

the trial he be of opinion upon the evidence before him that the charge has not been established against the accused or either of them, it would be his duty to acquit the accused who is found to be not guilty. At the present stage of the proceedings we cannot quash the commitment as regards either of them.

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 EMPEROR
 v.
 BALDEWA.

APPELLATE CIVIL.

 1906
 January 23.

Before Mr. Justice Banerji and Mr. Justice Richards.

TULSI DAS AND ANOTHER (JUDGMENT-DEBTORS) v. SHEO NARAIN (DECREE-HOLDER) AND KUNJ BEHARI AND OTHERS (JUDGMENT-DEBTORS).*

Civil Procedure Code, section 265—Act (Local) No. III of 1901 (United Provinces Land Revenue Act), section 107—Partition—Execution of a Civil Court decree for partition of revenue-paying property.

A decree of a Civil Court for partition is subject to the provisions of section 107 of the United Provinces Land Revenue Act and cannot be fully executed until the decree-holder's name is recorded in the revenue papers.

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

Babu *Harendra Krishna Mukerji*, for the appellants.

Babu *Durga Charan Banerji*, for the respondents.

BANERJI and RICHARDS, JJ.—This is an appeal against an order of remand under section 562 of the Code of Civil Procedure. The facts are these. The decree-holder, respondent, brought a suit for partition of a third share of certain property including shares in revenue-paying villages, and for possession of a divided one-third share. The case was compromised and in accordance with the compromise a decree for partition was made as prayed in the plaint. The decree was thus a decree for partition and for possession of the share which would be allotted to the plaintiff on partition. As regards the revenue-paying property the partition could not be effected by the Civil Court, but under the provisions of section 265 of the Code it could only be made by the Collector and according to the law for the time being in force for the partition of revenue-paying estates. The decree was accordingly sent to the Collector for

* First Appeal No. 86 of 1905, from an order of A. Sabonadiere, Esq., District Judge of Jhansi, dated the 23rd of May, 1905.

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BEHARI.

partition of the revenue-paying property. As we have pointed out above, the Collector could only make the partition under the law in force, namely, in these Provinces, the Land Revenue Act. Under section 107 of that Act an application for partition can only be made by one or more recorded co-sharers. As the plaintiff was not a recorded co-sharer the Collector refused to make the partition. Thereupon the Court of first instance ordered the proceedings to be filed, that is, as the learned Judge says, rejected the application for execution. This order the learned Judge has set aside, and he has remanded the case to the Court of first instance with a direction to give the decree-holder an opportunity to apply for possession of the undivided shares in the villages and to deliver possession of such shares on an application being made. This order of the Court below is in our judgment erroneous. The decree was, as we have already said, a decree not for joint possession of an undivided share, but for separate possession of a divided one-third share. In fact the plaintiff had in the plaint stated that he was in possession jointly with his brothers; so that the learned Judge in directing the Court below to deliver joint possession of an undivided one-third share has directed that Court to do that which the decree does not authorize it to do. We think under the circumstances the Court of first instance was right in refusing to grant the application for partition of the revenue-paying estate and for possession of a separate one-third share of such estate. The decree passed by the Civil Court for partition of the revenue-paying villages will not be infructuous if, for the purpose of obtaining partition, the decree-holder applies to the revenue authorities and gets his name entered in the revenue papers on the strength of the decree which declares his title and is binding on all persons who are parties to the suit. We accordingly allow the appeal, set aside the order of the Court below, and restore that of the Court of first instance. Under the circumstances of the case we make no order as to costs.

Appeal decreed.