

(1926) 02 CAL CK 0043
In the Calcutta High Court

Anath Bandhu Dutta and Another

APPELLANT

Vs

Aisali Namadas

RESPONDENT

Date of Decision : 26-02-1926

Acts Referred:

Citation : AIR 1926 Cal 1076 : 97 Ind. Cas. 188

Hon'ble Judges : Panton, J;B.B. Ghose, J

Bench : Division Bench

Judgement

1. This is an appeal against an order of remand made by the Subordinate Judge after reversing the decision of the Munsif decreeing a partition of certain properties. The plaintiffs appealed to this Court.

2. The facts found are that the plaintiffs purchased a non-transferable occupancy holding from the tenant in possession. After their purchase they were recognised by the landlord owning 15-annas 12-gandas share, but the defendant who was landlord to the extent of 8-gandas share did not recognize the purchase and the defendant dispossessed the plaintiffs from a certain area of land within the jote. The plaintiffs, therefore, brought a suit against the defendant for possession of the lands from which they had been dispossessed and obtained a decree for joint possession to the extent of their share of these lands. On the basis of that decree the plaintiffs brought the suit out of which this appeal has arisen, for partition only of those lands which formed the subject-matter of the previous suit as against the defendant. The Munsif made a decree for partition of those lands only, declaring that the plaintiffs would get their share of 15-annas 12-gandas and the defendant would get 8 gandas of the lands. The Subordinate Judge has held that this suit for partition with regard to a share of the lands in the jote is not maintainable and that the plaintiffs being only occupancy raiyats their landlord, that is the landlord with regard to 15-annas 12-gaands share of the jote should be made a party and in that view he reversed the decision of the Munsif and remanded the case for trial by making these amendments. The first contention raised on behalf of the appellants in this case is that the order of

remand is not in accordance with Rule 23 of Order XLI of the C.P.C. But the circumstances which have been found in this case by the Subordinate Judge are not covered either by Rule 23 or Rule 25 of Order XLI of the C.P.C. When the Appellate Court thinks it necessary that other parties should be joined as defendants and certain other properties should be included in the suit, the only course for it to take is to reverse the decision and to remand the suit for a fresh trial from the commencement and that can only be done under the inherent jurisdiction of the Court as laid down in the Full Bench case in Abdul Karim Abu Ahmad Khan Ghaznavi v. Allahabad Bank Ltd. 41 Ind. Cas. 598 : 44 C. 929 : 26 C.L.J. 49 : 21 C.W.N. 877. The next contention on behalf of the appellants is that it is not an inflexible rule that a partition cannot be effected at the instance of a tenant as against persons having superior interest possessing the lands in question jointly, and in support of this contention the case of Bhagwat Sahai v. Bepin Behary Mitter 7 Ind. Cas. 549 : 37 C. 918 : 12 C.L.J. 240 : 37 I.A. 198 : 14 C.W.N. 962 : 8 M.L.T. 228 : (1910) M.W.N. 691 : 7 A.L.J. 1137 : 12 Bom. L.R. 997 : 20 M.L.J. 907 (P.C) is cited. In that case it was held that the right of partition exists when two parties are in joint possession of land under permanent titles, although their titles may not be identical. Here the plaintiffs are only occupancy raiyats and any partition effected at their instance may not be binding upon their landlord. It is difficult to say that the title of an occupancy raiyat is a permanent title, but his right to such partition has not been denied in this case. The only direction that has been made is that his landlord should be made a party. We do not think that that is erroneous. With regard to the direction of the Subordinate Judge that the entire jote should be brought in the suit for partition, the learned Vakil for the appellant contends that that is also not an inflexible rule and he relies upon the case of Kali Charan Singha v. Kiranbala Debi 51 Ind. Cas. 948 : 29 C.L.J. 494 and other cases cited in it. Although the rule is not inflexible that all joint properties should be brought into the hotch-pot in a suit for partition, there are exceptional cases in which partial partition is allowed. Here the plaintiffs are entitled to 15-annas 12 gandas share of an occupancy jote and they desire to have a partition of only two kanis odd of land within that jote. There is no reason why such a partition should be allowed and we consider that the decision of the Subordinate Judge that all the lands of the jote should be included is right. The appeal must, therefore, be dismissed with costs.