CASES

DETERMINED BY

THE HIGH COURT OF JUDICATURE,

AT FORT WILLIAM IN BENGAL,

IN ITS

APPELLATE JURISDICTION.

CIVIL.

Before Mr. Justice L. S. Jackson and Mr. Justice Miller.

GIRISHCHANDRA ROY CHOWDHRY AND OTHERS (DEFENDANTS) *v.* RAJCHANDRA ROY CHOWDHRY AND OTHERS (PLAINTIFFS.)* 1863 *Sept.* 9.

Revenue Courts—Jurisdiction—Evidence—Res adjudicata.

A. died leaving four sons, B., C., D., and E., by a wife deceased; and a widow K., and three other sons, F., G., H., by her. K. brought a suit against B., C., D., and E., and against her three sons, F., G., and H., to establish her title to a certain talook which she alleged had been conveyed to her by A. under a deed of gift. B., C., D., and E., set up a prior deed of partition, whereby the property of the deceased, including this talook, was divided between all his sons in the proportion of 10 annas to B., C., D., and E., and 6 annas to F., G., and H. The High Court, on appeal, held, that the deed of partition was genuine, and rendered the subsequent deed of gift inoperative. Afterwards B., C., D., and E., instituted a suit in the Collector's Court for arrears of rent in respect of another talook, also included in the deed of partition, against the ryots, and F., G., and H. The ryots admitted that they held at the rent claimed, but stated they had not paid their rent on account of a dispute between the brothers as to the shares in which they were entitled to the same. F., G., and H., raised the plea that the suit could not be maintained in the Collector's Court; that in the Civil Court should be brought for the determination of their shares, and that decision in the prior suit was no evidence against them. *Held* the question was really one of title between the brothers, and such suit could not be maintained in the Revenue Courts.

THIS was a suit under Act X. of 1859 for arrears of rent.

* Special Appeal, No. 102 of 1868, from a decree of the Judge of Dacca, affirming a decree of the Deputy Collector of that district.

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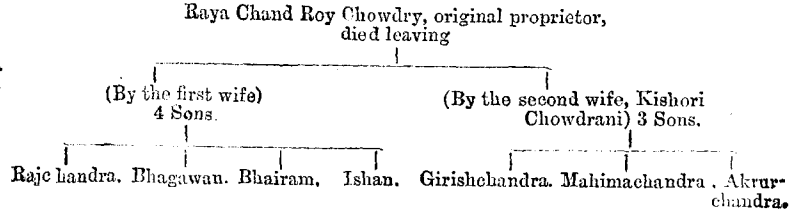
The following genealogical table will explain the relation of the contending parties:



The present suit arose out of the following circumstances:

Raya Chand was alleged to have executed, on the 3rd Magh 1267 (15th January 1861) a deed of partition, in which he set forth his intention of dividing the whole of his property, both real and personal, between the sons of the two marriages, in shares of 10 and 6 annas respectively, the sons of the first marriage getting 10, and those of the second 6. On the death of Raya Chand in Phalgun 1271 (February 1865), his second wife, Kishori, applied to the Collector of Mymensing, to have her name registered as owner of Talook Amjani Digar, which she alleged was conveyed to her by her deceased husband, under a Hibba (deed of gift) dated the 26th Bhadra 1270 (10th September 1863). In that case, the four sons of Raya Chand, by his first wife, appeared as objectors to the claim of Kishori, whose application was rejected by the Collector on the 23rd of April 1864. She then brought a civil suit against Girishchandra, Mahimachandra, and Akrurchandra (her three sons), and Rajchandra and his three uterine brothers, to establish her title to the aforesaid talook, on the basis of that deed of gift. The Zilla Judge dismissed her suit, and she preferred a regular appeal (1) to the High Court, which was also dismissed on the 11th March 1867. The judgment of Trevor and Glover, JJ., was as follows: "We come now to the appeal of the plaintiff, and the issue raised by it is this—As the Hibba of 26th Bhadra 1270 (10th September 1863) is proved, had anything previously occurred to prevent its operation? or, in other words, had Raya Chand previously divested himself of the property conveyed in it under the partition deed of 1267 (1861)? Now the *onus* of proving that he had so divested himself, will lie on the defendants. Now, the deed of 1267 (1861), which is the found-

(1) No. 230 of 1866.

