

(1906) 03 CAL CK 0004

In the Calcutta High Court

Case No : Appeal from Appellate Order No. 342 of 1904

Madon Mohon Mondul and others

APPELLANT

Vs

Baikanta Nath Mondul and another

RESPONDENT

Date of Decision : 16-03-1906

Acts Referred:

Citation : (1906) 03 CAL CK 0004

Final Decision : Dismissed

Judgement

1. The present appeal is against an order of the Additional District Judge of the 24-Pergunnahs remanding a suit to the Court of first instance to be proceeded with. The facts are set forth in detail in the lower Court's judgment. They are briefly that the Plaintiffs in 1890 brought a suit for partition. The suit was compromised, and it was settled that the plots disputed in this suit, viz, plots 1, 2, and 3, were to be divided in a certain manner. An Amin was appointed to effect the partition but he did not partition the disputed plots. Subsequently, the parties did not appear and the execution proceedings then pending were dismissed for default on the 19th June 1894.

2. The present suit was instituted on the 24th January 1903 for partition of plots 1,2, and 3. The Court of first instance dismissed the suit. The lower Appellate Court has under sec. 562 directed the suit to proceed. He held that the right to partition is a continuing cause of action and subsists as long as the property remains joint. Hence, as plots 1, 2 and 3 have never been partitioned, the Plaintiffs are entitled to sue to have a partition of them made.

3. The Judge relies on two cases, Nasratullah v. Mujibullah ILR 13 All. 309 at p. 313 (1891) and Thakore Becharji v. Thakore Pujaji ILR 14 Bom. 31 (1889)..

4. The Defendants appeal and contend (1) that the suit is barred under sees. 13 and 103 of the CPC and ILR 14 Bom. 31 (1889) that the plaint does not disclose a sufficient cause of action. On the whole, we think the order of the lower Appellate Court is right. The suit is not barred under sees. 13 and 103. There

was no final decree passed in the previous suit, The decree that was passed on the compromise was a preliminary one which never reached the stage of final decree under sec. 396 of the Code. Sec. 103 has no application to execution proceedings and the previous suit was never dismissed under sec. 103, Moreover, as pointed out in the case of Nasratullah v. Mujibullah ILR 13 All. 309 at p. 313 (1891) " when a decree declaring a right to partition has not been given effect to by the parties proceeding to partition in accordance with it, it is competent for the parties or any of them, if they still continue to be interested in the joint property, to bring another suit for a declaration of a right to partition in case their right to partition is called in question at a time when by reason of limitation or otherwise, they cannot put into, effect the decree first obtained. In this respect suits for declaration of right to partition differ from most other suits. So long as the property is jointly held, so long does a right to partition continue.

5. The Appellant relies on the case of Soni v. Munshi 3 Bom. L.R. 94 (1900) But that case is clearly distinguishable from the present, as in that case a final decree for partition had been made. It was on that ground that the Judges who decided it considered that they were not bound to follow the ruling in Nasratullah v. Mujibullah I. L. R. 13 All. 309 at p 313 (1891)

6. It appears to us that the plaint in this suit discloses a sufficient cause of action. The Plaintiffs are entitled to partition. Their efforts to obtain partition have in the circumstances set forth in the plaint hitherto been fruitless. They are now entitled to have the disputed plots divided. We, therefore, dismiss this appeal with costs, 3 gold mohurs.