PATNA HIGH COURT

Nathaniel Uraon

Vs

Mahadeo Uraon

A.F.A.D. No. 1046 of 1949

(Rai and Kanhaiya Singh, JJ.)

03.01.1957

JUDGMENT

Kanhaiya Singh, J.

1. This is a plaintiffs Second Appeal from the judgment of Mr. Muhammad Ataur Rahman, Additional Subordinate Judge, Ranchi, dated the 31st March, 1949, reversing a decision of Mr. Maheshvary Sahay, Additional Munsif, Ranchi, dated the 30th November, 1948.

2. The plaintiffs instituted this suit for possession of 3.08 acres of land comprised in Survey plots Nos. 564, 565, 566 and 2489 under khata No. 141 in village Lawagain. It is common ground that the plaintiffs and defendants Nos. 1 to 7 are descendants of the common ancestor, Sukra. Jogia Uraon, defendant No. 1, in the first instance executed in favour of Allah Bux, defendant No. 10, a usufructuary mortgage bond dated 9-3-1943 for a consideration of Rs. 100/- hypothecating thereby the disputed land and thereafter transferred to defendant No. 9 plot No. 2489 for a consideration of Rs. 100/- by virtue of a registered sale-deed, dated 28-5-1943, exhibit B. and to Mahadeo, defendant No. 8, plot No. 563 for a consideration of Rs. 100/- by another registered sale-deed dated 24-1-1944, exhibit B-1. The lands comprised in Khata No. 141 are the ancestral raiyati lands of the plaintiffs and defendants Nos. 1 to 7 and have been jointly recorded in their names or their ancestors in the record-of-rights. There is no dispute about this. The plaintiffs sought ejectment of defendants Nos. 8 to 11 and joint possession of the disputed lands with defendants Nos. 1 to 7 on the ground that thought the plaintiffs and the defendants were, by an arrangement among themselves, in separate possession of different plots for the sake of convenience, the joint family properties had not been partitioned bet ween them by metes and bounds, and, therefore, defendant No. 1 had no right to alienate any portion of the joint properties and to confer an exclusive right on defendants Nos. 8 to 11 by the sales without the consent of the co-owners since such transfers were invalid for want of competency.

3. The main contesting defendants were defendants Nos. 8 and 9 who filed separate writ ten statements. They admitted that they had purchased plots Nos. 566 and 2489, respectively, from defendant No. 1. They laid, however, no claim to the other two plots in dispute. Their defence was that the plots purchased by them constituted the separate and exclusive properties of

defendant No. 1 and that he had every right to dispose of them. They denied that the proper ties were still joint and contended that the plaintiffs and the defendants were separate and the properties which had been joint family properties had been divided 30 years back bet ween Bandhua Uraon, Sukra Uraon, Bhaura Uraon and Perwa Uraon and that in that partition the disputed plots were allotted exclusively to Perwa Uraon, the father of defendant No. 1. The other defendants filed written statements separately, defendants Nos. 2 to 7 supporting the plaintiffs' case and defendants Nos. 10 and 11 supporting the defence set up by defendants Nos. 8 and 9.

4. The learned Munsif held that the joint family properties of the plaintiffs and defendants Nos. 1 to 7 had not been divided amongst them by metes and bounds and that their separate possession of different plots was by reason of a private arrangement for the sake of convenience in cultivation. The conclusion reached on these findings was that defendants Nos. 9 and 10 had derived no title by virtue of the purchase from defendant No. 1. This conclusion he had arrived at on the strength of the two decisions of the Allahabad High Court in *Jamna v. Jhalli*[1] and *Mohammad Sher Khan v. Bharat Indu*[2] In his opinion, it is not permissible for one co-sharer in separate possession of a common land to alienate to a third person, as his own exclusive property, the portion which he has been occupying by agreement with his co-owners and till partition takes place no co-sharer is en titled to say that he has an exclusive right to any particular portion of the joint property and to confer an exclusive right on a third party by alienation without the consent of all the co-owners. He accordingly gave the plaintiffs a decree for joint possession with defendants Nos. 1 to 7 by ejecting defendants Nos. 8 to 11.

5. Defendants Nos. 8 and 9 took an appeal to the District Judge, and the learned Subordinate Judge who heard the appeal affirmed the finding of the learned Munsif that the joint family properties had not been divided by metes and bounds. He, however, relied upon two decisions of this Court in *Sat Narayan Singh v. Anant Prosad*[3] and *Ram Nandan Sahay v. Jai Gobind Pandey*[4] in preference to the decisions of the Allahabad High Court above referred to and concluded that the remedy of the co-owner was joint possession along with the transferor and the transferee. He, therefore, modified the decree of the learned Munsif by disallowing ejectment of defendants Nos. 8 and 9 and gave the plaintiffs a decree for joint possession of plots Nos. 566 and 2489 with defendants Nos. 1 to 9. According to the admitted case of the parties the share of defendant No. 1 was one-fourth in the disputed plots. So far as plots Nos. 564 and 565 are concerned, the defendants disclaimed all interests therein, and, therefore, the plaintiffs were held entitled to recover possession of those two plots in their entirety.

