APPELLATE CIVIL.

Before Suhrawardy and Graham JJ.

MATILAL SARKAR

v.

KAMAKHYACHARAN DE SARKAR.*

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May 13, 14.

Partition—Person not having a permanent interest in property, if can maintain suit—Co-ordination or similarity of interests, if essential to partition.

A person not having a permanent interest, *e.g.*, the holder of a *jote* right in a portion of a *howlâ* in the shape of a yearly lease with no definite period is entitled to maintain a suit for partition against the persons who have similar right to the remaining portion and have also *mâliki* right to a portion of the said *howlâ*.

Hemadri Nath Khan v. *Ramani Kanta Roy* (1), *Bhagwat Sahai* v. *Bipin Behari Mitter* (2) and *Mukunda Lal Pal Chowdhry* v. *I. Lehuraux* (3) distinguished.

Right to partition as right to possession is a right of property and such right depends, not upon the co-ordination of interests of parties concerned, but on the fact of their being in joint possession. Partition at the instance of a subordinate interest holder among persons holding other subordinate interests will not be binding among the superior interest holders and will enure till the interest of the party seeking partition lasts.

The plea that partition will result in great hardship, loss of time and money or will not have an enduring effect is no answer to a claim for partition.

Hobson v. *Sherwood* (4), *Baring* v. *Nash* (5) and *Sundar* v. *Parbati* (6) referred to.

Parbati Churn Deb v. *Ain-ud-Deen* (7) commented upon.

APPEAL FROM APPELLATE DECREE by the defendants.

The material facts of the case have been fully set out in the judgment.

Sharatchandra Ray Chaudhuri and *Bhupendra-kishore Basu* for the appellants.

*Appeal from Appellate Decree, No. 1349 of 1930, against the decree of Rajanikanta Ghosh, First Subordinate Judge of Dacca, dated Jan. 25, 1930, affirming the decree of Jitendranath Sen, Second Munsif of Dacca, dated Sep. 3, 1929.

(1) (1897) I. L. R. 24 Calc. 575.
(2) (1910) I. L. R. 37 Calc. 918 ; L. R. 37 I. A. 198.
(3) (1892) I. L. R. 20 Calc. 379.
(4) (1841) 4 Beav. 184 ; 49 E. R. 309.
(5) (1813) 1 Ves. & B. 551 ; 35 E. R. 214.
(6) (1889) I. L. R. 12 All. 51 ; L. R. 16 I. A. 186.
(7) (1881) I. L. R. 7 Calc. 577.

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Matilal Sarkar v. *Kamakhyacharan De Sarkar.*

Gunadacharan Sen and *Shacheendrakumar Ray* for the respondent.

SUHRAWARDY J. This appeal arises out of a suit for partition of a homestead. The plaintiff's claim for partition is based on the following facts: There was a *howlâ* called Jadunandan, which was held by five persons; Rupchand and Sreenath Das had a four annas share and in the remaining 12 annas Taranath and Priyanath had $9\frac{1}{2}$ annas share and Kalikumar $6\frac{1}{2}$ annas share, treating the 12 annas interest in the *howlâ* as 16 annas. About 60 years ago, according to the defence, the predecessor of defendant No. 1 took a *jote* settlement of the 4 annas of Rupchand and Sreenath. In 1300 B. S., the plaintiff took a *jote* settlement of 6 annas of the *howlâ* from Taranath, Priyanath and Kalikumar and, about that time, the defendants also took a *jote* settlement of the remaining 6 annas from these persons. In 1315 B. S., the defendants took *mirâsh* settlement of Kalikumar's $6\frac{1}{2}$ annas share in the 12 annas of the *howlâ* reckoned as 16 annas. In 1327 B. S., they purchased the *mâliki* interest of Kalikumar in that share. At the date of the institution of the suit, the position, therefore, was that the plaintiff had a *jote* right to 6 annas of the *howlâ* and the defendants Nos. 1, 2 and 3 the same right to the remaining 10 annas. But they had also *mâliki* right in about 5 annas of the *howlâ*. The plaintiff by the suit claimed partition of the *jote* from the defendants in respect of his share in it by metes and bounds. The defendants mainly contended that the suit was not maintainable, as there had been a previous partition under which the parties were in possession of different portions of the homestead, and that, as the defendants had become co-sharer landlords, the suit was not maintainable in law. The defendants also pleaded limitation and abandonment under the terms of the lease to the plaintiff.

