CALCUTTA HIGH COURT

Nil Kamal Bhattacharjya

Vs.

Kamakshya Charan Bhattacharjya

(Mukerji, J.)

05.01.1928

JUDGMENT

Mukerji, J.

1. This appeal has arisen out of a suit which was instituted for partition of certain homestead lands, to a one third share in which the plaintiffs had been declared entitled to in a previous suit between the parties. The trial Court made a preliminary decree for partition declaring the plaintiffs' right to get a one-third share in the lands and directing the appointment of a commissioner to effect the partition by metes and bounds. On an appeal being preferred by the defendants the Subordinate Judge discharged the preliminary decree aforesaid and ordered that as the defendants are willing to buy the plaintiff' share and to pay a reasonable price of the land in suit, a value of the plaintiff' share would be made by a commissioner by a local inquiry unless the price be agreed to by the parties, and that share of the plaintiffs would be sold to the defendants under Section 4, Partition Act.

2. The plaintiffs then appealed to this Court The decree of the Subordinate Judge was made on 31st March 1925, and the appeal was preferred to this Court on 29th June 1925. The record of the suit, however, arrived in the Court of first instance on 13th May 1925, and notwithstanding that orders were passed for agreeing upon a price of the share or taking steps for the appointment of a Commissioner to ascertain the same, neither party did anything in connexion with the suit in that Court till December 1925. In the meantime, it may be observed, the suit was put up before the Munsif on no less than sixteen occasions and on as many different dates. On one of these dates the plaintiffs were called upon to deposit the fees for the commission, but this order was not complied with. On 9th December 1925, peremptory order was passed adjourning the suit to 21st December 1925, and warning the parties that no further time would be allowed. On 21st December 1925 the plaintiff applied for a further adjournment, but the Munsif refused the application as the pleader who moved the application had no further instructions and the suit was dismissed. Whether there was any appearance on behalf of the defendants on that date it does not appear nor is it clear what their attitude was with reference to the suit. Be that as it may, the order that was passed was worded thus:

> The learned pleader has no further instructions. As the plaintiff does not deposit costs of commissioner as directed hence the Court is not in a position to move further. I do not see

I have any other alternative than to dismiss the suit. It is accordingly dismissed.

3. No steps have been taken to set aside the dismissal of the suit.

4. The first question which arises is whether in the circumstances aforesaid the appeal is maintainable. It is argued on behalf of the appellant : first, that with the reversal of the Subordinate Judge's decision in this appeal, all subsequent orders that may have been passed in the suit, including the order of dismissal aforesaid, will as a necessary consequence of such reversal pass away; second, that the Munsif had no jurisdiction to dismiss the suit in view of the decision of the Judicial Committee in the case of *Lachmi Narayan Marwary v. Balmakund Marwary*[1] and so his order should be treated as a nullity; and third, that the present appeal may be converted into an appeal embracing a challenge against the decree of the Munsif dismissing the suit.

5. There are difficulties in the way of accepting the first and the third of the aforesaid contentions in their entirety. As regards the second contention it seems unnecessary to go into the question whether in the events that happened the order of dismissal could be justified on the failure on the part of the plaintiffs either to appear or to take steps for the further progress of the proceedings. It is clear, however, on the authority of the decision in the case of *Lachmi Narayan Marwary v. Balmakund Marwary*[2] that after a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. The parties have, on the making of the decree, acquired rights or incurred liabilities which are fixed, unless or until the decree is varied or set aside. After a decree any party can apply to have it enforced.

6. Any order of dismissal that was passed, assuming that it was rightly passed, could only affect the further proceedings that followed upon the decree which the Subordinate Judge had made and could not touch the decree itself. The appeal, therefore, in my opinion, is competent and must be dealt with on its merits.

