

1915  
 JAMAL  
 v.  
 MOOLLA  
 DAWOOD  
 SONS & Co.

shares he kept for a time and subsequently sold them in a rising market. His pocket received benefit, but his loss at the date of the breach remained unaffected.

Their Lordships will humbly advise His Majesty that this appeal ought to be allowed, and the orders in the Original Court and in the Appeal Court discharged, and judgment entered for the plaintiff according to his plaint, and that the respondents ought to pay the costs in the Courts below and of this appeal.

*Appeal allowed.*

Solicitors for the appellant : *Arnold & Son.*

Solicitors for the respondents : *Bramall & White.*

J. V. W.

### APPELLATE CIVIL.

*Before Mookerjee and Newbould J.,*

ATRABANNESSA BIBI

*v.*

SAFATULLAH MIA.\*

1915  
 July 7.

*Benamidar—Partition—Joint immovable property, suit for partition of.*

A *benamidar* cannot maintain a suit for partition of joint immovable property.

*Basi Poddar v. Ram Krishna* (1), *Baburam v. Ram Sahai* (2), *Sreenath Nag v. Chundernath Ghose* (3), *Bhoobunnessur Roy v. Juggessuree* (4), *Sachitananda v. Baloram* (5), *Hara Gobinda Saha v. Purna Chandra Saha*

\* Appeal from Appellate Decree, No. 2673 of 1912, against the decree of C. N. Mosey, District Judge of Mymensingh, dated March 5, 1912, affirming the decree of Behari Lal Chatterjee, Subordinate Judge of Mymensingh, dated April 24, 1911.

(1) (1896) 1 C. W. N. 135.

(3) (1872) 17 W. R. 192.

(2) (1905) 8 C. L. J. 305.

(4) (1874) 22 W. R. 413.

(5) (1897) I. L. R. 24 Calc. 614.

(1), *Alikjan Bibi v. Rambaran* (2), *Kirtibas v. Gopal Jiu* (3), *Meheroonissa v. Hur Churn* (4), *Fuzeelun v. Omdah* (5), *Kally Prosonno v. Dinonath* (6), *Tamaoonissa v. Woojjulmonee* (7), *Hari Gobind Adhikari v. Akhoy Kumar* (8), *Issur Chandra v. Gopal Chandra* (9), *Baroda v. Dino Banthu* (10), *Mohendra Nath Mookerjee v. Kali Proshad Johuri* (11), *Kuthaperumal v. Secretary of State* (12), *Venkatachala v. Subramania* (13), *Lagdu v. Balvant* (14), *Ravji v. Mahades* (15), *Nand Kishore Lall v. Ahmed Ata* (16), *Yad Ram v. Umrao Singh* (17), *Donzelle v. Kedarnath* (18), *Kedarnath v. Donzelle* (19), *Indurbuttee v. Mahboob* (20), *Jaynarain v. Kadambini* (21), *Purnia v. Torab* (22), *Bogar v. Karam Singh* (23), *Basiruddin v. Mahomed* (24), *Ram Bhurosee v. Bissesser* (25), *Sita Nath v. Nobin Chunder* (26), *Gopi Nath v. Bhugwat Pershad* (27) and *Bhola Pershad v. Ram Lall* (28) referred to.

1915  
 ATRABAN-  
 NESSA BIBI  
 v.  
 SAFATULLAH  
 MIA.

SECOND APPEAL by Atrabannessa Bibi, the plaintiff.

This second appeal arises out of a suit for partition. The facts are shortly these. Mouza Dhubria was *lakshiraj* property of the principal defendants and the *pro forma* defendant No. 23. A portion of this mouza (which is in dispute) was washed away by the river Jumna but afterwards was re-formed. After the re-formation a dispute arose between the owners and a case, under section 145 of the Criminal Procedure Code, was instituted and the re-formed land was attached under section 146 of the Code on the 18th of July 1889. In

- |                                    |                                    |
|------------------------------------|------------------------------------|
| (1) (1909) 11 C. L. J. 47.         | (15) (1897) I. L. R. 22 Bom. 672.  |
| (2) (1910) 12 C. L. J. 357.        | (16) (1895) I. L. R. 18 All. 69.   |
| (3) (1913) 19 C. L. J. 193.        | (17) (1899) I. L. R. 21 All. 380.  |
| (4) (1868) 10 W. R. 220.           | (18) (1871) 7 B. L. R. 720 ;       |
| (5) (1868) 11 B. L. R. 60 note.    | 16 W. R. 186.                      |
| (6) (1873) 1 B. L. R. 56, 64.      | (19) (1873) 20 W. R. 352.          |
| (7) (1873) 20 W. R. 72.            | (20) (1875) 24 W. R. 44.           |
| (8) (1889) I. L. R. 16 Calc. 364.  | (21) (1871) 7 B. L. R. 723 note.   |
| (9) (1897) I. L. R. 25 Calc. 98.   | (22) (1865) 3 Wyman's Rep. 36.     |
| (10) (1898) I. L. R. 25 Calc. 874. | (23) (1907) 2 P. W. R. 26.         |
| (11) (1902) I. L. R. 30 Calc. 265. | (24) (1908) 12 C. W. N. 409.       |
| (12) (1906) I. L. R. 30 Mad. 245.  | (25) (1872) 18 W. R. 454.          |
| (13) (1910) 8 Mad. Law Times 377.  | (26) (1879) 5 C. L. R. 102.        |
| (14) (1897) I. L. R. 22 Bom. 820.  | (27) (1884) I. L. R. 10 Calc. 697. |
| (28) (1896) I. L. R. 24 Calc. 34.  |                                    |

