
(1910) 02 AHC CK 0035
In the Allahabad High Court

Pursotam Rao Tantia and Others

APPELLANT

Vs

Radha Bai

RESPONDENT

Date of Decision : 28-02-1910

Acts Referred:

Specific Relief Act, 1877 — Section 42

Citation : 6 Ind. Cas. 692

Hon'ble Judges : Tudball, J; Richards, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. This appeal arises out of a suit brought by the plaintiffs for a declaration that they were the proprietors in possession of, and the defendant, Musammat Radha Bai had no right to, the property in suit and that the said Musammat Radha Bai was not entitled to get her name entered in the Revenue papers. Musammat Radha Bai is the widow of Madho Rao who was a nephew of the plaintiff Parsotam Rao. A pedigree of the family, which is admitted to be correct will be found (at page 5 of the paper-book) below;

Nana Narain Sao | _____ | |
| Vasdeo Kao Parsotam Rao Babu Ram Anna, Tantia, Chandra Rao, deceased (plaintiff No. 1) deceased= | | Musammat Janki Madho Rao, Waman Rao, Bai, widow, deceased = (plaintiff No. 2). Musammat Radha Bai, widow. 2. One Nana Narain Rao made a Will, under which he divided up his property between his sons. The Will contained a provision that it might be well for the family of Nana Narain Rao if notwithstanding the division it continued together. The terms of the Will gave rise to some litigation which was commenced about the year 1901. In that suit one Babu Ram Chander Rao, one of the three sons of Nana Narain Rao, claimed a partition. He claimed that if his father's Will operated to divide the family, he was entitled to a partition by metes and bounds of the property bequeathed to him. If, on the other hand, the family was joint and undivided notwithstanding the Will, he claimed usual partition of all the family

property. Parsotam Rao was a defendant to that suit as also Madho Rao representing the third brother. Madho Rao and Parsotam Rao pleaded that the family was separate. At that time they considered it best for their interests to plead separation which would tie Ram Chander Rao to the particular property bequeathed to him by the Will. However, during the pendency of the suit, Ram Chander Rao died and his widow took his place; and then it became the interests of the defendants Madho Rao and Parsotam Rao to urge that the family was joint. By doing so, the rights of Musammat Janki Bai, the widow of Babu Ram Chander Rao, would be limited to a mere right of maintenance. The suit was litigated from Court to Court and finally there was a binding decree of the High Court holding that the family was separate. This decree was passed in March 1907. Madho Rao died in 1905 while the litigation was pending but subsequent to the preliminary decree in the original Court. The learned Subordinate Judge has dismissed the present suit on the ground that the suit is barred by the provisions of Section 42 of the Specific Relief Act. It appears that after the decision of the High Court already referred to, mutation of names was passed in favour of Musammat Radha Bai in respect of the share of Madho Rao, and the learned Judge held that it follows that Musammat Radha Bai must be deemed to be in possession and that, therefore, the plaintiffs' suit fails because they have sued for a mere declaration without asking for possession. At the same time the learned Judge refused to allow the plaintiffs to amend the plaint by adding a claim for possession on payment of the proper Court-fees. We think it is impossible to support the decree of the Court below on the ground on which it was passed. If there was nothing else in the case, we certainly would have allowed the plaint to be amended under the circumstances, so that all points might be thrashed out between the parties. We, however, think that there is another clear ground on which the plaintiffs' suit ought to be dismissed, namely, that having regard to the decision in the suit of Babu Ram Chander Rao v. Parsotam Rao and Madho Rao, it is no longer open to the plaintiffs Parsotam Rao and his son to bring the present suit. The decree passed in the previous suit was a decree ascertaining and declaring the rights of the parties in a suit for partition. Madho Rao, Parsotam Rao and Ram Chander Rao, were, as already mentioned, parties to that suit. It is argued on behalf of the appellants that inasmuch as it does not appear that there was any dispute or conflict of interests between the plaintiffs in the present suit and Madho Rao, and as they were all arrayed on the defendant's side in the prior suit, the decision in that suit cannot operate as *res judicata*, and that the plaintiffs are now entitled to re-open the entire question as between themselves and Radha Bai, the widow of Madho Rao. The nature of a partition suit has been dealt with in a number of cases. In the case of Shaik Khoorshed Hossein v. Nubbea Fatima 3 C. 551 : 2 C.L.R. 187, the learned Judges were of opinion that a decree for partition is not like a decree for money or the delivery of specific property which is only in favour of the plaintiff in the suit. It is a joint declaration of the rights of persons interested in the property of which partition is sought and such a decree, when properly drawn up is in favour of each share-holder or set of share-holders having a distinct share."

