

ineffectual. The circumstances of that case appear to be on all fours with the circumstances which occur here ; and, if well decided, it would be a precedent exactly in point. There are two substantial reasons why it ought not to be followed as an authority. In the first place, it appears to their Lordships that the learned Judges of the High Court of Madras were not justified in importing into the construction of a Hindu will an extremely technical rule of English conveyancing. The principle of joint tenancy appears to be unknown to Hindu law, except in the case of co-parcenary between the members of an undivided family. In the second place, the learned Judges misapprehended the law of England, because it is clear, according to that law, that a conveyance, or an agreement to convey his or her personal interest by one of the joint tenants, operates as a severance.

Their Lordships will humbly advise Her Majesty to affirm the judgment appealed from, and to dismiss the appeal. The appellant must pay the costs of the respondents who have appeared to oppose this appeal.

Appeal dismissed.

Solicitors for the appellant : Messrs. *Freshfield & Williams.*

Solicitor for the respondents : Mr. *J. F. Watkins.*

C. B.

APPELLATE CIVIL.

Before Mr. Justice Trvelyan and Mr. Justice Beverley.

MEHERBAN RAWOOT (DEFENDANT, APPELLANT) *v.* BEHARI LAL
BARIK *alias* SHAM LAL KATRI (PLAINTIFF, RESPONDENT.) *

1896

April 16.

Partition—Revenue-paying land in Civil Court—Civil Procedure Code (XIV of 1882), section 265—Commissioner to make partition—Partition by the Collector.

In a suit brought in the Civil Court for a partition of the lands in a revenue paying estate, the Court has no power to appoint a Commissioner to make the partition ; it is bound under section 265 of the Civil Procedure

* Appeal from Original Decree No. 106 of 1894, against the decree of Babu Brojomohun Pershad, Subordinate Judge of Gya, dated the 20th of December 1893.

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Code to have the partition made by the Collector according to the law for the time being in force for partition of estates.

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RAWOOT

Dabi Singh v. Sheo Lall Singh (1), distinguished.

v.
BEHARI
LAL
BARIK.

THE plaintiff in this case alleged in the plaint that a 9 annas out of 16 annas of *mouza* Kazi Chuck within the area of Macharam Katarwa, bearing *touzi* No. 3237 and *sudder jumma* Rs. 100, was sold to him by the defendant in 1889, and that the plaintiff's name was entered in the Government register; that the defendant threw obstacles in the way of the collection of the plaintiff's share of rent, and the plaintiff asked the defendant for a division of the lands according to shares, but the defendant refused. The prayer was :—

“That a decree may be passed in favour of the plaintiff, and that by measuring the land of the entire 16 annas of the aforesaid *mouza* Kazi Chuck within the area of Macharam Katarwa, a separate plot of 9 annas share of the plaintiff may be fixed with reference to the *jummabundi*, and that separate possession of the same be given to the plaintiff.”

The defendant did not appear in the Court below. An order for partition was made, and a Commissioner appointed to make the partition. On receipt of the Commissioner's report, the lower Court passed the final decree in the following terms :—

“That the claim of the plaintiff be decreed, and the land of the 9 annas share of the plaintiff be formed into a separate plot according to the partition made by the Commissioner, and that the plaintiff be put in possession of the 9 annas share in dispute, and that the plaintiff do recover Rs. 176-8 from the defendant on account of half the costs of the Court.”

Neither the plaint nor the decree mentioned anything about division of the revenue payable to Government.

The defendant appealed to the High Court.

Babu *Karuna Sindhu Mukerjee* for the appellants.—The partition can be carried out only by the Collector. Section 265 is clear in its terms. *Ramjoy Ghose v. Ram Runjun Chuckerbutty* (2), Section 29 of the Butwara Act supports my contention.

(1) I. L. R., 16 Calc., 203.

(2) 8 C. L. R., 367.

The case of *Zahrun v. Gowri Sunkar* (1) does not lay down that the Civil Court may make a partition of a revenue-paying estate. The decision of that case has not been correctly interpreted in the case of *Debi Singh v. Sheo Lall Singh* (2). The facts of the last-mentioned case, however, were peculiar ; there the suit was for partition of a portion of a revenue-paying estate in which the plaintiff held a certain share in *mokararri* right and a certain other share in proprietary right. It was not necessary that the Collector should carry out the partition in such a case.

Babu *Lakshmi Narayan Singha* for the respondent.—The case of *Debi Singh v. Sheo Lall Singh* (2) is clearly in point. The plaintiff does not ask that the revenue should be divided, and there cannot be any objection to the partition being carried out as it has been done.

The judgment of the High Court (TREVELYAN and BEVERLEY, JJ.) was delivered by

BEVERLEY, J.—This was a suit for the partition of a revenue-paying estate, *mousa* Kazi Chuck, *rukba* Macharam Katarwa, being No. 3237 on the *touzi* of the Gya Collectorate, and bearing a *sudder jumma* of Rs. 100. The plaintiff, having purchased a 9 annas share of this estate from the defendant, found some difficulty in collecting his rents, and he accordingly applied to the Civil Court to have his share of the estate partitioned and separated by metes and bounds. The defendant did not appear, and the Court having come to the conclusion that the plaintiff was entitled to a decree for partition, appointed a Commissioner to make that partition, and ultimately on the 18th of December 1893 directed that the plaintiff should be put into possession of the 9 annas share as defined by the Commissioner.

It is objected before us on appeal by the defendant that under section 265 of the Civil Procedure Code the learned Subordinate Judge had no power to appoint a Commissioner to make a partition of this property ; but that, inasmuch as it was an estate paying revenue to Government, he was bound under that section

(1) I. L. R., 15 Calc., 198.

(2) I. L. R., 16 Calc., 198.

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to have the partition made by the Collector according to the law for the time being in force for the partition of estates.

We are of opinion that this contention must succeed. We think that the section in question is imperative in its terms, and we are not aware of any case in which it has been held that a Civil Court is at liberty to proceed in any way other than that therein prescribed. The case of *Debi Singh v. Sheo Lall Singh* (1) has been brought to our notice; but that case clearly differs from the present. That was a case in which the plaintiffs held a certain share in proprietary right and another share in *mokararri* right in a certain village, which village formed a portion of a revenue-paying estate, and they asked the Court to define the portion of the village from which they might collect the rents they were entitled to, without in any way carrying out a partition of the estate itself. That case, we think, is quite distinguishable from the present, and affords no ground for holding that a Civil Court is not bound by the distinct provisions of section 265 of the Code.

We accordingly allow the appeal, set aside the final decree of the lower Court of the 18th December 1893, and direct that the Subordinate Judge do proceed in accordance with the provisions of section 265 of the Code of Civil Procedure. As the defendant did not appear in the lower Court, where he might have raised this objection, we make no order as to the costs of this appeal.

S. C. C.

Appeal allowed.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Beverley.

1896
 March 10.

ASHRUF ALI CHOWDHRY AND OTHERS (JUDGMENT-DEBTORS) v. NET LAL SAIHU AND OTHERS (DECREE-HOLDERS.)*

Civil Procedure Code (XIV of 1882), section 310A. and section 311—Civil Procedure Code Amendment Act (V of 1874)—Sale in execution of mortgage-decree—Application by mortgagor under section 310A., Civil Procedure Code.

The judgment-debtor in a mortgage-decree passed under section 88 of the Transfer of Property Act (IV of 1882) may apply to set aside a sale under

* Appeal from Original Order No. 349 of 1894, against the order of Babu Kader Nath Mozumdar, Subordinate Judge of Shahabad, dated the 5th of September 1894.