1915  
 ATRABAN-  
 NESSA BIBI  
 v.  
 SAFATULLAH  
 MIA.

1901 two title suits were brought by some of the owners in respect of the land in dispute: one in Subordinate Judge's Court and another in the Munsif's Court. The latter was subsequently transferred to the Court of the Subordinate Judge and both the suits were tried together in that Court. The parties, however, compromised both the suits and filed a *sulehnamah* defining their respective shares. On the 23rd of March 1904, the suits were decreed in terms of that *sulehnamah* and the land was released from attachment. During the time that the land was under attachment it was let out in *ijara* by the Government to a certain person for a certain period. In the *sulehnamah* referred to the share of the *pro formâ* defendant No. 23 was determined to be 14 gundas 1 kag. The defendant No. 23 conveyed this share of his to the plaintiff by a registered *kabala* dated the 30th April 1906. Subsequently Golam Sabdar Kazi (predecessor of the defendants Nos. 11 to 20) brought a suit for partition of the land in dispute in which the plaintiff was not made a party and obtained a decree. The plaintiff, therefore, brought this suit for partition of land in dispute alleging that the land was her *jote* land of which she had been in possession in *jote* rights from the time of the *ijara*. The defendants Nos. 6, 7, 11, 12, 13, 18, 19, 20 and 21 contested the suit. Other defendants did not appear, though duly summoned.

The main contentions of the defendants were that the *kabala* relied upon by the plaintiff was a mere *benami* one; that the plaintiff had no *jote* right and that the plaintiff was bound by the decree in the partition suit No. 77 of 1907.

The Subordinate Judge dismissed the suit with costs.

The plaintiff, thereupon, appealed to the District

Judge who dismissed the appeal with costs. Hence this second appeal.

*Babu Ram Chandra Majumdar* and *Babu Dhirendra Lall Khastagir*, for the appellant.

*Babu Dwarka Nath Chakravarti* and *M. Nuruddin Ahmed*, for the respondents.

*Cur. adv. vult.*

MOOKERJEE AND NEWBOULD JJ. A question of law of first impression has been raised in this appeal which has been preferred by the plaintiff in a suit for partition of joint immovable property. On the 30th April 1906, the plaintiff took a conveyance in respect of a share of the disputed land from her brother. On the 28th September, 1909, the plaintiff instituted this suit for partition and joined her vendor as *pro forma* defendant. The contesting defendants resisted the claim on the ground, amongst others, that the sale was a fictitious transaction and that the plaintiff as the nominal owner was not entitled to maintain the suit. The Courts below have concurrently found upon the facts in favour of the defendants and have dismissed the suit. The question thus arises, whether a *benamidar* can maintain a suit for partition of joint immovable property.

On behalf of the appellant, reference has been made to the cases of *Basi Poddar v. Ram Krishna* (1) and *Baburam v. Ram Sahai* (2) where the right of a *benamidar* to apply for reversal of an execution sale of land under section 310A of the Code of 1882 was sustained, as also to the decisions in *Sreenath Nag v. Chandra Nath* (3), *Bhoobunnessur v. Juggessuree* (4), *Sachitananda v. Baloram* (5), *Haragobinda v. Purna*

(1) (1896) 1 C. W. N. 135.

(3) (1872) 17 W. R. 192.

(2) 8 C. L. J. 305.

(4) (1874) 22 W. R. 413.

(5) (1897) I. L. R. 24 Calc. 644.

1915

ATRABAN-  
NESSA BIBI  
v.  
SAFATULLAH  
MIA.

1915  
 ATRABAN-  
 NESSA BIBI  
 v.  
 SAFATULLAH  
 MIA.

*Chandra* (1), *Alijan v. Rambaran* (2) and *Kirtibas v. Gopal Jiu* (3), where the right of a nominal mortgagee to enforce the security was recognised. On behalf of the respondents, on the other hand, reliance has been placed upon the doctrine now well settled in this Court that a *benamidar* is not competent to maintain a suit for possession of immovable property: *Meheroonissa v. Hur Churn* (4), *Fuzeelun v. Omdah* (5), *Kally Prosonno v. Dinonath* (6), *Tamaonnissa v. Woojjulmonee* (7), *Hari Gobind v. Akhoy* (8), *Issur Chandra v. Gopal Chandra* (9), *Baroda v. Dino Bandhu* (10), *Mohendra Nath v. Kali Proshad* (11). This doctrine is in accord with the pronouncement of the Madras High Court in *Ruthaperumal v. Secretary of State* (12), though possibly a discordant note is sounded in the still later case of *Venkatachala v. Subramania* (13), while a contrary view has been adopted in Bombay [*Dagdu v. Balvant* (14), *Ravji v. Mahadev* (15)] and in Allahabad [*Nand Kishore v. Ahmad Ata* (16) *Yad Ram v. Umrao Singh* (17)]. These cases indicate that a distinction has been recognised in this Court between suits for land and suits for money claims, in the determination of the question of the competence of a *benamidar* to maintain a suit; in the former class of cases, the right has been denied; in the latter class of cases the right has been sustained. The substantial question in controversy is, within which of these classes, does a suit for partition

(1) (1909) 11 C. L. J. 47.

