
(1914) 06 CAL CK 0017
In the Calcutta High Court

Anand Kisore Chowdhury and Others	APPELLANT
Vs	
Daiji Thakurain	RESPONDENT

Date of Decision : 18-06-1914

Acts Referred:

Bengal Estates Partition Act, 1876 — Section 12

Citation : AIR 1915 Cal 571 : 28 Ind. Cas. 580

Hon'ble Judges : Beachcroft, J;Asutosh Mookerjee, J

Bench : Division Bench

Judgement

Asutosh Mookerjee, J.—This is an appeal by the plaintiffs in a suit for declaration that the disputed properties are not joint properties of the parties and that they are not liable to be partitioned, and for a prohibitory order on the Collector not to effect a partition of them under the Bengal Estates Partition Act, 1876. The suit was commenced on the 9th April 1906 and was dismissed by the Subordinate Judge on the 9th March 1907 on the ground that it was not maintainable under the provisions of the Bengal Estates Partition Act, 1897. This decision was reversed by this Court on the 9th March 1909, and the case was remitted to the Court below for trial on the merits: *Ananda Kishore Choudhry v. Daiji Thakurani* 1 Ind. Cas. 549 : 36 C. 726 : 10 C.L.J. 189. On trial after remand, the Subordinate Judge has dismissed the suit on the ground that the alleged private partition of the lands in 1850 was not established by the evidence. The plaintiffs have appealed to this Court and urged two grounds against the decision of the Subordinate Judge, namely, first, that the question of previous partition is res judicata by virtue of a decision between the predecessors of the parties in a litigation of 1855, and, secondly, that if the matter is not res judicata, the balance of evidence supports the theory of a previous partition.

2. To test the validity of the first objection, we must examine the scope of the previous suit and of the decision therein. The plaintiffs are the descendants of one Bechu Chaudhuri, while the defendant is the daughter of one Bichak Chaudhuri. Bechu Chaudhuri and Bichak Chaudhuri were cousins, related through

their fathers. Upon the death of Bichak Chaudhury in 1853, his estate was successfully claimed by his mother and widow before the Revenue Authorities. Thereupon, on the 2nd April 1855. Bechu Chaudhuri instituted a suit against the mother and widow of Bichak Chaudhuri for recovery of. possession of the estate left by the latter, on the ground that it had vested in him by survivorship. The daughter of Bichak Choudhuri, who was at that time an infant and who is the defendant in this litigation, was not a party to that suit. The then defendants pleaded that Bechu Chaudhuri and Bichak Chaudhuri were not joint and that their village and Court affairs, collections and residence were separate. On those pleadings, four issues, were raised; of these, the first raised the question, whether the properties in suit were or were not joint at the time of the death of Bichak Chaudhuri; the second raised the question, whether or, not in 1850 the plain till: and Bichak Chaudhuri had partitioned by arbitiators the lands of village Rohara (which was one of the properties included in the estate, of Bichak Chaudhuri and is the property now in suit). The Court found upon the first issue that there had been a separation in estate between Bechu Chaudhuri and Bichak Chaudhuri. Upon the second issue, the Court observed that the allegation of the defendants with respect to the portion of lands of Rohara by arbitrators was proved by the deposition of three witnesses. The Court thereupon dismissed the suit on the 5th July 1856. On behalf of the plaintiffs, it is argued that the decision on the second issue operates as *res judicata* between the parties, and in support of this view reliance is placed upon the cases of *Mitna v. Fuzl Rub* 6 B.L.R. 148 : 15 W.R. (P.C.) 15 : 13 M.I.A. 573 : 2 Suth. P.C.J. 387 : 2 Sar. P.C.J. 626 : 20 E.R. 665 *Soorjomonee v. Suddanund* 12 B.L.R. 304 (P.C.) : 20 W.R. 377 : I.A. Sup. Vol. 212 and *Peary Mohun v. Ambica Churn* 24 C. 900. In our opinion, the contention of the appellant is unsound and must be overruled. The only question which could be and was directly and substantially in issue in the previous litigation was, whether or not there had been a separation in interest between the two cousins. As was pointed out by Lord Westbury in *Appovier v. Ram a Subba Aiyan* 8 W.R. (P.C.) 1 : 11 M.I.A. 75 : 1 Suth. P.C.J. 657 : 2 Sar. P.C.J. 218 : 10 E.R. 31 under the Hindu Law a partition is effected between members of a joint family, if there is a division of their rights; an actual distribution of the property by metes and bounds is not necessary. This view has been repeatedly affirmed by the Judicial Committee: *Doorga Persad v. Kundun Koowar* 13 B.L.R. 235 : 21 W.R. 214 : 1 I.A. 55 *Ram Kissen Singh v. Sheonundun Singh* 23 W.R. 412 (P.C.) : 9 B.L.R. 310 note; *Suraneni Venkata Gopala Narasimha Row v. Suraneni Lakshma Venkama Row* 3 B.L.R. (P.C.) 41 : 12 W.R. (P.C.) 40 : 13 M.I.A. 113 : 2 Suth. P.C.J. 265 : 2 Sar. P.C.J. 496 : 20 E.R. 494 *Gajapathi Radhika Pata Devi Garu v. Gajapathi Nilamani Patta Maha Devi Garu* 6 B.L.R. 202 : 14 W.R. (P.C.) 33 : 13 M.I.A. 497 : 2 Suth. P.C.J. 365 : 2 Sar. P.C.J. 601 : 20 E.R. 637 *Madho pershad v. Mehrban Singh* 18 C. 157 : 17 I.A. 194; *Balkishen v. Ram Narain* 7 C.W.N. 578 : 5 Bom. L.R. 461 : 30 C. 738 : 30 I.A. 139 *Ram Pershad Singh v. Lukhpati Koer* 30 C. 231 : 7 C.W.N. 162 : 5 Bom. L.R. 103 : 30 I.A. 1; *Musammat Parbati v. Naunihal Singh* 3 Ind. Cas. 195 : 36 I.A. 71 : 31 A. 412 : 10 C.L.J. 121 : 6 A.L.J. 597 (P.C.) : 5 M.L.T. 427 : 13 C.W.N.