7. The validity of the decree made by the Subordinate Judge has been challenged on several grounds which may be enumerated as follows : first, the defendants and their co-sharers from whom the plaintiffs have purchased, the plaintiffs under their purchase being entitled to one-third share and the remaining two-thirds share belonging to the defendants, do not constitute an undivided family within the meaning of Section 4, Partition Act 4, 1893; second, that if the said co-sharers may be regarded as members of "an undivided family" with the defendants, the plaintiffs are equally entitled to be treated as such member as well; third, that the property in suit is not a "dwelling house" within the meaning of that section; and fourth, that besides the portion on which the house stood there is a quantity of land lying vacant and that the plaintiffs are entitled to have their share allotted out of the same, the findings of the Court below not being sufficient to prevent the same from being partitioned.

8. To deal with these contentions it will be convenient to give a genealogy of the parties. It is as follows:

[1] A.I.R. 1924 P.C. 198

[2] A.I.R. 1924 P.C. 198

9. In support of the first three contentions reliance is placed, firstly, on the fact that the defendants and their co-sharers are not the male descendants of Kamalakanta to whom the

property in suit belonged, but are respectively the sons of the-daughter of a grandson of Kamalakanta and the sons of a daughter of a son of Kamalakanta; secondly, on the fact that the said defendants do not actually reside in the house and not in joint mess but are in service abroad; thirdly, on the fact that the huts of which the dwelling house comprised have in 1326 been blown down by a cyclone; and fourthly, on the fact that the plaintiffs as well as the defendants and their co-sharers, the vendees are all descendants of a common ancestor, namely, Chandra Sekhar. The expression "undivided family" as used in Section 4, Partition Act 4 of 1893 has been explained in a series of eases amongst which reference may be made to ***Khirode Chandra v. Saroda Prosad [1910] 12 C.L.J. 525 Sultan Begam v. Debi Prasad [1908] 30 All. 324*** and ***Kalka Prasad v. Banki Lal [1906] 9 O.C. 156*** which has been relied on with approval in the other two cases just mentioned, and ***Vaman Vishnu v. Vasudev Morbhat [1899] 23 Bom. 73***. These decisions lay down that the word "family" as used in the section ought to be given a liberal and comprehensive meaning, and it includes a group of persons related in blood, who live in one house under one head or management; that it is not restricted to a body of persons who can trace their descent from a common ancestor; that it is not necessary for the members to constitute an undivided family that they should constantly reside in the dwelling house, nor is it necessary that they should be joint in mess; that it is sufficient if the members of the family are undivided qua, the dwelling house which they own; that it is the ownership of the dwelling house and not its actual occupation which brings the operation of the section into play and that the object of the section is to prevent a transferee of a member of a family who is an outsider from forcing his way into a dwelling house in which other members of his transferrer's family have a right to live. Judged by these tests the defendants and their co-sharers must be held to belong to an undivided family; and the admission contained in para. 1 of the plaint and the fact that there was a partition of the ancestral properties amongst the four sons of Chandra Sekhar about a hundred years ago, and that the plaintiffs have no right to live in the house apart from their right under the purchase, clearly make them strangers to such family. The fact that the huts have blown down does not make the dwelling house any the less a dwelling house so long as the members have not abandoned it or, at any rate, given up the idea of using it as such. These contentions, therefore, must fail. As regards the remaining contention, it appears that the property in suit comprises an area of 22 gandas of which only 10 gandas form the site of the house itself and the remaining 12 gandas are appurtenant lands.

10. As pointed out in the case of ***Khirode Chandra Ghoshal v. Saroda Prosad Mitra [1910] 12 C.L.T. 525*** the term "house" embraces, not merely the structure or building but includes also adjacent buildings, curtilage's, garden, courtyard, orchard and all that is necessary for the convenient occupation of the house, but not that which is only for the personal use and convenience of the occupier It includes the land on which the structure of the dwelling house stands, and whether a particular plot of land is or is not necessary to the enjoyment of a house is to be determined on the evidence. The finding in this respect that the learned Subordinate Judge has recorded is that the vacant land is quite necessary for the due enjoyment of the dwelling house and it was so long used as such, and that both the plots (meaning the site of the house itself and the vacant land) constitute the dwelling house.

11. This finding, in my opinion, is sufficient and this contention also fails.

12. The result is that the appeal fails and must be dismissed with costs.

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