1897

SRIHARI BANERJEE v. KHITISH CHANDRA RAI BAHADOOR.

the case of *Rajkishen Mookerjee* v. *Radhamadhuv Holdar* (1). That case therefore is quite distinguishable from the present.

For the foregoing reasons we think the Court of Appeal below was wrong in holding that the suit was barred as *res judicata*. The judgment appealed against must therefore be set aside, and the case remanded to the lower Appellate Court to be tried on the merits. Costs will abide the result.

S. C. G. *Appeal allowed; case remanded.*

FULL BENCH.

Before Sir Francis William Maclean, Knight, Chief Justice, Mr. Justice Macpherson, Mr. Justice Trevelyan, Mr. Justice Beverley and Mr. Justice Banerjee.

HEMADRI NATH KHAN, BY HIS MOTHER AND GUARDIAN JAGADISWARI DEBI, AND ANOTHER (DEFENDANTS NOS. 9 AND 10) *v.* RAMANI KANTA ROY (PLAINTIFF) AND OTHERS (REMAINING DEFENDANTS.)*

1897 *March* 12.

Partition—Right to partition—Partition between zemindar and putnidars—Partition between parties, one of whom owns interest subordinate to the other.

The plaintiff was proprietor of an entire estate paying an annual revenue to Government of Rs. 2,444. In 1854 his father gave a *putni* lease of an undivided six annas share of the estate to the defendants' predecessors in title. The plaintiffs alleged that the land being held *ijmali*, although he and the defendants collected separately from the tenants their respective shares of the rent, difficulty and inconvenience had arisen in the management of the property, and he therefore sued to have his ten annas share of the land divided by metes and bounds from the six annas share of the *putnidars*, the land of the entire estate remaining liable as before for the entire amount of the Government revenue payable in respect of it.

Held, by the Full Bench that the plaintiff was entitled to a decree for partition.

THIS case was referred to a Full Bench by MACPHERSON and JENKINS, JJ., on the 8th September 1896, with the following opinion :—

* Full Bench reference in appeal from Original Decree No. 234 of 1894, against the decree of Babu Nil Madhub Das, Rai Bahadur, Subordinate Judge of Rungpur, dated the 17th of July 1894.

(1) 21 W. R., 349.

1897

HEMADRI NATH KHAN v. RAMANI KANTA ROY.

"The facts of this case are short and simple. The plaintiff is the proprietor of an entire estate paying an annual revenue to Government of Rs. 2,444-2-4. In 1854 his father gave a *putni* lease of an undivided 6 annas share of the estate to the defendants' predecessors in title. The plaintiff alleges that the land being held *ijmali*, although he and the defendants collect separately from the tenants their respective shares of the rent, difficulty and inconvenience has arisen in the management of the property, and he brings this suit to have his 10 annas share of the land divided by metes and bounds from the 6 annas of the *putnidars*, the land of the entire estate remaining liable as before for the entire amount of the Government revenue payable in respect of it.

"Two only of the nine defendants who are the owners of the *putni mehal* opposed the claim for partition, and the Subordinate Judge has made a decree for the division of the land comprised in the estate into two portions of 10 annas and 6 annas, the former to be allotted to the plaintiff and the latter to the defendants as the land of their *putni mehal*. Against this decree the ninth defendant, who was one of the objecting defendants in the lower Court, alone appeals, and the sole ground taken, or at least argued, before us is that, as the interests of the parties are not the same, the plaintiff being zemindar and the defendants *putnidars*, and as such the owners of an interest subordinate to the zemindar, the suit for partition is not maintainable. It is said that the [illegible] the partition is to alter the condition of the tenants a[illegible] It was [illegible]stance of the landlord by converting them from tenants of an[illegible]osed [illegible]vided portion of the entire estate into tenants of specific land in that estate and that this cannot be allowed. This may be the effect of the partition; but the answer is that the defendants' predecessors, by taking a *putni* lease of an undivided 6 annas share, took it subject to all the incidents attaching to such an interest in property, and that the defendants as their successors are bound by the same incidents, though one of them be the liability to partition.

