Mansaram Chakravarti Vs Ganesh Chakravarti and Others

Court: Calcutta High Court

Date of Decision: May 9, 1912

Citation: 16 Ind. Cas. 383

Hon'ble Judges: Beachcroft, J; Asutosh Mookerjee, J

Bench: Division Bench

Judgement

1. This is an appeal on behalf of the plaintiffs in a suit for partition of properties which, they allege, are owned and possessed by them jointly with

the defendants. For oar present purpose, the properties may be divided into two classes; first, those that were included in a previous suit for

partition, but were left undivided by the consent decree made therein; and, secondly, those that were not included in the previous -suit for partition.

In respect of properties of the latter class, the defendants contended that the claim was barred u/s 43 of the CPC of 1882. The question, therefore,

arises, whether one of two tenants-in-common, who has sued for partition of a part of the properties jointly held by them, is at liberty to bring a suit

for partition of the remainder of the properties. Upon this question, the Courts below have adopted divergent views. The Subordinate Judge

overruled the objection of the defendants and dismissed the claim on the merits, Upon appeal, the Judicial Commissioner has dismissed the claim

as untenable. On behalf of the plaintiffs, it has been argued in this Court, upon the authority of the cases of Jogendra Nath Rai v. Baldeo Das 35 C.

961 : 12 C.W.N. 127 : 6 C.L.J. 735 and Ittappan v. Manavikrama 21 M. 153 : 8 M.L.J. 92 that the view taken by the Judicial Commissioner

cannot be supported on principle. In our opinion this contention is well founded and must prevail.

2. As was explained in the case of Jogendra Nath Rai v. Baldeo Das 35 C. 961 : 12 C.W.N. 127 : 6 C.L.J. 735 one of the in separable incidents

of joint property is its liability to be partitioned at the instance of any of the joint owners : in other words, the cause of action for partition of joint

property is a perpetually recurring one. It is consequently impossible to hold that a case of this description falls within the rule enunciated in Section

43 of the Civil Procedure Code. As was pointed out by Mr. Justice Shephard in Ittappan v. Manavikarama 21 M. 153 : 8 M.L.J. 92 it cannot be

said that the causes of action are identical, when the one plaint omits matters which the defendant is entitled to have included, and the other is not

open to that exception. As was observed in Kaveri Ammall v. Sastri Ramier 26 M. 104 at p. 107 : 13 M.L.J. 58 Section 43 only requires that

every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action on which the suit is founded,

and not that every suit shall include every claim on every cause of action which the plaintiff may have against the defendant in respect of the

subject-matter of the suit. In applying Section 43, it has to be seen, therefore, whether the cause of action alleged in the plaint in the subsequent suit

is identical with the cause of action alleged in the former suit. Where there has been an infringement, No one right and one cause of action has

arisen, the plaintiff must make his whole claim, once for all, in one suit. Now, the right on the part of a tenant-in-common to have each field

separately divided between himself and his co-tenant is one thing; his right to claim a partition of all the fields held by them as tenants-in-common,

is another thing, and the circumstance that there has been an adjudication as to certain parcels of land on the footing of an alleged right of the

former sort, does not preclude a subsequent suit for partition of what is still jointly owned and held by the coparceners Musammat Badshah v.

Sahib 87 P.R. 1903 The same conclusion follows if the matter is considered from a different point of view indicated in Gorachand v. Basanta 15

C.L.J. 258 : 12 Ind. Cas. 684. When the plaintiff sues for partition of a part of the joint property, it is open to the defendant to take exception to

the scope of the suit and to insist upon the inclusion of all properties jointly owned by the parties. If he fails to take exception to the scope of the

suit, the inference is legitimate that the properties not included are by consent of parties left joint; and, if they continue to possess the characteristics

of joint property, they are Obviously liable to be partitioned at any time at the choice of any of the joint owners.

3. It has been argued, however, that the view we take is opposed to the decision in the case of Ukha v. Daga 7 B. 182 but it is sufficient to

observe that that decision is not defensible on principle and, at any rate, is not binding upon this Court. On the other hand, the decisions in the

cases of Nasratullah v. Mujibullah 13 A. 309 : A.W.N. (1891) 117; Bisheshir Das v. Ram Parshad 28 A. 627 : 3 A.L.J. 379 : A.W.N. (1906)

142; which were accepted as good law by this Court in the case of Madan Mohan Mondal v. Baikanta Nath Mondal 10 C.W.N. 839 support the

contention of the appellants. These cases show that if a suit for partition has been brought, ""but, for some reason, the properties have not been

actually divided by the decree made therein, it is open to any of the joint owners to maintain a subsequent suit for partition. This view is not

opposed to the decision in the case of Soni Maganlal v. Himatbhai Chhotabhai 3 Bom. L.R. 94 to which reference has been made by the

respondents, because in that case the partition had actually been effected by the decree in the previous suit, and one of the parties commenced a

subsequent suit not for partition bat for recovery of the portion separately allotted to him. Under these circumstances, it was held that the remedy

of the plaintiff was by way of the execution of the decree in the previous suit. This conclusion does not militate against the view taken in the cases

already mentioned. The decision in Guddappa v. Tirkappa 25 B. 189 : 2 Bom. L.R. 872 and Niaz Ahmad v. Abdul Hamid 30 A. 279 : 5 A.L.J.

278 : A.W.N. (1908) 131 were not given in suits for partition and are clearly distinguishable. The cases of Sooruj Pershad v. Saheb Lal 3 W.R.

25 and Bhanpat Ram v. Balbhadhar Nath A.W.N. (1903) 97 are not of any assistance to the respondent. In so far as the former case is

concerned, it was not a suit for partition, but an action in ejectment by the plaintiff who had been ousted by his co-sharers. In the latter case, it

appears that the first suit had been brought upon an allegation of partition. Upon the failure of the plaintiff in that litigation, he commenced a second

suit for joint possession;" It appears to have been held that the second suit was barred under Sections 13 and 43 of the Code of 1882. It is

difficult, however, to support this conclusion on principle, because the causes of action in the two suits were distinct and the subject-matters of the

two litigations were also different. In the former litigation, the plaintiff claimed a specific portion on the allegation that it had been allotted to him on

partition. In the second suit, he claimed joint possession of the whole property on the allegation that he was interested therin as a share-holder.

Upon a review, then, of the authorities, we are of opinion that although the contention of the respondent may to some extent be supported"" by the

decisions in Ukha v. Daga 7 B. 182 and Dhanpat Ram v. Balbhadhar Nath A.W.N. (1903) 97 these cases cannot be supported on principle, and

we adhere to the view taken by this Court in the cases of Jogendra Nath Roy v. Baldeo Das 35 C. 961 : 12 C.W.N. 127 : 6 C.L.J. 735 and

Gorachand v. Basanta 15 C.L.J. 258 : 12 Ind. Cas. 684.

4. The result is that this appeal is allowed, the decree of the Judicial Commissioner set aside and the case remanded to him in order that the appeal

may be reheard. The appellants are entitled to their costs in this Court. We assess the hearing fee at three gold mohurs.