the mortgagor would be entitled to redeem his property on payment of what is due at the time of redemption. The amount due at the time of redemption would be the amount of principal and interest calculated down to the time of payment, and the time of payment having been extended down to the 28th February 1891, in my opinion under the terms of the agreement the mortgagee would be entitled to calculate his interest down to that time. That was the view of the parties, because the defendant did calculate his interest down to that time and did pay the whole amount, including that interest, into Court to be paid over to the plaintiffs, although he afterwards for some reason or other gave notice to the Court not to pay over the interest for the year, and it is contended before me now that he had a right to do that, because the decree of this Court when it was drawn up did not assess the extra year's interest. If this were a question of execution, there might be ground for contending that before the decree could be executed it must be amended by making a calculation and inserting the figure in the decree, but inasmuch as the defendant himself accepted that, and calculated the amount on that basis and paid it into Court for the plaintiffs, it seems to me there is no necessity now for making any further calculation of interest. The interests of justice in this case will be fully served by directing the Court to pay this amount, which was paid by the defendant for the plaintiffs, to the plaintiffs. The result is that the order will be in accordance with that proposed by Mr. Justice Beverley, and the mortgagee must get the costs.

A. A. C. *Appeal decreed.*

Before Mr. Justice Norris and Mr. Justice Beverley.

HRIDOY NATH SHAHA AND ANOTHER (DEFENDANTS) *v.* MOHOBUTNESSA BIBEE AND OTHERS (PLAINTIFFS) AND OTHERS (DEFENDANTS).*

1892 *August* 17.

Partition—Private partition—Putni of separate share—Subsequent partition under Bengal Act VIII of 1876, *section* 128—*Parties—Defendants.*

The plaintiffs were co-sharers in a certain estate, *T* being another co-sharer. In 1818 a private partition took place between the co-sharers in

* Appeal from Appellate Decree No. 1465 of 1891, against the decree of F. J. Bradbury, Esq., District Judge of Pubna and Bogra, dated the 26th day of June 1891, affirming the decree of Baboo Prosunno Comar Bose, Munsiff of Pubna, dated the 7th April 1890.

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the course of which certain specific lands were allotted to *T* in severalty, the rest remaining undivided. *T* granted a patni lease of her share to third parties who were thenceforth in possession; and subsequently there was a partition of the whole estate by the Collector under Bengal Act VIII of 1876, in the course of which the specific lands allotted to *T* in the private partition were allotted to the plaintiffs, who brought against the tenants of the land suits for rent to which they made the patnidars defendants. *Held* that the patnidars were properly made parties to the suits in order to try the question of the right to receive the rent as between the plaintiffs and the patnidars. *Kashee Ram Dass* v. *Sham Mohinee* (1), *Ahamudeen* v. *Girish Chunder Shamunt* (2), and *Mudan Mohan Lal* v. *Holloway* (3), referred to.

Held also that, assuming that the patnidars were not parties to the partition proceedings by the Collector, they were entitled to retain possession of the lands allotted to their lessor *T* in the private partition, by which partition the plaintiffs were bound, notwithstanding the subsequent partition by the Collector. *Ahmedoollah* v. *Ashruff Hossein* (4), *Obhoy Churn Sircar* v. *Huri Nath Roy* (5), and *Juggessur Doyal Singh* v. *Bissessur Pershad* (6), approved. *Byjnath Lal* v. *Ramoodeen Chowdhry* (7), distinguished.

Section 128 of Bengal Act VIII of 1876 does not apply to a case in which there has been a prior private partition; the estate in such a case not being "held in common tenancy" within the meaning of that section.

THESE six appeals arose out of six rent-suits brought by the plaintiffs, who were three of the co-sharers of a certain estate, a lady of the name of Tamizunissa Bibee being the fourth co-sharer. The estate in question was partitioned by the Collector, and lot or section No. 1 was assigned to the plaintiffs, who were put into possession of such section in Joisto 1295 B.S. These partition proceedings were commenced prior to Bengal Act VIII of 1876 coming into operation, but were completed after it came into force. In 1818 a private arrangement had been come to amongst the co-sharers, by which certain lands were assigned to the various co-sharers in severalty, other lands remaining *ijmali* or joint as before. Among the lands assigned to Tamizunissa Bibee as her share were those held by the tenant-defendants, and from that year these tenant-defendants began to pay their entire rent to her. Tamizunissa granted a patni lease of her share of the

