

(1926) 03 CAL CK 0053
In the Calcutta High Court

Ashutosh Roy Chowdhury and Others

APPELLANT

Vs

Mono Mohan Roy Chowdhury and Others

RESPONDENT

Date of Decision : 29-03-1926

Acts Referred:

Limitation Act, 1963 — Section 5

Citation : AIR 1927 Cal 65 : 97 Ind. Cas. 539

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

Bench : Full Bench

Judgement

B.B. Ghose, J.—The defendants are the appellants before us. The plaintiff's, brought the suit out of which this appeal arises for declaration of their right in permanent tenure-holders to two plots of land described in schedules "ga" and "gha" of the plaint and for confirmation of possession or in the alternative for a decree for possession if it was found that they were out of possession. There were several other prayers which it is not, necessary to state now. The facts on which they base their claim may be shortly stated thus: There is a revenue paying Estate No. 955 known as Ramdeb Basu Choudhuri of which the plaintiffs, the defendants and several other persons were co-sharers. There was a private partition under which two sets of co-sharers held two plots of land separately and these were recorded in the Record of Rights as Cadastral Survey Plots Nos. 1020 and 1021. Those two sets of Co-sharers created permanent tenures with regard to the two plots of land in favour of the plaintiff under which title the plaintiffs have been in possession of those lands. The disputed plots of land were part and parcel of the Cadastral Survey Plots Nos. 1020 and 1021. There was subsequently a partition of the estate under the Estates Partition Act (V of 1897, B.C.). There was a direction by the Board of Revenue that the Record of Rights should, as far as possible, be the basis of the partition. The greater part of the plots Nos. 1020 and 1021 have been allotted to the shares of the representatives of the lessors of the plaintiffs but the disputed portions have been fraudulently included in the portions allotted to the defendants and a cloud has thus been cast on the plaintiffs' title. The defendants contested the plaintiff's claim on various

grounds. The trial Court dismissed the suit. On appeal by the plaintiffs the Subordinate Judge has decreed the suit declaring their title as claimed and directing that they should recover possession of the disputed land which shall remain a part and parcel of defendants' separate estate and the defendants will be entitled to get proportionate rent from the plaintiffs for these lands which will be ascertained in a properly framed suit.

2. The defendants raise various grounds of appeal against that decree, the first of which is that the appeal by the plaintiffs to the lower appellate Court was barred by limitation and that the Court acted wrongly in extending the period of limitation u/s 5 of the Limitation Act. This argument is based on the following facts. Judgment was delivered by the trial Court on the 9th of February 1922; decree was signed by the Judge on 5th of April 1922; the appeal was lodged on 10th of May 1922. If the period between the date of judgment and the date when the decree was signed is excluded along with the actual period necessary for the preparation of the copy of the decree there can be no question that the appeal was presented within the period of limitation. That the period between date of the judgment and the date of signing the decree should be excluded in computing the period of limitation has been settled so far as our Court is concerned by the Full Bench decision in *Bani Madhub Mitter v. Matungini Dassi* (1886) 13 Cal. 104 (F.B.). Whatever argument may be based on the provisions of the Civil P.C. and the Limitation Act, we are bound by the decision in that case. But it is argued that that case is no longer law having regard to the decision of the Privy Council in *Pramatha Nath Roy v. Lee* AIR 1922 P.C. 352 which affirmed the decision of this Court in *Pramatha Nath Roy v. Lee* [1919] 23 C.W.N. 553. That decision was with regard to a case on appeal from a decision on the Original Side of this Court where the rule is that the decree or order is not drawn up without an application by the party and the conduct of the appellant was held to be negligent in that case. There is no such rule in the *moffusil* and the party has no control over the matter of signing of the decree by the presiding Judge. The Full Bench case in *Bani Madhub Mitter v. Matungini Dassi* [1886] 13 Cal. 104 (F.B.) was neither overruled nor disapproved by their Lordships of the Privy Council but seems to have been approved, (see page 1004 of 49 Cal., The next case cited *Kamruddin Hyder Vs. M.N. Mitter*, only followed the rule in *Pramatha Nath Roy's* case AIR 1922 P.C. 352 and has no application to this case. The last case cited, *Harish Chandra Tewari v. Chandpur Co. Ltd.* [1912] 39 Cal. 766, *Kamruddin Hyder Vs. M.N. Mitter*, with regard to an application for leave to appeal to the Privy Council in which it was held that the decision of the Full Bench in *Bani Madhub Mitter v. Matungini Dassi* [1886] 13 Cal. 104 (F.B.) did not apply to such a case. The practice of excluding the period in question has been followed uniformly for at least 40 years and is still followed in the appellate side of this Court in accepting appeals from decrees of subordinate Courts. I do not therefore, think that the appeal presented to the lower appellate Court was Court below acted wrongly in extending the period of limitation under the circumstances if it was of opinion that the appeal was barred by limitation. This

