

1881
January 21.

APPELLATE CIVIL.

Before Mr. Justice Pearson and Mr. Justice Spankie.

JHUSNA KUAR (PLAINTIFF) v. CHAIN SUKE AND ANOTHER (DEFENDANTS).*

*Partition—Hindu Widow—Act XIX of 1873 (N.-W. P. Land-Revenue Act),
ss. 108, 113, 114—Reversioners.*

A childless Hindu widow, who has succeeded to her deceased husband's share of a mahál, such share having been his separate property, and is recorded as a co-sharer of such mahál, is as much entitled, under s. 108 of Act XIX of 1873, as any other recorded co-sharer is, to claim a perfect partition of her share. The circumstance that she may after partition alienate her share, contrary to Hindu law, will not bar her right as a co-sharer to partition. If she acts contrary to the Hindu law in respect of her share, the reversioners will be at liberty to protect their own interests.

THE appellant in this case was the recorded co-sharer of a certain village, and had applied for partition of her share. The respondents, the other recorded co-sharers, and brothers of the appellant's deceased husband, Kishore Chand, objected to this application, their objection raising the question of the appellant's right to claim the partition. The Collector decided that the appellant was not entitled to claim the partition. The appellant appealed from the Collector's decision to the District Court, and, on the same being affirmed, she appealed to the High Court. The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. Conlan and Munshi Kashi Prasad, for the appellant.

Pandit Ajudhia Nath and Babu Jogindro Nath, for the respondents.

The judgment of the Court (PEARSON, J., and SPANKIE, J.,) was delivered by

SPANKIE, J.—The facts are clearly stated by the lower appellate Court. The record of procedure in the Revenue Court discloses carelessness and irregularities, more or less grave. The petition of the plaintiff-appellant asking for partition was presented to the

* Second Appeal, No. 797 of 1880, from a decree of W. C. Turner, Esq., Judge of Agra, dated the 5th May, 1880, affirming a decree of A. J. Lawrence, Esq., Collector of Agra, dated the 12th December, 1879.

Collector, who probably sent it to the Assistant Collector, though there is no order to that effect. The inquiry was commenced by the Assistant Collector; the issues were drawn and evidence was heard by him. For some reason or other not explained, the record got back to the Collector, who examined the patwari and pronounced judgment in the following terms:—"This village is a zamindari village: objectors say that the property is *maurusi*, and the applicant, having no issue, will by partition be able to dispose of her property: dismissed." Having regard to the fact that the Assistant Collector acted under s. 113 of Act XIX of 1873, and proposed to determine the nature and extent of the applicant's interest in the estate, we must accept the Collector's dismissal of the application for partition as a decision of a Court of Civil Judicature of first instance appealable to the District Court; and, as no exception appears to have been taken to the procedure, we must be content to let the decision, if it can be called one, stand.

From a note at the bottom of his order, it would seem that the Collector was guided by the precedent of this Court—*Bhoop Singh v. Phool Kower* (1)—which ruled 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. But in the case before us the lady is not in the position of an assignee of the profits for her maintenance. Kishore Chand, the recorded proprietor and lambardar of the village, on the 26th January, 1864, applied to the Collector to record himself as the owner of a one-third and his two brothers, Chain Sukh and Salig Ram, as owners of a two-thirds in equal shares. Mutation of names followed. On the death of Kishore Chand in July, 1871, the plaintiff, his widow, was recorded as proprietor in his stead, and at her request Chain Sukh was appointed lambardar, and she left

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

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on record that at her decease her brothers-in-law would succeed to her share (*malik hain*). These are admitted facts, and show that the plaintiff succeeded as heir of her deceased husband to a one-third share in the whole estate; and, though there has been no division by metes and bounds, that share is defined and separate. Chain Sukh and Salig Ram, defendants, cannot inherit it until the death of Kishore Chand's widow, the plaintiff. She is in possession by inheritance and not as an assignee of the profits of the share for her maintenance; and, as a recorded co-sharer in the mahál, she, under the terms of s. 108 of the Land-Revenue Act, is as much entitled as any other recorded shareholder would be to claim a perfect partition of her share. The circumstance that she might afterwards alienate her property contrary to the Hindu law would not bar her right as a co-sharer to partition. If she acted in regard to the property contrary to the Hindu law, those persons who are reversioners would be at liberty to protect their own interests.

In appeal the plaintiff urged this view of the case before the District Court. The lower appellate Court also appears to have been misled by the decision of this Court. The Judge has also overlooked the now established law that a division by metes and bounds is not necessary to constitute partition under the Mitakshara. Two conditions, however, are absolutely necessary. The shares must be defined, and there must be distinct and independent enjoyment of those shares. These conditions exist, it is admitted, in the present case. The mere circumstance that the widow admits that, upon her death, her brothers-in-law will be the owners, and the evidence of the patwári that there was commensality between the three brothers in Kishore Chand's lifetime, will not alter the position. The reference by the Judge to a decision of the Sudder Dewany Adawlut—*Khuman Singh v. Narayan Singh* (1)—as to village-custom permitting a widow to retain her husband's share for life, the co-sharers being assured that, on her death, the share would come to them, is, as the other decision, inapplicable to the present case. The rule that conditions in village administration-papers purporting to interfere with or alter the ordinary rules of

(1) N.-W. P., S. D. A. Rep., 1860, p. 658.

descent will not be enforced [*Sarupi v. Mukh Ram* (1)] will not apply here. No violence is offered to the Hindu law if a widow recorded and in possession of her deceased husband's separate share claims partition. The decision, therefore, on which the lower appellate Court relies and cites does not support its judgment. The right to partition is allowed by law, and the condition of the administration-paper that sharers are entitled to partition is in accordance with the law. It appears further that appellant in 1879 obtained a decree for her share of the profits. All the facts of the case are such that it is quite unnecessary to remand the case for any further inquiry. We must reverse the decree of the lower appellate Court, including that of the Court of first instance, with costs, declaring in favour of the appellant that she is a co-sharer in the mahál to the extent of one-third, and that she is entitled, under the provisions of s. 108 of Act XIX of 1873, to obtain the perfect partition of her share.

Appeal allowed.

Before Mr. Justice Oldfield and Mr. Justice Straight.

BALMAKUND v. JANKI AND ANOTHER.*

Custody of Minor—Minor Wife—Act IX of 1861.

Where a person claims the custody of a female minor on the ground that she is his wife, and such minor denies that she is so, Act IX of 1861 does not apply. Such person should establish his claim by a suit in the Civil Court.

ONE Balmakund applied to the District Court of Benares, under Act IX of 1861, for the custody of a minor girl on the ground that she was his wife. This application was opposed by the minor's mother, Janki, and by one Jangli, on the ground that the minor was not the wife of the applicant, but, on the contrary, was the wife of Jangli. The District Court, holding that there was no proof that the minor was the wife of the applicant, while there was proof that she was living with Jangli as his wife, rejected the application.

*First Appeal, No. 134 of 1880, from an order of M. Brodhurst, Esq., Judge of Benares, dated the 18th August, 1880.

(1) N.-W. P. H. C. Rep., 1870, p. 227.

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