PRIVY COUNCIL

P.C.*
1910
April 14;
July 15.

BHAGWAT SAHAI
v.
BIPIN BEHARI MITTER.

[On appeal from the High Court at Fort William in Bengal.]

Partition—Right to partition—Partition between owner of fractional share in zemindari interest, and mokararidars in joint possession—Interest not less permanent because the mokarari lease was liable, in certain events, to forfeiture.

The right of partition exists when two parties are in joint possession of land under permanent titles, although their titles may not be identical.

Hemadri Nath Khan v. *Ramani Kanta Roy* (1) cited with approval.

The appellants, plaintiffs in a suit for partition, were proprietors of a *mokarari* interest in the property partition of which was sought, and the respondents, defendants in the suit, were owners of a fractional share in the zemindari interest in the same property. The *mokarari* lease was, in certain contingencies, liable to forfeiture, and the High Court held that the appellants' tenure was on that account not sufficiently permanent to support their claim to partition, to which they would otherwise have been entitled:—

Held by the Judicial Committee (reversing that decision), that the distinction drawn by the High Court could not be supported. The appellants' title was a permanent one, though liable to forfeiture in events which had not occurred, and the rights incidental to that title must be those that attached to it as it existed, without reference to what might be lost in the future under changed circumstances.

APPEAL from a judgment and decree (5th May 1905) of the High Court at Calcutta, which reversed a judgment and decree 4th February 1904) of the Subordinate Judge of Gaya.

The plaintiffs were appellants to His Majesty in Council.

The question for determination in this appeal was as to the right of the appellants to a partition of certain villages called Kalapahar, Nimajodha and Muruli Khurd, the proprietary interest in which was vested to the extent of an 8 annas share in Rai Pasupati Nath Bose, respondent No. 4, whilst the remaining 8 annas share belonged to the appellants.

* *Present*: LORD MACNAGHTEN, LORD COLLINS, SIR ARTHUR WILSON, and MR. AMEER ALI.

(1) (1897) I. L. R. 24 Calc. 575.

On 16th September 1865, Rai Sham Lal Mitter and Rai Mohan Lal Mitter, the predecessors in title of Bepin Behari Mitter, Pramatha Nath Mitter and Chandra Nath Mitter, who were the only parties who opposed the partition, granted a *mokarari* lease of a 7 annas 6 pies share in the villages to Karori Lal, Lila Singh, Banwari Lal and Jagamohan Singh, the lease being described as "descendible to children in perpetuity, generation after generation, both in the male and female lines." The lease was made jointly to the four persons subject to a liability to pay a joint rent of Rs. 626 per annum; but at the bottom of the deed the respective shares of the lessees were set out as being—Karori Lal 1 anna 8 pies, Lila Singh 1 anna 8 pies, Banwari Lal 1 anna 8 pies, and Jagamohan Singh 2 annas 6 pies.

On 21st January 1869, Banwari Lal sold his 1 anna 8 pies share in the lease to Lila Singh; and on 10th March the lessees agreed amongst themselves that, instead of the above shares in the three villages, their interests should be as follows:—The four sons of Karori should have a 7 annas 6 pies share in Nimajodha, Jagamohan Singh should have a 3 annas 9 pies share in Kalapahar, and Lila Singh should have a 3 annas 9 pies share in Kalapahar and a 7 annas 6 pies share in Muruli Khurd.

By two deeds of sale, dated 13th April 1891 and 12th September 1893, the appellants purchased from the sons of Karori Lal a 10 pies share in all the villages; and on 27th May 1894 they purchased a 2 annas 6 pies share in all the villages from Jagamohan Singh. Thus they became entitled to a 3 annas 4 pies share in all the three villages; or reckoning the shares with regard to the private partition of 10th March 1878, the purchase was of 3 annas 9 pies of Nimajodha, and the same share in Kalapahar.

