

Mohd. Quashim Vs Noor Mohammad and Others

Court: Jharkhand High Court

Date of Decision: Jan. 27, 2005

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€” Section 44

Citation: (2006) 4 JCR 115

Hon'ble Judges: Hari Shankar Prasad, J

Bench: Single Bench

Advocate: Debi Prasad and L.K. Lal, for the Appellant; A.K. Sahani and M.K. Habib, for the Respondent

Final Decision: Dismissed

Judgement

Hari Shanakr Prasad, J.

This second appeal, at the instance of the appellant, is directed against the judgment dated 11.4.1989 and decree

dated 25.4.1989 passed in Title Appeal No. 68/15 of 83/88, whereby and whereunder the learned 7th Additional District Judge, Dhanbad was

pleased to dismiss the appeal and confirmed the judgment and decree of the learned lower Court passed in title Sit No. 37/81.

2. The plaintiffs-respondents filed a title suit being suit No. 37/81 for partition and claiming 1/4 share each for the plaintiffs and the defendant in the

land and house property measuring 12 1/2 katha situates at Mauja Bhandaridih, PS Baghmara District Dhanbad over the plot No. 1 within khata

No. 3 on the ground that father of the plaintiffs and defendant had acquired the suit property and it was in possession of father of the parties and out

of the suit property 5 katha of land was acquired by their father by registered deed and 2 katha by a hukumnama during the years 1922-39 and

after having 7 katha of land the father of the parties constructed a dwelling house in a portion of 7 katha and started living there with his children.

So far as remaining 5-2 katha of land is concerned, the case of the plaintiff is that this land was adjacent west of suit land purchased by their father

and their father used to possess 5-1/2 katha of land by growing seasonal fruits and vegetables on it and in this way acquired indefeasible title over

it by remaining in possession for more than the statutory period and in this way he became the title holder in respect of the entire suit property

measuring 12.5 katha of land. With the death of their mother in the year 1959 the father of the parties came in exclusive possession of the suit

property and he was living there with plaintiff with plaintiff and defendant and after the death of their father in 1978, plaintiffs and defendant, as his

sons, inherited the suit property and are in exclusive possession over the same. Plaintiffs felt some difficulty in joint possession of the suit property

and they requested the defendant for an amicable partition of the suit property and defendant first agreed but on 25.4.1981 they refused to

partition the suit property and they also started stacking brick, sand and other materials within the vacant portion of the suit property and started

digging foundation for construction of a building in spite of protest by the plaintiffs. Therefore, the plaintiff have filed the suit for partition and

claiming that each one of them including the defendant has not 1/4 share equal in the suit property. The defendant No. 1 Kasim Ali appeared and

filed written statement on his behalf as well as on behalf of his brother Mustafa Ansari. Later on Mustafa Ansari appeared as a witness and

disowned the joint written statement filed by the defendant No. 1 and he supported the case of the plaintiffs. The only case of the defendant is that

his father had taken settlement of 9.5 katha of land out of the suit property and this settlement was in the name of his mother Sugri Bibi and his

father was never in possession of entire suit property but has admitted that his father had constructed four rooms on a portion of the suit property

but this construction was on a portion of only 5 katha of land out of the suit property, which his father used to possess and for the remaining 7.5

katha of land, case of defendant is that this land was acquired by himself. Further case of the defendant is that since 1940 plaintiffs were living

separately and the plaintiffs were never in joint possession of the suit property alongwith defendant. Further case of the defendant is that his father

mortgaged 5 katha of land for Rs. 5000/- to Salamul Haque for legal necessity and defendant No. 1 redeemed the mortgaged land on payment of

Rs. 10,000/- to Salamul Haque and later on defendant No. 2 paid Rs. 2500/- being his liability of the amount whereas plaintiffs have not paid any

thing on that amount.

After payment of Rs. 2500/- by the defendant No. 2 in the year 1980 defendant No. 1 handed over one room to the defendant No. 2, which was

a country tiled one and defendant No. 2 made this room into a pakka one. It is further stated that defendant Nos. 1 and 2 have made some

construction jointly to move in 7.5 katha of land. The plaintiffs in zealous made their false claim in this portion of land and they have got a

proceeding started against him u/s 44, Cr PC which was dropped. The defendant admitted the claim of the plaintiffs in partition suit but so far as 5

katha of land out of suit property and that too subject to payment of Rs. 2500/- each to the defendant No. 1. As many as six issues were framed

and the learned Court below recorded evidence oral and documentary and came to a finding and decreed the suit on, contest with cost against the

contesting defendant. Defendant No. 1 being aggrieved by the judgment and decree of the learned Court below, filed Title Appeal No. 68/83 of

15/88 but the appellate Court dismissed the appeal and confirmed the judgment and decree of the lower Court. The defendant appellant filed this

second appeal and while admitting the appeal, the following substantial question of law was formulated.

Whether the learned Court of appeal below being a Court of first appeal should have discussed and analysed the oral evidences with regard to the

plea of the appellant relating to previous partition?

3. In course of argument, it was submitted that the counsel for the appellant in the first appellate Court had argued the case on three points and one

of the points was that the learned Court below ought to have held that there had already been partition before the parties but the learned first

appellate Court touched point No. 3 and discussed the evidence of defendant No. 2 and after discussing the evidence of defendant No. 2 came to

a finding that story of previous partition set up by the appellant is false and since one of the parties to the suit and that too defendant No. 2, who

setup a plea of previous partition had come out with the evidence that parties were joint then a plea of previous partition appears to be false. The

learned Counsel for the appellant submitted that there should have been discussion in details and the first appellate Court, being a Court of fact,

also has to deal with the evidence of witnesses recorded by the trial Court but the learned first appellate Court did not discuss the evidence in

detail and came to some extent and, therefore, this appeal should be allowed and case should be remitted back to the learned Court of appeal

below for discussion of evidence of witnesses, oral and documentary, on previous partition.

4. On the other hand, learned Counsel appearing for the respondents submitted that this is a case of concurrent findings and both the Courts

below have passed judgment in favour of the respondents and have held that parties were joint and there is a discussion of defendant No. 2, who

is one of the parties to the suit or appeal, so when this defendant No. 2 admitted that parties are joint then further discussion of evidence of

witnesses is not required and further that in a case of concurrent finding of fact, however, erroneous finding may be that cannot be interfered with in

the second appeal and this is not a law point involved in the matter and, therefore, this appeal should be dismissed.

5. I am also of the view that the learned trial Court has dealt with the evidence in details and even appellate Court has tried to discuss the evidence

of witnesses, though not in detail, but when the party himself admitted and he is joint with other coherers and there is a concurrent findings of fact,

then there should not be any interference in the judgment of the appellate Court.

6. In that view of the matter, this appeal is dismissed but in the circumstances, no order as to costs.