

CHOKHEY SINGH AND ANOTHER (DEFENDANTS) v. JOTE SINGH
(PLAINTIFF) AND CROSS-APPEAL.

P. C.*
1908.
November 17
December .

[On appeal from the Court of the Judicial Commissioner of Oudh at Lucknow.]
Compromise—Document signed by claimants in mutation proceedings—Acquiescence in partition proceedings.—Act No. XVII of 1876 (Oudh Land Revenue Act), section 74—Suit to dispute title and recover possession of shares to which plaintiff was entitled by Hindu law—Estoppel—Suit in Civil Court on title after partition.

THE plaintiff and defendants were claimants to the estate, consisting of 30 villages, of a deceased Hindu, and though by the ordinary Hindu law the plaintiff, as brother of the deceased, was entitled to the whole property as against the defendants, who were nephews (son, of a deceased brother) the three claimants in the mutation proceedings signed in 1896 a document which stated that the property was held, one moiety by the plaintiff and the other moiety by the defendants, and that "there is no other legal heir except the deponents; the mutation in respect of the deceased's share in all the villages should be allowed and nobody has any objection thereto;" and the revenue authorities effected mutation of names in that way. In 1902 partition which left the parties in the same state as to possession was effected in accordance with the provisions of the Oudh Land Revenue Act (XVII of 1876). In a suit brought in 1904 to recover possession as heir of the deceased of the half share held by the defendants, the latter pleaded (*inter alia*) that their possession was the result of a compromise come to between the parties in the mutation proceedings which was evidenced by the document of 1896, and that the plaintiff was estopped by such mutual arrangement from asserting his present claim.

Held by the Judicial Committee (affirming the concurrent decisions of both the Courts in India on the evidence) that there was no proof of any compromise. The mutation of names by itself created no proprietary title. The document of 1896 contained no words that could be construed as amounting to an abandonment by the plaintiff of his legal rights. It was merely a statement of the facts as they existed as to the possession of the property, and by its silence as to a compromise tended to support the conclusion that no compromise was ever made.

In the partition proceedings the plaintiff made no objection to the defendants' title under section 74 of Act XVII of 1876; but he filed an application in which he asked that "the share of Munnu Singh (the deceased) should be decided at present according to possession, and a separate suit will be filed in a competent court as regards the title in respect of the property of Munnu Singh." Both the Courts in India concurred in decreeing to the plaintiff the shares of the deceased in 29 of the villages, but as to one village they differed, the Judicial Commissioner holding that the plaintiff was not entitled to recover the share in it because the partition in regard to that village had dealt with the shares of other persons beside the parties to the present suit and also

* *Pre sent*:—Lord MACNAGHTEN, Lord ATKINSON, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON.

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because the plaintiff should have raised the question of the defendants' title in the partition proceedings and was now estopped from recovering the share which had been allotted to the defendants at the partition.

Held by the Judicial Committee that the order of the Revenue Officer in the partition proceedings showed that the shares of no other parties than the parties to this suit were affected by the partition of the shares in the one village as to which the Courts differed. The Revenue Court had clearly given effect to the plaintiff's application as to the question of title, for no inquiry under section 74 of Act XVII of 1876 was made and the question of title was left to be decided by the Civil Court. The grounds of estoppel therefore failed and the plaintiff was entitled to the shares in all the villages sued for.

APPEAL (61 of 1907) and cross-appeal (62 of 1907) consolidated from a judgment and decree (4th May 1906) of the Court of the Judicial Commissioner of Oudh which varied a decree (18th June 1905) of the Subordinate Judge of Sitapur who had decreed the plaintiff's claim in full.

The principal question raised on this appeal was the right of succession to the property consisting of 30 villages of one Munnu Singh who died on 24th May 1896. The claimants were his brother Jote Singh, and Chokhey Singh and Gajraj Singh his nephews the sons of a deceased brother. Under the ordinary Hindu law applicable Jote Singh was the nearest heir and entitled to the whole estate, but by an order of the revenue authorities dated 5th November 1896 mutation of names was in fact effected by leaving the property as it was then held, namely an eight anna share in the name of Jote Singh, and the other eight anna share in the names of Chokhey Singh and Gajraj Singh, the former being the elder having a slightly larger share. After mutation of names the parties remained in possession of their respective shares, and later a partition of a portion of the estate was effected in accordance with the provisions of Act XVII of 1876.

