

Aswini Kumar Roy and anr. Vs. Kshitish Chandra Sen Gupta and ors.

Aswini Kumar Roy and anr. Vs. Kshitish Chandra Sen Gupta and ors.

SooperKanoon Citation : sooperkanoon.com/857166

Court : Kolkata

Decided On : Nov-20-1970

Reported in : AIR1971Cal252

Judge : S.N. Bagchi, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Section 100 - Order 1, Rule 10; ;
[Constitution of India](#) - Article 141

Appeal No. : A.F.A.D. No. 801 of 1964

Appellant : Aswini Kumar Roy and anr.

Respondent : Kshitish Chandra Sen Gupta and ors.

Advocate for Def. : R.K. Bhattacharya and ;Madan Mohan Ghose, Advs.

Advocate for Pet/Ap. : J.N. Guha, ;Kiran Chandra Mitra and ;Nirmal Chakravorti, Advs.

Disposition : Appeal allowed

Judgement :

S.N. Bagchi, J.

1. This appeal at the instance of the defendants 1 and 2 is against the decree passed in Title Suit No. 1145 of 1960 of the first court of the Munsif at Sealdah.

2. Mr. Guha, the learned counsel for the appellants-defendants in this second appeal which arises out of the Title Appeal No. 151 of 1963 has very rightly taken only one ground and that is a ground of law. Mr. Guha submitted that if the learned appellate court found that Jan Md. left three daughters, the entire suit for declaration of title and recovery of possession against his clients must fail. There is a cross-objection at the instance of the plaintiffs wherein it is stated that the finding of the appellate court that Jan Md. left three daughters was not correct.

3. Let me now come into the details of the suit. There are two plaintiffs, Kshitish Chandra Sen Gupta and Sm. Kusum Kumari Nath and there are several defendants of which defendants 1 and 2 Aswini and Ram Nath are the appellants. The plaintiffs started their case in respect of land measuring 16 decimal covered by C. S. Plot No. 936/1728 of Mouza Digla, P. S. Dum Dum held by one Fate Mohammad as tenant under the Tewaris. Fate Mohammad had his house and homestead on the suit land. He died leaving three sons, Mohammad Jan, Jabur Mohammad and Yusuf and daughters Nurjahan, and Karimunnessa as his heirs to succeed. They possessed the suit land, Thereafter Mohammad Jan died. His share of property was inherited by his sons, daughters and widow. The plaintiff No. 2 purchased 6 annas share in such properties from Jubur Mohammad and Karimunnessa on 5-12-57 by a registered kobala and obtained possession of the share so purchased of the land in suit, They began to reside in the house purchased. Plaintiff No. 1 purchased tenants share of the suit land from Sk. Yusuf and Nurjahan Bibi, Mohammad Jan's heir by a registered kobala dated 18-6-58 and obtained possession of one room standing on the suit land. The defendants 1 and 2, it is alleged threatened to dispossess the plaintiffs from those rooms. The plaintiffs came to know that defendant No. 1 managed to obtain a fraudulent and sham kobala on 2-9-57 from defendant No. 2, the ex-landlord of the suit land. The defendant No. 1 it is said has been possessing the suit land as trespasser without having any vestige of title. The superior interest of defendant No. 2 in the suit land, it is said, had vested in the State. The recent record of right showing the possession of defendant No. 2 in 12 decimal and of one Bhim Mondal in 4 decimal of land out of the suit land according to them is erroneous. The plaintiffs have filed the suit against the defendants leaving Bhim Mondal. The plaintiffs have filed the suit against the defendants as trespassers and prayed for declaration of title and

recovery of possession as against them. In the joint written statement filed by the defendants 1 and 2, they took several pleas in defence as regards maintainability of the suit for nonjoinder of necessary parties and limitation. They, however, contended that one Rashbehari got the suit land in his share on partition with his co-sharer. Rashbehari turned to be a lunatic. One Sitanath his guardian sold the suit land to defendant No. 2 Ramnath with permission of the District Judge. Defendant No. 2 possessed the same. The defendant No. 1 purchased six cottas of land out of such property from defendant No. 2 for valuable consideration and has been in possession of the same since then. The defendants deny the truth of the story of the plaintiffs possession in and dispossession from the suit land by the defendants as set out in the plaint.