(1) 23 W. R., 227.
(2) I. L. R., 4 Calc., 350.
(3) I. L. R., 12 Calc., 555.
(4) 13 W. R., 447.
(5) I. L. R., 8 Calc., 72.
(6) 12 C. L. R., 281
(7) L. R., 1 I. A., 106.

estate to Ramdhon Laha, and although the patni was in respect of an undivided share, it was admitted by the parties that the patnidars, the successors of Ramdhon Laha's interest, had since 1858 been in separate possession of the lands of which their lessor was in separate possession before them, and amongst others of the lands held by the tenant-defendants, who by virtue of the private partition had been in possession of these lands for 70 years. In July 1886 Tamizunissa brought the patni to sale in execution of a decree for arrears of rent, when it was purchased by the appellants, and they appear to have been in possession since their purchase by receipt of rent from, amongst others, the tenant-defendants. By the Collector's partition proceedings already referred to the lands held by the defendants were allotted to the plaintiffs' share of the estate, and the plaintiffs brought these suits for rent against the tenant-defendants, making the patnidars parties to the suit in order that the question of the tenants' liability might be decided in their presence. It did not appear whether the patnidar-appellants were parties to the partition proceedings before the Collector.

Mr. *C. P. Hill*, Baboo *Sharoda Churn Mitter*, and Baboo *Mokundo Lall Kundo* for the appellants.

Sir *Griffith Evans*, Dr. *Rashbehary Ghose*, and Baboo *Jasoda Nandan Pramanick* for respondents.

Mr. *Hill*.—The patnidars were improperly joined as parties to these suits. No decree ought to have been made against them. Advantage ought not to be taken to try questions of title by means of suits for rent. Section 128 of the Estates Partition Act has no application to the present case: *First*, because even assuming that by virtue of section 3 the provisions of that Act were made applicable to the Collector's proceedings in this case, still those proceedings are only applicable to the procedure, "so far as they relate to the continuation of a partition from the point which it has reached," and not to the results and effects of the partition. *Secondly*, because section 128 of that Act was not intended under any circumstances to apply to a case in which there has been a prior *private partition*. It is clear from the wording of sections 12, 101 and 106 of that Act, that when in accordance with a private arrangement all or any of the co-sharers are in possession of separate

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lands held in severalty, the estate is not held in "common tenancy" in the sense in which these words are used in section 128; therefore that section will not apply. If section 128 does not apply, there is nothing in the Act which interferes with the claim of the patnidars to be retained in possession. Possession given to the plaintiffs by the Collector under section 123 was possession as against the other co-sharers only, and not as against the patnidars.—*Mackenzie* v. *Shere Bahadoor Sahi* (1), *Obhoy Churn Sircar* v. *Huri Nath Roy* (2). The question before the Court is determined by *Ahmedoollah* v. *Ashruff Hossein* (3), *Obhoy Churn Sircar* v. *Huri Nath Ray* (2), and *Juggessur Doyal Sing* v. *Bissessur Pershad* (4).

Sir *Griffith Evans* for the respondents.—The patnidars were rightly joined as parties to the suit, and the lower Courts were justified in trying the question of right to receive the rent as between the plaintiffs and the patnidars. The trial of that question was necessary in order to ascertain whether the relationship of landlord and tenant between the plaintiffs and the tenant-defendants existed or not, *Kashee Ram Dass* v. *Sham Mohinee* (5), *Ahamudeen* v. *Grish Chunder Shamunt* (6). The wording of section 153 of the Bengal Tenancy Act also supports this view. As to the other question relied upon by Mr. Hill, the principle upon which the decisions appear to be based has been overruled by the Privy Council, *Byjnath Lall* v. *Ramoodeen Chowdhry* (7). A partition effected by revenue authority is binding not only for revenue purposes, but settles all questions of title in respect of the estate. Moreover, some of the cases cited by Mr. Hill are cases of a complete private partition: in such cases it may well be held that the former co-owners become separate owners of separate lands instead of undivided shares, so that no future or other partition is legally possible. But in this case the arrangement in 1818 is not shown to be in the nature of a partition, nor is it shown that it was intended to be. It was most probably only an arrangement by which for convenience the co-sharers held by consent separate and exclusive possession of certain blocks of the estate, and

(1) I. L. R., 4 Calc., 378.
(2) I. L. R., 8 Calc., 72.
(3) 18 W. R., 447.
(4) 12 C. L. R., 281.
(5) 23 W. R., 227.
(6) I. L. R., 4 Calc., 350.
(7) L. R., 1 I. A., 106.

