

## APPELLATE CIVIL.

Before Das and Ross, J.J.

JHAPSI SAO

v.

MUSSAMMAT BIBI ALIMAN.\*

1925.

Dec., 1.

*Bengal Tenancy Act, 1885 (Act VIII of 1885), section 22(2)—co-proprietor purchasing occupancy holding, whether entitled to retain possession after partition.*

Under section 22(2) of the Bengal Tenancy Act, 1885, "If the occupancy right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder, he shall be entitled to hold the land subject to the payment to his co-proprietors or joint permanent tenure-holders, of the shares of the rent which may be from time to time payable to them".

*Held*, that the privilege conferred on the purchasing co-sharer by section 22(2), in derogation of the common right of the other co-sharers, is not taken away by reason only of a partition taking place. Therefore a co-proprietor acquiring an occupancy holding by purchase is entitled to retain possession of the holding on payment of rent to his co-sharers even after the estate in which the land is situate has been partitioned among the co-proprietors.

*Babu Ram Prasad v. Munshi Gopal Chand* (1), *Nandkishore Singh v. Chanderdip Singh* (2) and *Basdeo Narain v. Radha Kishun* (3), followed.

*Rambahadur Lal v. Gungora Kuar* (4), referred to.

*Quamuddin Khan v. Ramyad Singh* (5), distinguished.

*Midnapore Zamindari Company, Limited v. Naresch Narayan Roy* (6), explained.

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\* Appeals from Appellate Decrees nos. 55, 116 and 263 of 1922, from a decision of J. F. W. James, Esq., I.C.S., District Judge of Patna, dated the 9th November, 1922, affirming a decision of Lala Tarak Nath, Subordinate Judge of Patna, dated the 30th September, 1925.

(1) (1921) 2 Pat. L. T. 169.

(2) (1922) 3 Pat. L. T. 13.

(3) (1923) 3 Pat. L. T. 22.

(4) (1925) 89 Ind. Cas. 232.

(5) (1922) I. L. R. 1 Pat. 600.

(6) (1924) I. L. R. 51 Cal. 681, P. C.

1925.

## 'Appeal by the plaintiffs.

JHAPSI SAO  
v.  
MÜSSAMMAT  
BIBI  
ALIMAN.

These three appeals were directed against the judgment of the learned District Judge of Patna affirming a decision of the Subordinate Judge in suits brought by the plaintiffs for recovery of possession of certain lands as being bakasht lands to which they were entitled as the result of a partition. Mauza Dariapur Hasan was originally an estate bearing tauzi no. 88 in the Patna Collectorate. It was first partitioned in the year 1901 and on that partition one of the takhtas created was a takhta of 14-annas 15-dams which became tauzi no. 5146. One of the proprietors of that estate was Dr. Abdulla. The record-of-rights was finally published on the 22nd of February, 1911, when the lands in suit were recorded as bakasht lands subject to the incident that they were held by the defendants by virtue of purchase on payment of a proportionate share of rent to their co-sharers; that is to say, as being held under section 22(2) of the Bengal Tenancy Act. In 1912 further partition proceedings in respect of tauzi no. 5146 began and certain orders were passed by the Board of Revenue which are referred to in the judgment of Ross, J. The share of Dr. Abdulla became tauzi no. 5146 (new) and this estate was subsequently sold to the plaintiffs. The plaintiffs brought these suits to recover possession of the lands held by the defendants. The courts below held concurrently that the lands in suit were acquired by the defendants or their ancestors by purchase. There was no finding that the lands were acquired by the defendants or their predecessors before they became co-sharers in the village. The District Judge held that on this finding the defendants were entitled to continue to possess the lands on payment of rent under section 22(2) of the Bengal Tenancy Act, and that they were not liable to be ejected from cultivating possession.

*Manuk* (with him *Sushil Madhab Mullick*), for the appellants: A co-sharer landlord cannot retain possession of land on the ground that he is recorded

in the survey record as being entitled to keep the land in his possession on payment of rent to his co-sharers. He cannot resist partition on that ground. The respondents are estopped from upsetting the partition of the Board which proceeded on the assumption that the land in dispute was bakasht land. They cannot take shelter under section 22(2) which ceases to be applicable after partition. The Judicial Committee, in *Midnapur Zamindari Co., Ltd. v. Naresh Narayan Roy* (1), clearly lays down that where a co-sharer purchases a jote right in land held in common by co-sharers, such a purchase will be held in law to be for the benefit of all the co-sharers. Section 22(2) provides for an arrangement that so long as they are co-sharers the jote will be in the exclusive possession of one proprietor; but the arrangement will not derogate from the common law right of each proprietor to get back his property after partition. The case of *Midnapur Zamindari Co., Ltd. v. Naresh Narayan Roy* (1) in terms lays down that the co-sharer cannot resist partition on the ground that he is entitled to the exclusive possession of the jote. I also rely on *Quamuddin Khan v. Ramyad Singh* (2). Section 22(2) has no application after there has been a partition because the section contemplates the existence of co-proprietors and as soon as there is no joint interest subsisting in the land, the section ceases to have operation.

