
(1944) 06 CAL CK 0014
In the Calcutta High Court
Case No : Appeal No. 1118 of 1940

Bimalendu Roy

APPELLANT

Vs

Shebaita of Deity Gopal Deb and others

RESPONDENT

Date of Decision : 08-06-1944

Acts Referred:

Citation : (1944) 06 CAL CK 0014

Final Decision : Dismissed

Judgement

B. K. Mukherjea, J.—This appeal is on behalf of defendant 1, and it arises out of a suit commenced by the plaintiffs as sebaits of four deities, to wit, (1) Gopal Deb, (2) Krishna Gopal Thakur, (3) Radha Krishna Deb and (4) Lakshmi Janardan, for establishment of title of the deities to ten items of property described in the schedule to the plaint, and for permanent injunction restraining the defendants from interfering with their possession. There was also a prayer for confirmation of possession of the idols in respect of the lands in suit and in the alternative for recovery of possession if the plaintiffs were found to have been dispossessed.

2. There is not much controversy about the material facts which may be shortly stated as follows : The plaintiffs in their personal capacity together with defendant 1 were the joint owners of Touzi No. 204 of the Rangpur Collectorate. Plaintiff 1, Brojendra Kanta Roy Chowdhury, in his personal capacity had 1 anna 12 gandas share in the touzi; plaintiffs 2 and 3 Jyotish Chandra Roy Choudhury and Salil Kumar Roy Choudhury, had 8 annas 4 gandas share each, in the same capacity while Protiva Bala Debi Choudhurani, plaintiff 4, in her personal capacity was interested to the extent of 6 annas 8 gandas share in the touzi; the balance amounting to 1 anna 12 gandas belonged to defendant 1. In 1915 defendant 1 started a proceeding for partition of this touzi under the provisions of the Estates Partition Act, and this was registered as butwara case No. 1 of 1915-16. In course of these proceedings the Partition Deputy Collector made an order under S. 88, Estates Partition Act, on 11th July 1923, directing the inclusion of the ten

items of the disputed property in the partition as forming part of Touzi No. 204 of the Rangpur Collectorate. The present plaintiffs, who in their personal capacity were parties to the proceeding, objected to the order on the ground that they were rent free debuttar properties belonging to the idols mentioned above, and did not appertain to any revenue paying estate. These objections were rejected by the Partition Officer by his order dated 22nd March 1924. Eventually, the estate was partitioned and three separate touzis, to wit, Touzis Nos. 803, 804 and 805 were carved out of it and the residuary share remained as Touzi No. 204. Touzi No. 803 was allotted to Protiva Bala, Touzis Nos. 804 and 805 became the property of Salil Kumar and defendant 1 respectively; while the residuary estate was allotted to Brojendra and Jyotish. Of the disputed properties, which were included in the partition, items 1 to 5 were allotted to touzis Nos. 804 and 204, while properties 6 to 10 were made parts of Touzi No. 805. Possession of the different sahamas was delivered to the different parties on 29th March 1930. Brojendra, Jyotish and Salil had granted a putni in respect of their share to Maharaja Shrish Chandra Nandy, who was made defendant 2 in the suit.

3. The case of the plaintiffs deities is that the properties in suit were really revenue-free dabuttar properties which were held by them under ancient taidads and that the Collector had no jurisdiction to include them within Touzi No. 204 of the Rangpur Collectorate. Even after the final order was made in the partition case, the deities, it is said, continued to realise rents from the tenants of the suit lands. Cloud was, however, cast on their title by reason of the defendants having obtained certain rent decrees against certain tenants, and this led to the institution of the present suit. The suit was instituted on 28th March 1936. The Subordinate Judge who heard it gave a decree in favour of the plaintiffs. There were two appeals taken against this decision by the two defendants. They were heard together and the District Judge sent the case back on remand for fresh hearing after taking additional evidence. The suit was heard afresh and the Subordinate Judge decided it again in favour of the plaintiffs. The title of the deities was declared with respect to all the items of the property with the exception of two small blocks, and they were held entitled to recover possession from the defendants. Against this decision defendant 1 alone took an appeal to the Court of the District Judge of Rangpur and the appeal was confined to plots Nos. 6 to 10 only, in which defendant 1 was interested. The learned District Judge dismissed the appeal and affirmed the decision of the trial Judge. It is against this appellate decree that the present appeal has been filed by defendant 1.

