

(1878) 03 CAL CK 0014

Calcutta High Court

Case No: None

Jogender Nath Paul

APPELLANT

Vs

Ram Coomar Paul

RESPONDENT

Date of Decision: March 22, 1878

Citation: (1879) ILR (Cal) 56

Hon'ble Judges: Prinsep, J; Markby, J

Bench: Division Bench

Judgement

Markby, J.

In this case the suit was brought for a partition. The plaintiff alleged that the common ancestor of the parties and his five sons acquired certain properties; that after his death his five sons separated among themselves taking certain land, amounting to 16 high as each, for their own private expenses; that the remaining lands they held in ijmal among themselves; that one of them became the manager, who made the collections of the rents, and from the profits thereof paid the expenses of the Rash, Dole, etc., festivals and the worship of the idols,--all of which are patrimonial; and that the balance of the money they divided among themselves.

2. The substance of the defence, so far as we need advert to it now, is that the whole of the land under claim was the property of the idol.

3. The Munsif, who went very fully into the matter, came to the conclusion that 94 bighas and 6 cottas of the land were dewutter property and were not partible; and as there is no complaint now in respect of that part of the decision, we must assume that the Munsif came to the conclusion that the defendant had, in respect of that quantity of land, made out his allocation that this was the property of the idol. As to the rest of the property, with the exception of some land which has already been divided, the Munsif found that it was the joint family property, and gave a decree for partition. The Subordinate Judge has affirmed that decision.

4. Objection has been taken to that decision in special appeal, with regard to that part of the property which was found by the Munsif to be still ijmal property, that by the plaintiff's own admission contained in the plaint it is shown that this property could not be made the subject of partition"; and the paragraph in the plaint upon which the special appellant relies is that to which I have already referred, viz., where the plaintiff states how the properties were disposed of when the family separated. It is contended that, when that admission is once made we must assume that the property was to this extent transferred to the idol.

5. It seems to Me that this is carrying the statement in the plaint considerably beyond what would be the reasonable construction of the plaintiffs statement. He nowhere states expressly that the property was given to the idol, whilst he expressly says that each member of the family had an interest in the surplus profits.

6. The case is somewhat like the case of *Sonatun Bysack & Moore's I.A. 66*. There the Will begins with this statement that the property was given to the idol; but, nevertheless, relying mainly upon a subsequent clause in the Will by which it was declared that the members of the family of the testator should have an interest in the surplus, the Privy Council came to the conclusion that the property remained in the family and was not transferred to the idol, and that it was only subject to a trust in favour of the idol. It is argued here, and we think correctly, that all these cases must depend upon the intention of the parties. Nevertheless, this judgment of the Privy Council is a guide to us as to what our decision ought to be in this case; and it seems to me clearly to indicate that we should be going considerably beyond what the plaintiff states in the plaint, if we were to say that it contains an admission that this land is the property, of the idol. I also think it clear upon the decisions that, unless the property is transferred from the family and dedicated to the idol, the partition ought to take place. There may be some inconvenience in carrying on the worship of the idol, should the property be partitioned; but nevertheless partition is an incident of property in this country, and if the property is the property of the several members of the family and has not been actually dedicated to the idol, I think that the authorities show that the several members have a right to partition. A strong case in favour of the right to partition is that of *Radha Mohun Mundul v. Jadoomonee Dossee* 23 W.R., 369, where the claimant of a share admitted that the property was in a sense dewutter property. She claimed, nevertheless, that as shebait she had a right to a separate share of the dewutter property. Here the property could scarcely be called dewutter property at all, It is as in the case of *Sonatun Bysack (8 Moores I.A. 66)*, the private property of the family subject only to a trust in favour of the idol. Therefore, upon the facts as found by the Court below, I think that the decree for a partition was right.

7. But a difficulty has occurred as to one passage in the judgment of the Subordinate Judge. It appears that some thirty years ago the Government took proceedings for resumption of this property. As I understand, this property would

not have boon resumed if it could have been shown to have been the property of the idol. It was, therefore, the interest of all the members of the family to make out that it was so, and all the members of the family then joined together in making representations to the persons who were making the enquiry on behalf of the Government that the property belonged to the idol. Undoubtedly those statements, whatever their value may be (and we cannot enter into that in special appeal), were evidence as between the different members of the family, now that one party alleges that the land is the property of the idol, and the other party alleges that it is not so. Unfortunately, the Subordinate Judge seems to have taken upon himself, for some reason or other, to say that those statements were not evidence in this case. We are informed, and we have no reason to doubt, that no question was raised before him as to those statements being evidence. Nevertheless, he does say so, and the only possible doubt in the matter is whether he really means what he says, or whether he means to say that they are not conclusive evidence. If he means to say that they are not conclusive evidence, he is right; but we cannot put that construction upon what he says. He says that those statements cannot be used as evidence, and we think we should be taking too great a liberty with his language if we were now to say that this is not what he means. If the Subordinate Judge had been any longer in the judicial service, we should have made some enquiry about it. Unfortunately, he has ceased to be so and therefore we can make no further enquiry in the matter.

8. All that we can do is to remand the case. We have now explained what the law applicable to this case is. The appeal will be reheard, and the Subordinate Judge will determine whether or no he agrees with the view taken by the Munsif that the lands other than the 94 bighas and 6 cottas and the bhatee land 80 bighas, were not dedicated to the idol. If they were dedicated to the idol and ceased to be the property of the family, except otherwise than as representing the idol, then these lands are not partible. On the other hand, if he finds that they remained as the property of the several members of the family subject to a trust in favour of the idol, and that only the profits of those lands were dedicated to the worship of the idol and the surplus proceeds were distributed among the members themselves, then the decree will stand.

9. There is also another matter which can be set right on remand. It is complained before us that the decree as it now stands is not correctly drawn up. That decree being set aside, it is desirable that the Subordinate Judge should pay attention to this matter, and on the case being heard on remand, he will draw up a decree which will carry out fully and clearly the directions of the Court.

10. Costs will abide the result.