983 : 11 Bom. L.R. 878 Raghubir Singh v. Moti Kunwar 17 Ind. Cas. 766 : 35 I.A. 41 : 13 M.L.T. 162 : (1913) M.W.N. 127 : 11 A.L.J. 146 : 17 C.W.N. 453 : 17 C.L.J. 306 : 15 Bom. L.R. 426 : 2 M.L.J. 28; Suraj Narain v. Iqbal Narain 18 Ind. Cas. 30 : 13 M.L.T. 194 : 17 C.W.N. 333 : 11 A.L.J. 172 : (1913) M.W.N. 183 : 17 C.L.J. 288 : 24 M.L.J. 345 : 35 A. 80 : 15 Bom. L.R. 456 : 16 O.C. 129 : 40 I.A. 40; Brijraj Singh v. Sheodan Singh 9 Ind. Cas. 826 : 17 C.W.N. 949 : (1913) M.W.N. 515 : 11 A.L.J. 698 : 14 M.L.T. 1 : 18 C.L.J. 57 : 15 Bom. L.R. 652 : 35 A. 337 : 25 M.L.J. 188 : 40 I.A. 161. To determine whether two persons, members of a joint Mitakshara family, have separated so as to make the principle of survivorship no longer applicable between them, the Court must find whether they had an intention to separate, and, whether as a result of such intention, there has been severance of title and interest. Consequently, the question whether the lands of one of the villages, which formed part of the estate, had or had not been divided between the parties by arbitrators, was not directly and substantially in issue. Indeed, the question did not arise upon the pleadings as set out in the judgment. To enable, the then plaintiff to succeed by survivorship, he would have to prove that the parties had remained joint in respect of the whole estate, and the defendants, to defeat the claim of the plaintiff, must prove, not so much that particular tracts of land had been divided by metes and bounds and enjoyed separately, but rather that there had been a complete separation in interest, a total disruption of the tie of joint family. We hold accordingly that the finding in the previous litigation as to the lands of Rohara does not operate as res judicata. It is further worthy of note that the finding is inconclusive, as it does not show that all the lands of the village had been partitioned. The first ground urged by the plaintiffs consequently fails.