1925.

JHAPSI SAO  
v.  
MUSSALIMAT  
BIBI  
ALIMAN.

*Sultan Ahmed* (with him *Hasan Jan* and *Ahmed Reza*), for the respondents: A purchasing co-proprietor has a peculiar status under section 22(2) and this status will not be disturbed by reason only of a partition having been effected. The question is concluded by *Babu Ram Prasad v. Munshi Gopal Chand* (3) which has been followed in *Nandkishore Singh v. Chanderdip Singh* (4) and *Basdeo Narain v. Radha Kishun* (5).

(1) (1924) I. L. R. 51 Cal. 681, P. C. (2) (1922) I. L. R. 1 Pat. 600.

(3) (1921) 2 Pat. L. T. 163. (4) (1922) 3 Pat. L. T. 13.

(5) (1922) 3 Pat. L. T. 22.

1925.

JHAPSI SAO  
v.  
MUSSAMMAT  
BIBI  
ALIMAN.

[DAS, J.—Does not the word “ co-proprietors ” in section 22 indicate that the purchase was for the benefit of all the co-sharers ?]

I am holding the land for the benefit of my co-sharers only to this extent that I must pay rent to them. If certain rights have vested in me before partition, they cannot be taken away by partition; if the intention of the legislature had been otherwise, there would have been an express provision to that effect. The case of *Quamuddin Khan v. Ramyad Singh* (1) related only to pure bakasht lands and I submit that the position would be quite different if, as in the present case, it is bakasht land burdened with a right to hold it subject to the payment of rent to the co-sharer-landlords. The principle of trust is applicable in so far as it relates to the payment of rent only, the co-sharers having no right to claim any interest in the land itself.

[DAS, J.—Where there is a fiduciary relationship between the parties you cannot take any advantage to yourself without giving a share in the advantage to your co-sharers.]

The question is how far that fiduciary relationship extends. I submit it only extends to their right of receiving proportionate rent from me. Even in *Quamuddin Khan v. Ramyad Singh* (1) a few exceptions have been pointed out, *viz.*, a case where there is an arrangement between the co-sharer-landlords; and section 22(2) has been expressly referred to as coming within those exceptions.

In the case of *Midnapur Zamindari Co., Ltd. v. Naresh Narayan Roy* (2) the question of section 22(2) was not raised. Moreover there is a world of difference between the status of a purchaser from the co-proprietor and that of a co-proprietor having an interest in the land after partition. The first distinguishing element is that a person entitled to retain

(1) (1922) I. L. R. 1 Pat. 600.

(2) (1924) I. L. R. 51 Cal. 631, P. C.

possession must remain a proprietor. As soon as he ceases to be a proprietor, section 22(2) has no application.

[Ross, J.—Does not section 22(2) contemplate that he should remain a co-proprietor?]

I submit not. Section 22(2) was enacted for the protection of a co-proprietor-purchaser, because even if this section had not existed the purchaser was bound to pay the proportionate share of rent as the tenant had been doing.

*Manuk*, in reply: There is no difference between a co-proprietor who voluntarily transfers his right and a person who by operation of law is compelled to transfer his right.

[Ross, J.—A purchasing co-sharer acquires a privilege under section 22(2) in derogation of the common law. What is there to take away that privilege after partition?]

The fact that he ceases to be a co-sharer-landlord. The Privy Council says that he is in a less favourable position than an outsider-purchaser.

[Ross, J.—After partition he might become a tenant, but how can partition give you any title?]

The privilege acquired by virtue of section 22(2) in derogation of my common right continues so long as the purchaser remains a co-proprietor.

[DAS, J.—The holdings which the co-proprietor purchases cannot form the subject-matter of partition because technically there is no proprietary interest.]

But the Privy Council in *Midnapur Zamindari Co., Ltd. v. Naresh Narayan Roy* (1) has held that the co-sharer cannot resist partition on the ground that he is entitled to the exclusive possession of the jote.