4. The learned Munsif framed seven issues. The material of these issues are issues Nos. 2, 3 and 4. After discussing the evidence, the learned Munsif found that one Jabur held a valid power of attorney, Ext. 8. and under the power of attorney, the kobala was executed by Johur, the constituted attorney, in favour of the plaintiff No. 1, on behalf of the heirs of Md. Jan, the son of Fateh and the sons and daughters of Fateh and on behalf of himself. Thereafter, the learned Munsif held that by a separate kobala. Ext. 6, Karimunnessa and Jabur sold their share in suit property to plaintiff No. 2. So, according to the learned Munsif, Exts. 6 and 6-A covered the entire land in dispute acquired by the plaintiff Nos. 1 and 2 respectively. It must be made clear now that Ext. 6-A was not executed by Johur while Ext. 6 was executed by Johur and Karimunnessa. As regards possession in the suit land, the learned Munsif held that by defendants' alleged adverse possession, the title of the plaintiffs vendor in the suit land had not been extinguished. He found that Ramnath, Defendant No. 2 purchased the landlord's interest over the suit land in 1959 from Rashbehari and that the superior interest in land over the suit land in the landlord's right thus purchased vested in the State of West Bengal. The learned Munsif observes at page 10 of the judgment in the paper book as follows:--

'The case of the plaintiffs is that during riot of 1950, their vendors left the suit locality and in the meantime, refugees from East Pakistan squatted on the land forcibly. The defendant No. 2 admits such fact in evidence.'

Finally on the issues, the learned Munsif held that the plaintiffs acquired 16 annas title by purchase under Exts. 6 and 6-A from their vendors, heirs of Fate and Md. Jan. On the issue No. 5, as to the non-joinder of necessary parties and misjoinder of parties, the learned Munsif observed that the issue was not seriously pressed. He proceeded on the question of misjoinder and non-joinder of causes of action. But on the question of misjoinder of parties, there was no decision. The question of non-joinder and misjoinder of causes of action as considered by the learned Munsif rested on the fact that the plaintiff No. 2 purchased the share of the suit land earlier while plaintiff No. 1 purchased the suit land later but that they have joined in the same suit. They claimed declaration of title and recovery of possession against defendant No. 1 in the same suit. But that contention was repelled by the learned Munsif but the question of nonjoinder of necessary parties or in other words mis-joinder of parties had not been considered by the learned Munsif. The learned Munsif decreed the suit in full.

5. In appeal before the learned Additional District Judge, it was contended that the daughters of Jan Md. were Badrunessa Mehrunnessa and another and the executants of the kobala, Ext. 6-A not being Badrunessa and Mehrunnessa, their interest had not passed by the kobala. The learned Judge was unable to give effect to this contention; he observed:

'Syedennessa has been described in Ext. 8 and Ext. 6 (A) as the daughter of Jan Md. It might be that Jahur knew her by another name and he gave that name in his evidence. Jahur stated that Badrunessa was married before partition. Rafiennessa had been described as the wife of Sher Khan. It is clear that Raffennessa is no other than Badrunessa and that Sayednessa is another daughter of Jan Md. I hold that plaintiff No. 1 has by his purchase under Ext. 6 (a) acquired three-eighth share of Nurjan and Yusuf and 65/288th share of Jan Md. Plaintiffs shall get such declaration of their title in the suit land.'

As regards the relevant claim for eviction of the defendants 1 and 2 from Schedule Kha (1) land of the plaint and confirmation of possession in regard to schedule Kha (2), the learned Additional District Judge held that the plaintiffs were in possession of schedule Kha (2) as of right and that their possession in that portion

of the suit land should be confirmed. The learned Additional Judge observed in his judgment as follows.--

'I have held that the plaintiffs have not 16 annas share to the suit land. A small share in the suit land still remains with one of the daughters of Jan Md. She is not a party in this suit. The question is whether the plaintiffs, not having 16 annas share in the suit land, can eject the defendants who are trespassers.'

