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Calcutta High Court

Case No: Appeal from Appellate Decree No. 252 of 1936

Benoy Krishna Choudhury		APPELLANT
	Vs	
Bholanath Chowdhury and Others		RESPONDENT

Date of Decision: July 16, 1940

Final Decision: Allowed

Judgement

Mitter, J.

The original Plaintiff, Kali Krishna Choudhury, and the Defendant Benoy Krishna Choudhury are the sons of Kunja Kamini Dassi. On the death of Kunja Kamini Dassi in the year 1305 B.S., they inherited in equal shares her properties. Kunja Kamini''s husband, Tarini, the father of the Plaintiff and the Defendant, died on the 23rd March, 1928. He left a Will by which he bequeathed all his properties to his son, the Defendant Benoy. Probate of this Will has been taken and under the terms of this Will, the Defendant Benoy is entitled to all the properties left by his father Tarini. On the 18th March, 1929, Kali Krishna brought a suit out of which this appeal anises. He claimed a large number of properties set out in two Schedules, Ka and Kha of the plaint, as the properties of their mother, and he claimed half-share therein. Only two prayers made by him in his plaint are material for the purposes of this appeal. One was a prayer for partition by metes and bounds of the joint properties inherited by him and his brother Benoy from their mother. The second prayer, the prayer Uma was in these terms:

That the Plaintiff may be directed to be given an 8 annas share also in the crops that would grow on the disputed properties and the rents etc., that would be collected therefrom till the disposal of the present suit.

2. Property No. 1 of Schedule Ka is a putni taluk in Lot Uparkhara, Touzi No. 535 of the Murshidabad Collectorate, which admittedly belonged to Kunja Kamini and which the Plaintiff and the Defendant have inherited in equal shares. Item No. 2 of Schedule Ka describes the khas lands of the putni, Lot Uparkhara, which was held in

khas by the putnidars, namely, the two brothers. Item No. 59 thereof is a tank, called Katagare tank. The Plaintiff got a declaration that he is entitled to a half-share of the properties described in items Nos. 1 and 2 of the Ka Schedule of the plaint, except the said tank. In Schedule Kha is included a large number of plots of land included in the said putni taluk. The Plaintiff''s case was that these lands were comprised in the holdings of tenants holding under the putnidars, but those holdings had been purchased with the income of the putni Lot Uparkhara and so belonged to them in equal shares. Some of these jotes were purchased in the name of the Plaintiff, some in the name of the Defendant and his relations and some in the name of their father Tarini. It is on this basis that he claimed half-share of the lands described in Schedule Kha of the plaint.

3. The Defendants'' case with regard to those plots of land of Schedule Kha is that they had not been purchased with their joint money. Some of these jotes of subordinate tenants had been acquired with his own money and some had been acquired by his father Tarini from whom he got them under his Will.

4. In the preliminary judgment the learned Subordinate Judge held that the properties described in Schedule Ka of the plaint, except the said tank, were the properties of the Plaintiff and the Defendant. He declared that the Plaintiff and the Defendant had equal shares in them and directed a partition by metes and bounds in accordance with their shares. With regard to the properties of Schedule Kha, he held that five jotes,--one standing in the name of Hafizaddi Sheikh, two in the name of Maniruddi Sheikh, one in the name of Kali Charan and the other in the name of Kalimuddi Sheikh,-- belonged to the parties jointly; but the remaining jotes described in the Kha Schedule of the plaint had either been acquired by the Defendant and his relations or by his father Tarini, and in the lands comprised in those jotes the Plaintiff had no title. With regard to the prayer Uma, he gave the following directions in his preliminary decree:

Defendant do submit accounts of the net receipts of the properties aforesaid (these he held to be joint) from 1335 B.S. (1928-29) within one month from this date. Plaintiff will get from Defendant half of the net receipts of those properties found due on examination of the accounts

5. This preliminary decree was made on the 27th May, 1932. In the course of the suit the Defendant was appointed Receiver of the properties in suit on the 7th May, 1929, corresponding to the 24th Baisakh, 1336 B.S. He was asked to furnish security for his Receivership and he furnished as security for the due discharge of his functions as Receiver his undivided share in the properties that may be found to be joint by the learned Subordinate Judge. A security bond was executed charging his half-share in the joint properties but the said security bond was not registered under the Indian Registration Act. That ought to have been done in view of the decision of this Court in the case of Akshay Zemmdary, Ltd. v. Ramanath Burman 40 C.W.N. 1281 (1936). It is doubtful whether those properties can be got at on the

basis of being charged properties by reason of the non-registration of the said security bond.

