

(1929) 05 CAL CK 0051
In the Calcutta High Court

Solaiman Moosaji Asmal and Others

APPELLANT

Vs

Jatindra Nath Mondal and Others

RESPONDENT

Date of Decision : 13-05-1929

Acts Referred:

Transfer of Property Act, 1882 — Section 116

Citation : AIR 1929 Cal 553

Hon'ble Judges : Rankin, C.J;B.B. Ghose, J

Bench : Full Bench

Judgement

Rankin, C.J.—This is an appeal from a judgment and decree of the Subordinate Judge, Third Court of the 24 Parganas in a partition suit brought on 20th January 1920. It appears that the whole of the land with which we are concerned is about three bighas in area and, in 1893, a gentleman of the name Melosch took a lease for nine years of what was described as two bighas out of the three bighas and it was further said that the bigha which was not included was the share of Shyam Lal and Kishori Lal Mandal. Melosch was minded to put up a rice-mill and he covenanted to erect a brick-built machine-room and rice and paddy godowns at his own expense upon this land. He further covenanted that he should have the right, on the expiry of the term, to remove the-buildings at his own costs and that he should not be competent to claim any damages in respect of the removal from the lessors. There is a clause which seems to operate nothing:

If it be necessary to sell the same, I shall sell the same to you at the market price.

2. The lessors under that lease were, speaking substantially, the plaintiffs in the present suit, and, when that lease, came to an end in September 1902, the present defendant 1 whom I shall call Musaji executed a kabuliat on the same lines. The covenant ran as follows:

In addition to the machine-room etc, standing on the said land which was purchased by me, I shall erect machine-rooms etc, according to

requirements....On the expiry of the term within one month thereof, I shall remove the buildings etc, belonging to me at my own cost. I shall not be competent to claim any damages in respect of the same from you; and if it be necessary to sell the same, I shall sell the same to you at the market price.

3. Now, that term lasted till 1912. In the meantime in 1904, Musaji, defendant 1, purchased a one third share of the entire property from two of the co-owners who had not been lessors to him. After that in December 1909, he entered into a. fresh kabuliat with the plaintiffs excluding certain property:

the share of your cosharer Babu Kishori Lal Mandal specified in schedule below.

4. He covenanted again that, on erecting houses as required by him he would enjoy the property. He covenanted that he would remove the houses within one month of the expiry of the term at his own cost and would not be competent to claim damages in respect of the same from the plaintiffs. This last lease expired in October 1919 and the suit for partition was brought in January 1920.

5. In the written statement of defendant 1, he set up as a defence, first of all, that-there were some nine cottas of land which had not been comprised in any of his leases and that, as regards those nine cottas, he had become entitled to them by adverse possession apart altogether from the one-third share which he had bought as I have said. Then he went on to say that he raised valuable structures and a rice-mill on a part of the land and that as far as possible, that portion of the land should be allotted to him. So far not much difficulty arises. In para. 9, he said that:

the land in suit was low and jungly and this defendant reclaimed it, raised its level, covered the major portion of the land with bricks and cement plaster for the purpose of making a grain-yard; the defendant values the said improvements at about Rs. 20,000 and submits that he is entitled to get the value of the same from the other cosharers according to their shares on partition.

6. It will be seen, therefore, that the improvements which he claims are in no way claimed as having been made at any particular time rather than another. It might have been as well that particulars of this allegation had been given; but the allegation is that he reclaimed the whole land, raised its level and covered the major portion with bricks and cement plaster. There is no particular allegation about the nine cottas. There is no particular allegation that he did this before or after 1904 or that he did this at one point of the land rather than another. In that position, the suit came on for trial and, when the plaintiffs' witness was in the witness-box, the defendant's pleader wanted to cross-examine him about the details of these improvements; but the learned Judge thinking this to be irrelevant had the matter argued and came to the conclusion that, in this suit the question of improvement did not arise. He gave to defendant 1 in the directions contained in his preliminary decree for partition a right to have as far as possible the land upon which these valuable structures had been erected and no complaint as regards the structures erected in the way of a rice-mill is now

pressed before us. The learned Judge was of opinion that in this case no other question could be entertained as regards the improvements; and it is on that point that this appeal is directed.

