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case in this Court it appears that it refers to a former suit in which the Court had expressly abstained from coming to a decision upon the point in issue. It was therefore held that there was no adjudication and no *res judicata*. In a recent case (1) the Bombay High Court has held that *res judicata* does not apply when the former suit has been dismissed under s. 102 of the Code for default to appear on the part of the plaintiff. Those cases do not appear to us to apply to the present case.

With regard to the remaining portion of the subject-matter of suit, namely, the orchard, we find that the Court below has, upon the evidence, come to the conclusion that the kobala set up by the plaintiff was not a genuine transaction, that is, the Court was not satisfied that any consideration passed, and that, on the other hand, it was satisfied that the alleged vendor had never given up possession. The learned counsel for the appellant says that upon the evidence the lower Appellate Court is wrong. But in second appeal it is not open to us to discuss the evidence. The appeal is dismissed with costs.

P. O'K. *Appeal dismissed.*

Before Mr. Justice Tottenham and Mr. Justice O'Kinealy.

1886
January 2.

HARIDAS SANYAL AND OTHERS (PLAINTIFFS) *v.* PRAN NATH SANYAL AND OTHERS (DEFENDANTS.)*

Partition—Suit for partition of portion of Joint property—Partial partition.

The plaintiffs and the defendants being jointly entitled to and in possession of three *khanabaris* in a village and other immoveable property, the plaintiff sued for partition of one of the *khanabaris* only.

Held, that the suit would not lie.

THIS was a suit for partition of 1 paki $3\frac{5}{4}$ gundas of land and the buildings thereon, which constituted the joint-family dwelling house of the plaintiffs and the defendants. The plaintiffs and the defendants had occupied the house and land jointly down to the year 1288 (1871-72), when the former removed to another house which was their separate property. The plaintiffs alleged that, on the 12th November 1883, they had written to the defendants

* Appeal from Appellate Decree No. 1152 of 1885, against the decree of Baboo Rajendra Coomar Bose, Additional Subordinate Judge of Mymensingh, dated the 11th of March 1885, reversing the decree of Baboo Monmotho Nath Mookerjee, Munsiff of Attiah, dated the 17th of November 1884.

(1) I. L. R., 6 Bom., 482.

asking them to come to an amicable partition of the property now in question, but they had refused to do this; they further alleged that the joint possession of this piece of land was a constant source of quarrel between the plaintiffs and the defendants, and that it was necessary there should be a partition of it. The material portions of the written statement were as follows:—

"7. The plaintiff having constructed a separate house at a different place, has been residing in that new house, and we have been residing in the said ancestral dwelling house, and have been in possession of the entire land of that house. We and the plaintiff have many rent-free *ijmali* lands in Kedarpur and in other villages. Instead of suing for partition of all those rent-free lands, the plaintiff has asked for partition of one plot of land only.

"8. It is a rule observed in making a partition that lands are allotted to the several parties with reference to their convenience and proximity. The plaintiff having deserted the house under claim, has built another house; and, as we are residing in the said (former) house, the plaintiff can get some other rent-free land in lieu of the land of the house in question. Hence, instead of the entire *ijmali* rent-free land belonging to us and the plaintiff, the land of the dwelling house cannot be partitioned, and such partition would be illegal.

"9. We having made preparation for erecting a *dalan* on the place distinctly and separately belonging to us within our ancestral *khanabari*, there has arisen a perpetual enmity between us and the plaintiff's father and the plaintiff. Out of this enmity, and with the evil intention of injuring us and throwing obstacles in the way of our erecting the *dalan*, the plaintiff has brought this false and malicious suit for partition."