The Mitter respondents thereupon instituted a suit (131 of 1895) for cancellation of the *mokarari* lease on account of breach of covenant; the provision in the deed on which the claim was based being "in the event . . . . . of our transferring the *mokarari* tenure, by *darmokarari* sale, conditional sale, gift, mortgage, or in any other way, or in the event of our allowing

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a single *bigha* or *biswa* of land included in the said mouzahs to go into the hands of other persons.....the zemindars and their heirs shall have power to take direct possession of the said mouzahs." The deed also stated that, "save and except receiving the rent mentioned in this *kabuliat*, the proprietors have, and shall have, no right to prefer any title, make any demand, or raise any dispute about the *mokarari* property." That suit was compromised, the purchasers paying a sum of money to the lessors to waive the forfeiture and to recognize the particular transfers objected to: and an agreement dated 6th April 1896 was drawn up between the parties by which, in consideration of the above payment, the following rights were conceded to the appellants, namely, the recording of their names as tenants in the zemindars' office register, that is, in the books of the Mitter respondents; and an apportionment of the rent in respect of the purchased shares, and the opening of a separate account. The apportioned rent was agreed upon as Rs. 278-3-6, to be paid as stated by instalments and at fixed dates.

On 13th August 1903, the appellants instituted the suit, out of which the present appeal arose, claiming partition of either a 3 annas 9 pies share in the two villages Nimajodha and Kalapahar, or a 3 annas 4 pies share in the three villages, that is, either on the basis of the agreement of 10th March 1878, or on the basis of the shares specified in the original lease. The defendants were Rai Pasupati Nath Bose, Bipin Behari Mitter, Pramatha Nath Mitter, and Chandra Nath Mitter, Lila Singh, and two persons, Mathura Pershad and Jagdam Sahai, purchasers from the sons of Karori Lal of a 3 annas 9 pies share in Nimajodha. Subsequently, all the vendors were also added as defendants, but they did not appear and enter a defence.

The co-sharers in the lease supported the claim for a partition, and it was not opposed by Rai Pasupati Nath Bose.

The Mitter defendants alone opposed the partition, pleading that only the plaintiffs Bhagwat Sahai and Beni Pershad (plaintiffs 1 and 3) had any right to sue; that they were not entitled to partition; and that they (the Mitter defendants)

refused to recognize the transfer made to Mathura Pershad and Jagdam Sahai.

The only issue material on this appeal was—"No. 5. Can the plaintiffs claim a partition in this suit as against defendants 2 to 4 (the Mitter defendants)?" and on this issue the Subordinate Judge said :—

"When the plaintiffs Nos. 1 and 3, Bhagwat Sahai and Beni Pershad, purchased share of *mokarari* interest of some of the original mokararidars, defendant Nos. 2 to 4 instituted a suit for cancellation of the *mokarari* lease on the ground of such purchase. In that case there was a compromise, and Beni Pershad and Bhagwat Sahai paid bonus and got their names registered in serishta of defendants Nos. 2 to 4 as owners of 3 annas and 4 pies share in the *mokarari* interest in the disputed and other mouzahs con tituting the *mokarari* lease. This was stated in a registered *ekrarnama*, dated the 6th Apri 1896, produced by defendants Nos. 2 to 4 (Ex. A). For these reasons, these defendants, Nos. 2 to 4, who alone contest partition, are bound to recognise rights of at least plaintiffs Nos. 1 and 3 in the said share in the disputed mouzahs, and at least these plaintiffs can claim partition against defendants Nos. 2 to 4 as regards the said share in these properties in suit. I hold, however, that these defendants are not bound by any private partition between the original mokararidars or their heirs and assignees, as the lease was a joint lease. The defendants Nos. 2 to 4 have accepted rent from plaintiffs separately in respect of the said share. They have, therefore, admitted division of the tenancy or of the original *mokarari* lease: *Nubo Kishen Mookerjee* v *Sreeram Roy* (1). For that reason also defendants Nos. 2 to 4 cannot object to partition of share of plaintiffs in the mouzahs sought to be partitioned. The original *mokarari* lessees had fixed shares in the mouzahs sought to be partitioned and in other mouzahs included in the lease, and that share has been stated in the original *mokarari kabuliyat* stated above. Consequently, there can be no objection on the part of defendants Nos. 2 to 4 for separate enjoyment of these mouzahs by the mokararidars in proportion to shares stated in the said document, though their liability to pay *mokarari* rent remains joint in regard to all mouzahs covered by the lease."

The Subordinate Judge accordingly made a decree allowing the partition.

From this decree an appeal by the Mitter defendants came before a Divisional Bench of the High Court (Rampini and Caspersz JJ.) who, holding that the interest of the plaintiffs in the *mokarari* lease was not of a nature to entitle them to claim a partition against the Mitter defendants, reversed the decree of the Subordinate Judge, and passed a decree dismissing the suit with costs.

