

position of a stranger if a stranger had purchased at the auction sale. This is not a correct view of the matter. It is immaterial whether it was a stranger who purchased at the auction sale held in execution of the decree on the earlier mortgage or the plaintiffs to the suit. The fact that the plaintiffs became the purchasers cannot be regarded as having the effect of making the property which was included in the earlier mortgage responsible for the satisfaction of a later incumbrance. This question has been already decided by this Bench in *Zahir Singh v. Bansi Singh* (1). It was also the subject of decision in the case of *Bohra Thakur Das v. The Collector of Aligarh* (2).

We therefore allow the appeal, modify the decree of the Court below and give a decree to the plaintiffs for the relief claimed in the plaint, that is, for the recovery of the entire amount of their debt as against the six villages remaining subject to their mortgage in default of payment by the mortgagors of the amount found to be due. We extend the time for payment for a period of six months from this date. We direct that the decree be modified accordingly. The appellants will have their costs of this appeal.

Decree modified.

FULL BENCH.

1906
December 22.

*Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Sir George Know
and Mr. Justice Richards.*

MULCHAND AND OTHERS (DEFENDANTS) v. MUHAMMAD ALI KHAN
(PLAINTIFF) AND JADDU BIBI AND OTHERS (DEFENDANTS)*

*Civil Procedure Code, section 396—Partition—Commission to make partition—
Issue of commission to one person only.*

A Court issuing under section 396 of the Code of Civil Procedure a commission to make partition of immovable property not paying revenue to Government cannot legally issue such commission to one commissioner only.

Per RICHARDS, J.—But there is nothing to prevent the parties to partition proceedings agreeing that one commissioner only should be appointed; nor does it follow that all the partitions that have been made are invalid by reason of the fact that only one commissioner has been appointed.

* Second Appeal No. 811 of 1904 from a decree of J. Denman, Esq., District Judge, Cawnpore, dated the 1st of August 1904, modifying a decree of Babu Bipin Bihari Mukerji, Subordinate Judge of Cawnpore, dated the 31st of March 1904.

(1) F. A. No. 63 of 1903, decided
20th April 1905.

(2) (1906) I. L. R., 28 All., 593.

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THIS was a suit asking for the partition of certain immovable non-revenue-paying property, situated in the city of Cawnpore. There was no dispute as to the ownership of the parties or as to the proportionate shares to which they were entitled. The Court of first instance (Subordinate Judge of Cawnpore) appointed the amin of the Court as a commissioner under section 396 of the Code of Civil Procedure to make the partition, and he accordingly did so. The defendants Mulchand and others took exception to the manner in which the partition had been effected by the amin, but their objections were substantially overruled and the partition was adopted, but with some modification. The objecting defendants preferred an appeal to the District Judge, urging, amongst other pleas, that the procedure of the first Court was not in accordance with section 396 of the Code of Civil Procedure, inasmuch as that section made it incumbent on the Court to appoint more than one commissioner. The District Judge, however, rejected this plea on the ground that the appointment of one commissioner was in accordance with the usual practice, and was sanctioned by Rule 120 of the Rules of the High Court. Some further modification of the partition was made by consent of parties; but in the main the defendants' appeal was dismissed. The defendants thereupon appealed to the High Court, where the question of the legality of the appointment of one commissioner was again raised. The appeal was first heard before a division Bench consisting of Knox and Richards, JJ., on whose recommendation it was referred by the Chief Justice to a Full Bench.

Mr. *W. K. Porter*, for the appellants, argued that the express words of section 396 of the Code of Civil Procedure, especially when that section was read in its relation to the other parts of Chapter XXV of the Code, which deal with other kinds of commissions, clearly indicated that it was the intention of the Legislature that commissions to make partition should not be issued to one person only. *Bhivaji Akoba v. Narayan Balaji* (1) was in favour of this view. To the contrary was the case of *Gayan Chunder Sen v. Durgu Churn Sen* (2), but it was submitted that in that case the words of section 13 of the General Clauses Act, 1868, "unless there be something repugnant

(1) (1904) 6 Bom., L. R., 586.

(2) (1831) 1, L. R., 7 Cal., 316.

in the subject or context" had not been taken into account. Here the whole of section 396 and the rest of Chapter XXV was repugnant to the construction placed on the section under discussion in that case.

Munshi Gobind Prasad (for Babu Satya Chandra Mukerji), for the respondents, relied on the ruling of the Calcutta High Court, and more particularly on rule 120 of the rules of the High Court of the 4th of April 1894, which, it was contended, showed that the High Court, when framing rules for the subordinate Courts, had accepted the construction now sought to be placed by the respondents upon section 396 of the Code.

