

Before Mr. Justice Byres and Mr. Justice Piggott.

PEMA (DEFENDANT) v. JAS KUNWAR (PLAINTIFF).\*

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July, 24.

*Act (Local) No. III of 1901 (United Provinces Land Revenue Act), sections 107 and 111—Partition—Joint Hindu family—Hindu widow—Claim for partition by widow in possession in lieu of maintenance merely, though recorded, solatii causa, as a co-sharer.*

Held that the widow of a member of a joint Hindu family who is in possession of a portion of the family property under a family arrangement, in lieu of maintenance merely, is not a co-sharer and cannot in virtue of such possession enforce a claim for partition of the share of which she is so in possession, even though her name may be recorded solatii causa as a co-sharer. *Kailashi Kuar v. Badri Prasad* (1), *Bhoop Singh v. Phool Kower* (2) and *Jhunna Kuar v. Chain Sukh* (3) followed. *Bhupal Singh v. Mohan Singh* (4) referred to. *Habib-ullah v. Musammat Kushimba* (5) distinguished.

THE facts of the case were as follows:—

Mohan Singh, the ancestor of the parties, was the owner of the property in dispute. He died about thirty or thirty-five years ago. He had three sons, Prem Singh, Gaila Singh and Pema. Prem Singh died during the life-time of Mohan Singh, leaving him surviving his widow, the plaintiff; Gaila Singh died shortly after Mohan Singh's death. On the death of Mohan Singh, his property was recorded in the khewat in the names of the aforesaid Gaila, Musammat Jas Kunwar the plaintiff, and Pema the objector. On the strength of the entry of her name in the khewat, the plaintiff applied to the Revenue Court for imperfect partition of her share. Pema and the sons and representatives of Gaila, the deceased brother, objected, saying that the name of the plaintiff was entered by way of consolation, that she was allowed to realize the rents and profits of the particular share in lieu of maintenance allowance, and that she could not have the share partitioned. The Revenue Court disallowed the objections of the defendants, but held that the property in dispute was given to the plaintiff for her support. On appeal, the District Judge confirmed the decree of the Revenue Court on the ground that the plaintiff, being a recorded co-sharer,

\* Second Appeal No. 164 of 1913, from a decree of L. Johnston, District Judge of Meerut, dated the 4th of October, 1912, confirming a decree of Muhammad Ghafur Khan, Assistant Collector, First Class, of Meerut, dated the 30th of July, 1912.

(1) S. A. No. 344 of 1913, decided (3) (1881) I. L. R., 3 All., 400, 17th July, 1913.

(2) (1867) N. W. P. H. C. Rep., 368. (4) (1897) I. L. R., 19 All., 324.

(5) (1906) 3 A. L. J., 481.

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could claim partition. But he also came to the conclusion that the plaintiff was allowed her husband's share, on the death of Mohan Singh, in lieu of maintenance and by way of consolation. The defendant appealed to the High Court.

Babu Sarat Chandra Chaudhri (for Dr. Satish Chandra Banerji), for the appellant:—

The finding of the lower appellate court is that the respondent is in possession in lieu of maintenance and by way of consolation. It is submitted that such possession is not enough to entitle her to claim partition under section 107 of the Land Revenue Act. She must not only be 'recorded,' but she must be a co-sharer. By the term 'co-sharer' the Legislature intends a 'person' who has absolute control over the share in his or her possession. The respondent in this case is in possession on sufferance, the true owner being the appellant. She is not a co-sharer; *Bhoop Singh v. Phool Kower* (1). The applicant's position differs from that of a Hindu widow in possession of her husband's separate share. Such a widow can claim partition because she represents the estate fully and whatever may be the effect of an alienation made by her after her death, there is none to dispute it as long as she is alive.

[Munshi Parmeshwar Dayal for the respondent, referred to *Jhanna Kuar v. Chain Sukh* (2).]

It is also true that the applicant could maintain a suit for the profits of the share recorded in her name, but that is because of the presumption, which is irrebuttable, created by the provisions of section 201 of the Tenancy Act. No such presumption can be imported into the Land Revenue Act. In fact under section 111, the courts are not precluded from inquiring into the question of proprietary title. If she has difficulty in collecting the profits, she may resort to the Civil Court and get her maintenance allowance fixed and declared a charge upon the estate. But she cannot by her act bring about a change in the character of the family property. An application for partition under the Land Revenue Act, when objected to, becomes a suit in the Civil Court, and it has been held that a widow in possession in lieu of maintenance cannot sue for partition; *Kathaperumal v. Venkabai* (3), *Sundar v. Parbati* (4).

(1) (1867) N.-W. P., H. C. Rep., 368. (3) (1880) I. L. R., 2 Mad., 194.

(2) (1881) I. L. R., 3 All., 400. (4) (1889) I. L. R., 12 All., 51.

