

Ram Nath Rai Vs. Harendra Kumar Rai

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Court : Kolkata

Decided On : Dec-22-1930

Reported in : AIR1931Cal581

Appellant : Ram Nath Rai

Respondent : Harendra Kumar Rai

Judgement :

1. Some of the cosharer defendants in a partition suit in which a final decree was passed under which they obtained an allotment, there having been a separate allotment in respect of each of the other sets of cosharers of whom the plaintiffs were one, applied for possession of their allotment in execution of the decree. The decree was passed in 1916 and there was an amendment of it in 1918, but with that we are not concerned. The plaintiffs 'applied for and obtained delivery of possession of their allotment in 1928. On 21st August 1929 the present application for execution was filed. Objection was taken on the ground of limitation. It was overruled by the Munsif, but has been upheld by the District Judge. The applicants for execution have then preferred this appeal.

2. The Munsif held that the application of the plaintiffs decree-holders saved limitation. He relied upon the decisions of this Court in Khoorshed Hossein v. Nubbee Fatema [1877] 3 Cal. 551 and Mohun Chunder v. Mohesh Chunder [1883] 9 Cal. 568. The District Judge has held that the decree having specified portions of the subject-matter deliverable to each party or group of parties an application by

one party or group does not benefit the others within the meaning of the explanation to Article 182, Schedule 1, Limitation Act.

3. In the case of *Sheikh Khoorshed Hossein v. Nubbee Fatema* [1877] 3 Cal. 551, the decree concerned was a decree of 1871, and there were only two sharers parties to the decree. It is possible to understand that decision as being based upon the conclusion of the learned Judges that it was impossible to hold that in a case like that execution proceedings taken either by one shareholder or by the other were anything but proceedings on account of both the shareholders. The learned Judges observed:

The necessary result of those proceedings was to divide of the share of the defendant, and while this was going on at the instance of the plaintiff it would have been merely superfluous for the defendant to have put in an application to have the same thing done at her instance.

4. These remarks also applied to the decree of 1877 which formed the subject-matter of the decision in the case of *Mohun Chunder v. Mohesh Chunder*. In that case also there were two sets of cosharers, one set entitled to one-third and the other to the remaining two-thirds, and after the former set had obtained their one-third partitioned off the latter set came in and made an application to have possession of their two-thirds, and in connexion with the latter application the question of limitation arose. Such a decree was held to be a joint decree within the meaning of Article 179, Schedule 2 to the then Limitation Act. Both these cases again, were cases relating to what now stands for a preliminary decree, making joint declarations of the rights of the parties in the subject-matter of the suit. The character of those decrees was described in the judgment in the case of *Sheikh Khoorshed Hossein v. Nubbee Fatema* in these words:

A decree for partition is not like a decree for money or for the delivery of specific property,, which is only in favour of the plaintiff in the suit. It is a joint declaration of the rights of persons interested in property of which partition is sought and having been so made, it is unnecessary for these persons who are defendants in the suit to come forward and institute a new suit to have the same rights declared under a second order made. It must be taken that a decree in such suits is a decree, when

properly drawn up in favour of each shareholder or set of shareholders having a distinct share.

5. It is not clear why this decision was dissented from in the case of *Hikmat Ali v. Waliunnissa* [1890] 12 All. 506, but as in that case the facts were entirely different, it is not necessary to examine the decision any further. The description of a decree for partition, when properly drawn up, as amounting to a joint declaration has been approved in the case of *Dost Mahamad v. Said Begum* [1898] 20 All. 81, *Parsottam Rao Tantia v. Radhabai* [1910] 32 All. 469, *Assan v. Pathumma* [1899] 22 Mad. 494 and *Ashidbai v. Abdulla* [1907] 31 Bom. 271, but in none of these cases any question of limitation arose.

6. In the case of *Jeddi Subbayya v. Ramrao* [1898] 22 Mad. 998 which was not the case of a partition decree but in which a question of limitation arose, *Mohun Chunder v. Mohesh Chunder* was referred to and distinguished with the observation that

the decree here is not like a partition decree which though not in terms joint, ensures equally for the benefit of the defendant and of the plaintiff.

7. On the question of limitation, it appears, the decision in *Sheikh Khoorshed Hossein v. Nubbee Fatema* has been followed in two cases reported in A.I.R. 1922 Mad. at pp. 327 and 456. Of these two decisions the one at p. 327 was the case of a decree made under the Code of 1882 and was one declaring the rights of the plaintiffs and of the different defendants to one share each, to be ascertained thereafter. The date and exact nature of the decree in the case at p. 456 does not appear from the report. Oldfield, J., was a party to the decision in both these cases and he disposed of the question with these words:

No instance in which the contrary view has been acted on has been shown. The question is one of limitation and therefore of procedure, and the course of authority must be the decisive consideration.

8. In our judgment, after the introduction of the distinction between a preliminary and a final decree as emphasized by the provisions of the Code of 1908, it is

impossible to contend that the final decree in so far as it may provide for separate allotments in favour of the different parties to a partition suit can, in any view, be regarded as a joint decree within the meaning of para. 2, Expl. 1, Article 182, Schedule 1, Limitation Act. It is impossible in our opinion, to take such a decree out of the words of para. 1 of the explanation,

where the decree or order has been passed severally in favour of more persons than one, distinguishing portions of the subject-matter as payable or deliverable to each.

9. We accordingly think that the Judge below was right in holding that the application for execution was not saved by the plaintiffs' application of 1928

10. The appeal must be dismissed, but we will make no order as to costs.

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