(1) (1871) 15 W. R. 255.

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The judgment of the High Court appealed from was as follows :—

"This is a suit for partition, but of a novel character. The plaintiffs are mokararidars of a 3 annas 4 pies share of mouzahs Kalapahar, Nimajodha and Muruli Khurd.

The *mokarari* was, however, granted by the ancestors of the defendants Nos. 2 to 4; it was renewed by these defendants in the names of the plaintiffs Nos. 1 and 3 only. The plaintiffs seek for partition of the lands of the mehals, claiming a 3 annas 4 pies share of them, as against the proprietors of the mouzahs. Defendant No. 1 is an 8 annas co-sharer: he has no objection to the partition. The defendants Nos. 2 to 4 are the proprietors of the remaining 8 annas proprietary interest. They are in direct possession of a 6 pies share of this interest. The other defendants, namely, defendants Nos. 5, 6, and 7, have a *mokarari* interest in the remaining 7½ annas share. These last-mentioned defendants do not resist the plaintiffs' claim. It is the defendants Nos. 2 to 4 who alone do so.

"The Subordinate Judge has allowed partition, and has passed a preliminary decree directing it to be carried out.

"The defendants Nos. 2 to 4 now appeal. On their behalf it has been urged (i) that the suit is not maintainable, as tenure-holders cannot sue their landlords for partition; (ii) the plaintiffs as co-sharers only in the *mokarari* cannot sue for partition; (iii) that the defendants Nos. 2 to 4 do not recognise the plaintiffs Nos. 2, 4 and 5 and the defendants 6 and 7 as their tenants; (iv) that as there was a previous suit for partition, which was withdrawn without leave to bring a fresh suit, the present action is barred by the provisions of section 43 of the Code; and (v) that it has not been made out that any inconvenience will result from not partitioning the property, but rather the contrary.

"The four last-mentioned pleas do not seem to us to have much force; but it is unnecessary for us to consider them, as, in our opinion, the first ground of appeal must prevail.

"There are no precedents for such a suit as this. No case has been cited to us which is exactly in point. Our attention has been called to the cases of *Parbati Churn Deb* v. *Ainuddeen* (1); *Mukunda Lal Pal Chowdhry* v. *Lehuraux* (2), and the Full Bench case of *Hemadri Nath Khan* v. *Ramani Kanta Roy* (3). The first of these has no application. In the second, the principle that to entitle a person to partition, there must not only be joint possession, but the possession must be founded on the same title, was laid down. On this principle the plaintiffs have no right to partition. But the *ratio decidendi* of *Mukunda Lal Pal Chowdhry* v. *Lehuraux* (2) was disapproved of in the third case cited to us, *viz.*, the Full Bench Case of *Hemadri Nath Khan* v. *Ramani Kanta Roy* (3). This case was one brought by a zemindar, a 10 annas co-sharer, for partition against a putnidar of a 6 annas share. It was held that the plaintiff was entitled to partition in the circumstances of the case. But the learned Judges of the Full Bench laid down no general rule. On the contrary, Mr.

(1) (1881) I. L. R. 7 Calc. 577. (2) (1893) I. L. R. 20 Calc. 379.
(3) (1897) I. L. R. 24 Calc. 575.

Justice Banerji, who delivered the judgment of th Court, said :—'I think the Court must in each case determine whether, having regard to the nature of the interest 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.' Hence it is clear that the fact that the plaintiffs are mokarariders and the defendants, or some of them, are proprietors, will not bar the partition sought for in this case. But the learned Judge in the body of his judgment observed—'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 interest 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.' Again, Mr. Justice Beverley in his judgment in the case has said : '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 leaseholder 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.'

"The rule to be deduced from these passages would seem to be that partition should not be allowed when the interest of one or more of the persons owning interests in the property to be partitioned is of a temporary and qualified character—is not a permanent and transferable interest—and when there may be apprehension that the division effected may not have an enduring effect.

"Now, to apply these rules to this case. The interests of the holders of the *mokarari* in 7½ annas share of the properties would seem to us not to be of a permanent and transferable nature, but to be rather of a temporary and qualified character, for two reasons : (1) that the *mokarari*, by the terms of the lease of the 16th September 1865, is to become null and void on default of payment of 3 instalments of the *mokarari* rent. Hence the *mokarari* may cease at any time.

