PRIVY COUNCIL.

P C.*
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March 4.

BASIRAM SAHA ROY AND OTHERS

v.

RAM RATAN ROY AND OTHERS.

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

Joint Estate—Partition—Rights of putnidar—Finding that estate held in common—Jurisdiction in second appeal—Putni specifically naming villages—Estates Partition Act (Ben. V. of 1897), s. 99—Code of Civil Procedure (Act V of 1908), ss. 100, 101.

A finding on appeal that an estate previously to its partition under the Estates Partition Act, 1897, had not been partitioned privately or at all, is binding on the High Court in second appeal under ss. 100 and 101 of the Code of Civil Procedure, 1908.

The Estates Partition Act, 1897, does not contemplate that there can be a holding which is intermediate between a common tenancy and a several holding so that a formal partition does not interfere with the arrangement under which landowners, who are in some respects still tenants in common, may yet have specific shares allotted to their exclusive use.

Section 99 of the Act which provides for putnidars to whom a proprietor of an estate held in common has given a putni of "his share", applies although specific villages are named, if the putni purports to be of the share and it appears that the named villages were to be enjoyed merely as representing the share, the putnidar's right being in respect of the share whatever constituted it.

Nagendra Mohan Roy v. *Pyari Mohan Saha* (1) distinguished.

Joy Sankar Gupta v. *Bharat Chandra Bardhan* (2) approved.

Decree of the High Court reversed.

CONSOLIDATED Appeal (No. 55 of 1925) from three decrees of the High Court (April 24, 1923) reversing three decrees of the Additional District Judge of

* *Present:* LORD PHILLIMORE, LORD DARLING, MR. AMEER ALI AND SIR LANCELOT SANDERSON.

(1) (1915) L. L. R. 43 Calc. 103. (2) (1899) I. L. R. 26 Calc. 434.

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Faridpur (May 26, 1919) which reversed three decrees of the Subordinate Judge of Faridpur.

The three suits giving rise to the consolidated appeals were brought by the appellants against the principal respondents, and claimed that under putnis given to them or their predecessors about 1868 they were entitled to possession of lands which the defendants had received upon a partition under the Estates Partition Act, 1897.

The substantial question in the appeal was whether s. 99 of the above Act was applicable.

The District Judge (reversing the trial Judge) held that the above section applied and made decrees in the plaintiffs' favour.

On appeal to the High Court, the learned Judges (Chatterjea and Graham JJ.) considered that the findings of the District Judge did not preclude them in second appeal from holding that the estate was not held in common within the meaningof s. 99. In so holding they followed *Nagendra Mohan Roy* v. *Pyari Mohan Saha* (1). The view of the learned Judges is more fully stated in the judgment of the Judicial Committee, from which the material facts and the terms of the relevant provisions of the Act appear.

Feb. 10, 11. *Sir George Lowndes, K.C*, and *E. B. Raikes*, for the appellants.

H. N. Sen, for the respondents.

March 4. The judgment of their Lordships was delivered by

LORD PHILLIMORE. On the 9th April, 1868, the principal respondents gave putnis or perpetual leases of certain properties to the present appellants or to persons from whom the present appellants derive title.

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The material part of one of the putnis is expressed in the following terms:—

"The zamindary No. 2049 of the aforesaid pargana, standing in the "names of the Chowdhuries, and held in our ownership, is recorded in the "Collectorate of district Backergunj at a sudder Jumma of Rs. 1,280-15 "-6½ pies. A 12 gundas 1 kara 13 tils 1½ krant share out of the 1 anna "11 gundas 2 karas of the 1 anna 14 gundas hissya of Raghu Nath "Chowdhury appertaining to the 8 annas 10 gundas hissya of the "aforesaid zamindary, that is, a 6 annas 5 gundas share out of the "aforesaid 1 anna 11½ gundas hissya taken as 16 annas, belongs to us, "and of which we are in enjoyment and possession on payment of the "sudder rent. As we are unable to till, cultivate and settle the lands apper- "taining to the aforesaid hissya, we, of our own accord, grant you in "writing a putni talukdari pottah of mouzahs Chhoto Dumaria, Gopalpur, "Narayankhana, Dharabashail, Kandi, Suagram, Shalukha, Chhatian "Patiljhapa, Bahirshamli, Korya, Rarirbilla, Ghagharkanda, except the debot- "tar, and the kismats appertaining thereto, at the annual rent of Rs. 145."

The other putni is in similar terms.

The zamindari in question is of a very great extent, and, as appears from the passage in the putni lease which has just been quoted, the ownership of it has broken up into various divisions and subdivisions. There are said to have been 300 proprietors.

