
(1910) 08 CAL CK 0021
In the Calcutta High Court

Indu Bhushan Acharya and Others

APPELLANT

Vs

Sailaja Sundari Barmanya

RESPONDENT

Date of Decision : 06-08-1910

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151

Citation : 7 Ind. Cas. 382

Hon'ble Judges : Vincent, J;Richardson, J

Bench : Division Bench

Judgement

Richardson, J.—The question for consideration on this appeal is whether the decree of the learned District Judge, so far as it set aside the first Court's preliminary decree for partition and the final decree confirming the partition effected by a Commissioner, and so far as it remands the suit for the purpose of giving the plaintiffs an opportunity to bring the heirs of Madhu Sundari on the record as parties, can be supported.

2. As to the facts, Sailaja Sundari, the defendant in the suit and respondent before us, and the deceased Madhu Sundari were co-proprietors in equal shares of the four jamas to which the suit relates. The plaintiffs, (the appellants before us) sue as tenants under the heirs of Madhu Sundari of the half share which belonged to her.

3. The history of the plaintiff's title as tenants is as follows. It appears that one Kali Nath Dutta, who was at one time the joint Manager of the two ladies, purchased the four jamas in his own name at a sale held in execution of a money-decree against the then tenants and was thereupon treated by Madhu Sundari as the tenant of the jamas. Subsequently Madhu Sundari obtained a decree against him for her share of the rent, and in execution of that decree the right, title and interest of Kali Nath Dutta in the jamas was sold at auction and purchased by Uttama Sundary, the mother and predecessor of the plaintiffs. Uttama Sundari was unable to obtain possession and instituted a suit to which Madhu Sundari and Sailaja Sundari were with others made defendants. In that suit there was a

controversy raised by Sailaja Sundari as to the character in which Kali Nath Dutta had purchased the jamas, whether as benamdar for herself and Madhu Sundari or on his own behalf. In the result the suit was dismissed as against Sailaja Sundari but as against Madhu Sundari it was ordered that Uttama Sundari should obtain possession of a half share of the jamas as Madhu Sundari's tenant. The order to this effect in the judgment of the District Judge (Mr. Webster) before whom the suit came in appeal is quite clear.

4. As the jamas had not been partitioned between Madhu Sundari and Sailaja Sundari, the effect of the decree was to entitle Uttama Sundari to possession as tenant of a half share of the jamas jointly with Sailaja Sundari entitled as proprietor to possession of the other half. This is clear from paragraph 3 of the plaint in the present suit, which is a suit for partition, and a natural sequel to the former suit.

5. I have given the details in order to show what the precise position is. The plaintiffs are suing for the partition of four jamas to a half share of which they are entitled as tenants under the owners of a half share of the proprietary title, viz., the heirs of Madhu Sundari. The title to possession of the remaining half share of the jamas is in the owner of the remaining half share of the proprietary title, viz., Sailaji Sundari, and the proprietors, as between themselves, are undivided in respect of the jamas. The suit has been brought against Sailaja Sundari alone.

6. The judgment and decree of the learned District Judge, which the plaintiffs now seek to impugn, rest on the basis that the heirs of Madhu Sundari are, as the defendant has from the first contended, necessary parties to the suit and the only question which has been argued before us is whether the District Judge is right or wrong on this point. Now so far as the CPC is concerned, it may be that the express provisions of the Code on the subject do not go beyond giving the Court ample powers to add, as parties to a suit, persons who ought to be parties or whose presence is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in it. Beyond giving those powers, it may be that the Code affords little or no encouragement to the dismissal of a suit merely on the ground of a but from the nature of a suit or the particular law or rules applicable to its subject-matter, it may follow that certain persons are not merely proper parties in the sense that it is convenient that they should be parties but in the sense that in their absence the suit cannot be maintained at all. In the present suit I concur with the District Judge that the heirs of Madhu Sundari are necessary parties in the sense I have indicated. I think that it would have been open to the District Judge, as he indeed recognized, to go even further than he did and to dismiss the suit. He did not take that course because, as he says, "it was on the finding of the lower Court that the suit proceeded with the defect unremedied." The true position appears in the answer to the question, what is the right which the plaintiffs are seeking to establish ? The right is a right not only as against the defendant but also as