joint possession of the rest. Such an arrangement does not in law amount to a partition, and does not form any legal bar to a subsequent complete partition, or prevent the estate being held in common tenancy, and coming under section 128, although in making a subsequent partition, it would be equitably desirable to respect existing possession so far as possible, and to allot the shares so as to disturb the old possession as little as possible. Examples of this are seen every day in the case of family dwelling-houses, in which it is usual for certain rooms to remain for a long time, by consent or arrangement, in the exclusive occupation of certain members of the family. But such exclusive occupation is never considered as a legal bar to a suit for partition. That this was the nature of the arrangement is borne out by the fact that the patni relied on purports to be a patni of an undivided share, not a patni partly of defined lands and partly of a share in undivided lands. It is an error to treat the lands as partitioned in the legal sense of the word. The original patnidars were parties to the partition proceedings, and they are bound by them. At all events there is evidence that the original patnidars were co-sharers in the estate, and the case ought to be remanded to ascertain if this was so or not.

Mr. *Hill* in reply:—In the case of *Byjnath Lall* v. *Ramoodeen Chowdhry* (1), the co-sharers were all prior to the partition in joint possession of undivided shares. The case was distinguished in *Juggessur Doyal Singh* v. *Bissessur Pershad* (2) by the learned Judges who tried the latter case. The real distinction is the fact that in the Privy Council case there had been no private partition among the co-sharers; the mortgagee took an undivided share of property in joint possession of all the co-sharers. If the mortgage had been of lands separately allotted to the mortgagor in the course of a private partition, the co-sharers could not have effected a re-distribution of the lands so as to affect the mortgage.

The judgment of the Court NORRIS and BEVERLEY, JJ.) was as follows:—

These six appeals arise out of six rent-suits that were brought by the plaintiffs under the following circumstances.

(1) L. R., 1 I. A., 106. (2) 12 C. L. R., 281.

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The plaintiffs are some of the co-sharers in a certain estate, another co-sharer being a lady of the name of Tamizunissa. It is admitted and found as a fact by both the lower Courts that in the year 1818 a private arrangement was come to amongst the co-sharers, by which certain lands were assigned to the various co-sharers in severalty, other lands remaining *ijmali* or joint as before. Among the lands assigned to Tamizunissa in her share were those held by the tenant-defendants in these six suits, and it is admitted that from that year these tenant-defendants began to pay their entire rents to Tamizunissa. In 1858 Tamizunissa leased out her share in the estate in patni, and although the lease merely purports to demise Tamizunissa's undivided share in the estate, and contains no reference to the private partition or to the lands thereby assigned in severalty to Tamizunissa, it is admitted and found that the patnidars have since 1858 been in separate possession of the lands of which their lessor was in separate possession before, and, amongst others, of the lands held by these tenant-defendants. There has thus been separate possession of these lands by virtue of the private partition for the past 70 years.

In 1861 the co-sharers appear to have applied to the Collector to make a butwarra of the estate, and that butwarra was completed in the year 1887. Meanwhile, in July 1886, Tamizunissa brought the patni to sale in execution of a decree for arrears of rent, when it was purchased by the appellants before us, and they appear to have been in possession since their purchase by receipt of rent from (amongst others) the tenant-defendants.

By the Collector's butwarra, however, the lands held by these defendants have been allotted to the plaintiffs' divided share of the estate, and the plaintiffs accordingly brought these suits for rent against the tenant-defendants, making the patnidars parties to the suit in order that the question of the tenants' liability might be decided in their presence.

The first Court decreed the plaintiffs' suit, holding that under the provisions of section 128 of the Estates Partition Act VIII of 1876 of the Bengal Council (under which Act it is admitted that the butwarra was completed), the patni held good as regards the lands allotted in the butwarra to Tamizunissa, and as regards those lands only. And finding that a portion of the rents claimed

had been realized by the patnidars, it gave the plaintiffs decrees against them for that portion, and against the tenant-defendants for the balance. These decrees have been affirmed by the District Judge.

Mr. Hill, who appears on behalf of the patnidars, who are the appellants before us, has taken several objections to the decrees of the lower Courts. In the first place he has contended that the patnidars were improperly joined as parties to these suits, and that a decree ought not to have been made against them, and he has cited certain authorities to show that advantage ought not to be taken to try questions of title by means of suits for rent. In our opinion, however, this contention fails. We think that the patnidars were properly made defendants in the suits, and that the Courts were justified in trying the question of the right to receive the rent as between the plaintiffs and the patnidars. The trial of that question was in truth necessary, in order to ascertain whether the relationship of landlord and tenant between the plaintiffs and the tenant-defendants existed or not. In this conclusion we are supported by the cases of *Kashee Ram Dass* v. *Sham Mohinee* (1), *Ahamudeen* v. *Girish Chunder Shamunt* (2), and *Madan Mohan Lal* v. *Holloway* (3), and by the wording of section 153 of the Bengal Tenancy Act.

