

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present: THE HON'BLE JUSTICE RAJASEKHAR MANTHA
&
THE HON'BLE JUSTICE SUPRATIM BHATTACHARYA

FA 189 of 2013
Ananda Kumar Khan &Ors.
-Versus-
Joydeb Chandra Khan &Ors.

Appearance:

For the Appellants :Mr. Gopal Chandra Ghosh, Adv.

For the Respondents :Mr. ParthaPratim Roy, Adv.
Mr. Sarbananda Sanyal, Adv.
Ms. Poulami Chakraborty, Adv.

Hearing concluded on : **02.08.2023**
Judgment On : **09.08.2023**

Rajasekhar Mantha J.

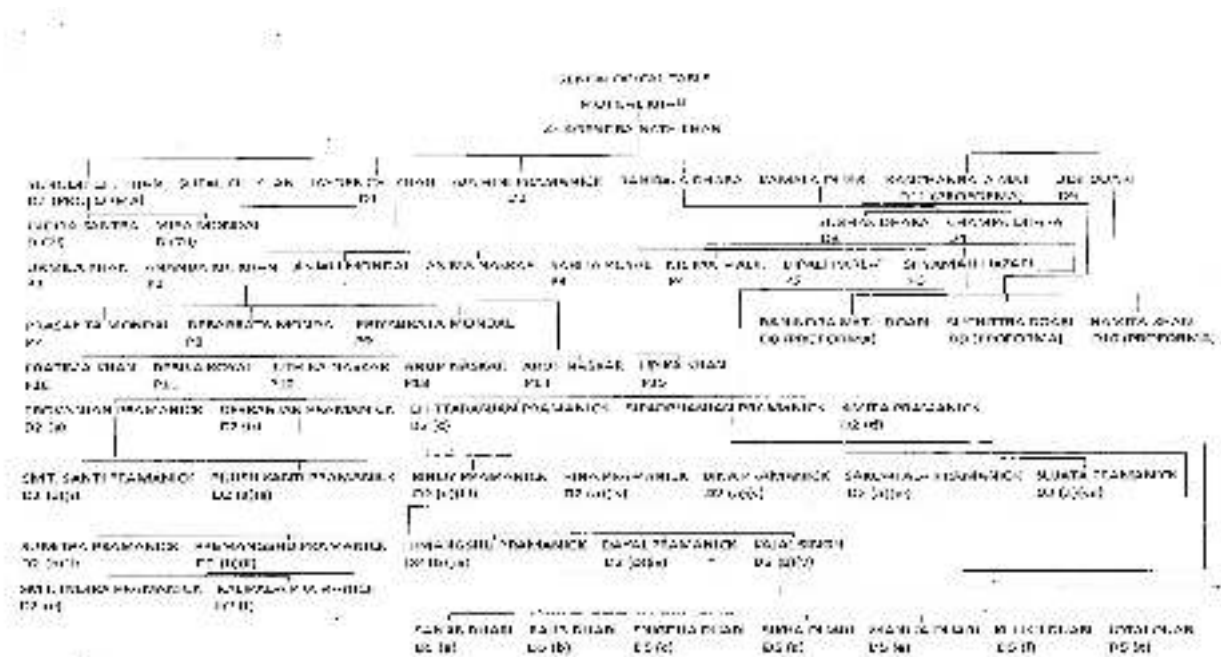
1. The appeal is directed against the judgment and order dated 19.04.2013 passed in Title Suit No. 129 of 2005 Ananda Kumar Khan & Ors. v. Jaydeb Chandra Khan & Ors. The suit was for partition and representation.

2. The appellant/plaintiffs are aggrieved that the suit was dismissed, inter alia, on the ground of non-joinder of parties and that certain documents were not proved in accordance with law. The Court below was of the view that the derivation of title in favour of the predecessor-in-interest of the plaintiffs and defendants, oneKhagendra Nath Khan has not been effectively proved.

