
(1922) 08 CAL CK 0070
In the Calcutta High Court

Kailas Chandra Nag and Others

APPELLANT

Vs

Bijay Chandra Nag and Others

RESPONDENT

Date of Decision : 29-08-1922

Acts Referred:

Citation : 72 Ind. Cas. 680

Hon'ble Judges : Cuming, J; Asutosh Mookerjee, J

Bench : Division Bench

Judgement

1. These three appeals are directed against the preliminary decree in a suit for partition of joint property. The subject-matter of the litigation is described in the plaint as Chak Nagergati; the plaintiffs assert that this is also known as Rajballavpore, but is a revenue-free Ukhraj and does not appertain to sikmi taluk Rajballavpore within Zemindaris bearing Touzi Nos. 4082, 138, 130 and 141 of the Collectorate of Mymensingh. The disputed block of land which covers about 75 bighas is said to have been formerly the Khanabari of four brothers, Krishnaprasad Nag, Debiprasad Nag, Kalikaprasad Nag and Sambhunath Nag, sons of one Aditya Ram Nag. Defendants Nos. 2 to 4 represent the branch of Krishnaprasad Nag and defendants Nos. 5 to 7 represent the branch of Shambhunath Nag. The plaintiffs claim 8-annas shaie in the khanabari, 4-annas as representing the branch of Debiprasad Nag and 4-annas as acquired by adverse possession against the representatives of Kalikaprasad Nag. According to the plaintiffs, the khanabari included three kinds of lands, namely, first, the entire Nagergathi lekhras; secondly, brahmattar lands obtained in exchange for a parcel known as Haruar Bhita; and, thirdly, other lands not specifically defined. Whether or not the third class was left undefined on purpose, it is plain that this has created considerable embarrassment in the investigation of the claim. The four brothers previously mentioned separated in or about the year 1781; but it is alleged that the homestead was never formally divided; though the co-owners have occupied different portions separately for convenience for over a century and have built houses thereon. The plaintiffs, consequently, seek partition of the lands which were so left joint. Their claim, it is conceded, is not supported by the

Record-of-Rights which docs not show the lands as joint property or as lekhraj. This, however, admittedly does not debar an enquiry into the true character of the lands. The defendants deny in substance that the lands are joint lekhraj, and they urge that the claim is barred by limitation. They also raise questions as to acquisition of title by adverse possession and challenge the validity of the title of the father of the plaintiff as the adopted son of Gangadhar Nag, the son of Debiparsad Nag. Questions were further raised as to the validity of conveyances relied upon by some of the defendants. A Commissioner was appointed to hold a local enquiry and to prepare a map with special reference to a chitta made by Rai Bahadur Tarachand Ghose, a Deputy Collector, in connection with resumption proceedings which took place in 1842. The Subordinate Judge came to the conclusion that the case put forward by each side was only partially true, and that plots Nos. 2, 3, 6 and 7 of the chitta of Tarachand Ghose as shown in the map of the Pleader Commissioner, were still joint properties of the parties, liable to be partitioned at their instance. He has further found that the share of the plaintiffs was 6-annas, that of the defendants Nos. 2 to 4, 4-annas, that of the defendants Nos. 5 to 7, 4-annas, and that of the defendant No. 8 ka, 2-annas. The Subordinate Judge has accordingly made a preliminary decree for partition of the four plots and has dismissed the suit with regard to the rest of the lands which are not joint properties. Three appeal have been preferred against this decree, namely, Appeal No. 2 by defendant No. 3, Appeal No. 17 by defendants Nos. 5, 6 and 7, and Appeal No. 30 by defendant No. 8 ka. There were cross-objections in some of these cases, but they have not been pressed. We are consequently not called upon to consider, whether the plaintiffs should have been granted further relief; we have only to examine, whether the decree made in their favour can be maintained.

2. The primary question for consideration is, whether the plaintiffs have established their title to the disputed lands or to any portion thereof as joint property. The earliest document directly relevant to the point is a list of sanads of lekhraj lands, filed on the nth March 1796, presumably under Regulation XI/VIII of 1793, which shows the existence of 7 kurs or 21 bighas of lekhraj in Chak Nageiganthi under a sanad dated the 28th June, 1766. This stood in the name of Krishnaprasad Nag one of the four brothers already mentioned. This is not even prima facie evidence that the lekhraj was obtained by Krishnaprasad Nag, for himself, from Suryanarayan Chaudhuri and Kritiparayan Chaudhuri, because at the time of acquisition the family was still joint: *Luximon v. Mullar* (1831) 2 Knapp 60 : 5 W.R.P.C. 67 : 1 Norton L.C. 169 : 12 E.R. 401; *Prit Koer v. Mahadeo Per shad Singh* 21 I.A. 134 : 22 C. 85 : 6 Sar. P.C.J. 485 : 11 Ind. Dec. 59 ; *Dhurum Das Pandey v. Shama Soondri Dibiah* 3 M.I.A. 229 : 6 W.R.P.C. 43 : 1 Suth. P.C.J. 147 : 1 Sar. P.C.J. 271 : 18 E.R. 484; *Rampershad Tewarry v. Sheochurn Doss* 10 M.I.A. 490 at p. 505 : 2 Sar. P.C.J. 177 : 19 E.R. 1058; *Umrithnath Chowdhry v. Goureenaih Chowdhry* 13 M.I.A. 542 : 15 W.R.P.C. 10 : 6 B.L.R. 232 : 2 Suth P.C.J. 381 : 2 Sar. P.C.J. 618 : 20 E.R. 653. But as, after acquisition, there was a partition among the members of the family in 1781,