"The suit cannot be regarded as a suit by a landlord against his tenant to alter in any way the nature of the tenancy. The plaintiff is certainly the landlord of the defendants as regards

1897.

HEMADRI NATH KHAN v. RAMANI KANTA ROY.

the 6 annas share held by them in *putni* right, but he is also the owner in zemindari right and as such in possession of the 10 annas share, and it is in the latter character that he brings this suit. There being no stipulation in the *putni* lease against partition, and no implied contract not to partition, the *putni* grant of the undivided 6 annas share did not alter or affect his right or position as proprietor of the remaining 10 annas share. He was left in full and uncontrolled possession of all his rights as such proprietor, and was free to deal with the share in any way he pleased. Supposing he sold it as distinct from the 6 annas share over which the *putni* right extended, the purchaser would as against him be entitled as of right to a partition of the zemindari interest, and he would have the same right against the purchaser. By the partition the *putnidari* right would be limited to the land allotted to the 6 annas sharer, and in that way a partition of it would be effected. So also if he gave a *putni* lease of the remaining 10 annas share, the *putnidars* holding *ijmali* with the *putnidars* of the 6 annas share would, we consider, be entitled to partition. There is nothing to prevent the plaintiff from doing what a person deriving title solely from him could do, and it does not seem to make any difference that he occupies the double character of lessor of the share given in *putni* and proprietor in zemindari right of the remaining share, or, that he and not the *putnidar* is the person asking for partition. The case must, we think, be dealt with on the same footing and governed by the same principles as if the grantor of the *putni* had been a co-sharer of the plaintiff and all necessary parties were joined.

"The parties are in *ijmali* or joint possession in different shares of the entire property which it is sought to partition, and that property is the whole of the estate of the defendants. The latter circumstance distinguishes the case from the case of *Parbati Churn Deb* v. *Ainuddeen* (1) and also in one respect from the case of *Mokunda Lal Pal Chowdhry* v. *Lehuraux* (2), as there is no difference between a lease of a share of a particular piece of land forming part of an entire estate, and a lease of a share of certain *mouzahs* forming part of an entire estate.

"There is unity of possession but not of interest, and the parties are in fact as regards the 6 annas share and the 10 annas share

(1) I. L. R., 7 Calc., 577. (2) I. L. R., 20 Calc., 379.

1897.

HEMADRI NATH KHAN v. RAMANI KANTA ROY.

tenants in common. It is said that there is no real difference in the interest, as, there being no reversion in favour of the zemindar, the *putni* grant confers an absolute estate terminable only on the sale of the parent estate for arrears of revenue due in respect of it. But, however that may be, there is no doubt that the zemindari interest and the *putnidari* interest are not the same.

"The only question then is, whether in this country to entitle a person to partition, there must be unity of interest as well as of possession in the property to be partitioned. It was so held in the case of *Mokunda Lal Pal Chowdhry* v. *Lehuraux* (1) referred to above, and this is the only case in point to which we have been referred. It has been held otherwise in England as the cases there cited show. The facts in *Mokunda Lal's* case were very complicated, and there were many difficulties in the way of a partition. It was the converse case to this, as the persons claiming partition were the permanent *talukdars* of a share of a portion of the land comprised in the entire estate, the defendants being the *putnidars* and zemindars of the estate. The claim might have been and probably was rejected partly on the ground that a partition could not be enforced of a part of the estate held by the defendants as in the case of *Parbati Churn Deb* v. *Ainuddeen* (2), but the substantial ground of the decision undoubtedly was that the interest being different there could be no partition. The learned Judges held that joint possession alone is not a sufficient basis for a claim to partition, and say 'in order that persons may be co-parceners and so have a right to partition, it seems to us that not only must they be in joint possession of the property, but that that joint possession must be founded on the same title,' by which we understand a title of the same description, if not exact unity of interest. They then go on to apply that principle to the facts of the case, and hold that for that and other reasons the suit must fail.

"Were it not for that decision we should have been disposed to dismiss this appeal and allow the decree for partition to stand. We cannot, we consider, do this without acting contrary to it.