contention of the appellants fails.

3. The arguments on behalf of the appellants on the other questions were placed under the following" heads: (1) the suit is barred under Article 14 of the Limitation Act; (2) Section 119 of the E states Partition Act bars a suit of this nature; (3) in order to disturb a" partition of the estate all the former co-sharers of the estate should have been made parties; (4) the allotments having been made with the consent of all the co-sharers, the plaintiffs cannot seek for an alteration; (5) u/s 99 of the Estates Partition Act the plaintiffs have no right to these lands, but their remedy is against their own lessors. Before dealing with these questions it is necessary to state that the allegation of fraud made by the plaintiffs has been found against them by both the Courts below. The question of a private partition of the estate was attempted to be raised in the trial Court at a late stage, which was not allowed by that Court. A similar attempt was made in the lower appellate Court but without any result, and in this Court the case of a previous partition of the estate has not been urged at all, and in fact it was stated by the learned vakil for the respondents that the endeavour of the plaintiffs to prove such a partition was misconceived. The case for the plaintiffs-respondents, which was for the first time clearly stated before us by their learned vakil, is that they do not desire to alter the boundary of the separated estates nor do they want that the allotment of the defendants should be reduced or that the acts of the partition authorities should be interfered with in any way. All they want is that their tenure should not be held to be reduced by the action of the partition authorities, and that they should hold the disputed lands under the defendants as tenants. Or, in other words, they urge that the decree as made by the lower appellate Court should stand. As the confusing statement of the claim of the plaintiffs has now crystallized in this form, the short point which arises is whether the plaintiffs are entitled to the lands as tenure holders under the defendants. This may be considered from two points of view : first, whether Section 99 of the Estates Partition Act applies to this case ; and secondly, if not, whether plaintiffs are entitled to hold the lands under the defendants having regard to the equitable principles applicable to cases of partition of joint estates.

4. Starting from this point of view it seems to me that the jurisdiction of the civil Court is not ousted u/s 119 of the Estates Partition Act, as the plaintiffs do not ask for any relief falling within that section. Nor do I think Article 14 of the Limitation Act applies to this suit as it is not for establishment of a right for which any act or order of the Revenue Officer is required to be set aside. The order for partition was made in February 1915, possession was taken in May 1915, and the suit was brought on 14th April 1919. The suit is, therefore, not barred by limitation. It seems also to be clear that the relief claimed by the plaintiffs cannot fail on the ground that the other co-sharers in the estate were not made parties. The principal argument of the appellants is that plaintiffs being co-sharers in the estate, and as such parties to the partition proceedings, they cannot take up the position that there was a private partition, and so Section 99 of the Partition Act applies to the case. The learned vakil relies upon the case of Sharat Chunder

