

(1922) 06 CAL CK 0069
In the Calcutta High Court

Rajani Kanta Roy and Others

APPELLANT

Vs

Raja Jyoti Prosad Singh Deo

RESPONDENT

Date of Decision : 09-06-1922

Acts Referred:

Citation : 75 Ind. Cas. 255

Hon'ble Judges : Pearson, J;N.R. Chatterjea, J

Bench : Division Bench

Judgement

1. This appeal is against the final decree in a suit for partition of a Mouza, called Ismail.

2. There is a preliminary objection to the hearing of the appeal on the ground that the defendant No. 2, Rakhal, died and no substitution was made within time; that another defendant No. 41, Sibani Debya. also died and no substitution was made in time, and that the suit being one for partition the appeal cannot proceed.

3. Rakhal died on the 24th May 1920. The application for substitution of his heirs was made on the 5th February 1921 and substitution was ordered to be made subject to objection at the hearing. It appears that Rakhal's interest was sold away in execution of a decree in 1918. On Rakhal's death, therefore, the interest was not in his heirs but devolved on a third party. It was re-purchased on the 23rd January 1921 by his heirs and they were brought on the record on the 5th May 1921 subject to objection at the hearing. The appellant was not bound to recognise the purchaser and could have proceeded against the heirs of the deceased; but there was a devolution of interest of Rakhal, and before the appeal came on for hearing the persons on whom the interest devolved were made parties to the case. Three months' limitation does not apply to a case of assignment or devolution of interest pending the suit.

4. It is contended for the respondents that the application, even if treated as one under Order XXII, Rule 10, not having been made in the Court below in the suit

cannot be made in this Court and that, as a matter of fact, the application was not under that rule but for substitution of the heirs of the deceased.

5. So far as the first point is concerned, it has been held by a Division Bench of this Court. (Civil Rules Nos. S-147 and S-148 of 1920 disposed of on the 11th March 1921) that the application can be made on appeal.

6. With regard to the second contention there is no doubt that the application was not under Order XXII, Rule 10. But the application can be allowed to be amended and, having regard to all the circumstances, we were not inclined to dismiss the case on such a ground when all the parties are before the Court, and the application for substitution may be allowed to be amended. As for Sibani, her heirs are already on the record and it is only necessary to have a note made on the record that her interest survives to those respondents.

6. The appellant is accordingly allowed to amend the application dated 5th May 1921 by adding a prayer under Order XXII, Rule 10, and we direct that the persons mentioned in the application be added as respondents in supersession of the order for substitution passed on the 5th May 1921. We also direct that a note be made in the record that the interest of the deceased Sibani survives against the defendant. No. 37.

7. The appellant, however, must pay the costs of this application for amendment, five gold mohurs, to the respondents on or before the 12th July in this Court. The plaintiff-respondent will be entitled to withdraw the said amount if it is deposited in this Court. If the said costs are not paid within the time aforesaid this appeal will stand dismissed with costs.

8. This disposes of the preliminary objection.

9. The first contention raised in this appeal is, that a number of defendants died while the suit was pending in the Court below and their heirs were not substituted.

10. It appears that some of these deaths took place before the case came on for hearing. It also appears that certain minors were represented by the Deputy Registrar when the case came up to this Court in Appeal No. 197 of 1910. When the case went back on remand no guardian ad litem was appointed for them in the Court below and the decree bears the name of Mr. Joyce as their guardian ad litem. Those of them who have attained majority after the decree of the lower Court have (along with others) preferred this appeal and two of them are still minors and are respondents represented by the present Deputy Registrar in this appeal. It is accordingly contended that the partition proceedings and the decree are bad as there was no substitution of the heirs of the deceased and the minors were not properly represented.

11. The Court below observed "There is nothing to show that any of the defendants died before the Commissioner did the survey work and the khanapuri work." But if the partition affects 15 annas co-sharers, a question which we will

deal with presently, the decree for partition should not have been made in the absence of the legal representatives of the deceased defendants and without the minors being properly represented.

12. But it was not only the plaintiff but the Court below also seem to have been under the impression that substitution of the heirs was not necessary as no death appeared to have taken place before the survey and khauapuri works were finished. The fact of the death of the defendants does not appear to have been brought to the notice of the Court below except the death of one of them incidentally in an application filed on the 7th September 1908 objecting to the Commissioner's proceedings, and it does not appear that the plaintiff had any knowledge of these deaths. All the heirs of the deceased defendants have now been made parties to the appeal and all persons interested in the property are before the Court. In these circumstances, we think that the suit should not be dismissed on the ground that the heirs were not substituted.

13. It is unnecessary to make any further order for substitution seeing that all the heirs have already been substituted and all the necessary parties are before the Court.

14. The second contention is that there should have been a partition of the Mouza among all the co-sharers and not merely of the plaintiff's one-anna share. It is urged that the judgment of the High Court, dated the 25th August 1915, must be given effect to only so far as the share of the plaintiff is concerned, but that it did not prevent a partition of the shares of the other co-sharers nor prevent a determination of the other issues in the suit.

