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Prem Naraln Vs. Hirday Narain

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Court : Allahabad

Decided On : Jul-29-1971

Reported in : AIR1972All47

Judge : R.S. Pathak and ;H.N. Seth, JJ.

Acts : Limitation Act, 1908 - Article 144

Appeal No. : Second Appeal No. 3873 of 1963

Appellant : Prem Narain

Respondent : Hirday Narain

Advocate for Def. : Gopal Behari and ;A.R. Man Singh, Advs.

Advocate for Pet/Ap. : G.D. Srivastava, Adv.

Disposition : Appeal dismissed

Judgement :

Pathak, J.

1. This is a defendant's appeal arising out of a suit for partition.

2. The appellant's father was the owner of a house. He mortgaged one-sixth interest in it in favour of the respondent in the year 1910. The mortgagor being

unable to pay the mortgage money the respondent filed a suit in 1916 for recovery of the amount. The suit was decreed. In execution of the decree a one-sixth interest in the house was put to auction, and was purchased by the respondent. Subsequently, he obtained symbolic possession of the interest purchased by him. Alleging that thereby he had become a co-sharer in the house with the appellant's father, he filed a suit for partition and separate possession in respect of a one-sixth share.

3. The suit was contested on the ground, inter alia, that the house was ancestral property, that the appellant was in exclusive possession over the house since the death of his father in 1921, that despite various acts relating to the property by the appellant hostile to the interest of the respondent the latter never asserted his right of joint ownership and the appellant was owner of the house by adverse possession and the suit was barred by limitation.

4. The trial court decreed the suit and the lower appellate court has affirmed the decree. According to the concurrent findings of the courts below, the house was not ancestral property but belonged entirely to the mortgagor, that the respondent was a co-sharer in the house by virtue of his purchasing a one-sixth share therein and by his symbolic possession over the same he would be presumed in joint possession of the house, that the different circumstances upon which the appellant relied did not establish any ouster of the respondent from the house and the suit was not barred by time.

5. Then this second appeal was filed.

6. The appeal came on for hearing before our brother Shukla, and in the opinion that an important question relating to the law of limitation had been raised he referred the case to a larger Bench. And so the appeal is now before us.

7. The entire contention on behalf of the appellant is that the suit is barred by time because it was not brought within 12 years of the respondent obtaining symbolic possession. It is urged that when the respondent became the owner of a one-sixth share in the house he was bound to bring the suit for partition and separate possession, and he was bound to do so within 12 years of obtaining symbolic

possession. It is said that the appellant was in adverse possession from the outset and at best the symbolic possession obtained by the respondent merely interrupted the period of adverse possession enabling the respondent to compute the period of 12 years afresh from that date.

8. In our opinion, the contention of the appellant is without substance.

9. The appellant's father was the sole owner of the house. It was not coparcenary property. When a one-sixth share in the house was acquired by the respondent, the appellant's father was not divested of the property altogether. He remained owner of a five-sixth portion of it He did not become a trespasser. On the contrary, when the respondent acquired the one-sixth share, he and the respondent became co-sharers. The appellant's father was in actual possession throughout. On the respondent obtaining symbolic possession -- which is all the possession he could obtain in the circumstances under Order 21, Rule 96 of the Code of Civil Procedure -- the appellant's father was no longer in exclusive possession. He was now in possession not only in his own right but also on behalf of his co-sharer. The appellant's father and the respondent were now co-sharers in possession.

The respondent was not bound to seek partition and separate possession. He could remain content with being a co-sharer. No question arose of his being compelled to file a suit for partition and separate possession. That occasion could arise if for some reason he desired separate possession of a specific part of the property representing his share or it became necessary to defend his title on the appellant's father asserting an adverse or hostile interest in the property or by any attempt to oust him from possession. It was not a case where the house was ancestral property, and the auction-purchaser not being a member of the family had no right to joint possession therein but only a right of partition and separate possession. Had the house been coparcenary property, the position would have been different. In this State, the purchaser of the undivided interest of a coparcener in specific property at an execution sale does not acquire a right to joint possession with the other coparceners. He acquires merely the right to compel a partition which the coparcener whose interest he has purchased might have compelled, had he been so minded, before the sale of his interest took place.