Relying on the decision in the case of Joy Gopal Singha v. Probadh Chandra, reported in 40 Cal WN 81 = (AIR 1935 Cal 646) and accepting the plaintiffs-respondents learned counsel's argument, the learned Additional Judge held that the plaintiffs shall only get joint possession in the suit in regard to Kha (1) schedule land in the plaint and shall not get a decree for eviction of the defendants or for removal of their ghars from schedule Kha (1) land of the plaint. The learned Additional Judge ordered as follows:--

'that the appeal be disallowed on contest by the contesting respondent and ex parte against others with costs to the contesting respondent. The judgment and decree of the learned Munsif are hereby affirmed subject to the modification stated below: Plaintiffs' title to 281/288th share of the suit plot is hereby declared. Plaintiffs' possession in Schedule Kha (2) of the plaint is hereby affirmed. Plaintiffs do get joint possession in Schedule Kha (1) of the plaint to the extent of 281/288th share. It is declared that the defendants have no right to remain and are trespassers on the Schedule Kha of the plaint land.'

6. The decree that has been passed by the learned Additional District Judge is self condemned. There is no identity of interest acquired in the share declared of the two plaintiffs in the disputed Ka and Kha (1) and Kha (2) schedule land of the plaint. The plaintiff No. 1 under the kobala Ext. 6 (a) purchased from eight co-sharers and plaintiff No. 2 under Kobala -- Ext. 6 purchased from other two co-sharers. Not that both the plaintiffs purchased from all the ten co-sharers their entire shares. So what the plaintiff had purchased are the shares of eight co-sharers and what the plaintiff No. 2 purchased is the share of two co-sharers. There is no identity of interest in all the two plaintiffs over the entire property and it cannot be said that both the plaintiffs have acquired by their different purchases

total 281/238th share in the entire suit land jointly. P. W. 1 Jahur, the constituted attorney, in his examination-in-chief gave out:

'Jan Md. died leaving a widow, Bibijan Bewa and sons Nur Md, Khursan Md. and Md. and daughters Badrunessa, Mehrunessa and another, whose name I cannot remember.'

This witness was recalled by the plaintiff and he said 'Mehrunessa is the daughter of my brother Jan Md.' The power of attorney -- Ext. 8 gives the name of eight persons. Within those eight persons Mehrunessa's name does not appear (Vide Ext. 8). In the two kobalas Exts. 6 and 6 (a), Mehrunessa's name does not appear. Then there was another daughter of Jan Md. This comes out in examination-in-chief of Johur. Who is that another daughter, whether she is alive or not, whether she left any heir or not was not elicited by recalling the witness. The persons whose names Jahur, P. W. 1, gave out as heirs of Fate and Jan and whose name he did not give out remained as what they were appearing in examination-in-chief. By recalling that witness, the plaintiff did not ask any question to explain whether Sayednessa had any other name. Now, while naming the heirs of Jan Md and particularly the daughters, this P. W. 1, Jahur said as I have already quoted 'daughter Badrunessa, Mehrunessa and another, whose name I cannot remember'. Then Ext. 6 (a) does not contain the name of Badrunessa. It contains the name of one Sayedunessa. The learned Additional Judge held that Badrunessa would be Sayedunessa. A Judge cannot be a witness. The witness himself said three daughters, Badrunessa, Mehrunessa and another. It was not explained by the witness P. W. 1 Jahur, that Badrunessa was alias Sayedunessa or that another whose name he did not know. If Judge becomes a witness, I pity the judge. There is no evidence that Sayedunessa was Badrunessa and the witness P. W. 1 knew that Badrunessa had an alias name Sayedunessa. Badrunessa did not execute the power of attorney--Ext. 8. Sayedunessa did. Sayedunessa, according to Jahur, the holder of the power of attorney, was not a daughter of Jan Md. Now if the oral evidence of Jahur is to be believed, then the power of attorney is to be disbelieved. In a conflict like this, the person who held the power of attorney and who executed the power are the best persons to explain.

