

Biswanath Sahu Vs. Dasa Sahu

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Court : Orissa

Decided On : Sep-01-1966

Reported in : AIR1967Ori81

Judge : G.K. Misra, J.

Acts : Limitation Act, 1908 - Schedule - Article 141; [Limitation Act, 1963](#) - Schedule - Article 65; Hindu Law; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 100 and 101; Court Fee Act, 1870 - Sections 7

Appeal No. : Second Appeal No. 295 of 1964

Appellant : Biswanath Sahu

Respondent : Dasa Sahu

Advocate for Def. : B.K. Pal, ;Bijoy Pal and ;A. Mohanty, Advs.

Advocate for Pet/Ap. : R.N. Misra and ;R.C. Patnaik, Advs.

Disposition : Appeal partly allowed

Judgement :

G.K. Misra, J.

1. Balaji, Dinabandhu and Kripasindhu were brothers. Balaji died leaving behind three sons, Kelai, Dasa and Binoda who died in 1928, 1917 and 1936 respectively

Rukuna, Kelai's widow, died in 1942-43. After the death of Dasa, his widow Ratani remarried Binoda. She died in 1957. Dinabandhu died issueless. Lokanath and Biswanath (plaintiff) are the sons of Kripasindhu. The disputed lands are plot 701 with an area 0.02 acre in Khata No. 478 and plot 702 with an area 0.01 acre in Khata No. 270. It is the admitted case that the disputed lands belonged to Kelai and Binoda who were separate, and after their death, those were recorded in the name of Rukuna and Ratani (described as widow of Binoda). On 15-10-1949 Ratani executed a registered sale deed (Ex. A) for a consideration of Rs. 400 in favour of the defendant. Plaintiff's suit was for declaration of title, confirmation of possession and for permanent injunction on the allegation that he was the adopted son of Kelai and was in possession all through.

In the written statement, plaintiffs adoption and his possession of the disputed property are denied. Defence case is that after the death of Rukuna in 1942-43, Ratani alone remained in possession of the disputed lands and transferred them to the defendant in 1949 whereafter the defendant is in exclusive possession in his own right, title and interest. The suit was filed on 15-2-1961 and is barred by limitation.

2. The Courts below concurrently found that the plaintiff was not the adopted son of Kelai, that after the death of Rukuna, Ratani alone was in exclusive possession of the disputed lands till the transfer in favour of the defendant in 1949 whereafter the defendant is in exclusive possession in his own right, title and interest, and that before the death of Rukuna, she and Ratani were in joint possession as tenants-in-common. On the aforesaid findings plaintiff's suit was dismissed. The second appeal has been filed by the plaintiff against the confirming decree.

3. The aforesaid findings of the Courts below are pure findings of fact. Nothing substantial was urged by Mr. Misra to establish that those were contrary to law.

4. Mr. Misra, however, urged a new contention which arises out of the admitted case and the findings and accordingly he was permitted to raise it for the first time in the second appeal. It is to the effect that the plaintiff is entitled to a declaration of joint title and recovery of joint possession with the defendant on the accepted finding that the disputed lands belonged to Kelai and Binoda after whose death

their wives Rukuna and Ratani were in possession as tenants-in-common.

5. The admitted position is that Rukuna had an undivided eight annas, interest in the disputed lands and continued in joint possession of the same till her death in 1942-43. On her death, succession opened and the undivided half of the disputed property devolved upon Lokanath and plaintiff as reversioners of Kalai. On the date of death of Rukuna, Lokanath and plaintiff became joint owners of the disputed property with Ratani. The finding is that they did not enter into actual possession, though they were entitled to joint possession. From 1942 to 1949, when the transfer was effected in favour of the defendant, Ratani was in possession of the disputed lands as a tenant-in-common and asserted no hostile animus so as to prescribe against the interests of the co-sharers. Even if it be conceded that the defendant was in adverse possession from 16-10-1949, he did not prescribe title by adverse possession as the suit was filed on 16-2-1961 within 12 years from the date of transfer Plaintiff is, therefore, entitled to a declaration of joint title and recovery of joint possession.

6. Mr. Pal contends that under Article 141 of the Limitation Act, a suit by a Hindu reversioner entitled to possession of immovable property on the death of Hindu female must be filed within 12 years from the date of death of the female. As the suit was not filed within 12 years of Rukuna's death, it is barred by limitation.

To a suit of this nature Article 141 has no application. If Ratani would not have been a tenant-in-common with Rukuna in respect of the disputed lands but were an utter stranger without having a vestige of interest. Mr. Pal's contention would have been unassailable. But the position is completely different here. Immediately before the death of Rukuna, she and Ratani were co-sharers or co-owners Both were in possession of the disputed property without partition by metes and bounds. None of them exercised adverse possession against the other. On the death of Rukuna, succession to the reversionery right opened. Lokanath and the plaintiff inherited the undivided half interest of Kelai in the disputed property. In eye of law they became co-owners or cosharers of Ratani. They were not in physical possession of the disputed lands though they were entitled to joint possession. In the eye of law, however, Ratani would continue to be in possession of the disputed

property on behalf of Lokanath and the plaintiff. She was a co-owner in possession.

Unless she exercised hostile animus, her possession of the undivided half constituted possession of Lokanath and plaintiff. Defendant should have pleaded and proved ouster of the reversioners either on the date of death of Rukuna or at some particular point of time in between her death and the date of transfer in 1949. Upto 16-10-1949 Ratani's possession of the undivided half of the disputed lands was on behalf of Lokanath and plaintiff. If in the eye of law they continued in possession with a valid title as tenants-in-common till 16-10-1949, plaintiffs suit for recovery of joint possession would be maintainable within 12 years of that date and is not barred by limitation. In this case, Article 141 cannot apply in isolation but must be associated with the further consideration that the predecessor-in-interest of the alleged trespasser against whom the suit is filed, was a cosharer or co-owner of the suit property. A suit for recovery of possession need not be filed until hostile animus was exercised for prescribing a right against the other cosharers. On this view, the relief for declaration of joint title and joint possession cannot be resisted.

In the undivided half Lokanath and the plaintiff have equal shares. Lokanath is not party to the suit. Neither the suit was brought by the plaintiff on behalf of Lokanath and himself. Plaintiff, is, therefore, entitled to declaration of Joint title in respect of the undivided one fourth of the entire disputed lands and recovery of joint possession thereof. In the suit, the relief claimed was for confirmation of possession, though ad valorem court-fee was paid. It is well known that if necessary court-fee has been paid, relief for recovery of possession can be granted even though the prayer was for confirmation of possession.

7. Mr. Pal placed reliance on AIR 1940 Mad 102 in support of the case that the period of 12 years limitation under Article 141 has application to the case of a cosharer where adverse possession has not started. On the contrary, there are some observations in AIR 1942 Mad 106 supporting my view. His Lordship observed-

There must be distinct evidence of ouster after that date, because it cannot be said that at the moment of vesting there was ouster. In order to constitute ouster there must be assertion of hostile title after vesting and notice thereof to the other co-sharers direct or indirect inferable from acts and circumstances which would warrant such an inference.

This decision refers to AIR 1940 Mad 102 and casts certain doubts on its correctness. Both the decisions, however, are not strictly applicable to the facts of the present case.

8. The judgments of the Courts below are set aside. Plaintiff's joint title to one-fourth of the entire disputed property is declared. He is entitled to recovery of joint possession of the same. In the result, the second appeal is allowed in part. As the defendant has substantially succeeded and the plaintiff partially succeeded on a contention argued for the first time in the second appeal plaintiff is to pay costs to the defendant throughout.

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