there is no presumption with regard to this or any other property, that it was excluded from the partition; and the burden lies upon him who alleges exclusion, to establish his assertion: *Narayan v. Nana* 7 B.H.C.R. 153. The plaintiff has sought to discharge this onus by evidence of a later date which has an important bearing on the matter. We have papers of a litigation which took place in 1825 between the predecessors of the parties to this suit. The judgments of the Trial Court and the Appellate Court, but not the pleadings, are available. The substance of the pleadings is, however, narrated in the judgments, and they furnish evidence of the allegations made by the parties on that occasion; see *Parbutty Dassi v. Purno Chunder Singh* 9 C. 586 : 4 Ind. Dec. 1038; *Bhaya Dirguj v. Pande Fateh Bahadoor Ram* 3 C.L.J. 521; *Byathamma v. Avulla* 15 M. 19 : 5 Ind. Dec. 363; *Thama v. Kondar* 15 M. 378 : 5 Ind. Dec. 616; *Krishnasami Ayyangar v. Rajagopala Ayyangar* 18 M. 73 : 4 M.L.J. 212 : 6 Ind. Dec. 400; *Malcomson v. O'Dea* (1863) 10 H.L.C. 593 : 9 Jur. 1135 : 9 L.T. 93 : 12 W.R. 178 : 11 E.R. 1155 : 138 R.R. 317; *Lyell v. Kennedy* (1889) 14 A.C. 437 : 59 L.J.Q.B. 268 : 62 L.T. 77 : 38 W.R. 353 and *Neill v. Devonshire* (1883) 8 A.C. 135 : 31 W.R. 622. The summary of the pleadings, as given in the judgments, shows that the dispute related to the piece of land which the parties got in exchange for Haruar Bhita and that they admitted that the main part of the *khanabari*, that is, where their residences were built, appertained to *lekhraj Nagergan-thi*. The importance of the judgments lies in the fact that it enables us to locate the *lekhraj Nagerganthi*, with some approach to certainty, from the admission made by the parties to that suit. The judgment of the Appellate Court shows that the *khanabari* was alleged to be covered by the sanad in the name of *Krishnaprasad Nag*, dated 28th June 1766, which was distinct from the *Adityaram taluk* under sanad dated 19th June 1748. It is not possible, however, from the summary of the pleadings in these judgments alone, to locate the lands, because no mention is made of the boundaries of the disputed *lekhraj*. For this purpose, the Subordinate Judge has relied upon the resumption proceedings of 1842, where reference is made to the map mentioned in the list of sanads dated 19th March 1796. A *chitta* was made in that proceeding by the *Amin Biswanath Datta*, on the 30th May 1840, which showed *Mouxa Nagerganthi* as distinct from *Mouxa Rajballavpore*. The matter was referred to the Deputy Collector *Tarachand Ghose*, and his *robokari* dated 23rd April 1842, is on the record. The Deputy Collector negatived the claim for resumption on the ground that the area was less than 50 bighas, and this view was, no doubt, not accepted by the superior Revenue Authorities. But this does not take away from the value of his investigation. He measured the disputed lands in the presence of all the parties concerned, and he came to the conclusion that, out of ten plots, only six plots, namely, Nos. 1, 2, 3, 5, 6 and 7 which measured about 13 kurs and odd, that is, nearly 406 bighas, constituted *lekhraj Nagerganthi*. The original area of the *lekhraj* was, as we have seen, seven kurs or 21 bighas, and the *lekhrajdars* had evidently annexed other lands not comprised in the grant. They naturally denied the *lekhraj* and alleged that the lands belonged to their other taluks, so as to escape resumption and assessment of revenue. The representatives of the