In 1897 a purchaser from one of these sharers applied under Bengal Act V of 1897 for a partition. This application was resisted by some of the other proprietors; but the Collector granted it, and in process of time a regular partition was effected, and the property was divided into 28 different estates.

As a result of this partition, the mauzas allotted to the respondents were not those mentioned in either of the putni leases of 1868.

Thereupon the appellants, relying upon section 99 of the Estates Partition Act, claimed that their putni leases should be held good as regards the lands allotted under the partition to the respondents, and this claim being resisted, they brought three suits,

which have now been consolidated, for possession and mesne profits.

The Subordinate Judge dismissed the suit. On appeal the District Judge reversed that decision, worked out the extent to which the appellants would be entitled to compensation lands, and gave the appellants a decree for possession of them with mesne profits and a proportion of the costs.

It should be stated that, in the view of the District Judge, accurate calculation would have given to the appellants a somewhat larger share, but that they were content to accept the decree in the form prepared by the District Judge in order thereby to avoid intricate calculations.

This judgment of the District Judge was, however, reversed on appeal by the High Court, which dismissed the suit. Hence the present appeal.

In order that the decisions in this case may be rightly appreciated, it is desirable to set out the material part of ss. 4 and 7 and the whole of s. 99 of the Estates Partition Act.

"Section 4.—(1) Subject to the provisions of this Act, every recorded "proprietor of a joint undivided estate who is in actual possession of the "interest in respect of which he is so recorded shall be entitled to claim a "partition of the said estate and the separation therefrom and assignment "to him as a separate estate of land representing the interest of which he is "in such possession."

"Section 7.—(1) Where the lands of an estate have been divided by "private arrangement formally made and agreed to by all the proprietors, "and each proprietor has, in pursuance of such arrangement, taken possession of separate lands to be held in severalty as representing his interest "in the estate, no partition of the estate shall be made under this Act "except—

"(*a*) on the joint application of all the proprietors; or

"(*b*) in pursuance of a decree or order of a Civil Court".

"Section 99.—If any proprietor of an estate held in common tenancy "and brought under partition in accordance with this Act has given his "share or a portion thereof in putni or other tenure or on lease, or has "created any other encumbrance thereon, such tenure, lease or

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"encumbrance shall hold good as regards the lands finally allotted to the "share of such proprietor, and only as to such lands".

In the view of the Subordinate Judge the parent estate was, previous to the formal partition of 1897, already enjoyed by its co-owners in severalty under a private partition. He also thought that the appellants had not really been dispossessed of their former putni lands, and that the suits were not brought *bonâ fide*, but in order to get more convenient lands in substitution for those specified in the original putnis. He further held that the owners of the estates in which the mouzas leased by the original leases had fallen, ought to have been made parties to the suits so that, if this should be found to be the right course, the appellants might be confirmed in the possession of their original mouzas.

The District Judge, whose conclusions on matters of fact must, according to law, be accepted (*see* Code of Civil Procedure, ss. 100 and 101), found that the estate had not been partitioned privately or at all before the partition of 1897, and that the estate was at that time still held in common tenancy. This being so, the provisions of s. 99 applied if the putni leases in question were to be considered as leases of a share or portion of the joint lands, and there having been no suggestion up to that stage that the putni leases were other than leases of shares or portions, he decreed in favour of the appellants, as already stated.

The Judges of the High Court took the view that he had not found conclusively, and so as to bind them, that the estate was previous to the partition held in common tenancy.

Deeming themselves at liberty to take their own view of the facts in this respect, the learned Judges thought that the lessors had been holding in severalty, and further that the putni leases were not

leases of shares or portions, but of specific villages, and therefore that s. 99 did not apply.

This second point, which had not apparently been put before the Courts at earlier stages, was taken in the memorandum of appeal to the High Court, and whether as a substantive point in itself or as supporting the view that the estate was no longer held in common tenancy, deserves consideration, and has been fully considered by their Lordships.

With regard to the first point, the learned Judges of the High Court expressed themselves in the following language:—

"The Court of first instance dismissed the suit on the finding that the "proprietors of the estate did not hold the land in common tenancy. "That decision was reversed by the Lower Appellate Court on the finding "that there was no previous private partition or private arrangement "formally entered into by all the proprietors by which each proprietor "was in separate possession of some specific land as appertaining to his "share in the zamindary.

"On behalf of the respondents it is contended that this finding of the "Lower Appellate Court is a finding of fact which is conclusive in second "appeal. We are unable to accept this contention. We are bound to "accept the finding that there was no formal private partition. But on "the facts admitted in the plaint and found by the Lower Appellate Court "we are unable to hold that section 99 can be made applicable to the "present case. On the plaintiffs' own case their lessors were in actual "exclusive possession of these 30 villages, and the plaintiffs are further in "this dilemma that unless at the time the putni lease was granted this "separate possession was consented to by the other co-sharers, they could "not have obtained a valid putni lease."