against their own landlords, the heirs of Madhu Sundari, to be put in possession of the half share belonging to the latter or rather the half share which would belong to the latter on a partition of the proprietary title. How can that half share be defined except in a suit to which the proprietors are all parties? It is hardly necessary to refer to the many authorities which declare that all the persons interested are necessary parties to a suit for partition, but reference may be made to the case of Chudasama v. Partap Sang 28 B. 209 : 5 Bom.L.R. 937, in which two cases of this Court are cited. It is idle, in my opinion, for the plaintiffs to contend that the suit is against the defendant merely as co-tenant with them of the four jamas. If the defendant can be considered a tenant at all, she can only be regarded for the purposes of the present suit as a tenant of the half share which would belong to herself as co-proprietor on a partition of the proprietary title, just as the plaintiffs must be regarded as tenants of the half share which would on partition belong to the heirs of Madhu Sundari, and what these half shares are can only be defined in a suit to which all the co-proprietors are parties. What has to be partitioned is the land and for the purpose in view, the tenant right must follow the proprietary right and cannot be abstracted from it and dealt with separately. The case of Parbati Churn Deb v. Ainuddeen 7 C. 577 : 9 C.L.R. 170 appears to go even further than it is necessary to go for the purposes of the present case.

7. Again if the heirs of Madhu Sundari are not necessary parties, they are certainly proper parties to the suit because their presence is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in it. If the decrees of the first Court had remained intact, it would have been open to Madhu Sundari's heirs during the continuance of the plaintiffs' tenancy to dispute the partition on the ground that it prejudiced their interests in respect of their security for their rent. If we suppose the determination of the tenancy some way or other, the defendant might equally have been exposed to further litigation in regard to the particular lands of which she and the heirs of Madhu Sundari should have direct possession. It may be said that in the event of the tenancy coming to an end, the proprietors would again become joint proprietors of the whole. But Sailaja Sundari might then prefer to retain direct possession of her half share and I do not see why any difficulties in the way of her doing so should not be forestalled by making Madhu Sundari's heirs parties to this suit or it may be that by that time Sailaja Sundari will have put a tenant on her half share. Further it would appear that the learned District Judge has left the question open whether the plaintiffs are entitled to ask for a partition. It would seem that such a question can only be well decided in a suit to which Madhu Sundari's heirs are parties. In this connection I should like to say expressly that if there is any question of this kind between the parties, though it is not easy to see how the question can now arise, nothing in this judgment will affect the decision upon it one way or the other. The conduct of the proprietors in regard to these jamas may preclude any of them from objecting, as against the plaintiffs, that a partition of the jamas cannot take place between

them without a partition of the whole estate, but that question is not before us, and it is also unnecessary for us to consider such cases as those of *Radha Kanta Shaha v. Bipro Das Roy* 1 C.L.J. 40 and *Upendra v. Mahomed* 12 C.W.N. 670.

8. For the reasons stated, I am unable in the circumstances to find that the District Judge has committed any error of law in the respect in which his judgment and decree have been attacked. If error there be, he had been too indulgent to the plaintiffs in not dismissing the suit.

9. I may add that it was not contended that the District Judge had no power under the CPC to remand the suit and that, in my opinion, such an objection would have little merit to support it. The decision of the first Court that the heirs of Madhu Sundari were not necessary parties was a decision on a preliminary point and if the decision was wrong the only alternatives open to the District Judge were to dismiss the suit or to allow the plaintiffs to withdraw it with liberty to bring a fresh suit or to remand it. He has told us why he did not take the first course and in point of substance there is little to choose between the two. Other. In this connection reference may be made to the case of *Habib Bakhsh v. Baldeo Prasad* 23 A. 167 : (1901) A.W.N. 39, decided under the old Code, and to Section 151 of the new Code and Mr. Justice Woodroffe's note to Order XLI, Rule 23 at page 1262 of his book.

10. In my opinion the appeal should be dismissed with costs and the appellants should pay the respondent's costs.

11. The cross-objections filed on behalf of the respondent were not pressed and I propose to dismiss them without costs.

Vincent, J.

12. I have read the judgment of my learned colleague and in the circumstances I agree that the appeal and cross-appeal should be dismissed. I am doubtful if Madhu Sundari or her heirs are actually necessary parties to the suit but it is obvious that it is very expedient that they should be parties and that the point in dispute should be decided once for all in the presence of the various persons interested in this land.