

(1925) 12 PAT CK 0006

In the Patna High Court

Jhapsi Sao and Others

APPELLANT

Vs

Musammat Bibi Aliman and Others

RESPONDENT

Date of Decision : 01-12-1925

Acts Referred:

Bengal Tenancy Act, 1885 — Section 22(2)
Estates Partition Act, 1897 — Section 119

Citation : AIR 1926 Patna 263 : 93 Ind. Cas. 1001

Hon'ble Judges : Ross, J; Das, J

Bench : Division Bench

Judgement

Ross, J.—These three appeals are directed against the judgment of the learned District Judge of Patna affirming a decision of the Subordinate Judge in suits brought by the plaintiffs for recovery of possession of certain lands as being bakasht lands to which they were entitled as the result of a partition. Mouza Dariapur Hasan was originally an estate bearing Tauzi No. 88 in the Patna Collectorate. It was first partitioned in the year 1801 and on that partition one of the takhtas created was a takhta of 14 annas 15 dams which became Tauzi No. 5146. One of the proprietors of that estate was Dr. Abdulla. The Record of Rights was finally published on the 22nd of February, 1911, when the lands in suit were recorded as bakasht lands subject to the incident that they were held by the defendants by virtue of purchase on payment of a proportionate share of rent to their co-sharers; that is to say, as being held u/s 22 (2) of the Bengal Tenancy Act. In 1912 further partition proceedings in respect of Tauzi No. 5146 began and certain orders were passed by the Board of Revenue which will be referred to later. The share of Dr. Abdulla became Tauzi No. 5146 (new) and this estate was subsequently sold to the plaintiffs. The plaintiffs brought these suits to recover possession of the lands held by the defendants. The Courts below held concurrently that the lands in suit were acquired by the defendants or their ancestors by purchase. There was no finding that the lands were acquired by the defendants or their predecessors before they became co-sharers in the village. The learned District Judge held that on this finding the defendants were entitled

to continue to possess the lands on payment of rent u/s 22 (2) of the Bengal Tenancy Act, and that they were not liable to be ejected from cultivating possession.

2. The contentions on behalf of the plaintiffs-appellants are, first, that the defendants are estopped by the judgment of the Board of Revenue in the partition proceedings from claiming to retain possession"of these lands; secondly, that the claim of the defendants is virtually one contesting the allotment made by the Board of Revenue and cannot be entertained u/s 119 of the Estates Partition Act; and, thirdly, that the acquisition of these holdings by the defendants as co-proprietors was an acquisition for the benefit of all the proprietors and that they were not entitled to retain possession of the lands after partition of the estate, the plaintiffs' remedy against exclusive possession by any co-sharer being a suit for partition. The first two contentions do not call for any detailed consideration. It is true that the defendants gave up their claim that these land's were raiyati lands, in the partition proceedings, and that the lands were allotted as bakasht lands by the Board of Revenue in order to equate the amount of bakasht lands held by the different proprietors in the different takhtas; it is true that the* judgment of the Board of Revenue shows that the allegation that lands were raiyati lands was not pressed before the Board; but there is nothing to show that the defendants gave up the position recorded in the Record of Rights that they held the lands u/s 22 (2). The order of the Board of Revenue was that if the arrangement suggested in the judgment could be made without any valid objection, effect should be given to it, otherwise the existing arrangement would have to stand. It appears that effect was given to the arrangement suggested and the partition was confirmed. Subsequently it was brought to the notice of the Revenue Authorities that there had been a misunderstanding and that the lands which were allotted as bakasht were not lands of which direct possession could be given. But as the partition had been confirmed, nothing resulted from these subsequent proceedings except certain pious observations. The contention of the learned Counsel for the appellants is that the judgment of the Board of Revenue gave them a clear title to direct possession of these lands and that the subsequent proceedings were ultra vires. The subsequent proceedings were without any effect and did not purport to effect anything. But the judgment of the Board of Revenue, whether due to a misunderstanding or not, could not take away any title to the possession of these lands which was in the defendants, and did not purport to do so. Strictly speaking all that it declared was that the lands were bakasht lands, and this is not denied. But whether they were bakasht lands of which direct possession would be given to the proprietor of the takhta in which they were situated on partition is another question altogether and is unaffected by the judgment of the Board of Revenue. Nor do I see how Section 119 of the Estates Partition Act can assist the appellants. That is a section which bars certain suits and it is not available to the plaintiffs in these actions, and to argue that the defence is in effect contesting the allotment made by the Board of Revenue is, in my opinion,

begging the question at issue.

3. The main argument on behalf of the appellants rests on certain observations of the Judicial Committee in *Midnapur Zemindary Co., Ltd. v. Naresh Narayan Roy* 80 Ind. Cas. 827 : 6 P.L.T. 750 : 1924 AIR P.C. 144 : 26 Bom. L.R. 651 : 47 M.L.J.33 : 51 C. 631 : 85 M.L.T. 169 : (1924) M.W.N. 723 : 29 C.W.N. 34 : 20 L. W. 770 : 51 I. A. 293 : L.R. 5 A. (P.C.) 137 : 13 A.L.J. 76 : 3 Pat. L.R. 193 (P.C.) where it is said that partition is the remedy which a co-owner has if he and his other co-owners cannot agree as to how the lands which they hold in common should be managed; and further.