6. Now, plaintiff Nathaniel Uraon has come up in Second Appeal; the other co-plaintiff, Bhaura Uraon, has been impleaded as a respondent. During the pendency of this appeal, Tiwari Uraon, defendant No. 9, who was respondent No. 2, died, and no substitution was made in his place. By an order of this Court dated 7-4-1952, the
appeal has abated as against him. The result is that the decree of the Court below with
respect to plot No. 2489 which was claimed by him has become final and the appeal stands dismissed as against the heirs of the deceased respondent No. 2. Now, there remains only one plot in dispute, namely, plot No. 566 having an area of 1.43 acres. This plot has been purchased by defendant No. 8, Mahadeo Uraon, who is respondent No. 1.

7. Mr. Amala Kanta Choudhury appearing for the appellant contended that the transfers in favour of defendants Nos. 8 and 9 by defendant No. 1 were invalid and conferred no title upon them,

and the plaintiffs were, therefore, entitled to eject them and obtain joint possession with their co-sharers, defendants Nos. 1 to 7. He relied upon a decision of a Single Judge of this Court in the case of *Bisua Uraon v. Ghamru Uraon*[5], which followed the earlier decisions of the Allahabad High Court in the cases of 55 Ind Cas 94 ; 106 Ind Cas 656 and *Qutubuddin v. Man gala Dubey*[6] It will be seen that the learned Munsif in this case also followed the decisions of the Allahabad High Court in the cases of 55 Ind Cas 94 and 106 Ind Cas 656 referred to above.

8. The decisions of this Court are slightly different. The general principles governing the rights of the co-owners in the common land are no longer in dispute. Where land is held in common by several persons, one co-sharer is entitled in law to cultivate any portion of the joint land, and the other co-owners have no right to object to his cultivation of the land so long as the common land is used for legitimate purposes and is not prejudicial to the rights of the other co-owners, and the exclusive possession of the said co-owner does not amount to ouster of the other-co-owners, their remedy being confined to only compensation for the exclusive use of the joint land according to their shares. If they want to cultivate their lands them selves and object to their exclusive possession, the proper and right course for them is to obtain partition of the common land by suit or otherwise. If the cultivation is not carried on in a proper and husband like manner and the possession of the co-owner is in denial of the title of the other co-owners, the latter may bring a suit for joint possession. There is unanimity of judicial opinion on this point. The question as to the right of the co-owners as between themselves was discussed in the leading case of *Watson and Co. v. Ramchund Dutt*[7] and the Judicial Committee laid down the law therein as follows:-

> "It seems to their Lordships that if there be two or more tenants in common, and one (A) be in actual occupation of part of the estate, and is engaged in cultivating that part in a proper course of cultivation as if it were his separate property, and another tenant in common (B) attempts to come upon the said part for the purpose of carrying on operations there inconsistent with the course of cultivation in which A is engaged and the profitable use by him of the said part, and A resists and prevents such entry, not in denial of B's title, but simply with the object of protecting himself in the profitable enjoyment of the land, such conduct on the part of A would not entitle B to a decree for joint possession."

The same principle was affirmed by the Judicial Committee in *Lachmeswar Singh v. Manowar Hossain*[8] These principles were reiterated by the Privy Council in the case of *Midnapur Zamindary Co. Ltd. v. Naresh Narayan Roy*[9] (1). Their Lordships of the Judicial Committee observed as follows :

> "Where lands in India are so held in common by co-sharers, each co-sharer is entitled to cultivate in his own interests in a proper and husband like manner any part of the lands which is not being cultivated by another of his co-sharer, but he is liable to pay to his co-sharers compensation in respect of such exclusive use of the lands. Such an exclusive use of lands held in common by a co-sharer is an ouster of his co-sharers from their proprietary right as co-sharers in the land. When co-sharers cannot agree as to how any land held by them in common may be used, the remedy of any co-sharer who objects to

the exclusive use by another co-sharer of lands held in common is to obtain a partition of the lands."

