(1917) 12 CAL CK 0003

Calcutta High Court

Case No: None

Ahamuddin Tamijuddin and Others		APPELLANT
	Vs	
Amiruddin and Others		RESPONDENT

Date of Decision: Dec. 18, 1917

Citation: 44 Ind. Cas. 216

Hon'ble Judges: Shamsul Huda, J; Fletcher, J

Bench: Division Bench

Judgement

Fletcher, J.

This is an appeal by the defendants Nos. 1, 2 and 3 from the decision of the learned second Subordinate Judge of Comillah, dated the 24th March 1917. The appeal is preferred against a preliminary decree passed in a suit for partition. The parties are Mahomedans. They had a common ancestor, that is, the grandfather of the first three defendants one Fazil Mahomed, Fazil Mahomed had two sons, Jamiruddi and Maniruddi. Jamiruddi married Tilakjan, the defendant No. 4, and of that marriage there were two daughters only, namely, Atardan and Nabojan. Jamiruddi then died and Maniruddi married his widow Tilakjan. The children that Maniruddi had were, first of all, the defendants Nos. 1, 2 and 3, three sons. He had also a daughter named Safarjan. Safarjan married the first plaintiff and had one son and no more, namely, the plaintiff No. 2. The share sought to be recovered in this suit was the share that Safarjan took under the Muhammadan Law as one of the heirs of her deceased father Maniruddi. The question in this case, therefore, is whether the plaintiffs have the right to recover that share. The learned Judge of the Court below has found that the plaintiffs have got the right that Safarjan had and, as regards the property sued for, the learned Judge has decreed in favour of the plaintiffs a 1/8th share in one of the plots mentioned in the plaint, namely, plot No. 13, and 17/192 share of the other plots. This appeal has been preferred against that finding and the points that have been urged in this appeal have been urged, if I may say so without disrespect, at great length and with considerable particularity and they are these:

The first point is that the case of the defendants was that after the death of Maniruddi, Safarjan had relinquished in consideration of a payment of Rs. 50 all interest which she had taken in the property as one of the heirs of Maniruddi, That case of payment depended solely on consideration of the oral testimony and the learned Subordinate Judge disbelieved it. It is said that the learned Judge was wrong in disbelieving that, because be accepted the story put forward by these defendants that the two daughters of the defendant Tilakjan by her first marriage with Jamiruddi had, in fact, relinquished their shares in favour either of the defendants or of Maniruddi. I do not think that that is so. Those payments do not stand or fall together because the daughters of Tilakjan by her first marriage came forward and gave evidence and stated that they made no claim to the property; and after such statement, it was immaterial for the Judge to enquire whether the statement as to the time and mode of the payment of Rs. 50 was or was not correct. I do not see that that in any way can affect the truth of the story as to the payment of Rs. 50 to Safarjan. So far as I have seen the evidence, I am of opinion that the story of this alleged payment was a wholly improbable and untrue story.

2. The next question that is raised is a question which the learned Vakil for the appellants has placed considerable stress on, and that is the issue of limitation. It is stated that the plaintiffs never having been in possession of the property, their suit is barred by the law of limitation; and the learned Vakil cited a great number of cases in support of that argument. The principles applicable to cases of this nature are perfectly simple. They have been laid down in numerous authorities and they are these. That the possession of one co-owner is prima facie, the possession of the other co-owners and that in order to make the possession adverse there must have been ouster of the plaintiff, although there are cases that where the possession of the defendant has been long and uninterrupted for a large number of years, the Court has come to the conclusion that the evidence in the circumstances of the case does warrant the finding that there has been an ouster of the plaintiff, without any express evidence of the fact of such ouster. These are the short principles that can be deduced from those cases. Judgments have been cited where a particular set of facts brought the case within those rules. But the rules are stated shortly and clearly in the judgment of the Privy Council in the appeal from the Colony of Ceylon reported as Corea v. Appuhamy (1912) A.C. 230 : 81 L.J.P.C. 151 : 105 L.T. 836. Now, what is the evidence in this case on which either it is proved that there was an actual ouster or it may be said that the Court ought to infer that there was an ouster of the plaintiffs? The actual ouster is really not set up by anybody. The case was not a case of actual ouster as presented in the written statement but it was a case of the acquisition of the interest of Safarjan by the payment of Rs. 50 and this case of ouster was not set up at all. The learned Judge was much impressed by the evidence of the fact of the occasional visits paid by Safarjan to her mother Tilakjan and also of the fact that the infant plaintiff was on his mother''s death nursed and brought up at Tilakjan''s house. Personally, I feel no doubt, even apart from that evidence of the

infant plaintiff having lived in the premises of Tilakjan, that there was no ouster of the plaintiffs. The case set up in the written statement does not, in any way, support an actual ouster which is necessary to prove that the possession of the defendants had become adverse as against the plaintiffs.

