

Nalinakshya Ghosal Vs. Raghunath Ghosal

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Court : Kolkata

Decided On : Aug-01-1924

Reported in : AIR1925Cal754,85Ind.Cas.662

Appellant : Nalinakshya Ghosal

Respondent : Raghunath Ghosal

Judgement :

Greaves, J.

1. This is an appeal by the plaintiff against a decision of the Subordinate Judge of Burdwan, dated the 18th March, 1921, dismissing the suit. The suit was one for an account and for partition and the main ground upon which the Subordinate Judge dismissed the suit was that there had been a previous partition and that as to certain properties which had been acquired out of joint funds subsequent to the previous partition there could be no decree for partition in the present suit as all the joint properties had not been included. The Subordinate Judge held that there was a further bar to the suit as the plaintiff was not in possession of any of the joint properties and that as the suit was one for partition and not for recovery of possession and partition the plaintiff could get no relief in the present suit.

2. The material facts are as follows: One Kenaram Ghosal had by his wife Hara Sundari, five sons Madhu Sudan, Hari Nath, Troilakhya, Raghu Nath and Nabin Gopal and a daughter Bindu Basini. Hari Nath predeceased his father Kenaram,

and died childless. Kenaram died in 1859 leaving him surviving his widow Hara Sundari and four sons Madhu Sudan, Troilakhya, Raghunath and Nabin Gopal. Nabin Gopal died unmarried in 1863 or 1864 leaving his mother Hara Sundari as his heir.

3. Madhu Sudan died in 1277 but prior to his death arrangements were in progress for an amicable partition between himself and his brothers Troilakhya and Raghunath. The partition was not completed at the time of Madhu Sudan's death but it was completed by his two sons, who were his heirs, and on the 25th June, 1872, Madhu Sudan's sons completely separated from Troilakhya and Raghunath and took their share of the joint family properties to which they were entitled as heirs of Madhu Sudan. Certain properties which Hara Sundari had inherited from her father Shiba Prasad Roy and also the properties which she inherited from Nabin Gopal were also included in the partition although Hara Sundari was still alive and did not die until 1883, but it has been found that this was done with her consent and the finding is not disputed in this appeal and has been accepted by both parties subject to a contention raised by the respondent to which I shall presently refer. One question which arises in this appeal is whether the partition of the 25th June, 1872, effected a separation between Troilakhya and Raghunath. The respondent contends that this was so and the Subordinate Judge has so found but the appellant contends that they remained joint after the separation of Madhu Sudan's branch. It is common ground that after the separation of Madhu Sudan's sons, who removed to Sijua, the village of Hara Sundari's father, Troilakhya lived jointly with Raghunath and Hara Sundari at Rautgram, the ancestral home, but the respondent contends, and as already stated the Subordinate Judge has so found that their properties were separate and that they were joint in mesa alone. It has, however, been found by the Subordinate Judge that they had some joint funds and joint cultivation. Troilakhya died in March, 1882, leaving two widows surviving him. He left a Will made on the day of his death (15th Falgun 1288 B.S.). It was addressed to his brother Raghunath whom he appointed executor. The Will states that the testator had been living in joint mess with Raghunath and had been performing the seba of the deities, the ceremonies of the ancestors as well as the daily and occasional rites from the proceeds of all that he had jointly with Raghunath, namely, lakheraj and mokarrari

jamias, tanks, ghars, doors, pucca buildings and other movable and immovable properties, paddy, cash money, money-lending business, etc. The testator authorised his elder wife Sm. Sarada Sundari Devi to adopt a son to him and directed Raghunath to cause her to adopt his (Raghunath's) second son, the plaintiff Nalinakshya. The testator then directed his executor to look after, manage and settle the properties in the same way as they had been managed during their jointness until the adopted son attained his majority. The testator then provided that his adopted son after attaining majority and receiving to his satisfaction properties, etc., namely, the properties left by the testator should as his representative, enjoy and possess the same, being invested with the right of sale and gift.

4. The Will was proved on the 2nd August, 1882, before the District Judge of Burdwan and Probate thereof was granted by the then District Judge of Burdwan to Raghunath, the executor named in the Will on the 27th September, 1882.

5. On the 14th Magh 1293 (1886) Sm. Sarada Sundari Devi adopted the plaintiff as Troilakhya's son. The validity of the adoption was questioned in the written statement but the defendant did not question it in his evidence and the Subordinate Judge has held that the plaintiff is the adopted son of Troilakhya. The finding has not been questioned on appeal to this Court.

6. The main question to be decided in this appeal is, as already Indicated, whether on the partition of 1872 a separation was effected between Troilakhya and Raghunath. The learned Subordinate Judge in arriving at the conclusion that there was a separation has mainly relied.

(1) On certain partition papers, Exhibits 21, 21 (a), 21 (b), 68 and 69.

