

*Privy Council Appeal No. 55 of 1925.*

*Bengal Appeals Nos. 89, 90 and 91 of 1923.*

Basiram Saha Roy and others	-	-	-	-	-	-	-	<i>Appellants</i>
								<i>v.</i>
Ram Ratan Roy and others	-	-	-	-	-	-	-	<i>Respondents</i>
Same	-	-	-	-	-	-	-	<i>Appellants</i>
								<i>v.</i>
Hem Chandra Chowdhury and others	-	-	-	-	-	-	-	<i>Respondents</i>
Same	-	-	-	-	-	-	-	<i>Appellants</i>
								<i>v.</i>
Jyotish Chandra Chowdhury and others	-	-	-	-	-	-	-	<i>Respondents</i>
								<i>(Consolidated Appeals)</i>

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 4TH MARCH, 1927.

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*Present at the Hearing :*

LORD PHILLIMORE.

LORD DARLING.

MR. AMEER ALI.

SIR LANCELOT SANDERSON.

[*Delivered by* LORD PHILLIMORE.]

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On the 9th April, 1868, the principal respondents gave putnis or perpetual leases of certain properties to the present appellants or to persons from whom the present appellants derive title.

The material part of one of the putnis is expressed in the following terms :—

“ The zamindary No. 2,049 of the aforesaid pargana, standing in the names of the Chowdhuries, and held in our ownership, is recorded in the

Collectorate of district Backergunj at a sudder jumma of Rs. 1,280-15-6½ pies. A 12 gundas 1 kara 13 tils 1½ krant share out of the 1 anna 11 gundas 2 karas of the 1 anna 14 gundas hissyas of Raghu Nath Chowdhury appertaining to the 8 annas 10 gundas hissyas of the aforesaid zamindary, that is, a 6 annas 5 gundas share out of the aforesaid 1 anna 11½ gundas hissyas taken as 16 annas, belongs to us, and of which we are in enjoyment and possession on payment of the sudder rent. As we are unable to till, cultivate and settle the lands appertaining to the aforesaid hissyas, we, of our own accord, grant you in writing a putni talukdari pottah of mouzahs Chhoto Dumaria, Gopalpur, Narayankhana, Dharabashail, Kandi, Suagram, Shalukha, Chhatian, Patiljhapa, Bahirshamli, Korya, Raririlla, Ghagharkanda, except the debottar, and the kismats appertaining thereto, at the annual rent of Rs. 145."

The other putni is in similar terms.

The zemandari in question is of a very great extent, and, as appears from the passage in the putni lease which has just been quoted, the ownership of it has broken up into various divisions and subdivisions. There are said to have been 300 proprietors.

In 1897 a purchaser from one of these sharers applied under Bengal Act No. 5 of 1897 for a partition. This application was resisted by some of the other proprietors; but the Collector granted it, and in process of time a regular partition was effected, and the property was divided into 28 different estates.

As a result of this partition, the mouzas allotted to the respondents were not those mentioned in either of the putni leases of 1868.

Thereupon the appellants, relying upon clause 99 of the Partition Act, claimed that their putni leases should be held good as regards the lands allotted under the partition to the respondents, and this claim being resisted, they brought three suits, which have now been consolidated, for possession and mesne profits.

The Subordinate Judge dismissed the suit. On appeal the District Judge reversed that decision, worked out the extent to which the appellants would be entitled to compensation lands, and gave the appellants a decree for possession of them with mesne profits and a proportion of the costs.

It should be stated that, in the view of the District Judge, accurate calculation would have given to the appellants a somewhat larger share, but that they were content to accept the decree in the form prepared by the District Judge in order thereby to avoid intricate calculations.

This judgment of the District Judge was, however, reversed on appeal by the High Court, which dismissed the suit. Hence the present appeal.

In order that the decisions in this case may be rightly appreciated, it is desirable to set out the material part of sections 4 and 7 and the whole of section 99 of the Partition Act.

"Section 4.—(1) Subject to the provisions of this Act, every recorded proprietor of a joint undivided estate who is in actual possession of the interest in respect of which he is so recorded shall be entitled to claim a partition of the said estate and the separation therefrom and assignment to

him as a separate estate of land representing the interest of which he is in such possession.”