4. Dr. Pal who appears in support of the appeal has contended before us, primarily, that there being an adverse order against the plaintiffs made by the Partition Officer under S. 88, Estates Partition Act, that order would stand, unless it was set aside by a suit as is contemplated by proviso (ii) to S. 119, Estates Partition Act; and such a suit has got to be instituted within one year from the date of the order under Art. 14, Limitation Act. As more than twelve years had already elapsed from the date of the order any suit under the proviso to S. 119,

Estates Partition Act, was now barred and no other remedy was open to the plaintiffs as laid down in the section itself. He has further argued that in any event with regard to the properties Nos. 9 and 10 no title could accrue to the plaintiffs on the basis of the taidad upon which they rested their claim. Now, S. 119, Estates Partition Act, provides inter alia that an order made under S. 88 which comes within Chap. 9 of the Act cannot be contested or set aside by suit in any Court or by any means other than those expressly provided in the Act. Proviso (ii) further lays down that any person who is aggrieved, by an order made under S. 88, may bring a suit in a Court of competent jurisdiction to modify or set aside such order. Under Art. 14, Limitation Act, the period of limitation provided for a suit to set aside an act or an order of an officer of Government in his official capacity is one year from the date of the act or order. The words "set aside" as used in Article 14, Limitation Act, clearly imply that the order complained of is binding on the plaintiffs unless and until it is set aside and the Article cannot have any application when it is not necessary for the plaintiff to set aside the act or order in order to obtain the relief which he claims. The question, therefore, narrows down to this-whether the plaintiffs were bound to set aside the order under S. 88, Estates Partition Act, before they could obtain any relief by way of declaration of title to or recovery of possession of the properties in suit. In our opinion the answer to this question should be given in the negative.

5. In the first place, the present plaintiffs were not parties to the partition proceedings at all. Section 88, Estates Partition Act, lays down : If a dispute or doubt is found to exist as to whether any land forms part of a parent estate, the Deputy Collector shall, after due notice to the parties interested inquire into the fact of possession and shall report his conclusions to the Collector, who will act in one of the various ways specified in the section. No notice, it seems, was served upon the deities in the present case, and as strangers to the proceedings they could not be affected in any manner by the decision which may be arrived at by the revenue authorities for the purpose of partition between the proprietors. It is an accident that some of the proprietors happened to be shebais of the deities as well, but they appeared before the Revenue Officer in the character of proprietors and not otherwise though they might have urged for exclusion of the properties from partition on the ground of their being revenue free properties belonging to certain deities. There was no real adjudication upon the claim of the deities and there is no order binding on them, which it is necessary to be set aside. The decision of this Court in 24 Cal. 149 Laloo Singh v. Purna Chander Banerjee ('97) 24 Cal. 149 is one of the earliest authorities on this point. In this case by reason of an order made under S. 116 of the old Estates Partition Act, which corresponds to S. 88 of the present Act, certain lands were included in the defendants' mouza and the plaintiffs who were dispossessed from these lands brought a suit for declaration of titles to, and recovery of possession of the same nearly eleven years after the order was made. It was held that Art. 14, Limitation Act, did not apply and that the plaintiffs were not bound to institute a suit before

they were actually dispossessed. The case in 29 Cal. 367 *Parbati Nath v. Rajmohun* ("02) 29 Cal. 367 upon which a considerable stress is laid by Dr. Pal is, in our opinion, distinguishable. The plaintiff in that case, who was a party to the partition proceeding wanted certain lands to be excluded on the ground that they belonged exclusively to him in howla right. This objection was overruled and he brought a suit after more than one year had elapsed from the date of the order. It was held that the objection preferred by him must be taken to have been raised in the capacity of a howladar and as the suit was filed by him in the same capacity it was barred under Art. 14, Limitation Act.