The Court of first instance gave the plaintiffs a decree, but this decision was reversed on appeal. The judgment of the lower Appellate Court was as follows:—

"This is a suit for enforcing partition of a piece of rent-free homestead, which admittedly forms the *khanabari* of the plaintiffs and defendants. Since 1281 the plaintiffs have ceased to reside in this homestead, having removed therefrom and made a new *bari* of their own on a plot of land which they allege belongs

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to them exclusively. The defendants have not been able to show that they have any interest in the land last mentioned. The Munsiff has decreed the plaintiffs' claim. It is now urged in appeal by the defendants that, as there are other lands belonging to them and the plaintiffs which are held by them in *ijmali*, the plaintiffs are not entitled to have a partition as respects only one portion of the undivided property. It appears to me that this objection is valid. That there are two other *ijmali lakheraj* homesteads adjoining to the *bari*, of which partition is now sought for, one of which is tenanted, and the other unoccupied, and that also *putni* interests are held in *ijmali* by the parties both in the village where the *khanabari* is situated as well as in a neighbouring village, has been proved even by the plaintiffs' witnesses, and has been admitted before me on the part of the plaintiffs during the hearing of this appeal. In this state it is but proper that all the undivided properties held and owned by the parties must be brought under partition instead of only one portion thereof; and it has not been shown that the plaintiff would be put to any great inconvenience if his prayer for partition of the *khanabari* in question were not granted, since he has already got a new *bari* of his own. On the other hand, there is good ground for saying that the defendants would suffer if only this *khanabari* were partitioned independently of the two *lakheraj baris* that are adjoining to it. I would refer to the following rulings in support of the contention that partial partition cannot be allowed—*Hari Narayan Brahme* v. *Ganpatrav Daji* (1); *Lalljeet Singh* v. *Raj Coomar Singh* (2); *Nanabhai Vallabhdas* v. *Nathabai Haribhai* (3). Consequently the order of the Munsiff, granting partition of the lands in question, will be set aside, and this appeal decreed, and the suit of the plaintiffs dismissed with all costs and interest at 6 per cent. The defendants will have of course no right to raise permanent structures on the lands in question."

The plaintiffs appealed to the High Court on the ground that "the lower Appellate Court is wrong in holding that the present

(1) I. L. R., 7 Bom., 272; 8 C. L. R., 367.
(2) 25 W. R., 353.
(3) 7 Bom., H. C., (A. C.) 46.

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suit, which is a suit for partition of the paternal *khanabari*, is not maintainable, because the parties have other lands which are held by them in *ijmali*."

Baboo *Durga Mohun Das*, and Baboo *Grish Chundra Chowdhuri*, for the appellants.

Baboo *Guru Das Banerji*, for the respondents.

The judgment of the Court (TOTTENHAM and O'KINEALY, JJ.) was delivered by

TOTTENHAM, J.—This was a suit for the partition of a *khanabari* belonging to the parties in this suit. The defendants objected that, if this particular *khanabari* only were partitioned, the result would be serious to them; that there are two other *khanabaris* adjoining the one in question, and that the partition ought to be applied to them also as well as to other joint-family property. The lower Appellate Court has decided that this suit for partition of this single *khanabari* could not be maintained, and has dismissed it.

We think that the weight of authority is in favor of the lower Appellate Court's decision. The cases are quoted by Mr. Mayne in his book on Hindu law (1). In the present instance we think that the decision of the Court below is reasonable as well as in accordance with law. The appeal is dismissed with costs.

P. O'K. *Appeal dismissed*

FULL BENCH.

Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Cunningham, Mr. Justice Wilson, Mr. Justice Prinsep and Mr. Justice Trevelyan.

1886 *March* 23.

MANGNIRAM MARWARI (PLAINTIFF) *v.* DHOWTAL ROY AND OTHERS (DEFENDANTS).*

Interest—Interest after filing of plaint—Interest at rate stated in bond—Discretion of the Court—Civil Procedure Code (Act XIV of 1882), *s.* 209.

Interest after date of suit is in the discretion of the Court, notwithstanding that a fixed rate of interest is mentioned as payable "up to realization" in the bond sued upon.

* Full Bench on Regular Appeal 266 of 1885, against the decision of the Second Subordinate Judge of Bhaugulpore, dated 10th December 1884.

(1) See Mayne's Hindu Law, s. 417, 3rd Ed., p. 469.