"Then there is a further clause prohibiting alienation subject to the same penalty. Alienation of part of the *mokarari* interest has no doubt taken place and been condoned, but on the defendants Nos. 2 to 4 instituting a suit to cancel the *mokarari* on the ground of this alienation, the present plaintiffs

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Nos. 1 to 3 at once compromised the matter with them by paying a bonus of Rs. 500 and costs, and obtaining a distribution of the rent. This was effected by the *ekrarnama* of 6th April 1896. But the defendants Nos. 2 to 4 do not appear to be bound to overlook and condone any future alienation of any other portion of the *mokarari* interest.

"In these circumstances, it seems to us that the interests of the plaintiffs in this case are not of such a permanent and transferable nature as to ensure that any division that may now be effected will be of enduring effect. For this reason we do not consider them entitled to partition against the wishes of the defendants Nos. 2 to 4.

"We accordingly set aside the decree of the Judge in the Court below and decree this appeal with costs."

On this appeal,

Kenworthy Brown, for the appellants, contended that the High Court had, in coming to the conclusion that the *mokarari* lease was not of a permanent and transferable character, put an erroneous construction upon it. The fact that it was liable to forfeiture in certain events did not alter the interest of the appellants in the lease, nor lessen their right to obtain partition as against the respondents. Persons possessed of only limited interests in property, and only in small portions of it, could maintain suits for partition against their co-owners. Reference was made to *Shamasoonderi Debi* v. *Jardine Skinner and Co.* (1), *Sundar* v. *Parbati* (2), *Padmamani Dasi* v. *Jayadamba Dasi* (3), *Uma Soondari Debi* v. *Benode Lal Pakrashi* (4), *Mayfair Property Company* v. *Johnston* (5), *Gaskell* v. *Gaskell* (6), *Heaton* v. *Dearden* (7), and *Hobson* v. *Sherwood* (8). No doubt the appellants and respondents had different interests in the land, but had the High Court in this case given proper effect to the decision of a Full Bench of the same High Court in *Hemadri Nath Khan* v. *Ramani Kanta Roy* (9) the partition asked for should have been granted, notwithstanding that the interests were not co-ordinate in degree. Having regard to

(1) (1869) 3 B. L. R. App. 120; 12 W. R. 160.
(2) (1889) I. L. R. 12 All. 51, 56; L. R. 16 I. A. 186, 193, 194.
(3) (1871) 6 B. L. R. 134, 138.
(4) (1907) I. L. R. 34 Calc. 1026, 1028.
(5) [1894] 1 Ch. 508, 512.
(6) (1836) 6 Simon 643, 644.
(7) (1852) 16 Beav. 147, 150.
(8) (1841) 4 Beav. 184.
(9) (1897) I. L. R. 24 Calc. 575, 583.

the terms and effect of the *ekrarnama* dated 6th April 1896, the High Court should have held that the respondents were bound to recognise the status of the appellants, and their claim should have been granted.

DeGruyther, *K. C.*, and *S. A. Kyffin*, for the respondents (1), (2) and (3), contended that the appellants had no interest in the land, of which they claimed partition, sufficient to enable them to maintain that claim. As between themselves and the respondents the appellants were substituted lessees, as agreed between them on 6th April 1896. No recognition was made at that time of the private arrangement between the appellants made on 16th March 1878. The respondents were not bound to recognise a transfer of the *mokarari* interest made in violation of the conditions of the lease, but, on the contrary, they were entitled to cancel the lease for breach of covenant. It was, therefore, a forfeitable and not a permanent lease, and the appellants had only a tenure of a limited character which did not entitle them to demand partition. Reference was made to the Bengal Tenancy Act (VIII of 1885), section 88; the Estates Partition Act (Bengal Act V of 1897) section 3, sub-sections (5) and (7), and sections 6, 8, 23 and 99; and Bengal Regulation XIX of 1814 (Partition of Estates paying revenue to Government), section 4. The English cases cited were not applicable to the present case: see *Kally Dass Ahiri* v. *Monmohini Dassee* (1) and *Abhiram Goswami* v. *Shyama Charan Nandi* (2). Before it could be said they were applicable to India, it must be shown that the special Statutes on which those cases were decided, 31 Hen. VIII, Chap. I, and 32 Hen. VIII, Chap. 32, were made applicable. The appellants as lessees could not, it was submitted, compel a partition as against the respondents who were their lessors. Reference was made to *Ridai Nath Sandyal* v. *Iswar Chandra Sahu* (3), *Parbati Charan Deb* v. *Ainuddeen* (4), *Ruttunmonee Dutt* v. *Brojo Mohun Dutt* (5), *Lalljeet Singh* v. *Raj Coomar Singh* (6),