15 It appears that the plaintiff purchased one-anna share of one Ramanuj and Elokeshi in Mouzah Ismail and a certain share in Barathol and asked for a partition of those shares. The Court below originally dismissed the claim for partition of Ismail on the ground that the share of Ramanuj had previously passed to one Danesh who preferred a claim to 2 annas 4 gundas share which had been attached by the plaintiff's ancestor and the claim was allowed. This share subsequently passed by successive transfers to Jogendra, the son of Ramanuj, and that, therefore, Ramanuj had no share in Ismail which could pass to the plaintiff under his purchase, and the Court merely declared the plaintiff's right to 8-gandas share in Barathol which was let out in mokarari.

16. On appeal to this Court (R.A. No. 197 of 1910) it was held that Ramanuj had other shares which he obtained from another branch of the family, sufficient to meet the claim of the plaintiff. This Court directed that "there must be a partition by metes and bounds of Ismail, it being declared that the plaintiff is entitled to the one-anna share he claims in Ismail and two-annas five gandas in Barathole." After this decision, the other issues raised in the case cannot be gone into, nor can the shares of other co sharers be partitioned as those shares were not defined by the High Court, and the High Court did not direct the lower Court to determine those shares. It is no doubt hard that the co-sharers should not have

their shares partitioned in this suit for partition but they did not ask the High Court for such an order. They did not do so probably because most of the lands were in the separate possession of each co-sharer. However that may be, having regard to the decision in R.A. No. 197 of 1910, the other issues cannot be gone into, nor can the shares of other co-sharers be partitioned. The decree passed in that appeal must be taken to be the preliminary decree which is to be worked out. This contention, therefore, must be overruled.

17. The third contention relates to the allotment of the lands of Mouzah Ismail to the plaintiff. It is strongly pressed before us that the partition has seriously prejudiced the defendant No. 37, Jogendra.

18. There are 158 bighas of khas kanali lands. The plaintiff purchased only one-anna share of Ramanuj, and 2 annas 4 gandas share is alleged to have been acquired by his son Jogendra. The Commissioner classified the lands under various classes. There are, as stated above, 138 bighas of khas kanali lands but Ramanuj alone was recorded as the owner of 12 bighas 9 cottas and nothing was recorded in the name of Jogendra. The total area of khas danga land is 115 bighas. The plaintiff under his one anna share would be entitled to about 7 bighas and Ramanuj was recorded as being in possession of 8 bighas 8 cottas, nothing being recorded in the name of Jogendra.

19. It is contended that Jogendra's share was more than the share of Ramanuj; that a proportionate quantity of land should have been left for him, and that the whole of the lands should not have been given to the plaintiff.

20. It appears that Jogendra, on the 7th September 1918, put in a petition to the Court below in which he complained as follows; "The Commissioner instead of dividing and partitioning into shares according to the classification of lands is allotting the lands and jamas in the rightful possession of this defendant to the share of the plaintiff separately. He is not listening to any objections and is not admitting any documents and is expressing the opinion that he is not finding any land in the rightful possession of this defendant in the said Mouzah. This defendant has got 3 annas 4 gandas mokarari interest and 3 annas 4 gandas lakharaj interest in the said Mouzah, and there are many lands in khas possession and there is a Mouzah, Chak Aral, at a permanently fixed rent. The plaintiff has been admitting the said rights in the possession of the defendants over and over again. But the Commissioner, without noticing that and by dividing the lands in the rightful possession of the defendant is about to allot them to the share of the plaintiff. On representing it to the Commissioner, he said that he would make the division according to the convenience of all the parties and for that reason he asked all the parties to be present. The pleader for this defendant having appeared before the Commissioner in accordance herewith, he said that the other parties had not been attending and so he would do as he pleased, and would refuse to take any documents on behalf of this defendant. This defendant would be greatly prejudiced by that. By classifying all the lands of the Mouzah and by delineating the plaintiff's share at one definite extremity, the convenience

of all parties would be met and justice would be done."

21. The Court directed the Commissioner to be informed of the said petition, and the latter reported as follows: "During khanapari work I could not ascertain which lands are in possession of Ramanuj and which are in possession of Jogendra Narain Roy; nor did they point out those lands to me at that time. So far as I could ascertain from local inquiry I recorded the lands in possession of defendant, Ramanuj Roy. And as plaintiff purchased the share of Ramanuj Roy, I think, plaintiff should be given lands in possession of Ramanuj Roy as far as possible and on that principle I have allotted the lands to plaintiff's share."

22. The Court by its order, dated 9th September 1918, held that, under the circumstances, no action could be taken in respect of Jogendra's application.

23. It is contended that an inquiry should have been made into the allegations against the Commissioner, and that the matter should not have been disposed of in the manner it has been done.

