

PATNA HIGH COURT

Badri Prasad

Vs

Shyam Lal Jaiswal

Civil Revns. Nos. 985 to 995 of 1959

(V. Ramaswami, C.J. and R.K. Choudhary, J.)

01.02.1962

JUDGMENT

V. Ramaswami, C.J.

1. It appears that the petitioner in all these applications filed 11 Small Cause Court Suits for realisation of his share of monthly rental of Rs. 250/- in regard to a cinema building located in Siwan, and the case of the petitioner was that the cinema building belonged to him and defendant No. 4, who jointly executed a lease of the building in favour of defendant No. 1 on a monthly rental of Rs. 375. The document of lease was executed on the 26th of April 1955. The case of the petitioner is that there was a subsequent partition suit between the plaintiff and defendant No. 4 and on the 14th of June, 1958, there was a compromise decree in the partition suit. By virtue of this compromise decree most of the properties of the joint family were partitioned but the cinema building could not be partitioned. It was decided that the petitioner Badri Prasad should have two-thirds shares and defendant No. 4 Jagarnath Prasad should have one-third share in this cinema building. Notice of the partition was given to defendant No. 1, who agreed to the arrangement and commenced paying the sum of Rs. 250 per month as rent to the petitioner for his share and Rs. 125 per month to defendant No. 4 as his share.

2. The suits were contested by defendants 1 to 3 on the ground that there was payment of the rent claimed by the petitioner and in any case that the suits were not maintainable only for the petitioner's share of the rent. It was contended that the petitioner should have brought suits for the entire rent mentioned in the lease and not only for the petitioner's share of the rent of the cinema building. Defendants 2 and 3 also said that they were separate from defendant No. 1 and were not liable for any rent due to the petitioner under the lease. Their case was that they were not parties to the contract of lease and so they cannot be made liable for the payment of rent. The case of defendant No. 4 was that the compromise decree was fraudulent and the plaintiff was not entitled to two-thirds share of the rent, but only to a one-third share of it.

3. Upon these rival contentions of the parties the lower Court has held that there was a valid compromise decree between the plaintiff and defendant No. 4 in the partition suit and that the plaintiff was entitled to two-thirds of the rent of the cinema house. The lower Court rejected the

plea of payment put forward on behalf of defendants 1 to 3. But the lower Court took the view that the suits were not maintainable because the plaintiff and defendant No. 4 being joint lessors, the plaintiff alone could not maintain a suit for his share of rent separately. In the ultimate result, therefore, the lower Court has dismissed all the suits.

4. On behalf of the petitioner it was submitted by learned Counsel that the lower Court is erroneous in law in holding that the petitioner is not entitled to bring a suit for his share of rental for the cinema building. In our opinion the argument put forward on behalf of the petitioner is well founded and must be accepted as correct. It is the admitted position in the present case that there was a partition suit between the petitioner and defendant No. 4 and there was a compromise decree in that suit on the 13th of June, 1958, by which the plaintiff was allotted two-thirds share of the cinema building and defendant No. 4 was allotted one-third share. In our opinion the principle of section 37 of the Transfer of Property Act governs the present cases. Section 37 is in the following terms :

"37. When, in consequence of a transfer, property is divided and held in several shares, and thereupon the benefit of any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract to the contrary amongst the owners, be performed in favor of each of such owners in proportion to the value of his share in the property, provided that the duty can be severed and that the severance does not substantially increase the burden of the obligation; but if the duty cannot be severed, or if the severance would substantially increase the burden of the obligation the duty shall be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose; Provided that no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in manner provided by this section, unless and until he has had reasonable notice of the severance.

Nothing in this section applies to leases for agricultural purposes unless and until the Provincial Government by notification in the official Gazette so directs." Section 109 of the Transfer of Property Act is also relevant in this connection and reads as follows :

"109. If the lessor transfers the property leased, or any part thereof, or any part of his interest therein the transferee, in absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him; Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and in case they disagree,

