

on the ground (amongst others) that, in making this payment, the plaintiffs believed themselves interested in doing so.

We think that this conclusion of the Subordinate Judge may be properly confirmed, though we doubt whether his judgment can be supported upon the grounds which he mentions. We think that his conclusion may be supported upon this principle that where a payment is made by one person for the benefit of another, and that other afterwards adopts that payment, and avails himself of it, the sum becomes money paid for his use.

The plaintiffs, *bonâ fide* believing themselves to be the owners of the four annas share, paid the revenue of it to the zemindar. The defendants then paid the revenue on the remaining twelve annas; when they did so, they must have found that the revenue on the four annas had been paid by the plaintiffs; and they availed themselves of that payment by the plaintiffs, only paying, or offering to pay, to the zemindar the revenue on the remaining twelve annas. We think that, under these circumstances, the Rs. 225 so paid by the plaintiffs became money paid to the use of the defendants; and that the judgment of the Court below can be supported upon that ground. No doubt the justice of the case is entirely with the plaintiffs.

The appeal is dismissed with costs.

Appeal dismissed.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice McDonell.

PARBATI CHURN DEB (PLAINTIFF) *v.* AIN-UD-DEEN AND OTHERS
(DEFENDANTS).*

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May 31.

Co-Sharers—Partition—Portion of an Estate—Parties.

The owner of a twelve annas share in a joint zemindari granted to the plaintiff a mokurari lease of his share in a small portion of land within the zemindari. The owners of the remaining four annas share granted a putui of his share in the whole zemindari to the defendants. The plaintiff brought a suit against the defendants for partition of the small plot of land.

* Appeal from Appellate Decree, No. 2472 of 1879, against the decree of Baboo Uma Churn Kastogiri, Subordinate Judge of Tippera, dated the 30th July 1879, affirming the decree of Baboo Ram Obunder Dhur, Munsif of Bamunberia, dated the 10th March 1879.

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Held, that such a suit would not lie, because the zemindars were not made parties; and also that a partition could not be enforced of a part of the estate held by the defendants, who, if the plaintiff's claim was allowed, might, in respect of the same estate, be subjected to many claims for partition at the *suit of persons in the plaintiff's position*.

In this case it appeared, that one Monwar Ali was a twelve annas shareholder in a certain undivided zemindari, the remaining four annas of which were held by certain persons known as the heirs of Nasiruddin. On the 4th of August 1877, Monwar Ali gave to the plaintiff a mokurari lease of a certain plot of land within the zemindari, which plot was defined by metes and bounds, and was in extent about one-fiftieth of the whole zemindari. The whole zemindari being joint, this lease, of course, only covered twelve annas of the rents and profits of the plot of land. The heirs of Nasiruddin had given a patni of their four annas share of the whole zemindari, to the defendants; and this suit, which was for partition, was instituted, on the 13th of November 1878, by the plaintiff, the mokuraridar of the twelve annas share of the small plot, against the defendants, the patnidars of the four annas share of the whole estate.

The suit was dismissed in the Court of first instance, on the ground, that the plaintiff, being interested in a fractional part of the estate only, could not sue the co-sharers of the whole estate for a partition. This decision was upheld on appeal by the Subordinate Judge, the material portion of whose judgment is as follows:—“The plaintiff and defendants are not sharers in the same tenure under one and the same proprietor. Their tenures are separate, under different proprietors. The law says, that a sharer may sue for partition. As neither the plaintiff is the sharer of the patni held by the defendants, nor the defendants are the sharers of the mokurari tenure held by the plaintiff, I consider that the plaintiff has got no power in him to call upon the defendants by notice to join him in apportioning the lands of two separate tenures. Such a partition will, in fact, be a partition between the proprietor of a twelve annas share and the proprietors of a four annas share in the zemindari, and this cannot be done in a suit in which they are not parties. There is also another difficulty

of assorting the jama of each of the two shares. To allow the plaintiff to hold separately a certain portion of the lands as lands of the twelve annas share, while the proprietors of the two shares hold all other lands jointly, is to annihilate the right of the proprietors of four annas share thereto. Neither has the proprietor of the twelve annas share authorized the plaintiff, nor have the proprietors of the four annas share given power to the defendants, by express terms, in the pattas, to make a partition between them. The appeal is dismissed with costs." The plaintiff appealed to the High Court.

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Baboo *Joy Gobind Shome* for the appellant.—The learned Judge was wrong in holding that this suit could not be maintained; the case is on all fours with that of *Rani Samasundari Debi v. Jardine, Skinner, and Co.* (1); see also *Ram Pershad Narain Tewaree v. The Court of Wards* (2).

