APPELLATE CIVIL.

Before S. K. Ghose and Patterson JJ.

RAJANIMOHAN SAHA

v.

SAMBHUNATH SAHA.*

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July 5.

Partition—Monthly tenancy—Temporary right, if partible—Convenience, rule of—Transfer of Property Act (IV of 1882), ss. 44, 106, 123.

It has not been laid down anywhere, as a fixed rule of law, that a property held in temporary right cannot be partitioned.

Lalit Kishore Mitra v. *Thakur Girdhari Singh* (1) and *Rajendra Narain Saha* v. *Satish Chandra Pal* (2) referred to.

No doubt the tenants would be entitled to partition of their holding under section 44 of the Transfer of Property Act unless it could be shown that the holding was liable to some disability against partition. When once the rights are established, the sole ground on which partition may be allowed or refused is the ground of convenience.

Hemadri Nath Khan v. *Ramani Kanta Roy* (3) followed.

Bhagwat Sahai v. *Bipin Behari Mitter* (4) explained.

The recitals in an unregistered *kabala*, though not admissible to prove sale, may be admissible in evidence for a collateral purpose, *e. g.*, to prove possession.

Varada Pillai v. *Jeevarathnammal* (5) and *Jagannath Marwari* v. *Sm Chandni Bibi* (6) relied on.

SECOND APPEAL by Rajanimohan Saha and others, plaintiffs.

Plaintiffs sued for partition of some land which they held as monthly tenants under the Transfer of Property Act along with the defendants who, *inter alia*, resisted their claim on the ground that, this being a monthly tenancy under section 106 of the Transfer of Property Act, was not a fit subject for partition. The trial court gave plaintiffs a decree, which was

*Appeal from Appellate Decree, No. 1935 of 1927, against the decree of J. M. Pringle, District Judge of Dacca, dated July 2, 1927, reversing the decree of Nata Bihari Ghose, Subordinate Judge of Dacca, dated June 8, 1925.

(1) (1916) 1 Pat. L. J. 441.
(2) (1912) 15 Ind. Cas. 331.
(3) (1897) I. L. R. 24 Calc. 575.
(4) (1910) I. L. R. 37 Calc. 918 ; L. R. 37 I. A. 198.
(5) (1919) I. L. R. 43 Mad. 245 ; L. R. 46 I. A. 285.
(6) (1921) 26 C. W. N. 65.

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reversed on appeal by the defendants. In consequence, the plaintiffs preferred this Second Appeal to the High Court.

Dr. Saratchandra Basak, *Mr. Gopalchandra Das* and *Mr. Bhubanmohan Saha*, for the appellants.

Mr. Brajalal Chakravarti and *Mr. Rupendrakumar Mitra*, for the respondents.

S. K. GHOSE J. Plaintiffs sue for partition of a plot of land described as "Bairagi Bari," alleging that they have purchased the four-fifths share of the tenancy right and defendants have purchased the remaining one-fifth share. Plaintiffs and defendants have small shares in the landlord's interest, the entire 16 annas of that interest being held by a large number of persons. The defence is that plaintiffs have no title except by virtue of the superior interest and that the property falls within the joint estate only up to a certain extent, the rest being in another estate. Plaintiffs won in the first court, but they lost in the court of appeal below. They now come in Second Appeal.

In this appeal, the first point is whether plaintiffs have proved their tenancy right to the land in suit. Plaintiffs base their right upon three conveyances, namely, (1) exhibit 1, which is an unregistered deed bearing date 4th *Sraban*, 1308 B. S., in respect of a one-fifth share of the tenancy right, for a sum below Rs. 100, (2) exhibit 1 (*c*) an unregistered deed of conveyance, dated 2nd *Ashwin*, 1308 B. S., in respect of a two-fifths share, for a sum above Rs. 100, the documents being executed by two females on behalf of their minor sons. The latter confirmed the transaction in 1328 B. S., by two registered instruments, exhibits 1 (*a*) and 1 (*b*); (3) exhibit 1 (*d*)—an unregistered deed of conveyance, dated 7th *Agrahayan*, 1310 B. S., in respect of a one-fifth share of the tenancy for a sum above Rs. 100. Defendants got their title from a registered *kabala*, exhibit 1 (*e*), dated 8th *Baisakh*, 1310 B. S., in respect of a one-fifth share of the tenancy right. It is admitted

