

(1961) 06 CAL CK 0006
In the Calcutta High Court
Case No : Suit No. 748 of 1934

The Official Trustee of West Bengal

APPELLANT

Vs

Bidyadhar Mullick

RESPONDENT

Date of Decision : 16-06-1961

Acts Referred:

Citation : (1962) 2 ILR (Cal) 109

Hon'ble Judges : Mallick, J

Bench : Single Bench

Advocate : A.C. Mitra, for the Appellant; Gouri Mitter, for the Respondent

Judgement

Mallick, J.—The Plaintiff has taken exception to the report filed by the Commissioner of Partition in the above partition suit. The suit is for partition of the estate left by one Shib Chandra Mullick. Shib Chandra Mullick died on August 4, 1866. After his death the estate was held and enjoyed by Hrishikesh Mullick and after Hrishikesh's death by his widow Pura Sunderi. Hrishikesh died on January 9, 1873 and Pura Sunderi died on September 11, 1932. The instant partition suit was instituted by the Plaintiff on April 27, 1934. The Plaintiff claims to be entitled to half of the estate and to the remaining half the Defendants are entitled jointly. A preliminary decree was passed in this suit on June 28, 1937 and Mr. H.N. Sanyal; a well-known counsel of the Calcutta Bar, was appointed the Commissioner of Partition to divide the estate. He was also directed to make certain enquiries. Mr. Sanyal entered upon the reference and signed his report on July 7, 1960. The Plaintiff has taken exception to this report. The Plaintiff prays that the return be set aside and/or modified.

2. The learned Commissioner in his return has divided the properties into two parts. He has allotted to the Plaintiff the properties set out in Schedule B, Part I, to the report comprising six items of immoveable property situate in Calcutta of the value of Rs. 7,34,504.69 nP. He has also allotted to the Plaintiff the entirety of the compensation money payable to the estate by the Government of West Bengal in respect of the acquisition of certain Zamindary properties by the

Government. He has also allotted a moiety of the compensation money payable by the Government of East Pakistan in respect of Zamindary properties situate now in East Pakistan. There is a sum of Rs. 47,530.90 nP. belonging to the estate which is now lying in the "United Bank of India, Khulna Branch, he has allotted this amount to the Plaintiff as well.

3. To the Defendants the learned Commissioner has allotted jointly properties set out in Schedule B, Part II. They consist of six items of immoveable property the value of which comes up to Rs. 7,12,177.21nP., a moiety of the compensation money payable by the Government of East Pakistan in respect of the acquisition of Zamindary properties situate in East Pakistan. He has also allotted to the Defendants certain shares. The total value of the properties allotted to the Plaintiff comes up to Rs. 7,99,795.59 nP., whereas the total value of the properties allotted to the Defendants come up to Rs. 7,15,386.01 nP. The Plaintiff has been directed to pay to the Defendants owelty money amounting to Rs. 42,204.79 nP.

4. Prior to the institution of the instant suit another suit for partition was instituted wherein the Defendants were parties being Suit No. 2112 of 1932. In the said suit Gadadhar Mullick and Preolal Mullick were appointed joint Receivers and they realized as such Receivers a considerable amount of rents and profits of the estate and pursuant to various orders of the court a sum amounting to Rs. 1,44,000 of such profits was distributed amongst the parties thereto. In the instant suit it is contended that half of the said amount of Rs. 1,44,000 belongs to the Plaintiff in the instant suit. As such a claim was put forward before the learned Commissioner that the sum of Rs. 72,000 should be decreed in favour of the Plaintiff against the Defendants. The preliminary decree inter alia dealt with this claim and directed an enquiry in the following terms:

It is further ordered and decreed that the said Commissioner do make an enquiry as to what amount, if any, the Plaintiff is entitled to as mesne profits for his share in respect of the said estate since the twelfth day of September, one thousand nine hundred and thirty-two until possession thereof is delivered up to the Plaintiff and submit his report along with the said return.

5. The learned Commissioner held that during the period mentioned in the decree, the sum of Rs. 1,44,000 were realised by the Receivers in Suit No. 2112 of 1932 and distributed amongst the Defendants. The learned Commissioner has however held that the amount so paid cannot be said to be mesne profits in as much as they were moneys realised lawfully by the Receivers and payments made pursuant to the orders of the Court to the parties. Even though the amount so paid to the Defendants cannot be said to be mesne profits "the learned Commissioner directed that half of the said sum namely Rs. 72,000 should be paid to the Plaintiff out of the money now lying in the hands of the Receivers. Further he has held that apart from the Receivers nobody else realised any money from the estate and indeed could not realise any money belonging to the estate. In the result he has held that np mesne profits in the technical sense of

the term has been realised by any of the Defendants out of the rents and profits of the estate. Some Khas lands measuring a little more than 60 acres belonging to the estate has been left out of the partition at the request of the parties. This is the gist of the return filed by the learned Commissioner.