6. After the preliminary decree a Commissioner was appointed to effect the partition. He has done so and a final decree for partition has been made. The Defendant does not attack before us that part of the final decree. The same Commissioner was appointed a Commissioner for the purpose of ascertaining the net profits of the properties which had been found to be joint by the Court in its preliminary decree for the period 1335 to 1341 B.S. As all the collection papers were in the possession of the Defendant as Receiver, he was asked to produce those papers in order that the net profits of the joint properties may be ascertained for the said period and the Plaintiff may be given his half-share in terms of the preliminary decree which we have quoted above. The Commissioner submitted three reports, one on the 16th April, 1934, the second on the 18th January, 1935, and the third on the 3rd June, 1935. The learned Subordinate Judge has, with certain modification, which we will hereafter indicate, granted the Plaintiff a decree in accordance with the first report of the Commissioner as modified by his third report. It is this part of the decree of the learned Subordinate Judge that has been attacked by the Defendant-Appellant.

7. A preliminary objection has been taken by Mr. Choudhury, appearing on behalf of the Plaintiff. His objection is that the appeal is incompetent, as the order passed by the learned Subordinate Judge, by which he has made the Defendant liable for the sum of money is not appealable. His contention is this, that the order by which the Defendant has been made liable to pay the said sum to the Plaintiff is an order made against the Defendant qua Receiver and that such an order is not appealable, because it does not come within any of the provisions of Or. 43 of the Code of Civil Procedure.

8. The foundation of his argument rests upon the following fact: (1) that after the preliminary decree a direction was given on Defendant No. 1 in his capacity as Receiver to produce the collection papers; (2) that in the final decree as drawn up, the learned Subordinate Judge gave the following direction:

Plaintiff will get Rs. 3377-13-11/2 (Rupees three thousand, three hundred and seventy-seven, annas thirteen and one and half pies only; as net receipt of the properties decreed in his favour from the Defendant Receiver for the years 1335 to 1341 B.S.

9. It is unfortunate that in the final decree the learned Subordinate Judge added the word "Receiver" after the word "Defendant"; and it is on the addition of this word that Mr. Choudhury raises the contention, namely, that though that direction for payment to the Plaintiff has been put in the final decree as drawn up, the meaning of the Court was clear namely, to make him in his capacity of Receiver liable to pay the said sum of Rs. 3,377-13-11/2 pies to the Plaintiff. As we have already stated, the

Court had to direct the Defendant Receiver to produce before the Commissioner the collection papers, because those papers were in his possession. There would be no meaning in appointing a Commissioner to check a Receiver''s account. The appointment of a Commissioner can only mean that the learned Judge wanted the terms of the preliminary decree relating to accounts to be carried out. The sentence which we have quoted from the final decree as drawn up would indicate clearly to our mind that the learned Subordinate Judge was carrying out in the final decree the directions given in this respect in the preliminary decree. We have already pointed out that the Defendant was appointed a Receiver on the 24th Baisakh, 1336. As Receiver, he was accountable to the Court from that period till his discharge but the said sum of Rs. 3,377-13-11/2 pies is, as the decree expressly states, for the period commencing from the year 1335 B.S.; that is to say, from a period anterior to the institution of the suit and about a year before the Defendant was appointed Receiver. The terms of the decree follow closely the terms of the preliminary decree, for in the preliminary decree the Defendant was made liable for half share of the net profits from the year 1335 B.S. As we have already stated, the addition of the word "Receiver" after the word "Defendant" in the final decree is unfortunate. The appeal which has been preferred by the Defendant is in our opinion an appeal against the final decree and it is accordingly competent. We accordingly overrule the preliminary objection raised on behalf of the Plaintiff Respondent.

