

Ram Krishna Bera and ors. Vs. Bejoy Kumar Addya and ors.

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Court : Kolkata

Decided On : May-13-1935

Reported in : 164Ind.Cas.935

Judge : M.N. Mukhrji and ;S.K. Ghose, JJ.

Appellant : Ram Krishna Bera and ors.

Respondent : Bejoy Kumar Addya and ors.

Judgement :

1. These two appeals have arisen out of a final decree in a suit for partition. The facts necessary to be stated for the purposes of these appeals are the following:

In 1899, the predecessors of the parties to these suits jointly took a lease of a large quantity of land in the Sundarbans which were bounded on the east and also on the west by two rivers. Being subject to the fluvial action of these rivers, the lands necessarily were liable to change in their extent. 12 annas share of the lands was taken lease of by one Madan Mohan Jana in the name of his Benamdar one Radha Gobinda Jana and the remaining 4 annas share thereof was similarly taken lease of in the name of one Raj Krishna Bera. After the lease was obtained, there was a sort of rough and ready division of the lands between the owners, presumably in accordance with their respective shares, and thereafter a Bheri on embankment being put up as indicating the line of demarcation between the two divided shares, the parties went on reclaiming the lands which at that time were

covered with Kala jungle. In 1904 Madan Mohan Jana sold his 12 annas share of the lands to the Adhyas, the predecessors of the plaintiffs in the suit. In the kobala by which this sale was made it was stated that the total area of the lands was 3,440 bighas, that the lands had been acquired in the shares of 12 annas and 4 annas, and thereafter the following declaration was made by the executant, Madan Mohan Jana: Having got a deed of release executed by my said Benamdar Radha Gobinda Jana in my favour on July 10, 1900, I got my own name registered as Malik under Act VII of 1876, in the Collectorate of this District, in respect of the 12 annas share owned and held by me, on September 7, 1901, and having got the same amicably partitioned with my co-sharer Raj Krishna Bera, got about 2,580 bighas of land demarcated in my own 12 annas share from the northern side of the Lot, and have been in possession and enjoyment of the same.

2. Thereafter in 1916, the successors-in-interest of the aforesaid Raj Krishna Bera who were the owners in respect of the 4 annas share of these lands under the acquisition made as above, instituted a suit against the Adhyas in order to have a partition effected by metes and bounds in accordance with the shares of the two parties in the lands. The suit was framed as resting on an agreement between Madan Mohan Jana and Raj Krishna Bera to the following effect: that as the division that was made by them at the beginning was a rough and ready division because it was not possible or practicable at the time to partition the properties by metes and bounds the lands being full of Kala jungle, a proper partition should be effected after the land were fully cleared and made culturable; and that if upon measurement any co-sharer be found to be in possession of more land than his legitimate share, he should be made liable to give up the excess land in his possession to the other party. The Adhyas, as defendants in the suit, denied this agreement. They asserted in their written statement that a proper demarcation in accordance with the respective shares of the parties had been made after the acquisition and that the embankment had been put up as determining the demarcating line between the two divided shares. It was further stated in that written statement that the parties had always acquiesced in the demarcation and had been in possession of the respective plots which had been allotted to them in the demarcation and had been clearing jungles and constructing Bhiris and so on in their respective portions. It was further alleged in that written statement that the

rivers that flow on the eastern and western boundaries of the lands had by their action caused diminution or increment in respect of those lands and that, therefore, a second partition would be unfair. A Commissioner was nevertheless appointed for measuring the lands and as the result of his investigation it appeared that the Beras, the plaintiffs in the suit, were in possession of more lands than legitimately fell to their share. Upon that the Beras very wisely withdrew from the suit. The aforesaid local investigation that was made by the Commissioner opened the eyes of the Adhyas and they thereafter instituted the present suit going back upon the allegation which they made in their defence in the suit of 1916 and alleging that in point of fact there was no partition actually effected in respect of the lands in accordance with the respective shares of the parties and that, therefore, they were entitled to have the lands properly partitioned. The Beras, the defendants in the suit, similarly went back upon their own allegations in the plaint in the suit of 1916 and took up the altitude that there had been a partition duly and properly effected shortly after the lands had been acquired that the parties had been in respective possession of their allotments and that the lands ought not to be partitioned again.