FACTS OF THE CASE

3. The plaintiffs are the children of Sufal Chandra Khan son of Khagendra Nath Khan and grandchildren of Motilal Khan. The genealogical table of the family of Khagendra Nath Khan is set out herein below:-

Genealogical Table



4. The following 18 properties have been included in the schedule to the point in which all parties to the suit may have an interest:-

ITEM NO.	MOUJA	KHATIA N.C.S.	PILOT C.S.	TOTAL AREA	CATEGORY	OWNED BY	ACQUISITION OF OWNERSHIP
01	BANIBON	243	2188	08 DECIMAL (3484.8sq.ft).	SHALI	KHAGENDRA NATH KHAN	ACQUIRED BY PURCHASE ON 12/10/1949 FROM WIFE OF KHEJAMAT ALI KHAN. EXT.5, pg. 18-19 PART 2
02	BANIBON	604	2199	04 DECIMAL OR 1742.4 sq.ft.	DANGA	KHAGENDRA NATH KHAN	PURCHASED BY KHAGENDRA NATH KHAN FROM SADHANBALA KHAN THE ONLY LEGAL HEIR OF SASHIBHUSAN KHAN BY DEED DATED 31/03/1968, EXT.2, pg. 7-11, PART 2.
03	BANIBON	604	2201	02 DECIMAL OR 871.2 sq.ft.	DANGA	KHAGENDRA NATH KHAN	PURCHASED BY KHAGENDRA NATH KHAN FROM SADHANBALA KHAN THE ONLY LEGAL HEIR OF SASHIBHUSAN KHAN BY DEED DATED 31/03/1968, EXT.2, pg. 7-11, PART 2.

04	BANIBON	454	2208	23 DECIMAL OR 10018.8 sq.ft.	DOBA	KHAGENDRA NATH KHAN	(10ana) FROM MOTILAL (6ana) FROM BECHURAM KOYAL BY PURCHASE. KHAGENDRA NATH KHAN ON EXT.11(pg. 36-37, PART 2) & EXT.7 (pg. 24-25, PART 2) EXT. 3, 06/12/1963 (pg. 12-14, PART 2)
05	BANIBON	454	2210	12 DECIMAL OR 5227.2 sq.ft.	BASTU	KHAGENDRA NATH KHAN	PURCHASED BY KHAGENDRA NATH KHAN FROM BECHURAM KOYAL ON 06/12/1963, EXT.3, (pg. 14, PART 2)
06	BANIBON	454	2211	02 DECIMAL OR 871.2 sq.ft.	DANGA	KHAGENDRA NATH KHAN	PURCHASED BY KHAGENDRA NATH KHAN FROM BECHURAM KOYAL ON 06/12/1963, EXT.3, (pg. 14, PART 2)
07	BANIBON	454	2212	02 DECIMAL OR 871.2 sq.ft.	DANGA	KHAGENDRA NATH KHAN	PURCHASED BY KHAGENDRA NATH KHAN FROM BECHURAM KOYAL ON 06/12/1963, EXT.3, (pg. 14, PART 2)
08	BANIBON	454	2209	21 DECIMAL OR 9147.6 sq.ft.	BASTU	KHAGENDRA NATH KHAN	INHERITED FROM FATHER MOTILAL KHAN EXT.11, (pg. 36-37, PART 2)
09	BANIBON	454	2213	16 DECIMAL OR 6969.6sq.ft.	DANGA	KHAGENDRA NATH KHAN HAS 7 DECIMAL & GOPAL CHANDRA KHAN HAS 9 DECIMAL.	ADMITTED IN W/S ON 16/12/2006 pg. 21, PART 1.
10	BANIBON	454	2214	19 DECIMAL OR 8276.4 sq.ft.	DOBA	KHAGENDRA NATH KHAN	BY PURCHASE FROM SADHANBALA @ SADHANMOYEE KHAN. EXT. 2, 31/03/1968, (pg. 7-11, PART 2)
11	BANIBON	454	2215	27 DECIMAL OR 11761.12 sq.ft.	SHALI	KHAGENDRA NATH KHAN	BY PURCHASE FROM SADHANBALA @ SADHANMOYEE KHAN. EXT. 2, 31/03/1968, (pg. 7-11, PART 2)
12	BANIBON	454	2216	45 DECIMAL OR 19,602.00 sq.ft.	DOBA	KHAGENDRA NATH KHAN	INHERITED FROM FATHER MOTILAL KHAN EXT.11, pg. 36-37, PART 2
13	BANIBON	454	2217	11 DECIMAL OR 4791.6 sq.ft.	SHALI	KHAGENDRA NATH KHAN	INHERITED FROM FATHER MOTILAL KHAN EXT.11, pg. 36-37, PART 2
14	BANIBON	454	3021	15 DECIMAL OR 6534 sq.ft.	DANGA	KHAGENDRA NATH KHAN	INHERITED FROM FATHER MOTILAL KHAN EXT.11, pg. 36-37, PART 2
15	BANIBON	454	3020	21 DECIMAL OR 9147.6 sq.ft.	SHALI	SUFAL CH KHAN (FATHER OF PLAINTIFF NO 1 ANANDA KR KHAN) ND DEFENDANT NO 1 JOYDEB CH KHAN. (EACH GOT 50%)	PURCHASE FROM SADHANBALA @ SADHANMOYEE KHAN. EXT. 11, 13/08/1967, pg. 1-5, PART 2
16	KANTABERI A	861	4131	1 ACR, 11 DECIMAL OR 48,351.6 sq.ft.	SHALI	KHAGENDRA NATH KHAN	INHERITED FROM FATHER MOTILAL KHAN pg. 20, PART 1, 16/02/2006 (W/S D1)
17	KANTABERI A	860	4225	71 DECIMAL OR 30,927.6 sq.ft.	SHALI	KHAGENDRA NATH KHAN	INHERITED FROM FATHER MOTILAL KHAN pg. 137-139, PART 1
18	KANTABERI A	863	4423	1 ACR, 41 DECIMAL OR 61419.6 sq.ft.	SHALI	75 DECIMAL OF KHAGENDRA NATH KHAN. 66 DECIMAL OF DEFENDANT NO 13, 14, 15 (ANANDA MANNA, RABINDRA MANNA, NITYANANDA MANNA).	INHERITED FROM FATHER MOTILAL KHAN DEFENDANT NO 13, 14, 15 (ANANDA MANNA, RABINDRA MANNA, NITYANANDA MANNA) PURCHASED FROM KHAGENDRA NATH KHAN'S LEGAL HEIR, AFTER KHAGENDRA NATH KHAN DIED. (EXT.19, 2/4/1984 pg. 74-81, PART 2)