These observations show an insufficient appreciation of the judgment of the District Judge. His language is as follows:—

"Under the circumstances stated and discussed above, I believe the "plaintiff-appellants' evidence that the estate No. 4515 was held in common "tenancy before the Collectorate partition of 1905.

"As there was no previous private partition or private arrangement "formally made and agreed to by all the proprietors by which each "proprietor was in separate possession of some specific lands as appertaining

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"to his share in the zamindary, the plaintiffs can now well say under "s. 99 of the present Estates Partition Act that his putni would hold good "only in respect of the lands finally allotted to the share of the grantor "of the lease."

He has distinctly found that the estate was held in common tenancy. This is a finding of fact which according to law is conclusive, and which the High Court and their Lordships are bound to accept without further enquiry. But their Lordships will add for the satisfaction of the parties that they would see no reason upon the papers for differing with the District Judge, if it was within their competency to examine the question.

The view to which the High Court leans is a view which one of their number, Ghose J. took in a previous case, a judgment which is printed in the appendix to the present appeal (*Dina Nath Shaha Roy* v. *Chandra Kumar Bose*, decided February 26th, 1923) and the same conclusion on the facts was reached in another case similarly printed (*Prasanna Kumar* v. *Madha Badya*, decided February 21st, 1922). It is a view that there is some *tertium quid* between common tenancy and several holding, and that when this *tertium quid* exists, if any formal partition supervene, it does not affect or interfere with the arrangement under which landowners who are in some respects still tenants in common may yet have specific shares of the estate allotted to their exclusive enjoyment.

The Act does not apparently contemplate any such cases as being possible. If they were to exist, it would be strange if a formal partition could take away the possession of estates thus enjoyed from former possessors.

In the present case the partition has allotted to the lessors of the plaintiffs lands of which they had not

the enjoyment before, and has not allotted to them the mouzas which are now in question.

It is to be observed that the appendix to this case shows that in another instance with similar circumstances the parties agreed that it was held in common tenancy (*Chandra Kumar Mukhopadhya* v. *Dina Nath Shaha Roy*).

The case of *Nagendra Mohan Roy* v. *Pyari Mohan Saha* (1) may be put on one side, as there the two Courts came to concurrent findings of fact.

There remains to be considered the objection that this is not a case which comes under section 99 because the putni lease, it is said, is not a lease of a share or portion of the estate, but a lease of certain specified mouzas of which the lessors had control and some form of possession at the time when the leases were made, but which by operation of the partition have now been taken away from them.

If their Lordships took this view they would have to consider whether the lessors might not be compelled to make by way of equitable compensation a similar lease of the new mouzas which they had obtained in lieu of the former ones.

On the whole, however, their Lordships think that it will not be necessary to resort to this consideration.

Each lease purports to be a lease of that share in the estate which belongs to the lessors. It is true that it specifically applies to certain mouzas of which the lessors have the enjoyment as representing their share, but it is obvious from the subsequent proceedings that this enjoyment was by convention only and subject to revocation and that as against their lessors, the lessees were entitled to say, "Give us your share, "if it be not in these villages, then in those which

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"you get instead". A grant in respect of its amplitude is always construed (unless it be a Crown grant) against the grantor.

It is true that there is no direct authority for such a case, but grants of a share in specified mouzas which are themselves only portions of an estate held in common tenancy, have been treated as coming under section 99.

The fourth case printed in the appendix (*Gopal Chandra Biswas* v. *Basanta Kumar Saha Roy*, decided August 18th, 1924) is to this effect.

The decision of the High Court of Calcutta upon the construction of a similar section in the earlier Partition Act agrees with this (*Joy Sankar Gupta* v. *Bharat Chandra Bardhan* (1). Support is also lent by the decision of this Board in *Bijnath Lall* v. *Ramoodeen Chowdry* (2), in the case of a mortgage of an undivided share in certain specified villages which were themselves part of an estate held in common tenancy. This case, it is true, was decided before the Partition Acts and upon the construction of the regulations; but it indicates the principle upon which subsequent legislation has proceeded. The observations on p. 119 are very much in point.

Their Lordships therefore are of opinion that the District Judge was right in holding that s. 99 applies to this case, and they will humbly advise His Majesty that this appeal should be allowed, and that the judgment of the District Judge should be restored with costs.

Solicitors for the appellants: *Watkins & Hunter.*

Solicitors for the respondents: *Ranken Ford & Chester.*

A. M. T.

(1) (1899) I. L. R. 26 Calc. 434. (2) (1874) L. R. 1 I. A. 106.