

**(1915) 05 CAL CK 0032**  
**In the Calcutta High Court**

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| Sris Chandra Datta Chaudhuri and Others    | APPELLANT  |
| Vs                                         |            |
| Mahima Chandra Datta Chaudhuri and Another | RESPONDENT |

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**Date of Decision :** 11-05-1915

**Acts Referred:**

Transfer of Property Act, 1882 — Section 44

**Citation :** 33 Ind. Cas. 17

**Hon'ble Judges :** Roe, J;Asutosh Mookerjee, J

**Bench :** Division Bench

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## Judgement

Ashutosh Mookerjee, J.—This is an appeal by the first three defendants in a suit for partition of joint property. The substantial question now in controversy between the parties is, whether the suit as framed is maintainable.

2. The disputed property, the subject-matter of the partition claimed by the plaintiffs, is included in an estate Azimpur which has been divided and formed into five separate estates. One of these divisions is called Choi Hissya, wherein the sixth defendant has a share. The plaintiffs have acquired the position of permanent tenure-holders under the sixth defendant in a taluq Ananda Bose and a howla Chandraprabha; they claim an one-anna nineteen-and-a-half-gandas and one til share in the howla and taluq mentioned. Their allegation is that the lands now in suit, which are comprised in Mauza Icholi, are included in the Choi Hissya estate and have been separated by metes and bounds so as to be capable of partition without reference to other lands of the estate. The defendants, who are some of the proprietors of the estate and the lessors under them, contend that the plaintiffs are not entitled to maintain this suit for partition in respect of these lands alone, but are bound to claim partition of all the lands in the Choi Hissya estate, although the plaintiffs have no interest in any lands other than those now in dispute. The Court of first instance gave effect to this contention and dismissed the suit. Upon appeal the Subordinate Judge has reversed that decision and made a preliminary decree for partition. In our opinion the decree of the Subordinate Judge is manifestly correct.

3. It cannot be disputed, in view of the decision of the Full Bench in Hemadri Nath Khan v. Ramani Kanti Roy 24 C. 575 : 1 C.W.N. 406 and of the Judicial Committee in Bhagwat Sahai v. Bipin Behary Mitter 7 Ind. Cas. 549 : 37 C. 918 : 12 C.L.J. 240 : 14 C.W.N. 964: 8 M.L.T. 228 : 7 A L.J. 1137 : 12 Bom. L.R. 997 : 20 M.L.J. 907 : (1910) M.W.N. 691 : 37 I.A. 198 that the fact that the plaintiffs are permanent tenure-holders and seek partition as against the co-sharers of their lessors in the estate, is no objection to the grant of relief to them. But it has been argued on behalf of the defendants-appellants that as, by private arrangement amongst the co-proprietors, separate parcels of the lands of the Choi Hissya estate have been in occupation of different proprietors, the plaintiffs as lessees under some of them should not be allowed to maintain a suit for partition of the lands included in the one mauza wherein alone they are interested and thereby to disturb the arrangement made by the superior landlords. The contention in substance is that the plaintiffs are in no better position than their grantor and as their grantor would not in ordinary circumstances have been allowed to maintain a suit for partition as against his co-sharers in respect of a portion only of joint property, the plaintiffs are under a similar disability. This argument has been controverted as unsound on behalf of the respondents and the principle has been challenged as too comprehensive that a suit for partition must in all circumstances include all the joint properties owned by the parties to the suit. In support of this view reliance has been placed upon the decisions in Padmamani Vast v. Jagadamba Dasi 6 B.L.R. 134; Panchanun v. Shib Chunder Mullick 14 C. 835; Ram Mohan Lal v. Mulchand 28 A. 39 : A.W.N. (1905) 169 : 2 A.L.J. 700; Syed Habibur Rasul v. Ashita Mohan Ghosh 12 C.W.N. 640 and Hem Chandra Chowdhary v. Hemanta Kumari Debi 23 Ind. Cas. 442 : 19 C.W.N. 356. We may state at once that it is not necessary for the purposes of the present case to maintain the view that a suit for partition need not embrace all the joint properties owned by the parties thereto. We shall accordingly assume that, as an, ordinary rule, a suit for partition must include all the properties jointly held by the parties: Jogendra Nath Mukerji v. Jagobundhu Mukerji 14 C. 122; Jogendra Nath Rai v. Baldeo Das 6 C.L.J. 735 : 35 C. 961 : 12 C.W.N. 127; Mahomed Fazlur Rahman v. Mahomed Fayzur Rahman 10 Ind. Cas. 354 : 15 C.W.N. 677; Satya Kumar v. Satya Kripal 3 Ind. Cas. 247 : 10 C.L.J. 503; Mansaram v. Ganesh 16 Ind. Cas. 383 : 17 C.W.N. 521. But as a necessary corollary to this rule, we have the complementary principle that a partition suit can include no property wherein each of the parties to the suit does not claim an" interest: Ham Taran Nag Mozumdar v. Hari Charan Nag Mozumdar 22 Ind. Cas. 30 : 18 C.L.J. 556; Radha Kanta Shaha v. Bipro Das Roy 1 C.L.J. 40; Raw Lochhi Koer v. Collingridge 5 C.L.J. 307 : 11 C.W.N. 397; Kailash Chandra Das v. Nityananda Das 3 Ind. Cas. 21 : 11 C.L.J. 384; Uma Sundari Debi v. Benode Lal Pakrashi 34 C. 1026; Ram Mohan Lal v. Mul Chand 28 A. 39 : (1950) A.W.N. 69 : 2 A.L.J. 700 and Subba Row v. Ananthanarayana Iyer 14 Ind. Cas. 524 : 23 M.L.J. 64 : 11 M.L. T 395. But on behalf of the appellants this principle has been assailed as inequitable; we are unable, however, to give effect to this criticism.

