

(1925) 03 CAL CK 0102
In the Calcutta High Court

Purna Chandra Singha and Others

APPELLANT

Vs

Radhika Mohan Deb and Others

RESPONDENT

Date of Decision : 24-03-1925

Acts Referred:

Evidence Act, 1872 — Section 90

Citation : AIR 1926 Cal 370

Hon'ble Judges : Greaves, J;Cumming, J

Bench : Full Bench

Judgement

Cuming, J.—These two appeals Nos. 328 and 329 of 1924, arise out of two suits. The first suit out of which Appeal No. 329 arises was a suit for partition of a certain howlah and the suit out of which the second appeal, arises was a suit for declaration of title and for recovery of possession on the basis of a previous partition of the property in 1212 by virtue of a certain chitta. With regard to the first suit, it was dismissed by the first Court on the ground that the property had already been partitioned. The lower appellate Court held that no previous partition had been proved and made a preliminary decree for partition. With regard to the second suit the first Court decreed it on the finding that there was a previous partition and, therefore, the chitta of 1212 B.S. on which the plaintiff in that suit relied was genuine. The second Court dismissed the suit finding that there had been no previous partition. The defendant in the first suit who is the plaintiff in the second suit has appealed to this Court against both the decrees.

2. It will be seen that the decision of the second suit would depend on the view to be taken of the first suit; for clearly if we hold that the decision of the first appellate Court is correct, then the order in the second appeal will also be correct. I would, therefore, deal, first of all, with Appeal No. 328 of 1924, which is a suit for partition.

3. The first point that has been argued by the learned advocate for the appellant is that the Judge was wrong because he refused to apply the presumption of genuineness u/s 90 of the Evidence Act to a certain chitta of 1212 B.S. On the

ground that it had not been proved that this chitta had been produced from proper custody, I have no hesitation in holding that the Judge was quite right in the view he has taken, namely, that it had not been proved that the chitta had been produced from proper custody. The custody alleged by the defendant was that of the Collectorate. Now in the first place there is no evidence to clearly show that this document had been in the custody of the Collectorate. An officer of the Collectorate was examined and he stated that the record-keeper had given him this document to produce in Court. He himself was neither the record-keeper nor an officer of the record-room, and the document had not been in his custody. All he proved was that the record-keeper had given him the document to be produced in Court; that does not certainly prove that this document was actually in the custody of the Collectorate and the learned Judge was quite right in the conclusion he came to on this point. Then there is a further fact that even if it be admitted for the sake of argument that this document was produced from the Collectorate there is nothing to show that the custody of the Collectorate was a proper custody. The document in question is a chitta relating apparently to a private partition among certain persons of certain property. Normally there is no reason for its being in the Collectorate and, therefore normally the Collectorate could not be considered the proper custodian of this document; an endeavour had been made by the defendant-appellant to prove that this document was filed in the Collectorate in 1865 in connexion with a petition for registration of their howlah. The learned Judge points out, and I may incidentally note that, this is purely a question of fact, that this document is not included in the list of documents which were filed in 1865 at the time when the petition for registration of the howlah was made. Mr. Roy has endeavoured to persuade us that the record was not in proper order and he seems to suggest that there has been some change in a certain document, namely, Ex. 2, a list of papers which was filed with the application for registration. Now this ground of appeal finds no place whatever in the twenty-nine grounds of appeal in this case. It is a ground which depends on question of facts and no notice whatever had been given of it to the opposite party. Moreover, it is a remarkable fact that his suggestion was never made in the Court of First Appeal. Had there been any substitution or suspicious change in the document obviously the matter would have suggested itself to the learned Vakil who conducted the appeal in the lower Court. Mr. Roy then urged that the parties have been in separate possession of this property ever since 1212 B.S., and he argues that the learned Judge was wrong in saying that nothing could be inferred from that circumstance this way or that way. As a matter of fact the learned Judge in dealing with this point was considering not the separate possession of the whole of the property by different cosharers, but was referring to the separate possession of certain sharers of the homestead by the owners, and I am not prepared to say that any inference can be drawn necessarily from the fact that the parties had been in separate possession of their shares of the homestead for many years that there must have been a partition of the whole property.

4. Then Mr. Roy referred us to a large number of documents in the case in which reference is made to a partition and he seems to argue, if I understand him rightly, that the only inference that the Judge could legally draw from a reference to these documents is that there had been a previous partition. I am not prepared to accept this contention. The learned Judge has, so far as I can see, dealt with every document in the case, and it is not contended by Mr. Roy that in this case he has wrongly considered the terms of any of these documents. After a very careful consideration of all the documents produced by both the parties, he has come to the finding of fact, namely, that there was no previous partition. Whether I should come myself to the same finding, if it were open to me to go into the facts, I am not prepared to say. Possibly I might not have; but the first appellate Court was the Judge of facts and we are not, sitting in a Court of second appeal, able to deal with questions of fact. On consideration of all the evidence he came to a certain finding of fact and he cannot be said to have arrived at this finding without taking into consideration the evidence before him or to have wrongly construed any document that was before him.

5. For these reasons, the appeals fail and are, therefore, dismissed with costs.

Greaves, J.

6. I agree.