5. There are 15 plaintiffs and 11 defendants in the suit. The plaint was amended once and the Defendant No. 1 has filed 2 additional written statements.

6. The plaintiffs filed for interrogatories. The defendants clearly did not answer the same.

ISSUES FRAMED BY THE COURT BELOW

- 1. Is the suit maintainable in its present form and prayer?*
- 2. Whether the plaintiffs have any cause of action to file this suit?*
- 3. Is the suit barred by limitation?*
- 4. Is the suit bad for defect of parties?*
- 5. Is the suit bad for partial partition?*
- 6. Are the plaintiffs entitled to any relief as sought for?*
- 7. To what other relief/reliefs, plaintiffs are entitled?*

7. The defendants did not cite any evidence. All documents produced by the plaintiffs, including title deeds and Record of Rights, have been received without objection and exhibited in the Court below.

8. On 22nd December 2009 Defendant no.1 Joydeb Khan declared by affidavit that there is no need to implead anyone else in the suit as all necessary parties are available on record.

9. By an order dated 21st March 2011, the Court below found that the defendants could not effectively answer the interrogatories submitted by the plaintiff the said defendants were therefore debarred from taking the plea that the suit was bad for non-joinder of defect of parties.

10. It further appears that an application filed by the plaintiff for an amendment to the plaint to include certain properties under Order 6 Rule 17 was dismissed by the Court below on 12th September 2006.

11. It also appears that on 26th April 2006, an order of status quo was passed against the defendants on an allegation by the plaintiff that the defendants were trying to raise a construction in the suit property and also cut away valuable trees on the suit and to catch fish from a common tank.

12. This Court has heard detailed arguments of Counsel for the appellants. The respondents have filed detailed notes of arguments. The notes have also been carefully considered by this Court.

