
(1911) 07 CAL CK 0017
In the Calcutta High Court

Syed Raziuddin Hussain and Others

APPELLANT

Vs

Dr. Taharat Hussain

RESPONDENT

Date of Decision : 12-07-1911

Acts Referred:

Bengal Estates Partition Act, 1876 — Section 89

Citation : 13 Ind. Cas. 498

Hon'ble Judges : Mookerjee, J;Carnduff, J

Bench : Division Bench

Judgement

1. This is an appeal on behalf of the defendants in an action in ejectment. The plaintiff and the predecessor-in-interest of the defendants were proprietors of a Mouzah Mukhdumpur Kazi Chak. In 1893 a partition of the Mouzah was completed under the Bengal Estates Partition Act, 1878. The result of the partition was that plot No. 82, upon which the dwelling-house of the defendants stands, was allotted to the plaintiff. The partition was completed and possession delivered on the basis thereof on the 6th March 1898. On the 17th September 1908, the plaintiff commenced this action for recovery of possession on the ground that upon completion of partition and delivery of possession, the defendants became trespassers and were not entitled to continue in occupation of their dwelling-house which had fallen into the share allotted to the plaintiff.

2. The Court of first instance dismissed the suit. Upon appeal the District Judge has made a decree for ejectment. In the present appeal the defendants have assailed that decree on the ground that in view of certain orders of the Revenue authorities to which we shall presently refer, no decree for ejectment ought to have been made against them.

3. It appears that, during the progress of the partition proceedings, the present plaintiff took objection to the proposed allotment, on the ground that plot No. 82, which contained the dwelling-house of the predecessors of the defendants, had fallen in his share. This objection was overruled by the Deputy Collector, who stated in his order that Section 89 of Act VIII of 1876 would apply. The plaintiff

was not satisfied with this order. When the papers were submitted to the Collector for confirmation of the allotment made by the Deputy Collector, the objection was repeated and overruled. It has been stated to us that the objection was reiterated also before the Commissioner and met with the same fate. No rent, however, was assessed in accordance with Section 89, and after possession had been delivered to the parties on the 6th March 1898, the predecessors of the defendant on the 1st April following invited the attention of the Deputy Collector to the fact that no rent had been assessed and prayed that rent might be assessed as contemplated by Section 89. This application was refused on the ground that it had been made too late. The question, which now arises for consideration, is what are the rights of the parties in view of the circumstances stated? The District Judge has held, upon the authority of the decisions in *Musammat Nawab Begum v. Rustum Khan* 2 Agr. H.C.R. 149; *Laikhram v. Ghumnee* 3 Agr. H.C.R. 298 and *Wazihuddin v. Syed Mozhar Hossain* S.A. No. 522 of 1902 unreported, that the defendants are in the position of trespassers and are liable to be ejected. In our opinion, the cases relied upon are distinguishable and do not assist us in the solution of the question raised. The two cases before the Agra High Court merely recognise the doctrine that upon the completion of partition proceedings, the owners become the proprietors of the land separately allotted to them and cease to be joint owners of the entire land. The necessary inference from this proposition is that they cease to be joint proprietors of all the lands and become the sole proprietors of the lands specifically allotted to them; in other words, after partition no proprietor can claim to continue in occupation of any land not specifically allotted to him. The decision of this Court in the case mentioned has no application to the circumstances of the present litigation. It related to a peelkhana (stable for elephants) which could not in any sense be described as a dwelling house within the meaning of Section 89 of the Bengal Estates Partition Act, 1876. In the case before us (here is no room for controversy that the intention of the Revenue authorities was that the particular plot now in dispute should be dealt with u/s 89 of the Bengal Estates Partition Act. The present plaintiff started with the objection that the land had been allotted to him although thereupon stood the dwelling-house of the predecessors of the defendants, at that stage he was evidently anxious that the land should not be allotted to his share. The order thereupon passed was that his objection was not tenable in view of Section 89 of the Estates Partition Act. It has been contended by the learned Vakil for the respondent that it thereafter became the duty of the predecessor of the defendants to invite the Revenue authorities to assess the rent mentioned in Section 89 and as they failed to have the rent assessed, they are liable to be ejected. We are not prepared to accept this contention as well founded. What obviously happened was that a mistake was made by both the parties as also by the Deputy Collector. In 1895 when the Deputy Collector decided that Section 89 would apply to the land now in dispute the parties must have understood that in due course the rent mentioned in that Section would be assessed. Section 89 provides that if a dwelling-house belonging to one proprietor is situated on any