“Section 7.—(1) Where the lands of an estate have been divided by private arrangement formally made and agreed to by all the proprietors, and each proprietor has, in pursuance of such arrangement, taken possession of separate lands to be held in severalty as representing his interest in the estate, no partition of the estate shall be made under this Act except—

- (a) on the joint application of all the proprietors : or
- (b) in pursuance of a decree or order of a Civil Court.”

“Section 99.—If any proprietor of an estate held in common tenancy and brought under partition in accordance with this Act has given his share or a portion thereof in putni or other tenure or on lease, or has created any other encumbrance thereon, such tenure, lease or encumbrance shall hold good as regards the lands finally allotted to the share of such proprietor, and only as to such lands.”

In the view of the Subordinate Judge the parent estate was, previous to the formal partition of 1897, already enjoyed by its co-owners in severalty under a private partition. He also thought that the appellants had not really been dispossessed of their former putni lands, and that the suits were not brought *bona fide*, but in order to get more convenient lands in substitution for those specified in the original putnis. He further held that the owners of the estates in which the mouzas leased by the original leases had fallen, ought to have been made parties to the suits so that, if this should be found to be the right course, the appellants might be confirmed in the possession of their original mouzas.

The District Judge, whose conclusions on matters of fact must, according to law, be accepted (*see* Code of Civil Procedure, sections 101 and 102), found that the estate had not been partitioned privately or at all before the partition of 1897, and that the estate was at that time still held in common tenancy. This being so, the provisions of section 99 applied if the putni leases in question were to be considered as leases of a share or portion of the joint lands, and there having been no suggestion up to that stage that the putni leases were other than leases of shares or portions, he decreed in favour of the appellants, as already stated.

The Judges of the High Court took the view that he had not found conclusively, and so as to bind them, that the estate was previous to the partition held in common tenancy.

Deeming themselves at liberty to take their own view of the facts in this respect, the learned judges thought that the lessors had been holding in severalty, and further that the putni leases were not leases of shares or portions, but of specific villages, and therefore that section 99 did not apply.

This second point, which had not apparently been put before the Courts at earlier stages, was taken in the memorandum of appeal to the High Court, and whether as a substantive point in itself or as supporting the view that the estate was no longer held in common tenancy, deserves consideration, and has been fully considered by their Lordships.

With regard to the first point, the learned judges of the High Court expressed themselves in the following language :—

“ The Court of first instance dismissed the suit on the finding that the proprietors of the estate did not hold the land in common tenancy. That decision was reversed by the Lower Appellate Court on the finding that there was no previous private partition or private arrangement formally entered into by all the proprietors by which each proprietor was in separate possession of some specific land as appertaining to his share in the zamindari.

“ On behalf of the respondents it is contended that this finding of the Lower Appellate Court is a finding of fact which is conclusive in second appeal. We are unable to accept this contention. We are bound to accept the finding that there was no formal private partition. But on the facts admitted in the plaint and found by the Lower Appellate Court we are unable to hold that section 99 can be made applicable to the present case. On the plaintiffs' own case their lessors were in actual exclusive possession of these 30 villages, and the plaintiffs are further in this dilemma that unless at the time the putni lease was granted this separate possession was consented to by the other co-sharers, they could not have obtained a valid putni lease.”

These observations show an insufficient appreciation of the judgment of the District Judge. His language is as follows :—

“ Under the circumstances stated and discussed above, I believe the plaintiff-appellants' evidence that the estate No. 4,515 was held in common tenancy before the Collectorate partition of 1905.

“ As there was no previous private partition or private arrangement formally made and agreed to by all the proprietors by which each proprietor was in separate possession of some specific lands as appertaining to his share in the zamindari, the plaintiffs can now well say under section 99 of the present Estates Partition Act that his putni would hold good only in respect of the lands finally allotted to the share of the grantor of the lease.”