that the original tenants were five brothers from whom plaintiffs and defendants derived their title by purchase as above. The difficulty in the way of the plaintiffs is that all these three deeds of sale were unregistered. The learned District Judge took the view that, as regards the first acquisition in *Sraban*, 1308 B. S., the transaction being for a consideration of less than Rs. 100, it did not require to be proved by a registered instrument and that there had been proof of delivery of possession as required by section 54 of the Transfer of Property Act. He therefore accepted the plaintiffs' case that they came into possession of a part of the disputed land in *Sraban*, 1308 B. S. The learned District Judge further thought that the *kabala* exhibit 1 was relevant for the strictly collateral purpose of proving in what capacity the entry of possession was made by the plaintiffs and he found that, as regards this one-fifth share acquired in *Sraban*, 1308, the plaintiffs had shown that they were tenants. But, as regards the other two *kabalas*, the learned District Judge thought that they could not be used at all in favour of the plaintiffs, and so he thought that they were in possession in their capacity as co-sharer landlords. In this view, he came to the conclusion that the plaintiffs were not entitled to partition without joining the other co-sharer landlords. The learned advocate for the appellants has contended that the learned District Judge was wrong in not considering that the *kabalas* exhibits 1 (*c*) and 1 (*d*) could also be admitted for the collateral purpose of proving the character of the possession of the plaintiffs as that of tenants. I think this contention is correct and it is supported by the decision of their Lordships of the Judicial Committee in the case of *Varada Pillai* v. *Jeevarathnammal* (1). That was a case of a gift and the fact that in that case there was no deed of gift at all makes to my mind no essential difference. The point is that in that case, although the gift was held to be invalid because it was not made by a registered deed as

(1) (1919) I. L. R. 43 Mad. 245 ; L. R. 46 I. A. 285.

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required by section 123 of the Transfer of Property Act, and the recitals in a petition could not be used as evidence of gift, it was held that those recitals might be referred to as explaining the nature and character of the possession of the donee. A similar view was taken in the case of *Jagannath Marwari* v. *Sm. Chandni Bibi* (1). In that case also the fact that a deed of gift was not necessary according to law makes no difference, the point being that an unregistered deed of gift was held to be admissible in evidence for the purpose of proving the character of the possession of the donee. Now it has been found by the trial court that the *kabalas* were genuine documents for consideration and that they were followed by delivery of possession to the plaintiffs. The learned District Judge has not reversed these findings, on the contrary he writes that "it is admitted "that both the parties are in possession of the disputed "land." As regards the first *kabala*, it has been found that it led to the possession of a one-fifth share by the plaintiffs as tenants. As regards the second *kabala*, although the title was not possibly perfected by the two deeds of release, exhibits 1 (*a*) and 1 (*b*), still those deeds were operative by way of admission of adverse possession on the part of the tenants vendors. Plaintiffs and defendants themselves are no doubt small co-sharer landlords, and I do not overlook the fact that, in the courts below, plaintiffs tried to make a case that they were actually paying rents to the other landlords, but that the learned District Judge found that some of the rent receipts were forged. Still we have the fact that plaintiffs have been in possession of these properties ever since the execution of the *kabalas* from 1308 onwards, and, in order to explain the character of the possession, we have to look to those documents. They show that the possession was that of a tenant. The only point that has troubled me is this, that, although plaintiffs' title has been perfected by possession for more than twelve years as against the vendors. whether that

(1) (1921) 26 C. W. N. 65.

could conclude the present defendants, they being also co-sharer landlords. Hence, apparently the learned District Judge was led to think that plaintiffs' possession as regards the three-fifths share must be held to be that of co-sharer landlords. But I think this position is inconsistent with the view that, as regards the one-fifth share, plaintiffs were in the position of tenants. From the judgment of the trial court, I find that in that court it was admitted that the original tenants were five Saha brothers and it appears that the father of defendants Nos. 1 and 2 purchased from Manmohan Saha, son of one of the Saha brothers. The defence of defendant No. 1—that he or defendant No. 2 has got no tenancy right—seems to me to be inconsistent with the origin of their possession by virtue of the aforesaid purchase. I, therefore, think that the learned trial court took the correct view when it stated that "in the present case "the plaintiffs and their predecessors first entered "into possession as tenants." This possession continued for more than twelve years and I find that plaintiffs have got their title in respect of the four-fifths share of the tenancy right in the land in suit.

The next point upon which the learned District Judge decided the suit against the plaintiffs is that the tenancy is a monthly tenancy under section 106 of the Transfer of Property Act and that, therefore, it is not a fit subject for partition. The question is whether this view is correct. No doubt, plaintiffs would be entitled to partition of their property under section 44 of the Transfer of Property Act, unless it could be shown that the holding was liable to some disability against partition. To my mind, when once the rights are established, the sole ground on which partition may be allowed or refused is the ground of convenience. This principle was laid down in the Full Bench case of *Hemadri Nath Khan* v. *Ramani Kanta Roy* (1) and, following this principle, the case of *Bepin Behari Mitter* v. *Lala Bhagwat Sahai* (2) held that partition should not be allowed when the

(1) (1897) I. L. R. 24 Calc. 575. (2) (1905) 9 C. W. N. 699.