7. Mr. Bhattacharrya, learned Counsel for the respondents submitted that in preference to the oral evidence, the primary evidence was the power of attorney, and if the power of attorney showed that Sayedunessa was the daughter of Jan Md., that should be accepted. But the oral evidence is in conflict with the documentary evidence and the witness who gave the evidence did not explain the conflict. Therefore, the only way left out is to hold that Sayedunessa, who did not come to the witness box, even if she might be a daughter of Md. Jan, was not Badrunessa and Badrunessa was another daughter, so also Mehrunessa and so also another, whose name the witness did not know. So, the three daughters, Badrunessa, Mehrunessa and another all of whom should be presumed to be alive unless proved to be dead did not join either Exts. 6 or 6 (a). In cross-objection Mr. Bhattacharyya took one ground to the effect that the learned Additional District Judge was not correct in holding that Mehrunessa was a daughter of Md. Jan. I cannot accept this submission. Evidence of Mr. Bhattacharyya's own client P. W. 1 shows the existence of three daughters. Badrunessa, Mehrunessa and another who is alive. If a Court bases its judgment partly on evidence partly on no evidence, partly on surmises and partly on conjectures, it is difficult for a court of higher jurisdiction sitting in appeal to decide as to which part of evidence and which part of conjecture and surmises and which part of no evidence entered into consideration of the court in arriving at a finding of fact. This situation raises a question of law which entitles the court in second appeal to decide that law upon reading entire evidence minus the conjecture and surmises. That principle is applicable in such a case. The learned Judge was not justified in finding that Badrunessa was none but Syedunessa when there was no evidence on the point. Therefore, I was driven to look to the evidence itself in the second appeal, and I hold that Badrunessa, Mehrunessa and another, whose name the P. W. 1 did not know are the daughters of Md. Jan and are alive. They did not join in either of the two kobalas. Therefore, their shares whatever it might be which is unascertainable without their presence in record did not pass either to the plaintiff No. 1 or the plaintiff No. 2 under either of the two kobalas. The cross-objection, therefore, fails.

8. Now the most important question is whether a suit for declaration of title and recovery of possession as against defendants Nos. 1 and 2 who have been held to be trespassers by both the courts below, which finding, Mr. Guha, in his

accustomed fairness did not challenge before me and accepted, is maintainable.

9. Mr. Guha first drew my attention to the observations of their Lordships of the Supreme Court in the case of Mahendra Lal Jaini v. State of Uttar Pradesh : AIR 1963 SC1019 . The observations of the Supreme Court run as follows:--

'Lastly it is urged that the lease was in favour of two persons, namely, the petitioner and Virendra Goyal, and the present petition has been filed only by the petitioner and Virendra Goyal has not been made a party to it, even as respondent. It is urged, therefore, that the present petition is not maintainable on that ground also, and reliance in this connection is placed on the analogy of suits, where all co-owners must join in a suit to recover property unless the law otherwise provides, and if some co-owners refuse to sue, the proper course to adopt as to the rest is to make them defendants in the suit. It is enough to say that this principle applicable to suits for possession can have no application to a petition under Article 32, which is not a suit for possession.'

The principle quoted in the extract above was accepted to be the sound principle of law. Mr. Bhattacharyya sought to explain that principle urging that the decision in that case was on a writ petition. It requires no learning because their Lordships have themselves explained as I have already quoted above. Their Lordships observed:--

'It is enough to say that this principle applicable to suits for possession can have no application to a petition under Article 32, which is not a suit for possession.'

Therefore, the soundness of the principle extracted from the judgment of their Lordships of the Supreme Court remained where it was and reflect on the validity of the law on this point upon which Mr. Bhattacharyya, the learned Counsel for the respondents strenuously relied quoting before (sic) a number of decisions wherein it has been consistently laid down that a co-owner or a co-sharer can sue for eviction against a trespasser without joining the other co-owners in the suit. I should say that Mr. Bhattacharyya took me through a number of decisions which I would not quote to burden this judgment. I would quote only one decision of the Mysore High Court where all the decisions relied on by Mr. Bhattacharyya had

been considered and one decision of their Lordships of the Supreme Court to arrive at my conclusion on the very important question that now comes before me for decision. The position is this; that at least three daughters of Md. Jan who are admittedly co-owners in respect of the disputed land have not been made parties to this suit. On such a frame of the suit for non-joinder of necessary parties, the fatality of the suit is writ large on the plaint itself. In the case reported in AIR 1967 Mys 143 (Shivangouda Lingangouda v. Gangawwa Basappa), his Lordship Hegde, J. as his Lordship then was, considered the question at page 144 of the report and observed as follows:--