(Mulla, Hindu Law, 13th Ed. p. 292, para 261). On the contrary, we are concerned with a case of separate property belonging entirely to the appellant's father in which by acquiring a one-sixth share the respondent became entitled to joint possession, and after obtaining symbolic possession of his share must be considered as a co-sharer in possession of the house.

A distinction must also be drawn from those cases where the vendor transfers his entire interest to the purchaser, be it by private treaty or by auction sale in execution. In that event, the title to the entire property passes to the purchaser, and if the vendor continues in possession he does so as a trespasser in adverse possession against the purchaser. The purchaser may obtain symbolic possession which interrupts the period of such adverse possession, and as the period of adverse possession commences to run again from the date of interruption a suit for possession by the purchaser must be brought within 12 years from the date of symbolic possession. In the present case as we have pointed out, the facts are entirely different. The respondent became a co-sharer with the appellant's father, and after he obtained symbolic possession they became co-sharers in possession. There was no question whatever of the appellant's father being in adverse possession against the respondent.

10. We may now turn to the cases cited before us.

11. Shri C. D. Srivastava, for the appellant, relies upon Manikayala Rao v. Narasimhaswami : [1966]1SCR628 . In that case, a decree was obtained in a money suit against Narasimhaswami and his four sons who constituted a Mitakshara Hindu Joint Family. In execution of the decree, a 4/5th share in the joint family properties representing the shares of the four sons were put to auction on December 21, 1936 and purchased by Sivayya. The sale was confirmed. Sivayya sold the properties to Prakasalingam. On November 6, 1939, Prakasalingam obtained an order under Rules 35 (2) and 96 of Order 21 of the Code of Civil Procedure for delivery and joint possession of the properties along with the members of the joint family in actual possession. Possession was delivered to him by beat of drum. Subsequently, Prakasalingam re-transferred the property to Sivayya. On October 16, 1951. Sivayya filed a suit against the

members of the joint family for partition and separate possession of his share of the joint family properties. The trial court decreed the suit but on appeal the High Court held that the suit was barred by limitation under Article 144 of Schedule I to the Limitation Act.

The Supreme Court took the view that Article 144 did not apply. It observed :

'This article obviously contemplates a suit for possession of property where the defendant might be in adverse possession of it as against the plaintiff. Now, it is well settled that the purchaser of a coparcener's undivided interest in joint family property is not entitled to possession of what he has purchased. His only right is to sue for partition of the property and ask for allotment to him of that which on partition might be found to fall to the share of the coparcener whose share he had purchased. His right to possession 'would date from the period when a specific allotment was made in his favour': Sidheshwar Mukherjee v. Bhubneshwar Prasad Narain Singh : [1954]1SCR177 . It would, therefore, appear that Sivayya was not entitled to possession till a partition had been made. That being so, it is arguable that the defendants in the suit could never have been in adverse possession of the properties as against him as possession could be adverse against a person only when he was entitled to possession. Support for this view may be found in some of the observations in the Madras Full Bench case of Vyapuri v. Sonamma Bai Ammani, ILR 39 Mad 811 : (AIR 1916 Mad 990 (2)) (FB).'

Then, proceeding on the assumption that Article 144 was applicable, the Supreme Court was still of the view that the suit was not barred. It observed that by the delivery of symbolic possession under the order of November 6, 1939, the adverse possession of the defendant was interrupted and as the suit had been brought within 12 years of that date it was not barred under Article 144. The facts make the case entirely distinguishable. It was a case where the purchaser had acquired a coparcener's interest in joint family property, where he was not entitled to joint possession but merely to sue for partition of the property and for separate possession of his share; there was no question of the purchaser becoming a co-sharer in possession with those already in possession. He had a right to possession only after a partition had been effected.

