

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

MUKUNDA LAL PAL CHOWDHRY AND ANOTHER (PLAINTIFFS) v.
I. LEHURAUX AND OTHERS (DEFENDANTS).*

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June 24.

Partition—Right to Partition—Joint possession—Co-parceners—Suit by subordinate tenure-holder for partition against superior landlord.

Joint possession alone is not a sufficient ground for compelling a partition. In order that persons may be co-parceners and so have a right to partition, not only must they be in joint possession, but that joint possession must be founded on the same title.

A subordinate tenure-holder therefore has no right of partition as against his superior landlord.

Ridai Nath Sandyal v. Iswar Chandra Saha (1) and Parbati Churn Deb v. Ain-ud-deen (2) referred to.

The plaintiffs were proprietors of a 12-anna share and *dur-talukdars* of the other 4-anna share, of *taluk* A, which consisted of a $7\frac{1}{2}$ annas share of so much of the lands of three villages D, B, and T, as appertained to an estate in the Collectorate No. 23. Estate No. 23 with three other estates represented fractional shares in three parganas comprising about 500 villages. No partition had been made of these parganas, but by private arrangement certain lands in a village had been assigned to one estate, and certain other lands to another, some lands being kept joint and common to all four estates. In estate No. 23 there was another permanent tenure, S, a *taluk* consisting of lands not only in the three villages D, B, and T, but in nine others: of this *taluk* a 2-anna share belonged to L, one of the zemindars of estate No. 23, and a $7\frac{1}{2}$ anna share of the remaining 14-anna share was held under the plaintiff. In a suit against L for partition of such of the lands of *taluk* A as appertained to estate No. 23, and were separate from the other estates, to which the other zemindars of estate No. 23 were made parties; *Held*, assuming the plaintiffs were entitled to partition at all, that the suit would lie as regards the lands specified as belonging to estate No. 23 without reference to the lands held in common as belonging to all the four estates. *Hari Das Sanyal v. Pran Nath Sanyal (3)*, and *Padmamani Dasi v. Jagadamba Dasi (4)*, referred to.

* Appeal from Original Decree No. 214 of 1891, against the decree of Baboo Kali Prosunno Mookerjee, Subordinate Judge of Tippera, dated the 11th of April 1891.

(1) 4 B. L. R., App. 57, note.

(3) I. L. R., 12 Calc., 566.

(2) I. L. R., 7 Calc., 577; 9 C. L. R., 170.

(4) 6 B. L. R., 194.

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THIS was a suit for partition. The plaintiffs alleged that within the jurisdiction of the Civil Court of the district of Tippera there were four distinct zemindaris, which respectively consisted of fractional shares in pargana Kudba, and which were respectively recorded as estates Nos. 23, 24, 25, and 26 on the *tausi* of the Collectorate of Noakhali: that the whole of the estate No. 23, consisting of 4 annas $6\frac{1}{2}$ gundas share of the said pargana, was the property of Raja Harish Chandra Roy; that on the 12th of Joisto 1267 B.S. (24th May 1864) Raja Harish Chandra granted a *mokurrari shekmi taluk* of a $7\frac{1}{2}$ -anna share in *mauzas* Deora, Bagmara and Talagao, appertaining to estate No. 23, to one Banga Chandra Das at an annual rent of Rs. 50; that Raja Harish Chandra subsequently granted a *putni taluk* of the entire estate to Alfred Courjon represented in this suit by his executor defendant No. 1; that Banga Chandra Das having been dispossessed from his *taluk* by Alfred Courjon and Rani Joy Doorga, the widow of Raja Harish Chandra (defendant No. 2), sold a 4-anna share, and jointly with the purchaser instituted a suit against them for possession of the *taluk* (known as *taluk* Banga Chandra Das) which resulted in a decree confirming them in their respective shares; that at a sale in execution of a decree against Banga Chandra Das, the plaintiffs purchased his 12-anna share on 3rd Falgoon 1283 (13th February 1877), and obtained a *dur-taluk* of the remaining 4-anna share on the 13th Assar 1291 (28th September 1884), and as *talukdars* and *dur-talukdars* were in possession of the entire 16 annas of the *taluk*; that in consequence of the lands of the *taluk* being held jointly with other lands of the estate there were constant disputes between the plaintiffs and the defendants, and the plaintiffs were put to much inconvenience and experienced great difficulty in the management and enjoyment of their property. The plaintiffs therefore prayed for partition and possession of such of the lands of their *taluk* as appertained to estate No. 23 and were separate from the other estates.

The zemindars of estate No. 23 were made parties to the suit, but defendant No. 1 alone defended it. He contended that inasmuch as there were more than 500 *mauzas* appertaining to estate No. 23 and lying in different parganas, and he, as the executor of

Alfred Courjon, and defendant No. 7 were in possession of all the lands in that estate by virtue of zemindari and *putni* rights, a suit for partition of some of the lands lying in three *mauzas* only was not maintainable: he also contended that the suit was not maintainable on the ground that Alfred Courjon and defendant No. 7 were not the co-sharers of the plaintiffs, but their superior landlords. He further contended that the suit was not maintainable on the ground that there was another permanent tenure called *taluk* Sobharan Lashkar in estate No. 23 consisting of lands not only in the three *mauzas* mentioned in the plaint, but in nine others, and that defendant No. 1 was in khas possession of a 2-anna share, and the remaining 14-anna share was held under the plaintiffs and defendant No. 1.

