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parties to the present suit and they make no claim, it cannot be said that the plaintiff is disqualified from claiming to recover this property.

I would affirm this part of the decision of the Subordinate Judge and dismiss the appeal with costs. For the purpose of assessment of costs in this Court and in the court below the hearing fee of Rs. 100 will be taken as the hearing fee.

JAMES, J.

The appeals are thus dismissed except that the decree of the Subordinate Judge must be amended so far as it describes the amount of costs to which each party is entitled and which each party is liable to pay.

AGARWALA, J.—I agree.

Appeals dismissed.

APPELLATE CIVIL.

Before Courtney Terrell, C.J. and Kulwant Sahay, J.

MAHADEO PRASAD SINGH

v.

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Dec. 21.

Estates Partition Act, 1897 (Ben. Act V of 1897), sections 77 and 99—estate held in common tenancy—bakasht lands held in severalty in pursuance of private partition—mukarrari of bakasht land in exclusive possession by one of the co-sharers without the concurrence of others—collectorate partition—mukarrari land allotted to other co-sharers—such co-sharers, whether entitled to take the land free of mukarrari—section 99, whether applicable—bakasht lands held by several proprietors, whether deemed to be land held in severalty—section 77—Patna High Court, decisions of, whether ought to be followed by subordinate courts in preference to decisions of other High Courts.

* Appeal from Appellate Decree no. 279 of 1930, from a decision of F. F. Madan, Esq., I.C.S., District Judge of Muzaffarpur, dated the 10th August, 1929, confirming a decision of Babu Priya Lal Mukherji, Munsif of Muzaffarpur, dated the 20th April, 1929.

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Where an estate was held in common tenancy but the bakasht lands were held in severalty in pursuance of a private partition between the co-sharers and on collectorate partition a parcel of the bakasht land, which was encumbered by one of the co-sharers without the concurrence of the others, was allotted to such others.

Held, that section 99 of the Estates Partition Act was applicable and that, therefore, the mukarraridar could not resist a suit for khas possession brought by the co-sharers to whose new estate the bakasht land had been allotted.

Madho Lal v. *Mahadeo Rai*(1), *Niranjan Mukherjee* v. *Soudamini Dassi*(2) and *Basiram Saha Roy* v. *Ram Ratan Roy*(3), followed.

Hridoy Nath Shaha v. *Mohobutnessa Bibee*(4), *Prosanna Kumar Bedanta Tirtha Bhattacharjya* v. *Madhu Badya*(5) and *Bama Charan Kar* v. *Pyari Mohan Gantam*(6) not followed.

Held, further that under section 77 of the Act the bakasht lands held in the occupation of the several proprietors of the estate cannot be deemed to be land held in severalty and that the Butwara Officer was not bound to allot these lands to the proprietor in whose separate possession he found these lands under a private arrangement.

Bahuria Janakdulari Kuer v. *Bindeshwari Gir*(7), followed.

Where there is a direct decision of the Patna High Court on any particular point, courts subordinate to it are bound by that decision and ought to follow it in preference to a contrary decision of any of the other High Courts on the same point.

Appeal by the plaintiffs.

The facts of the case material to this report are set out in the judgment of Kulwant Sahay, J.

A. D. Patel and *Harnarayan Prasad*, for the appellants.

(1) (1928) A. I. R. (Pat.) 202.
(2) (1926) I. L. R. 53 Cal. 694, F. B.
(3) (1927) I. L. R. 54 Cal. 586, P. C.
(4) (1891) I. L. R. 20 Cal. 285.
(5) (1922) 68 Ind. Cas. 500.
(6) (1925) 87 Ind. Cas. 581.
(7) (1920) 5 Pat. L. J. 456.

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Sir Sultan Ahmed and *Gurdayal Sahai*, for the respondents.

KULWANT SAHAY, J.—This appeal by the plaintiffs arises out of a suit for recovery of possession of 3 bighas 16 kathas of zerait or bakasht lands included in the allotment made to the plaintiff in a Collectorate partition, the defendants-second-party claiming to hold it as mukarraridars under a mukarrari deed executed in their favour by the co-sharer of the plaintiffs before the partition.