"If the *putnidars* had been the persons asking for partition, we think, on principle, they would have been entitled to it. For

(1) I. L. R., 20 Calc., 379. (2) I. L. R., 7 Calc., 577.

the reasons already given we think the case cannot be regarded as a case by a landlord against a tenant or a tenant against a landlord to alter the nature of the tenancy, and the *putnidars* would certainly have no other means of relief from a state of things which might be most injurious to all parties. If the *putnidars* are entitled to a partition, the zemindars are, we think, equally so entitled.

"We must therefore refer to a Full Bench the question whether, on the facts as stated, there can be a decree for partition."

Babu *Harendra Narain Mitter* for the appellants.

Mr. *Woodroffe* and Babu *Tarak Nath Palit* for the respondents.

The arguments sufficiently appear from the judgment of BANERJEE, J.

The following cases were cited in argument: *Parbati Churn Deb* v. *Ainuddeen* (1), *Mokunda Lal Pal Chowdhry* v. *Lehuraux* (2), *Shama Sundari Debi* v. *Jardine, Skinner & Co.* (3), *Gour Churn Soor* v. *Jugobundhoo Sen* (4), *Ridai Nath Sandyal* v. *Iswar Chandra Saha* (5), *Ajoodhya Persad* v. *Collector of Dhurbunga* (6), *Heaton* v. *Dearden* (7), *Baring* v. *Nash* (8), *Hobson* v. *Sherwood* (9), *Gibbs* v. *Haydon* (10), *Sinclair* v. *James* (11), *Kasumunnissa* v. *Nil Ratan Bose* (12), *Padmamani Dasi* v. *Jayadamba Dasi* (13), *Muhammad Baksh* v. *Mana* (14), *Sundar* v. *Parbati* (15), *Debi Singh* v. *Sheo Lall Singh* (16), *Waghela Rajsangji* v. *Masludin* (17).

The following opinions were delivered by the Full Bench (MACLEAN, C.J., and MACPHERSON, TREVELYAN, BEVERLEY and BANERJEE, JJ.)

BANERJEE, J.—The facts of this case, as set out in the referring order, are shortly these:—

(1) I. L. R., 7 Calc., 577. (2) I. L. R., 20 Calc., 379.
(3) B. L. R., Ap. 120; 12 W. R., 160. (4) 22 W. R., 437.
(5) 4 B. L. R., Ap. 57 *note*. (6) I. L. R., 9 Calc., 419.
(7) 16 Beav., 147. (8) 1 V. & B., 551.
(9) 4 Beav., 184. (10) 30 W. R., (Eng.) 726.
(11) L. R., (1894), 3 Ch., 554. (12) I. L. R., 8 Calc., 79.
(13) 6 B L. R., 134. (14) I. L. R., 18 All., 334.
(15) I. L. R., 12 All. 51; L. R., 16 I. A., 186.
(16) I. L. R., 16 Calc., 203.
(17) I. L. R., 11 Bom., 551; L. R, 14 I. A., 89.

1897

HEMADRI NATH KHAN v. RAMANI KANTA ROY.

"The plaintiff is the proprietor of an entire estate paying revenue to Government. In 1854 his father gave a *putni* lease of an undivided 6 annas share of the estate to the defendants' predecessors in title. The plaintiff alleges that the land being held *ijmali*, although he and the defendants collect separately from the tenants their respective shares of the rent, difficulty and inconvenience has arisen in the management of the property, and he brings this suit to have his 10 annas share of the land divided by metes and bounds from the 6 annas of the *putnidars*, the land of the entire estate remaining liable as before for the entire amount of the Government revenue payable in respect of it."

The Court below having made a decree for partition, one of the defendants has appealed against it on the ground that there can be no decree for partition in a suit by a zemindar against his *putnidars*, and the question we are asked to determine is "whether on the facts stated there can be a decree for partition."