In the next place Mr. Hill contends that section 128 of the Estates Partition Act has no application to the present case, and that for two reasons. First, he says, even assuming that by virtue of section 3 the provisions of that Act were made applicable to the Collector's proceedings in this case, and that, we may say, is found as a fact by the lower Courts, still those provisions are only applicable to the procedure "so far as they relate to the continuation of a partition from the point which it has reached," and not to the results and effects of the partition. And, secondly, he contends that section 128 is not intended under any circumstances to apply to a case in which there has been a prior private partition. As regards the first argument, we think it unnecessary to express any opinion, because for the second reason

(1) 23 W. R., 227. (2) I. L. R., 4 Calc., 350.
(3) I. L. R., 12 Calc., 555.

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advanced by Mr. Hill, we are of opinion that the section in question will not apply. The section runs as follows :—

"If any proprietor of an estate held in common tenancy and brought under partition in accordance with the provisions of this Act shall have given his share or a portion of it in patni or other tenure or lease, such tenure or lease shall hold good as regards the lands finally allotted to the share of the lessor and only as to such lands."

It seems clear from the wording of other sections of the Act (*e.g.*, sections 12, 101 and 106) that when in accordance with a private arrangement all or any of the co-sharers are in possession of separate lands held in severalty, the estate is not "held in common tenancy" in the sense in which those words are used in section 128, and that therefore that section will not apply. In truth that section follows, and was probably based upon, the decision of their Lordships of the Privy Council in *Byjnath Lal* v. *Ramoodeen Chowdhry* (1), in which the co-sharers were all prior to the partition in joint possession of undivided shares. We shall have occasion to refer to this decision later on.

If section 128 be out of the way, it does not seem that there is anything in the Estates Partition Act that will interfere with the claim of the patnidars to be retained in possession of the separate lands which they have held in severalty for so many years. It is assumed for the present that they were not parties to the butwarra proceedings before the Collector. The fact that the Collector did not allot to Tamizunissa, in accordance with section 106, the lands of which her patnidars were admittedly in possession in severalty in accordance with the private partition, will not affect the patnidars' right to retain possession of those lands. The possession given to the plaintiffs by the Collector under section 123 was possession as against the other co-sharers only, and not as against the patnidars: *Mackenzie* v. *Shere Bahadoor Sahi* (2), *Obhoy Churn Sircar* v. *Huri Nath Roy* (3).

But Mr. Hill contends that the question before us is determined by authority, and he relies upon the cases of *Ahmedoollah* v.

(1) I. L. R., 1 I. A., 106. (2) I. L. R., 4 Calc., 378.
(3) I. L. R., 8 Calc., 72.

Ashruff Hossein (1), *Obhoy Churn Sircar* v. *Huri Nath Roy* (2), and *Juggessur Doyal Singh* v. *Bissessur Pershad* (3). We think that these cases are all in point.

In the case of *Ahmedoollah* v. *Ashruff Hossein* (1), one of the co-sharers had granted a mokurrari of certain land which upon a private partition was included within his separate share. Subsequently there was a regular butwarra under Regulation XIX of 1814, and some of the land comprised within the mokurrari was allotted to the shares of others of the co-sharers. It was held that those co-sharers could not avoid or ignore the mokurrari grant, but on the contrary were bound by it. As Markby, J., said :—"It is not denied that prior to the partition by the revenue authority there had been a private partition by the sharers of the estate, and I am at a loss to conceive by what possible means a title which is good originally can be got rid of by any act to which the holder of that title is not himself a party."