The Subordinate Judge found that *taluk* Banga Chandra Das consisted of a $7\frac{1}{2}$ -anna share in such of the lands of *mauzas* Deora, Bagmara and Talagao as appertained to estate No. 23; that these three *mauzas* appertained to the four estates; that some of the lands of estate No. 23 were held separately from, and others jointly with, the lands of the other three estates; that *taluk* Banga Chandra Das was a subordinate tenure held under the *putni* of Alfred Courjon; that the four estates were joint and that the lands thereof were in the possession of Alfred Courjon, some as his zemindari and the others as his *putni* or *dur-putni*, and that Alfred Courjon had created a number of subordinate *taluks* out of these lands; that *taluk* Sobharan Lashkar was in estate No. 23 and consisted of lands not only in *mauzas* Deora, Bagmara and Talagao, but in nine other *mauzas*; that a 2-anna share of this *taluk* was in the khas possession of Alfred Courjon, and the remaining 14 annas were held under the plaintiffs and Alfred Courjon. He held that no partition could be made of those lands of the estate No. 23 lying in the three villages of Deora, Bagmara and Talagao which were held separately from the lands of the other estates, as that would be a partition of a portion only of joint property; nor could the joint lands of all the estates be partitioned in the absence of the proprietors who were not parties to the suit. He also held that the holder of a subordinate tenure had no right of partition as against his superior landlord, and that, therefore, the plaintiffs, as holders of a subordinate tenure consisting of a fractional share of

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only three villages, had no right to partition against the defendants who held a higher tenure not only of those villages but also of several other villages jointly with them. He was also of opinion that even if the plaintiffs were entitled to partition, it would be impossible for any Court to carry into effect such a partition. He relied upon the decisions in *Haridas Sanyal v. Pran Nath Sanyal* (1), *Ridai Nath Sandyal v. Iswar Chandra Saha* (2), and *Parbati Churn Deb v. Ain-ud-deen* (3).

The Subordinate Judge accordingly dismissed the plaintiffs' suit.

The plaintiffs appealed to the High Court.

Dr. *Rash Behary Ghose*, Baboo *Akshya Kumar Banerjee* and Baboo *Tarit Mohun Dass* for the appellants.

Baboo *Durga Mohun Dass* and Moulvi *Seraj-ul-Islam* for the respondents.

The arguments and cases cited sufficiently appear from the judgment of the Court (NORRIS and BEVERLEY, JJ.), which was as follows:—

This is a suit for partition.

The plaintiffs are the proprietors of a 12-anna share in a certain tenure known as *taluk* Banga Chandra Das, and they allege that they are in possession of the other 4 annas of the tenure as *dur-talukdars*; but it does not appear upon the proceedings, so far as we are aware, to whom the plaintiffs pay rent on account of the 4-anna share of the *taluk*.

The *taluk* in question consists of a $7\frac{1}{2}$ annas or a $\frac{1}{3}\frac{1}{2}$ part of the rents of so much of the lands of the three villages, Deora, Bagmara and Talagao as appertain to the estate No. 23 on the *tauzi* of the Collectorate of Noakhali. It appears that estates Nos. 23, 24, 25 and 26 represent fractional shares in three parganas comprising some 500 villages. No *butwara* has been made of these parganas, but by some private arrangement, apparently, certain lands in a village have been assigned to one estate and certain other lands to another, some lands being kept common to all the four estates.

(1) I. L. R., 12 Calc., 566.

(2) 4 B. L. R., App. 57 note.

(3) I. L. R., 7 Calc., 577; 9 C. L. R., 170.

Thus the estates do not consist of entire villages, but of specific lands in certain villages and a joint interest in other lands kept *ijmali*.

It is not clearly set out in the plaint who are the proprietors of these four estates; but it is alleged that the defendant No. 1, either as zemindar or as *putnidar* or as *dur-putnidar*, is in possession of estate No. 23; and the other zemindars of that estate have been added as parties to the suit.

The plaintiffs, therefore, on the ground that they are in joint possession of the lands in suit with the defendant No. 1, ask for a partition of those lands as against him.

There is yet another complication in this intricate and curious system of tenures that must be noted. It appears that there is another permanent tenure called *taluk* Sobharan in this estate No. 23, which *taluk* consists of lands not only in the three villages in suit but in nine others. A 2-anna share of this *taluk* is in the *khas* possession of the defendant: of the other 14-anna share, a 7½-anna share is held under the plaintiffs.