I am of opinion that the question ought to be answered in the affirmative. As a general rule, every joint owner of property should be held entitled to obtain partition, or in other words "to be placed in a position to enjoy his own right separately and without interruption or interference" by his co-sharer—see *Shama Sundari Debi* v. *Jardine Skinner & Co.* (1) and Story's Equity Jurisprudence, section 648. It is against good sense, if not also against good morals, as the Roman law viewed it, to compel joint owners to hold a thing in common, "since it could not fail to occasion strife and disagreement among them." But if partition has the advantage of placing each co-sharer in a position to enjoy his own property without interference by others, it has the disadvantage of subjecting him to expense, and of impairing more or less the value of the joint property by dividing it into comparatively small parts; and where partition is sought by a co-owner whose interest in the property is limited in point of time, the question may arise, whether the temporary advantage to be secured to him is sufficient to outweigh the disadvantage of subjecting the other co-owners to expense and trouble which may in the end lead to no permanent division, the successors of the applicant not being bound by anything done at his instance. The general rule must,

(1) 3 B. L. R., Ap. 120; 12 W. R., 160.

therefore, be taken subject to many exceptions and qualifications, depending upon the nature of the thing owned jointly, the nature of the interest of the party claiming partition, the nature of the terms and conditions on which the different joint owners hold their respective interests, and various other matters. But I do not see any good and sufficient reason for thinking that the present case should form any exception to the rule. It is not suggested that the property sought to be divided in this case is either impartible, or is from its nature such that the partition asked for will impair the value of any of the shares into which it is to be divided. Nor is it suggested that the applicant for partition has only a limited interest, and that a partition at his instance will not be of any permanent effect. The only grounds upon which the learned Vakil for the appellants rests his contention that there ought not to be any partition in this case are two, namely, *first*, that the plaintiff is precluded from demanding any such partition against the defendants by reason of his predecessor in title having granted a *putni* of an undivided share of 6 annas to the predecessors of the defendants; and, *second*, that there can be no partition between parties who do not own co-ordinate interests, but one of whom owns an interest subordinate to the other.

In support of the first ground, it is urged that the plaintiff's predecessor in title having granted a *putni* of an undivided share of 6 annas in the entire zemindari, to allow the plaintiff to enforce partition and limit the *putni* to a specific portion of the zemindari proportionate to the 6 annas share, would be to allow him to alter the terms of the *putni* lease, against the will of the lessees. A contention somewhat similar to this was raised in *Heaton* v. *Dearden* (1) on behalf of the defendant whose predecessor in title had agreed to grant a lease of an undivided moiety of certain mines, in a suit for specific performance of the agreement to lease and for partition, and the contention was disallowed. And there is no reason why a different principle should be followed in this case. The *putni* lease contains no covenant against partition, and even if it did, it is doubtful whether it would have been binding for all time.

The contention on behalf of the appellants proceeds on the

(1) 16 Beav., 147.

1897

HEMADRI NATH KHAN v. RAMANI KANTA ROY.

assumption that there cannot be any fair and just division of the lands of the zemindari into two portions proportionate to the shares of the parties, and that partition must result in disadvantages to the *putnidars*; but no reason has been given to justify such an assumption, and the Court cannot accept it as *prima facie* well founded.

Moreover it was admitted by both sides in the course of the argument that the plaintiff's father, the grantor of the *putni*, owned only a 6 annas share, and the remaining 10 annas belonged to the plaintiff's grandmother; and that the plaintiff has inherited the 6 annas share from his father, and the 10 annas from his grandmother. That being so, the plaintiff as owner of the 10 annas share is not bound by the terms of the *putni* lease, and that lease can in no way be a bar to his right to obtain a separation of his 10 annas share.

As to the second ground, the only reason that might be urged in its support is, that if partition can be enforced as between co-owners whose interests are not co-ordinate in degree, parties having permanent interests may be put to frequent and needless expense and trouble by having to watch partition proceedings instituted at the instance of co-owners with temporary interest, such proceedings not leading to any division of the property which can have a lasting effect. But in the present case, no such reason can hold good: in the first place, because the party who is asking for partition is the holder of the higher of the two kinds of interest respectively owned by the parties to the suit, his interest being that of a zemindar, so that there can be no apprehension of the division effected not having an enduring effect; and, in the second place, because the interest owned by the party against whom partition is sought, though subordinate to that of the plaintiff, is certainly not of a temporary and qualified character such as would make it undesirable to have a partition against him and to subject him to the trouble and expense of a partition proceeding. He owns a *putni* which by the Law (Regulation VIII of 1819, preamble and section 3) is a permanent tenure at a fixed rent, heritable and transferable; and which is one of those interests which, to use the language of Pontifex, J., in *Kasumunnissa* v. *Nil Ratan Bose* (1) "are in fact substantial proprie-

