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AIR 1951 Cal 412 : 55 CWN 289

Calcutta High Court

Case No: A.F.A.D. No. 1707 of 1946

Jogendra Nath Mondal and Others	APPELLANT
Vs	
Adhar Chandra Mondal	RESPONDENT

Date of Decision: Aug. 11, 1950

Acts Referred:
Specific Relief Act, 1877 â€" Section 54#Transfer of Property Act, 1882 â€" Section 44

Citation: AIR 1951 Cal 412 : 55 CWN 289

Hon'ble Judges: R.P. Mookerjee, J

Bench: Single Bench

Advocate: Hiralal Chakravarty, Syamadas Bhattacharjya and Nalini Mohan Dam, for the Appellant; Shayama Charan Mitter, for the Respondent

Final Decision: Allowed

Judgement

R.P. Mookerjee, J.
This appeal on behalf of the deft. arises out of a suit filed by the pltf. resp. for permanently restraining the deft. from taking joint possession of the homestead.

2. The property originally belonged to the members of a family & the relationship amongst the parties ""will appear from the following genealogical table:

NILMONI

|

_____

| | | |

Dinanath Troilokya Baikuntha=Giribala Rameswar

| |

Siddhesar=Narayani _____

| | |

Daughter Adhar Pashupati

| Pltf.

_____

| |

Jaladhar Sasadhar

3. The deft. Jogendra Nath had purchased the share which originally belonged to Siddheswar from his widow Narayani & his grandsons Jaladhar & Sasadhar. The case of the pltf. Adhar is that Jogendra on the strength

of the said conveyance, is making preparation to take joint possession of the homestead which had been in the possession of Narayani. The pltf. has accordingly filed the present suit for declaration that the property in

dispute forms the undivided family dwelling house of the pltf. & his other co-sharers, including Narayani & the deft. being a stranger purchaser is not entitled to take joint possession of any portion of the said homestead. It

is accordingly prayed that the deft. being a stranger purchaser may be permanently restrained from taking joint possession on the strength of his purchase of the interest of Narayani. The pltf. has impleaded only the

transferee Jogendra Nath. The other co-sharers have not been joined as parties.

4. The defence inter alia raised various issues. The deft. claimed that he was an agnatic relation of the pltf"s. family, the property in question was not a homestead & at least a portion thereof was neither a part of the

homestead nor the necessary adjunct thereto. It was further claimed that the members of the family had been in possession of separate portions after partition & the portion sold was not a part of any joint homestead. The

pltf. & Narayani were possessing lands separately. It was further contended that the suit as framed is not maintainable & the relief as claimed is not available to the pltf. in the present proceedings.

5. Both the Cts. below have found in favour of the pltf. that the deft. was not a member of the joint family which originally owned the property, that the property in suit constituted an undivided family dwelling house & that

there had been no previous partition. The deft. was accordingly permanently restrained from taking joint possession.

6. The principal question raised in this appeal is whether on the facts found the suit as framed is maintainable in law. In the lower Cts. reliance had been placed upon the provisions contained in Section 44, T. P. Act, & in

Section 4, Partition Act.

7. Section 44, T. P. Act, provides that the transferee from a co-sharer acquires the right of his transferor so far as is necessary to give effect to the transfer & no further. In respect of a dwelling house the second para. of

Section 44 provides:

Where the transferee of a share of a dwelling house belonging to an undivided family is not a member of the family nothing in this section shall be deemed to entitle him to joint possession or other common or part

enjoyment of the house.

8. The transferee from one of the members of a Hindu co-parcenary may acquire a right to joint possession or to ascertain the share by partitioning the share to which he is entitled. Such a transferee does not acquire the

status of a coparcener in the family. In the case of a dwelling house belonging to an undivided family, the transferee shall not by the provisions of this section be deemed to be entitled to joint or common enjoyment of the

house.

9. The stranger purchaser of an undivided share in a homestead, used as a residence by joint Hindu family, cannot obtain a decree for joint possession. The proper course to follow by a Ct. in such a case is either to direct

delivery of possession by partition in execution proceedings or to leave the purchaser to his remedy by a separate suit for partition, Girijakanta v. Mohimchandra 20 C. W. N. 675: (A. I. R.1916 Cal. 170). If such a suit

for partition is brought by a stranger transferee the parties will be entitled to invoke the provisions contained in the Partition Act IV [4] of 1893.

10. On behalf of the pltf., it is contended that as a stranger transferee cannot be placed in joint possession of a homested through Ct. it is open to any one of the members of the joint family who has still an interest in the

said property to bring a suit for restraining such a stranger transferee from taking possession. It is urged on the other hand on behalf of the deft. that there is no provision of law under which an outsider transferee cannot

obtain amicable possession.

11. Section 4, Partition Act, makes no reference about the rights of a stranger purchaser to obtain or not to obtain amicable joint possession in the homestead. The only provision therein is about the procedure to be

followed in a suit for partition by such a stranger purchaser. The provision of this section therefore is of no assistance in deciding the issue in the present appeal.

12. To test the extent & nature of the right given u/s 44, T. P. Act we may consider a case where the stranger transferee has already got into possession of a portion of a joint family homestead. Is it open to any one or

more of the members of the joint family who still own some share or other in the same homestead to bring a suit in ejectment of that stranger transferee from that property? There is no provision of Law under which a

stranger transferee can be ejected simply on the ground that is was not possible for such a transferee to have obtained joint possession through Ct.

