whether the subject-matter of the alienation by the defendant No. 1 in favour of the defendants 7 and 10 was of a share of a dwelling house and as to whether the said dwelling house belonged to an undivided family.

14. There is not much controversy that the provisions of Section 4 of the Partition Act and Section 44 of the Transfer of Property Act are complementary to each other and the terms "undivided family" and "dwelling house" have the same meaning in both the sections. "Family" is a term of wide import and is not restricted to a body of persons who can trace their descent from a common ancestor. It is often understood to include a group of persons who live in one house under one head or management. As was held in the case of *Paluni Dei v. Rathi Mallik*[1],:-

> "The term 'family' is not defined in the Act. It has been consistently held that it would neither be possible nor desirable to frame a comprehensive formula or an exhaustive definition to indicate the meaning of the term 'family'. In *Khirode Chandra v. Saroda Prosad*[2], Sir Ashutosh Mukherjee's classical exposition of the meaning of the term

'family' cannot be improved upon. After a thorough discussion, their Lordships' conclusion was couched in the following language :

"The word 'family' as used in the Partition Act ought to be given a liberal and comprehensive meaning, and it does include a group of persons related in blood, who live in one house or under one head or management. There is nothing in the Partition Act to support the suggestion that the term 'family' was intended to be used in a very narrow and restricted sense, namely, a body of persons who trace their descent from a common ancestor."

15. Therefore, keeping in view the observation referred to above, there can be no dispute that the parties in this case must be taken to have been members of one family. But that is not enough for the present purpose. The plaintiff had categorically alleged that there had been a partition. In the courts below, there has been a finding that there had been a completed partition between Arta, the ancestor of the plaintiff and defendants 1 and 2 and Fakir and Khosali who are predecessors of defendants 3 to 12. Thus while all the parties were once upon a time members of the family, that family had ceased to exist on account of complete partition. The defendants 3 to 12 are strangers to the family of the plaintiff, the defendant No. 1 and the defendant No. 2. A Division Bench of the Calcutta High Court examined at considerable length the meaning and scope of the term "undivided family" in the case of *Boto Krishna Ghose v. Akhoy Kumar Ghose*[3], It was held there that "undivided family" meant simply a family not divided qua the dwelling house, in other words, a family which owns a dwelling house and has not divided it. It does not mean a Hindu joint family or even joint family. The members need not be joint in mess. The essence of the matter is that the house itself should be undivided amongst the members of the family who are its owners. The emphasis is really on the undivided character of the house.

16. In view of the finding recorded in the courts below there is hardly any scope to hold that the plaintiff, defendants 1 and 2 and the defendants 3 to 12 are members of an undivided family qua the dwelling house.

17. There has been considerable dispute during hearing of this appeal as to whether it can be said that there is a dwelling house belonging to the undivided family. The plaintiff and the defendants 1 and 2 after partition from the predecessors of defendants 3 to 12 had continued joint and have claimed one-third share in the house and other properties. That is how the alienation by defendant No. 1 in favour of the transferee-appellants is of his undivided one-third share. Mr. Pal emphatically contends that there is no dwelling house of the family. On the homestead plots, each of the members i.e. the plaintiff, the defendant No. 1 and the defendant No. 2 had raised separate houses and they were not under a common roof. According to him, where on an undivided homestead undivided members of the family have not been
living under a common roof, but have raised their separate residential houses, the protection under Section 44 of the Transfer of Property Act cannot be availed. To be more precise, the contention of Mr. Pal is that in a given case where on an undivided homestead, the members of the family raise independent residential houses, such houses of theirs though standing on an undivided homestead cannot constitute a dwelling house belonging to an undivided family.

18. The meaning of "dwelling house" came to be the subject-matter or consideration in a series

of cases before the Calcutta and the Patna High Courts as also this Court. Judicial view is unanimous about the meaning of "dwelling house." In fact, the dictum given by Sir Asutosh Mukherjee in the case already referred to is a classical one and gives the true meaning of the term. On several occasions, courts have applied the dictum to the facts of each case that came up for adjudication, but have not differed from the basic meaning of "dwelling house" as given therein. A family dwelling house consists of the house itself and all necessary appurtenances required for beneficial enjoyment of the house, neighbouring homestead plots including the bari and even a tank attached to the residential house in a compact manner have been included in the meaning of "dwelling house." On many occasions it has been held that even a vacant site upon which there used to be the family dwelling, but the same has been pulled down or has fallen, would continue to be dwelling house until parties have abandoned their intention to raise residential structures thereon.