(1) (1897) I. L. R. 24 Calc. 440, 446.
(2) (1909) I. L. R. 36 Calc. 1003, 1015.
(3) (1865) 4 B. L. R. App. 57 (note.)
(4) (1881) I. L. R. 7 Calc. 577.
(5) (1874) 22 W. R. 333.
(6) (1873) 12 B. L. R. 373

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Kenworthy Brown replied commenting on the cases cited for the respondents and referring in addition to Story's Equity Jurisprudence, section 648 : Stephen's Commentaries 15th Ed., Vol. I, page 241 : *Sriram Chakravarti* v. *Hari Narayan Singh Deo* (6), Bengal Tenancy Act (VIII of 1885), sections 3 and 5 : *Fatteh Bahadur* v. *Janki Bibi* (7) *per* Kemp J ; *Barahi Debi* v. *Debkamini Debi* (8), *Ram Mohan Lal* v. *Mulchand* (9), *Ram Charan* v. *Ajudhia Prasad* (10), and *Subbarazu* v. *Venkataratnam* (11). [*DeGruyther, K.C.*, referred to the Bengal Tenancy Act, sections 3 and 188.]

July 15.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. This is an appeal from the judgment and decree of the High Court of Calcutta, dated the 5th May 1905, which reversed those of the Subordinate Judge of Gaya, dated the 4th February 1904.

The sole question for decision on the appeal is whether the appellants are entitled to partition of certain properties as against the opposing respondents.

In order to dispose of this question, it is sufficient to deal very broadly with the facts. It is enough to say that the appellants are proprietors of a *mokarari* interest in the properties in question, the opposing respondents being owners of a fractional share in the zemindari interest in the same properties.

(1) (1869) 3 B. L. R. App. 120 ; 12 W. R. 160.
(2) (1892) I. L. R. 20 Calc. 379.
(3) (1907) I L. R. 34 Calc. 1026, 1028.
(4) (1889) I. L. R. 12 All. 51, 56 ; L. R. 16 I. A. 186, 193, 194.
(5) (1897) I. L. R. 24 Calc. 575, 583.
(6) (1905) I. L. R. 33 Calc. 54.
(7) (1870) 4 B. L. R. App. 55.
(8) (1892) I. L. R. 20 Calc. 682.
(9) (1905) I. L. R. 28 All. 39.
(10) (1905) I. L. R. 28 All. 50.
(11) (1891) I. L. R. 15 Mad. 234.

In the judgment appealed against it was held, in accordance with an earlier decision of a Full Bench of the same Court, that the fact of the party on one side of the dispute being in a lower grade of title than those on the other side was not necessarily a bar to partition.

Their Lordships agree with the opinion of the Full Bench, in the case referred to, that the right of partition exists when two parties are in joint possession of land under permanent titles, although those titles may not be identical. It is unnecessary for their Lordships to consider whether a right to partition exists in any other case, and they are desirous to avoid indicating any view upon any such subject.

In the present case all parties concerned in the appeal have joint shares in the land, of course under different titles, and this has been recognised by the learned Judges whose decision is under appeal. But those learned Judges held that the right of partition, which would otherwise have belonged to the appellants, the *mokarariders*, was lost by reason of the fact that their *mokarari* is liable to forfeiture in certain contingencies, and therefore is lacking in the permanence of interest necessary to support a claim for partition. Their Lordships are of opinion that the distinction thus introduced cannot be supported.

The title of the appellants is a permanent title, though liable to forfeiture in events which have not occurred, and the rights incidental to that title must, in their Lordships' opinion, be those which attach to it as it exists, without reference to what might be lost in future under changed circumstances.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, and that the judgment and decree of the High Court should be set aside and that of the Subordinate Judge restored with costs in the Court below.

The opposing respondents will pay the costs of the present appeal.

Appeal allowed.

Solicitors for the appellants : *T. L. Wilson & Co.*

Solicitors for the respondents : *Broughton, Broughton & Holt.*

J. V. W.