13. Section 44, T. P. Act & Section 4, Partition Act, 1893, are complementary provisions. Section 4, Partition Act, gives under certain conditions the co-sharer member of a joint-family the option of buying out the

interest of a transferee of an undivided share of a joint homestead at a valuation to be made by the Ct.

14. We have, however, to consider the effect of the provisions contained in the second para. of Section 44, T. P. Act. A stranger transferee is not to be deemed under that section to be entitled to joint possession or other

common or part enjoyment of the house. It will be apparent that the provisions of this section are of a negative nature. On proof a sufficient defence the Ct. will not forcibly put a stranger transferee in joint possession with

the members of the joint family. This does not create a positive right in favour of the members of the family.

15. We have next to consider whether on these facts the pltf. would be entitled to have an injunction issued by the Ct. at this stage. The exercise of the jurisdiction to grant relief by the issue of an injunction is not a matter

ex debito justitiae but one which is purely within the discretion of the Ct. The latter is not bound to grant such relief merely because it is lawful to do so. Injunction in the case of tort is to be issued as provided in the

Specific Relief Act. All that is necessary is to ascertain first whether under the law relating to contract & tort there is an obligation, a breach of which is threatened, secondly whether the general principles regulating the

ground of an injunction relief permit of such remedy under the particular circumstances of the case.

16. Tort has been theoretically defined to be an unauthorised prejudicial interference by an act or omission of right in rem of another person, and the conduct which brings about the prejudicial interference is said to be

tortuous (Pollock on Torts). Considered more practically from the point of view of English Jurisprudence tort is an act or omission giving rise by virtue of the common law jurisdiction of the Courts to suffer remedy which

is not against contract. It is commonly said to be an actionable wrong independent of contract. In Ballison v. Guildford (1874) 18 Eq. 359 d + the Master of Rolls speaking of the principles upon which a Court of Equity

enforces when an injunction is asked for said :

I take that, in order to obtain an injunction a pltf. who complains, not that act an of actual violation, but that a threatened or intended act, if carried into effect will be violation of the right, must show that such will be the

inevitable result. It will not do to say a violation of the right may be the result; the pltf. must show that a violation will be the inevitable result.

He then proceeds to cite a case decided by Lord Tottenham in which the Lord Chancellor said :

I consider this Court has jurisdiction of injunction to protect property from an act threatened which if completed would give a right of action. I by no means say that in every such case an injunction may be demanded as

to right ; but if the party applying is free from blame and promptly applies for relief and shows that by the threatened wrong the property would be so injured that an action for damages would be no inadequate redress an

injunction, will be granted.

17. Applying this principle to the facts of the present case, it is not possible to describe the attempted act of the stranger transferee as being in the nature of a tortuous act. Even if such an act were considered to be a

tortuous one, we have also to consider whether it is open to the pltf. to bring a proper action in the civil Court for determination of the respective rights and for partition.

18. Can the threatened act be deemed to be an act of trespass ? The provisions contained in Section 44, T. P. Act, disentitle a stranger transferee from bringing a suit for obtaining joint possession of a homestead. There

is on the other hand no provision under which the owner of an undivided share of a joint homestead cannot either let out or sell away to an outsider the portion of the joint property which is in his possession. It has not

even been suggested that a co-sharer of the homestead can be restrained when he is about to transfer his interest in the joint family homestead. The law does not provide for the same and the ordinary rights of ownership

may be exercised by a co-sharer. A co-sharer cannot restrain another co-sharer from either selling or letting out the latter''s share to an outsider. That co-sharer may be acting unreasonably. That may be a sufficient

ground for having partition enforced. But this does not entitle a co-sharer from restraining another co sharer from making over amicable possession to a stranger or the latter obtaining amicable possession of the share

which such transferee has purchased.

19. Reference has in this connection been made to certain observations in Rajani Kanta Sen and Others Vs. Sita Kumari and Others . A stranger purchaser had purchased a share of a family dwelling house and having

been unable to obtain possession thereof instituted a suit for joint possession and obtained an ex parte decree. An order was also obtained on behalf of the decree-holder under Order 21, Rule 97, Civil P. C. At this stage

a suit was filed by the other co-sharers of the dwelling house for a declaration of their title to and for permanently restraining the purchaser from obtaining khas possession by executing the decree. An attempt was made to

invoke the principles contained in Section 44, T. P. Act. This Court held that as a decree had already been passed as well as an order had been obtained under Order 21, Rule 97, Civil P. C., the decree-holder could not

be restrained from executing the decree. It is, further, observed that the pltfs. had an opportunity of contesting the claim of the stranger purchaser before the decree had been passed in the earlier suit. The pltfs. must be

regarded as being estopped in the latter suit from asking for as injunction which would prevent the deft. from executing the decree obtained quite properly. On this ground alone the decision of the Court of appeal below

had to be affirmed. There is an observation however that

in any case however even if it be assumed that the principles of Section 44, T. P. Act might be applied in a suitable case for the purpose of preventing a stranger to the family from obtaining joint possession of a family

dwelling house, the proper step for the members of the joint family to apply for an order of this nature would be at the time when a decree is made in a suit.

There is no decision by the Court as to whether Section 44, T. P. Act, will at all be attracted.

20. I hold, therefore, that the suit as framed by the pltf., impleading only the stranger transferee, for permanently restraining the deft. from taking possession is a misconceived one and is not maintainable in its present form.

21. This appeal is, therefore, allowed and the suit dismissed. In view of the circumstances of the case, each party will bear his respective costs in this Court. The deft. will be entitled to the costs of both the Courts below.