6. The learned Standing Counsel appearing in support of the application made a preliminary submission to this effect that having regard to the fact that some of the properties sought to be partitioned in these proceedings are now situate in East Pakistan, whether this Court still retains jurisdiction over those properties. If this Court had lost jurisdiction over those properties by reason of the partition of India it was the duty of the parties to come to court and obtain an amendment of the preliminary decree and/or the writ issued by this Court to the learned Commissioner whereby the learned Commissioner was directed to effect partition of the entire estate including the properties now situate in East Pakistan.

7. In default of the parties not having the Pakistan properties either excluded from the purview of the suit and/or in any event obtaining an order from this Court as indicated above there, might be complications in the future. The learned Standing Counsel was fair enough to concede that at first blush it did seem that there was something in the point though on closer scrutiny it might appear that no complication could arise if this return is confirmed.

8. It is to be noted that the suit was instituted in 1934 when this Court had jurisdiction over all the properties including the properties now situate in Eastern Pakistan. When India was divided in 1947 provisions were made in the statutes by parliament and orders issued thereunder whereby in respect to pending litigations the jurisdiction of the courts over properties situate in either Dominions was maintained. The same position was continued after the Indian Constitution came into force. It seems to me therefore that this Court had never lost jurisdiction over the properties comprising the estate in suit even though in 1947 a part of the estate has become part of a foreign territory. Nevertheless, it must be recognised that even though in law this Court still retains jurisdiction over the land now situate in a foreign territory, to effect a partition of the part now in foreign territory in this suit will involve considerable practical difficulties. I think it was the appreciation of these difficulties that led the parties to contend before the learned Commissioner that these properties should be left out of the suit. It is clear that the parties intended to adjust their rights in the lands situate in East Pakistan later in other proceedings. I believe the learned Commissioner agreed with the parties and at their request left out the Khas land in East Pakistan from the purview of this suit. It appears from the Minute Book which has been placed before me that the Plaintiff was a party to this submission before the learned Commissioner. That being the position I do not think that the learned Standing Counsel can make any grievance of it or raise the "point now.

9. The learned Standing Counsel has contended that if this Court still retained jurisdiction over the property and can deal with the property in this suit it was not at all necessary that there should have been a partition by metes and bounds

of that particular property in Pakistan, the property Could very well have been sold or the entirety of the property could have been allotted to either of the parties. No doubt that could have been done and if the parties had suggested that, I am sure, the learned Commissioner would have proceeded on that footing. But the parties did, not suggest that the Pakistan property should be sold or that it should be allotted in its entirety to one party. On the other hand it was submitted before the learned Commissioner that the property should be left out of this partition so that the parties may deal with it in a subsequent proceeding. In that view of the matter I do not think the Plaintiff can now be allowed to take any exception to what the learned Commissioner has done at their express request.

10. The other point made by the learned Standing Counsel is that previous order of this Court should have been obtained for modification of the preliminary decree in order to enable the learned Commissioner to act in that way. This is, if at all, nothing more than a mere irregularity and having regard to the facts of this case, I think, I should condone the irregularity and should neither modify nor set aside the return because of this alleged irregularity.

11. The partition effected by the learned Commissioner appears to me fair to both the parties. The learned Standing Counsel appearing in support of this application conceded that generally speaking it must be said that a fair partition has been effected. The immoveable properties allotted to the parties are substantially of the same value and no exception has been taken to the report as to the allotments made. The only point on which grievance can be made is with respect to the allotment of a sum of money amounting to Rs. 47,530.90 nP. lying in the United Bank of India, Khulna Branch. This sum has been exclusively allotted to the Plaintiff. It is contended by the learned Standing Counsel for reasons which need not be stated here that moneys lying in Pakistan is as good as lost money. That in any event there are difficulties in bringing money from Pakistan within a reasonable period of time and the difficulty is so great that all practical men would not consider it real asset. At least would not give it its face value. In that view of the matter the learned Standing Counsel submitted that the learned Commissioner should instead of making an allotment to the Plaintiff of this doubtful asset should have allotted half to the Plaintiff and half to the Defendant as indeed he has done with respect to the compensation money payable by the Pakistan Government for the acquisition of zaminderies in Pakistan. The learned Standing Counsel pointed out that if he had done that amount of owelty directed to be paid by the Plaintiff and A grievance has been made that even though the learned Commissioner has directed that the sum of Rs. 72,000 is to be paid to the, Plaintiff out of the fund now lying with the Receiver he did not allow any interest on this sum payable to the Plaintiff. It is pointed out by Mr. Gouri Mitter that if we look carefully to the terms of the preliminary decree-and the finding of the learned Commissioner himself-no amount could have been decreed in favour of the Plaintiff and the Defendants could have taken exception to this direction of the learned Commissioner that a

