

(1925) 07 PAT CK 0009
In the Patna High Court

Balaram Manjhi and Others		APPELLANT
	Vs	
Jagannath Manjhi and Others		RESPONDENT

Date of Decision : 24-07-1925

Acts Referred:

Citation : AIR 1925 Patna 760

Hon'ble Judges : Ross, J

Bench : Division Bench

Judgement

Ross, J.—This is an appeal against an order of the Additional Subordinate Judge of Purulia reversing a decision of the Munsiff of Raghunathpur and remanding a partition suit for allotment of hasil land and began according to the principles laid down in the judgment.

2. A preliminary objection is taken on behalf of the respondents that this is not a remand under Order 41, Rule 23 nor under Rule 25: it is remand under the inherent power of the Court and no appeal lies: Raghunandan Singh v. Jadunandan Singh (1918) 3 P.L.J. 253. On behalf of the appellants it is contended that the order is a remand under Order 41, Rule 23. It seems to me plain that this is not a case of a suit being disposed of upon a preliminary point. The order of remand goes on to the whole principle on which the partition is to be made and there is no question of any preliminary point; it affects the whole decision of the whole suit. The remand must therefore be taken to have been made under the inherent powers and no appeal lies.

3. I am then asked by the appellants to treat the appeal as an application in revision. The question then arises as to whether there is any point of jurisdiction. The contention on behalf of the appellants is that the parties having agreed to the allotment as made by the Commissioner, the Subordinate Judge had no jurisdiction to alter it; and, secondly, that the Subordinate Judge had no jurisdiction to lay down a principle of partition which is against the settled law. Reference was made to a passage in the Commissioner's report where he says; "Both the parties requested me to divide that chak according to their respective

shares keeping them in possession of their lands as far as practicable and accordingly I divide the chak keeping the parties in possession of their lands as far as possible."Evidently the partition made by the Commissioner did not meet the wishes of the parties because it was objected to when the report came before the Munsiff. The objection of the defendant was that as he had reclaimed more of the danga land he ought to be left in possession of it. It cannot be therefore said with any show of reason, that the allotment made by the Commissioner was agreed to by the parties. All that the parties agreed to was that they should be left in possession as far as possible, but from the manner in which this agreement was applied in practice there is no reason to suppose that the parties agreed to the allotment because in fact objection was taken to the partition actually made,

4. With regard to the principle of law, reference was made on behalf of the appellants to the decision of the Judicial Committee in *The Midnapur Zamindary Co. v. Naresh Narain* AIR 1924 P.C. 144, where it was laid down that if a co-sharer purchases any jote right in the lands held in common by the co-sharers such a purchase will be held to have been a purchase for the benefit of all the co-sharers, and it is contended that the view that the Munsiff took was right, namely, that if the defendant expended money, on reclaiming the danga land which was held in common tenancy, he did so at his own risk and that the reclamation would be for the benefit of the joint property. On the other hand there is a decision reported in *Kallian Banerjee v. Madhusudan Bannerjee* (1881) 8 C.L.R. 259, where, in precisely similar circumstances to the present, the principle adopted by the learned Subordinate Judge was laid down by the Calcutta High Court. In any case if the learned Subordinate Judge was in error in this part of his judgment it is merely an error of law and does not affect his jurisdiction.

5. It was further contended that he had acted without jurisdiction in directing a partition of the Bagan because the Bagan was not partitioned by the Commissioner and no objection was taken on this score before the Munsiff. It seems true that this objection was not taken before the Munsiff; but the partition was to be a partition of the whole property and, if by oversight or for any other reason one of the properties was left unpartitioned I think that it was open to the parties to draw the attention of the learned Subordinate Judge to the omission and to get a direction from him in the matter.

6. In my opinion this appeal as a second appeal does not lie and must be dismissed with costs; nor can it succeed as an application in revision.