[Ross, J.—What the Privy Council says is that a landlord cannot prescribe against his co-sharer. He cannot be allowed to acquire an occupancy right as against his co-sharer-landlord.]

It goes further than that.

S. A. K.

*Cur. adv. vult.*

1925.

JHAPSI SAO  
v.  
MUSSAMMAT  
BIBI  
ALIMAN.

1925.

JHAPSI SAO

v.

MUSSAMMAT

BIBI

ALIMAN.

ROSS, J.

Ross, J. (after stating the facts set out above, proceeded as follows): The contentions on behalf of the plaintiffs-appellants are, first, that the defendants are estopped by the judgment of the Board of Revenue in the partition proceedings from claiming to retain possession of these lands; secondly, that the claim of the defendants is virtually one contesting the allotment made by the Board of Revenue and cannot be entertained under section 119 of the Estates Partition Act; and, thirdly, that the acquisition of these holdings by the defendants as co-proprietors was an acquisition for the benefit of all the proprietors and that they were not entitled to retain possession of the lands after partition of the estate, the plaintiffs' remedy against exclusive possession by any co-sharer being a suit for partition. The first two contentions do not call for any detailed consideration. It is true that the defendants gave up their claim, that these lands were raiyati lands, in the partition proceedings, and that the lands were allotted as bakasht lands by the Board of Revenue in order to equalize the amount of bakasht lands held by the different proprietors in the different takhtas; it is true that the judgment of the Board of Revenue shows that the allegation that the lands were raiyati lands was not pressed before the Board; but there is nothing to show that the defendants gave up the position recorded in the record-of-rights that they held the lands under section 22(2). The order of the Board of Revenue was that if the arrangement suggested in the judgment could be made without any valid objection, effect should be given to it; otherwise the existing arrangement would have to stand. It appears that effect was given to the arrangement suggested and the partition was confirmed. Subsequently it was brought to the notice of the Revenue authorities that there had been a misunderstanding and that the lands which were allotted as bakasht were not lands of which direct possession could be given. But as the partition had been confirmed, nothing resulted from these subsequent proceedings except certain pious observations. The contention of the learned Counsel for the

1925.

JHAPSI SAO  
v.  
MUSSAMMAT  
BIBI  
ALIMAN.  
ROSS, J.

appellants is that the judgment of the Board of Revenue gave them a clear title to direct possession of these lands and that the subsequent proceedings were ultra vires. The subsequent proceedings were without any effect and did not purport to effect anything. But the judgment of the Board of Revenue, whether due to a misunderstanding or not, could not take away any title to the possession of these lands which was in the defendants, and did not purport to do so. Strictly speaking all that it declared was that the lands were bakasht lands, and this is not denied. But whether they were bakasht lands of which direct possession would be given to the proprietor of the takhta in which they were situated on partition is another question altogether and is unaffected by the judgment of the Board of Revenue. Nor do I see how section 119 of the Estates Partition Act can assist the appellants. That is a section which bars certain suits and it is not available to the plaintiffs in these actions; and to argue that the defence is in effect contesting the allotment made by the Board of Revenue is in my opinion begging the question at issue.

The main argument on behalf of the appellants rests on certain observations of the Judicial Committee in *Midnapore Zamindari Co., Ltd. v. Naresh Narayan Roy* (1) where it is said that partition is the remedy which a co-owner has if he and his other co-owners cannot agree as to how the lands which they hold in common should be managed; and, further, "If the Midnapore Company has in fact been cultivating any of these lands, it cannot, by such separate use of the lands, have acquired any jote rights in them. Even if the Midnapore Company purchased any jote rights in lands held in common by the co-sharers, such a purchase would in law be held to have been a purchase for the benefit of all the co-sharers and the jote right so purchased would by the purchase be extinguished". Now this general statement of the law must be read subject to the provisions of

1925.

JHAPSI SAO  
v.  
MUSSAMMAT  
BIBI  
ALIMAN.  
ROSS, J.

section 22(2) of the Bengal Tenancy Act, where the consequences of the purchase of an occupancy holding by a person jointly interested in the land as proprietor are enacted. Learned Counsel relies on the language of that sub-section and contends that if it be construed strictly it has no application after partition occurs. The section enacts that a co-proprietor acquiring an occupancy right in land

“ shall be entitled to hold the land subject to the payment to his co-proprietors.....of the shares of the rent which may be from time to time payable to them.”