10. In the first report of the Commissioner, the Commissioner calculated (1) the net income of the putni, that is to say, the total amount of the rent which was payable by the tenants holding under the putni less the amount paid as putni rent and the amount incurred for collection charges; (ii) the net value of the crops grown on the khas lands described in Schedule Ka, item No. 2 of the plaint; and (iii) the net value of the crops produced in the lands of the aforesaid fife jotes, namely, two jotes which previously belonged to Maniruddi Sheikh, the jote which belonged to Hafizaddi. Sheikh, the jote which belonged to Kalimuddi Sheikh and the jote which belonged to Kali Charan; that is to say, the jotes which the learned Subordinate Judge held to have been purchased khas by the putnidars with their joint income. He totalled up these figures and allowed the Defendant credit for the amount of paddy delivered to the Plaintiff for his maintenance from 1335 B.S. onwards. He also allowed the Defendant Credit for the rent at a certain rate on the footing that the Plaintiff was residing or had been allowed to reside in one of the houses belonging to the Defendant. There was no order of the Court on the Defendant as Receiver directing him as Receiver to pay maintenance allowance in the shape of paddy to the Plaintiff before Pous, 1337 B.S. The lower Court disallowed these two items of credit to the Defendant on the ground that he had acted in this respect without the orders of the Court. Mr. Das in his appeal contends that though the lower Court may have been right in disallowing to his client the amounts allowed by the Commissioner for occupation rent of the house, his client is entitled to get credit of the value of the paddy that he had supplied to the Plaintiff from 1335 B.S. up to

Aswin, 1337 B.S. We cannot accept this contention. The Defendant cannot get credit for this amount on the ground stated by the Court below, namely, that he had acted not in pursuance of the Court''s order. This point urged by Mr. Das must accordingly be overruled.

11. The second point urged by Mr. Das, however, raises a question of principle. We have already indicated the substance of the first report of the Commissioner. The basis of that report is that for the lands of Kha Schedule except the lands of the aforesaid five jotes, which originally belonged to Maniruddi Sheikh, Hafizaddi Sheikh, Kalimuddi Sheikh and Kali Charan, profits were calculated on the basis of the cash rent that would be payable by the subordinate tenants holding under the putni and not on the basis of the actual crops raised on those plots. The view on which the Commissioner proceeded is that those lands were included in tenancies held under the putni and the fact of the purchase of those tenancies either by the Defendant or his relations or by Tarini, made the Defendant or his relations or his father Tarini, as the case may be, tenants under the putni. Those purchasers, therefore, were only liable to pay such rent which was reserved for the tenancies so purchased by them. Those purchasers, and among them was the Defendant in his capacity as the original purchaser and his capacity as the sole, legatee under his father''s Will, may have been cultivating the lands in khas or in bhag; but in terms of the preliminary decree the Plaintiff was not entitled to have the profits of those lands assessed on the basis of khas cultivation. The preliminary decree had clearly determined that the Plaintiff was not entitled to the benefit of the purchase of those tenancies made by the Defendant and his relations or by his father Tarini. Objection was taken to this basis of calculation by the Plaintiff. He pointed out to the Court that in the finally published Settlement Record, there were no stranger tenant in occupation of the suit lands, but the suit lands were recorded as the khas lands of the putnidars. He accordingly said that the profits of those lands must be calculated on the basis of paddy grown and not on the rental basis. This objection was given effect to by the learned Subordinate Judge, who directed the Commissioner to revise his estimate of the net profits by calculating the profits of those lands of Schedule Kha, also on the basis of the produce yielded.

12. In the second report submitted by the Commissioner he stated that he could not work out the net profits of the lands of Schedule Kha on that basis. But in his third report he calculated the net profits of those lands of Schedule Kha on the basis of the produce yielded. It is unnecessary to go into details of this controversy. We have said that the learned Subordinate Judge upheld the contention of the Plaintiff in this respect. An application for review was filed by the Defendant which was heard by the successor-in-office of the learned Subordinate Judge who had upheld the contention of the Plaintiff in this respect. That learned Subordinate Judge expressed the view that his predecessor''s order was wrong in the face of the preliminary decree but rejected the application for review on the ground that he had no jurisdiction to alter the order made by his predecessor. Be that as it may, it is open

to the Defendant Appellant to argue the matter before us, as we are not fettered by the previous order that may have been made by the Court below.