STANLEY, C. J.—This appeal has been referred to a Full Bench. It involves an important question arising out of the section of the Code of Civil Procedure dealing with commissions to make partition. The appellants contended in the Courts below that the allotment of shares by one commissioner is contrary to the provisions of section 396 and is illegal. This section, it is said, contemplates the appointment of more than one commissioner and renders it compulsory on the Court to appoint more than one. Chapter XXV of the Code deals with four classes of commissions, namely:—

- (a) Commissions to examine witnesses ;
- (b) Commissions for local investigations ;
- (c) Commissions to examine accounts and
- (d) Commissions to make partitions.

In the case of commissions to examine witnesses, section 385 expressly provides that the commission may be issued to any person whom the Court thinks fit to execute the same. In the case of commissions for local investigations likewise the Court may issue a commission to such person as it thinks fit. In the case of commissions to examine accounts, the language is the same. But when we come to commissions to make partitions, instead of the singular number we find the plural is used. In the first portion of the section (s. 396) the Court is empowered to issue a commission to such *persons* as it thinks fit. The second paragraph of the section provides that "the commissioners shall ascertain and inspect the property, etc., and the third paragraph directs the commissioners to "prepare and sign a report, or (if

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they cannot agree) separate reports appointing the share of each party." In this case the use of the plural "persons," and "commissioners," is noticeable. But it is argued that in view of section 13 of the General Clauses Act of 1897, the use of the plural is by no means decisive of the question before us. It is provided by that section that words in the singular shall include the plural and *vice versa*, unless there is anything repugnant to this construction in the subject or the context. We have therefore to see whether there is anything in section 396 to make it repugnant to treat the plural nouns "persons" and "commissioners," as used in the section, as applicable to a single individual. In my opinion the direction in the third clause of the section shows beyond doubt that the Legislature intended that more than one commissioner should be appointed. That clause directs that the commissioners shall prepare and sign a report, or, if they cannot agree, separate reports. This shows that the appointment of two or more commissioners was in the contemplation of the Legislature. If it had been intended that one or more commissioners might be appointed, we should have expected to find before the words "if they cannot agree" words such as "in case there be two or more commissioners." It appears to me that the Legislature advisedly used the plural number in the case of commissions to make partition, and therefore that the Court cannot legally issue a commission to one commissioner only.

I would therefore allow the appeal on the ground that the allotment of shares carried out by one commissioner is contrary to law.

KNOX, J.—I fully agree and have nothing further to add.

RICHARDS, J.—I also agree, but it appears to me that there is nothing to prevent the parties to the partition proceedings agreeing that one commissioner only should be appointed, and I do not think it follows that all the partitions that have been made are invalid by reason of the fact that only one commissioner has been appointed.

BY THE COURT.—The order of the Court is that the appeal being allowed the decrees of both the lower Courts are set aside, and the case is remanded to the Court of first instance, through the lower appellate Court, with directions that it proceed with

the partition of the property in dispute according to law, appointing, unless the parties otherwise agree, at least two commissioners to make the partition. Under the circumstances we make no order as to the cost of this appeal. All other costs will abide the result.

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Appeal decreed and cause remanded.

APPELLATE CIVIL.

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December 22.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

RAM SARUP (PLAINTIFF) v. RAM DEI AND OTHERS (DEFENDANT).*

*Act No. XV of 1877 (Indian Limitation Act), Schedule II, Article 125—
Limitation—Alienation—Fictitious award—Hindu family.*

A Hindu widow, plaintiff in a suit to recover property, in respect of which she was entitled to a Hindu widow's estate, from the possession of the widows of other members of her husband's family, entered upon a collusive arbitration by which the whole of the property of the plaintiff's husband was divided amongst certain female members of the family, it being declared that each of the parties to the arbitration proceedings took an absolute estate in the share allotted to her. *Held* that this proceeding amounted to an "alienation" of the property so dealt with within the meaning of article 125 of the second schedule to the Indian Limitation Act. *Shoo Singh v. Jeoni* (1) referred to.

THE facts of this case are fully stated in the judgment of the Courts.

The Hon'ble Pandit *Sundar Lal* and Dr. *Savish Chandra Banerji*, for the appellant.

Mr. *B. E. O'Connor*, *Babu Jogindro Nath Chaudhri* and *Munshi Govind Prasad*, for the respondents.

STANLEY, C.J., and BURKITT, J.—This is an appeal against a decree of the learned District Judge of Shahjahanpur dismissing the plaintiff's suit by which he sought to obtain certain declarations.

The plaintiff Ram Sarup is grandson of one Balak Ram, deceased, by his daughter Musammat Ram Piari, and the defendants are Musammat Rami Dei, widow of Bahadur Lal, last

* First Appeal No. 273 of 1904, from a decree of C. D. Steel, Esq., District Judge of Shahjahanpur, dated the 12th of September 1904.

(1) (1897) I. L. R., 19 All., 524.