9. It must, therefore, be taken as settled that one co-sharer may use a joint property or any part of it for all legitimate purposes so long as his use of the joint property does not prejudice the rights of the several co-owners and does not amount to their ouster. It is equally well-settled that a co-owner can transfer his undivided share in the joint property by way of lease, sale, gift, or otherwise. There appears to be some divergence of judicial opinion as to whether a co-owner cultivating the common land can transfer by way of lease, sale or gift any specific portion of the common land in his exclusive possession for time being. The Allahabad High Court seems to think that such transfer gives the other co-owners a right to sue for ejectment of the transferee and for joint possession with the transfer. In the case of 55 Ind Cas 94 above referred to Lindsay, J., sitting singly, has held that it is not permissible for one co-sharer in separate possession of the joint property to alienate to a third person as his own exclusive property the portion which he has been occupying by agreement with his co-owners. He has held that such a transfer did not confer any exclusive right on the transferee. A Division Bench of the Allahabad High Court in the case of 106 Ind Cas 656 has laid down a similar principle. According to them, the right of co-owners to sole possession is a right which continues only so long as they possess themselves and such a right is consistent with the other co-sharers' title, and if however, the co-sharers transfer to a stranger this amounts to a denial of the title of their co-owners and is inconsistent with that title. Consistent with these observations they held that such a transfer gave the co-owners a right to sue for joint possession with the transferors and ejectment of the transferee after declaration that the transfer was invalid against them. In the case of Mohammad Sher Khan (B) some of the co-owners had built two shops on a portion of the common land and had transferred the site along with the building to a stranger. It is not quite clear whether the construction of the building affected the rights of the other co-owners, so much so that without the demolition of the building there could not be any equitable partition between the different co-owners. If the construction of the building and the transfer of the site with the building to stranger caused serious prejudice to the other co-owners, the latter were certainly entitled to sue for joint possession with the transferor and ejectment of
the transferee. If however, the transfer by a co-owner of a portion of the common land to a stranger is by itself regarded as a denial of the title of the other co-owners, irrespective of prejudice to them. I must say with great respect that the pro position of law has been too widely stated. There appears to be no rule of law of equity making it obligatory upon a co-owner in possession of a common land to cultivate the land or use it personally without the aid of tenants. If by private arrangement between themselves different co-sharers cultivate different portions of the common land, there appears to be no cogent reason why any of them, subject to the rights of the co-owners, should not deal with the land in a proper and husband like manner by inducting tenants into the land, or by constructing structures thereon, or by otherwise transferring them to a third person, provided always that he does not take more than his share, because such acts are not necessarily inconsistent with the continuance of joint ownership and joint possession. A person can in law confer upon another person all the rights he possesses in law but not more. It is equally well-settled that one joint owner might license the doing of whatever he might do himself. In the case of *Wilkinson v. Haygarth*[10], Coleridge, J., observed, as follows :

"It must be admitted on the part of the plaintiff that the tenant" (meaning thereby a tenant

in common) "might license the doing of whatever he might do himself."

This was followed in two cases of this Court, namely, 51 Ind Cas 31 and 52 Ind Cas 543 . It has been held in many cases that one co-sharer can induct a tenant on a land belonging to several co-sharers. In the case of Sat Narayan Singh, above referred to, one co-sharer brought the suit to recover compensation for use and occupation from a tenant inducted on the land by another co-sharer-landlord and the co-sharer was given a decree for use and occupation. The right of the co-owner to settle a tenant on the joint land was not questioned. The case of Ram Nandan Sahay (D) went a step further. In that case, one of the co-sharers brought the suit for ejectment of a tenant in ducted noon the land by another co-sharer. The tenant had erected a wall and a chabutra on 7 dhurs of the common land. After a review of different decisions of the High Courts hiring on the question Das, J., laid down as fallows :

> "The authorities. I think, establish the pro position that, before a court will, in the case of co-sharers, make an order directing that a portion of the joint property alleged to have been dealt with by one of the co-owners without the consent of the other should be restored to its former condition, a plaintiff must show that he has sustained, by the act he complains of, some injury which materially affects his position." His Lordship further pointed out that where there was a denial of the title of one co-owner by the other co-owners, there is in law an ouster, and where there is an ouster, the co-owner ousted is entitled to a decree for joint possession. It will thus appear that the co-owner is not entitled to obtain restoration of the common land to its former position by the removal of structures erected thereon by another co-sharers or by his tenant, if the act complained of did not affect his position materially. This question arose specifically in the case of *Madan Mohun Shaha v. Rajab Ali*[11], In that
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> case a common tank was re-excavated and improved by
> raising embankments by the tenants of one of the co-sharers without, any opposition of the remaining co-sharers, and latter brought a suit for khas possession of the disputed property jointly with the co-sharer-defendants. Their Lordships of the Calcutta High Court observed as follows :
> ".....when one co-sharer is holding possession of a certain land and deals with it in a particular way and in the ordinary course, if the other co-sharers are not satisfied with that dealing or with that course of conduct, their proper remedy is by partition. In a partition suit the rights of all the parties are adjudged upon a proper basis, and any loss or damage suffered by one set of partners is made good at the expense of the other."

