

(1920) 05 AHC CK 0001
In the Allahabad High Court

Zahurul Haq and Others

APPELLANT

Vs

Nabi Bakhsh and Others

RESPONDENT

Date of Decision : 25-05-1920

Acts Referred:

Citation : AIR 1920 All 41 : 57 Ind. Cas. 478

Hon'ble Judges : Piggott, J;Kanhaiya Lal, J

Bench : Division Bench

Judgement

1. This was a suit in which one Nabi Bakhsh claimed possession of certain Zamindari property and the houses standing on the abadi land. Nabi Bakhsh says that he became the owner of the same by an auction-purchase of the 28th of May 1915, which was ostensibly in favour of one Kalian. The plaintiff Says that Kalian acted as his benamidar and he holds a formal relinquishment in his favour executed by Kalian on the 19th December 1917. In this appeal we. are not concerned with the merits of the plaintiff's claim; as a matter of fact the question before us in whether those merits are or are not to be investigated. The difficulty raised by certain defendants had reference to partition proceedings which were going on in the year 1915. We understand that the record of those partition proceedings was before the Court below. It has not been laid before us, and we are content to deal with the matter on the facts as stated in the judgment under appeal, although there is more than one point on which the appellants might, in their own interests, have taken the trouble to see that we were better informed. At any rate, we know that when this partition was commenced, Kalian was not a recorded co-sharer, in any portion of the mahal which was the subject-matter of the partition. So far as we know he never became a recorded co-sharer Consequently no notice went to him of what was going on. Indeed for ought, we know the partition may have been started before the date on which Kalian acquired tills by his purchase at auction or at any rate before the 17th of September 1915 when he received formal possession of the shares purchased by him. Indeed we may infer that the partition had been going on before this latter date, for the lower Appellate Court says that it was at a vary

late stage of the partition that Kalian presented to the Court a certain application on the 12th of October 1915, the consequences of which have been discussed in argument in connection with this appeal. In this petition Kalian informed the Court that he was in fact a co sharer in the mahal under partition. He asked that his name might be recorded amongst the non-applicants for partition and, further, that the shares of which he claimed to be the proprietor might be made into a separate patti. The only order we can find to have been passed on this application is to the effect that Kalian's name might be entered amongst the non-applicants for partition. We know that, when the partition papers came to be finally drawn up, no property was assigned to Kalian under the partition, nor was he recorded as the proprietor of a patti or of any share in any patti. In his present suit the plaintiff says that the property purchased ostensibly by Kalian, but in reality by himself, on the 28th of May 1915 was made into two separate pattis appertaining to the mahal of the non-applicants of the partition, he has been kept out of possession by the persons who were recorded as proprietors of these pattis in the partition papers, hence he sues to recover possession. The Court of first instance held on the objection of the defendants that the suit was one relating to the partition of a mahal within the meaning of Section 233(k) of the Land Revenue Act and was, therefore, not maintainable. On appeal by the plaintiff the lower Appellate Court has reversed this finding and sent the case back for disposal on the merits.

2. I think the order of the lower Appellate Court was right. The present case is distinguishable from those which have been relied upon on behalf of the defendants-appellants on a variety of grounds. If a partition had been conducted behind the plaintiff's back, at a time when he had only recently acquired proprietary rights in the mahal and had not yet succeeded in obtaining formal delivery at all of possession over the property so acquired, it is beyond question that the plaintiff would not be bound by anything done in the course of the partition thus conducted without notice to him, and not being a recorded co-sharer he would be under no obligation to enter an appearance before the Partition Court with a view to protecting his own rights. It is quite conceivable that he might know nothing whatever about the partition until it was completed. A suit brought by him under such circumstances, not with a view to disturbing the allotment of the land made at the partition, but with a view to recovering his own property from certain persons to whom it had been assigned by the Partition Officer, would not be contrary to the provisions of Section 233(k). It is contended, however, that the entire position is altered by the fact that Kalian entered an appearance before the Partition Court by his petition of October the 12th, 1916, and by the order which the Court passed on that petition. One answer to this plea could readily be found in the fact that according to the plaintiff, Kalian was only his benamidar, had no beneficial interest in the shares which he was supposed to have purchased and might have colluded with the other parties by presenting this petition and neglecting to follow it up with any further action. An allegation to this effect was made in the plaint. It has been

suggested before us that it was not pressed by the plaintiff, because it is not referred to in his memorandum of appeal to the lower Appellate Court. We might perhaps regard this as a sufficient answer on this, point, if it were the only one in the case and had been negatived by the trial Court. We note, however, that Kalian's petition, put in as the lower Appellate Court says at a very late stage, must obviously have been presented long after the period provided for the presentation of objections under sections 110 and 111 of the Land Revenue Act and indeed long after the partition proceeding had been drawn up. We find that the partition khasra containing the final allotment of the lands of the mahal plot by plot to different co-sharers was only prepared on the 13th of November 1915. The partition proceeding must obviously have been drawn up a considerable time before this. Under these circumstances the Assistant Collector conducting the partition had no jurisdiction to entertain an objection by Kalian, to the effect that he was the real owner of any share in the mahal under partition, nor is it at all clear that he intended to do so. All we know is that he ordered that Kalian's name might be put upon the record on the partition case as one of the non-applicants. There is no suggestion that he proceeded to adjudicate upon Kalian's claim. A fair inference seems to be that his order merely amounted to permission accorded to Kallan to watch the subsequent proceedings with a view to satisfying himself that the shares allotted to the persona against whom he intended hereafter to enforce his rights were adequate and reasonable. There was, as far as we can discover, no adjudication as to Kallans proprietary rights, and we do not think there could have been any such adjudication in the circumstances. This is, therefore, a case in which the plaintiff, not being a recorded co-sharer, had no notice of the commencement of the partition proceedings and was under no obligation in law to prefer any claim before the Partition Court. A belated claim was no doubt preferred by Kalian for the presentation of which it is sought to make the plaintiff responsible; but this claim was never adjudicated upon and could not have been adjudicated upon under the circumstances. These considerations satisfy us that the case does not fall within the mischief aimed at by Section 233(k) of the Land Revenue Act and that the entertainment of the plaintiff a claim is not barred by any principle of res judicata. The decision of the Partition Court would not be equivalent to the decision of a Civil Court of competent jurisdiction except upon an objection regularly filed, properly entertained in accordance with the provisions of the Land Revenue Act and properly adjudicated upon. None of these conditions were fulfilled in the present case. We, therefore, dismiss this appeal with costs.