3. A number of issues were framed, 13 in all, giving rise to various questions which arose upon the pleadings of the parties. When the case came on for trial, no attempt, however, appears to have been made on behalf of the plaintiffs to establish any of the questions raised in the issue except that on September 9, 1929, the date on which the trial of the case took place, they examined one Amulya Krishna Mukherjee who simply deposed that the plaintiffs share in the property in suit was 12 annas and the share of the defendants was 4 annas, that the properties had not been partitioned by metes and bounds, after proper measurement, and that amicably and for convenience of possession the plaintiffs possessed the northern part and the defendants the southern part. This witness was not cross-examined. No other evidence was adduced by any of the parties, but a joint petition was put in by them then and there. Whether this petition was put in after the preliminary decree was passed by the learned Subordinate Judge, as the learned Judge has said in his judgment or not, is a matter which is not very material ; because all the events that took place on that day, namely, September 9, 1929, would have to be taken together in order to find out what exactly was

meant by the parties. This joint petition is not very happily worded and a reference to its terms will be made hereafter. For the present it will be sufficient to say that on receipt of this joint petition, the learned Subordinate Judge appointed a Commissioner and asked him to make a local investigation. Such investigation was made and a report was submitted. The learned Judge, overruling the objection that was taken on behalf of the defendants to the report and purporting to follow the suggestion contained in the joint petition, made a decree the relevant portion whereof runs in these words:

The Commissioner's report and plan to form part of the decree, The parties do get possession of their respective allotments and do bear their own costs but the Scheme B of the final report be adopted for partition with this modification that the area allotted to the plaintiffs will continue to be held by the defendants as tenants under the plaintiffs on payment of fair and equitable rent which shall be determined in a separate suit. The defendant shall be liable to pay rent from the date of the final report by the Commissioner.

4. The net result of this decree is that all lands lying to the north of the Bheri and which were in the possession of the plaintiffs were allotted to the plaintiffs and all lands lying to the south of the Bheri and of which the defendants were in possession < were allotted to the defendants ; that it being found that a quantity of 113 bighas 18 cottas and 13 1/4 chataks of land was in the possession of the defendants in excess of their share; it was ordered that the defendants would be allowed to hold those lands on payment of fair and equitable rent to the plaintiffs from the date of the Commissioner's report. And it was ordered that the plaintiffs would get such rent determined in a separate suit. It is from the decree that these two appeals have been preferred.

5. Appeal No. 151 of 1931 has been preferred by the defendants. This appeal may be dealt with and disposed of quite shortly because it appears that as at present constituted this appeal is not in order. One of the plaintiffs respondents died during the pendency of the appeal and no substitution has been made of his heirs in his place. It is not disputed that the appeal has abated. But it has been argued that this defect may be got over in two ways : firstly, because this appeal is analogous

to the other Appeal No. 171 of 1931 which the plaintiffs have preferred from the same decree and, secondly, that this appeal may, in any event, be treated as a cross-objection to the said other appeal. We are of opinion that neither of the propositions is tenable, Appeal No. 171 of 1931 relates to a matter which is entirely different from what forms the subject-matter of Appeal No. 151 of 1931 even though the two appeals have arisen out of the same decree. Any variation which may be made to the decree of the Court below in respect of the subject-matter of Appeal No. 151 of 1931, will have to be made as against the heirs of a party to the appeal who is dead. In such circumstances we are not aware of any authority for treating the appeals as forming one case and allowing one appeal to go on even if there is no substitution in respect of the deceased party in that appeal. As regards treating the memorandum of appeal in Appeal No. 151 of 1931 as a memorandum of cross-objection in Appeal No. 171 of 1931> it is apparent that none of the conditions required for the entertainment of cross-objections as laid down in the Code of Civil Procedure are satisfied in the present case. We are of opinion, therefore, that Appeal No. 151 of 1931 has abated and must accordingly be dismissed. Our attention has been drawn to the principle which has been laid down by the Judicial Committee, namely, that if a substitution has been made in an appeal which is pending in this Court, no further substitution is necessary with regard to proceedings arising out of the same case when they are being had in the Court below later on. We are of opinion that that principle has no application whatsoever to the present case.

6. So far as Appeal No. 171 of 1931 is concerned, the facts which have to be considered have already been set out. The proceeding that took place on the September 9, 1929, to which reference has been made above, reveal facts which cannot be overlooked. They are the following: No attempt was made to substantiate any of the issues framed in the case beyond examining the witness Amulya Krishna Mukherji who only spoke to the share and deposed that there had been no partition ; that witness was not cross-examined; and a joint petition on behalf of the parties was immediately put in after the examination of that witness and no other evidence-was adduced. These facts suggest to our mind beyond any reasonable doubt that the parties had agreed, that no further evidence would be adduced but that the decree that will eventually be made would be such decree as

would be consistent with the equities of the case. In other words these proceedings, to our mind, suggest that the parties thought that the order which would be ultimately obtained from the Court would be not an order based on evidence adduced, but an order which the Court would pass upon a consideration of the facts, circumstances and equities which were apparent. In that view, it is not at all unfair to assume that the parties at that stage thought that the Court would act very much like an arbitrator and pass such order as would seem just and equitable. If that view be accepted, it would be highly doubtful as to whether an appeal is at all competent from the decision which the Court made in the shape of a final decree in the suit. But even if that view be not accepted and it be taken that the decree that was made was final decree passed by the Court under ordinary circumstances, the appeal which has been preferred to this Court has really no substance.