(2) (1910) 12 C. L. J. 357.

(3) (1913) 19 C. L. J. 193

(4) (1868) 10 W. R. 220.

(5) (1868) 11 B. L. R. 60 note.

(6) (1873) 11 B. L. R. 56, 64.

(7) (1873) 20 W. R. 72.

(8) (1889) I. L. R. 16 Calc. 364.

(9) (1897) I. L. R. 25 Calc. 98.

(10) (1898) I. L. R. 25 Calc. 874.

(11) (1902) I. L. R. 30 Calc. 265.

(12) (1906) I. L. R. 30 Mad. 245.

(13) (1910) 8 Mad. Law Times 377.

(14) (1897) I. L. R. 22 Bom. 820.

(15) (1897) I. L. R. 22 Bom. 672.

(16) (1895) I. L. R. 18 All. 69.

(17) (1899) I. L. R. 21 All. 380.

of land fall. In our opinion, a suit for partition of immoveable property should, for our present purpose, be included in the same category as a suit for possession of land. The object of a suit for partition is to alter the form of enjoyment of joint property by the co-owners; or, as has sometimes been said, partition signifies the surrender of a portion of a joint right in exchange for a similar right from the co-sharer. Partition is thus the division made between several persons, of joint lands which belong to them as co-proprietors, so that each becomes the sole owner of the part which is allotted to him; the essence of partition is that the property is transformed into estates in severalty and one of such estates is assigned to each of the former occupants for his sole use and as his sole property. No intelligible principle has been suggested whereby an analogy can be established between the process thus described and the enforcement of a money claim, even when such claim is associated with land, as in the case of a *benami* mortgage or of a *benami* lease, though it may be observed that even as regards leases [*Donzelle v. Kedarnath* (1), *Kedarnath v. Donzelle* (2), *Ind rbuttee v. Mahboob* (3), *Joynarayan v. Kadambini* (4), *Purnia v. Torab* (5), *Bogar v. Karam Singh* (6)], as also as regards mortgages [*Alijan v. Rambaran* (7), *Basiruddin v. Mahomed* (8)], there is apparently some divergence of judicial opinion. We accordingly hold that the plaintiff as *benamidar* is not entitled to maintain a suit for partition of the joint property in dispute.

It has finally been argued on the authority of the decision in *Ram Bhurosee v. Bissesser* (9), that the

(1) (1871) 7 B. L. R. 720 ;  
16 W. R. 186.

(2) (1873) 20 W. R. 352.

(3) (1875) 24 W. R. 44.

(4) (1871) 7 B. L. R. 723 note.

(5) (1865) 3 Wyman's Rep. 14.

(6) (1907) 2 P. W. R. 26.

(7) (1910) 12 C. L. J. 357.

(8) (1908) 12 C. W. N. 409.

(9) (1872) 18 W. R. 454.

1915  
 ATRABAN-  
 NESSA BIBI  
 v.  
 SAFATULLAH  
 MIA.

defendants should not have been allowed to object that the plaintiff was not the real owner. There is no foundation for this contention. The defendants allege that the vendor of the plaintiff was a party to a prior partition suit instituted in 1907 and that the present suit had been instituted at his instance and on his behalf by his *benamidar* with a view to enable him to escape from the effects of the decree in the earlier litigation. This, if established, is a complete answer to the suit as framed, and the defendants were undoubtedly competent to urge this defence as they have successfully done. This also meets another objection taken by the defendants, namely, that the proper procedure was not to dismiss the suit but to direct that the beneficial owner be made a joint plaintiff—a course commended in *Sita Nath v. Nobin Chunder* (1), *Gopi Nath v. Bhugwat Pershad* (2), *Kally Prosonno v. Dinonath* (3), *Bhola Pershad v. Ram Lall* (4). In the present case, the procedure now suggested cannot possibly be adopted. In the first place, the vendor of the plaintiff cannot be joined as a co-plaintiff without his consent. In the second place, if he was so joined, it would be of no avail, as the relief claimed must be refused on the ground that the suit is barred by the decree in the prior partition suit.

As a last resort, the plaintiff has relied upon her jote right, but we are of opinion that the District Judge has very properly left the matter open for adjudication in a separate suit appropriately framed in that behalf.

The result is, that the decree of the District Judge is affirmed and this appeal dismissed with costs.

S. K. B.

*Appeal dismissed.*

(1) (1879) 5 C. L. R. 102.

(3) (1873) 11 B. L. R. 56.

(2) (1884) I. L. R. 10 Calc 697.

(4) (1896) I. L. R. 24 Calc. 34.