
(1950) 06 CAL CK 0010
In the Calcutta High Court
Case No : A.F.A.D. No. 1941 of 1946

Lal Behari Samanta and Others

APPELLANT

Vs

Gourhari Dawn and Others

RESPONDENT

Date of Decision : 29-06-1950

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 101, 33
Partition Act, 1893 — Section 4
Transfer of Property Act, 1882 — Section 44, 53A

Citation : AIR 1952 Cal 253 : 54 CWN 912 : (1951) 2 ILR (Cal) 263

Hon'ble Judges : Lahiri, J

Bench : Single Bench

Advocate : Hiralal Chakravarty and Rabindra N. Bhattacharji, for the Appellant; Sarat Chandra Janah, for the Respondent

Final Decision : Allowed

Judgement

Lahiri, J.—This appeal is at the instance of the plaintiffs and it arises out of a suit for injunction restraining defendant No. 1 from exercising any act of joint possession in respect of an undivided share of a dwelling house.

2. The case of the plaintiffs is that C. S. plots Nos. 553 and 509 to 513 constitute the homestead proper of the plaintiffs and C. S. plots Nos. 516, 504 and 554 are parts of the homestead being tanks or lands adjacent to the homestead. Recently defendant No. 1 who is a stranger to the family purchased from one of the co-sharers an undivided share in C. S. plots Nos. 516, 504 and 554 and was threatening to interfere with the plaintiffs' possession. The plaintiffs accordingly prayed for an injunction in terms of the second paragraph of Section 44 of the Transfer of Property Act restraining defendant No. 1 from exercising any act of joint possession in respect of these three plots.

3. The defence of the principal defendant No. 1 was that the suit was not maintainable, that there was a partition of the dwelling house by metes and bounds, that in any event the defendant No. 1 had a right of easement in respect

of the tank which is C. S. Plot No. 516.

4. The Court of First Instance decreed the plaintiffs' suit in respect of C. S. Plots Nos. 516, 504 and 554 holding that they are parts of the undivided family dwelling house of the plaintiffs and that there was no partition by metes and bounds amongst the co-owners of the dwelling house, the question of the easement right being left open by consent.

5. On appeal by defendant No. 1 the decree of the trial Court was affirmed with regard to C. S. plots Nos. 504 and 554 but the decree of the Court of First Instance was modified with regard to plot No. 516. This plot No. 516 is a big tank. The Court of appeal below modified the injunction granted by the Court of First Instance in this way: That the injunction should stand in respect of the southern and western banks of the tank but it should be dissolved in respect of the northern and eastern banks and that the defendant should be entitled to exercise joint possession in respect of the northern and eastern banks but he will not be permitted to use any "ghat" on the southern and western banks of the tank.

6. The present second appeal is confined only to C. S. plot No. 516. With regard to plot No. 516 the Court of appeal below has come to the following findings:

"(a) It is no doubt adjacent to some of the "bastu plots but it can hardly be said that the whole of this big tank is essential for the convenient use or enjoyment of the homestead;

(b) There are in all 7 or 8 "ghats" in it and only 3 of them on the south-west corner belong to the plaintiffs There are other "ghats" of strangers on the other side of this tank;

(c) In all probability the defendant who has land on the eastern bank of the tank has also a "ghat" on that side; and

(d) It seems to me rather inequitable and hard that the whole of such a big tank should be treated as an appurtenance of the homestead and the defendant kept out of its possession altogether."

Upon the aforesaid findings the appellate Court came to the conclusion that the plaintiffs were not entitled to an injunction restraining defendant No. 1 from using any portion of the tank jointly with the plaintiffs.

7. Mr. Chakravarty appearing in support of the appeal has argued, in the first place, that the decree for joint possession made by the Court of appeal below in favour of defendant no. 1 is illegal. This argument is quite sound. There could be no decree in favour of a defendant in a suit instituted by the plaintiffs. All that the Court could say was that the decree made by the Court of First Instance be modified in the manner indicated by the appellate Court, but the declaration of the right of joint possession of defendant No. 1 is certainly bad in law. But this is a mere matter of form.

On the merits of the case Mr. Chakravarty has argued that the appellate Court was wrong in law in modifying the decree of the First Court on the ground that several strangers had built certain "ghats" in a certain portion of the tank. He argued that the introduction of strangers on previous occasions could not in any way affect the right of the plaintiffs from enforcing their rights against a stranger on a subsequent occasion. The circumstances under which the strangers were permitted to construct "ghats" on a certain portion of the tank are not known to us.

Mr. Chakravarty relied upon the case of. "MASITULLAH v. UMRAO," 119 Ind Gas 523 (All) in support of the proposition that the fact that certain cosharers did not exercise the right of pre-emption u/s 4 of the Partition Act on a previous occasion will not debar them from exercising that right on a subsequent occasion upon a new transfer. In this case it has been said that

"no estoppel can arise against the defendants for their not having claimed the benefit of Section 4 in the former suit. The sale of the plaintiffs has given rise to a fresh cause of action and there is nothing in law to preclude the defendants from exercising their statutory right u/s 4 of the Partition Act."