The suit out of which the present appeal arose was instituted on 24th November 1904 by Jote Singh against Chokhey Singh and Gajraj Singh to recover possession from them of the eight anna share of Munnu Singh's estate which they had held before and since the mutation proceedings and refused to give up. The plaintiff claimed title as next heir and stated that his consent to the mutation proceedings was given under a misconception of law.

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The defence was that on the death of Munnu Singh the defendants, though excluded by the ordinary law, claimed to be entitled to the whole estate under an oral will of Munnu Singh and as being joint in estate with him, and that a compromise was come to between the parties, the result of which was the order in the mutation proceedings. The defendants pleaded a custom in the family that nephews were not excluded by brothers, and contended that the plaintiff was estopped by the mutual arrangement, and by his having acquiesced in the partition from asserting his present claim.

Of the documentary evidence referred to in their report exhibit A 1, which was a joint statement of the claimants in the mutation proceedings, the material portion is set out in their Lordships' judgment. Exhibit A 17, which was a copy of a petition of objections filed by the plaintiff Jote Singh under section 73 of Act XVII of 1876 (the Oadh Land Revenue Act), dated 27th October 1900, in the matter of a claim by a person of the same name (Jote Singh) for partition of Thake Bhawani in the village Bihat Biram, was to the effect that the plaintiff desired that his interest in the village should be separated from that of the person claiming partition, and stated that he "does not wish to keep his share joint with that of the other defendants." Exhibit No. 58, the purport of which (so far as it is material) is also given in their Lordships' judgment, was an application filed by Jote Singh in reply to the objections taken by the present defendants Chokhey Singh and Gajraj Singh in the matter of the partition of the village Bihat Biram, dated 20th December 1902, and Exhibit A 18 was the order of the Deputy Collector of Sitapur, dated 5th July 1902, regarding the partition of the village of Bihat Biram, and showed that the village was divided into two thokes namely Hathi Singh, and Bhawani Singh, the former of which was allotted to persons none of whom were parties to the present suit; and the latter was partitioned between Chokhey Singh and Gajraj Singh the defendant's, who received 8 annas $3\frac{1}{2}$ pies of it, and Jote Singh the plaintiff, who obtained 7 annas and $8\frac{1}{2}$ pies.

The Subordinate Judge found that there was no ground for the defendants' allegations that they were joint with Munnu Singh, and that he made an oral will in their favour; and held

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that the dispute on the death of Munnu Singh was not settled by a compromise as alleged by the defendants; that the plaintiff did not consent to mutation in favour of the defendants under any misconception of law; that the succession to the property was not governed by any special custom; and that the plaintiff was not estopped from claiming the property in suit under the provisions of the ordinary Hindu Law. After finding that there was a partition of the property subsequent to the mutation, the Subordinate Judge said:

"It is urged by the learned vakils for the defendants that, inasmuch as there was a partition in accordance with the mutation proceedings, the plaintiff cannot be allowed to bring this suit, the object of which is, as they contend, to disturb or set aside the partition proceedings.

"I do not think that the object of this suit is to disturb or set aside the partition effected by the Revenue Court. The partition remains intact, even after the plaintiff gets a decree in this case. The fact that the decree in this case will either entitle the plaintiff to a fresh partition with regard to the land in defendants' possession or entitle the plaintiff to the land in defendants' possession cannot be said to have an effect of disturbing or setting aside the partition made by the Revenue Courts." I, therefore, find that the fact of partition between the parties does not render the suit unmaintainable. It was further argued by the learned vakils for the defendants that the statement of the plaintiff in the mutation proceedings is a bar to this suit. There is no doubt that the plaintiff through his agent stated before the Tahsildar of Misrikh during the pendency of the mutation proceedings that the defendants were in possession of half the property of Munnu Singh and that the mutation should be effected accordingly. It has not been proved that this statement was the result of any compromise or settlement arrived at between the parties or that it was made to avoid any litigation. Hence, as held by their Lordships of the Privy Council in *Muhammad Imam Ali Khan v. Husain Khan* (1) the statement in question can be no bar to this suit.

The decree made by the Subordinate Judge was one in favour of the plaintiff for possession of the property in dispute.

