
(1924) 08 CAL CK 0040
In the Calcutta High Court

Loke Nath Saha and Others

APPELLANT

Vs

Radha Gobinda Shaha and Others

RESPONDENT

Date of Decision : 07-08-1924

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115

Citation : 86 Ind. Cas. 765

Hon'ble Judges : Suhrawardy, J; Duval, J

Bench : Division Bench

Judgement

1. This miscellaneous appeal and the four revision cases (Nos. 120 to 122 and 147 of 1922) are directed against the same order. The plaintiff who is the respondent in the appeal and opposite party in the revision cases brought a suit for partition. It was dismissed by the Trial Court: but on appeal it was decreed by this Court and the case sent back to the lower Court with the direction that partition be made of the property. On the receipt of the order of this Court the Subordinate Judge passed the preliminary decree on the 5th September 1921 fixing the shares of the parties. A Commissioner was appointed to effect the partition according to the following directions: "The Commissioner will partition the suit lands without interfering as far as possible with the possession of the parties. Out of the lands to be partitioned those lands which are necessary to remain in the joint possession of the parties shall remain joint. The Commissioner will consider about the separate partition of the lands belonging to the shares of defendants Nos. 1 and 2." The defendants Nos. 23 to 25 applied to the Subordinate Judge to have their shares partitioned. By this judgment dated the 19th January 1922 the Court below allowed the prayer; and an objection was taken to the preliminary decree to the effect that the 1/7th share of defendants Nos. 23 to 25 should also have been directed to be partitioned by metes and bounds, All the defendants except defendants Nos. 28 to 30 subsequently applied to the learned Subordinate Judge to have their shares separately partitioned. It appears that defendants Nos. 1 to 11 had 1/7th share, defendants Nos. 12 to 22 1/7th, defendants Nos. 23 to 25 1/7th, defendants Nos. 26 and 27, 1/7,

defendants Nos. 28 to 30 1/7th and the plaintiffs 2/7ths. The plaintiffs and defendants Nos. 28 to 30 objected to the partition of the shares of the defendants on the ground that the plaintiffs would not get suitable and convenient lands and there would be great delay in effecting the partition. The plaintiffs further stated that they had no objection if after the plaintiffs had got possession of the lands (in their respective shares) to their satisfaction, the defendant's shares were partitioned and allotted to them. The learned Subordinate Judge heard the parties in respect of their applications and by his order dated the 15th February 1922 disallowed the prayer of the defendants for partition of their shares in separate sahams and the Commissioner was directed to effect a partition of the plaintiffs' shares only. The Subordinate Judge had proceeded solely upon the decree of this Court in First Appeal No. 98 of 1918 made on the 10th March 1920. The direction in the decree is to the following effect: "So far as it is possible in making the partition, the Judge shall leave the respective parties in possession of the lands that they are now in possession of. If necessary, the Judge in making the partition shall equalise the plaintiff's share out of the lands in the possession of the defendants and in the first place, out of lands in which the defendants do not claim a permanent interest." The Court below is of opinion that this decree restricts his jurisdiction for ordering a general partition amongst the parties and that partition could only be between the plaintiffs on the one hand and the defendants on the other. We do not think that this interpretation ought to be put to the decree. It is to be observed that the plaintiff's suit was obviously dismissed by the First Court. An appeal was taken to this Court solely on the ground that the Court below was wrong in holding that the land was incapable of partition. There was no question in this Court at that stage of any partition between the defendants inter se. The decree, therefore, was found limited to giving a direction to the effect that partition should be effected. It is argued on behalf of the petitioners that the direction in the judgment that the Judge shall have the respective parties in possession of the lands, that they are now in possession of contemplates a general partition amongst the parties. It is, on the other hand, contended by the plaintiffs that by the expression "respective parties" is meant only the plaintiffs on the one hand and the defendants on the other. This may or may not be the intention of the Judges who passed the decree; but it is clear that this point was not before them and they were not called upon to pass any order with regard to it. It cannot be questioned that every co-parcener has a right to claim partition. In a suit for partition the position of the parties is not that of the plaintiffs and defendants as in other suits: for in a partition suit or in a suit for administration or in a suit for a similar nature every party stands in a position of a plaintiff with reference to another and that of the defendant with reference to some other. Unless there is a special reason it is not possible to deny to a co-parcener the right of partition either at his own instance or at the instance of any one else. The defendants had all from the very beginning claimed a separation of their sahams in case partition was ordered by the Court. No doubt their first contention was that there should not be a partition; but they added in their written statements as in their petitions

to the Court that should a partition take place their shares should be separately allotted to them. In these circumstances we fail to see on what ground could the lower Court, refuse the prayer of the defendants for partition of their shares. The view which the learned Subordinate Judge has taken of the judgment of the High Court is not, in our opinion, correct and, therefore, the only course left to us is to set aside the order of the Subordinate Judge dated the 15th February 1922 and order that the Commissioner be directed to allot separate shares to the different sets of respondents. The learned Judge has relied upon the principle which he considers has been laid down in the case of *Hikmat Ali v. Waliunnissa* 12 A. 506 : A.W.N. (1890) 128 : 6 Ind. Dec. (N.S.) 1067. The facts of that case are that of several co-sharers who were Muhammadans some applied for partition of a certain property. The other co-sharers objected to the partition and did not claim a partition of the shares of the defendants inter se. The Court below, however, passed a decree ordering a partition of the entire property amongst the co-sharers. One of the defendants appealed and the learned Judges held that no partition amongst the defendants inter se having been prayed and the parties not consenting to any such partition being made the Court below had no jurisdiction to partition amongst the defendants the residue of the property left after partitioning the plaintiff's share. We fail to see how the facts of that case and the law laid down therein can help the plaintiffs in resisting the application of the defendants for partition of their shares. It now remains for us to pass orders on the appeal and the applications before us. It has been conceded and there can be no doubt, that no appeal lies to this Court from the order complained of and dated the 15th February 1922. The Miscellaneous Appeal No. 178 of 1922 is, therefore, dismissed.

2. With regard to the revision cases, we have been invited to the learned Vakil's appearing for the different sets of defendants to interfere with the order complained of u/s 115, C.P.C., whereas it is argued on behalf of the plaintiffs that it is not a question which affects the jurisdiction of the Court below. In consideration of the entire circumstances of this case we think that we ought to exercise our revisional powers. The effect of the order passed by the Court below is to lead the parties to as many partition suits as there are co-sharers. It is moreover denying jurisdiction which is vested in the Court below, namely, to, order partition at the instance of the defendants. We think that the proper order to pass in these revision cases is to set aside the order of the Court below and to give direction to the Court to direct partition allotting separate shares to the different sets of defendants who pray for partition according to their shares enumerated above. The result is that the Rules are made absolute. In the circumstances of this case we make no order as to costs either in the appeal or in the revision cases.