The trial court overruled the defendants' objections and decreed the plaintiff's suit. The

learned Subordinate Judge, on appeal, has concurred in the decree. Both courts have found that the defendants have failed to prove previous partition. Defendants Nos. 1, 2 and 3 have appealed and several points have been raised on their behalf.

It is contended, in the first place, that the present suit is not maintainable, inasmuch as the plaintiff has only a temporary interest in the land in suit and as such is not capable of maintaining a suit for partition. The plaintiff's lease appears to be a yearly lease for no definite period. In support of this contention, reliance has been placed on the Full Bench decision in *Hemadri Nath Khan* v. *Ramani Kanta Roy* (1), and on the case of *Bhagwat Sahai* v. *Bipin Behari Mitter* (2). The Full Bench case was one between the *patnidâr* and the *zemindâr*. In a previous decision of this Court in *Mukunda Lal Pal Chowdhry* v. *I. Lehuraux* (3), it was held that, in order to maintain a suit for partition, the plaintiff must be of equal status with the defendant. The Full Bench decided that it was not necessary that parties should have equal rights in the joint property. In that case, the suit was by a co-sharer *zemindâr* against a *patnidâr*. In *Bhagwat Sahai's* case (2), the suit was brought by a proprietor of a *mokarrari* interest in the properties in suit against the owners of shares of the *zemindâri* interest therein, and their Lordships approving the decision of the Full Bench in *Hemadri Nath Khan's* case (1) held that the suit was competent. But the contention before us is that those cases lay down that the holder of a permanent interest only is entitled to maintain a suit for partition against the holder of a different permanent interest. It so happened that in those cases the parties were holders of permanent interests though of different kinds. But I do not think that they are authorities for the view that a suit for partition can only be maintained by one who has

(1) (1897) I. L. R. 24 Calc. 575. (2) (1910) I. L. R. 37 Calc. 918; L. R. 37 I. A. 198.

(3) (1892) I. L. R. 20 Calc. 379.

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some sort of permanent interest in the property in suit. It appears from the judgment of Banerjee J. in *Hemadri Nath's* case (1) that it was urged before the Full Bench that partition could be enforced only as between co-owners whose interests were co-ordinate in degree for otherwise parties having permanent interest might be put to frequent and needless expenses and trouble by having to watch the partition proceedings instituted at the instance of a holder of a temporary interest. The objection was not, however, considered, because there both the parties had permanent interests in the property in suit and hence "there was no "apprehension of the division effected not having an "enduring effect." Beverley J. expressed an opinion that "the right to partition can only exist as between "co-parceners holding similar interests in the "property." But how "similar interest" could be defined, the learned Judge felt difficult to say, though he opined that they should probably be transferable permanent interests. In *Bhagwat Sahai's* case (2), their Lordships of the Judicial Committee have left the question expressly open, but they agree with the "opinion of the Full Bench in the case referred to (1) "that the right of partition exists when two parties "are in joint possession of the lands under permanent "titles, although these titles may not be identical." They proceed to observe:—"It is not necessary for "their Lordships to consider whether the right to "partition exists in any other case and they are "desirous to avoid indicating any view upon any "such subject."

The question as to whether a suit for partition can be brought by a person not having a permanent interest in the property, has, therefore, not been authoritatively decided. It appears that in English law such right exists and it has been asserted and accepted from a long time. In *Hobson* v. *Sherwood* (3), the plaintiff was tenant for life in 1/5th of the

(1) (1897) I. L. R. 24 Calc. 575, 582. (2) (1910) I. L. R. 37 Calc. 918; L. R. 37 I. A. 198.
(3) (1841) 4 Beav. 184 (186); 49 E. R. 309 (310).