7. Mr. Hira Lal Chuckerburty for the appellant says that without hearing evidence to find out what these improvements are, when they are made, what their value is and so fourth, it is not possible to make a partition and to be sure that defendant 1 is not entitled to more than the right which has been granted to him, namely, to get as much as possible the land which has got the structures and the rice-mill upon it. Upon that question the first thing that has to be carefully looked into is the question of the position of defendant as a lessee. The lease which I have referred to of 1st December 1909 expire in October 1919 and the first thing the see is whether that lease is still subsisting or not. Defendant 1 in his written statement objected that the plaintiff were not in possession and, when on comes to the evidence given by the partie what one finds is that, in October 1919 there is no suggestion that defendant wrote to the plaintiffs or to anybody else so as to change his status or position giving notice to them that he would be no longer their tenant or anything of that kind. The evidence on the part of the landlords was that they regarded defendant 1 as a tenant and not as a trespasser and that defendant 1 was really in the position of a tenant holding over upon the terms of the kabuliat of 1909. In my judgment, that was his position The principle at all events of Section 116, T.P. Act a principle which in no way depends upon that enactment, is clear enough. If a tenant holds over, it only, requires the consent of the landlord to keep him as a tenant upon terms which can be discovered from the proper source In my opinion, the learned Judge was entirely right when he dealt with this suit on the footing that at the time it was brought defendant 1 was a tenant of the plaintiffs holding over with the consent of the lessors.

8. That being the position, there can be no doubt that the plaintiffs had possession of the land to found a suit for partition and I see no objection at all to this suit upon that score. In these circumstances, the learned Judge's reasoning is this. We are here partitioning land which is in the occupation, so far as the plaintiffs' share is concerned, of defendant 1 as a tenant. The terms of the tenancy deal expressly with the question of improvement. At the end of the term, the various covenants or bargains that have been made with defendant 1 will take effect. He was to be entitled to put up any structures he liked on a part of his tenancy. Equally he was not to be entitled to make the landlords, the plaintiffs, pay for them. He was to have the right to take them away, if he wanted. Otherwise, as between the lessee and the lessors, when the terms came to an end, he was to have no further advantage for his expenses on the improvements. In these circumstances, the learned Judge says that it is not reasonable or possible in this partition suit to do more than to give to defendant 1 a one-third share directing that, as far as possible, his one-third share should be the land upon which these structures of his have been erected, Mr. Hira Lal Chakraborty contends before us that that is not enough, because his client after 1904 was a co-owner. He says that his client, defendant 1 is to be treated as if

he were a co-owner in possession of the whole as such and he says further that it is a general principle of equity that when a man, as co-owner, has made improvements over the whole, prima facie he is entitled not merely to get an allotment of his share which will carry with it, so far as possible, the benefits of the improvements but he is entitled prima facie either to make the other co-owner pay for the improvements he has made upon the rest of the property or else the other co-owners must get a smaller share in order that the person who has made the improvements may reap the value of his expenses.

9. In my opinion, this appeal fails upon two main grounds in that respect as to which Mr. Chukerbutty in a very able and careful argument has not convinced me at all. First of all, it seems to me that, as between defendant 1 and the plaintiffs, defendant 1 who took his kabuliat after he became a co-owner, namely, in 1909, is not in the position of a co-owner in occupation of the whole as such. He is a person who has definitely attorney to them in respect of the plaintiffs' share. He has made a bargain with them, notwithstanding that he is a co-owner a bargain that he will get possession of the plaintiffs' share as a tenant with the right to build what he likes on the term that he is not to charge the plaintiffs with the costs that he may have expended. It appears to me, therefore, that the general principle applicable to a co-owner who is in possession of the whole as such is not to be applied to this case without qualification. Prima facie, this matter of improvement is a matter upon which the plaintiffs and defendant I have long ago made their bargain with their eyes open and that is an important circumstance when we come to consider the equity in this case. In the second place, Mr. Chuckerbutty's case here would require us to put the law too high. I am prepared to assent to the proposition that where a person has expended money upon a joint property and a time comes to partition it, it is reasonable and right to endeavour to give him such an allotment as may enable him to reap the advantage of what he has expended upon improvements. But when we are asked to go beyond that and to say that it is the prima facie right of such a co-owner expending money to improve the whole or a greater portion of the joint land to have in one way or another recouped to him by his co-owners the value of the improvements which they got in the shares which are allotted to them, then I say that that is not the law. In some cases it may be possible to go so far. In the case before North, J. for example, namely *In re: Jones, Forrington v. Forrester* [1893] 2 Ch. 461 money had been borrowed at the instance of both the joint tenants, it had been secured on the share of one, it had been borrowed for the purpose of making improvements and the property at the time of the suit had to be sold and the price was going to be enhanced by reason of the improvements which had been made. In such a case as that, it may be right enough to give to the person who has made the improvement not only his one third of the purchase money but such a further sum as represents improvement which he has made. But in a case which is not such, in a case where the improvements have been made by a co-owner at his own will I do not say improperly, in any way, but at his own will it is a very different matter; prima facie it is not a thing which the

