

Bhabani Bewa and ors. Vs. Akshoy Kumar Das and anr.

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Court : Orissa

Decided On : Mar-15-1955

Reported in : AIR1955Ori143; 21(1955)CLT371

Judge : Narasimham, J.

Acts : [Partition Act, 1893](#) - Sections 4

Appeal No. : Second Appeal No. 53 of 1952

Appellant : Bhabani Bewa and ors.

Respondent : Akshoy Kumar Das and anr.

Advocate for Def. : G. Dhal, Adv.

Advocate for Pet/Ap. : M.S. Rao, Adv.

Disposition : Appeal allowed

Judgement :

Narasimham, J.

1. This is an appeal against the concurrent decisions of the two lower Courts decreeing the respondent-plaintiffs' suit for partition.

2. The properties to be partitioned are two plots bearing Nos. 1247 (having an area of six cents) and 1390/1827 (having an area of two cents) in. Mouza Baro, P.S. Tihiri in Balasore district. In the Current Settlement, plot No. 1247 was recorded as 'Gharbari' (homestead) and plot No. 1390/1827 was recorded as 'bari'. Admittedly, the aforesaid two plots were the joint property of one Mayadhar, and Upendra who had -/8/- share each. Defendants 1, 2 and 3 are the successors-in-interest of Mayadhar. Upendra sold his -/8/- interest in the aforesaid plots, to one Dibakar Mahalik on 22-1-1931 (Ex. 3-a) who, in turn, sold it to the plaintiffs on 6-2-1937 (Ex. 1).

The plaintiffs' claim for partition is based on the transfer of title in their favour by the aforesaid two sales.

3. The main contention raised by the defendants was that as they were co-sharers of Upendra and as the disputed plots formed part of their homestead, Section 4 of the Partition Act should be applied. and they should be given the option of purchasing, the plaintiffs' share at the current market value. The two lower Courts, however, rejected this contention of the defendants holding (though not clearly) that the disputed plots did not form part of the joint, dwelling house of the defendants and Upendra.

4. From the map (Ex. 2-a) prepared by a Commissioner who made local inspectipn, it would be clear that plot No. 1247 lies adjacent north of plot Nos. 1389 and 1390 in which is located the residential house of the defendants. Between the two plots, however, there is a village rasta; but there is a doorway leading from the defendants' house to the rasta and almost opposite to it there is another doorway leading from the rasta into plot No. 1247. In a portion of plot No. 1247, there was a thatched hut in a dilapidated condition. Plot No. 1390/1827 lies adjacent south of plot Nos. 1389 and 1390.

5. The principles to be borne in mind in deciding whether the disputed plots form part of the dwelling house of the defendants are well-settled. In -- 'Khirode Chunder Ghosal v. Saroda Prosad Mitra', 12 Cal LJ 525 (A) it was pointed out that the expression 'house' in Section 4 of the Partition Act

'embraces not merely the structure or building but includes also adjacent buildings, curtilage, garden court-yard, orchard and all that is necessary for the convenient occupation of the house but not that which is only for the personal use and convenience of the occupier.'

It was further pointed out that the question whether a particular plot of adjacent land is or is not necessary to the enjoyment of a house is to be determined on evidence. The same principle was reiterated in a later Patna decision reported in -- 'Babulal Tiwari v. Hulla Mallah', AIR 1938 Pat 13(B). The mere fact that there is an intervening lane between the actual residential house and a plot which is claimed as appurtenant to it will not necessarily show that the latter plot does not form part of the dwelling house if it could be reasonably held, on the evidence, that the latter plot is used for the accommodation of servants or guests or for other purposes incidental to the use of the house by residence.

Thus, in -- 'Gour Chand Basak v. Khirode Nath', AIR 1948 Cal 73 (C) though a municipal lane intervened between the disputed house and the admitted main house of the family, it was still held that the disputed house formed part of the dwelling house because though the family members did not actually sleep there it was used by the servants and guests of the family.