In *Obhoy Churn Sircar* v. *Huri Nath Roy* (2) one of two co-sharers had leased his share in patni, and there had been a private partition of the estate between the patnidar and the other co-sharer. Subsequently upon a batwarra some of the lands held by the patnidar were allotted to the other co-sharer, but it was held that he was bound by the private partition, and could not recover those lands as against the patnidar. In that case Morris, J., said: —"Had the property continued joint—that is to say, had there been no private arrangement between the four annas plaintiff-proprietors and the twelve annas patnidar-defendants—then doubtless on the occasion of a batwarra at the instance of the plaintiffs' and the patnidars' lessor, the patnidars would be bound to follow the share assigned to the latter. But when, admittedly, an independent arrangement was made between the four annas plaintiff-proprietors and the patnidars of the twelve annas share, by which as between them the whole estate was partitioned, and this arrangement was acted on by possession following according to the partition, then I hold that the plaintiffs cannot set aside this arrangement by simply relying on a batwarra to which the patnidars were not consenting parties."

(1) 13 W. R., 447. (2) I. L. R., 8 Calc., 72.

(3) 12 C. L. R., 281.

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The case of *Juggessur Doyal Singh* v. *Bissessur Pershad* (1) is very similar to that of *Ahmedoollah* v. *Ashruff Hossein* (2). A mokurrari grant had been made of certain land, which under a private partition was in the separate possession of one of the co-sharers of the estate. Upon a subsequent partition of the estate by the Collector, some of this land fell within the divided share allotted to one of the other co-sharers, and that co-sharer sued to eject the mokurraridar. It was held that he could not avoid the grant that was made by one of the co-sharers in pursuance of the private partition.

It has been contended by Sir Griffith Evans, who appears for the plaintiffs-respondents in these appeals, that all these cases have been overruled by the decision of the Privy Council in the case of *Byjnath Lal* (3) above referred to, and that a partition effected by the revenue authorities is binding, not merely for revenue purposes, but as settling questions of title in the estate.

We are not prepared to accept this contention. The case of *Juggessur Doyal Singh* v. *Bissessur Pershad* (1) was specially distinguished from *Byjnath Lall* v. *Ramoodeen Chowdhry* (3) by the learned Judges that tried it. But the main distinction, as we take it, between *Byjnath Lall's* case and the three cases relied on by Mr. Hill, is the fact that in the former case there had been no private partition among the co-sharers. The mortgagee in that case had taken a mortgage of an undivided share of property in the joint possession of all the co-sharers, and it was held that upon partition his mortgage became a lien upon the separate divided share of his mortgagor. Had there been a private partition prior to the mortgage, and had the mortgage been of lands assigned to the mortgagor in severalty, the case would have been different. The decision of their Lordships is based on the fact that there was no privity of contract between the mortgagee and the co-sharers other than his mortgagor, but had the mortgage been of lands separately assigned to the mortgagor by a private partition, the co-sharers could not have effected a redistribution of the lands so as to affect the mortgage. The principle upon which the case of *Byjnath Lall* was decided is thus stated by their

(1) 12 C. L. R., 281. (2) 13 W. R., 447.
(3) L. R., 1 I. A., 106.

Lordships:—"It is clear that the mortgagor had power to pledge his own undivided share in these villages; but it is also clear that he could not, by so doing, affect the interest of the other sharers in them, and that the persons who took the security took it subject to the right of those sharers to enforce a partition, and thereby to convert what was an undivided share of the whole into a defined portion held in severalty."

For these reasons we are of opinion that these appeals ought to succeed, and that the plaintiffs' suits ought to be dismissed.

We have dealt with the question before us as it was argued, and as indeed it is dealt with in the judgments of the lower Courts, upon the assumption that the patnidars were other than co-sharers in the estate, and not parties to, and therefore not bound by the Collector's batwarra. It was, however, stated in argument before us that the original patnidars were themselves co-sharers in the estate, and joined in the application to the Collector for a partition. If this be so, the case assumes a totally different aspect, for we take it that the appellants before us can have no higher rights than those of the original patnidars whose interest they purchased. In that case the facts would not be very dissimilar from those in *Sharat Chunder Burmon* v. *Hurgobindo Burmon* (1), and we think that the decision in that case would be applicable.

The patnidar co-sharers, by assenting to the redistribution of the lands, must be held to have waived any rights they had under the private partition, and the more so as they omitted to assert any such rights before the Collector, in accordance with the provisions of section 106 of the Estates Partition Act. We therefore think that these cases ought to go back to the lower Appellate Court for a finding of fact, as to whether the original patnidars were also co-sharers in the estate, and whether they applied to the Collector for a partition. If this issue be found in the affirmative, the decrees of the lower Appellate Court will stand; if, on the other hand, the issue be found in the negative, the plaintiffs' suits must be dismissed for the reasons stated in this judgment. The costs in these appeals will follow the result.

Appeal allowed and cases remanded.

(1) I. L. R., 4 Calc., 510.