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Court : Mumbai

Decided On : Jan-29-1918

Reported in : (1918)20BOMLR1064

Judge : Walter Phillimore, Bart., ;Buckmaster and ;Lawrence Jenkins, JJ.

Appellant : Hardit Singh

Respondent : Gurmukh Singh

Disposition : Appeal allowed

Judgement :

Buckmaster, J.

1. The question in this appeal is whether the appellants have an interest jointly with the respondents in a village known as Bhagsar.

2. In the proceedings, out of which the appeal has arisen, the appellants were the plaintiffs and the respondents were the defendants, and in that suit the two material issues were, first, whether the property in question was part of a joint family estate, and, secondly, if it were, whether the plaintiffs, who were members of the family, had lost their right by abandonment, acquiescence, or adverse possession. The finding of the two Courts that the property was originally joint is not challenged, and the only question is that raised by the second issue. Upon this

the Subordinate Judge of Ferozepore found in favour of the appellants, and his judgment was reversed by the Chief Court of the Punjab. In considering the soundness of this latter judgment it is important to bear in mind certain facts with regard to the possession of joint property, which distinguish it from property separately held. In the former case the phrase 'exclusive possession' has an equivocal meaning ; in the latter it has not. If by exclusive possession of joint estate is meant that one member of the joint family alone occupies it, that by itself affords no evidence of exclusion of other interested members of the family. Uninterrupted sole possession of such property, without more, must be referred to the lawful title possessed by the joint holder to use the joint estate, and cannot be regarded as an assertion of a right to hold it as separate, so as to assert an adverse claim against other interested members (Maharaja Sir Luchmeswar Singh Bahadur v. Sheik Manowar Hossein I.L.R.(1891) IndAp 48 and Corea v. Appuhamy [1912] A.C. 230. If possession may be either lawful or unlawful, in the absence of evidence, it must be assumed to be the former. The fact, therefore, that this village of Bhagsar has been occupied for many years by the defendants and their predecessors is insufficient to prove exclusion of the plaintiffs without further evidence. This evidence the respondents sought to find in certain proceedings that took place in 1890, and as the Chief Court has recorded their opinion that the respondents' view of these matters is correct, and this Board has not had the advantage of hearing counsel for the respondents, it becomes necessary to submit this evidence to close scrutiny.

3. The facts seem to be these : A disposition of part of the property appears to have been made by Wasewa Singh and Hazara Singh, the fathers of the defendants, in favour of two people named Phala and Mala, who were respectively the brothers-in-law of Wasawa and Hazara. Mala appears to have taken proceedings in 1890 in assertion of his right for partition of this land. The records of the proceedings appear to have been lost, apart from an order, dated the 20th February, 1891, and it is only from the material thus furnished that it is possible to ascertain what the proceedings were. This order states that on the 10th November, 1890, an order of partition was proposed and partition had been all but prepared, when the plaintiff Mala objected on the ground that it was prejudicial to him, and on an enquiry being directed he asserted that he was entitled to one-third

of certain khatas, Nos. 39 to 41, the property of the sons of Wasawa and Hazara, referred to in the order as Basawa and Hazara. This the sons of Wasawa and Hazara disputed, and asserted that Mala should get a share in proportion to rupees 5 : 14 : 3 being his share, shown in the jamabandi papers. What this share was meant to be it is impossible to know. It may be that it represents the share to which Mala might be entitled upon the footing that the property was jointly held with the appellants' predecessors, and that the sons of Wasawa and Hazara were asserting that the estate was jointly held by them with others in order to defeat Mala's claim. Both Mala and the occupancy tenants disputed the entries in the revenue papers, and those entries clearly showed that the estate was then held jointly by Wasawa and Hazara and the predecessors of the plaintiffs. The Court consequently directed that it was expedient to postpone the partition until the objectors had obtained relief against the entries in the revenue papers in a civil Court. Now these entries were adverse to the objectors, because they showed that the estate was jointly held with the plaintiffs' predecessors, and unless their claim was removed Mala's share would be to that extent reduced. Three months' time was allowed in order to have these entries rectified and that was in substance the whole effect of the order. No suit was brought in pursuance of this permission, and the entries were continued on the same footing in the revenue papers, down to and including those for 1905 and 1906, and clearly showed the interest of the plaintiffs in the joint estate.

4. These facts led the Chief Court to the conclusion that the defendants set up in 1890 adverse possession, and that that possession had continued for more than twelve years before the institution of these proceedings. If their Lordships were so able to interpret the proceedings referred to, they would not be prepared to differ from the judgment of the Chief Court, but in truth they can only find that at that time the revenue records were the subject of challenge, though apparently not by the present respondents, and that the parties interested in their alteration took no steps whatever to secure rectification, with the result that the appellants have remained, as shown by these records, entitled to their joint share in the property.

5. The absence of all the preliminary proceedings leading up to the order, to which reference has been made, has caused much of the difficulty in this case. If these

could be examined much that is now obscure might be made plain, but it is only possible to reconstruct them- from the order now in existence.

6. Their Lordships are unable to think that the information thus obtained is sufficient to justify them in holding that an estate, which must be accepted as having originally been joint, which is recorded as joint throughout the whole of the revenue records, is an estate from which the defendants were adversely excluded as the Chief Court think. Apart from the effect of these proceedings, the Chief Court, in agreement with the Court below, do not appear to regard the evidence of actual user as sufficient to establish the contention of abandonment or exclusion, and this conclusion is in agreement with their Lordships' view.

7. For this reason they will humbly advise His Majesty that the appeal be allowed with costs and the judgment of the Subordinate Judge restored.

8. Their Lordships' attention has been directed to the fact that the appellants only claimed a two-thirds share of the estate, but for some unexplained reason three-fourths has been awarded to them by the decree of the Subordinate Judge. This must be due to some error in drawing up the order, for it is inconsistent both with the claim and the evidence. In these circumstances the decree of the Subordinate Judge must be altered by substituting therein the words 'two-thirds share' in the place of the words 'three-fourths share,' and so altered the decree should be restored.