
(1935) 07 CAL CK 0049
In the Calcutta High Court

Jadu Nath Guha Roy and Others

APPELLANT

Vs

Kasiswar Guha Roy and Others

RESPONDENT

Date of Decision : 30-07-1935

Acts Referred:

Limitation Act, 1963 — Section 18

Citation : AIR 1935 Cal 779

Hon'ble Judges : R.C. Mitter, J

Bench : Division Bench

Judgement

R.C. Mitter, J.—The facts on which the controversy in this appeal rests are very simple and may be stated as follows:

2. Kalinath Guha, the father of defendants 1 to 4 and husband of defendant 5 Dinabandhu Guha, Kasiswar Guha, the plaintiff, Sulata Sundari Chaudhurani, widow of Biseswara Guha and Durga Mohan Guha, were the joint proprietors of certain properties. On 8th September 1912 the said persons partitioned their properties by a registered deed. In Clause 19 of the said deed it is provided that:

A co-sharer shall not be able to purchase in his own name or in benami any ryoti or under-ryoti holding or any portion thereof situate within the allotment of another. If he does the person in whose allotment it is situate shall be entitled to take khas possession, and the purchaser or his benamidar shall not be entitled to raise any objection; if he does it will be disregarded.

3. The said clause as also other clauses of the partition deed are expressly made binding not only on the executants of the deed but on their heirs and legal representatives.

4. A ryoti holding going by the name of Bam Kanai Sil was within the plaintiff's allotment. In contravention of the terms of the said clause defendants 1 to 4, the heirs of Kali Nath Guha, purchased on 5th June 1916, 15 annas share of the said ryoti holding from Kalidas Sil and Hara Sundary Dassi, the ryots in the benami of one Rajendra Narayan Chowdhury. On the same date Kalidas Sil,

defendant 6, took an osat ryoti from the ostensible purchaser Rajendra Narayan Chowdhury and continued in possession as before. This contrivance was adopted by defendants 1 to 4 in order to conceal from the plaintiff that the purchase was really by them and the cloak of secrecy was maintained so successfully for a number of years that even Kalidas Sil could not know that the real purchasers were defendants 1 to 4 and that they were his real landlords. Defendants 1 to 4 subsequently made a gift of the same to their mother, defendant 5.

5. The plaintiff came to Court with the allegation that though he knew of the sale of the ryoti holding by Kalidas Sil and Hara Sundary Dassi to Rajendra Narayan Choudhury he did not know that Rajendra Narayan Chowdhury was the benamidar of defendants 1 to 4, and that he was kept away from knowing the real nature of the said purchase by the fraud of defendants 1 to 4 and that he came for the first time to know that defendants 1 to 4 were the real purchasers in March 1928. On the said allegations he instituted this suit on 11th February 1930 and claimed possession on the basis of Clause 19 of the partition deed. Many defences were put forward in the lower Courts but all were overruled. The Court of first instance declared that defendants 1 to 5 did not acquire any title to the ryoti-holding Mudafat Ram Kanai Sil, and further held that the plaintiff was entitled to recover rent of the said ryoti holding, meaning, obviously, from defendant 6. The defendants filed an appeal before the learned District Judge. At the time of the argument a plea was raised by the appellants that the plaint had been insufficiently stamped. Thereupon the plaintiff put in a petition on 23rd August 1932 stating that he did not want khas possession and would be satisfied if he is allowed to get rent from defendant 6; that is he proceeded upon the footing that by reason of Clause 19 of the partition deed the 15? annas of the ryoti holding purchased by defendants 1 to 4 should be wiped away. The said prayer was allowed by Order No. 13 passed by the learned District Judge on the same date. The learned District Judge dismissed the appeal. In his decree he declared that the plaintiff was entitled to get rent from defendant 6, the rent which defendant 6 stipulated to pay by the under ryoti kabuliat which he had executed in favour of Rajendra Narayan Chowdhury on 5th June 1916.

6. Mr. Roy appearing for the principal defendants appellants has raised a number of points before me. Two of them require serious consideration, but the rest are of no substance. The two substantial contentions are that (a) the suit is barred by limitation, and (b) Clause 19 of the partition deed violates the rule against perpetuities and so unenforceable. I will deal with these points last of all.