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tion of the defendants' case, is not contested before us. Both the plaintiff and the defendants admit that the Mahajani properties were divided in the shares of 10 and 6 annas, shortly after the deed of 1267 (1861) was executed, namely in the following year. . . . . The only contest is as to the real property. To prove that partition was equally effected in respect of the zemindaries, the defendants have put in a quantity of documentary evidence, at the head of which are certain schedules called Batwara papers, in which all the real property of Raya Chand is set down, and divided in the shares of 10 and 6 annas. These lists purport to have been signed by the donor, and if proved, they go a long way to establish the defendants' case." (Those Batwara papers were found, as a fact, to be genuine, for reasons given in the judgment.) "We think that the deed of gift propounded by the plaintiff is a genuine deed, executed by Raya Chand; and that the plaintiff, Kishori, would be entitled to recover upon it, had the property covered by the deed remained at the time of its execution in the possession of the donor; but, on the whole evidence we are of opinion, that after the execution of the partition deed of 1267 (1861), Raya Chand divided all his property between the sons of the two marriages, in the proportion of 10 and 6-anna shares; that he signed and delivered the schedules propounded by the defendants, and by their delivery divested himself of all the right in the real property, in the same way as he had divested himself of all right in the personal property; that in accordance with this partition, the defendants got possession of a 10-anna share in Mauza Amjani Digar, and that therefore the deed of gift of that entire property, executed subsequently in the plaintiff's favor in 1270 (1863) was, by previous acts, rendered inoperative, and conveyed to the plaintiff nothing."

The present suit was brought by Rajchandra and his three uterine brothers, for recovery of arrears of rent, from 1271 to 1273 (1864—1866), in respect of their 10-anna share of the lands held by the tenants, defendants, in talook Sheikh Suliah. The shareholders and co-owners with the plaintiffs were also made defendants. The plaintiffs alleged that, by virtue of a deed of partition dated the 3rd Magh 1267 (15th January 1861)

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and the Batwara papers of 1268 (1861), which were executed by their deceased father, and declared valid by the decision of the High Court, on the 11th March 1867, they (the plaintiffs) were entitled to, and were also in possession of, a 10-anna share of the lands, the rent of which was claimed; and that the co-sharers, defendants, Girishchandra and others, were entitled to the remaining 6 annas; and that the ryots held these lands at an annual jumma of Rs. 144-8. The ryots, defendants, admitted that they held the lands in question at the rent alleged, which was not paid, simply on account of a disagreement having broken out between the plaintiffs and the defendants, Girishchandra, &c., as to the shares to which they were respectively entitled. They alleged that they were willing to pay the amount of rent which was legally due from them.

The shareholders, defendants, Girishchandra and others, raised the defence that save in a civil action there is no law which allows co-sharers to be made defendants in a suit for recovery of arrears of rent. The plaintiffs should have first instituted a civil suit, for the determination of their shares. The decision of the High Court, which formed the basis of the present action, could not be used as evidence against the defendants, co-sharers, nor was it a binding declaration of their rights. The question of the respective shares of the parties arose incidentally in the previous suit, and was not conclusively adjudicated upon. The main point at issue there, was whether Kishori was entitled to Talook Amjani Digar, under an alleged deed of gift from her husband. The defendants further alleged, that on the 30th Ashar 1270 (13th July 1863), the whole estate of their father was equally divided by him between his sons by the two marriages, and that by virtue of this partition they (the defendants), as well as the plaintiffs, were respectively in possession of 8 annas of the property, and that the plaintiffs could not claim more than the rent due from an 8-anna share only. The Deputy Collector held that the suit was cognizable by the Revenue Court; and on the merits, he held that the plaintiffs were entitled to recover from the ryots the amount of rent sued for, inasmuch as a 10-anna share of their father's property was assigned to them by the deed of the 3rd Magh 1267 (15th January 1861). The co-

sharers appealed. The Judge affirmed the decision. He held that the decision of the High Court of the 11th March 1867 established conclusively that a partition had been effected between the plaintiffs and the co-sharers, defendants, in the proportion of 10 annas and 6 annas share respectively; and on the strength of that decision the Court, acting under Act X. of 1859, had power to give the plaintiffs a decree for the rent of a 10-anna share of the lands in question.