estate, which life-tenancy was subject to extinction on his marrying. The suit was demurred on the ground that the plaintiff had such an unstable status that he was not entitled to maintain a suit for partition against persons having right to the estate and the remainder. The Master of the Rolls, in giving the judgment of the Court, observed: "As "tenant for life, I apprehend there can be no question "but that he is entitled to a partition. The question "is, whether circumstance of his life-estate being "determinable on his second marriage makes any "difference. As at present advised, I think it does "not; but I will further consider it." On further consideration the Master of the Rolls ordered partition to proceed. In *Baring* v. *Nash* (1), the plaintiff was owner of a tenth share and the defendants of the remainder of the term of 500 years. They were also owners of inheritance of the other nine-tenth shares. On demurrer, it was held that the plaintiff was entitled to maintain the suit, however small his interest in the joint property might be. There would be no objection due to minuteness of his interest, inconvenience or reluctance of other tenants, if there was not objection taken to the plaintiff's title, partition being a matter of right whatever might be the inconvenience or difficulty. In *Sundar* v. *Parbati* (2), the Judicial Committee held that a suit for partition would lie between two Hindu widows having life interest in the property on the basis of possession alone. In *Doman Pandey* v. *Panchu Kole* (3), it was held that between two *mâl râiyats*, whose interest was not permanent, partition could be effected, but it would not be binding upon the superior landlord and would only be subsisting during the currency of the settlement. In *Lalit Kishore Mitra* v. *Girdhari Singh* (4),—a Patna case, the plaintiff was a lessee for a term of the underground mines and minerals

(1) (1813) 1 Ves. & B. 551; 35 E. R. 214.

(2) (1889) I. L. R. 12 All. 51; L. R. 16 I. A. 186.

(3) (1900) 5 C. W. N. 185.

(4) (1916) 1 Pat. L. J. 441.

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in a village. The term was for a period of 999 years. But the trial court dismissed the suit on the ground that the lessee for a term was not a joint owner of the minerals with the other owners of the village and was, therefore, not entitled to claim partition of the mines and minerals. The learned Chief Justice held, referring to the Full Bench case and the decision of the Judicial Committee above referred to, that the plaintiff had the right to claim partition on the ground that he was in joint possession with others. The claim or right to demand partition is one of the rights of ownership. Right to partition as right to possession is a right of property and such right depends not upon the co-ordination of interests of parties concerned, but on the fact of their being in joint possession.

Partition at the instance of a subordinate interest holder among persons holding other subordinate interests will not be binding upon the superior interest holder and will enure till the interest of the party seeking partition lasts. But the fact that such partition is not binding upon the landlord is no reason why it cannot be effected among the tenants. The sole basis, upon which claim to partition is founded, is the joint possession of the parties. In *Muhammad Bakhsh* v. *Mana* (1), it was held that a joint occupancy tenant was entitled to sue for partition of the joint occupancy holding, though the *zemindâr* was not made party to the suit. The view which apparently is in conflict with that taken in the Allahabad case is expressed in *Anath Bandhu Dutta* v. *Aisali Namadas* (2), but the decision in that case proceeded upon other grounds.

In some cases it has been suggested that partition under certain circumstances will result in great hardship, loss of time and money and, in some cases, that it will not have an enduring effect. In the English cases I have cited, this question was considered. In *Hobson's* case (3) referred to above,

(1) (1896) I. L. R. 18 All. 334. (2) (1926) 43 C. L. J. 601.

(3) (1841) 4 Beav. 184 (186); 49 E. R. 309 (310).

the Master of the Rolls observed: "I cannot help "regretting that this suit should ever have been "instituted. The plaintiff alone, who is tenant for "life determinable on his second marriage, "desires a partition; all the other parties desire to "keep the estate together. If, however, the plaintiff "is entitled to the relief he asks, he must have it, "however inconvenient it may be to the other "owners." Similar observation was made in *Baring's* case (1), where the Vice-Chancellor observed: "Partition being matter of right: "whatever may be the inconvenience and difficulty:" it must be ordered at the instance of the petitioner that partition be effected. See also *Sundar's* case (2).

In my judgment, the plaintiff in this case is entitled to maintain the suit for partition against the defendants who hold similar interest in the property. I may observe here that the objection to the maintainability of the suit on the ground that the plaintaff has a temporary interest in the lands in suit was not taken in any of the courts below and was not even suggested in the grounds of appeal in this Court, except by means of an additional ground placed before us at the hearing of the appeal. I am not sure that the question now raised by Mr. Ray Chaudhuri is a pure question of law. It may involve an investigation into facts on evidence. We do not know what is the status of the defendants with reference to the lands of which they have taken *jote* settlement. It may be that they have right similar to that of the plaintiff. It is also possible that the plaintiff, by virtue of being a settled *râiyat* of the village, has acquired right of occupancy in the homestead under section 182, Bengal Tenancy Act. Though this point has been raised for the first time, I have allowed it to be raised and discussed as a question of law.