such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased." The principle of this section also applies to the present cases. The effect of the partition decree is that there is surrender of a portion of a joint right in exchange for a similar right of a co-sharer. In other words, the single obligation of the lessee to pay rent to the lessors under the lease is converted into several obligations to pay rent to the lessors individually, that is, to the petitioner and defendant No. 4. It is not disputed in these cases that the lessee had notice of the partition decree and there is also evidence that he has paid for several months the share of rent separately to the plaintiff. The view that we have expressed is borne out by a decision of the Division Bench of this High Court in *Bhudeb Chandra v. Bhikshakar Pattanaik*¹, where the principle of section 109 of the Transfer of Property Act has been applied, and it was held that the assignee was entitled to maintain a suit for his share of the rent alone. In *Atrabannessa Bibi v. Safatullah Mia*², it was observed by Mookerjee and Newbould, JJ., that partition signifies the surrender of a portion of a joint right in exchange for a similar right from the co-sharer. In other words, partition is the division made between several persons of joint lands which belong to them as co-proprietors, so that each becomes the sole owner of the part which is allotted to him; the essence of partition is that the property is transformed into estates in severalty and one of such estates is assigned to each of the former occupants for his sole use and as his sole property. It has also been held by the Bombay High Court in *Waman Ramkrishna v. Ganpat Mahadeo*³, that a partition by metes and bounds among the co-owners of immoveable property amounts to a "transfer" within the meaning of that term in Section 53 of the Transfer of Property Act. The same view has been reiterated by the Madras High Court in *Rasa Goundan v. Arunachela Goundan*⁴, in which it has been held that partition is a transfer of property within the meaning of section 53 of the Transfer of Property Act. On behalf of the opposite parties reliance was placed by learned Counsel on the decision of the Judicial Committee in *Baraboni Coal Concern, Ltd. v. Gukulananda Mohanta*⁵, In that case four shebait of a family deity had executed a mining lease of the idol's interest in a mauza but only one of the shebait brought a suit against the lessee for a fourth share of the royalties reserved after making the other three shebait as co-defendants. That was held by the Judicial Committee that the suit was not maintainable and no one of the four lessors with or without the consent of the co-lessors can sue for an aliquot part of the whole. It is manifest that the material facts of the present cases are different, and the principle of the decision of the Judicial Committee has no application to the present case. The crucial fact in the present case is that there was a partition decree as between the plaintiff and defendant No. 4, and by virtue of that partition decree the plaintiff was given two-thirds share of the cinema building and defendant No. 4 was given one-third share of it. The principle of the

Privy Council case cannot, therefore, be applied for the determination of the question at issue in the present cases. As we have already pointed out, the present cases are governed by the principle underlying section 37 and section 109 of the Transfer of Property Act. It must, therefore be held that the suits brought by the petitioner for his share of rent in the cinema building are maintainable.

5. In view of the findings of fact already arrived at by the lower Court the petitioner would be entitled to a decree for the rent claimed in all the suits as against defendants 1 to 3. But it was contended on behalf of the opposite parties that the finding of the lower Court with regard to the liability of defendants 2 and 3 also for the payment of the rent is not correct in law. The view taken by the lower Court is that though the lease itself shows that defendant No. 1 was the lessee, the conduct of the parties indicates that defendant No. 1 had taken the lease on behalf of the joint

family members, namely, Defendant 2 and 3. The objection taken by the opposite parties is that there was a registered takshimnama between defendant No. 1 and defendants 2 and 3 dated the 27th of November, 1943, (Exhibit B), and the lease in the present cases is dated the 26th of April, 1955, long after the deed of partition had been executed. It was submitted on behalf of the opposite parties that defendant No. 1 was separate from defendants 2 and 3 that defendant No. 1 entered into the lease only for himself and not as agent of defendants 2 and 3. On behalf of the petitioner, however, learned Counsel submitted that there were two sale deeds (Exhibits 4 and 4/a) executed in the year 1957 which would show that the parties were still joint and that the takshimnama dated the 27th of November, 1947 was a sham transaction and there was no separation of the joint family. It is necessary, therefore, that these cases should go back to the lower Court for determining this particular question of liability of defendants 2 and 3 and then grant a decree to the petitioner in all the suits in accordance with law. It will be open to the lower Court to decide the issue whether defendants 2 and 3 were members of a joint family along with defendant No. 1 on the date of execution of the lease, and whether defendant No. 1 had taken the lease for the benefit of the joint family. But it will not be open to any of the parties to agitate any other issue before the lower Court when these cases go back on remand to it.

6. We therefore, allow these applications, set aside the decree of the Small Cause Court Judge, dated the 22nd of August, 1958, and order that these cases should go back to the lower Court for disposal in accordance with the directions given in our judgment and in accordance with law. Costs will abide the result of the suits after remand.

Petitions allowed.

Cases Referred.

¹ AIR 1942 Pat120 at p. 125

² ILR 43 Cal 504 at p. 509: (AIR 1916 Cal 645 at p. 646)

³ ILR 60 Bom 34

⁴ AIR 1923 Mad 577

⁵ 61 Ind App 35