13. Having regard to the terms of the preliminary decree namely, that the Plaintiff''s claim to those purchased jotes described in Schedule Kha had been negatived, the Plaintiff is only entitled in his character as a moiety sharer of the putni to get the cash rent reserved in respect of those purchased jotes. He is not entitled on the findings arrived at in the preliminary judgment to get khas possession of the lands included in those purchased jotes. That being so, he is not entitled to claim accounts of the lands included in the said purchased jotes on the basis of paddy produced. We accordingly uphold this contention urged on behalf of the Defendant-Appellant.

14. Mr. Choudhury, appearing on behalf of the Plaintiff-Respondent, has filed an affidavit before us and on the basis of that affidavit he contends that the Defendant is not entitled to get credit of the putni rent for the years 1340 and 1341 B.S. That credit has been given to the Defendant in the first and second report of the Commissioner. In the affidavit he states that the Defendant sold his interest in the properties found to be joint, including his interest in putni in Lot Uparkhara, to his brother-in-law Jitendra and that the superior landlord brought a suit for rent for 1341 B.S.,--it may be for the whole 1340 B.S. also, and for other years at least for a part of 1340 B.S.,-- got a decree and realised the whole of the decretal amount from Jitendra. Jitendra thereafter instituted three contribution suits, in which he claimed half of the rent together with costs recovered from him by the superior landlord from the Plaintiff and has got a decree. Second appeals against those decrees passed in those suits have been preferred by the Plaintiff in this Court and they are pending. In these circumstances he asked us to make the Defendant liable for putni rent for those years 1340 and 1341. Any finding that we may arrive at in this appeal would not bind Jitendra, because he is not a party thereto. Without recording any definite finding as to whether the Defendant No. 1 paid the putni rent for those years payable in the Plaintiff''s half share or not, we do not think it proper to disturb the decree of the learned Subordinate Judge in this respect. The Plaintiff may agitate the said question in the second appeals, or he may make an application to the Court below for leave to initiate such proceedings against the Defendant in his capacity as Receiver as he may be advised to take. We have no doubt that if the learned Subordinate Judge is satisfied that the Defendant did not pay the superior landlord the rent due in the Plaintiff''s half share in respect of the putni for the year 1341 B.S. and for the whole or part of the year 1340 B.S., he would readily grant the leave to sue the Receiver that may be asked for.

15. We have already stated that it may be difficult for the Plaintiff to recover his just dues from the Defendant on the ground that the security bond given by the Defendant as Receiver may prove for want of registration ineffective as a charge on his properties. Justice of the case in the circumstances requires that the Plaintiff should be given a charge for the amount that may be found due to him from the

Defendant on the properties which have been allotted to his share as a result of the final decree for partition passed in this suit.

16. The result of the appeal is that the Plaintiff would get from the Defendant the sum of Rs. 483-3-3 pies. Subject to the aforesaid modification with regard to the basis of calculation of the profits of the lands described in Schedule Kha, except the lands included in the two jotes which stood in the name of Maniruddi Sheikh, one jote in the name of Hafizaddi Sheikh, one in the name of Kali Charan and the 5th in the name of Kalimuddi Sheikh, the appeal is dismissed.

17. Although many grounds have been taken by the Defendant-Appellant directed against the fairness of the allotments made, none of those grounds had been pressed before us. The points pressed before us are those which we have already indicated. Mr. Das has succeeded partially even with regard to the points that he pressed before us. In these circumstances we think that the Defendant should not have the full hearing-fee under the rules. We accordingly direct that so far as this appeal is concerned the Defendant would get from the Plaintiff three gold mohurs as hearing-fee and one-third of the costs of paper book. The Plaintiff would get from the Defendant Rs. 182 instead of Rs. 228 as costs of the lower Court. The amount of Rs. 483-3-3 pies decreed in favour of the Plaintiff and the costs of this appeal decreed in favour of the Defendant-Appellant would carry interest at the rate of 6 per cent. per annum from this date. The costs of the lower Court which we have allowed to the Plaintiff would also bear interest at the rate of 6 per cent. per annum from the date of the lower Court''s judgment.