In one case also the Privy Council allowed widows, who were jointly in possession, to enter into a partition, but that case was decided upon the principle of the well-known case of *Asher v. Whitlock*, (1) that possessory title was good as against the whole world except the true owner. Here the true owner has appeared to oppose the application, and as against him the prayer for partition cannot be allowed. There are a series of rulings which go to show that a Hindu widow in the position of the respondent is not a co-sharer so as to put forward a claim for pre-emption; *Bhupal Singh v. Mohan Singh* (2), *Phopi Ram v. Rukmin Kuar* (3).

It is therefore submitted that the respondent is out of court.

Munshi Parmeshwar Dayal (for the Hon'ble Dr. Tej Bahadur Sapru), for the respondent :—

The question which has to be decided in this case is whether a Hindu widow who is placed in possession of her husband's share, in lieu of maintenance, is entitled to claim partition under the Land Revenue Act. A partition under that Act is different in effect from a partition by a Civil Court of joint property, under the Hindu Law. The former does not necessarily break the joint character of the family, whereas the only object of the latter is the separation of the family property and dissolution of the joint family. The members of the family would be as much entitled to the profits after a Revenue Court partition as they were before the partition. The only requisite under section 107 of the Land Revenue Act is that the person applying for partition must be a recorded co-sharer. The widow in the present case having been recorded as a co-sharer was entitled to claim partition. Her position, although she was in possession in lieu of maintenance, is analogous to that of a Hindu widow inheriting her husband's separate property under the Hindu Law. The only difference is that the former gets the property by virtue of some grant or family arrangement, whereas the latter gets the property by right of inheritance. In both cases the interest which vests in the widow is for her life. She cannot be ousted during her life-time nor can she be compelled to accept maintenance in any other form, if she is already in possession of her husband's share in lieu of her maintenance; *Yellawa v. Bhimangavda* (4); *Mayne's*

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(1) (1865) L. R., 1 Q. B., 1.

(3) (1890) Weekly Notes, 1895, 84.

(2) (1897) I. L. R., 19 All. 324.

(4) (1893) I. L. R., 18 Bom., 452.

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Hindu Law, 7th Edition, paragraphs 395, 396 and 397. The law applicable to a Hindu widow entitling her to claim partition under the Revenue Law, would be quite applicable to a case like the present. This case approaches very nearly the case reported in I. L. R., 3 All., 400, which was a case of a Hindu widow claiming partition under the Revenue Act. The case of *Bhoop Singh v. Phool Kower* (1) relied on by the other side, is not to the point, inasmuch as the facts of the case, as set forth in the judgement, do not disclose whether the woman claiming partition in that case, was a "recorded co-sharer." Moreover the law applicable to partition there was materially different from the present law. In Act XIX of 1863, section 3, the words used were "recorded proprietor," and not "recorded co-sharer." The latter terms were brought in for the first time in Act XIX of 1873. A proprietor may be a co-sharer but all co-sharers are not proprietors. Besides, a Hindu widow who is in possession of property in lieu of maintenance, holds a charge over the property in her possession, and the charge will hold good for her life-time; Mayne's Hindu Law, 7th Edition, paragraph 460. In this aspect the present case is governed by the case of *Habibullah v. Musammat Kushimba* (2).

Babu Sarat Chandra Chaudhri, in reply:—

The case of *Habibullah v. Musammat Kushimba* was one of a Muhammadan widow in possession of her husband's property in lieu of her dower. Her right was a much higher right than that of a Hindu widow in possession of property in lieu of maintenance. Moreover in Act XIX of 1863, section 3, the word 'proprietor' was used where the word 'co-sharer' now occurs, and, there being no substantial change in the law on that point, it may be taken that the word 'proprietor' was used synonymously with the word "co-sharer."

RYVES and PIGGOTT, JJ :—The facts out of which this appeal arises are as follows :—Mohan Singh was the owner of some zamindari property. He had three sons, Prem Singh, Gaila and Pema. Prem Singh died in the life-time of his father, leaving surviving him a widow, Musammat Jas Kunwar (plaintiff respondent). After the death of Mohan Singh, his property was recorded in the

(1) (1887) N.-W.P., H. C. Rep., 368. (2) (1905) 3 A. L. J., 481.

names of Gaila, Musammat Jas Kunwar and Pema. Subsequently Gaila died and the names of his widow and sons were recorded in the khewat instead of his own name. On the 13th of November, 1911, Musammat Jas Kunwar instituted a suit in the Revenue Court for imperfect partition in respect of a one-third share of the property which had originally belonged to Mohan Singh, stating in her plaint that she was "the owner, zamindar and co-sharer of one-third out of one-fourth share in the holdings bearing khewat Nos. 22, 23 and 33 in mauza Nehru," and was in possession thereof. The reason for seeking partition, she alleged, was because there were constant disputes between the parties owing to the property being joint. Pema, defendant appellant, objected under section 111 of the Revenue Act, on the ground that Musammat Jas Kunwar's name had been entered in the Revenue papers merely for her consolation, and that she was not in possession as a co-sharer, but had been receiving maintenance only, and that was all that she was entitled to.