sum of Rs/72,000 be paid to the Plaintiff." However, having regard" to the absolute fairness with which the learned Commissioner has acted in this matter, the Defendants did not take any exception to the allotment of Rs. 72,000 made now before me by the learned Standing Counsel was not made before the learned Commissioner and it therefore escaped his attention. I am sure if this was brought to the notice of the learned Commissioner he would have dealt with this matter in the same way as he had dealt with the compensation money payable by the Pakistan Government and in my judgment this would be a fair way in which this amount should be dealt with in this partition proceeding. "What I think is to maintain the allotment as made by the learned Commissioner to the Plaintiff subject to this that if and when he realises the money or any portion thereof, he will pay over half of the sum to the Defendants. If this is done, then, in substance, half is being allotted to the Plaintiff and half to the Defendants. There should be a corresponding reduction in the owelty money payable by the Plaintiff to the Defendants. If account is taken of this fact the owelty money will have to be reduced from Rs. 42,204.79 nP to Rs. 18,439.34 nP. In my judgement this ought to be done and the return, to that extent, ought to be. varied and I make an order accordingly.

12. A grievance has been made that even though the learned Commissioner has directed that the sum of Rs. 72,000 is to be paid to the Plaintiff out of the found now lying with the Receiver he did not allow any interest on this sum payable to the Plaintiff. It is pointed out by Mr. Gouri Mitter that if we look carefully to the terms of the preliminary decree and the finding of the learned Commissioner himself-no amount could have been decreed in favour of the Plaintiff and the Defendants could have taken exception to this direction of the learned Commissioner that a sum of Rs. 72,000 be paid to the Plaintiff. However, having regard to the absolute fairness with which the learned Commissioner has acted in this matter, the Defendants did not take any exception to the allotment of Rs. 72,000 made by the learned Commissioner to the Plaintiff. There is force in this contention of Mr. Gouri Mitter. I have carefully looked to the terms of the preliminary decree and also the finding of the learned Commissioner. No exception has been taken to that finding of the learned Commissioner in this report so that the Plaintiff must be taken to have accepted these findings. If that is the position, it cannot be contended that anything is payable on that account to the Plaintiff. Nevertheless, when no objection has been taken by the Defendants, the amount directed to be paid to the Plaintiff, namely, the sum of Rs. 72,000 out of the money lying in the hand of the Receiver must stand, but no claim for interest can be entertained. On that ground I think the return cannot be challenged by the Plaintiff.

13. The learned Standing Counsel pointed out that the language used by the learned Commissioner in the portion of the return in which he dealt with the khas lands in Pakistan measuring 60.01 acres may lead to difficulties. In para. XIII the learned Commissioner deals with this land which reads as follows:

There is now in the said Bedkashi Abad Zemindary in East Pakistan Khas lands containing 60-01 acres particulars whereof are given in Schedule "Z" hereunder written. At the desire of the parties I direct that the said khas lands shall continue to remain joint as it is not possible to divide them. I do hereby certify and direct that the Plaintiff and the Defendants, other than the Defendants Bidyedhar Mullick and Anirudha Mullick in their capacity as Spending and Receiving Trustees, jointly to take possession of the said khas lands and make such arrangements in respect thereof as circumstances will permit.

14. The Learned Counsel seems to think that if this portion of the report of the Commissioner is confirmed, then the Receiver, who is actually in possession of the property, would be under an obligation to make over physical possession to the owners, namely, the Plaintiff and the Defendants in the suit. The property now being situate in Pakistan, there may be any number of difficulties in that regard. I do not think, however, that that was what the learned Commissioner intended to say or that what he stated amounts to what the learned Standing Counsel is apprehensive of All that the learned Commissioner has said is that the parties having agreed that this property be taken out of the suit, they remain jointly entitled to the property and would be entitled to get possession. I do not think the paragraph referred to direct possession to be made over by the Receiver to any of The parties. Such directions, in any event, will not have to be either asked for by the parties or given by the court now at this stage. The question, if any, may possibly arise at the time when an application for final decree will be made, when if necessary he question may have to be considered. I do not, therefore, think that the Plaintiff need be apprehensive of any difficulty later on, if the return of the learned Commissioner in respect of this award is confirmed.

15. These are all the points urged by the learned Standing Counsel.

Mr. Gouri Mitter submitted that certain directions would be necessary, having regard to the fact that under the award money given to the Plaintiff is now lying in the United Bank of India, Khulna, lying in the personal account of Mr. H.N. Sanyal who is also the Receiver of the estate. Direction will have to be given with respect to it. But I think these directions are properly to be given not now but when the application for final decree will be made. In this exception application directions need not be given. All necessary directions are to be given in the final decree to be passed by the court in the application for final decree to be made hereafter.

16. Subject to what I have stated above with respect to the allotment of Rs. 47,000 in the United Bank of India, Khulna, and subject to the variation of the owelty money, as indicated before, the report is confirmed.

17. The learned Commissioner in his report has set apart a certain sum of money on account of cost. He has also directed in his report that the costs of the parties are to be paid out of the estate and such payments are to be debited against the

respective parties. I direct that the costs of this application, as of a suit, be paid out of the money lying in the hand of the Receiver; certified for two counsel. The Official Trustee, however, is to be paid his costs as between attorney and client.