

*Before Mr. Justice McDonnell and Mr. Justice Field.*

ASHANULLAH (PLAINTIFF) v. KALI KINKUR KUR AND OTHERS  
(DEFENDANTS).\*

*Partition—Joint property consisting of several houses—Principle of  
Partition—Commission of partition—Act XIV of 1882, s. 396.*

1884  
April 17.

Where in a suit for partition possession was sought of a definite share of a property consisting of a number of houses: *Held*, that the principle in such cases is, that if a property can be partitioned without destroying the intrinsic value of the whole property or of the shares, such partition ought to be made; but where partition cannot be made without destroying the intrinsic value of the property, then a money compensation should be given.

IN this suit the property, of which partition was claimed, was said to consist of ten houses. The houses were originally in the joint possession of three brothers, the defendants. The shares of two of these brothers, being a 10 anna 13 gunda one cowri one krant portion of the whole property, was purchased by the plaintiff at an execution sale. The principal defendant, the brother who still retained his share, contended that partition of *ijmali* dwelling-houses could not be legally made. The Munsiff found that one of the ten houses was not then in existence, and ordered that nine of the houses should be partitioned, and directed that a valuation of the nine houses should be made, and a two-third share thereof be made over to the plaintiff who should be at liberty to remove them, but as regards the tenth house no order was made, the Munsiff stating that as to this house he left the plaintiff to seek such remedy as he might be advised. The Subordinate Judge modified the decree, and ordered that the houses should be valued by an expert in execution of the decree and two-thirds of the value with interest be given to the plaintiff.

The plaintiff appealed to the High Court.

\* Appeal from Appellate Decree No. 1928 of 1882, against the decree of Baboo Uma Churn Kastogiri, Subordinate Judge of Tipperah, dated 22nd June 1882; modifying the decree of Baboo Protap Chander Mezoondar, Officiating First Munsiff of Moradnagore, dated 13th of July 1881.

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Baboo *Chunder Madhub Ghose* for the appellant contended that the decree of the lower Court limiting the plaintiffs' claim to a two-third share in the value of houses was bad in law.

Baboo *Boikanto Nath Doss* for the respondents.

The judgment of the Court (McDONELL and FIELD, JJ.) was delivered by

FIELD, J.—The plaintiff in this case purchased two-thirds of a property consisting of ten houses. One of these houses has since fallen down, or otherwise been destroyed, and the present dispute concerns nine houses only. The plaintiff sued to have a partition, and he said that he intended to break down and remove those houses, of which he would obtain possession by this partition.

The Munsiff gave him a decree for six houses out of the nine, holding that this was the arithmetically proportionate share of the property. An appeal was then preferred to the Subordinate Judge, and the Subordinate Judge evidently influenced by the idea that the case was a hard one, directed that the houses should be valued, and that two-thirds of the value together with legal interest should be given to the plaintiff.

The plaintiff now contends that the Subordinate Judge had no right to give him the price of the houses instead of the houses themselves, and we think that upon this bare contention the plaintiff is entitled to succeed. The principle in these cases of partition is that if a property can be partitioned without destroying the intrinsic value of the whole property, or of the shares, such partition ought to be made. If, on the contrary, no partition can be made without destroying the intrinsic value, then a money compensation should be given instead of the share which would fall to the plaintiff by partition.

In the present case the defendant did not object before the Subordinate Judge that the nine houses could not be partitioned without destroying the value of the property. He did not object that no three houses could be given to him which would bear a fairly proportionate value to the whole of the property. We think, therefore, that the decree of the Subordinate Judge is erroneous and must be set aside.

We have, however, to point out that the Munsiff committed

an error in directing six houses out of the nine to be given to the plaintiff without specifying which six houses should be given. In other words, he should have proceeded under the provisions of s. 396 of the Code of Civil Procedure, and we direct that having determined what portion of the property ought to be given to the plaintiff as representing the two-thirds which he obtained by purchase, the Munsiff do proceed to embody in his final decree the result of the Commissioner's investigation and report.

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We do not think that this is a case in which we ought to give costs.

*Case remanded.*

*Before Mr. Justice Tottenham and Mr. Justice Norris.*

ANUNDO RAI AND OTHERS (DEFENDANTS) v. KALI PRASAD SINGH  
AND ANOTHER (PLAINTIFFS.) \*

1884

April 21.

*Ghatwali Tenures of Kharukpore—Transferability of Ghatwali tenures—  
Mitakshara law inapplicable to ghatwali tenure—Family custom inappli-  
cable to ghatwali tenure.*

A ghatwali tenure in Kharukpore is transferable if the zemindar assents and accepts the transfer.

Such assent and acceptance may be presumed from the fact of the zemindar having made no objections to a transfer for a period of over twelve years, and when such a fact has been found a Court ought to recognize such a transfer.

In a suit, brought to recover possession of a ghatwali tenure situated in Kharukpore which had been brought to sale in execution of a decree against the previous ghatwali and purchased by the defendants, the plaintiffs sought to rely on the Mitakshara law and certain family custom for the purpose of establishing their right. The lower Court applying such law and custom found that the tenure was transferable, and that it was joint ancestral property and gave the plaintiffs a decree for two-thirds of the property and the defendants a decree for the remaining one-third, holding that to be the extent of the previous ghatwali interest which had been purchased by the defendants.

\* Appeal from Original Decree No. 114 of 1882, against the decree of Hafiz Abdool Kurreem, Khan Bahadoor, Second Subordinate Judge of Bhagulpore, dated the 13th of February 1882.