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MIHIN LAL v. IMTIAZ ALI.

584 and section 585 of the Code of Civil Procedure this Court could not in second appeal try the issues of fact.

This appeal is dismissed with costs.

Appeal dismissed.

1896
April 17.

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

MUHAMMAD BAKHSH AND OTHERS (PLAINTIFFS) *v.* MANA AND OTHERS (DEFENDANTS).*

Occupancy tenant—Partition—Right of joint occupancy-tenants to partition—Civil and Revenue Courts—Jurisdiction.

Held that a joint occupancy-tenant is entitled to sue for, and a Civil Court is competent to grant a decree for partition of the joint occupancy-holding, though, if the zamindar is not made a party to the suit for partition, such decree will not affect the mutual rights and liabilities of the zamindar and the occupancy-tenants as they stood prior to the partition. *Sundar* v. *Parbati* (1), *Baring* v. *Nash* (2), *Oomesh Chunder Shaha* v. *Manick Chunder Bonick* (3) and *Bhagi* v. *Girdhari* (4) referred to.

THE facts of this case, so far as they are necessary for the judgment of the Court, appear from the judgment of the Court.

Pandit *Madan Mohan Malaviya* for the appellants.

Mr. *Abdul Raoof* for the respondents.

EDGE, C. J., and BLENNERHASSETT, J.—The plaintiffs in this case sought a decree for partition of an occupancy-holding. The plaintiffs and the defendants were co-sharers in the holding. It has been found that they were joint tenants of the holding. The zamindar was not a party to the suit. The suit was brought in the Court of the Munsif of Muzaffarnagar, who decreed the claim. On appeal, the Judge of Saháranpur dismissed the suit, being apparently of opinion that joint tenants of an occupancy-holding could not obtain partition. The plaintiffs have brought this appeal.

Mr. *Malaviya* for the appellants has contended that all joint tenants are entitled as of right to partition. He has relied upon a dictum of their Lordships of the Privy Council in the case of

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* Second Appeal No. 115 of 1894, from a decree of H. Bateman, Esq., District Judge of Saháranpur, dated the 28th November 1893, reversing a decree of Maulvi Maula Bakhsh, Munsif of Muzaffarnagar, dated the 13th December 1892.

(1) L. R. 16 I. A., 186.
(2) 1 Vesey and Beames, 551.
(3) 8 W. R., 128.
(4) Weekly Notes, 1895, p. 143.

Sundar v. *Parbati* (1). That was a case of Hindu widows being in possession. It was questionable, so far as appears from the report of that case, whether they had any title except a possessory title. One of the widows sued for partition. Their Lordships made a decree for partition, saying that "it is impossible to hold that a joint estate is not also partible." Mr. *Malaviya* has also contended that, at least since the time of Henry VIII, joint tenants and tenants in common and persons jointly entitled to an interest for years in lands had been entitled in England to obtain partition, and that where the tenants for years, for example, seek partition, it is not necessary that the landlord or owner in fee should be a party to the suit. Of course on the latter point Mr. *Malaviya* is referring to cases in which no express covenant against partition or subdivision is contained in the lease. Mr. *Malaviya* has relied on the decision of the Vice-Chancellor in *Baring* v. *Nash* (2). There it was held that the plaintiff, who was entitled under an indenture of assignment of the remainder of a term of five hundred years commencing in 1740 to one undivided tenth part of certain premises, was entitled to a decree for the partition of his share against the defendants, who were respectively entitled to seven-tenths of the same premises, and that without making the reversioner a party. Sir Thomas Plumer in delivering judgment said (at p. 554):—"It is clear the absolute owner of a tenth part may compel the owners of the other nine to concur with him, and there would be no objection from the minuteness of this interest the inconvenience, or the reluctance of the other tenants in common, if no objection could be taken to the plaintiff's title; partition being a matter of right; whatever may be the inconvenience and difficulty." Now the question is as to whether the reversioner was a necessary party. Sir Thomas Plumer said (p. 555):—"The question is whether the lessee for years of one-tenth part has the same right and equity against the owner of the inheritance of that tenth; and clearly the lessee has not the same right to compel that owner to concur. As between the lessee and the remainder man in fee

(1) L. R., 16, I. A., 186. (2) 1 Vesey and Beames, 551.