7. The other points raised by him are: (i) The purchase being not of the whole of the ryoti holding Mudafat Ram Kanai Sil, Clause 19 of the partition deed does not apply; (ii) Clause 19 of the partition deed does not bind heirs and assigns of the executants; (iii) there being no prayer for recovery of rent, and the only prayer being for possession, the decree passed is erroneous, especially when the plaintiff challenged in his plaint the osat ryoti created by Rajendra Narayan Choudhury in favour of defendant 6; (iv) no decree for rent could be passed

against defendant 6 in this suit, as a former suit for rent brought by the plaintiff against defendant 6 had been dismissed on the finding that the plaintiff had dispossessed defendant 6 from a portion of the ryoti holding; (v) that the plaintiff has ratified the purchase of defendants 1 to 4 in the course of an adjustment of accounts between him and the said defendants in December 1923; (vi) the plaintiff having himself violated Clause 19 of the partition deed by purchasing ryoti and osat ryoti holdings in the shaham of Kali Nath Guha is not entitled to any relief.

8. Some of these contentions are new ones, for the first time raised here, and some proceed upon misconception of facts, but all have the merit of having no substance. The first and the second contentions are against the express provisions of the partition deed, the provisions which I have mentioned above, and points Nos. 4 and 5 are absolutely new points. Apart from the fact that points Nos. 4 and 5 involve investigation of facts, and so cannot be allowed to be urged for the first time in second appeal, there are no merits in the same. The Subordinate Judge has found that at the time of the adjustment, the fact that Rajendra Narayan Chowdhury was the benamidar was not disclosed by defendants 1 and 4, a finding not touched or reversed by the learned District Judge. How on such a finding a case of ratification can arise I fail to see. Nor can I see how point No. 4 arises at all. This suit is not a suit for recovery of rent of the ryoti holding from defendant 6. By the application which the plaintiff made before the District Judge on 23rd August 1932, the substance of which I have stated above, the plaintiff abandoned his prayer for khas possession, but the effect of his petition and the decree which he has obtained from the District Judge is still a decree for possession against defendants 1 to 5. He has obtained a decree for possession through defendant 6 who is to be his direct tenant by reason of the declaration given by the District Judge in his favour. Surely it was open to the plaintiff during the progress of the suit to withdraw his challenge to defendant 6, accept him as a tenant of his and recover possession from defendants 1 to 5 through the said defendant 6. For these reasons I overrule the first five points raised by Mr. Roy.

9. Regarding the sixth point Mr. Roy invokes in his aid the maxim that he who seeks equity must come with clean hands. In England the said maxim has been confined strictly to cases where the plaintiff seeks equitable reliefs. If the plaintiff has purchased raiyati or under-raiyati holding in the shaham of Kalinath Guha, the defendants can sue him if in time, but that is in my judgment no defence to this action. I now pass on to the two substantial points involved in the appeal, namely: (a) if the suit is barred by limitation, and (b) is Clause 19 of the partition deed an illegal clause, by reason of its violating the rule against perpetuities?

10. Regarding the point of limitation Mr. Roy contends, firstly, that Article 113 is the article applicable; secondly, Article 120, and, thirdly, if Article 143 is applicable, which is the article applied by the Courts below, limitation runs from

date of the conveyance by Kalidas Sil and Hara Sundary Dassi in favour of Rajendra Narayan Choudhury, there being no scope on the evidence in the case for the application of Section 18, Lim. Act. In my judgment the suit being not a suit for specific performance of a contract there is no scope for the application of Article 113. The plaintiff does not require an act of the defendants to perfect his title; all that he asks for is possession through the help of Court. The competition is between Article 120 and Article 143, and if Article 143 is the proper article to apply there can be no scope for the application of Article 120.