'There is a catena of decisions which have taken the view that one of the co-owners can bring a suit for ejecting a trespasser from the property owned by him and others either jointly or as co-owners, the basis being that he has a right to hold every inch of the joint property until a division takes place. The judicial opinion on this point is uniform--

* * * * * No decision taking a contrary view has been brought to my notice. The ratio of the decision of the Madras High Court in Adhilakshmi Ammal v. T. Nallasivan Pillai, AIR 1944 Mad 530 or that of this Court in Somalinge Gowda v. Kalyanamma, S. A. No. 269 of 1969 (Mys) does not bear on that point under consideration. They dealt with cases where one co-owner sought to set aside the alienation made by other co-owner or where one co-owner sues for possession of property which is in the possession of another co-owner.'

Before his Lordship a decision of their Lordships of the Supreme Court was pressed, : [1964]6SCR1 , and the learned Counsel submitted that decisions upon which the principle, as observed by the learned Judge, rested had been impliedly overruled by the Supreme Court decision. His Lordship could not accept the contention and explained the Supreme Court decision in his own way. So we are brought to the Supreme Court decision : [1964]6SCR1 . That judgment was delivered by his Lordship Gajendragadkar, J. the then Chief Justice sitting with four other Hon'ble Judges of the Supreme Court. What happened in that case was this: One Kanakarathanammal filed a suit in the court of Additional District Judge of Bangalore in which she claimed to recover possession of the properties

described in the schedule attached to the plaint being both movable and immovable. The properties were in possession of the respondents Lognatha and others before the Supreme Court. The case in the plaint showed that according to the appellant, the property belonged exclusively to her mother and that when she claimed such property and sued for recovery of possession by evicting the defendants trespassers, the defendants challenged her title. In that connection the appellant relied on the fact that under a sale deed executed in favour of her mother, the properties in dispute were acquired. The respondents on the other hand alleged that on 17th November, 1947, that means even after the kobala referred to above, the father of the appellant had executed a will under which he had been appointed an executor and that as such executor obtained the probate of the will and got possession of the properties and handed over the same to the respondent No. 2. So respondent Nos. 1 and 2 had set up in them a title, based on the title in appellant's father and claimed possession under the will of the appellant's father. Their Lordships observed at page 274 of the report in paragraph 9 as follows:--

'As soon as we reach this conclusion it becomes necessary to consider whether the appellant's suit must fail for non-joinder of necessary parties, It is common ground that the appellant has brothers alive, and even in the alternative plea that if the property was found to belong to appellant's mother, under the relevant Mysore law the appellant and her brothers would be entitled to succeed to that property and the non-joinder of the brothers was, therefore, fatal to the suit. In fact, as we have already indicated, the trial Court had dismissed the appellant's suit on this ground. The decision about the question as to the appellant's title to this property would thus depend upon the construction of the relevant provisions of the Act. Section 10 is relevant for the purpose. Section 10 (1) defines 'Stridhan' as meaning property of every description belonging to a Hindu female, other than property in which she has by law or under the terms of an instrument, only a limited estate. Section 10 (2) prescribes an inclusive definition of the word 'Stridhan' by Clauses (a) to (g). The appellant contends that the property in question falls under Section 10 (2) (b), whereas according to the respondents it falls under Section 10 (2) (d).'

Now, their Lordships explaining the Section 10 (2) (b) of Mysore Hindu Law Women's Rights Act (10 of 1933) observed at page 275 as follows:--

'The gift that is contemplated by Section 10 (2) (b) must be a gift of the very property in specie made by the husband or other relations therein mentioned. Therefore, we are satisfied that the trial court was right in coming to the conclusion that even if the property belonged to the appellant's mother, her failure to implead her brothers who would inherit the property along with her makes the suit incompetent.'