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they are not as tenants in common. They between them represent the absolute interest in that tenth part, but each has a separate, independent interest, and the proceeding of the one can neither avail nor bind the other. As the owner of the inheritance therefore cannot be compelled to join at the instance of the lessee, a permanent partition cannot take place, if the owner of that tenth part will not concur. If therefore he was a party no relief could be prayed against him; nor would he be bound by the partition, or any right of his precluded to consider the freehold as undivided notwithstanding any division of the temporary interest. For that purpose the owner of the inheritance of this share is not a necessary party." That case is a high authority showing that in order to grant partition as between joint tenants of a holding it is not necessary that the landlord should be a party to the suit, and further that the decree which might be made for partition as between the joint tenants, and which would be binding and effective as between them, would not bind the landlord or affect his rights as landlord: that is to say, that it would not split up, so far as he was concerned, the holding or the rent payable to him or his remedies for the non-payment of the full rent of the whole holding and for the ejectment of the tenants from the whole in case the full rent was not paid. It is quite true that, prior to the Statute 31 Henry VIII Cap. I, tenants in common and joint tenants could not compel partition *inter se*, and prior to the Statute 32 Henry VIII Cap. XXXII, persons holding limited interests for life or years could not compel partition *inter se*. However, although the right to obtain partition in this case, if it had originated in England, might have depended upon Statute 31 Henry VIII Cap. I, still it may be inferred from the dictum of their Lordships of the Privy Council to which we have referred that the holders of a joint estate in India are entitled to enforce partition. In *Oomesh Chunder Shaha* v. *Manick Chunder Bonick* (1), the High Court at Calcutta granted partition between shikmidars who held under the zamindar. In the case of *Bhagi* v. *Girdhari* (2) it was held, and

(1) 8 W. R., 128. (2) Weekly Notes, 1895, p. 143.

we think rightly, that there is nothing to prevent the members of a joint Hindu family in possession as such joint family of an occupancy-holding from obtaining partition of their shares in such holding *inter se* from a Civil Court, though, if the zamindar be not made a party to such suit for partition, the decree therein will not affect the joint liability to him of the occupancy tenants. The subject of the right to obtain partition is exhaustively dealt with in chapter XIV of the second English edition (1892) of Story's Equity Jurisprudence.

On the other hand, it has been contended by Mr. *Abdul Raoof* that it is contrary to the policy of the Land Revenue Acts that there should be such partition as that sought in this case, and that in any event a Civil Court has no jurisdiction. We may observe that the case of *Oomesh Chunder Shaha* v. *Manick Chunder Bonick* (1) was decided several years before Act No. XIX of 1873 was passed, and, if it was the intention of the Legislature that there should be no right of partition between joint tenants of occupancy or other holdings in a *mahal*, we should have expected that the Legislature would so have provided; but it has not done so. The partition which is reserved by Act No. XIX of 1873, for the exclusive jurisdiction of the Courts of Revenue is the perfect or imperfect partition of section 107 of that Act. Now what is sought here is not the partition or the division of a *mahal* into two or more *mahals*, nor is it the division of any property into two or more properties jointly responsible for the revenue assessed on the whole. The partition here sought is therefore not a partition reserved for the jurisdiction of the Courts of Revenue. Further, it does not appear to us that on the Courts of Revenue was conferred any jurisdiction to make such a partition as is here sought. That being so, and if there does exist the right to have partition in this case, section 11 of the Code of Civil Procedure confers the jurisdiction to give a decree in accordance with the right in this case on the Civil Court.

(1) 8 W. R., 128.

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In our opinion the plaintiffs were entitled to the decree for partition which they obtained from the first Court, but the partition will not affect the rights of the zamindar, nor will it have the effect of apportioning the rent as between these parties and him. He will be still entitled to the same rights in respect of this occupancy-holding as if no partition had been decreed. The partition will merely affect the rights of the parties to this suit *inter se*.

We allow this appeal with costs in this Court and in the Court below, and restore and affirm the decree of the first Court.

Appeal decreed.

1896
April 21.

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

SRI RAM AND OTHERS (DEFENDANTS) *v.* KESRI MAL (PLAINTIFF).*

Act No. III of 1877 *(Indian Registration Act), section* 17, *clause (n)—Mortgage—Receipt purporting to extinguish mortgage—Receipt only covering interest of one co-mortgagee—Registration.*

The provisions of section 17 cl. (*n*) of Act No. III of 1877 do not apply to a receipt which purports to extinguish not the entire mortgage but only the rights under the mortgage of one of two joint mortgagees.

THIS was a suit for sale on a mortgage.

One Afzal Husain had borrowed Rs. 1,000 from Sri Ram and Ramji Lal jointly under a registered mortgage deed, the shares of the mortgagees in the loan being $\frac{1}{3}$ and $\frac{2}{3}$ respectively. Afzal Husain sold the mortgaged property to Sri Ram and certain other persons. Subsequently Ramji Lal assigned his rights and interests in the mortgage to Kesri Mal, the present plaintiff. Kesri Mal, not having received the amount due to him, sued to recover the same by sale of the mortgaged property. He made Afzal Husain, the original mortgagor, Sri Ram and his co-vendees, and Ramji Lal parties to the suit.

Afzal Husain pleaded that the assignment of the mortgage had been made with the knowledge of Ramji Lal. The defendants vendees pleaded that they had paid off Ramji Lal, and tendered

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Second Appeal No. 175 of 1894, from a decree of E. O. E. Legatt, Esq., Additional District Judge of Saháranpur, dated the 21st December 1893, reversing a decree of Rai Sanwal Singh, Additional Subordinate Judge of Saharanpur, dated the 8th September 1892.