10. The following extract from Freeman on Co-tenancy and Partition 2nd. Edition, section 199, may be usefully referred to :

> "A lease or deed by one tenant in common to a stranger of a portion of the joint estate, although voidable by the co-tenants who do not join therein, is valid between the parties and against all persons unless so avoided. If the title of the co-tenant entitled to disaffirm

> the conveyance become vested in the one by whom it was executed, the newly acquired title of this lessor or grantor will ensure by estoppel to the benefit of the lessee or grantee. Such a conveyance is undoubtedly void so far as it under takes to impair any of the rights of the other co-tenants.

It will not justify the grantee in taking exclusive possession of the part described in his deed. It will not deprive the other co-tenants of the right to enjoy every part and parcel of the real estate, nor can it, to any extent, prejudice or vary their right to a partition of the common property. The grantee is liable to lose all his interest in the parcel conveyed to him, by its being set off to some other of the co-tenants upon partition. But although the deed docs not impair the rights of the other co-tenants, it by no means follows that they may treat it as void, or entirely disregard it. While falling short of what it profess es to be, it nevertheless operates on the interest of the grantor, by transferring it to the grantee." The above extract was relied upon by the Full Bench in the case of *Bibi Kaniz Fatma v. S.K. Hossainuddin Ahmad*[12], The principle, therefore, appears to be well-settled. One tenant in common can settle a portion of the joint land with a stranger. Such a conveyance is not legally invalid or void so as to entitle the other co-owners to obtain khas possession of the joint land by eviction of the tenant. They can at best sue for joint possession or for partition, and if on partition the portion settled with the tenant is allotted to their share, they will in deed be entitled to obtain khas possession of that land by ejecting the tenant. If, however, that portion falls to the share of the grantor, the title of the lessee will be perfect and valid, and the lessor will be es topped from questioning the grant on the ground that he had no right to make a transfer of the joint estate. It is equally true that the settlement of a common land by one of the co-sharers in possession does not bind the other co-sharers who have a right to avoid it if it affects the rights materially, that is to say, when equity between the different co-proprietors could not be suitably
squared up in a suit for partition. Unless there is a complete partition, one co-sharer cannot so deal with the land as to make it binding upon the other co-owners. At the same time, the other co-owners have no right to reject the transferee and obtain exclusive possession of that land. The test in such cases is whether the use of the common land by the cosharer either by himself or by his transferee, be he a tenant or a purchaser, operates as irremediable prejudice to the other co-owners. If it is used in good husbandry for the proper cultivation of the land, not in denial of the title of the other co-owners but with the object of making a profit out of the land, the other co-owners would appear to have no right to main tain an action in trespass either against the co-owners or a third party who has been inducted upon the land by the co-owners and who has been occupying the land with the leave and licence of the co-owners. The position is the same whether the transfer of the common land is by way of lease or by way of sale. But the lessee or the purchaser takes the lease so transferred at his own risk because if in the event of partition of the joint land, the portion of the joint land occupied by the lessee or the purchaser goes eventually to the other cosharers, he will have no right to maintain his possession as against such co-owners. Similarly, if a co-owner or his transferee makes any structure upon a portion of the joint land, that act by it self does not entitle the co-owners to sue for khas possession by the ejectment of the transferee. If they are dissatisfied with the mode of cultivation or use of the common land by the co-owner or his transferee, their remedy always is by way of a suit for partition. In the present case, the plaintiffs have been given a decree for joint possession of the disputed land with their cosharers-transferors and the transferees, and, I think, no legitimate exception can be taken to the form of the decree. In view of the principles discussed above, the plaintiffs were not entitled to

obtain a decree for ejectment of the transferees. In my opinion, the learned subordinate Judge has taken an entirely correct view of the law on the subject. The contentions raised on behalf of the appellant must, therefore, be overruled.

11. In the result, the appeal is dismissed with costs.

Rai, J.

12. I agree

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Appeal dismissed.

Cases Referred.

[1]55 Ind Cas 94
[2]106 Ind Cas 656
[3]51 Ind Cas 31
[4]52 Ind Cas 543
[5] S. A. No. 2307 of 1948, D/-10-2-1950 (Pat)
[6](AIR 1935 All 771)
[7] ILR 18 Cal 10 (PC)
[8] ILR 19 Cal 253 (PC)
[9]6 Pat LT 750
[10](1847) 12 QB 837
[11] ILR 28 Cal 223
[12] ILR 22 Pat 382