## APPELLATE CIVIL.

*Before Mr. Justice Prinsep and Mr. Justice Pigot.*

1882 *December* 18.

DASSORATHY HURI CHUNDER MAHAPATTRA (PLAINTIFF) *v.* RAMA KRISHNA JANA AND OTHERS (DEFENDANTS,)*

*Landlord and Tenant—Cuttack—Surborakari tenures—Alienation without consent of landlord—Forfeiture—Alienation by one of several co-sharers—Changing case made in plaint—Second Appeal.*

The alienation of a surborakari tenure in Cuttack, and *à fortiori* the alienation of any portion of such tenure, is invalid without the consent of the landlord.

Assuming that the sale of such a tenure would entitle the landlord to re-enter as upon a forfeiture, the sale of a portion thereof by one of several co-sharers would not work a forfeiture of the whole tenure.

A plaintiff was not allowed to alter his case in second appeal.

THIS was a suit for the recovery of possession of land. The plaintiff was the zemindar. The first seven defendants—called the Jana defendants—were holders under him of a surborakari tenure; the eighth defendant, Gopinath Misser, was the heir of a purchaser from some of the Jana defendants. The plaintiff stated that the Jana defendants had partitioned the surborakari tenure between them; that afterwards the owners of some of the several shares purported to sell them to the father of the eighth defendant; and he charged that by such partition and sale and by each of them, the defendants had in law lost all their rights and interests in the holding, and were liable to be ejected.

The Jana defendants, who severed in their defences, pleaded that they had a right to partition the lands between themselves as they thought fit, and to sell any of such portions when partitioned. They also pleaded limitation.

The Court of first instance gave the plaintiff a decree which was modified on appeal to the lower Appellate Court. The Judge said:

"Of late years, at least, the Courts of Orissa have always held the sur-

* Appeal from Appellate Decree Nos. 2025 and 2233 of 1881, against the decree of A. W. Cochran, Esq., Officiating Judge of Cuttack, dated the 5th September 1881, modifying the decree of W. Wright, Esq., Subordinate Judge of that district, dated the 31st December 1880.

borakari tenure to be indivisible and inalienable without the zemindar's consent. Respondent quoted two rulings quite in point—*Puddolochun Mundle* v. *Lukhun Burrooah* (1), and *Doorjodhun Doss* v. *Chooya Daye* (2). The ruling quoted on the other side—*Saddanundo Maiti* v. *Nowrattam Maiti* (3)—is not a weighty one. The question whether *surborakaris* were capable of being alienated or not was not raised in the lower Court in that case, and no evidence was given. A surborakari is not a mokuddami, and no one in Orissa confounds the two. Mr. Ricketts clearly distinguishes between the two. Merely because the allowance made to the surborakar is called malikhana, I cannot conclude that he is malik; the word malikhana has a secondary meaning much more often used than its primary one. It is very clear the plaintiff never sanctioned either the division or the alienation; had he done so, separately obtained receipts would have been forthcoming. I hold his suit is within time, even though I do not agree with the lower Court that the Janas should be ejected. He was not bound to recognize the division or the alienation in any way till his rights were affected. This suit has come out of the rent case of 1874.

"The order of the lower Court as to khas possession I cannot confirm. The Jana defendants may have acted vexatiously, but it has not been shown that they acted contrary to law, or did really anything more than persist in fighting the zemindar on the points at issue here now. They had perhaps some reason to think they could alienate. I certainly cannot say that they have plainly and certainly acted vexatiously. Appellant quoted *Kashenath Punee* v. *Lukhmonee Pershad* (4), and *Suddye Purira* v. *Boistub Purira* (5). Both are in point. I modify the lower Court's order, and, while allowing the Janas to remain in possession, set aside the alienation, and declare that the division of the tenure is not legal without the landlord's consent."

The plaintiff appealed to the High Court on the grounds that he was entitled, on the facts found by the District Judge, to a decree for possession; that on the question of forfeiture, the Judge had mistaken the nature of a surborakari tenure; and that had he taken a correct view of the nature of the tenure he would have held that the defendants had forfeited their rights therein.

Gopinath Misser also appealed against that portion of the decree setting aside the sale to his father.

Baboo *Nil Madhub Sen* for the appellant.

(1) 2 S. D. A., 1860, p. 109.
(2) 1 W. R., 322.
(3) 8 B. L. R., 280.
(4) 19 W. R., 99.
(5) 12 B. L. R., 84: 15 W. R., 261.

1882

DASSORATHY HURI CHUNDER MAHAPATRA v. RAMA KRISHNA JANA.

Mr. *Twidale* and Baboo *Obhoy Churn Bose* for the respondents.

The judgment of the Court (PRINSEP and PIGOT, JJ.) was delivered by

PRINSEP, J.—We think that the conclusion arrived at by the lower Appellate Court is correct.

Any acts of one or more of several joint tenants which possibly might operate as a forfeiture of tenancy, would not entitle the landlord to exact that penalty as against all the tenants; moreover the plaintiff zemindar's case has throughout been that the tenure cannot be split up by any arrangement among the tenants as between themselves, and that he is not bound to, and will not acknowledge the validity of, any such arrangement by which separate specific rights are created.

We cannot now allow him in second appeal to alter his case and to claim a forfeiture on any specific shares of the joint tenancy so as to entitle him to recover khas possession of those shares. The landlord's appeal must therefore be dismissed.

The appeal of the assignee of the rights of some of the sharers must also be dismissed, as it has been found on the authority of reported cases that the alienation of a tenure of this description (a *surborakari* tenure) in Cuttack, and *à fortiori* any portion of it, is invalid without the consent of the landlord.

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*Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Mitter.*

1883
*February* 27.

HEM CHUNDER SOOR (PLAINTIFF) *v.* KALLY CHURN DAS (DEFENDANT.)*

*Evidence Act, (I of* 1872), *s.* 92—*Mortgage—Sale—Conduct of Parties—Oral Evidence when admissible to prove that an apparent sale is a mortgage—Admissibility of Parol Evidence to vary a written Contract.*

The defendant, in answer to a suit by the plaintiff for possession of certain land alleged that the kobala, which purported to be an out-and-out sale in favor of the plaintiff, and on which the plaintiff based his title to the property, was intended by the parties to operate only as a mortgage; and to prove such allegations tendered evidence of the circumstances under

*Appeal under s. 15 of the Letters Patent against the decree of Mr. Justice Field, dated the 21st July 1882, in appeal from Appellate Decree No. 1953 of 1881.