The Lower Court has dismissed the plaintiffs' suit on several grounds. In the first place the Subordinate Judge has held that the plaintiffs cannot sue for partition of the lands appropriated to estate No. 23 without at the same time asking for partition of those lands that are held common to all the four estates. In the next place he has held that as subordinate *talukdars* the plaintiff cannot enforce a partition as against their landlord. The Subordinate Judge notices other forcible objections to the suit, and adds that, even if the plaintiffs were entitled to a partition, it is difficult to conceive how such partition could be carried into effect.

In appeal it has been contended before us by Dr. Rash Behary Ghose that the decision relied on by the Subordinate Judge [*Hari-das Sanyal v. Pran Nath Sanyal* (1)] is not applicable to the facts of the present case, and that there is no rule which would compel a plaintiff, when suing for a partition of lands in which he and the defendant are jointly interested, to ask for the partition of other lands in which third parties are also interested. In the case of *Padmamani Dasi v. Jagadamba Dasi* (2) it was held that the

(1) I. L. R., 12 Calc., 566.

(2) 6 B. L. R., 134.

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subject-matter of a partition must be a matter of convenience. On this point we are inclined to agree with the learned pleader for the appellants that if the plaintiffs are entitled to a decree for partition, such a decree might be made as regards the lands specified as belonging to estate No. 23 without reference to the lands that are held in common as belonging to all the four estates.

As regards the question whether the plaintiffs as permanent *talukdars* are entitled to a partition as against their landlord, Dr. Rash Behary Ghose has cited as authorities upon the point the English cases of *Hobson v. Sherwood* (1), *Heaton v. Dearden* (2), and *Baring v. Nash* (3). We are of opinion, however, that this is not a matter in which English cases decided under a wholly different system of law can afford us very much assistance. The authorities relied on by the Subordinate Judge appear to be in point, and the facts in the case of *Purbati Churn Deb v. Ain-ud-deen* (4) appear to be very similar to those in the case before us.

The plaintiffs base their claim to partition upon their joint possession with the defendant No. 1 of the subject-matter of the suit. We take it, however, that joint possession alone is not a sufficient basis for such a claim. In order that persons may be co-parceners, and so have a right to partition, it seems to us that not only must they be in joint possession of the property, but that that joint possession must be founded on the same title. We are not aware of any Indian case in which a person holding a subordinate interest in land has been held to have a right of partition as against the superior holder. In the present case the plaintiffs pay their rent to defendant No. 1, who is the *putnidar* of the $7\frac{1}{2}$ -anna share in which is the *taluk* Banga Chandra Das; he is also the zemindar of a 1-anna share, and the *putnidar* or *dur-putnidar* of the other $7\frac{1}{2}$ annas. The nature of his possession is different from that of the plaintiffs; his possession is that of a subordinate tenure-holder. Such an interest does not carry with it in our opinion the right as against the superior landlord of compelling him to partition the lands in these three villages, so as to assign to the *taluk* Banga Chandra Das an exclusive interest in certain specific lands instead of a joint undivided interest in all the

(1) 4 Beav., 184.

(3) 1 V. and B., 551.

(2) 16 Beav., 147.

(4) I. L. R., 7 Cal., 577; 9 C. L. R., 170.

lands in these villages which appertain to estate No. 23. Such a partition could only be carried out by means of a partition between the three shares of the zemindari, viz., $7\frac{1}{2}$ annas, $7\frac{1}{2}$ annas, and 1 anna; and it could not properly be carried out in respect of these three villages only, without taking into consideration the other villages comprised in the zemindari. Moreover, it is possible—and indeed it is in evidence—that there are other *taluks* in these villages that would be affected by such a partition, the holders of which have not been made parties to the suit.

For all these reasons we are of opinion that the decree of the lower Court is correct and that the plaintiffs' suit must fail.

The appeal is dismissed with costs.

C. D. P.

Appeal dismissed.

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

ABDUN NASIR AND ANOTHER (PLAINTIFFS) v. RASULAN
(DEFPENDANT No. 1).*

1892
August 30.

Relinquishment of or Omission to sue for portion of claim—Cause of action—Joint property, suits for exclusion from, and partition of—Co-sharers—Civil Procedure Code (Act XIV of 1882), section 43.

One co-sharer suing another for exclusion from joint property, and omitting to include in his claim a portion of the property of which he seeks possession, is not debarred by section 43 of the Code of Civil Procedure from suing to have the joint estate partitioned, including the portion omitted from the former suit, the causes of action in the two suits being different.

THE plaintiffs, Hakim Abdun Nasir and Mussamat Bibi Shobratur, his wife, sued for partition of a *lakheraj mehal* called Mansurpore, alleging that the former owners separated 6 bighas 2 cottahs from the lands of the entire *mausa* and made a *hiba* of the same in favour of one Buduruddin Hossein, the plaintiffs' ancestor, and then privately divided the remainder of the *mehal* into three *patis* according to their respective shares. The plaintiffs alleged that they were entitled to certain shares in each of these *patis* and also to a 12-anna share in the plot of 6 bighas

* Appeal from Original Decree No. 109 of 1891, against the decree of Baboo Jogesh Chunder Mitter, Subordinate Judge of Patna, dated the 26th of January 1891.