12. We have also been referred to Jang Bahadur Singh v. Hanwant Singh AIR 1921 All 9 (FB) where a Full Bench of this Court held that where an auction purchaser merely obtained formal delivery of possession that did not save limitation. There the suit was for possession of a house. The entire house had been sold by auction in execution of a decree and delivery of possession was obtained bv the purchaser. The Court found that the possession so obtained was merely formal possession and not actual possession. The possession of which the property was susceptible in the circumstances was not obtained by the purchaser. The judgment-debtor was in actual possession and the purchaser should have had him dispossessed and himself obtained actual possession instead. What he did in fact was to obtain symbolic possession only, and that, the Full Bench held, was of no avail so far as the computation of limitation was concerned. Now, that was a case where the purchaser acquired title to the entire property leaving the judgment-debtor with none, and the possession of the judgment-debtor thereafter was the possession of a trespasser. The facts are very different from those before us.

13. We may then refer to Sita Ram v. Ram Sunder : AIR1928 All412 . The purchaser had acquired the entire share of the judgment debtor in the property and subsequently obtained formal possession over that share, in the manner provided by Order 21, Rule 96 of the Code, The judgment-debtor, notwithstanding this, continued in actual physical possession of the property along with the other co-owners. The purchaser brought a suit for partition against the other co-owners and obtained a decree for the separation of his share. Thereafter, he applied for the actual possession of his separated share. An objection being taken to the application he brought a suit claiming actual physical possession of his share. A Division Bench of the High Court held that the suit was barred by limitation. It will be noted that the purchaser acquired the entire share of the judgment-debtor in the property. As it was an undivided share in the joint property, the only possession open to him was formal possession. He obtained formal possession and from that date he became entitled to seek actual possession of his share by demanding a partition. But, as the learned Judges observed:

'..... if the judgment-debtor, in spite of the formal delivery of possession to the plaintiff retained actual possession as has been found, it is difficult to see how his possession could be otherwise than adverse. The execution sale had put an end to his title -- he ceased to be a co-owner of the property, and his occupation after that would be that of a trespasser upon the joint possession of all the co-owners. And if they failed to oust him before the expiry of 12 years their title as joint owners would become extinguished with regard to any portion of the property so held adversely. And it would follow that after the lapse of 12 years in such a case the joint owners could not, in a suit for partition, include any portion of the property to which their joint title had been lost. Joint owners by delaying to sue together for ejectment of a trespasser in wrongful possession of a portion of the joint property, or by delaying to have partition in order to assert their separate rights to actual possession in accordance with their shares, cannot stop the running of time in favour of the trespasser.'

If the judgment-debtor had not become a trespasser by reason of the loss of his entire share in the property, the position would have been entirely different. If he had retained some part of his share in the property the purchaser would have been a co-owner with him, and as the learned Judges have significantly observed in another part of the judgment:

'Any co-owner of joint property can call for partition at any time as long as co-ownership exists.'

14. Reliance has also been placed upon Niranjan Lal v. Jhamman Lal : AIR1931 All234 . Dalai, J., who decided that case, merely applied the principles laid down by this Court in Sita Ram : AIR1928 All412 (Supra).

15. In our opinion, upon the facts and circumstances of the present case, the contention of the appellant that the respondent's suit is barred by limitation has no force and must be rejected.

16. The next contention on behalf of the appellant is that the finding of the courts below that the respondent was in possession of the house is arbitrary and is inconsistent with the pleadings contained in the plaint. It is pointed out that the

respondent merely pleaded symbolical possession and not actual possession, and it is urged that the courts below were not justified in considering evidence contrary to the pleadings of the respondent, and we are referred to Siddik Mahomed Shah v. Mt. Saran . Upon the view which has appealed to us. We consider that the obtaining of symbolical possession by the respondent was sufficient in the circumstances of the case. Consequently, this contention can be of no assistance to the appellant.

17. No other contention has been raised before us.

18. The appeal fails and is dismissed with costs.

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