The appeal was heard by two Judges (*Mr. E. Chamier*, Officiating Judicial Commissioner, and *Mr. L. G. Evans*, additional Judicial Commissioner) of the Court of the Judicial Commissioner of Oudh, who agreed with the findings of the Subordinate Judge that the defendants and Munnu Singh did not constitute a joint family, and that there was no will of Munnu Singh in their favour; that no custom of the kind alleged by the defendants was proved; that the allegation of a dispute and a

(1) (1898) I. L. R., 26 Calc., 81; L. R., 25 I. A., 161.

subsequent compromise between the parties, on the death of Munnu Singh in 1896, was not established; and that, rejecting the evidence founded on such allegation, there was nothing in the circumstances of the case with regard to the shares in 29 of the villages in suit which afforded a ground for holding that the plaintiff was estopped from bringing this suit, citing as authority the case of *Muhammad Imam Ali Khan v. Husain Khan* (1) with regard, however, to the share in the village of Bihat Biram they considered that the circumstances were somewhat different, and that the plaintiff was estopped from claiming any share in that village. The decision of the Court of the Judicial Commissioner on that point is set out in their Lordships' judgment. The claim of the plaintiff was therefore allowed to shares in all the disputed property except the shares in the village of Bihat Biram.

Both parties appealed from this decision to His Majesty in Council.

On these appeals:

De Gruyther, K. C., and *J. Redwood Davies* for the appellants in appeal No. 61 and for the respondents in the cross-appeal contended that the evidence on the record was sufficient to establish a compromise of the rights of the parties claiming as heirs to the estate of Munnu Singh under which the defendants validly acquired the half share of which they had been ever since in possession. That such an arrangement was made was evidenced by the fact that mutation of names was made on those terms, and by the plaintiff's consent to such mutation having been given. He admitted in his evidence that his consent was not given under any misconception of law as he was at the time aware that he was entitled to the whole of the property. Exhibit A 1 was referred to as showing that the plaintiff agreed to the defendants holding the half share which he was now suing for; that document stated that no one objected to mutation being made in that way. The plaintiff also had acquiesced in that settlement for a long time, and had allowed a partition of the property to be made in accordance with it; and it was submitted that he could not now maintain a suit to set aside that disposition of the property.

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Reference was made to the Oudh Land Revenue Act (XVII of 1876) sections 68, 73, 74 and 75; and the case of *Muhammad Imam Ali Khan v. Husain Khan* (1) which had been cited in the judgments of the courts below as authority for the plaintiff's not being estopped by any admission made during the mutation proceedings, was distinguished: and it was submitted that the plaintiff was estopped by his conduct, and by the provisions of the above Act, from claiming not only any share in the village of Bihat Biram, but also any portion of the property in dispute.

Sir R. Finlay, K. C. and *G. E. A. Ross* for the respondent in appeal 61 and for the appellant in the cross-appeal contended in appeal 61 that on the evidence there was no dispute between the parties, which was settled by awarding the property in suit to the defendants; and that had been established by the concurrent findings of both the courts in India. The mutation proceedings conferred no title on the defendants, nor in any way affected the plaintiff's rights, and the Court of the Judicial Commissioner had rightly held that the plaintiff was not estopped by his conduct from maintaining the present suit. That court said:—"All that the defendants did in consequence of the action or inaction of the plaintiff was to take possession of half the property and enjoy the profits thereof. All that is proved in the present case is that the plaintiff gratuitously admitted the right of the defendants to a share." Reference was made to *Muhammad Imam Ali Khan v. Husain Khan* (2). In the cross-appeal it was contended that the Court of the Judicial Commissioner was in error in holding that the plaintiff was estopped from claiming the share in the village of Bihat Biram because the special circumstances which had been found by that court to estop the plaintiff from claiming the said share did not amount to an estoppel. Nor was he estopped by the provisions of Act XVII of 1876 (The Oudh Land Revenue Act), to sections 68 and 219, clauses (d) and (e), of which Act reference was made. Exhibit No. 58 was referred to, to show that in the partition proceedings the plaintiff reserved his right to question in a separate suit the title of the defendants to the share in the village of Bihat Biram. Assuming, therefore, without admitting, that the plaintiff did not raise any objection in

(1) (1898) I. L. R., 26 Cal., 81; (2) (1898) I. L. R., 26 Cal., 81 (99, 100) & I. R., 25 I. A., 161, I. R., 25 I. A., 161 (177.)

the partition proceedings with regard to the right of the defendant's to possession of the said share, he was not debarred from claiming the share in a suit in the Civil Court.

De Gruyther, K. C., replied.