In -- 'Boto Krishna v. Akhoy Kumar', AIR 1950 Cal 111 (D) it was further pointed out that the integrity of the dwelling house would not be destroyed merely because the co-sharers were living in separate huts inside the undivided plot,

6. The actual condition of the disputed dwelling house on the date of the commencement of the litigation is not very material. Thus, in -- 'Nil Kamal v. Kamakshya Charan', AIR 1928 Cal 539 (E), it was held that the mere fact that the huts had been blown out did not make the dwelling house any the less a dwelling house so long as the members have not abandoned it or, at any rate given up the idea of using it as such.

This decision was followed in a later Allahabad decision in -- 'Bhagirath v. Afaq Rasul', AIR 1952 All 207 (F).

7. The two lower Courts have not borne in mind the aforesaid principles in approaching the case, They seem to have been very much influenced by the fact that plot No. 1247 was separated from the admitted dwelling house of the defendants by a rasta. They have also given undue importance to the dilapidated condition of the hut in plot No. 1247 as found by the Commissioner (P. W. 2). Hence, I am unable to accept their concurrent findings that the disputed plots were not required for the ordinary and reasonable enjoyment of the dwelling house of the defendants.

8. Taking plot No. 1347 in the first instance, the admitted position is that it is to the north of the residential house of the defendants, though separated by a village rasta, but there is a gate leading to the rasta from their dwelling house and another gate almost opposite to it leading from the rasta to that plot. Doubtless, the hut in the plot was found to be in a somewhat dilapidated condition by the Commissioner (P. W. 2) when he made local inspection on 12-2-1949. But there is no reason to disbelieve the defendant's statement that the hut was then under repair.

There is absolutely 'no evidence on the side of the plaintiffs to show that the defendants' family abandoned all idea of using the hut in that plot as part of their dwelling house. Even in the settlement khatian, it was noted as 'Gharbari'. It is true that defendant 3 admitted that one of the rooms in that hut was in the possession of Upendra and after his death by his sons. But separate possession of one of the rooms by one of the co-sharers would not affect the integrity of the house.

Plaintiff 2 did not state that the defendants and Upendra had abandoned all idea of using the hut in plot No. 1247 as part of their dwelling house. In this state of the evidence the defendant's version which is corroborated by the settlement entry should have been accepted and it should be held that plot No. 1247 was a part of the dwelling house of the defendants and Upendra. It is true as stated by P. W. 1, that this plot originally belonged to the ancestors of the plaintiffs who, however, sold it to the ancestors of the defendants long ago. But the previous history of the ownership of the plot is quite immaterial and the evidence on record clearly shows that it was used as part of the dwelling house of the defendants and that some of

the members of the family used to sleep there.

9. As regards plot No. 1390/1827, it should be noted that it is a very small strip of land lying adjacent to the admitted dwelling house of the defendants. The evidence of D. W. 1 is to the effect that it is enclosed by a fence and that there is a cow-shed there of his family and also kutchra Samadhis of some of his ancestors. Plaintiff 2 also admitted the existence of the cow-shed and the Samadhis though he tried to show that these were well within the admitted dwelling house of the defendants in plot Nos. 1389 and 1390 and that the disputed plot No. 1390/1827 was further, south of them.

The lower appellate Court preferred the evidence of the plaintiffs on this point chiefly because when the Commissioner visited the locality he was not asked to report whether there was a fence enclosing this plot. Apparently, the lower appellate Court, overlooked the fact that the Commissioner's local inspection was made prior to the appearance of the defendants in the suit. Hence, there can be no question of the Commissioner being asked to report about the existence of a fence around the plot and no adverse inference can be drawn against the defendant on account of their omission to ask the Commissioner to report about the existence of such a fence.

Considering the small area of this plot and its position adjacent south of the admitted dwelling house of the defendants and the admission by plaintiff 2 himself that the cow-shed and the Samadhis of some of the ancestors of the defendants lie to the south of their dwelling house there was no justification for the lower Courts to disbelieve the evidence of D. W. 1. I would therefore hold that this plot was also necessary for the reasonable and convenient enjoyment of the dwelling house of the defendants

10. I would, therefore, allow the appeal, set aside the judgment and decree of the two lower Courts and declare that the defendants are entitled to the benefits of Section 4, Partition Act. The trial Court may now take steps to ascertain the value of Upendra's share of the disputed plots and give the defendants a reasonable opportunity to purchase that share from the plaintiffs. The appellants should get costs throughout.

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