

Tulsi Bibi Vs. Farrak Bibi and ors.

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Court : Kolkata

Decided On : Aug-22-1934

Reported in : AIR1935Cal273,155Ind.Cas.815

Appellant : Tulsi Bibi

Respondent : Farrak Bibi and ors.

Judgement :

D.N. Mitter, J.

1. This is an appeal from the decree of the Subordinate Judge of 24 Parganas, dated 27th Nov. 1929 by which he dismissed the plaintiff's suit on her failing to put in ad volorem Court-fees for her share within a fortnight of the date of the judgment. The suit was one for partition and was instituted by Tulsi Bibi who is the appellant before us. It is stated in the plaint that one Golam Jalani Khan, a Peshwari Mohamedan, who was a wealthy land-holder and a brick manufacturer of Topsia in the District of 24 Parganas and was governed by the Kakezai custom of inheritance prevailing in his clan died on or about 23rd day of March 1927 leaving considerable movable and immovable properties, that upon the death of the said Golam Jalani Khan the plaintiff, now appellant, and the defendants Furokh Bibi and Najibunnessa Bibi jointly and absolutely inherited the estate left by the said Gulam Jelani Khan by virtue of such special custom of inheritance prevailing in the Kakezari clan by which he was governed. She further states that the plaintiff

and the said defendants obtained joint possession of the said estate and the management thereof was entrusted in the hands of Furrokh Bibi she being the senior member of the family who from time to time paid various sums of moneys to the plaintiff and the other defendant Najibunnessa Bibi. In paragraph No. 7 she recites that the defendant Najibunnessa Bibi, in collusion with the defendant Furokh Bibi, secretly and without the knowledge of the plaintiff instituted a suit for partition being title Suit No. 107 of 1927, against the said Furokh Bibi ignoring her rights altogether. It is stated in paragraph No. 13 that Furokh Bibi is all along and still is in management of the said estate and has failed and neglected to render to the plaintiffs a true and faithful account in respect of the income thereof though repeatedly called upon by the plaintiff to do so On these allegation she prayed for partition by metes and bounds of the estate of Gulam Jelani Khan and allotment of plaintiff's one third share to her to be enjoyed by her in severalty and absolutely. There were other reliefs which were asked for including relief for an injunction restraining the defendant from dealing with the income of the joint estate or any part thereof and from proceeding with the partition by virtual of the fraudulent compromise in title suit No. 107 of 1927. The two preliminary issues that were tried by the Subordinate Judge were to this effect, namely

(1) Has the necessary Court-fee been paid? and

(2) Is the plaintiff entitled to get any relief without a prayer for recovery of possession and without setting aside the document dated 25th April 1927 alleged to have been executed between the plaintiff and defendant 1 as mentioned in the plaint?

2. The Subordinate Judge also stated in his judgment the respective contentions of the plaintiff and defendants. The plaintiff contended, that the Court-fee payable was the one payable in a suit for partition, namely a sum of Rs. 15, whereas the defendants contend that as it appears that she was out of possession the suit cannot proceed unless advalorem Court-fees are paid. After recording the objections of the parties the learned Subordinate Judge said this:

In my opinion the arguments advanced on the defendant's side are quite cogent and reasonable and I am of opinion that the plaintiff must pay advalorem Court-

fees for her alleged share and that there ought to be a prayer that the alleged instrument is void in law.

3. Against this decision the present appeal has been brought by the plaintiff and it is contended on her behalf that the Subordinate Judge has gone wrong on the question of Court-fees. The question as to what the proper Court fees ought to be on the plaint depends on the allegations which are contained in the plaint, and the plaintiff states clearly in paragraph No. 3 that immediately after the death of Gulam Jelani Khan when succession opened out she being the wife of Golam Jelani Khan became entitled to 1/3rd of the properties and she was in joint possession of the said estate. Reliance was placed on behalf of defendants in the Court below on an affidavit which was filed by the plaintiff's Karpardaz, when the karpardaz is alleged to have stated that the plaintiff was out of possession of the properties which form the subject matter of partition. The affidavit is printed at page 15 of the paper book and the relevant para, is para. No. 16. That paragraph runs as follows:

That inspite of repeated requests the said Furrokh bibi is presenting your petitioner from entering into possession of the said brick field and of other properties and from sharing the management of same.

4. There is no allegation here that she Was not in possession of any portion of the joint property including the dwelling house. We do not think that on the materials before the Court the Subordinate Judge was right in treating the suit as one when the plaintiff has admitted that she was out of possession of the joint property. In a case where several persons become entitled on the death of the last owner to succeed to the estate of the last owner the properties belong jointly to all of them and possession of one co-sharer is really a constructive possession on behalf of all. This is a principle which has been accepted and firmly established. Reference may be made in this connection to the decision in *Bidhata Rai v. Ram Charitar Rai* (1907) 6 CLJ 651 where Mookerjee, J., pointed out that the plaintiff is entitled to maintain a suit for partition, if his possession to some part of the joint property is admitted or established, but if it is established that he is not in possession at all of any portion of the joint property, or that there has been a complete ouster he must sue for recovery of possession and partition and pay ad-valorem Court-fees upon

a plaint appropriately framed for the purpose. It is pointed in that case that in order to maintain a suit for partition the plaintiff must be in actual or constructive possession of the properties, and whether he has such possession or not, is to be determined in view of the principle that the possession of one of the co-owners, is prima facie the possession of all the co-owners, and his possession must be presumed to be in conformity with right and title as coowner. Having regard to this accepted and well known principle we are of opinion that this suit is really a suit for partition on the materials as were before the Court. Consequently on the Court-fee of Rs. 15 which were paid on the plaint the plaintiff is entitled to maintain the suit.

5. The result is that the decree of the Subordinate Judge dismissing the suit is set aside and the case is sent back to him for the determination of the other issues. It will be open to the Subordinate Judge, after the evidence has been gone into, if he finds that evidence establishes that she is altogether out of possession, to ask for advalorem Court-fees. The plaintiff appellant is entitled to get her costs in this appeal. These costs are to be realised from defendants 1 and 2. The hearing-fee is assessed at five gold mohurs.

Edgley, J.

6. I agree.

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