4. "if the Midnapur Company has, in fact, been cultivating any of these lands, it cannot by such separate use of the lands have acquired any jote rights in them. Even if the Midnapore Company purchased any jote rights in lands held in common by the co-sharers such a purchase would in law be held to have been a purchase for the benefit of all the co-sharers, and the jote rights so purchased would by the purchase be extinguished."

5. Now this general statement q| the law must be read subject to the provisions of Section 22 (2) of the Bengal Tenancy Act, where the consequences of the purchase of an occupancy holding by a person jointly interested in the land as proprietor are enacted. Learned Counsel relief on the language of that sub-section and contends that if it be construed strictly it has no application after partition occurs. The section enacts that a co-proprietor acquiring an occupancy right in land "shall be entitled to hold the land subject to the payment to his co-proprietors...of the shares of the rent which may be from time to time payable to them." tie argues that as from the moment of partition there are no longer any co-proprietors, the sub-section ceases to have any operation; and the land must be treated as ordinary bakasht land falling to the direct possession of the proprietor of the takhta to which it is allotted. In principle I do not see why this consequence should ensue. Section 22 (2) confers a privilege on the purchasing co-sharer which is in derogation of the Common Law right of the other co-sharers as stated in the judgment of the Judicial Committee quoted above. I do not see what there is in partition to take away that privilege. On the contrary it would appear that the partition only removes the necessity for the limitation on the effect of the purchase and would set free the holding to be operated upon by the ordinary provisions of the law. In other words, Section 22 (2) imposes a limitation on the rights of the co-sharers for the benefit of the purchasing co-sharer: and there is no reason why this limitation should be removed by reason only of a partition taking place. That no undue stress is to be laid on the word "co-proprietors" in the sense contended for by the appellants would appear from the decision of this Court in *Lala Bambahadur Lal and Others Vs. Mt. Gungta Kuer*, , where the status conferred by Section 22 (2) was discussed and it was held that the status created was a peculiar status which attached to the co-sharer so long as he remained a co-sharer; it was held that when the co-sharer parted with his interest in the estate he lost the right to retain land under that

section. But in referring to the decisions where it had been held that on partition the purchasing co-sharer was entitled to retain possession of land recorded in his name u/s 22 (2) of the Bengal Tenancy Act, Kulwant Sahay, J., said: "In these cases the interest of the co-sharer who had purchased the holding did not cease; he continued to be the proprietor after the partition, and hence it was held that he was entitled to retain possession." His right to possession was, therefore, not limited to the period of the co-proprietorship but continued because the co-proprietor continued to be a proprietor (though of another takhta) after the partition. The authorities bearing directly on the question are conclusive in favour of the respondents. In *Ram Prasad v. Gopal Chand* 58 Ind. Cas. 955 : 2 P.L.T. 163, the precise question now under consideration was dealt with and it was held that the defendants could not be ejected from such lands upon partition; and that the Legislature never intended nor did the language of Section 22 (2) give rise to the interpretation that the co-proprietor acquiring an occupancy holding by purchase, although entitled to retain possession on payment of rent to his co-sharers, must give it up the moment the estate in which the land is situate is partitioned among the co-proprietors. The same view was taken in *Nandkishore Singh v. Mathura Sahu* 65 Ind. Cas. 586 : 3 P.L.T. 13 : AIR 1922 Pat. 193 where the argument that the purchasing co-proprietors ceased to be co-proprietors after the partition and that the partition effected a complete change in the status was dealt with and was negatived. A similar view was taken in *Basudeo Narain Vs. Radha Kishun and Dabindra Missir and Others*, , a case which dealt with Section 22 (2) of the Act as it stood before the amendment in 1907. In that case their Lordships observe as follows:

Now if this be correct, then something must happen subsequent to the acquisition, of the holding by the co-sharer landlord to; put an end to the holding. It is suggested that the partition between the co-sharer landlord puts an end to the holding; but in my judgment there is no foundation for this argument in the Bengal Tenancy Act and we have not been referred to any cases which support the argument put before us by the learned Vakil appearing on behalf of the respondent.

6. Learned Counsel for the appellants relied on the decision in *Qyamuddin Khan v. Ramyad Singh* 67 Ind. Cas. 530 : 3 P.L.T. 419 : AIR 1922 Pat. 354 : 1 Pat. 600 as laying down a different principle. Now that case was expressly decided on the ground that it was not a case u/s 22 (2) of the Bengal Tenancy Act, and the decisions referred to above, which were considered, were not dissented from but were distinguished precisely on that ground. The lands in that case were treated as ordinary bakasht lands of the maliks without more, which on partition would necessarily go to the-proprietor of the takhta to which they were allotted.

7. On the principle and on authority I am of opinion that the decision of the learned District Judge in this case was correct and that the appeals should be dismissed with costs.

Das, J.

8. I agree.