3. To test the soundness of the second objection, namely, that the balance of evidence supports the theory of a private partition, we must remember that no direct evidence, oral or documentary, is available to prove a complete partition of the lands of Rohara in 1850. The Subordinate Judge has on good grounds refused to place any reliance on the khasra which was not produced in the litigation of 1855. The predecessor of the plaintiffs then strenuously maintained, though unsuccessfully, that there had been no division of the lands, and could not very well produce measurement papers, if any, drawn up with a view to effect a partition. The Subordinate Judge has suspected, not without good reason, that the khasra might have been manufactured during the pendency of the partition proceedings before the Collector. In the absence of direct evidence of a partition in 1850, we are thus thrown back upon circumstantial evidence. As was pointed out by the Judicial Committee in *Budha Mal v. Bhagwan Das* 18 C. 302 (P.C.) and by the Bombay High Court in *Murari v. Mukund* 15 B. 201 a partition may be occasionally established by oral evidence, which, though not directly proving the factum of partition, may be of such a character as to justify the inference that a partition must have been made between the parties or their predecessors. The plaintiffs in the present case rely upon the circumstance that the representatives of Bechu Chaudhuri and Bichuk Chaudhuri have, for a long

period of time, occupied distinct parcels of land, have apparently exercised in respect thereof the rights of a sole owner, and have recognised each other as entitled to possession in severalty. This, no doubt, is an important circumstance, but is by no means conclusive. It is well-settled that the mere separate enjoyment of parcels in severalty does not indicate complete partition between the parties: *Runjeet Singh v. Gujraj Singh* 1 I.A. 79; *Lakhshmi Devi Garu v. Surya Narayana Dhatrazu Bahadur Garu* 24 I.A. 218 : 20 M. 256 *Sreeram v. Sreenath* 7 W.R. 451; *Lalljeet Singh v. Raj Coomar Singh* 25 W.R. 451. To put the matter briefly, there may be a mutual arrangement for the management and enjoyment of separate portions of joint property which does not amount to partition. On the other hand, that inference in favour of a theory of partition would be strengthened, if it was proved that not only had the parties enjoyed separate and distinct portions of the family property for many years, but had also dealt with the separate portions in every respect as their own property, for instance, carried out improvements on them, or effected alienations to strangers or to members of the family: *Peary Lall v. Bhawoot Koer* W.R.F.B. 18 : 1 Ind. Jur. (o.s.) 100; *Bodh Singh v. Gunesh Chunder Sen* 19 W.R. 356 : 12 B.L.R. (P.C.) 317 : 3 Sar. P.C.J. 253; *Udoy Chand v. Panchoo Ram* 11 C.L.R. 514); *Makhun Lall v. Ram Lall* 3 C.W.N. 134. In the case before us, there is no evidence of the existence of any circumstances which weigh in favour of the theory of permanent partition as distinguished from temporary distribution for the sake of convenience of enjoyment. On the other hand, there are significant facts which are inconsistent with the case of the plaintiffs. Thus, though in some cases the parties have collected rent exclusively from separate sets of tenants, most of the lands are still joint, and most of the tenants have been paying rent jointly to the parties. This is emphasised by the rent decree obtained, on the 15th May 1903, against Ramruch Raot, in a suit in which the present respondent was, joined as a co-sharer landlord. Again, we recently as 1895, both the parties jointly sued one Mr. Crowdy and his partner of the Hoti Indigo Factory and on the 5th June 1896, obtained a decree for joint possession of lands which had been purchased by the Crowdys on the 1st June 1895, from cultivators who had no transferable rights in their holdings. Again, between the 17th and 21th October 1894, the parties accepted joint kabuliyats from numerous tenants; and in February and March 1905, they jointly took kabuliyats from other tenants, who subsequently sued them jointly in respect of the lands of their tenancy. It is also plain from the Record of Rights that there were at least 120 bighas of land in the joint possession of the parties. Finally, it is indisputable that the areas in the occupation of the parties are not in exact proportion to their respective shares in the entire estate. In view of all these circumstances, the Subordinate Judge has rightly held that although there may have been a distribution of some of the lands and separate enjoyment thereof by mutual consent and for mutual convenience, there was No. such final and definitive partition as is contemplated in Section 12 of the Estates Partition Act, 1876, and as would effectively deprive the Collector of his jurisdiction. This is in harmony with the view of the facts accepted by the Board of Revenue on five successive occasions, as appears from

the orders of Mr. Cockerell (22nd April 1886), Sir Henry Harrison 19th June 1890), Mr. Buckland (25th March 1903), Mr. Slacke (21st December 1905) and Mr. Macpherson (4th December 1906). The plaintiffs have wholly failed to discharge the heavy burden which lay upon them to prove conclusively that the partition proceedings commenced before the Revenue Authorities on the 3rd December 1884 and concluded on the 30th January 1907, after the lapse of more than 22 years, have been without jurisdiction.

4. The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs. We assess the hearing fee at ten gold mohurs.

Beachcroft, J.

5. I agree.