4. Take one concrete illustration. Suppose two properties A and B are jointly owned by X and Y. By mutual arrangement X holds possession of A, while Y holds possession of B, but no final and definitive partition is effected between the parties. Y, though in possession of B, transfers to Z his one-half share in A. Is Z entitled to claim partition as against X? There is no room for controversy that Z is entitled to maintain a suit for this, purpose, though the result may be that X will thereby be driven to sue Y for partition of B. But this does not involve any hardship upon X; when he consented to take exclusive possession of A and allowed his co-owner Y to occupy B, he did so with full knowledge that the arrangement might be disturbed by partition, whether that partition was effected at the instance of Y or of a transferee from Y. If this view were not maintained, it would be necessary to hold that when by mutual arrangement, co-owners are in possession of different parcels of land included in their joint property, their right of alienation is restricted, thereby. In the case mentioned, as soon as Y. transfers his interest in A to Z, A ceases to be part of the joint property held by X and Y and acquires the character of joint property held by Y and Z; at the same time, B retains its character of joint property owned by X and Y. Consequently in respect of A either X or Z is entitled to claim partition against the other; and a similar position must be maintained with regard to Y. In the case before us, it has been urged that the plaintiffs should not be granted relief till they institute a suit for partition, not merely of the lands comprised in Mauza Icholi wherein alone they are interested as permanent tenure-holders, but also in ninety-nine other mauzas which are comprised in the Choi Hissya Zemindary, and wherein they have no interest at all. To give effect to this contention would be to affirm the principle that the plaintiffs can institute a suit for partition in respect of property in which they possess no interest whatsoever; no conceivable theory has been suggested to support such a view, while Section 44 of the Transfer of Property Act clearly points to the contrary conclusion. We may add that reference was made in the course of argument to the case of *Shivmurteppa v. Virappa* 24 B. 128 : 1 Bom. L.R. 620 which is plainly distinguishable on the ground that there the subject-matter of the litigation was co-parcenary property held by members of a joint Mitakshara family. The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

5. We may mention that an objection has been raised before us in respect of parcel No. 75. The parties are agreed that the question whether parcel No. 75 is liable to be partitioned as included in Mauza Icholi in the Choi Hissya Zemindary should remain open for determination by the Court below before the final decree for partition is made; a declaration to this effect will accordingly be inserted in the decree.