Moonshee *Serajul Islam* for the respondents.—This suit is not maintainable. A partition of a portion of a share cannot be had, unless all the portions are included in the suit. The person who bought the interest of the zemindar in one plot, cannot compel a partition of that plot alone; the zemindar could not do it, and a purchaser from him has no higher rights than he himself could have. In *Rani Samasundari's case* (1), the whole sixteen annas were divided; and in *Ram Pershad Narain Tewaree v. The Court of Wards* (2) all the parties were before the Court. In this case the titles under which the parties hold are distinct and separate. The respondents are not joint with the appellant. [The cases of *Baboo Lalljeet Singh v. Baboo Raj Coomar Singh* (3) and *Ruttun Monee Dutt v. Brijo Mohun Dutt* (4) were referred to.]

Baboo *Joy Gobind Shome* in reply.—The patnis in *Rani Samasundari's case* (1) were given by different parties as in this case; and, as in that case, the owners of the whole sixteen annas of the plot of which we seek partition are before the Court. It is not necessary that the interest of each party should extend

(1) 8 B. L. R., App., 120; S. C., 12 W. R., 160. (2) 21 W. R., 152.

(3) 25 W. R., 353.

(4) 22 W. R., 393.

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to the whole estate in order to get partition: Suppose there were twenty zemindaries, why should not the mokuridar of one or more get a partition if he pleased? The zemindar's rights do not limit ours; these are all the lands we hold jointly with the defendants, and we are entitled to a partition of them.

The judgment of the Court (GARTH, C. J., and McDONELL, J.) was delivered by

GARTH, C. J.—The plaintiff sued for a partition, and the facts are these: Mouwar Ali is the owner of an undivided twelve annas share in a mouza, and Ali Kasim and others are entitled to the remaining four annas. The defendants have obtained a patni of the four annas share, and the plaintiff has obtained from Mouwar Ali a mokurari of a small portion of the twelve annas share. Under this mokurari, he has an undivided twelve annas share in a small area of a mouza. The entire mouza held in joint possession consists of upwards of 100 drones of land; and the portion in which the plaintiff has a twelve-anna share is less than two drones. Under these circumstances, the plaintiff sues the defendants for a partition,—that is to say, he prays to have the small area in which he has a twelve-anna share divided as between him and the four annas patnidar. Neither of the zemindars is made a party to the suit; and the defendants object that, in point of law, the plaintiff is not entitled to the partition.

Both the lower Courts have dismissed the plaintiff's suit. The Munsif has dismissed it upon the ground, that the lessee of twelve annas of part of the joint estate has no right to a partition against a lessee of four annas of the entire estate; and also, that if such a partial partition were allowed between tenure-holders of portions of entire properties, it would lead to great expense and inconvenience. The Subordinate Judge gives several reasons for his decision. He says,—*first*, that the plaintiff and defendants are not sharers in the same tenures under the same proprietors. They have separate tenures under different proprietors; and that, as the plaintiff is not a sharer in the defendants' patni, nor the defendants sharers in the plaintiff's mokurari, neither party has a right to enforce a

partition against the other; *secondly*, he says, that such a partition would be an unlawful interference with the rights of the zemindars, that they are not made parties to the suit, and that such a partition cannot be made without their concurrence; and *thirdly*, he considers, that to allow the four annas share to be thus subdivided, would be injurious to the four annas patnidar.

It has been argued here on special appeal, that a partition may legally be enforced as between tenure-holders of the same zemindari, as long as between them they are entitled to the whole sixteen annas in the particular area sought to be partitioned; and that it is no objection to such a partition that the parties hold separate tenures under separate owners of the zemindari. It is said that partition would not affect the rights of the zemindars, either *inter se* or as against their respective lessees; and it would only be in force during the lessees' interests. If either the defendants' patni or the plaintiff's mokurari were to determine, the partition would be at an end.

We think that the judgment of the lower Courts should be confirmed, for the following reasons:—

First, that a partition of this kind cannot legally be enforced without the zemindars being made parties to the suit; and *secondly*, that a partition cannot be enforced of a part of the estate held by the defendants. The defendants are entitled, by right of their patni, to an undivided four annas share in a large estate of 100 drones; and if the plaintiff was entitled to compel a partition as against the defendants of an area of two drones only, the defendants might, in respect of the same estate, be subjected to forty or fifty claims for partition at the suit of forty or fifty different persons, each of whom is in the plaintiff's position, and might be put to great expense in consequence of his estate being divided into forty or fifty separate areas.

The appeal is dismissed with costs.

Appeal dismissed.

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