THIS COURT'S FINDINGS

13. Order 1 Rule (13) provides that any objection as regards non-joinder or misjoinder of parties must be taken at the earliest stage in the proceedings. However, a Court could find a suit bad for non-joinder and or misjoinder even without any objection from the parties. Section 99 however provides that a higher court must not upset a decree for an error or irregularity including mis-joinder of parties, not affecting the merits of the case. The only exception is as regards non-joinder of necessary parties. Hence the arguments of Ld Counsel for the appellants that, the defendants have expressly waived their rights as regards the objection to the non-joinder of parties is irrelevant, and cannot be accepted.

14. This Court however finds that after recording the plaint and defense case the Court below found that plot no. 2188 being item no. 1 in the Schedule was originally owned by one Khejamat Ali Khan. He died leaving behind his wife Amina Bibi she sold the entire property to Khagendra Nath Khan predecessor-in-interest the common ancestor to plaintiffs and defendants. Amina was entitled to sell the same under "Shafi-e-Sharik".

15. The other co-sharers of Amina Bibi have not at any point in time challenged the sale. They have not within a year exercised any right of pre-emption in respect of the property. The parties, as legal heirs of Khagendra, are in continuous occupation of the property by a presumption that is drawn from a document registered more than 40 years ago. Reference in this regard is made to the decision of the Supreme Court in the case of **Prem Singh v. Birbal** reported in **(2006) 5 SCC 353**. At paragraph 27 it was held as follows:-

“27. There is a presumption that a registered document is validly executed. A registered document, therefore, prima facie would be valid in law. The onus of proof, thus, would be on a person who leads evidence to rebut the presumption. In the instant case, Respondent 1 has not been able to rebut the said presumption.”

16. In **Ishwar Dass Jain (Deceased) Thr LRs Vs Sohan Lal** reported in **(2000) 1 SCC 434**, at paragraph 27 it was held as follows:-

“27. We shall next refer to the vital evidence or facts relating to the mortgage which have not been considered by the courts below. The defendant admitted in his evidence as DW 2 that the mortgage deed was executed by him. The endorsement of the Sub-Registrar shows that the amount of Rs 1000 was paid as mortgage money. There is a presumption of the correctness of the endorsement made by the Sub-Registrar under Section 58 of the Registration Act (vide Baij Nath Singh v. Jamal Bros. & Co. Ltd. [AIR 1924 PC 48 : 51 IA 18]); it can be rebutted only by strong evidence to the contrary.”

17. This Court is, therefore, of the view that there was no requirement of impleading the other legal heirs of Khejamat Ali. Even by applying the principles of adverse possession, the plaintiffs and defendants could have claimed title by continuous occupation of the property in question.

18. A Civil Court is not debarred from framing an issue adverse possession after hearing counsel for the parties; based on the evidence on record and also based on answers to interrogatories. Order XV Rule 3 of the

CPC mandates as such. The Court ought to have framed an issue as regards the title of the property of the parties by adverse possession. The learned Court below, therefore, erred in holding that the property of Khejamat Ali and the title of Khagendra Nath Khan was defective in respect of the property purchased from Khejamat Ali and his wife Amina Bibi. The property in question could have been easily partitioned after determining the shares of the parties to the suit.

19. In respect of Item no. 9 in the Schedule property i.e. Plot No. 2213, standing in the name of Khagendra Nath Khan and Gopal Chandra Khan, the Court below found that the same was wrongly recorded in the C.S. Record of Right in the name of Sashibhusan Khan. The title deed, however, stood in the name of Khagendra Nath Khan and Gopal Chandra Khan. It is now well-settled that a record of rights is only in evidence of possession and cannot negate any title to any property. In any event, a partition suit is concerned with the shares of each of the parties to the suit in the property in question. A partition suit is not a title suit.