1903, *December 7th* :—The judgment of their Lordships was delivered by **SIR ANDREW SCOBLE** :—

The suit out of which these appeals arise relates to the right of succession to the property of one Munnu Singh, who died childless on the 24th May 1896. The property consists of shares in some thirty villages in the District of Sitapur, in the Province of Oudh. The claimants are Jote Singh, the only surviving brother of the deceased, and Chokhey Singh and Gajraj Singh, his nephews, the sons of a brother who had predeceased him.

It is not disputed that, under the ordinary Hindu law applicable to the family, Jote Singh was the nearest heir and entitled to succeed to the whole estate. His nephews, however, sought to defeat his claim on various grounds. They alleged that they had been joint with Munnu Singh during his life-time, and that he had made an oral will in their favour. Both Courts in India found against them on these points. They set up a family custom, whereby brothers and brothers' sons are entitled to succeed together, but they entirely failed to establish such a custom. They further asserted a compromise—and this was the only ground argued before their Lordships—under which they claimed to have acquired a half-share in the estate, by agreement with Jote Singh.

There is no doubt that by an order of the 5th November, 1896, mutation of names in respect of Munnu Singh's property was effected in the following manner, *viz.*, one half into the name of Jote Singh and one half into the names of Chokhey Singh and Gajraj Singh, the former, being the elder, having a slightly larger share. But this mutation of names by itself confers no proprietary title, and it was therefore sought to prove that it was the result of a valid compromise made at the time of the mutation proceedings, and that Jote Singh was thereby estopped from asserting his present claim. Both Courts in India have found as a fact that there was no such compromise,

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and their Lordships see no reason to dissent from the conclusion at which they arrived. It was, however, argued before their Lordships that the Courts below had not given sufficient attention to a document (Exhibit A-1) signed by the three claimants in the mutation proceedings, in which it is stated that—

“Jote Singh, own brother of the deceased, is in possession of half of the *haqqiat* of the deceased, and Chokhey Singh and Gajraj Singh in equal shares, after deducting the *jethansi* right of Chokhey Singh at the rate of 4 per cent., are in possession of the other half of his share. There is no other legal heir except the deponents. The mutation in respect of the deceased's share in all the villages should be allowed and nobody has any objection thereto.”

There is no reference in the document to any compromise, and it does not appear to their Lordships that it contains any words that can be construed as amounting to an abandonment by Jote Singh of his legal rights. It is merely a statement of the facts as they existed in regard to the possession of the property—the main point considered by the Revenue authorities upon applications for mutation of names—and, by its silence as to a compromise, tends to support the conclusion that no compromise was ever made.

The Courts in India concurred in holding that, as regards twenty-nine of the villages in which Munnu Singh was a sharer, Jote Singh was entitled to succeed him as his heir according to Hindu law, but as regards one village, Bihat Biram, they differed. That village had been the subject of partition proceedings under the Oudh Land Revenue Act (Act XVII of 1876), and the Judicial Commissioner held that, as a portion of Munnu Singh's share in Bihat Biram was allotted to Chokhey Singh and Gajraj Singh at the partition, Jote Singh was estopped from now claiming it. The Subordinate Judge had held that there was no such estoppel.

The judgment of the learned Judicial Commissioner upon the point is in these terms :—

In 1900, one Jote Singh (not the plaintiff) applied for partition of one of the thokes in the village, whereupon the plaintiff presented a petition (*see* Exhibit A-17) praying that his entire interest in the village should be separated from that of the applicant Jote Singh as well as from the shares of the present defendants, and this was done with the result that the defendants were allotted a separate patti, which includes the share now in dispute, and their father, Bhikam Singh's, share in the village as one of the sons of Mitan Singh.

The effect of the decree of the Court below is to give the plaintiff a portion of the patti allotted to the defendants at the partition. The defendants, no doubt, conducted their case at the partition on the assumption that they were entitled to half the share of Munnu Singh, junior, and it seems impossible now to put them back into the position which they occupied before the partition, for the partition dealt with the shares of other persons besides those of the parties to the present suit.

Moreover, in the partition the plaintiff had an opportunity, of which he should have availed himself, of objecting to the defendants' title (*see* section 74 of Act XVII of 1876, the Revenue Act which was then in force). Had he raised the question then, it would have been disposed of before the partition. In my opinion, it is too late now for the plaintiff to claim that portion of Munnu Singh's share in Bihat Biram which was allotted to the defendants at the partition. It appears to me that as to this the plaintiff is estopped.