The first court framed, among others, two issues, as to the entry of Musammat Jas Kunwar's name in the khewat and as to her possession. That court decided both these issues in the plaintiff's favour and disallowed Pema's objection. On appeal the learned District Judge found as follows :—

"It appears that Musammat Jas Kunwar has been in possession of her husband's share, and I find accordingly. As her husband predeceased her father-in-law, it appears that she was allowed her husband's share on her father-in-law's death, in lieu of maintenance and by way of consolation and she was recorded at Mohan Singh's death as a co-sharer. She is entitled then to partition of the share recorded in her name. It is clear that Musammat Jas Kunwar has not absolute ownership." He dismissed the appeal.

It has been contended before us that, on the facts found, Musammat Jas Kunwar is not entitled to partition, because she cannot be said to be a co-sharer, and the mere fact that she is recorded in the khewat as such, does not make her a co-sharer. It is argued that she has not even the limited estate of a Hindu widow in possession of her deceased husband's share. As her husband died in the life-time of her father-in-law, the utmost that she was entitled to,

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was maintenance, and the findings of the court below amount to nothing more than this, that the family, instead of paying her a certain sum annually, put her in possession of a share of the family property in lieu of maintenance.

No doubt her brothers-in-law, the real co-sharers of the property, might have agreed to give her an absolute title to the share which would have belonged to her husband, if he had been living, or any other share, but the finding of the lower appellate court that she has not an absolute ownership, shows that this was not done.

In our opinion, this contention is correct. Under section 107 of the Revenue Act, a recorded co-sharer of a mahal may apply for partition to the Revenue court. On such application being properly made, the Collector is required to issue a proclamation calling on the other recorded co-sharers in the mahal to appear and state their objection, if any, to the partition. If objection is made by a recorded co-sharer the court may, under section 111, if the objection involves a question of proprietary title which has not already been determined by a court of competent jurisdiction, inquire into the merits of the objection. This shows that the mere fact that the applicant for partition is recorded as a co-sharer, and has been in possession of his share, does not entitle him to obtain partition. If a person, although recorded as a co-sharer and in possession, is proved not to be in fact a co-sharer, the court cannot make a partition in his favour. This view was adopted as long ago as 1867 in the case of *Bhoop Singh v. Phool Kower* (1). There it was held that the proprietary right to a share in an undivided estate, which includes and carries with it a right to claim and enforce a partition of that share, must be a right of absolute and unlimited nature, and does not belong to a Hindu widow who has been placed in possession of her deceased husband's share for her maintenance. Consequently where the widow is not an absolute proprietor, but simply an assignee of the profits for her maintenance, she cannot claim partition of the share so assigned.

Act No. XIX of 1863 was in force when that case was decided. We have examined its provisions and find that they are substantially the same as in the present Revenue Act; only there the term "proprietor" is used instead of "co-sharer." But in our opinion,

(1) (1867 N.-W.P., H. C. B., p. 368.

more especially having regard to section 111 of the present Act, we think the two words are synonymous. That decision was considered in *Jhunna Kuar v. Chain Sukh* (1), where it was affirmed, although a distinction was drawn between a widow who was not an absolute proprietor but simply an assignee of the profits for her maintenance, and a childless Hindu widow who had succeeded to her deceased husband's share in a mahal, such share having been his separate property, and was recorded as a co-sharer in the mahal.

On behalf of the respondent, we were pressed with the decision in *Habibulla v. Musammat Kushimba* (2). That case, in our opinion, has no application here. There a Muhammadan widow in possession of her deceased husband's property in lieu of her dower, and who was recorded as a co-sharer, sought partition. An objection was raised by one Habibulla, who was not himself a recorded co-sharer, on the ground that the widow's possession was analogous to that of a mortgagee, and that therefore under the proviso to section 107 she was not entitled to partition. On appeal this Court only decided two points; and that case is therefore only an authority for what it actually decided. It held (1) that Habibulla not being a recorded co-sharer, could not raise objections under section 111, and (2) that the widow was not a mortgagee within the meaning of section 107. The very point we have to decide has come up for determination before another Bench of this Court since the arguments before us were concluded in *Musammat Karilashi Kunwar v. Badri Prasad* [S. A. No. 344 of 1913, decided on the 17th of July, 1913, by the learned Chief Justice and Banerji, J.]. The facts of that case are on all fours with the case before us and we are fortified in our opinion by that decision.

In *Bhupal Singh v. Mohan Singh* (3) this Court, relying on two previous decisions of *Phopi Ram v. Rukmin Kuar* (4) and *Imam-ud-din v. Surjaiti* (5), has held that a Hindu widow in possession in lieu of maintenance, and recorded as a "co-sharer," was not entitled to sue for pre-emption as a "co-sharer" in the mahal.

The result is we allow the appeal, and, setting aside the decrees of the courts below, dismiss the plaintiff's suit with costs in all courts.

*Appeal allowed.*

(1) (1881) I. L. R., 3 All., 400.

(3) (1897) I. L. R., 19 All., 324.

(2) (1906) 3 A. L. J., 434.

(4) Weekly Notes, 1895, p. 84.

(5) Weekly Notes, 1895, p. 85.