

1893
July 3.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

KEDAR NATH AND ANOTHER (PLAINTIFFS) v. RAM DIAL AND OTHERS (DEFENDANTS) *

Act XIX of 1873, ss. 3, sub. s. (1), 107—Partition—Wajib-ul-arz—Power of Collector in constituting a new mahál by partition to frame a new wajib-ul-arz for such mahál.

It is within the implied, though not within the specified, powers of a Collector while constituting new *maháls* by partition of a previously existing single *mahál* to frame a new *wajib-ul-arz* for each of the new *maháls* so constituted.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Amir-ud-din*, for the appellants.

Munshi *Ram Prasad*, for the respondents.

EDGE, C. J., and BURKITT J.—The question upon which this appeal turns is by no means an easy one. It is this:—Whether on the partition of a *mahál* for which at the settlement a record-of-rights was prepared and sanctioned, the partitioning officer can prepare for each of the separate *maháls* into which the original *mahál* is partitioned a new record-of-rights. In 1876, in the settlement of *mahál* Purwa Mir, a *wajib-ul-arz* was prepared and recorded. If that is the record-of-rights governing this case, the plaintiffs, appellants here, are entitled to succeed. In 1886 perfect partition of Purwa Mir into seven *maháls* was made by the Collector, and on that partition separate records-of-rights were prepared for the new *maháls* and, amongst others, for *mahál* Sham Sundar and *mahál* Munna Singh. If these records-of-rights were legally prepared, the defendants, respondents here, are entitled to have this appeal dismissed. Mr. *Amir-ud-din* for the plaintiffs has contended, and we think correctly, that there is no express provision enabling a partitioning officer to prepare and record on partition new records-of-rights. There does not appear to be any power in that respect

* Second appeal No. 762 of 1890, from a decree of G. A. Tweedy, Esq., Ollieiating District Judge of Cawnpore, dated the 10th April 1890, confirming a decree of Syed Akbar Husain, Subordinate Judge of Cawnpore, dated the 17th September 1889.

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specifically given to the partitioning officer. Mr. *Amir-ul-din* has gone further and has contended that no officer other than a Settlement Officer during the course of settlement operations has power to frame and record any record-of-rights. We have come to the conclusion, although with some hesitation, that the latter contention of Mr. *Amir-ul-din* is not sound. In *Jai Ram v. Mahabir Rai* (1) a new *wajib-ul-arz* prepared on perfect partition by the partitioning officer was recognised by this Court as a lawfully prepared *wajib-ul-arz* and as governing the *mahál* to which it applied. Turning to Act No. XIX of 1873, we find in s. 107 that "perfect partition" means the division of a *mahál* into two or more *maháls*. Under that Act a recorded co-sharer in a *mahál* is, under certain circumstances, entitled to have perfect partition of his share, and under that Act the old *mahál* Purwa Mir was divided by perfect partition into seven *maháls*. Section 3, sub-s. (1) of the Act defines a *mahál* as "(a) any local area held under a separate engagement for the payment of the land revenue, and for which a separate record-of-rights has been framed; or (b) any local area of which the revenue has been assigned or redeemed, and for which a separate record-of-rights has been framed." If it was the intention of the Legislature that '*mahál*' when it occurred in the Act should have the meaning assigned to it in the definition clauses of s. 3 it would apparently necessarily follow there could be no perfect partition of a *mahál* into two or more *maháls* unless a separate record-of-rights was framed for each new *mahál*. It is impossible to say what may have been the intention of the Legislature. Strictly speaking a *khowat* is as much a part of a record-of-rights in a village as is a *wajib-ul-arz*. Section 94 of the Act directs the Collector to keep and maintain the record-of-rights and from time to time to cause to be registered all changes which may take place and anything which may affect any of the rights and interests recorded. On a partition it is quite manifest that the original *khowat* of the village would no longer apply, as the *mahál* to which it related no longer existed, and it would be necessary to prepare a fresh *khowat* for each separate new *mahál*. Although, apparently, no express power is given to the

(1) L. L. B., 7, AB, 720.

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partitioning officer by Act No. XIX of 1873 to frame separate records-of-rights for the separate *maháls*, still, as the object of a perfect partition is to create absolutely separate *maháls* with separate interests, he must of necessity, it appears to us, have power to do all things which are necessary to the creation of separate *maháls* on partition. It is conceivable that one object may occasionally be to exclude from a right of pre-emption in one new *mahál* the shareholders in other new *maháls* into which the original *mahál* might be partitioned. In the result we come to the conclusion, no doubt with some hesitation, that the partitioning officer lawfully framed a new and separate record-of-rights for each *mahál* into which on partition the original *mahál* was divided. Under these circumstances we hold that the *wajib-ul-arz* of 1886 applies and we dismiss this appeal with costs.

Appeal dismissed.

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July 4.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

ANTU SINGH AND OTHERS (PLAINTIFFS) v. MANDIL SINGH AND OTHERS
(DEFENDANTS).*

Practice—Suit for exclusive possession—Decree for joint possession, circumstances under which such decree may be granted.

Although under certain circumstances in a suit for exclusive possession of immovable property a decree for joint possession may be given, nevertheless such a decree should not be given unless the plaintiff asks for it and the evidence shows that he is entitled to it.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Rajendro Nath Mukerji*, for the appellants.

The respondents were not represented.

EDGE, C. J., and BURKITT, J.—The plaintiffs brought their suit for exclusive possession of a tank. The first Court gave them a decree for exclusive possession. The defendants appealed. The

* Second appeal No. 310 of 1891, from a decree of J. J. McLean, Esq., District Judge of Azamgarh, dated the 21st January 1891, reversing a decree of Babu Nihala Chandur, Munsif of Azamgarh, dated the 18th June 1890.