20. Apart from that the ownership of Khagendra Nath Khan has been admitted in the written statement filed on 16th December 2006 at Page 21 Part 1 of the Paper Book. The Court below, therefore, ought not to have placed much relevance on an incorrect entry in the record of rights. It is not usual for parties to forget to rectify entries in the ROR of the purchase of properties. The instant property was purchased in the 1960s and the plaintiffs and defendants and their predecessors have been in continuous occupation thereof for more than five decades. The arguments of the

defendants is liable to be rejected applying the dicta in the ***Prem Chand case (Supra)*** and the ***Ishwar Dass Case (Supra)***

21. The 23 decimals of land at Banibon against Item no. 4 was admittedly standing in the name of Khagendra Nath Khan having purchased it from Motilal Khan and Bechuram Koyal. The said portion was purchased in the year 1963. In the event any of the legal heirs of Bechuram Koyal had any dispute with regard to the purchase they would have definitely objected to the same in the 55 years since it was sold. The recording of the name of Sasibhushan in the CSROR is irrelevant and only requires rectification. Once again applying the principles in the case of ***Prem Singh Case (Supra)*** and ***Ishwar Dass (Supra)*** the Court below erred in questioning a document of the year 1963 after 55 years of its execution.

22. The same error has been committed by the Court below in respect of Item no. 7 of the Schedule, being Plot no. 2212 purchased from BechuramKoyal on 6th December 1963. Defendant no. 6 Gopal Chandra Khan has, in the written statement at page 29 of the Paper Book, admitted that the said Plot was sold by the original owner Sucharan to the father of Khagendra Nath Khan namely, Motilal Khan in 1944. The title deed has been exhibited as No. 7. It is quite possible that the C.S.R.O.R. may not have been rectified, altered, or applied for being altered after the sale in the name of Motilal and Sucharan. At the risk of repetition that a record of right is not evidence of actual title, it is found that the title of the property in the name of Khagendranath and his father Motilal is clearly evident from exhibit 11 which is a document dated 6th December 1963.

23. It is now well settled that an entry in revenue records is not conclusive proof of title. It may at best indicate a possessory right. Reference in this regard is made to the decision of ***Prahlad Pradhan and Ors v. Sonu Kumar and Ors*** reported in **(2019) 10 SCC 259**. At paragraphs 5 and 6 it was held as follows:-

“5. The contention raised by the appellants is that since Mangal Kumhar was the recorded tenant in the suit property as per the Survey Settlement of 1964, the suit property was his self-acquired property. The said contention is legally misconceived since entries in the revenue records do not confer title to a property, nor do they have any presumptive value on the title. They only enable the person in whose favour mutation is recorded, to pay the land revenue in respect of the land in question. [Bhimabai Mahadeo Kambekar v. Arthur Import & Export Co., (2019) 3 SCC 191 : (2019) 2 SCC (Civ) 21; Narasamma v. State of Karnataka, (2009) 5 SCC 591 : (2009) 2 SCC (Civ) 582; Balwant Singh v. Daulat Singh, (1997) 7 SCC 137; Sawarni v. Inder Kaur, (1996) 6 SCC 223] As a consequence, merely because Mangal Kumhar's name was recorded in the Survey Settlement of 1964 as a recorded tenant in the suit property, it would not make him the sole and exclusive owner of the suit property.

6. The appellants have failed to adduce any evidence whatsoever, apart from the Survey Settlement of 1964 to establish that the suit property was the self-acquired property of Mangal Kumhar.”

24. A registered title deed is any day a better, clear, and actual proof of the title to a property. It is quite possible that there may have not been a rectification of the Record of Rights. The entry may also be incorrect sometimes. In the instant case, the parties are in continuous possession of the property for more than 5 decades based on the title deeds. The title deeds and continuous possession of the property are sufficient to prove the title of the parties to the properties in question. The Court below erred in ignoring the same.

25. It is clear evident to this Court that in respect of each of the 18 Items mentioned in the Schedule to the plaint, title deeds and documents have been exhibited. Each of the documents are more than 50 years old. In

respect of some plots of land, the plaintiffs as well as the defendants are in continuous occupation for more than 40 years. The suit, therefore, could not have been dismissed for non-joinder of parties.