parties admitted their joint possession in respect of plott Nos. 2, 3, 6, 7, though not in respect of Nos. 1, 4, 5, 8. The Subordinate Judge has, from this concluded that these were not lekhras or joint property. We pass on next to the proceedings of the Thak Survey of 1856. The evidence does not establish conclusively the presence of the Nags at the time of the Survey, though the very fact of previous disputes and the resumption proceedings would render their absence highly improbable. Thak Chak No. 27 covers the lands, which are treated as comprised in the shiknti taluks of the Nags. This could not be correct, and it is significant that the very existence of the resumption proceedings of 1842 was suppressed; in the face of the Taidad of nth March, 1796, and of the admissions made in the suit of 1825, it is difficult to see how the entry could have been made in the form it took, if the resumption proceedings had not been kept in the back ground. In the suit of 1825, the main homestead portion, but not the fringe area, was admitted to be joint, though the parties were in occupation of different portions. As explained by this Court in *Kulada Prasad Tewary v. Sadhu Charan* 27 Ind. Cas. 412 : 20 C.L.J. 32 and *Anand Kisore Chowdhury v. Daiji Thakurain* 28 Ind. Cas. 580 : 21 C.L.J. 296 separate possession is not conclusive evidence of partition and must be interpreted in the light of all the circumstances of the case. In our opinion, the Subordinate Judge has correctly held that the disputed land is not joint property in its entirety and that plots Nos. 2, 3, 6, 7 alone, of the chitta of Tarachand Ghose, constitute joint property still capable of partition. The plaintiffs cannot successfully claim partition of the remaining plots, and the appeal by the third defendant must also fail.

3. The fifth and seventh defendants, who have preferred a separate appeal, claim, in addition to their 4-annas share, specific lands based on title by compromise with a previous owner; they further challenge the validity of the adoption of Gurucharan Nag, the father of the plaintiffs. These allegations are entirely unfounded. The adoption took place nearly a century ago, in or about the year 1823. The person, whose adoption is challenged, enjoyed the status of an adopted son all his life, but at this distance of time direct evidence cannot be expected. No doubt, as stated by Lord Atkinson in *Kishori Lal v. Chunni Lal* 1 Ind. Cas. 128 : 36 I.A. 9 : 31 A. 116 : 9 C.L.J. 172 : 5 M.L.T. 58 : 13 C.W.N. 370 : 11 Bom. L.R. 196 : 19 M.L.J. 186 (P.C.) the onus of proving an adoption is on the party setting it up. But very slight evidence may be sufficient for this purpose, where the alleged adopted son has been treated as such for a long series of years. In *Rufi Narain v. Gopal Devi* 3 Ind. Cas. 382 : 36 I.A. 103 : 36 C. 780 : 10 C.L.J. 58 : 6 A.L.J. 567 10 C.L.J. 58 : 13 C.W.N. 920 : 5 M.L.T. 423 : 11 Bom. L.R. 833 : 19 M.L.J. 548 : 93 P.R. 1909 : 146 P.W.R. 1909 : (1910) 68 P.L.R. where a question arose as to the factum of an adoption alleged to have been made nearly half a century before suit, the Judicial Committee held that the Trial Court was right in holding the adoption proved, when, in the absence of direct evidence of much value, it appeared that the alleged adopted son had, without controversy, succeeded to his father's estate and enjoyed it till his death, and, further, that transactions during and after his death took place on the footing of

the adoption. The allegation of title by adverse possession is not more promising. The sole occupation by one co-sharer, of a portion of joint property, does not constitute an ouster of the other co-sharers; and a co-sharer in possession of a portion of the common land, with the tacit or express consent of his co-sharers, cannot change the nature of that possession; see the judgment of Viscount Cave in *Varada Piltat v. Jeevarathnammal* 53 Ind. Cas. 901 : 46 I.A. 285 : 43 M. 244 : (1919) M.W.N. 724 : 10 L.W. 679 : 24 C.W.N. 346 : 38 M.L.J. 313 : 18 A.L.J. 274 : 2 U.P.L.R. (P.C.). 64 : 22 Bom. L.R. 444 and of Lord Buckmaster in *Hardit Singh v. Gurmukh Singh* 47 Ind. Cas. 626 : 28 C.L.J. 437 : 58 P.W.R. 1918 : 64 P.R. 1918 : 24 M.L.T. 389 : 20 Bom. L.R. 1064 : (1919) M.W.N. 1 : 9 L.W. 123 : 1 U.P.L.R. (P.C.) 8; see also *Lokenath Singh v. Dhwakeshwar Prosad Narayan Singh* 27 Ind. Can. 465 : 21 C.L.J. 253 : 20 C.W.N. 51 and *Israil v. Samset Rahman* 21 Ind. Cas. 861 : 41 C. 436 : 19 C.L.J. 471 18 C.W.N. 176. In our opinion, there is no substance in the appeal preferred by defendants Nos. 5 and 7.

4. The defendant No. 8 ka, who also has preferred a separate appeal, has pressed the question raised in the tenth issue, namely, whether the conveyance set up by him covers the land in suit, and whether it is valid or void for want of consideration and for undue influence. The conveyance was executed on the 14th November, 1910 by one Harinath Bose for about one-tenth of the real value of the property. The Subordinate Judge has found that there was in fact no consideration at all for the conveyance, and that it was secured by the exercise of undue influence. The" evidence has been placed before us, and we feel no doubt that the Subordinate Judge has rightly held that the document was really obtained on false pretences and was not operative to transfer title.

5. Upon a scrutiny of all the materials, our conclusion is that the decree of the Subordinate Judge is amply supported by the evidence on the record and cannot be successfully impeached. The appeals and cross-objections are all dismissed, and the parties will pay their own costs in this Court.