24. In the absence of any enquiry on the point we are not in a position to determine the merits of the application of Jogendra. But he does not appear to have acted promptly, as the application was made after the Commissioner had finished the held work. At the same time, it does appear that, although Jogendra has a share, no land has been recorded in his name. We think, therefore, that Jogendra has been prejudiced.

25. The Commissioner appears to have given notice to the co-sharers by post as well as by beat of drum several times. The Commissioner says that only some of them appeared before him occasionally. But there were certain minors; they were not properly represented in the Court below and their interests do not appear to have been properly looked after in the partition proceedings as the Commissioner himself says that only some of the defendants attended and that not regularly. In his report of the 19th September 1918 he says: "I have allotted the plaintiffs one-anna share mostly from the lands in possession of defendant, Ramanuj Roy, whose share the plaintiffs purchased. In a few cases I departed from this rule--one in case of partitioning tanks held in khas possession by the co-sharers and another in case of patit danga lands. In the first case I found no tank exclusively in khas possession of Ramanuj Roy. So I allotted one entire tank which was held in khas possession jointly by all the co-sharers. I did so because in giving one entire tank to plaintiff instead of one-anna share in all the tanks, it would be convenient to the plaintiff as well as to the defendants to use and enjoy the tanks. In the second case as the paid danga lands in possession of the tenants under Ramanuj Roy did not meet the demands of the plaintiff, so I allotted to plaintiff the small portion of khas patit lands in possession of Ramanuj which was left after giving the plaintiff his share of the same class. But this even did not make up the deficiency. So I had to take a portion of the ejmali patit danga land (plot No. 859) and I allot the same to the plaintiff's share."

26. The tank and the patit danga lands being joint, the allotments certainly

affected the minors.

27. The suit was instituted in 1907 about 15 years ago and a large sum has been spent in the partition proceedings, and although under the circumstances we are reluctant to remand the case, we think that the minors as well as Jogendra have been prejudiced though Jogendra himself is partly responsible for it. Having regard to the fact that the minors have not been properly represented, that the partition affects their interests and that the heirs of the deceased were not brought on the record before the decree, we think that the final decree should be set aside.

28. The kharanpuri of the class filed lands made by the Commissioner will stand. But the Commissioner will proceed to record the lands in the possession of Ramanuj and Jogendra separately in the presence of all the defendants after giving notice to them and then proceed to allot lands in one aana share of the plaintiff. There will also be a partition of the tanks and patit danga lands in the plaintiff's one-anna share in the presence of all the defendants. To this extent only the proceedings of the Commissioner are set aside and there will be a fresh partition, as indicated above.

29. As regards Mouzah Barathol the Commissioner (Bibhuti Babu) reported (as would appear from the judgment of the Court below) that the plaintiff should get a certain sum as his share of the rents of the Mouzah and neither party took any objection to the Same.

30. As regards Chak Aral the Commissioner says: "The men present stated it to be a separate Mouzah and not a part and parcel of Mouzah Ismail but the Revenue Survey Map shows that it is a part of Ismail. Defendants did not produce any document before me to show that it was a separate Mouzah. So I could not leave it aside. But I have made a separate list of the lands in this Chak and have partitioned these lands separately so that if this Chak be not a part of Ismail, this portion of the partition work may be left aside without affecting the partition of the rest of the Mouzah.

31. It is contended on behalf of the appellant that Mouzah Ismail is held under the Raja of pachait, whereas in the petition of claim made by Ramesh Chandra Mukherjee on the 24th April 1896 in Execution Case No. 293 of 1896 in which the ancestor of the plaintiff was the decree-holder and Ramanuj and Ram Gopal were the judgment-debtors, it was asserted that Chak Aral was held under one Priya Sakhi Debi and that it was released from attachment. Now, if this assertion is true (we cannot decide that point here) prima facie it would not form part of Mouzah Ismail. This question does not appear to have been gone into fully by the Court below. The learned Subordinate Judge merely says that "Aral Chak being within Mouzah Ismail is liable to partition."

32. We accordingly direct the Court below to go into this question and if that Court finds that Chak Aral is not a part and parcel of Mouzah Ismail then it will be excluded from partition. If on the other hand, it finds that it is part and parcel

of Mouzah Ismail as purchased by the plaintiff, then it must be partitioned along with the Mouzah.

33 The Court will decide this question of Chak Aral before the Commissioner is directed to make fresh allotments.

34. The final decree of the Court below is accordingly set aside and the case sent back to that Court in order that fresh partition may be made as directed above and the case then disposed of according to law.

35. The appellant must put in the costs of the fresh partition within the time to be fixed by the Court below, failing which, the partition already effected will stand.

36. So far as the costs of Chak Aral are concerned, we assess the hearing fee at three gold mohurs which will abide the result, and as regards the rest of the lands, we assess the hearing fee at Rs. 100.

37. The plaintiff-respondent must pay the costs of this appeal to the appellant.

38. As the case has been pending for a very long time, we trust that the Court below will take it up at an early date.