(2) Upon the acts and conduct of Raghunath and Troilakhya subsequent to 1873 which, he says, showed that they acquired properties separately and dealt with their properties separately although they remained joint in mess and for that purpose had some joint transactions.

(3) The deposition of the defendant.

7. It is, therefore, necessary to examine into these three matters to see if the Subordinate Judge's conclusion is correct. With regard to (1) the partition papers were tendered in evidence by the plaintiff and their admission was strenuously opposed by the defendant. They are really lists showing the allocation of the properties between the two brothers and Madhusudan's sons and the allotments to them individually are in the case of Exhibits 21(a) and 21(b) signed by the others. Some point has been made of the fact that a certain amount of land was excepted from the allotments to provide for the maintenance of Sm. Khetramoni, a daughter of Khudiram, a son of Shiba Prasad who predeceased him as showing the accuracy with which the partition was made and a similar inference was sought to be drawn from Exhibit 21 which shows the division of the cash.

8. But after all these papers do not carry things very far; if the estate was to be partitioned for the purpose of ascertaining the share of Madhusudan's heirs, it was necessary to divide the estate into three parts for this purpose and I cannot, therefore, but consider these documents colourless for the purpose of the point which arises for decision.

9. With regard to (2) there is no doubt that subsequent to the partition properties were acquired in the separate names of Troilakhya and Raghunath and the instances of this to which we have been referred are numerous. They are to be found in Exhibits Nos. 70 and 71, Exhibit R. Exhibit S. and in numerous Exhibits of the T series namely, T-19, T-5, T-10, T-12, T-2, T-8, T-20, T-9, T-21, T-6, T-30, T-15, T-24, T-26, T-3 and T-11, special stress was laid by the respondent on Exhibits T-9 and T-21 as being sales of land in the same mouza and pargana on the same date by the same person to Ragunath and Troilakhya respectively. And it was said that except as regards Exhibit 70 there was no evidence of any of the properties being treated as joint.

10. There is no doubt that these Exhibits of the T series and others are pieces of evidence upon which the respondent is entitled to rely as evidence of separation but I do not think they are in any way conclusive. After all, even assuming that there were separate acquisitions, such acquisitions are not inconsistent with the brothers having remained joint and moreover the fact that the conveyances were

taken in the name of one or other brothers is not necessarily conclusive of the fact that they were separate acquisitions.

11. A further point was made by the respondent that after Troilakhya's death the same method of acquisition continued and reference was made to Exhibit A-C, to Exhibit 55 where Raghunath's position as executor and as a separate owner is said to be recognised, to Exhibit 76, Exhibit 75, Exhibits 5 and 6, Exhibit 72, Exhibit 8, Exhibit 14, Exhibit 16 and reference was also made to Exhibit 1 rent decrees between 1884 and 1916 in the name of Raghunath alone and to Exhibit A-B as showing that 14 suits of 1915 were brought in the name of Raghunath alone.

12. With regard to (3) the Subordinate Judge states that the entire deposition of the defendant very satisfactorily shows that there was a complete separation between him and Troilakhya but that thereafter he and Troilakhya remained in joint mess and for that purpose they had some joint fund and joint cultivation but in respect of acquisitioned properties and in their dealings with their respective properties one had no connection with the other and in another passage the Subordinate Judge states that the entire deposition of the defendant, read between the lines, shows that he meant that they were only joint in mess.

13. It is necessary to examine the deposition of the defendant to ascertain if it bears out the construction put upon it by the Subordinate Judge.

14. In this connection it is necessary to state the Subordinate Judge who saw the witnesses and recorded the deposition is not the Subordinate Judge whose judgment is under appeal and that consequently we are in the same position as he was with regard to the evidence.

15. The defendant who at the time of his examination was 84 or 85 years of age stated in examination-in-chief that there was a partition between himself and his other brother in 1276 B.S. and that thereafter he and Troilakhya continued to live in the same mess and that they had separate money-lending business after the partition but he admitted a joint purchase of one Biswambhur's property after the partition.

16. In cross-examination he stated that he lived in the same mess with Troilakhya during his lifetime and his widow and adopted child till institution of this suit and that the lands of Troilakhya and himself had all along been cultivated jointly in spite of the partition. Later he stated that ha and the plaintiff had got joint cultivation only in Rautgram and none in Shijua and Lohar. He further stated that there was never any separate jama-kharach of Troilakhya's estate, and that all collections from mehals were entered in the Rautgram jama-kharach. He stated that certain lands of Basantapur, Koromda and Kaigram were in the joint possession of himself and the defendant and that the defendant had a share in the Rautgram tahabil. And he made this significant statement that he and Troilakhya had everything joint but he added that there was separate jama-kharach of each of them.

17. In re-examination he stated that he and Troilakhya had separate tahabil as well as separate jama-kharach although their cultivation was joint. He stated that the Rautgram tahabil was his but that plaintiff's money was also kept in that tahabil.