11. In my judgment Article 143 applies to this case. Mr. Roy contends that that article is applicable only to suits between landlord and tenant based on forfeiture and in support of his contention relies upon some observations in *Bhairab Chandra Naskar v. Kadam Bewa* (1913) 22 IC 28 and *Abinash Chandra Ghosh v. Narahari Mather*, 1930 Cal 165. Article 143 is in general terms. By its terms it applies to all suits for possession, when the plaintiff becomes entitled to possession by reason of any forfeiture or breach of condition. A tenancy can be forfeited on the breach of a covenant in a lease providing in such cases for reentry, or where the title of the landlord is repudiated, but other interest owned by persons other than tenants can be forfeited by rules of law or by reason of breach of express conditions, and a person may also be entitled to possession on certain conditions being not performed. The forfeiture of an estate owned by a Hindu widow on remarriage is an instance. This article has been applied to such a case in other Courts although the point is not settled in this Court: *Tilottoma Dassi v. Madhu Sudan Giri* 1928 Cal 714. It has also been applied to cases coming under the provisions of Section 119, T.P. Act, on the footing that by that section a condition is imposed by law to exchanges of property for mutual return if one party is deprived of what he got by exchange: *Raja Gopalam v. Kasivasi Somasundara Thambiran* (1907) 30 Mad 316 and *Steenivasa Aiyangar v. Johnsa Rowther* 1920 Mad 812. It has also been applied to a case where a purchaser agreed to put the vendor in possession of a part of the property purchased on his failure to pay the vendor certain annual fees: *Bhojraj v. Gulshan Ali* (1882) 4 All 493. In *Mt. Bebea Sahodra v. Roy Jung Bahadur* (1862) 8 Cal 224 as a result of a family settlement a Hindu widow retained half share of certain villages which belonged to her husband, and her cosharer retained the remaining half share. The widow agreed not to alienate the properties which were to go over to her cosharer at her death. The widow alienated four annas share in some of the villages and on her death the suit was brought by her cosharer to recover the said share of the said villages from the transferee. The suit was brought beyond 12 years of the transfer but within 12 years of the widow's death. Sir Arthur Hobhouse on a construction of the covenant held that it did not prevent an alienating by the widow of her life estate, and there were no words of forfeiture there and so there was no forfeiture on the transfer being effected. In this view of the matter Article 144, Act 9 of 1871, which corresponds to Article 143 of the present Act, was not applied, but he held that time ran from his widow's death. If Article 144, Act 9 of 1871, had been applicable only to suits between landlord

and tenant Sir Arthur Hob-house would have said so and there would have been no necessity to construe the covenant in question and to hold that Article 144 of that Act was inapplicable because of the construction so put upon it. When a particular article is intended to be made applicable to suits between landlord and tenant only it is stated to be so in express terms in the Limitation Act (Art, 139).

12. The cases cited by Mr, Roy do not support him. In both the cases cited the suit was brought on the footing that there was a tenancy and the same had been forfeited. It was held that Article 143 was not applicable as there was at no time any relationship of landlord and tenant. If that was so, there was or could be no question of forfeiture. I accordingly hold that Article 143 applies to this case and time ran from the date of the purchase by Rajendra Narayan Choudhury, which being beyond 12 years of the institution of the suit, it is prima facie barred by limitation, unless the case comes within Section 18, Lim. Act. The finding of the Courts below is that by contrivances adopted by defendants 1 to 4 the plaintiff was kept from knowledge of his right to sue. The methods adopted were so effective that even Kalidas Sil did not even up to the year 1919 know that defendants 1 to 4 were his landlords in respect of his osat raiyati. These findings of the Courts below, in my judgment, are good findings and defendants 1 to 4 cannot in my judgment succeed by simply showing that by diligent inquiries the plaintiff could have known of the real nature of Rajendra Narayan's purchase much earlier. In *Biman Chandra Dutt v. Promotha Nath Ghosh* 1922 Cal 157 Sir Ashutosh Mookherjee has pointed out that the terms of Section 18, Lim. Act are materially different from Section 26, Real Property Limitation Act (3 and 4 Will. IV, C. 27) and that when a plaintiff has established that by fraud of the defendant he had been kept from the knowledge of his right to sue the burden is shifted on the defendant to show that the plaintiff had knowledge of the transaction impeached beyond the period of limitation. If the defendant only asserts or proves that the plaintiff had some clues and hints which if vigorously and acutely followed up might have led to a complete knowledge of his fraud, he does not discharge the burden shifted on to him, though under the English Act, he may have done so for these reasons having regard to the finding of the lower appellate Court that the plaintiff first came to know in the year 1923 that the purchase was really by defendants 1 to 4 and that he was prevented by fraud of defendants 1 to 4 from knowing the same before, I do hold that the suit is in time. Regarding the point that Clause 19 of the partition deed violates the rule against perpetuities I am of opinion that it is not a good point. That clause did not create any right in property in favour of the co-sharers of any of them. The raiyats and under-raiyats holding under them could transfer their interest to any body, only rights were reserved to a quantum co-sharer to disregard purchase of such rights by his other co-sharers who got allotments elsewhere. The case is in my judgment governed by the principles formulated by Greaves and Mukherji, JJ., in *Jogesh Chandra Roy v. Asaba Khatoon* 1927 Cal 41. The clause in question cannot be construed as a clause for preemption and so *Kala Chand Mukherjee v. Jatindra Mohan Banerjee* 1929 Cal 263 does not apply. I accordingly affirm the

judgment and decree of the District Judge and dismiss the appeal with costs. Leave to appeal under the Letters Patent asked for is granted.