

(1909) 03 CAL CK 0005

Calcutta High Court

Case No: None

Dwarika Nath Chatterji and
Another

APPELLANT

Vs

Jiban Ali and Others

RESPONDENT

Date of Decision: March 26, 1909**Final Decision:** Dismissed

Judgement

1. This appeal arises out of a suit brought by two brother's Dwarika Nath Chatterjee and Basanta Kumar Chatterjee for a decree that a certain oshut nimhowla pattah set up and filed by defendants Nos. 1 to 8 might be cancelled, for costs, and for further other relief. The defendants Nos. 1 to 8 pleaded that the suit of the plaintiffs was unmaintainable in its present form, that it was barred by limitation, and that the pattah was genuine. The facts of the case appear to be shortly as follows: There is a Nimhowla, mauza Bora Manika, Kismut Butumora, standing in the name of Kali Kant Ganguli. Within that nimhowla was an oshut nimhowla, bearing a yearly jama of Rs. 40-6. By a kabala dated the 15th Aswin 1257 one Munshi took settlement of that oshut nimhowla from Rama Nand Chuckerbarti who was the great-grandfather of the two plaintiffs, the plaintiffs' father being Rama Nund's daughter's son. Rama Nund had four brothers, Rama Kanta Tarkabogish, Krishto Hari Chuckerberty, Loke Nath Chuckerberty and Krishna Gobinda Nayalanker. In 1900 the plaintiffs filed a suit (No. 1642 of 1900) in the Court of the Munsif at Bhola for assessment of the jama of the oshut nimhowla. In that suit, the defendants Nos. 1 to 8 set up an oshut nimhowladari pattah, (which is the one in dispute in this suit), dated the 15th Jaist 1252, purporting to have been granted by Krishna Gobinda Nayalanker, one of the five brothers, whom we have mentioned. In that suit the plaintiff's claim was decreed, the Munsif disbelieving the genuineness of the pattah. On appeal on 19th May 1902, their claim was dismissed, the Kabuliat being disbelieved and the pattah upheld. On the 17th May 1905, just three years after the date of the last-mentioned judgment, the plaintiffs filed this suit. The first Court decided that so far as the plaintiffs' claim to have the pattah cancelled as a forgery was concerned, it was

barred by limitation, the pattah having been admittedly set up and brought to the plaintiffs' notice in the year 1901. Among other issues, however, the first Court raised the third issue--"Is the pattah sought to be set aside a forged document, and had the person by whom it purports to have been granted no right to grant it." On a consideration of the second portion of this issue the Court of first instance discussed the question of the rights of the parties under the pattah, assuming it to be a genuine document and decided that it "was to a certain extent invalid against the plaintiffs. That Court accordingly, while dismissing the suit so far as the declaration of forgery of the pattah was concerned, gave the plaintiffs a decree that the pattah was invalid against them except to the extent of Krishna Gobinda Nayalanker's share, that is, a three-anna and four gunda share in the nimhowla. The Court of first instance came to the conclusion that all the five brothers were interested equally in the nimhowla; that is, each brother had a three anna four gunda share. On that view of the case the plaintiffs as heirs of Rama Nand Chakraverty would be entitled to a three annas and four gundas. It was stated that the other four brothers had died childless and their shares had devolved on an agnate Isser Chandra Chakraborty who sold half of his share (6 annas and 8 gundas) to the plaintiffs. So that the plaintiffs became entitled to 9 annas and twelve gundas, and the other six annas eight gundas remained with defendant No. 10 Srimati Kadambini Debi, the present representative of Isser Chandra Chakraborty. Against that decision the defendants Nos. 1 to 8 preferred an appeal. The lower appellate Court took the same view with regard to the plaintiffs' claim for cancellation of the pattah; that is to say, it was of opinion that that claim was barred by limitation. But it was further of opinion, contrary to the opinion of first instance, that the pattah was genuine. The fourth point for determination as stated by the lower appellate Court is whether the pattah is invalid as regards the plaintiffs' share in the nimhowla. In discussing that question the lower appellate Court held on the evidence that it had not been proved in the case that the five brothers were, prior to the grant of the pattah in 1252, jointly interested in the nimhowla. The learned Subordinate Judge held, quite rightly, that if Krishna Gobinda Chakraverty after the date of the pattah chose to give his brother any share in the nimhowla that would not of course affect the right of the grantees under the pattah. The learned Subordinate Judge accordingly dismissed the plaintiff's suit in toto.

2. Against that decision the plaintiffs have preferred this appeal. In the first place, we are of opinion that upon the plaint and written statements the Courts below should have confined their attention to the plaintiffs' claim as laid; that is to say, to the question whether the pattah was a forgery and should be cancelled at the suit of the plaintiffs. The plaint which we have carefully perused does not suggest that the plaintiffs were seeking from the Court any other relief. We do not think that the common form of prayer for further or other relief should have been allowed to suggest or include a claim such as has now been put forward and discussed by both the lower Courts, namely, whether the pattah was invalid as regards the plaintiffs'

share. That assumes a fact which is entirely inconsistent with the claim for cancellation of the pattah, namely, that the pattah was a genuine document. It might have been open to the plaintiffs to put that as an alternative claim before the Court, but they did not do so and we do not think that the Courts should have considered it. The reasons against such a course are obvious. The claim for cancellation is a particular claim falling under a particular Article (91) in the second schedule of the Limitation Act which gives the plaintiffs three years within which to sue to set aside the pattah. The pattah having come to the knowledge of the plaintiffs admittedly in 1901, that suit was barred. By allowing the plaintiffs to go into another question on the assumption of the genuineness of the pattah the Courts have given the plaintiffs a further period within which to bring their suit; namely, six years from the date of the judgment of the lower appellate Court, the 17th May 1902. As we have already said we are of opinion that this should not have been allowed. Taking the suit then as it stands, there is no doubt that it is barred by limitation. Assuming, however, for a moment that the question which has been raised by the plaintiffs and accepted by the Courts could be discussed, we have the finding of fact of the learned Subordinate Judge that the plaintiffs have failed to prove that the five brothers were joint in interest in the nimhowla prior to the date of the pattah in dispute. The learned Subordinate Judge says, "There is no reliable evidence on the plaintiffs' side to show that when the pattah was granted by Krishna Gobinda, he lived in commensality with his brothers or that they had interest in the nimhowla." It would seem that as he does not mention it the learned Subordinate Judge had lost sight of the quasi admission as to commensality which is contained in the 15th ground of appeal to the lower appellate Court. That, however, is not precisely evidence in the suit, though, no doubt it might have been considered. We do not consider it of sufficient importance to justify us in remanding the case to the Subordinate Judge for a further finding on that fact as there is no doubt that he has considered the evidence, properly so-called, which was before him in the case. Being, however, of opinion as we have said, that the question of the invalidity of the pattah as against the plaintiffs on the assumption of its genuineness ought not to have been gone into at all, it is not necessary to discuss this question any further.

3. The result is that this appeal fails and is dismissed with costs.