Burmon v. Hurgobindo Burmon [1879] 4 Cal. 510; Hridoy Nath Shaha v. Mobobutnessa Bibee [1893] 20 Cal. 285. It, is also urged that the equitable principle laid down in the case of Byjnath Lall v. Ramoodeen Chowdry [1836] 1 I.A. 106 should be applied to this case with the result that the defendants would get the lands free from the incumbrance of the leases in favour of the plaintiffs created by the former co-sharers, leaving the plaintiffs to claim any relief they thought fit against their lessors. This principle has been applied in the case of partition under the Estates Partition Act in Joy Sankar Gupta v. Bharat Chandra Bardhan [1899] 26 Cal. 434; Tarini Kanta Majumdar v. Ishnr Chandra Chakravarti [1913] 21 C.L.J. 603 and other cases. The respondents rely on the following cases in support of their contention that they are entitled to remain on the land. Juggessur Dayal Singh v. Bissessur Pershad 12 C.L.R. 281; Hridoy Nath Shaha's case [1893] 20 Cal. 285 already cited by the appellants; Janki Nath v. Kali Narain Roy [1910] 37 Cal. 662; Abdul Latif Meah v. Amanaddi Patwari [1911] 15 C.W.N. 426; and Nogendra Mohan Roy v. Pyari Mohan Saha [1916] 43 Cal. 103. It would be an unprofitable task to give in detail the result of the analysis and examination of each of these cases. The principle I gather from the (cases is this : where there has been a previous formal amicable partition of an estate among the co-sharers, and if one of them creates a tenure comprising the lands of his share, a subsequent partition by the Collector with the consent of the co-owners will not affect the interest of the tenure-holder who was no party to the partition proceedings. If, however, the tenure-holder is himself a co-owner and was a party to the partition proceedings he cannot be heard to say that there was a previous partition between the co-owners. Again, if a co-owner claims under a grant from all the co-owners with regard to some lands within the estate, his interest in those lands is not affected by the partition proceedings. In this case the plaintiffs being themselves co-owners cannot say that there had been a previous partition, nor have they been able to prove that there was such a partition. I must now dispose of the question arising u/s 99 of the Partition Act. That section provides that if a proprietor of an estate held in common tenancy has given his share or a portion thereof in patni, etc...such tenure etc., shall hold good as regards the lands finally allotted to the share of such proprietor, and only as to such lands. Now, in this case the proprietors in question did not give their share or any portion of it on lease, assuming that the estate was held in common tenancy. What they did was to create a tenure on specific lands in the estate. This section does not apply to such an action and the illustrations to the section support this view. In my opinion, therefore, the argument based on Section 99 of the Act is of no avail to the appellants. But I think where a proprietor creates an incumbrance on a portion of the joint estate, in case of a partition the equitable rule laid down in Byjnath Lall's case [1836] 1 I.A. 106 will come into operation, although Section 99 of the Act does not apply. A co-sharer may be in possession of a particular piece of land within the joint estate by virtue of his right as a joint owner, but by such possession the rights of the other co-owners in that piece of land are not necessarily affected. All co-owners continue as tenants in common with regard to the land, unless the co-owner in possession acquires a separate

right. Any person accepting an interest in that land from the co-sharer in possession of it must take it subject to the right of the others to enforce a partition and such incumbrancer cannot complain if the land is allotted to a co-sharer other than his grantor, and he is thereby deprived of his right to it. But the position is different if a co-owner holds a particular piece of land in severalty. A person is said to hold land in severalty if he holds it in his own right only, without any other person being joined or connected with him in point of interest. With regard to co-owners in a joint estate, an interest in severalty in a portion of the land within the joint estate in favour of one" of the co-owners can only be created by a formal agreement by all the co-owners by which possession is given to one of them. Such an agreement is referred to in Sections 76, 77 and 78 of the Estates Partition Act.

5. The Subordinate Judge has held that the lands were in the exclusive possession of plaintiffs' lessors. That alone does not give them an exclusive right to those lands. Although I have held that Section 99 of the Act does not apply it seems to me that the plaintiffs cannot succeed in their suit unless they can prove that by some formal arrangement agreed to by all the co-sharers including the defendants or their predecessors, the lessors of the plaintiffs were given the exclusive right to the lands in question. If they can prove that, the equitable rule I have stated above does not come to the aid of the defendants, as they have by their own act authorized the plaintiffs' lessors to deal with the lands. As the Subordinate Judge does not appear to have considered the case from this point of view and did not come to the proper findings, so as to enable us to decide the question the decree of the lower appellate Court must be set aside and the case sent back to that Court to decide on the evidence on the record whether the plaintiffs have succeeded in proving that their lessors hold the lands in their exclusive right as indicated above. If the fact is found in their favour a decree as made by the Subordinate Judge will be passed. The suit must fail if the finding is in the negative. As both parties made unfounded allegations and thereby unduly complicated the hearing in the Courts below they will bear their own costs in both the Courts. The appellants, however, will get the costs of this appeal from the respondents. The costs of further hearing will abide the final result.

Graham, J.

6. I agree.