
(1934) 08 CAL CK 0049
In the Calcutta High Court

Rati Lal Nanji and Others

APPELLANT

Vs

Uttam Lal Sarcar and Another

RESPONDENT

Date of Decision : 16-08-1934

Acts Referred:

Citation : AIR 1935 Cal 275 : 155 Ind. Cas. 842

Hon'ble Judges : Mitter, J;Edgley, J

Bench : Full Bench

Judgement

Mitter, J.—This is an appeal by the plaintiffs from a decree of the Subordinate Judge of Asansol dated 23rd July 1930 by which their suit claiming several reliefs was dismissed. The reliefs claimed in the plaint are: (1) that certain coal lands mentioned in Schedule (1) to the plaint be declared to be the joint and partnership properties of plaintiff 1 and defendant 2 constituting the firm, of Khengarji Amritlal & Co., (plaintiff 2); (2) that a decree in money suit No.207 and the subsequent proceeding thereof are not binding on the plaintiffs or either of them; (3) that the sale in execution of the said decree is void or even if it be held to be valid is not binding on plaintiff 1. and his share has not been affected thereby, and (4) that it be declared that plaintiff 1 has a right to redeem the schedule properties and the decree for redemption may be passed after taking an account of what would be due to the principal defendant.

2. The case stated in the plaint is that the principle defendant Uttamlal Sarkar and this cosharer are the joint owners of mauza Jote Dhamo and that the onehalf share of the said undivided mauza belongs to the said defendant and the remaining half share to his cosharers that in the said mauza there is a plot of land measuring 527 bighas the underground coal mining, rights thereof was demised to one, Mr. James Kirkwood by two leases one of which was executed by the principal defendants on 28th January 1920, in respect of his undivided half share and the other by his cosharers Hem Chandra, Sarkar and others on the same date and at the same time in respect of the remaining eight annas; that on 17th April 1920, Mr. Kirkwood demised on certain terms his rights in the said plot

of 627 bighas acquired under the two leases to the proforma defendant for the firm of Khengarji Amritlal & Co. the partners whereof were the proforma defendants Amritlal Ojha and the late Nanji Khengarji, the father of plaintiff 1 that on 20th June 1921, Mr. Kirkwood conveyed to the firm of Khengarji Amritlal & Co., the right which he had under the two leases, viz., his right to receive royalty from the said firm under the, sub-lease of 17th April 1920; that, the said firm became the tenant under the principal defendant and his cosharers in respect of the premises demised by the leases of 28th January 1920; that plaintiff's father had 7-annas share in the colliery; that plaintiff 1's father died on 3rd March 1928; that on the death of his father the plaintiff became entitled to his entire share in the partnership business regarding the jote Dhamo Colliery; that some time in August 1928, plaintiff 1 came to know that the colliery has been sold in execution of a decree obtained by defendant 1 for the royalty of the said colliery; that as a result of his inquiries it transpired that defendant 1 had instituted a suit (Misc. No. 207 of 1924) against defendant 2 for certain amount due to him in respect of royalty of the colliery and had obtained a charge decree on 21st April 1923, which was eventually confirmed by the High Court on 18th January 1928; that defendant 1 proceeded to sell some of the properties covered by the said charge decree and that he himself had purchased the same at a grossly inadequate price of Rs. 700, the real price being Rs. 1,25,000; that in the said suit neither plaintiff's father nor the plaintiff was made a party; that the plaintiff believes that defendant 1 followed an illegal and irregular procedure in bringing about the sale; that the properties being partnership properties could not be sold by defendant 1 in execution of a decree against defendant 2 alone and the partnership properties have not in fact been sold. On this state of pleadings the plaintiffs asked for the reliefs which have already been stated. There were several defences to the suit but it is only necessary to mention those defences which bear on the points raised by the present appeal. They are: (1) that defendant 2 was the sole owner and proprietor of the firm of Khengarji Amritlal & Co.; (2) that the defendant 1 executed, the decree in Suit No. 207 of 1924 quite legally and purchased the properties at a fair price; (3) that the plaintiff allowed himself to be represented by defendant 2 in all transactions regarding the disputed colliery with the lessors and is bound by the decree in money Suit No. 207 of 1924, on the principal of estoppel, acquiescence and waiver. On these pleadings several issues were framed.