Their Lordships held that the property was not acquired by the appellant's mother under a gift from her father. On the other hand, it was held that the property had been purchased by the appellant's mother in her own name though the money consideration that was paid by her had been received by her from her husband. Therefore, their Lordships held that it was not the 'Stridhan' acquired under a gift from the husband in regard to the disputed properties within the scope of Section 10 (2) (b) of the Mysore Hindu Law Women's Rights Act 10 of 1933. Accordingly, their Lordships held that after the death of the mother, her two sons and daughter, that means, the appellant and her brothers become heirs entitled to their respective shares in the property in dispute. At page 275 their Lordships observed as I have already quoted above as follows:

'Therefore, we are satisfied that the trial court was right in coming to the conclusion that even if the property belonged to the appellant's mother, her failure to implead her brothers who would inherit the property along with her makes the suit incompetent. It is true that this question had not been considered by the High Court, but since it is a pure point of law depending upon the construction of Section 10 of the Act, we do not think it necessary to remand the case for that purpose to the High Court.'

There was an effort before their Lordships of the Supreme Court by the appellant to amend the plaint and add the brothers as plaintiffs in the suit for recovery of possession of the properties including immovable properties in unlawful occupation of the respondents. What was the fate of that effort? Their Lordships following the Privy Council decision rejected the prayer. At page 276 of the

Supreme Court report their Lordships held as follows:--

'It is unfortunate that the appellant's claim has to be rejected on the ground that she failed to implead her, two brothers to her suit, though on the merits we have found that the property, claimed by her in her present suit belonged to her mother and she is one of the three heirs on whom the said property devolves by succession under Section 12 of the Act.'

At page 276 of the report their Lordships observed:

'Once it is held that the appellant's two brothers are co-heirs with her in respect of the properties left intestate by their mother, the present suit filed by the appellant partakes of the character of a suit for partition and in such a suit clearly the appellant alone would not be entitled to claim any relief against the respondents.'

Those observations, according to Mr. Bhattacharyya changed the character of the suit before the Supreme Court into a suit for partition while the suit out of which the present appeal arose was a suit for declaration of title and recovery of possession. With respect, I cannot persuade myself to accept the explanation of Mr. Bhattacharyya. 'Partakes the nature of' does not mean by the expression that the suit itself is a suit for partition. The suit is only a suit for declaration of title and recovery of possession. Ultimately it was found that the respondents came into possession of the property under a will of the appellant's father. Before the will, the self same property was the subject-matter of a transfer by one Mr. Gibbs. Mr. Gibbs executed the sale deed in favour of the appellant's mother long before the appellant's father made the will. Appellant's father, however, supplied the fund with which the appellant's mother purchased the property but possession in the property in dispute was not with the appellant's mother or as a matter of that with the appellant even in spite of the purchase in question. So the conflict was whether the will would prevail or the purchase would prevail. Their Lordships held that the purchase would prevail. The person claiming on the strength of the purchase is the original owner. But the original owner left two co-sharers. In a suit for declaration of title and recovery of possession all the co-owners are necessary parties and for non-joinder of necessary parties, such a suit becomes incompetent. This is the analysis that I have made in my own way and this decision of their

Lordships of the Supreme Court overrules all other decisions that had been considered in the Mysore High Court case and relied upon by Mr. Bhattacharyya. Mr. Bhattacharyya placed very kindly before me the decision of the Supreme Court. Mr. Bhattacharyya has read and placed the decision in his own way so also did Mr. Guha and I have read it in my own way and my conclusion is that this decision of their Lordships of the Supreme Court : [1964]6SCR1 and the principle enunciated by their Lordships, even if obiter dicta but not so, shall be binding on us and with respect I bow down to that decision of their Lordships and hold that Mr. Bhattacharyya's contention cannot sustain in the face of the Supreme Court decision which I have elaborately discussed above.

10. Accordingly Mr. Guha's contention that the judgment and decree passed by the learned Additional District Judge as well as by the learned Munsif cannot be sustained in law and must be reversed and set aside and that the suit must be dismissed on contest with costs to the defendants, prevails.

11. The appeal is allowed with costs.

12. The judgment and decree passed by both the courts below be and the same are set aside and reversed. The appellant shall get costs all throughout.

13. Cross-objection is dismissed on contest. There will be no order as to costs in Cross-objection.

14. Leave under Clause 15 of the Letters Patent is prayed for and is refused.

15. No order is required on the application for acceptance of additional evidence.