(1) I. L. R., 8 Calc., 79.

torial interests, in the grant of which, as in this case, considerable premiums are paid." Of the Indian cases cited, the only one that has any direct bearing upon this point is *Mukunda Lal Pal Chowdhry* v. *Lehuraux* (1), in which the learned Judges say: "We are not aware of any Indian case in which a person holding a subordinate interest in land has been held to have a right of partition as against the superior holder," and they assign as one of the reasons for holding that the suit for partition had been rightly dismissed, the fact that the interest owned by the plaintiffs was subordinate to that of the defendants. But there were other grounds on which the decision in that case was based; and for the reasons given above I am unable to assent to the view, that as a general proposition of law, there can be no partition as between parties, the interest of one of whom is subordinate to that of the others. I think the Court must in each case determine whether, having regard to the nature of the interests owned by the parties and to all other circumstances necessary to be taken into consideration, the balance of convenience is in favour of allowing partition, and if it determines that question in the affirmative, the mere fact of the parties owning interests which are not co-ordinate in degree, ought not to be a bar to partition. This view is in accordance, not only with the English cases cited in the argument, namely *Baring* v. *Nash* (2) and *Heaton* v. *Dearden* (3), which may be referred to so far as they deal with general principles, but also with the rules of justice, equity and good conscience, which our Courts are directed to follow in cases not provided for by any definite rule of law (see Act of XII of 1887, section 37).

For the foregoing reasons, I think that upon the facts stated in the referring order, a decree for partition can properly be made.

MACLEAN, C. J.—I have had the advantage of reading the judgment of Mr. Justice Banerjee, and I concur in his conclusion. I desire to add that my decision must be taken to apply only to the particular facts of this particular case.

MACPHERSON, J.—I agree with Mr. Justice Banerjee.

TREVELYAN, J.—I concur with Mr. Justice Banerjee.

(1) I. L. R., 20 Calc., 379. (2) 1 V. and B., 551.

(3) 16 Beav., 147.

1897

HEMADRI NATH KHAN v. RAMANI KANTA ROY.

BEVERLEY, J. —The language used in the case of *Mukunda Lal Pal Chowdry* v. *Lehuraux* (1) may not be strictly accurate or very precise, but what was intended to be decided in that case was that mere unity of possession, or as I should prefer to term it mere joint possession, is not enough to entitle the persons so in possession to have the land partitioned by metes and bounds. The right to a partition can only, in my opinion, exist as between co-parceners holding similar interests in the property. How "similar interests" should be defined it may not be easy to say. They should probably be permanent transferable interests. A temporary lease-holder of an undivided portion of an estate ought not, in my opinion, to be allowed to put his lessor to the trouble and expense of a partition. But, however that may be, the question does not really arise in this case. Here it is practically the zemindar of a 10 annas share of the estate seeking partition as against himself as the 6 annas zemindar and the *putnidars* who hold that 6 annas share under him. I can see no objection to a partition in this case, and I would answer the question put to us accordingly.

F. K. D.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Ameer Ali.

1897 *April* 6.

JOGENDRA NATH ROY BAHADUR (PLAINTIFF) *v.* J. C. PRICE (DEFENDANT.) *

Civil Procedure Code (Act XIV of 1882), section 424—Suit against public officer in respect of acts done by him in his official capacity—Notice of suit—Suit for damages against a public officer—Trespass—Joinder of causes of action—Amendment of plaint.

The plaintiff sued the defendant, a public officer, to recover damages for two distinct acts (*viz.*, wrongful arrest and trespass) alleged to have been illegally and maliciously done by the defendant on two different occasions, and claimed one lump sum as damages for both the acts; no permission to

* Appeal from Original decree No. 149 of 1896, against the decree of Babu Chandra Kumar Roy, Officiating Subordinate Judge of Rajshahye, dated the 17th of February 1896.

(1) I. L. R., 20 Calc., 379.