6. In the present case the cosharers did not claim title to the disputed lands in another right, but contended that they belonged to other persons altogether, namely, the deities. We may point out that the decision in 29 Cal. 367 *Parbati Nath v. Rajmohun* ("02) 29 Cal. 367 is hardly reconcilable with the view that has been taken in a long series of cases since then. It has been held by this Court in quite a large number of cases that the Collector exercising his jurisdiction under the Estates Partition Act is not endowed with any authority to decide any question of title which might be raised by a party interested in the proceedings. Section 88 only allows the Deputy Collector to inquire into the question of possession and nothing else. The right which a person has under the general law of bringing a suit in civil Court for declaration of title is not in any way affected or curtailed by the Estates Partition Act, and with reference to such suits for declaration of title a co-proprietor is in exactly the same position as a stranger: vide 37 Cal. 662 *Janaki Nath v. Kali Narain Roy* ("10) 87 Cal. 662 : 7 I. C. 881, 52 C. L. J. 247 *Kedar Nath v. Naresh Chandra* ("31) 18 A. I. R. 1931 Cal. 29 : 130 I. C. 232 : 52 C. L. J. 247, 33 C.W.N. 1219 *Mt. Matangini Ghose and Others Vs. Mt. Monmohini Ghose and Others*, *Sasi Kanta Acharjee v. Rajendra Kumar* ("35) 22 A. I. R. 1935 Cal. 729 : 40 C. W. N. 112: 159 I. C. 681. The same view has been taken by the Patna High Court in 6 Pat. 73 *Ajodhya Prosad v. Ramkhelawan Singh* ("26) 13 A. I. R. 1926 Pat. 421 : 6 Pat. 73 : 96 I. C. 632. The position, therefore, is that S.119, Estates Partition Act, excludes jurisdiction of civil Courts only in matters which relate to the mode or determination of Government revenue or to the details of partition and allotment, and it does not oust the jurisdiction of the Courts in matters involving questions of title. In the case before us the plaintiffs did not seek to challenge the propriety of the allotments in any way; nor has it been contended before us that any question of Government revenue is involved in this case. The case of the plaintiffs simply is that the lands in suit are outside Touzi No. 204 and consequently they cannot be partitioned amongst the proprietors of the said touzi. In our opinion no order made by the Partition Deputy Collector in this connection is binding on the deities, and consequently they are not obliged to have it set aside.

7. Lastly, we agree with Mr. Das that apart from any question of title amongst the parties inter se, as the Courts below have held concurrently that the lands in dispute are revenue-free properties which did not appertain to any revenue paying estate at all, the Partition Collector had no jurisdiction to partition it under

the Estates Partition Act. The order made under S. 88, Estates Partition Act is, therefore, a nullity out and out and it can be ignored and need not be set aside by any suit or proceeding. Our conclusion, therefore, is that the suit as framed is quite competent and it is not barred under Art. 14, Limitation Act.

8. The other ground raised by Dr. Pal is absolutely without any substance. It is contended that the taidad under which the plaintiffs claim title to the properties Nos. 9 and 10 of the plaint schedule shows that the grant was in favour of a deity named Lakshmi Narayan, but Lakshmi Narayan does not figure as a plaintiff in this suit. No such contention was raised at any stage of the suit or proceeding and the finding of the Courts below is that the income of the property has been appropriated all along for the seba and worship of the plaintiffs deities. Admittedly, Lakshmi Janardan is one of the plaintiffs in this suit and had the question been raised in the proper form it might have been proved by the plaintiffs that Lakshmi Janardan is the same as Lakshmi Narayan, as mentioned in the taidad. In our opinion the appeal fails and is dismissed with costs.

Akram J.

10. I agree.