land which it may be necessary to include in the separate estate of another proprietor, the owner of such house may retain that with the offices, buildings and grounds immediately attached thereto upon agreement to pay rent for the land occupied by such dwelling-house, offices, buildings and grounds to the proprietor of the separate estate in which such land is included, the limits of the land so occupied and the rent to be paid for it in perpetuity shall be fixed by the Deputy Collector and shall be stated in the paper of partition. The reasonable interpretation of the order of the Deputy Collector is that the plaintiff who took the objection which proved unsuccessful should invite the Deputy Collector to assess the rent which he was to receive in view of the fact that Section 89 was held applicable to the case. But whether this was so or not, the defendants or their predecessors might very well have expected that rent would be assessed in ordinary course by the Deputy Collector pursuant to the order which he had made. The result of the mistake by the parties and the Deputy Collector is that rent has not been assessed. The learned Vakil for the respondent has contended that the inference is that the defendants are trespassers and that it is not open to a Civil Court to afford any relief to the defendants. We are not prepared to accept this contention as well founded. The statutory duty which was cast upon the Revenue authorities has not been performed, and, as already explained, it was not performed by reason of the mutual mistake of the Court and the parties. Under these circumstances, we are of opinion that we are not powerless to do justice and afford complete relief to the parties.

4. The proper course to pursue now is to have the rent assessed and that rent ought to be assessed in conformity with the provisions of Section 89. We shall, therefore direct the District Judge to request the Deputy Collector to assess the rent payable in perpetuity in respect of this land u/s 89 of the Bengal Estates Partition Act 1876. When the Deputy Collector has assessed the rent, subject to the result of an possible appeal to the superior Revenue authorities as mentioned hereafter, that will be declared to be the rent payable by the defendants to the plaintiff. The learned Vakil for the respondents has further argued with considerable force that the defendants have hitherto enjoyed this land without any payment to the plaintiff, and they cannot justly escape payment of rent for all these years. We are of opinion that this contention is well founded, and that to prevent injustice it is necessary to direct that the defendants should pay the rent which would have accrued due, had it been duly assessed by the Deputy Collector. We, therefore, direct further that when the rent has been assessed by the Deputy Collector, the District Judge will make a decree in favour of the plaintiff for all arrears of rent at that rate from the date of the delivery of possession, that is the 6th March 1898, up to the date of the commencement of this suit, namely, the 17th September 1908. The net result of this litigation, therefore, is that although the plaintiff is not allowed a decree for ejectment, he will have a decree declaring his title to receive the rent which may hereafter be determined by the Deputy Collector from the defendants; and he will also have a decree for all arrears of rent.

5. We may add that as the rent will be assessed by the Deputy Collector u/s 89, before his decision is accepted and acted upon by the District Judge, it will be open to the parties to proceed by way of appeal to the Collector and the Commissioner under the provisions of Sections 142 and 143 of the Bengal Estates Partition Act; in other words, under our directions in 1911 proceedings will be taken which might and ought to have been taken in 1898.

6. As we have made a decree for rent from the 6th March 1898 up to the 17th September 1908, it is desirable to point out that no question of limitation arises, in view of the fact that rent has not up to the present time been assessed.

7. The result is that this appeal is allowed, the decree of the District Judge discharged and the case remanded to him in order that the directions given in this judgment may be carried out. Each party will bear his own costs throughout the litigation.