3. The next point urged is a point that is closely allied to the question of limitation and that is whether at the institution of the suit the plaintiffs were or were not in possession of the property, In a partition '' suit ordinarily it is not very material as to whether the plaintiff is or is not actually in possession of his share. But in this country in the Mofussil Courts it is important, because on the rulings of the High Courts of India including this High Court a person who sues for partition and is out of possession must ask, first of all, to be restored to possession of his share and pay additional ad valorem fee upon his plaint, whereas in the case where the plaintiff is in possession he simply sues for partition and separation of his share. In this case, accepting that rule that this suit, if the plaintiffs were out of possession, would require an additional Court-fee as being a suit to restore the plaintiffs to possession, I think the evidence on the issue of limitation shows clearly that the plaintiffs had never been ousted from their shares as the possession of the defendants was the possession of the plaintiffs. Therefore, agreeing with the learned Judge on this issue, I am of opinion that the plaintiffs were in possession of their shares and were entitled to maintain the suit on a plaint bearing a stamp of Rs. 10 only.

4. Then, the next point that was urged was as regards defect of parties and the defect of parties, I gather, was this: It is said that the Court having disbelieved the defendants'' story as to the relinquishment by Safarjan, the wife and mother of the two plaintiffs respectively, ought to have disbelieved the story of relinquishment by Atarjan and Nabojan, the two daughters of Jamiruddi, and that, therefore, the Court ought to have held that there was a defect of parties as the said two daughters of Jamiruddi were not made parties. That seems to me to be a manifest fallacy. The case of these two other persons Atarjan and Nabojan was supported by a statement of theirs that they had ceased to have any interest in the property and if they had ceased to have any interest in the property, clearly they were not necessary parties to a partition suit.

5. The next point, which is the only point that has any substance in it, is that the learned Judge of the Court below has awarded to the plaintiffs a larger share in the plots other than plot No. 13, which the facts found by him warrant. It is said that the share awarded ought to have been 29/384 instead of 17/192. Although the method of the calculation is not accurate, it seems on the statements made in paragraph 13 of the written statement, that the plaintiffs have not been awarded a larger share because the defendants'' case was that Atarjan and Nabojan relinquished within one month after the death of Maniruddi and they stated that at the date of that relinquishment, the claim of Atarjan and Nabojan had long been barred by limitation. If it was long barred by limitation so shortly after the death of Maniruddi

then, of course, the relinquishment by Atarjan and Nabojan must have enured for the benefit of Maniruddi and Tilakjan, his wife, she taking her rights as the widow of her first husband Jamiruddi. On that footing, the plaintiffs have not been given a larger share and there is no reason to disturb the finding of the learned Subordinate Judge in that respect.

6. The other point raised was with regard to plot No. 13, which the learned Judge has found to have belonged solely to Maniruddi and of which the plaintiffs were, therefore, entitled to 1/8th share. That this property was acquired by Maniruddi originally there seems to have been no controversy in the Court below. The kobala, which has not been printed but the date of which and the boundaries are given in the paper-book, seems to show that it is the same property as is mentioned in the sale-certificate (Exhibit A) and also in the khatian (Exhibit E). What the sale-certificate was, whether it was a decree obtained by a co-sharer-land-lord or not, we do not know, and, although the property may be the same the boundaries given in it do not agree with the boundaries given in the kobala in favour of Maniruddi, but some of the boundaries in the khatian (Exhibit E) do seem to agree with the boundaries in the kobala in favour of Maniruddi. Exactly what happened as to this property we do not know; but there is nothing to show that the interest that Maniruddi undoubtedly got under this kobala has been put an end to and I do not think that this certificate of sale the proceedings of which we know nothing about or the statement in the remarks column of the khatian only is sufficient to displace the title that Maniruddi acquired under the kobala Exhibit A. I do not think there is anything in this case. It is quite clear on the findings of fact and the statements made in the judgment of the learned Subordinate Judge that the present plaintiffs have perfectly good title to the share in the properties allotted to them. It may be that they had been urged on to bring this suit or that they have been financed by Neazuddi, the brother of the plaintiff No. 1. But if the case is a genuine one, it does not matter much who found the money to finance the suit. There cannot be, in my opinion, any doubt that these two plaintiffs have got an interest in the property and that they have been rightly given their share. The points raised in the present appeal seem to me to have no force in them and I agree in the conclusion arrived at by the learned Judge of the Primary Court. The present appeal, therefore, fails and must be dismissed with costs. We assess the hearing fee at five gold mohurs.
Shamsul Huda, J.

7. I agree.