(1925) 01 CAL CK 0006

Calcutta High Court

Case No: None

Bama Charan Kar and Others	APPELLANT
Vs	
Pyari Mohan Gantam and Others	RESPONDENT

Date of Decision: Jan. 19, 1925

Acts Referred:

- Estates Partition Act, 1897 - Section 7

Citation: 87 Ind. Cas. 581

Hon'ble Judges: Mukerji, J; Ewart Greaves, J

Bench: Division Bench

Judgement

Mukerji, J.

These four appeals arise out of as many suits instituted by the plaintiffs for recovery of possession of certain lands upon declaration that the plaintiffs have got zemindari right therein and that the defendants have no tenure appertaining thereto.

2. Pargana Kotalipara bore Touzi No. 4515 of the Faridpur Collectorate. This estate was partitioned by the Collector under the Estates Partition Act into 28 sahams, and each saham was formed into a separate estate bearing a separate number. The plaintiff in one of the suits is the owner of 16-annas of one of the separate estates, and the plaintiffs in the other three suits are entitled to shares in some of the other separate estates. The plaintiffs seek to eject the defendants in these suits, in three of which the other co sharers of these separate estates have been made pro forma defendants, on the ground that the principal defendants hold the lands under certain fictitious tenures which they have managed, to get recorded in the last Cadastral Survey and Settlement proceedings as appertaining to the zemindari without the plaintiff''s knowledge.

3. The principal defendants claim to hold the lands, in all the suits as owners of a sikmi taluq Nanadram Choudhry and in one of the suits also as, owners of a howla

Nobo Kumar Das. They contend that the tenures are not fictitious but real, that there'' was a private partition and arrangement amongst the co-sharers of the estate Touzi No. 4515 by which the said co-sharers were in possession of separate lands, that the sikmi taluq was created by all the '' proprietors, that the sikmi taluq as well as the howla have been existing from before the Permanent Settlement and that all the co-sharers of the zemindari have all along recognized these tenures, and that the. defendants are not liable to eviction.

4. The Court of first instance decreed the suits. These decrees were evicting |he defendants in such of the suits in which, the plaintiffs are owners of the entire separate estates and in such of the suits in which the plaintiffs are only fractional owners, the decrees awarded the plaintiffs joint possession to the extent of their shares with the defendants in these suits. On appeals preferred by the principal defendants the said decrees were affirmed by the Court of Appeal below. The lower Appellate Court found that the sikmi taluq Nandaram Choudhury existed from before the Permanent Settlement, that the howla Nobo Kumar Das was created long after the Permanent Settlement, that there was no evidence that the tenures were created by all the proprietors and that the tenures were not proved to have been recognized by all the proprietors. It was further found that it was not established that the pre-decessors of the present plaintiffs had given their share or, shares in the taluq or the howla to the predecessors of the present defendants or that the lands in suit in this way appertain to those tenures. The said Court, therefore, upheld the decision of the Court of the first instance decreeing the suits, and further held "that these tenures shall hold goods as regards the lands finally allotted to the share or shares that have been formed into separate estates, of those proprietors whose predecessors created the same."

5. The first ground urged on behalf of the appellants is that the finding of the Court of Appeal below to the effect that there is ho evidence to show that the tenures were created by all the proprietors and that it has not been proved that they were recognized by all the proprietors, was arrived at without considering several relevant documents that had been adduced in evidence on behalf of the defendants and which were on the record. Mr. Sen appearing on behalf of the appellants had drawn our attention to several documents* as supporting a finding contrary to that at which the learned Subordinate Judge has arrived, but on a careful examination of those documents I am unable to hold that they really assist his client in this respect. Then it would appear that some of these documents, e.g., Ex. A., Ex. B. and Ex. S, (1) are specifically referred to by the learned Subordinate. Judge in his judgment; while as to the others, although they are not so mentioned, the learned Subordinate Judge did take them into consideration, for he has referred to the fact that they are noticed in brief in the judgment of the Court of first instance. I have no reason to think that the learned Subordinate Judge did not consider their bearing on the case, though no detailed examination of their contents appears in his judgment. There is no substance, in my opinion, in this contention and it must accordingly fail.

6. The next point urged by Mr. Sen on behalf of the appellants is that it has not been found that Pargana Kotalipara, that is to say the parent estate, was held in common tenancy and not held in severalty in pursuance'' of a private arrangement amongst the proprietors and that such a finding is necessary so as to entitle the plaintiffs to a declaration that the tenures in question should hold good as regards the lands finally allotted to the share of the proprietors who may have created them and to such lands only. In other words it is contended that although it has been found that there was not such a division formally made and agreed to by all the proprietors as would attract the operation of Section 7 of the Act, it has not been found that the estate was held, in fact, in common-tenancy so as to entitle the plaintiffs to evict the defendants by the operation of Section 99 of the Act. It is urged, in substance, that the plaintiffs must bring their case within the terms of that section before they can succeed in evicting the defendants and that the findings necessary for that purpose are wanting.