The co-sharers appealed to the High Court.

Mr. *Montrion* (with him Baboos *Annada Prasad Banerjee* and *Chandra Madhab Ghose*) for appellants.—The sole dispute is one of title. That plaintiffs are conscious of this fact, appears from the form of plaint. It is, therefore, not a rent suit, nor triable by the Collector. Moreover, the claim is for a share of ijmali rent, without showing any exceptional ground or cause for harassing the ryot with such fractional claim. *Dharam Lal Sing* v. *Jagadamba Koer* (1); *Syed Hyder Ali* v. *Amrit Chowdry* (2); *Amrit Chowdry* v. *Syed Hyder Ali* (3); *Bani Madhab Ghose* v. *Thakur Das Mandal* (4). The civil judgment (which is confessedly the cause of action) is in no way identified with the claim now made. This is apparent from the pleadings in the civil suit. There the plaintiff claimed, as her husband's donee, against his representative, a small estate. The claim was resisted by the respondents, but yielded to by the appellants. The judgment was adverse to the donee, on the ground that the donor had already parted irrevocably with his interest in the subject of gift. The proofs were of a peculiar character, and the decision in no way touches, much less concludes, the right of appellants to dispute their brothers' exclusive title to any portion of the estate, certainly not to a portion of the talook or bazar held by these ryots, who have never paid rent or attorned to respondents.

Mr. *Paul* (with him Baboos *Kali Mohan Das* and *Ramesh Chandra Mitter*) for respondents.—An appeal must lie from a decree. No decree was passed against the present appellants

(1) 3 Wym. Rep., 82.
(2) 2 Wym. Rep., 204.
(3) 2 Wym. Rep, 305.
(4) 6 W. R., Act X. Rul., 71.

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(co-sharers, defendants,) by the Courts below, for the amount of rent sued for, hence they had no right to prefer this appeal. They were nominally made defendants, inasmuch as they would not join the plaintiffs, in instituting this suit against the ryots. It is the ryots alone who can object to the carrying on of the suit on the score of jurisdiction. But they have not appealed. Therefore, the decision of the lower Appellate Court must stand. All that the co-sharers, defendants, are entitled to ask, is that the suit be ordered to be dismissed with costs as against them, for having been unnecessarily made parties in the present action. Where some of the co-sharers refuse to join the other shareholders in bringing a suit for the recovery of rent, the latter cannot thereby be precluded from recovering the amount due to them in proportion to their shares, which were determined by a previous decision of the High Court. The ryots are willing to pay rents separately to the shareholders. Consequently, the Court below was competent to entertain the suit; and the ryots being satisfied with the decree, there can be no further appeal. As the right of the plaintiffs was sufficiently declared in the previous suit, there is no reason why they should be again referred to a civil suit for the same subject-matter. A Collector can try the question of right when it is involved in determining the point as to who is entitled to the receipt of rent; *Gauridas Byragee* v. *Jagannath Roy Chowdry* (1) The ryots are the ryots of the plaintiffs, unless they have attorned to some one else. They were the ryots of the deceased proprietor whose representatives the plaintiffs are. The title of the plaintiffs as landlord being admitted, they are entitled to obtain a decree for the rent of their share. The co-sharers, defendants, are precluded by that decision from questioning any more the 10-anna share of the plaintiffs, who now sue not as proprietors of the entire estate, but as 10-anna proprietors of the mehal. The real contention in that suit was, whether partition was actually effected between the sons (the plaintiffs and the co-sharers, defendants,) in pursuance of the terms of the deed executed by their father, Raya Chand Roy, the deceased proprietor; and it was held that the

(1) 7 W. R., 25.