26. There is another aspect of the matter. The Court below found that one of the properties is a water body called “Doba”. The Court below found that a water body cannot be partitioned by metes and bounds. The said plot no. 2208 was purchased on 6th December 1963 by Khagendra Nath Khan. It is now a well-settled principle of law of partition and also under the Partition Act of 1893 that if a property cannot be divided by metes and bounds an option is required to be given to the parties to buy out the shares of the other. If any of the shareholders are not willing to buy, the same property may be sold and/or auctioned to a third party. The learned Trial Judge, therefore, wholly failed in holding that a water body cannot be partitioned or subject matter of a partition suit.

27. The object and purpose of partition suits have been discussed in the decision of the Supreme Court in the case of **Shub Karan Bubna Vs Sita Saran Bubna and Ors.** reported in **(2009) 9 SCC Pg 689**. At paragraphs 5, 6, and 7, it was held as follows:-

“The issue

5. “Partition” is a redistribution or adjustment of pre-existing rights, among co-owners/coparceners, resulting in a division of lands or other properties jointly held by them into different lots or portions and delivery thereof to the respective allottees. The effect of such division is that the joint ownership is terminated and the respective shares vest in them in severalty.

6. A partition of a property can be only among those having a share or interest in it. A person who does not have a share in such property cannot obviously be a party to a partition. “Separation of share” is a species of “partition”. When all co-owners get separated, it is a partition. Separation of share(s) refers to a division where only one or only a few among several co-owners/coparceners get separated, and

others continue to be joint or continue to hold the remaining property jointly without division by metes and bounds. For example, where four brothers owning a property divide it among themselves by metes and bounds, it is a partition. But if only one brother wants to get his share separated and other three brothers continue to remain joint, there is only a separation of the share of one brother.

7. *In a suit for partition or separation of a share, the prayer is not only for declaration of the plaintiff's share in the suit properties, but also division of his share by metes and bounds. This involves three issues:*

- (i) whether the person seeking division has a share or interest in the suit property/properties;*
- (ii) whether he is entitled to the relief of division and separate possession; and*
- (iii) how and in what manner, the property/properties should be divided by metes and bounds?*

In a suit for partition or separation of a share, the court at the first stage decides whether the plaintiff has a share in the suit property and whether he is entitled to division and separate possession. The decision on these two issues is exercise of a judicial function and results in first stage decision termed as "decree" under Order 20 Rule 18(1) and termed as "preliminary decree" under Order 20 Rule 18(2) of the Code. The consequential division by metes and bounds, considered to be a ministerial or administrative act requiring the physical inspection, measurements, calculations and considering various permutations/combinations/alternatives of division is referred to the Collector under Rule 18(1) and is the subject-matter of the final decree under Rule 18(2)."

28. This Court notes with anguish that the said issue of partition between the parties has been pending for more than 18 years.

29. It is clear to this Court from the evidence on record, the discussions aforesaid, from the interim orders passed and interim proceedings that the defendants have been rather adamant and want to continue to occupy portions of the joint property. In anticipation of the partition, they have also tried to make construction and have cut off valuable trees in their control. The suit for partition joint property is thus opposed by the defendants for collateral purposes.

30. This Court is of the view that the impugned judgment and order dated 19th February 2012 is wholly erroneous and is liable to be set aside.

31. The matter is remanded back to the Court below to pass a preliminary decree for partition within one month mandatorily and positively, after deciding the respective shares of the parties. The 18 properties mentioned in the Schedule shall be the subject matter of partition between all the parties.

32. After passing of a preliminary decree, the Court may appoint a Commissioner of Partition to divide the suit property by metes and bounds to the extent possible either by relocation and reallocation or any manner permissible in law. FA 189 of 2013 is, therefore, stand allowed and disposed of.

33. There shall be no order as to costs.

34. Urgent photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

(Rajasekhar Mantha, J.)

I agree.

(Supratim Bhattacharya, J.)

09.08.2023

1. After the judgement is delivered in open Court, it is submitted by the counsel for the respondents that the LCR may be sent expeditiously before the court below.

2. Let the LCR be sent forthwith by the Registry by special messenger.

Costs whereof shall be borne by the appellants.

(Rajasekhar Mantha, J.)

I agree.

(Supratim Bhattacharya, J.)