

(1878) 06 CAL CK 0029

Calcutta High Court

Case No: None

Hurgobindo Burmon
and Others

APPELLANT

Vs

Sharat Chunder
Burmon and Others

RESPONDENT

Date of Decision: June 19, 1878

Citation: (1879) ILR (Cal) 510

Hon'ble Judges: Mitter, J; Maclean, J

Bench: Division Bench

Judgement

Maclean, J.

In this case the plaintiff's and defendants were owners of an undivided estate, which they brought to partition under Reg. XIX of 1814. The partition appears to have been duly carried out, and the lands divided amongst the co-sharers according to their interests in the estate.

2. The plaintiffs bring this suit for a declaration of their mokurari jamai rights in the whole of a plot of land described as dag 153 and in 10/16 of a plot described as dag 152, and ask the Civil Court to direct that the partition award may be altered, and dag 153 allotted to the share of defendants 1 to 5, and 10/16 on dag 152 allotted to the share of defendants 1 to 6 and 48, and the rest of dag 152, to the share of themselves and defendants 39 to 43. The plaintiffs appear to have made a similar application to the Revenue authorities, and base their action on the refusal to grant their request.

3. Three of the defendants (24, 25, 30) appeared in the Munsif's Court, and disputed the jurisdiction of the first Court to interfere with the proceedings of the revenue authorities. They also denied the plaintiffs' title to, and possession of, the lands they claimed.

4. The case was in the first instance thrown out by the Munsif, who hold that no suit would lie under the circumstances. This decision was reversed on appeal, and on re-trial the Munsif found that the plaintiffs had failed to make out their title, and were not entitled to ask for a re-distribution of the lands.

5. The Subordinate Judge on appeal considered that the plaintiffs had a good title, which had not been affected by the partition proceedings, and accordingly reversed the Munsif's decision to that extent, and gave the plaintiffs a declaratory decree. The prayer for re-distribution was rejected.

6. In special appeal it is contended before us that this suit cannot be maintained, that the plaintiff's remedy lies against those persons from whom they derive their title, and not against those to whom the lands they claim may have been allotted. As the effect of the partition was to bring all the lands of the undivided estate under division, notwithstanding any private and separate occupation, it is important to ascertain exactly what the position of the plaintiffs were, as, that seems to have been but imperfectly understood by the pleaders.

7. It is clear that they were part-owners of an undivided estate, and it cannot now be maintained that they did not join with all their co-sharers in applying for partition. In addition to their shares as part-owners, they held the lands in suit as tenants, and partly as purchasers from some of the other co-sharers: and when they applied to the Collector to allot these lands to the shares of those from whom they obtained them, they were met by the objection that this could not be done for several reasons, one of which was, that all of those persons were not then applicants; whether they subsequently joined the other applicants, and whether there has been a complete division, is not quite clear. Probably there has,--but the fact remains that the Revenue authorities, have effected the partition, and the Civil Court cannot touch the distribution made by them. The plaintiff's suit therefore, so far as it asks that land may be taken from the shares to which it has been allotted and put into other shares, cannot succeed.

8. As for their prayer for a declaration of their title, which the Subordinate Judge finds to be a good title, we think that it ought not to be granted. The Subordinate Judge lays down that the transfer of land by a shareholder must be recognized in making the divisions, and that any other shareholder consenting to receive land in the possession of a third party undertakes to put up with the incumbrance. This is an incorrect exposition of the law. In the first place, assuming that the whole of the lands were not held jointly, but that some of them were held in severalty by some of the shareholders, the Revenue authorities would not be bound to proceed with the division if they found that the separate enjoyment of some of the lands affected the proper incidence of the Government revenue. In this case, however, the estate was dealt with as a joint undivided estate on the application of all the co-sharers, and we must, therefore, assume that there was no previous partition which the Collector would recognize; and to say that any co-sharer took his allotment of land subject to

incumbrances created by another co-sharer, is not only not warranted by any law, but it is clearly opposed to the law relating to partitions as explained by the Privy Council. We find it laid down in *Byjanath Lall v. Ramooddeen Chowdry* (21 W.R. 233), that one co-sharer in a joint and undivided estate cannot deal with his share so as to affect the interests of other sharers, and persons who take any security from one co-sharer do so subject to the right of the others to enforce a partition; and further, that a mortgagee who takes such a security in the share of one co-sharer, who has no privity of contract with the other co-sharers, would have no recourse against the lands, allotted to such co-sharers, but must pursue his remedy against the lands allotted to the mortgagor.

9. We think that this principle is applicable to all assignees of any interest whatever,--and that it ought to govern this case. The plaintiffs set up to be assignees of the interests of some of the share-holders in respect of the lands referred to in this suit. The other share-holders are not privy to the contract between the plaintiffs and their assignors; and as the lands have been allotted to the appellants, the plaintiffs' remedy lies, not against the appellants to whom they have been allotted, but against the plaintiffs' assignors. The Subordinate Judge was wrong in laying down that the lands were allotted subject to the plaintiffs' incumbrance on them, and we reverse his decree, declaring the plaintiffs' title, and restore the Munsif's decree, dismissing the plaintiffs' suit with costs. The plaintiffs will also pay the costs of this appeal.