The facts are shortly these: The entire 16-annas of village Rupnath Chapra, tauzi no. 18235 of the Muzaffarpur Collectorate, belonged to Kalar Singh, the father of the first defendant. Kalar Singh sold a 4-annas share out of his 16-annas share in the tauzi to one Bechu Singh in the year 1903. Bechu Singh in turn sold this 4-annas share to the plaintiffs on the 21st December, 1917. On the 13th of September, 1919, the defendant no. 1, who was the joint co-sharer with the plaintiffs in respect of a 12-annas share, granted a mukarrari to the defendants-second-party of 4 bighas of the bakasht lands appertaining to his 12-annas share. In the year 1921 there was a Collectorate partition of the tauzi and a separate allotment was made to the plaintiffs as representing their 4-annas share in the tauzi and this was formed into a separate estate bearing tauzi no. 24691. Out of the bakasht land which was granted in mukarrari to the defendants-second-party by the first party, 3 bighas 16 kathas was included in the allotment to the plaintiffs. The plaintiffs instituted the present suit for recovery of direct possession of this 3 bighas 16 kathas on the allegation that they were not bound by the mukarrari and were entitled to take the land unencumbered with the mukarrari.

The defence was that before the Collectorate partition there was a private partition of the bakasht lands amongst the proprietors under which the defendant no. 1 was holding the 4 bighas in dispute in

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severalty and that the mukarrari granted by him under those circumstances was binding on the present plaintiffs.

Both the courts below have found as a fact that there was a private partition amongst the co-sharer maliks and the learned District Judge has observed that no dispute was raised on appeal that the bakasht lands of the tauzi had been in separate possession of the parties by private arrangement. The question upon this finding is whether section 99 of the Estates Partition Act (Bengal Act V of 1897) applies. If this section applies there can be no doubt that the plaintiffs are entitled to direct possession.

Section 99 provides:

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

It is contended on behalf of the appellants that the estate in question was held in common tenancy between the plaintiffs and the first defendant before the Collectorate partition and that the mukarrari given by the first defendant to the defendants-second-party shall hold good only as regards the bakasht land finally allotted to the share of the first defendant under the Collectorate partition and not to the land allotted to the plaintiffs. On the other hand, it has been contended on behalf of the respondents that although the estate was held in common tenancy yet the bakasht lands were held by the proprietors in severalty and, therefore, section 99 has no application to the present case.

The question was considered by this Court in *Madho Lal* v. *Mahadeo Rai*(1). In that case also it had been found by the lower appellate court that there

(1) (1928) A. I. R. (Pat.) 202.

had been a private arrangement between the defendant-first-party and the defendant-second-party under which the former was in possession of the joint bakasht lands and the latter was in possession of the joint raiyati lands. The plaintiffs in that case had taken a settlement of the disputed lands from the defendant-second-party which on partition was allotted to the defendant-first-party. Das, J. in dealing with this point observed as follows: "It is well settled that a co-sharer has no right to deal with joint property in such a way as to affect the rights of the other co-sharers. * * * * The disputed lands have fallen to the takhta of the defendants-first-party and I can see no ground whatever for holding that the defendant-first-party would have this encumbrance on their property. The case rests on a principle and is covered by authorities. It is not necessary to refer to all the authorities; it will be sufficient for us to refer to a decision of the Full Bench of the Calcutta High Court in *Niranjan Mukharji* v. *Soudamini Dasi*(1) where it was pointed out that a person to whom a parcel of land has been allotted by a decree for partition of a civil court does not take it subject to a permanent lease granted by his former co-owners without his concurrence when the land was the joint property of all the co-sharers". The learned Judges composing the Full Bench in the Calcutta case referred to above considered a number of decisions where the question had arisen and held that the equitable principle laid down by the Privy Council in *Byjnath Lall* v. *Ramoodeen*(2) applied to such cases and was recognized by the Legislature in Section 99 of the Estates Partition Act. The decision of this Court referred to above was cited before the learned District Judge in the present case but he refused to follow it as he doubted its correctness, and he referred to the decisions of the Calcutta High Court in *Hridoy Nath Shaha* v. *Mohobutnessa Bibee*(3), *Prosanna Kumar*

(1) (1926) I. L. R. 53 Cal. 694, F. B.
(2) (1874) L. R. 1 I. A. 106; 21 W. R. 233.
(3) (1891) I. L. R. 20 Cal. 285.

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Bedanta Tirtha Bhattacharjya v. *Madhu Badya*(1) and *Bama Charan Kar* v. *Pyari Mohan Gantam*(2). In my opinion when there is a direct decision of this Court on any particular point courts subordinate to this High Court ought to follow that decision in preference to a contrary decision of the other High Courts on the same point. In fact, the decision of a Division Bench of this Court is binding not only on the subordinate courts but also on the other Division Benches of this Court so long as that decision is not overruled by a Full Bench of this Court or on appeal by the Privy Council.