3. Issue 2 is to the following effect: Is plaintiff 1, a partner in the firm of Khengarji Amritlal & Co. (plaintiff 2)? The finding of the Subordinate Judge on this issue is in favour of the plaintiff-appellant. He has held that Nanji Khengarji who was a partner in the firm of Nanji is the father of plaintiff 1. The finding of the Subordinate Judge on this part of the case has been challenged by the respondent by way of cross-objection and we have heard the respondent on this point but nothing that we have heard from the respondent induces us to take a view different from that of the Subordinate Judge on this point. It is true that no deed of partnership was produced in this case; besides it appears that the

conveyance (Ex. 4) executed by Amritlal Ojha in favour of the firm shows that Amritlal Ojha was not the sole partner, for in that document Amritlal describes himself as a member of the firm of Khengarji Amritlal Co. This document is dated 22nd January 1921 (see p. 17, part 2). The subsequent conveyance by Mr. Kirkwood dated 20th June 1921, is in favour of the firm Khengarji Amritlal & Co.: see Ex. 5, p. 20, part 2. It also appears that in Ex. 9 series a published report of the Government of the list of coal mines worked under the Indian Mines Act, Nanji father of plaintiff 1, is also shown as the partner of the firm and these reports extend from 1920 to 1927: see pp. 9, 10 and 25, part 2. We have no doubt on this documentary evidence that the plaintiff's father was the partner of the firm. The respondent in support of his cross-objection has seriously commented on the fact that Amritlal Ojha has not gone into the witness-box and that his agent Maniklal who was present in Court has not also been examined and that when material evidence is withheld an inference unfavourable to the party withholding the evidence should be drawn. Chunilal, however has been examined on behalf of the plaintiff and he proves that Nanji was the proprietor of the colliery and that he was appointed by Nanji some ten years before he was deposing to look after the work of the colliery. We are therefore of opinion that the Subordinate Judge has rightly decided the issue in favour of the plaintiff. This disposes of the cross-objection.

4. Issues 3 and 4 raise the question as to whether Amritlal represented the firm in Money Suit No. 207 of 1924, and whether the decree obtained by defendant 1 for royalty of the colliery in Money Suit No. 207 and the sale in execution thereof are binding on the plaintiffs. It is to be noticed in this connexion that plaintiff 1 is the son of one of the partners and plaintiff 2 is the firm of Khengarji Amritlal & Co. The Subordinate Judge has held on the evidence of Uttam Lal Sarkar, defendant 1 alone, that Amritlal represented the plaintiff's firm and the plaintiffs are bound by the decree against defendant 1 and the sale thereunder. This finding of the Subordinate Judge has been challenged by the learned Advocate-General who appears for the plaintiffs-appellants. After reading the evidence of Uttam Lal we do not think that any case of presentation has been made out.

5. On the other hand the receipts which Uttamlal gave to Khengarji Amritlal & Co.. would go to show that Uttamlal was treating the company as the tenant. These receipts extend over the period of four years commencing from 29th July 1924, and ending with 28th November 1927: (see Ex. 7 series) pp. 38 to 41; part 2. Some of the receipts cover a period subsequent to the institution of the suit of 1924, and they make it clear that the tenant was the firm. After issuing the receipts defendant 1 who was plaintiff in Suit No. 207 might have added the firm as a party to the suit if he wanted to make the decree in the suit binding on the firm, The evidence of defendant 1 is that Amritlal told him that he had acquired Kirkwood's interest in the firm but any representation by one of the partners will not bind the other partner, Nanji. If defendant 1 had only cared to look into the conveyance by Kirkwood he would have at once discovered that the

transferee was the firm one member of which was Amritalal. This conveyance at p. 21, part 2 refers to the pottah of 17th April 1920 granted by Kirkwood in favour of Amritalal where Amritalal is described as a member of the firm. The receipts and these documents show conclusively that the doctrine of representation, cannot be availed of by defendant 1. For the above reasons the conclusion of the Subordinate Judge that Amritalal represented the firm cannot be supported. It follows from this that the sale is not binding either on plaintiff 1 and cannot affect his interest not is the sale binding on the firm, i.e., plaintiff" 2. The share of plaintiff 1 in the partnership seems to be five and half annas and the sale so far as he is concerned does not bind him.

6. The next question for consideration is what is the effect of the sale so far as the plaintiff 2 is concerned. Order 21, Rule 49, Civil P. C, provides that save as otherwise provided by that rule property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners of the firm as such. This is an imperative provision of the statute and renders the sale in execution of the decree in Money Suit No. 207, of 1924, invalid and inoperative as against the plaintiffs or either of them. It appears from the application for execution dated 16th March 1928, pp. 47 to 50, part 2, that the decree-holder prayed for realization of the decretal amount including costs and interest by auction sale of the colliery in question, that in the said execution case the property was sold and was purchased by the decree-holder for Rs. 700 only: see Ex. 2, p. 63, part 2. The sale as we have held is inoperative but there is an alternative prayer in the plaint that it be declared that the first plaintiff has the right to redeem the schedule properties and a decree for redemption be passed after taking an account of what will be due to defendant 1. Having regard to the fact that Amritalal Ojha represented to defendant 1 that he was the sole partner of the firm it will be just to grant the plaintiff the alternative relief claimed by him and we accordingly set aside the decree of the Subordinate Judge dismissing the plaintiff's suit and direct that plaintiff 1 be allowed to redeem the properties which have been sold and that a decree for redemption be passed after taking an account of what will be due to defendant 1. in accordance with the provisions of Order 34, Rule 7, Civil P. C,. read with Rule 15, Considering all the circumstances of the case we are of opinion that each party should bear its own costs throughout.

Edgley, J.

7. I agree.