7. The decree is founded entirely upon the basis of the joint petition filed on September 9, 1929. The evidence of the only witness who was examined on behalf of the plaintiffs could not suffice to form the foundation of the decree. If one turns to the terms of the joint petition, one finds that that petition speaks nowhere of khas possession and nothing is further away from those terms than the idea that the parties or any of them will have to give up their possession in respect of any lands of which they or any of them had already been in possession.

8. Leaving aside para. 1 of the petition which deals with certain other matters we come to para. 2 which runs thus:

That it will be decided that the plaintiffs have got a 12 annas share and the defendants a 4-annas share and that the Commissioner will keep intact the plaintiffs' portion on the northern side and the defendants portion on the southern side as they possess now : and the said demarcated partition will be made according to the former boundaries and area of the lease.

9. Then certain other matters are started in this paragraph to which, for the purpose of the present appeal, we do not consider necessary to refer. Then comes para 3 which runs thus:

That it will be decided at the time of the final decree whether the defendant will be competent to retain in their possession on payment of reasonable rent, any land which it may be found they possess in excess under the partition in the above manner, according to the map of the lease.

10. If para. 3 is taken by itself, it undoubtedly suggests that the Court had an option either to make or not to make an order for eviction in respect of the excess lands. On the other hand the words (which have been underlined (italicised) above) of para 2 that eviction of any of the parties was out of the question. In order that paras. 2 and 3 may be reconciled the only meaning that can be attributed to the petition is that the possession of the parties such as it was at the time when the petition was filed and as would be found by the Commissioner in the course of the his local investigation will be kept intact or maintained and that the court will have to decide whether any rent will have to be paid by the defendants in respect of the lands which would be found to be in their possession in excess of the share legitimately belonging to them. That, in our opinion, is the only meaning that can be attributed to this petition, : the statements contained in paras. 2 and 3 are to be reconciled and a meaning to be given so that they may be consist with each other. That being the position - the Court thought that the petition suggested that some such order should be made That indeed is what the Court has said. The learned Judge, with reference to this matter has said thus:

To proceed upon partition in this case on the strict basis of valuation would be to nullify the effects of the previous agreement and amicable division and the long and undisturbed possession by the parties. Such a wholesale change does neither appear to be the desire of the parties, as can be gathered from their respective pleading in this suit. It should not be equitable in this case either The only other point left to be considered in this case is whether the defendants who are in possession of 113 bighas 18 cottahs and 13 1/4 chattaks in excess of their share should be allowed to hold this on payment of rent to the plaintiffs. I think they should be so allowed. Defendants have been in possession of this area undisturbed for a long space of time and as the area is in the Sunderbans they had evidently also to incur expenses and undergo risks for reclaiming it. And as there was already a sort of division solidified by a demarcating Bheri the

defendants must have in good faith believed the area to be within their share, that must also have been the idea of the plaintiffs who remained content all the while and only awoke to the consciousness of the excess enjoyed by the defendants by the letters attempt at fixing a correct boundary. I therefore, consider the suggestions made in the joint petition very fair.

11. That, therefore, was the meaning which the learned Judge himself attributed to this petition. That being the position, we have got to see whether the order which the learned Judge has made is a proper order having regard to the facts and circumstances of the case.

12. Now, the fact that immediately after the acquisition a Bheri was put up at a considerable cost demarcating the lands roughly in consonance with the shares which the parties had in them and the fact that, when the lands were sold by Madan Mohan Jana, it was distinctly stated to be in the kobala that he executed that there had been a partition and also separate enjoyment of the lands in accordance with the demarcation, and the attitude which the plaintiffs themselves took us in their written statement in the suit of 1916, all tend to show that both the parties treated the lands separated by the Bheri as being lands which would be in consonance with their respective shares. In addition to all this, there is the fact that the defendants have presumably at considerable cost, reclaimed the lands, and have made them fit for cultivation. Again in the joint petition no mention was made of khas possession and on the contrary it was suggested that possession would remain with the parties on an order being made if considered proper for payment of equitable rent.

13. We are of opinion, therefore, that the view which the learned Subordinate Judge has taken of the matter is right and that appeal No. 171 of 1931 must also be dismissed. There will be no order for costs in any of the appeals.