7. Mr. Chakravarti, on behalf of the respondents, contends, on the other hand, that the findings are sufficient and that no finding as to the estate having been held in common tenancy is necessary. He contends that what was pleaded in the written statement was that the partition effected by the Collector was void by reason of the provisions of Section 7 of the Estates Partition Act and that there is a clear finding negativing the existence of the conditions mentioned in that section. He says it was for the defendants to show that the estate was not a common tenancy but in severalty by virtue of some private arrangement amongst co owners and that the defendants failed to prove the same. He furthermore distinctly and definitely urges that it is not necessary for the plaintiffs to rely on Section 99 of the Act, but that under the general law the plaintiffs, upon the findings that have been arrived at, are entitled to a decree for possession.

8. The question, therefore, ultimately reduces itself into one of sufficiency or otherwise of the findings arrived at by the Court below and also as to what is necessary to be proved in order to justify decrees for possession, such as have been passed in these suits.

9. Mr. Chakravarti, as I have stated, relies upon what he says to be the general law, He says that the plaintiffs are zemindars, and as such they have prima facie title to the gross collections from all the mouzas within their zemindari and it is for the defendants, if. they desire to remain upon the land, to prove their right. He relies upon the case of Rajah Sahib Perhlad Sein v. Maharajah Rajendar Kishore Singh 12 M.I.A. 292 at p. 331 : 2 Suth. P.C.J. 225 : 2 Sar. P.C.J. 430 : 20 E.R. 349, where their Lordships of the Judicial Committee observed as follows: "The appellant is the zemindar; and as such he has a prima facie title to the gross collections from all the mouzas within his zemindari. It lay upon the respondents to defeat that right by proving the grant of an intermediate tenure. In their Lordships'' opinion, there is in the record before them no satisfactory proof of the deed relied upon, or of any right

or interest in these villages beyond, at most the lifetime of Madan Mohan Tewari." There can be no dispute as to the proposition of law enunciated as above; but can it be said that the defendants have failed to prove their right in this case? Upon the findings of the learned Subordinate Judge, the defendants have succeeded in proving the existence of the; two tenures, one from before the Permanent Settlement and the other since then--tenures the character of which was impugned as fictitious, but which have been proved to be real tenancies. The only thing which the defendants have failed to prove is either that the plaintiff''s predecessor or the whole body of the proprietors created them. It may be amply inferred from the findings, more especially from the portion of the judgment quoted above, that the tenures were, in fact, created by some one or more of the proprietors. Their right the defendants have established, though they have been unable to point out the particular person or persons who created that right in its inception. To hold that under such circumstances the plaintiff can eject the defendants without proof of any other circumstances would be to hold that the effect; of a partition under the Estates Partition Act is to annul all tenures, leases,, and encumbrances unless the holders thereof can point out the particular individual or individuals out of the entire body of co-proprietors who may have created the same. To hold that this is the law would, also lead to this position that it will be open to the zemindars if they are so minded, to annul all tenures or leases and encumbrances by combining together and getting a partition effected under the Estates Partition Act. In that case the owner of a separate estate formed after partition under the Estates Partition Act would get perhaps higher rights than a purchaser at a revenue sale. This, in my opinion, is not the law, and could never have been the intention of the Legislature.

10. The defendants attempted to prove that the tenures in question existed from before the Permanent Settlement and were created by all the proprietor of the estate or were admitted by all the proprietors to have been so created. This, they did in order to show that the rents payable on these tenures were assets within the meaning of Section 3 Sub-section (13), of the Act, which should have been taken into consideration in making the partition, and also for availing of the benefit of the provisions of Section 83 of the Act., The onus With regard to this was undoubtedly on the defendants, and they failed to charge the same. That, '' however, does not put an end to their rights. The character of the tenures having been found to be real and not fictitious as alleged on behalf of the plaintiffs, it is for the plaintiffs, who are suing in ejectment, to make out circumstances which would entitle them to a decree. They must make out a case u/s 99 of the Act.

11. What then are matters that have to be proved in order to make out a case under that section. It has to be proved in the first place that the estate that has been partitioned was held in common tenancy; there is ho presumption in law that because an estate has been partitioned under the Estates Partition Act, it must necessarily have been held by the proprietors in common tenancy and not in severalty. In the next place, it has to be proved that the tenure, lease or

encumbrance was not created by the plaintiff. Then the plaintiff will get a decree for khas possession or joint possession with the defendants to the "extent of his share according as he is the sole owner or only a co-sharer in the estate from which he seeks to eject the defendant. The fact that the estate was held in common tenancy has to be proved by the plaintiff. The existence of the tenure, lease or encumbrance has to be proved by the defendant. The plaintiff has to prove that it was not created by him. If the defendant can prove that it was created by any proprietor of the estate, it will hold good as regards the lands finally allotted to the share of such proprietor.