19. Admittedly, the two plots which constitute the actual homestead and the bari - that is plots 1619 and 1618 - belonging to the plaintiff, the defendant No. 1 and the defendant No. 2 and on plot No. 1619 the residential houses have been located. Undivided members have raised houses for their own convenience. Normally all these separate houses would really be treated as the residential house and for convenience, different members of the undivided family would be treated to be in occupation and enjoyment. Unless in a particular case it is shown out of one's own earning a house has been constructed on a joint homestead plot, the house itself would belong to the joint family and will have the incidences of the joint family asset. Merely because, the undivided members have raised independent structures on the admitted undivided homestead, it cannot be held that these structures do not constitute dwelling house of the undivided family. I would, therefore, overrule the contention of Mr. Pal that in the present case the separate constructions cannot be taken to constitute the undivided family's dwelling house. It, therefore, follows that the plaintiff, the defendant No. 1 and the defendant No. 2 on one side and the defendants 3 to 12 on the other had completely severed their connections and on account of partition in the time of their predecessors Arta's successors and the defendants 3 to 12 are not members of an undivided family. The structures standing on the homestead plots constitute dwelling house of the undivided family.

20. The next question is in relation to the tank. From the sketch indicated in schedule 'A' of the plaint it appears that plots Nos. 1619, 1618 and 1630 are all located in a row. The actual house portion being the first, the bari intervening between the tank and the house portion. The eastern portion of the tank adjoins plot No. 1618. The plaintiff has claimed the ghat on that side and had contended that the defendants 3 to 12 were entitled to use the northern ghat of that tank. I do not see any unreasonableness in the claim which has been accepted in the courts below.

21. If in this state of things, a member of the family transfers his share in the dwelling house to a stranger paragraph 2 of Section 44 of the Transfer of Property Act comes into play and the transferee does not become entitled to joint possession or any joint enjoyment of the dwelling house although he would have the right to enforce a partition of his share. The object of the provision in Section 44 is to prevent the intrusion of the strangers into the family residence which is allowed to be possessed and enjoyed by the members of the family alone in spite of the transfer of a share therein in favour of a stranger. The factual position as has been determined is that the property is still an undivided dwelling house, possession and enjoyment whereof are confined to the members of the family. The stranger-transferees being debarred by law from

exercising right of joint possession which is one of the main incidences of co-ownership of the property should be kept out This view has been adopted in this Court in the case of *Udayanath Sahu v. Ratnakar Bej*[4], His Lordship the present Chief Justice held :-

> "If the transferee (stranger) 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. Plaintiff's 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."

22. A similar view has been taken in the Madras High Court in the case of *Ramaswami Pillai v. Subramania Pillai*[5], It would, therefore, follow that the defendant-appellants who were stranger-alienees were not entitled to joint possession.

23. The last contention of Mr. Pal is that the plaintiff sued for injunction only. The learned trial Judge, however, has decreed ejectment or the transferee defendants and that decree has been upheld. Once it is held that the plaintiff is entitled to protection under the second part of Section 44 of the Transfer of Property Act and the stranger purchasers are liable to be restrained, it would follow that even if the defendants have been put in possession or have come jointly to possess they can be kept out by injunction. The effect of that injunction would necessarily mean ejectment. In that sense and to the said extent, the decree of the trial court upheld by the lower appellate court must be taken to be sustainable. The remedy of the stranger purchaser is actually one of partition. Until then, he is obliged to keep out from asserting joint possession.

24. On this analysis, the irresistible conclusion to follow is that the defendants are liable to be restrained under Section 44, Part-II of the Transfer of Property Act and
the affirming decree of the lower appellate Court has to be sustained.

25. This appeal fails and is dismissed. In the circumstances of this case, I would direct both the parties to bear their own costs throughout.
Appeal dismissed.
Cases Referred.

[1] AIR 1965 Oris 111
[2](1910) 7 Ind Cas 436 (Cal)
[3] AIR 1950 Cal111
[4] AIR 1967 Oris139
[5] AIR 1967 Mad 156