However, the view taken by this Court is supported by a ruling of the Judicial Committee in *Basiram Saha Roy* v. *Ram Ratan Roy*(3) and this decision has in effect overruled the Calcutta decisions referred to by the learned District Judge. There the zamindari in question which was of a very great extent and was owned by about 300 proprietors was brought under partition and formed into 28 different estates. Some of the proprietors had granted patnis in respect of specific villages comprised within the zamindari as forming their shares in the zamindari. The question was whether the proprietor, to whose new estate formed under partition some of the patni leases had fallen but who had not himself created those patni leases, was bound by those leases, or whether he was entitled to take possession thereof free of those patni leases. Lord Phillimore in delivering the judgment of the Judicial Committee referred to sections 4, 7 and 99 of the Estates Partition Act and held that although some of the villages comprised in the zamindari were held by some of the proprietors exclusively that did not amount to holding the zamindari in severalty. Referring to the view taken by the High Court His Lordship observed "It is a view that there is some *tertium quid* between common

(1) (1922) 68 Ind. Cas. 500.
(2) (1925) 87 Ind. Cas. 581.
(3) (1927) I. L. R. 54 Cal. 586, P. C.

tenancy and several holding, and that when this *tertium quid* exists, if any formal partition supervene, it does not affect or interfere with the arrangement under which land-owners who are in some respects still tenants in common may yet have specific shares of the estate allotted to their exclusive enjoyment. The Act does not apparently contemplate any such cases as being possible". In this view of the case it is not necessary to consider the decision of the Calcutta High Court relied upon on behalf of the respondents and referred to by the learned District Judge, and I am of opinion that section 99 applies and the plaintiffs are entitled to take direct possession of the land in dispute.

There is another ground upon which the plaintiffs are entitled to succeed in the present case. Section 77 of the Estates Partition Act provides:

"Whenever the Deputy Collector who is appointed to carry out a partition finds that, in pursuance of a private arrangement formally made and agreed to by all the proprietors of an estate, the proprietors respectively, or any of the proprietors, are in possession of separate parcels of land held in severalty as representing portions only of their respective interests in the parent estate, while other land of the parent estate is held in common tenancy between such proprietors, then, notwithstanding anything contained in section 7, a joint application shall not be required, and the Deputy Collector shall allot to the separate estate of each proprietor the land of which such proprietor is found to be in possession in severalty in accordance with such private arrangement."

There is, however, an exception provided for in the explanation to this section, which says that lands held in the occupation of the several proprietors of an estate as *sir*, *khamar* or *nij-jote* shall not be deemed to be land held in severalty within the meaning of this section. The lands in question in the present case come within the denomination of *sir*, *khamar* or *nij-jote* and, therefore, the Deputy Collector was not bound to allot these lands to the proprietor in whose separate possession he found those lands under a private arrangement. This fact takes away the present case from all the Calcutta cases referred to by the learned Advocate for the respondents. This

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view is supported by the decision of Mullick and Sultan Ahmed, JJ. in *Baburia Janakdulari Kuer* v. *Bindeswari Gir*(1).

I, would, therefore, set aside the decree of District Judge and decree the suit for possession of the land claimed. The plaintiffs are also entitled to mesne profits as claimed the amount of which will be determined by the first court on a proper application being made therefor. The appellants are entitled to their costs throughout.

COURTNEY TERRELL, C.J.—I agree.

Appeal allowed.

PRIVY COUNCIL.

J. C.* 1934.

Feb. 2.

KAMTA SINGH

v.

CHATURBHUJ SINGH.

On Appeal from the High Court at Patna.

Mortgage—Discharge of Mortgage—Suit for Contribution —Plaint—Claim based on registered Mortgage verbally varied —Transfer of Property Act (IV of 1882), sections 59, 82.

The appellants having paid off a mortgage on land which they had purchased sued the respondents for contribution in accordance with section 82 of the Transfer of Property Act, 1882, alleging that land purchased by the respondents from the mortgagors was also subject to the mortgage. By their plaint the appellants set out a registered mortgage deed covering the respondents' land, but stated that its terms had been verbally varied. The respondents by their written

* PRESENT: Lord Tomlin, Lord Russell of Killowen, and Sir Lancelot Sanderson.

(1) (1920) 5 Pat. L. J. 456.