The learned Judicial Commissioner appears to their Lordships to have been under a misconception on two points of fact. If the order of the Revenue Court in the partition proceedings be looked at, it will be found that it divides the village into two thokes, the first of which, thoke Hathi Singh, is partitioned among five families, none of whom are parties to this suit; while the second thoke, Bhawani Singh, is divided between the parties to this suit, in almost equal proportions. The shares of no other persons are therefore affected by the partition order. In the second place, it appears from Exhibit No. 58, an application filed by Jote Singh in reply to the objections taken by Chokhey Singh and Gajraj Singh in the partition proceedings, and dated 20th December 1902, that Jote Singh asked that "the share of Munnu Singh should be divided at present according to possession, and a separate suit will be filed in a competent court as regards the title in respect of the property of Munnu Singh." The Revenue Court appears to have given effect to this application, for no inquiry under section 74 of Act XVII of 1876 was made, and the question of title was left to be decided by the Civil Court in Jote Singh's present suit, which was filed on the 24th November 1904. In the opinion of their Lordships the grounds of estoppel relied on by the learned Judicial Commissioner both fail.

Their Lordships will humbly advise His Majesty that the appeal of Chokhey Singh and Gajraj Singh should be dismissed and the cross appeal of Jote Singh allowed; that the decree of the Judicial Commissioner should be discharged, and the decree

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of the Subordinate Judge restored except as to costs, Chokhey Singh and Gajraj Singh paying Jote Singh's costs in both Courts.

The appellants Chokhey Singh and Gajraj Singh will pay the costs of Jote Singh in both the appeal and the cross-appeal.

Appeal (No. 61) dismissed.

Cross appeal (No. 62) allowed.

Solicitors for the appellants in appeal No. 61, and for the respondents in appeal No. 62:—*T. L. Wilson & Co.*

Solicitor for the respondent in appeal No. 61, and for the appellant in appeal No. 62:—*Douglas Grant.*

J. V. W.

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FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Sir George Knox, Mr. Justice Banerji, Mr. Justice Aikman and Mr. Justice Griffin.

BHAGWATI (PLAINTIFF) v. BANWARI LAL AND OTHERS (DEPENDANTS).*
Civil Procedure Code, sections 244, 318, 319—Execution of decree—Sale in execution—Purchase by decree-holder, but possession not given—Remedies open to decree-holder auction-purchaser—Act No. XV of 1877 (Indian Limitation Act), schedule II, article 138.

A decree-holder, whether holding a decree for sale on a mortgage or a simple money decree, who purchases at a sale held in execution of such decree property belonging to his judgment debtor is in the same position as would be any other purchaser at an auction sale held in execution of a decree. *Sabhanjit v. Sri Gopal* (1) and *Mahabir Pershad Singh v. Marnaghten* (2) referred to.

If after confirmation of a sale in his favour the auction purchaser fails to obtain from the judgment-debtor possession of the property purchased, he may claim possession not only by an application under section 318 or section 319 of the Code of Civil Procedure, but also by suit: section 244 of the Code is not a bar to such suit and does not apply to such an application. *Raynor v. The Mussoorie Bank, Limited* (3), *Maganlal v. Doshi Mulji* (4) and *Gulzari Lal v. Madho Ram* (5) referred to. *Kalian Singh v. Thakur Das* (6) and *Sheo Narsin v. Nur Muhammad* (7) overruled. *Madhusudan Das v. Gobinda Prasad Chowdhurani* (8) and *Kattayat Pathumayi v. Raman Menon* (9) dissented from. *Mahomed Mosraf v. Habib Mia* (10) followed. *Seru Mohun*

* Second Appeal No. 288 of 1906, from a decree of Maula Bakhsb, Subordinate Judge of Moradabad, dated the 4th of January 1906, affirming a decree of Rama Das, Munsif of Amroha, dated the 24th of September 1904.

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| (1) (1894) I. L. R., 17 All., 222. | (6) Weekly Notes, 1906, p. 87 : S. C., 3 A. L. J. R., 234. |
| (2) (1889) I. L. R., 16 Calc., 682. | (7) (1907) I. L. R., 30 All., 72. |
| (3) (1885) I. L. R., 7 All., 681. | (8) (1899) I. L. R., 27 Calc., 34. |
| (4) (1901) I. L. R., 25 Bom., 631. | (9) (1902) I. L. R., 26 Mad., 740. |
| (5) (1904) I. L. R., 26 All., 447. | (10) (1904) 6 C. L. J., 749. |