estate was partitioned among the sons in the shares of 10 annas and 6 annas respectively; the plaintiffs obtained 10-anna share and the co-sharers, defendants, 6 annas. Hence that decision is a binding declaration of the rights of the parties, and the defendants cannot be allowed to raise an objection which was already adjudicated upon by a Court of competent jurisdiction. See *Barrs* v *Jackson* (1) and the same case in appeal (2), *Outram* v. *Morewood* (3), *Duchess of Kingston's case* (4)., *Meer Bahadoor Ali* v. *Mussamut Sunneechuroo* (5), *Deokee Nundun Roy* v. *Kalee Pershad* (6), and *Mussamut Edun* v. *Mussamut Bechun* (7). It cannot be pretended that the point decided in the regular suit between the brothers, was a point incidentally or collaterally decided. The point, *viz.* that the brothers took, by partition, in the life-time of their father, in the proportion of 10 annas and 6 annas, was the broad issue raised and decided in that suit. Such a determination comes within the objections given by DeGrey, C. J., in the *Duchess of Kingston's case.* "That the judgment of a Court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter, directly in question in another Court; *secondly*, that the judgment of a Court of exclusive jurisdiction directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another Court, for a different purpose."

In *Barrs* v. *Jackson,* Knight Bruce, v. c., held, that the fact in an issue, as to who was next-of-kin in an administration suit, was not conclusive in a distribution suit. This ruling was reversed on appeal, and it was held, that the finding was conclusive between the same parties in the second suit, although the object of the second suit was different to that in the first suit.

In the present case, the regular suit was in reality a family suit, put forward for the division of the rights of the brothers

(1) 1 Young & Collier's C. R., 585
(2) 1 Phil., 582.
(3) 3 East 345.
(4) 2 Smith's L. C., Ed. 1867, 678.
(5) 6 W. R., 157.
(6) 8 W. R., 366.
(7) 8 W. R., 175.

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though under the garb of a suit brought by the widow for possession of a small parcel of property alleged to have been given to her in gift by the deceased.

If the judgment in that suit is not to be considered a final declaration of the rights of the brothers, another suit for declaration of those rights is necessary. Will not the evidence to be adduced in such suit be exactly the same as that already adduced in the suit decided ? Can the other side suggest the possibility of any evidence other than the evidence already given, and would any Judge, after the careful and elaborate decision pronounced by Justices Trevor and Glover, decide differently. Such is the rule of law, as I have endeavoured to show.

But in a Court of equity and good conscience it ought to be clear by undoubted law, that a point or fact directly put in issue, and decided in a suit between parties, should be binding between the same parties in any future litigation. This appears a principle of common sense and good reason. It is free from all technicalities of the law, and is undoubtedly just.

The judgment of the Court was delivered by

MITTER, J.—We are of opinion that a suit, like the present, cannot be maintained in the Revenue Courts. It is admitted that there is no legal contract in existence between the plaintiffs and the tenants, defendants, by virtue of which the former can claim, from the latter, a 10-anna share of the rent payable by them on account of their holding. It is also admitted that rent has never been collected from the tenants, defendants, by the plaintiffs, separately from their co-sharers. The plaintiffs allege that a valid and binding partition has been made between them and their co-sharers, and that the result of this partition has been to constitute them the proprietors of a 10-anna share of the land of which the holding of the tenants, defendants, consists. But the plaintiffs are unable to state that the tenants, defendants, have received any authority or permission from their other landlords, *viz.* the co-sharers of the plaintiffs, to recognize them as the holders of such a share. These co-sharers, on the other hand, who were made defendants in the Court below, and who

