

1869

J. B. HULLEN  
v.  
LALIT JHA.

appears to us very probable that this petition was put in, in the attempt to get possession, but be that as it may, we cannot overlook the fact which has been found on the evidence, that the tenant has not been put in possession. Following therefore the decision in *Hurish' Chunder Koondoo v. Mohinee Mohan Mitter* (1), which has already been followed by us in another case, we reverse the decision of the Judge, restore that of the first Court, and decree this appeal with all costs payable by the special respondents.

Before Mr Justice Norman and Mr Justice E Jackson,

RANI SAMASUNDARI DEBI (PLAINTIFF) v. MESSRS. JARDINE  
SKINNER AND OTHERS (DEFENDANTS) \*

*Joint Ownership—Partition—Costs.*

1869  
July 13.

IN CASE of joint ownership each party has a right to demand and enforce partition. A shareholder of a Patni Talook can claim and enforce a partition of such Patni Talook as against his co-sharers, but such partition would not affect the liabilities of the parties under their contract with the zemindar.

The costs of the suit as well as for effecting a partition must be borne by each party, as such expenses are not caused by any wrongful act of either party, but by the nature of their tenancy.

Baboo *Srinath Das* and *Mohini Mohan Roy* for appellant.

Mr R. T. *Allan* and Baboo *Bhairab Chandra Banerjee* for respondent.

THE facts sufficiently appear in the judgment of

NORMAN, J.—The plaintiffs hold under a patni lease 13as. 6g. 2c. 2k. of an estate called Taraff Kusba in Rajshahye; and the defendants under a distinct patni granted by co-harers in the zemindari entitled to such fractional share, hold 2as. 13g. 1c. 2k in the same estate Taraff Kusba. The plaintiff sues for partition, alleging that she has suffered inconvenience and loss in consequence of the defendants' attempts to enforce the cultivation on indigo.

The first Court decreed a partition. The Judge reversed this order and dismissed the suit. From this decision the plaintiff appeals. Several cases were referred to by the Judge and one not noticed by him was cited before us: *Banimadhub Bose v. Pearee Lal Mundul* (2); *Mathur Chunder Kurmohar v. Manik Chunder Bungo* (3); *Oomesh Chunder Shaha v. Manick Chunder Bonick* (4); *Gouri Sankar Roy v. Anand Mohan Moitro* (5).

Special Appeal, No. 1581 of 186<sup>3</sup>, from a decree of the Judge of Rajshahye, dated the 13th March 1868, reversing a decree of the Judge of the Small Cause Court exercising the power of Principal Sudder Ameen of that district, dated the 19th September 1867.

(1) 9 W. R., 582.

(4) 8 W. R., 123.

(2) S. D. A. Rep., 1863, 536.

(5) 9 W. R., 478.

6 W. R., 192.

The Judge attempts to distinguish the present case from those cited on the ground that the parties here are particulars. But we think it may be laid down broadly that in all cases of joint ownership each party has a right to demand and enforce partition; in other words a right to be placed in a position to enjoy his own right separately and without interruption or interference by others; see Spence's Equitable Jurisdiction, Vol. 1, page 653; Story's Equity Jurisprudence, Sections 648-649.

The zemindars have nothing to do with this question. They have been made defendants, and had they merely appeared for the protection of their own interests, they would have been entitled to their costs. Those who have appeared and opposed the partition must bear their own costs. The partition will of course not affect the liabilities of the parties under their several contracts with the zemindars. The decision of the lower Appellate Court must be reversed. The respondents must pay the costs of the appeals in the lower Appellate Court and in this Court. The case must be remanded to the first Court, in order that an Ameen may be appointed to survey and make a partition as between the plaintiffs and the defendants; on the Ameen making his report, either party will be at liberty, if dissatisfied to except to it in the usual way.

The costs of the suit in the first Court and of the partition are the necessary expenses of obtaining a partition by a decree of Court caused not by any wrongful act of the defendants, but by the nature of the tenancy, viz., a tenancy of an undivided share of an estate. The plaintiff for her own advantage, convenience, and security is desirous of exercising her right of exchanging her undivided share for an equivalent share of that estate to be held in severalty. The defendants hold subject to the plaintiff's right to demand such partition. The plaintiff and principal defendants must therefore each bear their own costs of the suit in the first Court, and the costs of the partition will be divided between the parties in proportion to their respective shares in the estate.

*Before Mr. Justice L. S. Jackson and Mr. Justice Markby.*

GORACHAND GOSWAMI AND OTHERS (PLAINTIFFS) *v.* RAGHU  
MANDAL AND OTHERS (DEFENDANTS)\*

*Act VIII. of 1859, s. 119—Appeal—Ex parte Judgment.*

Section 119, Act VIII. of 1859, does not apply to a defendant who is only absent on an adjourned hearing. It relates only to one who has never appeared.

Baboo *Banshidar Sen* and *Gris Chandra Mookerjee* for appellant.

Baboo *Krishna Sakhu Mookerjee* and *Nilmadhab Sen* for respondent.

\* Special Appeal, No. 169 of 1869, from a decree of the Judge of West Burdwan, dated the 3rd November 1868, reversing a decree of the Moonsiff of that district, dated the 14th May 1868.

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RANI SAME  
SUNDARI DEBI  
*v.*  
MESSR. JAR-  
DINE SKINNER

1869  
July 15.