12. Now what are the findings of the learned Subordinate Judge in the present case? The learned Judge''s finding is in these words "In the circumstances I am inclined to hold that the estate was virtually held in common tenancy and it was never partitioned by any private arrangement formally made and agreed to by all the proprietors as contemplated by Section 7 of the Estates Partition Act and that the several proprietors consequently did not take possession in pursuance of such arrangement of separate lands to be held in severalty as representing their individual interest in the estate," This is a finding disposing of the, defendants'' objection to the validity of the partition based upon Section 7 of the Act. The learned Judge rightly pointed out in his judgment that the defendants wanted "to make out that there was a private partition amongst the proprietors formally made and agreed to by all of them u/s 7 of the Estates Partition Act." This finding disposes of that objection. But it is not a finding to the effect that the estate was held in common tenancy as required by the terms of Section 99 of the Act. The private arrangement described in Section 7 of the Act'' is not necessarily the same private arrangement that would prevent the application of Section 99; and if it is found that the estate was held not in common tenancy but in severalty in pursuance of some private arrangement amongst the parties Section 99 will not have any application : Hridoy Nath Shaha v. Bibee Mohobutnessa 20 C. 285 : (sic)0 Ind. Dec. (N.S.) 194 and Abdul Latif v. Amanaddi 9 Ind. Cas. 39 : 15 C.W.N. 426.

13. It is not that the fact of a common tenancy was admitted on behalf of the defendants. In their written statements they distinctly averred that there was a private arrangement effected with mutual Admission and consent amongst the proprietors for upwards of a century, to hold the zemindari in distinctly separate hisyas. No doubt they went further and alleged that such private '' arrangements led to a formal partition re- suiting in the different co-sharers holding the lands according to their respective '' shares such as would come within Section 7 of the Act; but all the same the denial of a common tenancy was there and it was for the plaintiffs to prove that the estate was a common tenancy. The Court of Appeal below has come to no finding on this question.

14. I am, therefore, of opinion that the findings are not sufficient to entitle the plaintiffs to the decrees they have obtained in these suits. I am clearly of opinion

that the plaintiffs cannot succeed unless they can avail themselves of the benefit of Section 99 of the Act, and as Mr. Chakravarti, contends that they do not wish to do so, and as on the findings the plaintiffs failed to prove that the tenures are fictitious these suits should have been dismissed. Unless the plaintiffs who are suing in ejectment, can bring their case within Section 99 of the Act they must take their estates subject to the tenures of the defendants. If any authority were needed for this position, reference may be made to the observation of this Court in the case of Nogendra Mohan Boy v. Pyari Mohan Saha 30 Ind. Cas. 420 : 43 C. 103 at. p. 114 : 21 C.L.J. 605 : 20 C.W.N. 319, where in a suit for ejectment under somewhat similar circumstances'' it having been found that Section 99 of the Act had no application, it was held that "the inference follows that the, plaintiffs have taken the disputed lands subject to the tenure of the defendant and was not entitled to eject them."

15. With all deference to Mr. Chakravarti''s arguments, however, I am not sure that the plaintiffs do not intend to rely upon Section 99 of the Act. The Court of first instance held that it was by virtue of Section 99 of the Act that the tenures were as that Court put it, "annulled." One of the questions formulated by the learned Subordinate Judge for his determination was "Has Section 99 of the Act any application to'' the case?" 1, therefore, think that the proper order for us to make in these appeals would be to set aside the decree of the lower Appellate Court and send back the cases to that Court to deal with and dispose of the appeals on determining the following questions: First, whether the estate Touzi No. 4515 was held by the proprietors in common tenancy within the meaning of Section 99 of the Estates Partition Act, and the lands of the estate were not held in severatly by the proprietors in pursuance of any private arrangement amongst themselves? Second, whether the plaintiffs in each of these suits or their predecessors-in-interest were parties to the creation'' of the tenures in question? The plaintiffs in each of the suits will be entitled to a decree in the event of the first question being answered in the affirmative and the second one in the negative. Such decree will be one for eviction of or for joint possession with the principal defendants accordingly as the plaintiffs are sole or fractional owners of the separate estates.

16. There are indications in this case that the parties failed to realize the legal effect of their pleadings. I would accordingly direct that they be allowed to adduce such further evidence on the questions formulated as above in the lower Appellate Court.

17. The costs of these appeals should abide the result.

Greaves, J.

18. I agree.