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are now special appellants before us, deny that such a partition has ever been made, and they also deny that the plaintiffs are entitled to the share they have claimed. The tenants, defendants, say that the plaintiffs and the special appellants have been quarrelling with each other, regarding the extent of their shares, and that so far as they themselves are concerned, they are ready to bring into Court the whole amount of their rent, leaving it to the Court itself to determine the share to which the plaintiffs are lawfully entitled. Upon this state of facts, it is clear that before the plaintiffs can succeed in such a suit, there must be an adjudication between them and the special appellants, upon the question of partition. Indeed, the plaintiffs themselves appear to have asked for such an adjudication, as is clearly shown by their own plaint. We are of opinion that the Collector's Court is not the proper tribunal to adjudicate upon such a question, and between such parties; and the plaintiffs' suit must necessarily fail. Disputed questions of title between rival proprietors, whether co-sharers or otherwise, can be determined by the Civil Courts only; and parties seeking for the determination of such questions must resort to those Courts for relief. It has been said, that we might strike off the names of the special appellants from the category of defendants, and treat this suit as a simple suit for rent between the plaintiffs and the tenants, defendants. But we are unable to see how such a course could be adopted even if we were otherwise inclined to hold that the plaintiffs are entitled to alter their case at this late stage of the proceedings. The case had been throughout treated by consent of parties as a case between the plaintiffs on the one side, and the tenants, defendants, and the special appellants on the other. Be this as it may, it is abundantly clear that the presence of the special appellants is absolutely necessary for the protection of the tenants, defendants. If the tenants, defendants, had entered into any engagement with the plaintiffs to pay to the latter a particular share of their rent, it would have been for them to protect themselves in the best manner they could in any subsequent litigation between themselves and the special appellants. But in the absence of such a contract, the tenants, defendants, can not be fairly subjected to the risk of such a

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litigation, and the Court is bound to see that any decree that it passes against them in this case, will be a sufficient protection to them against any adverse claim for rent, that the special appellants might hereafter choose to bring. Now it is clear, that no such protection can possibly exist, unless the question of partition is settled between the plaintiffs and the special appellants before us. According to our view of the case, there must be an adjudication upon the question of partition, and in order that this adjudication might be a sufficient protection to the tenants, defendants, it must be of such a character as to bind their other landlords, *i. e.* the special appellants. Suppose, for instance, the Collector were to pass a decree against the tenants, defendants, for a 10-anna share of their rent, but after determining the question of partition, as that question must be determined before any such decree can be passed; and suppose also that the question was determined as between the plaintiffs and the tenants, defendants, only, what would be the effect of such a determination in any future suit that the special appellants might choose to bring against the tenants, defendants, claiming a larger share of the rent than that which is allotted to them under the partition in question? Would the special appellants be prevented by such a determination from proving against the tenants defendants that no such partition has ever been made? And what would be the answer of the tenants, defendants, when such a fact is proved against them, and in such a suit? If the names of the special appellants were struck off from the record of this case, the decision passed in it would not be even admissible as evidence against them in any future litigation for rent between them and the tenants, defendants.

The dispute that is going on between the plaintiffs and the special appellants, is no way attributable to the tenants, defendants according to the admitted facts of this case; and the tenants, defendants, ought not, either in law or equity, to suffer for such a dispute. The plaintiffs might be entitled in law to the 10-anna share they have asked for, but, before recovering that share from the tenants, defendants, they are bound to show that the latter will be protected from the risk of being compelled to pay their rent twice over, leaving aside the trouble and

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expense of a double litigation for the rent of one entire holding. It is clear, therefore, that before any decree can be passed against the tenants, defendants, there must be an adjudication upon the question of partition between the plaintiffs and the special appellants; and we have already observed that Revenue Courts are not competent to adjudicate upon such questions, and between such parties.

It has been contended, that the question of partition has been already settled between the plaintiffs and the special appellants, in a suit in which one Kishori Chowdrani, the mother of the special appellants, was plaintiff, and the plaintiffs in this case and the special appellants were defendants. It is admitted, however, that that suit related to a zemindari which has no connection with the land occupied by the tenants, defendants. Under such circumstances, it is clear, that the direct legal operation of the decision that has been passed in that suit, can not extend beyond the property to which it related. Any other effect that might be attached to it, is a mere question of evidence. We have already given our reasons for holding that the Revenue Courts are not competent to determine a disputed question of title between rival proprietors, and any enquiry relating to a mere matter of evidence bearing upon such a question would be, therefore, superfluous. We decline to pass any opinion upon the value of the decision referred to, as a mere matter of evidence, as the issue upon which it bears is not one which we can try in the present suit.

We reverse the decisions of both the lower Courts. The plaintiffs will pay to the tenants, defendants, the costs incurred by the latter, in the Court of first instance only, but they must pay to the special appellants the costs of all the Courts.