The next question urged by Mr. Ray Chaudhuri on behalf of the appellants is that the defendants

(1) (1813) 1 Ves. & B. 551 (554); 35 E. R. 214 (215).

(2) (1889) I. L. R. 12 All. 51; L. R. 16 I. A. 186.

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being *mâliks* of certain shares of the *howlâ*, the plaintiff cannot maintain a suit for partition against them. The plaintiff claims partition against the defendants not in the latter's capacity as *mâliks*, but as they are *jote* holders of the land in suit jointly with the plaintiff. The learned Subordinate Judge has considered this point and he observes: "The mere fact that the appellant who is a co-"sharer of the plaintiff in the *jote* under partition, "happens to be a fractional landlord of the *jote* in "question does not, in my opinion, alter the situation "in any way." I think the view taken by the learned Subordinate Judge is right. The effect of this partition will in no way be binding on the defendants in their capacity as *mâliks*. It will still be open to them to claim partition as *mâliks* against their co-shareres in the *howlâ*.

Mr. Ray Chaudhuri has raised a ground also upon which the lower courts decided against him and that is that on the terms of the plaintiff's lease it should have been held that this *jote* has come to an end. The *kabuliyat* says that if the lessee goes elsewhere, in that event, he should have no claim or interest in the land or in the *jamâ* mentioned in the *pâttâ*. The finding of the lower appellate court is that the plaintiff has still been in possession of the disputed plot through his *bargâdârs* and that the plaintiff went to his father-in-law's place after the cyclone of 1326. Similar findings were entered by the trial court, which held that the defendant's story of abandonment had no legs to stand upon and that in the settlement record the defendant and the plaintiff had been recorded as tenants in possession of C. S. plot No. 950 in suit. If there has been a forfeiture, it is the landlord who can claim or waive it. It is in evidence that the plaintiff's landlord is still receiving rent from him.

Lastly, it has been contended that the plaintiff is interested only in one of the several plots of which the *howlâ* is composed. It will be extremely

inconvenient if a person interested in a portion of a property is allowed to claim partition of that portion, for it will set the defendants to a number of suits at the instance of other parties who are interested in other portions of the land, and in support of this contention reliance has been placed on *Parbati Churn Deb* v. *Ain-ud-Deen* (1). I am not quite sure whether the observation made by Garth C. J. in that case can be held to be good law now. But this point also was not taken at the trial. We have got no findings of the courts below as to whether the land of which partition is claimed by the plaintiff is a portion of a bigger plot. So far as the plot in suit is concerned, it is the case of both parties that they have shares in it as claimed by them. There can be no objection that this plot held jointly by the parties under similar title should not be partitioned.

In the view I have taken in this matter, the appeal fails and must be dismissed with costs.

GRAHAM J. I agree that the appeal should be dismissed. Two main points were, as I understand, urged on behalf of the appellants: firstly, that the plaintiff being merely a temporary tenant could not sue for partition, and secondly, that such a suit would not lie where the defendants as here have rights as co-sharer landlords. As to the first point, it may be observed that no such case was made in the courts below, nor was there any issue upon it in the precise form in which it has now been sought to be raised. No doubt, it is a question of law and such questions may be raised at any time. But the decision of the matter would involve an investigation of facts. That being so, we ought not to allow it to be raised for the first time in Second Appeal.

With regard to the second contention, Mr. Ray Chaudhuri for the appellants referred to certain authorities in support of the proposition that there can be no partition in view of the fact that the defendants are co-sharer landlords. None of the

(1) (1881) I. L. R. 7 Calc. 577.

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cases, however, are on all fours with the present case and I do not see how the fact that the defendant happens to combine in himself a dual status of *râiyat* and landlord can deprive the plaintiff of his right to partition. Nor does it appear that defendant's interest will suffer in any way, if partition be made. As a matter of fact we have been informed that partition has already been finally made.

Appeal dismissed.

A. A.