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interest in question was of a temporary and qualified character. On appeal, their Lordships of the Judicial Committee, in the case of *Bhagwat Sahai* v. *Bipin Behari Mitter* (1), reversed the finding that the interest in question in that case was of a temporary and qualified character, but they expressly refrained from adopting as a rule of law that a temporary interest could not be partitioned. In the case of *Lalit Kishore Mitra* v. *Thakur Girdhari Singh* (2), the subject of partition, which was allowed, was terminable, albeit it was a mining lease for a term of 999 years. In the case of *Rajendra Narain Saha* v. *Satish Chandra Pal* (3), the subject-matter of partition, which was also allowed, was an ordinary occupancy holding. Thus, I do not find that it has been laid down anywhere as a fixed rule of law that a property held in temporary right can not be partitioned and the only rule that I can find is the rule of convenience. In the present case, stress has been laid on the finding that the subject-matter of the suit is a monthly tenancy under section 106 of the Transfer of Property Act terminable on 15 days' notice. The learned advocate for the appellant in this Court has complained that this matter was agitated for the first time in the court of appeal below. In reply to this, I have been referred to issue No. 4 of the trial court, which runs as follows: "Are the "plaintiffs entitled to a partition of the tenancy right, "without bringing into hotchpot the superior "proprietary right which they and defendants have "to the land?" This issue, however, did not raise the question quite in the same way, and, judging from the fact that the learned Subordinate Judge disposed of it in a few lines, it is apparent that the parties did not attach particular importance to this question at the time of the trial. However, no doubt, we have the finding that the subject-matter of the suit is a monthly tenancy terminable on 15 days' notice, but, looking at the actual circumstances, it seems to me

(1) (1910) I. L. R. 37 Calc. 918; L. R. 37 I. A. 198.
(2) (1916) 1 Pat. L. J. 441.
(3) (1912) 15 Ind. Cas. 331.

that this is only technically so. The subject-matter of the suit is a plot of land adjoining a homestead and it does not appear to have any substantial structure on it. The holding is very old and the finding is that it has been under occupation for over half a century. Plaintiffs certainly have been occupying it since their purchase more than 12 years ago without apparently any effort on the part of the landlords to eject them. The landlords are numerous and scattered and there is no practical likelihood of their uniting to eject the tenants. The tenancy right is possessed solely by the present plaintiffs and the defendants, and they themselves are co-sharer landlords. In these circumstances, I cannot see how the prayer for partition can be refused on the ground of convenience. Plaintiffs and defendants have been in joint possession for a long time, and of course partition as between them would not bind the landlords. In the circumstances of this case, I consider that the mere fact that technically the holding is a monthly tenancy should not debar the plaintiffs from their lawful right to partition. I think, therefore, that partition should be allowed.

The learned District Judge disposed of the appeal against the plaintiffs on these two points. In this Court the learned advocate for the defendant respondent has argued that, on the findings arrived at by the learned District Judge, it cannot be said that the tenancy was transferable. It is pointed out that the learned District Judge has found that the tenancy has been in existence for about half a century. He says "Its occupation by the *bairagi* goes back about "half a century and its previous history is unknown." It has been argued from this that the learned District Judge appears to have found that the property was in existence from before the passing of the Transfer of Property Act in 1882. I do not think, however, that this is the proper construction of what the learned District Judge has found. Apparently that was not in his mind and it would be a straining of the language used to hold that he must be taken to have

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found that the tenancy was in existence from before the passing of the Transfer of Property Act, which was about 40 years before the suit. On the other hand, it was never the defence that the tenancy had been in existence from before the passing of the Transfer of Property Act, but the defence was that the tenancy was governed by the Bengal Tenancy Act. My attention has been drawn to ground No. 14 of the grounds of appeal in this Court, which runs as follows: "For that the court of appeal below is "wrong in holding that the present tenancy is a "tenancy from month to month, whereas it should "have held under the circumstances of the case that "there is a presumption of permanency and that the "tenancy was created before the Transfer of Property "Act." The learned advocate for the appellants, on his attention being drawn to this ground, stated that he gave it up and I do not consider that his clients are to be bound by what is after all an inconsistent ground in appeal. There is, therefore, no substance in the point taken by the respondents, and it must fail.

The result is that in this suit there will be a preliminary decree for partition, subject, however, to the decision of the following issue, namely issue No. 6, of the trial court, which was to this effect:—"What "are the correct boundaries and extent of the land "liable to be partitioned? Are the settlement plots "indicative of the land correctly depicted and is "the record incorrect?" Upon this, the learned Subordinate Judge came to this finding:—"It is, "accordingly, held in this issue that the land in suit "is the Cadastral Survey Settlement *dags* Nos. 205 "and 272 and that portion of 1054, which lies between "them, being bounded on the west and east by the "lines joining the nearest corner points of the *dags* "Nos. 205 and 272." The question was raised again before the learned District Judge and he remarked as follows: "There was another point in the appeal "about the limits of the alleged tenancy regarding "which, however, in view of my decision on the main

"question, I did not hear argument." It is necessary that this point should now be heard and decided. The appeal is accordingly allowed. The decree of the lower appellate court is set aside and the case is remitted to that court, in the first place, for a decision of the above point. When that point has been decided, there will be a preliminary decree for partition. Appellants will get their costs in all courts. Future costs will abide the result.

PATTERSON J. I agree.

Case remanded.

G. S.