This case was cited with approval by a Bench of this Court in the case of Dost Muhammad Khan v. Said Begam 20 A. 81. The remarks of the learned Judges will be found at page 87 of the Reports. They observe, " in a suit for partition (as the former suit was) the decree is or ought to be a joint declaration of the rights of the persons interested in the property of which partition is sought and is a decree in favour of each sharer. It decides what interest each of the sharers has in the property, the subject of partition, whether those sharers be plaintiffs or defendants and renders unnecessary any subsequent suit by any of such sharers for a declaration of his interest in the property." In the case of Assan v. Pathumma the Madras High Court deals with the nature of a partition suit at page 499: If, on the other hand, they were suit for partition, which, in my opinion, they really were, a fortiori the plaintiffs were entitled to join. For in a suit for partition each co-owner, as against another occupies in himself the role of plaintiff as well as defendant. It is in consequence of the reciprocal character of the right which co-owners have in the matter of partition that even those who are not actual plaintiffs can. claim that their shares be allotted to them by the decree." The learned Judge refers to the case of Sheikh Khoorshed Hossein v. Nubbea Fatima 3 C. 551 : 2 C.L.R. 187, already referred to and also to Domat's Civil Law, paragraph 2757. In the case of Ashid-bai v. Abdulla Haji Mahomad 31 B. 271 : 8 Bom. L.R. 652 the learned Judge says at page 291. "When a suit for partition is brought by a person alleging that it is undivided property and that he has a share in it, the law requires that in order to enable the Court to ascertain such person's share it must have before it as parties to the suit all the persons admittedly having or claiming to have shares in the property, otherwise there cannot be a valid final and binding decree for partition. The quantum of the share of the plaintiff must be determined with reference to the number of shares and their respective sharers. And such a determination of the sharers, being essential for the determination of the plaintiff's share, enables the Court to pass a complete decree for partition allotting to each party, whether he is plaintiff or defendant, his share. In such a case it is obvious injustice that a defendant should be driven to another suit to have his share already determined, partitioned off. That is the reason of the rule." We quite agree with the view taken in the several cases we have referred to and we think that the plaintiffs cannot re-open any of the questions which were tried in the former suit. It is worthy of note that when the appeal in the former litigation was decided, the widow of Madho Rao, i.e., the present defendant, was arrayed as a respondent with the present plaintiffs as appellants.

3. At the conclusion of the judgment our attention was called to paragraphs 5 and 7 of the plaint. With regard to paragraph 5, where it is pleaded that a re-union took place, we must say that this question of re-union has already been decided in the former suit. The learned Judge says-- "But in addition to this there had never been a joint title to the testator's property in the hands of his son. Nana Narain Rao held it as self-acquired property, he made three separate devises to his sons, who took separately as self-acquired property the interest so

devised to them. That being so, a question of re-union does not arise. That cannot be re-united which had never been joint." In paragraph 7 of the plaint it is alleged: "Madho Rao executed a document on the 31st of January, 1905. In it, he repeated the allegation of his family being joint and fixed only a maintenance allowance from Rs. 50 to Rs. 75 for Musammat Radha Bai in case she refused to live with the plaintiffs. If for some reason or other, the family of the plaintiffs and Madho Rao should be considered to be separate according to law, the result of this document would be that Madho Rao made the plaintiffs owners of the property and only fixed a maintenance allowance for the defendant." Having regard to the above allegations, which raised a question which had not been specifically dealt with in the Court below, we allowed an adjournment to enable the appellant to produce before us the document of the 31st January, 1905. Mr. Surendra Nath Sen has, produced a certified copy of the said document. We assume merely for purposes of argument that this document of the 31st January, (sic), is a genuine document and proceed to consider its provisions in order to ascertain if it could possibly have any bearing on the present appeal. The document (assuming it to be genuine) was executed by Madho Rao a day before his death. At that time the litigation between Musammat Janki Bai and Parsotam Rao and Madho Rao was still pending. We have already pointed out that Madho Rao in conjunction with Parsotam Rao was at that particular period setting up the case that the family was joint for the purpose of defeating the claim of Musammat Janki Bai as the widow of Babu Ram Chander Rao. The relevant portion of the document is a declaration by Madho Rao that the family was joint, and an exhortation to his nephew Waman Rao Bhaiya to whom the document was addressed as to how he should manage the property and giving instructions as to the amount of maintenance to be paid to the widow in certain events. It is contended that this document ought to be construed as a Will and that the declaration as to the family being joint ought to be construed as a bequest of the property of Madho Rao to the other members of the family as if the family was joint and not separate. We think it quite impossible to give this construction to the document. The document was executed solely for purposes of the then pending litigation in the hopes probably that it might be used as evidence. In the view we take of the true construction of the document, it can have no bearing, even on the assumption that it is genuine, on the present appeal. The order of the Court accordingly is that the appeal be dismissed with costs including in this Court fees on the higher scale.