18. With all respect to the Subordinate Judge I should not be prepared to draw the inference which he has drawn from the deposition of the defendant. That deposition contains at least one unequivocal statement that the defendant and Troilakhya had everything joint and there is the further statement that all collections were paid into the Rautgram account in which the plaintiff had a share.

19. But in determining the question as to whether there was a separation or not it seems to me that there are other matters to which the Subordinate Judge has omitted to give full weight.

20. The first of these is the written statement of the defendant. This is a confused and badly drawn document but it sufficiently shows the nature of the original defence which was (see paras. 4 and 19) that there had been no adoption of the plaintiff by Troilakhya, that (see para. 9) Madhusudan alone separated and the others were members of a joint Hindu family and lived in joint mess, that (sea para. 19), the Will of Troilakhya was a mere paper transaction. I cannot find in the written statement, unless perhaps the statement in p. 24 can be taken as such,

any suggestion of a complete separation of the joint family in 1872. Indeed, I think, the whole tenor of the written statement, which is verified by the defendant as true to his knowledge is against any idea of separation. I think the whole story of separation is an after-thought based on the partition papers and put forward when it was seen that the original defence could not stand.

21. The second point to which I think the Subordinate Judge has not paid sufficient attention is the significance of the single account into which all collections, etc., were paid and from which, it seems, all payments were made, except, perhaps the original sum for starting the Calcutta business which I cannot find in the accounts. If the defendant's story were true you would certainly expect to find three separate accounts, one of the admittedly joint properties, another of the defendant and another of the plaintiff, or before him, of Troilakhya. A faint suggestion was made by the defendant that other accounts existed but none have been produced and the only account is the Rautgram account from which, as I have stated, all payments were made and into which all sums were paid. The story of the Rautgram account put forward by the defendant, namely, that it was his and that the plaintiff paid money into it for convenience seems manifestly untrue. There is this additional fact that when Raghunath filed an inventory of Troilakhya's properties on applying for Probate the properties included in the inventory do not accord with those said to have been allotted to Troilakhya in 1872. Some of them are the same but even where this is so the areas in many cases do not agree with the areas of the properties in the partition lists. The points upon which the Subordinate Judge has relied seem, for the reasons which I have given, inconclusive and his deductions therefrom erroneous and I think it is abundantly established from the mouth of the defendant himself and from his written statement and from the surrounding, circumstances and from the facts which I have indicated that only Madhusudan's branch separated in 1872 and that Troilakhya until his death remained joint with the defendant and that after his death same state of affairs continued.

22. This being so it remains for us to consider whether there is anything to prevent the plaintiff from obtaining a decree for partition in the suit as framed, I think there is no obstacle to the passing of such a decree. The learned Subordinate Judge

thinks that there could be no such decree in the suit as framed even as to properties admittedly joint and unaffected by the previous partition which he has found because the plaintiff was out of possession. This conflicts with his previous finding that the plaintiff was the sole manager of the family consisting of the plaintiff and defendant and defendant's sons from 1310 till the date of suit, upon the evidence of the plaintiff, that of Kali Prasanna Mukherjee, Nirranjan Mondal, Sashi Bhusan Mullick and of the defendant himself. I think it is established that the plaintiff was not out of possession when the suit was brought and that there is no bar to his obtaining a decree for partition in the present suit.

23. The learned Subordinate Judge has found yet another bar to such a decree in the fact that there are joint properties in which other persons are interested who are not parties to the suit. This apparently is so and there can be no partition in respect of these properties in the present suit but this is not, I think, a bar to the decree which is sought.

24. It was suggested on behalf of the respondent that if there was no partition between Raghunath and Troilakhya in 1872, the joint family after Madhusudan's branch separated consisted of Hara Sundari (the mother). Troilakhya and Raghunath and that there was no division of Hara Sundari's properties which it is said passed to Raghunath on her death. This, I think, is clearly not so and is contrary to the facts. In 1872 Madhusudan's branch separated and with Hara Sundari's consent her properties were divided one-third going to Madhusudan's branch and two-thirds to Troilakhya and Raghunath jointly. Hara Sundari from that time forward had parted with her interest in favour of her sons and lived with Troilakhya and Raghunath and was maintained by them but she had no property of her own and no share in the joint undivided property.

25. The result is that, in my opinion, the decision of 'the Subordinate Judge is wrong and the appeal must be allowed with costs. There will be an enquiry by the Subordinate Judge as to which of the properties comprised in the Schedules to the plaint are joint properties of the plaintiff and defendant and a declaration that the plaintiff is entitled to an 8-annas share in such of the properties as shall be found to be joint properties of the plaintiff and defendant and that the defendant-is

entitled to the remaining 8-annas. There will be the usual decree for partition and the Commissioner to be appointed will take an account on the footing of existing assets of the income of the joint properties from the date of the institution of the suit when the plaintiff was deprived of joint possession to the date when the plaintiff is put into possession of his share.

Chakravarti, J.

26. I agree.

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