It is no doubt true that in the case before me there is no question of any estoppel but at the same time I hold that the sale to defendant No, 1 has given rise to a new cause of action in favour of the plaintiffs and the plffs. are entitled to enforce their right against defendant No. 1, Therefore, the first reason given by the Court of appeal below for modifying the injunction granted by the trial Court is not, in my judgment, quite sound.

8. The second reason given by the Court of appeal below is that though the tank is adjacent to the "bastu" plots, it could not be said that the whole of this big tank is essential to the convenient use or enjoyment of the homestead. On this point the Court of First Instance came to the conclusion that C. S. plot No. 516 appertains to the undivided dwelling house of the plaintiffs and their co-sharers. Upon that finding it is quite clear that this tank is a part of the dwelling house of the plaintiffs and their cosharers. Upon that finding it is quite clear that this tank is a part of the dwelling house of the plaintiffs and his co-sharers. If it is a part of the dwelling house, the question whether it is essential for convenient use or enjoyment of the homestead does not arise. The appellate Court also holds that this tank is adjacent to some of the "bastu" plots. If that be so, it is a part of the dwelling house.

9. The third reason given by the Court of appeal below that in all probability the defendant who has lands on the eastern bank of the tank has also a "ghat" on that side, does not bear scrutiny. There is no evidence on the record that the defendant has built a "ghat" on the eastern side of the tank. Therefore, this observation of the Court of appeal below is based on no evidence.

10. The last reason given by the Court of appeal below to the effect that in the circumstances of the case it will be inequitable to keep the defendant out of

possession of the tank altogether is equally erroneous. The effect of the injunction, prayed for, is not to keep the defendant out of possession of the tank altogether but merely to prevent him from exercising any act of joint possession along with the plaintiffs or their co-sharers. The defendant as the purchaser of an undivided share has certainly a title to a portion of the disputed land but his remedy lies in a suit for partition and he can possess his own share by instituting a suit for partition unless, of course, he is pre-empted u/s 4 of the Partition Act.

11. Mr. Jana appearing in support of the respondent has urged, in the first place, that the Courts below were not right in holding upon the evidence on the record that there was no partition of the family dwelling house. In particular, he pointed out that the Courts below have not given effect to the recitals contained in Exhibits A and A-I. It appears from the judgment of the appellate Court that both these documents were considered in the judgment. With regard to Ex. A-I which is a ka-bala by which the defendant No. 1 purchased from the plaintiffs' co-sharers, the appellate Court has pointed out upon a consideration of the entire kabala including the schedules that the recital about the amicable partition referred only to an arrangement of exclusive possession for the sake of convenience and did not mean partition by metes and bounds. With regard to Ex. A, it was pointed out by the Court of appeal below that the recital was made by certain persons who had not yet acquired by title to the property and as such the recitals were of no value as against the plffs. Upon a consideration of all the relevant evidence on the record the Court of appeal below came to the conclusion that the story of partition set up by defendant No. 1 had not been proved. In this view of the matter it seems to me that the decision of the Court of appeal below on this question is final and conclusive, it being a question of fact which cannot be interfered with in second appeal.

12. In the second place Mr. Jana has argued that Section 44 is merely a restrictive section and does not create any right in favour of the plaintiffs. He has argued on the analogy of Section 53A of the Transfer of Property Act that Section 44 is not a weapon of offence but merely of defence. The 2nd paragraph of Section 44 runs as follows :-

"Where the transferee of a share of a dwelling house belonging to an undivided family is not member of the family, nothing in this section shall be deemed to entitle him to Joint possession or other common or Bart enjoyment of the house."

The relevant portion of Section 53A is to this effect:

"The transferor or any person claiming under him shall be debarred from enforcing against the transferee and any person claim-tog under him any right in respect of the property of which the transferee has taken or continued in possession."

The language of the 2nd paragraph of Section 44 suggests that the transferee of the share of the dwelling house has no title to joint possession or other common or part enjoyment of the house. It is true that it takes away the right of the

transferee to ask for joint possession but at the same time it seems to me that it does create a right in favour of the other co-owners of the dwelling house who are affected by the sale. Mr. Jana has relied upon the decision in the case of Sujit Kumar Biswas and Another Vs. Iswar Chandra Nandy and Others which lays down that the principle underlying Section 44 is that it is inequitable to permit a stranger to intrude himself upon the privacy of a joint Hindu family residence. If that be so, the co-sharers of the joint Hindu family residence who are affected by the sale to the stranger have been given a right under this section to ask for an injunction restraining the stranger purchaser from exercising any act of joint possession in respect of the joint family residence. I do not think that the language of Section 53A and the language of Section 44 of the Transfer of Property Act are analogous. The second point raised by Mr. Jana should be accordingly be overruled.

13. For the foregoing reasons the decree of the lower appellate Court is set aside and that the Court of First Instance restored.

14. The cross-objection is dismissed.

15. In the circumstances of the case, there will be no order for costs either in the appeal or in the cross-objection.

16. Leave to appeal under Clause 15 of the Letters Patent is asked for and is refused.