He argues that as from the moment of partition there are no longer any co-proprietors, the sub-section ceases to have any operation; and the land must be treated as ordinary bakasht land falling to the direct possession of the proprietor of the takhta to which it is allotted. In principle I do not see why this consequence should ensue. Section 22 (2) confers a privilege on the purchasing co-sharer which is in derogation of the common law right of the other co-sharers as stated in the judgment of the Judicial Committee quoted above. I do not see what there is in partition to take away that privilege. On the contrary it would appear that the partition only removes the necessity for the limitation on the effect of the purchase and would set free the holding to be operated upon by the ordinary provisions of the law. In other words, section 22(2) imposes a limitation on the rights of the co-sharers for the benefit of the purchasing co-sharer; and there is no reason why this limitation should be removed by reason only of a partition taking place. That no undue stress is to be laid on the word “ co-proprietors ” in the sense contended for by the appellants would appear from the decision of this court in *Bambahadur Lal v. Gungora Kuar* (1) where the status conferred by section 22(2) was discussed and it was held that the status created was a peculiar status which attached to the co-sharer so long as he remained a co-sharer; it was held that when the co-sharer parted with his interest in the estate he lost the right to retain land



under that section. But in referring to the decisions where it had been held that on partition the purchasing co-sharer was entitled to retain possession of land recorded in his name under section 22(2) of the Bengal Tenancy Act, Kulwant Sahay, J., said, "In these cases the interest of the co-sharer who had purchased the holding did not cease; he continued to be the proprietor after the partition and hence it was held that he was entitled to retain possession". His right to possession was therefore not limited to the period of the co-proprietorship but continued because the co-proprietor continued to be proprietor (though of another takhta) after the partition. The authorities bearing directly on the question are conclusive in favour of the respondents. In *Babu Ram Prasad v. Munshi Gopal Chand* <sup>(1)</sup> the precise question now under consideration was dealt with and it was held that the defendants could not be ejected from such lands upon partition; and that the legislature never intended nor did the language of section 22(2) give rise to the interpretation that the co-proprietor acquiring an occupancy holding by purchase, although entitled to retain possession on payment of rent to his co-sharers, must give it up the moment the estate in which the land is situate is partitioned among the co-proprietors. The same view was taken in *Nandkishore Singh v. Chanderdip Singh* <sup>(2)</sup> where the argument that the purchasing co-proprietors ceased to be co-proprietors after the partition, and that the partition effected a complete change in the status, was dealt with and was negatived. A similar view was taken in *Basdeo Narain v. Radha Kishun* <sup>(3)</sup>, a case which dealt with section 22(2) of the Act as it stood before the amendment in 1907. In that case their Lordships observe as follows: "Now if this be correct, something must happen subsequent to the acquisition of the holding by the co-sharer-landlord to put an end to the holding. It is suggested that the partition between the co-sharer-landlords puts an

1925.

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JHAPSI SAO  
v.  
MUSSAMMAT  
BIBI  
ALEMAN.  
ROSS, J.

(1) (1921) 2 Pat. L. T. 168.

(2) (1922) 3 Pat. L. T. 13.

(3) (1922) 3 Pat. L. T. 22.

1925.

JHAPSI SAO

v.

MUSSAMMAT

BIBI

ALIMAN.

ROSS, J.

end to the holding; but in my judgment there is no foundation for this argument in the Bengal Tenancy Act and we have not been referred to any cases which support the argument put before us by the learned Vakil appearing on behalf of the respondents". Learned Counsel for the appellants relied on the decision in *Quamuddin Khan v. Ramyad Singh* (1) as laying down a different principle. Now that case was expressly decided on the ground that it was not a case under section 22(2) of the Bengal Tenancy Act, and the decisions referred to above, which were considered, were not dissented from but were distinguished precisely on that ground. The lands in that case were treated as ordinary bakasht lands of the maliks without more, which on partition would necessarily go to the proprietor of the takhta to which they were allotted.

On the principle and on authority I am of opinion that the decision of the learned District Judge in this case was correct and that these appeals should be dismissed with costs.

DAS, J.—I agree.

*Appeals dismissed.*

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### PRIVY COUNCIL.

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1925.

Dec., 2.

RAO BAHADUR MAN SINGH

v.

MAHARANI NOWLAKHBATI.\*

*Hindu Law—Widows' Estate—Surrender to Reversionary Heirs—Reservation of Maintenance Allowance—Widows Disqualified Proprietors—Invalidity of Deed of Surrender—Court of Wards Act, 1879 (Ben. Act IX of 1879), section 60.*

The two widows of a Hindu who were in possession of his property for a joint widows' estate were declared in 1907 to be disqualified proprietors under the Court of Wards Act,

\* PRESENT: Lord Shaw, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.