Court will do to endeavour to make sure that the owner who has improved the property will get every penny to himself of the advantage which his money has created. See, in this connexion, Freeman on Co-tenancy and Partition, Edn. 2, p. 680:

If one joint tenant or tenant-in-common covers the whole of the estate with valuable improvements so that it is impossible for his co-tenant to obtain his share of the estate with out including a part of the improvements so made, the tenant making the improvements would not be entitled to compensation therefor, notwithstanding they may have added greatly to the value of the land; because it would be the improver's own folly to extend his own improvements over the whole estate and because it would be unjust to permit a co-tenant at his pleasure to charge another co-tenant with improvements he may not have desired. In such a case, the improver stands as a mere volunteer and cannot, without the consent of his co-tenant, lay the foundation for charging him with improvements.

10. Prima facie, it seems to me that such an owner will be given an allotment, so far as is possible, that may enable him to keep the advantage of his improvements. But it requires a special case and a very strong case for the Court to go any further than that.

11. I notice that, in two cases of this Court which were cited to us in which Asutosh, J. Mookerjee, delivered judgment, namely, the cases of Upendra Nath v. Umesh Chandra [1911] 15 C.W.N. 375 and Jagannath Marwari v. Chandni Bibi AIR 1921 Cal. 647 there is no reason for saying though the language is undoubtedly wide in certain of the expressions, that Mookerjee, J. intended to lay down a proposition beyond what I have endeavoured to state. He was most careful in one of those cases to say that the question whether one could go further and invoke the aid of equity so as to enable a co-sharer to get the whole advantage of his own improvements was a question which did not arise. For these reasons, I think that, although the learned Subordinate Judge perhaps took a certain risk in striking so soon as he did and in refusing to go into evidence about these improvements, he arrived at a right conclusion. It does not seem to me that it is necessary or advisable that we should require the defendant-appellant to give particulars of the dates and the characters of the various improvements he claims to have made upon the property or to direct any enquiry thereon because it is sufficiently clear that it is not in this case possible upon any principle of equity for the Court to do more for him than the decree of the learned Subordinate Judge has done.

12. Certain other points have been taken by the learned advocate for the appellant which are only minor points and need not be dealt with at any length. One is that there was a defendant Khatiza Bibi a married lady who lived at an address in Natal in South Africa which appears to have been known to the parties. She was served quite properly by a registered letter. I observe that this registered letter was apparently a registered post-card. It does seem to me

rather inadvisable to send such a notice in the form of a post-card. But she was served in a way that complied with the rules under Order 5, Civil P.C. Then, it is said that there was no acknowledgment of the return and another notice was sent again. That was quite proper and was a fresh service under the rules. Thereupon the plaintiffs getting somewhat excited about the position appear to have gone to the learned Subordinate Judge and got an order under the guise of an order for substituted service an order according to which a copy of the notice was put up in the Court House of the twenty-Perganas by way of giving information to the lady who by all consent was then living with her husband somewhere in Natal in South Africa. That is an absurdity. It is certainly not a reasonable way of serving notice. Substituted service is not to be used in any way which is unbusiness like and ridiculous. But in this case, there is ample evidence that under Order 5, Rule 25, Civil P.C., this lady was properly served by a proper notice being sent to her and posted to her in the ordinary manner. In these circumstances, it was not necessary to have recourse to the somewhat peculiar procedure that had been adopted in this case under the guise of substituted service.

13. The last point which remains for consideration is with reference to a plot of 9 cottas which does not appear in any of the leases granted to defendant 1 or his predecessor Melosh. As regards that, defendant 1 makes a claim to have acquired a complete title thereto by adverse possession. That is not an easy thing to make out as against a co-owner at any time. But on the evidence of the defendant-appellant's own witnesses in this case, it seems to me that that claim is wholly unsubstantial. This plot of 9 cottas is a piece of land on which there seems at first to have been a cattle-shed and it was not originally leased to Mr. Melosch for the purposes of his mill. As time went on, the owner of the mill seems to have taken to use it. He seems to have used it as a place where some of his coolies might sleep at night. I need not say that one co-owner by making use of the property in that way does not acquire adverse possession as against the other co-owners. The case of adverse possession on the oral evidence can safely be rejected.

14. In the circumstances mentioned, it appears to me that this appeal fails and must be dismissed with costs to the plaintiffs-respondents. This hearing-fee is assessed at fifteen gold mohurs. The advocate for the minor defendant respondents says that he has been siding with the appellant.

B.B. Ghose, J.

15. I am entirely of the same opinion.