He has distinctly found that the estate was held in common tenancy. This is a finding of fact which according to law is conclusive, and which the High Court and their Lordships are bound to accept without further enquiry. But their Lordships will add for the satisfaction of the parties that they would see no reason upon the papers for differing with the District Judge, if it was within their competency to examine the question.

The view to which the High Court leans is a view which one of their number—Mr. Justice Ghose—took in a previous case, a judgment which is printed in the appendix to the present appeal (*Dina Nath Shaha Roy v. Chandra Kumar Bose*, decided February 26th, 1923).\* It is a view that there is some *tertium quid* between common tenancy and several holding, and that when this *tertium quid* exists, if any formal partition supervene, it does not affect or interfere with the arrangement under which landowners who are in some respects still tenants in common may yet have specific shares of the estate allotted to their exclusive enjoyment.

The Act does not apparently contemplate any such cases as being possible. If they were to exist, it would be strange if a

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\* The same conclusion on the facts was reached in another case similarly printed (*Prasanna Kumar v. Madha Badya*, decided February 21st, 1922).

formal partition could take away the possession of estates thus enjoyed from former possessors.

In the present case the partition has allotted to the lessors of the plaintiffs lands of which they had not the enjoyment before, and has not allotted to them the mouzas which are now in question.

It is to be observed that the appendix to this case shows that in another instance with similar circumstances the parties agreed that it was held in common tenancy (*Chandra Kumar Mukhopadhyaya v. Dina Nath Shaha Roy*).

The case of *Nagendra Mohan Roy v. Pyari Mohan Saha* (I.L.A. 43 Calc., p. 103) may be put on one side, as there the two Courts came to concurrent findings of fact.

There remains to be considered the objection that this is not a case which comes under section 99 because the putni lease, it is said, is not a lease of a share or portion of the estate, but a lease of certain specified mouzas of which the lessors had control and some form of possession at the time when the leases were made, but which by operation of the partition have now been taken away from them.

If their Lordships took this view they would have to consider whether the lessors might not be compelled to make by way of equitable compensation a similar lease of the new mouzas which they had obtained in lieu of the former ones.

On the whole, however, their Lordships think that it will not be necessary to resort to this consideration.

Each lease purports to be a lease of that share in the estate which belongs to the lessors. It is true that it specifically applies to certain mouzas of which the lessors have the enjoyment as representing their share, but it is obvious from the subsequent proceedings that this enjoyment was by convention only and subject to revocation and that as against their lessors, the lessees were entitled to say, "Give us your share, if it be not in these villages, then in those which you get instead." A grant in respect of its amplitude is always construed (unless it be a Crown grant) against the grantor.

It is true that there is no direct authority for such a case, but grants of a share in specified mouzas which are themselves only portions of an estate held in common tenancy, have been treated as coming under section 99.

The fourth case printed in the appendix (*Gopal Chandra Biswas v. Basanta Kumar Sahah Roy*, decided August 18th, 1924) is to this effect.

The decision of the High Court of Calcutta upon the construction of a similar section in the earlier Partition Act agrees with this (*Joy Sankar Gupta v. Bharat Chandra Bardhan*, I.L.R. 26 Calcutta, p. 434). Support is also lent by the decision of this Board in *Bijnath Lall v. Ramoodeen Chowdry* (L.R. 1 I.A., p. 106), in the case of a mortgage of an undivided share in certain specified villages which were themselves part of an estate held in common

tenancy. This case, it is true, was decided before the Partition Acts and upon the construction of the regulations ; but it indicates the principle upon which subsequent legislation has proceeded. The observations on p. 119 are very much in point.

Their Lordships therefore are of opinion that the District Judge was right in holding that section 99 applies to this case, and they will humbly advise His Majesty that this appeal should be allowed, and that the judgment of the District Judge should be restored with costs.



In the Privy Council.

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BASIRAM SAHA ROY AND OTHERS

<sup>v.</sup>

RAM RATAN ROY AND OTHERS

SAME

<sup>v.</sup>

HEM CHANDRA CHOWDHURY AND OTHERS

SAME

<sup>v.</sup>

JYOTISH CHANDRA CHOWDHURY AND OTHERS.

(*Consolidated Appeals.*)

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