Privy Council Appeal No. 93 *of* 1916.

Bengal Appeal No. 70 *of* 1913.

Srimati Bhabatarini Debi Chowdhurani and Others - - - - - - - - *Appellants,*

v.

Dharani Kanta Lahiri Chowdhury and Others - *Respondents,*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH JUNE, 1918.

Present at the Hearing:

LORD BUCKMASTER.
SIR JOHN EDGE.
MR. AMEER ALI.
SIR WALTER PHILLIMORE, Bart.

[*Delivered by* SIR WALTER PHILLIMORE, BART.]

Their Lordships approach this case with grave dissatisfaction.

The suit was begun as long ago as 1892: in the course of the litigation it has come before six Subordinate Judges, and has been four times to the High Court.

The case has given occasion to an acute division of judicial opinion: and lastly the matter now in controversy could, by the exercise of a little care and precision of statement, have been raised and decided at a very early stage, or it may be that the controversy would never have arisen at all.

The original plaintiff, who was the predecessor in title of the present appellants, instituted this suit for partition of certain brahmattar lakheraj, or revenue-free lands, being lands held along with zemindari No. 77, in a village commonly called Kalipur, in Bengal. This zemindari had been by virtue of proceedings begun in 1851 partitioned by the Collector into five new estates, numbered 5253, 5254, 5406, 5407, and a residual 77. Of these No. 5253 belonged to the plaintiff, and now belongs to the present appellants, as a one-third share of the old zemindari. No. 5254 belongs to defendant No. 1 the present first respondent as his one-third share, and the other estates being lesser shares belong to other defendants who are not taking part in this appeal.

Originally partition was made of the whole of the lands held in common, both revenue paying and revenue free. But objection was taken that it was beyond the jurisdiction of the Revenue authorities to partition revenue-free lands, and the order for partition was accordingly corrected by directing the exclusion of the revenue-free lands. It is these latter lands of which, as has been said, partition is sought in the present suit.

Defendant No. 1 opposed the application for partition. He raised several defences, of which the only ones that need be noticed were that the plaint was too vague and did not properly specify the boundaries of the lands sought to be partitioned (a very prophetic objection), and that he had a separate right and possession in respect of several portions of the lands mentioned in Schedule No. 1 to the plaint.

These defences were overruled, and partition was directed by the first Subordinate Judge before whom the case came, whom it is convenient to call Judge No. 1. Defendant No. 1 appealed to the High Court; his appeal was rejected, and the partition proceeded.

When the matter came before the Commissioners who were directed to make the partition, and the parties attended to point out the several lands, the controversy which is the subject of the present appeal broke out.

The plaintiff had expressed himself in his plaint as seeking partition of chucks halka or areas of land numbered 1, 2, 3, 4, 6, and 7 on a certain map, which he annexed to and made part of his plaint. On the map are shown six chucks, five of considerable size and one smaller. The five are further shown as being subdivided. The plaintiff said that he had sought for and obtained partition of the whole of these six chucks. Defendant No. 1 said that the plaint and the decree only related to certain residual portions of the five larger chucks (there being no dispute about the smaller one which was No. 2), and that these residual portions were the Nos. 1, 3, 4, 6, and 7 of the plaint and decree.

The Commissioners thereupon reported the matter to the Court, and Subordinate Judge No. 2 made an order that they should make two maps with two sets of measurements, one according to the contention of the plaintiff, the other according to the contention of defendant No. 1.

The Commissioners then made a second report, dealing with a variety of matters of detail, and also with the question now in controversy. They expressed their opinion in favour of the plaintiff.

The case then came before Subordinate Judge No. 3. He went very fully into the whole matter, took the opposite view, and decided in favour of defendant No. 1, ordering the partition to be limited to chuck No. 2 and the residues of the other chucks.

He came to this conclusion upon the construction of the plaint and the decree, putting aside all other matters as extraneous.

Plaintiff appealed from this order to the High Court; but

his appeal was dismissed, upon the ground that the order was interlocutory only and could not prejudice his contention when the proper time came for raising it.

It is to be regretted that the High Court took this view of the order. It might well have been treated as determining the right, and the point might then (in the year 1905) have been decided and settled. However it was left open.

The case then came before Subordinate Judge No. 4. He appears to have differed from Judge No. 3. At any rate he ordered two sets of maps to be prepared, following Judge No. 2.

Then it came back again from the Commissioners to Judge No. 5. He thought the matter was governed by the order of Judge No. 3, and that there should be only one map, making partition only of the lesser areas, according to the contention of defendant No. 1.

However, the Commissioners still feeling a difficulty in accepting this view, the case came again to the Court. This time Judge No. 4 was sitting. He adhered to his original view, and ordered two sets of maps. From this order defendant No. 1 appealed in his turn to the High Court, and was told in his turn that the decree was interlocutory and was not matter of appeal.

The two sets of maps were then prepared, and the case came before Judge No. 6. He decided in favour of the plaintiff. Defendant No. 1 appealed to the High Court, which took the opposite view, and decided in favour of defendant No. 1 and for the smaller areas.

It is from this decision that the present appeal has been brought.

As this point was not raised before Judge No. 1, their Lordships are not assisted by his reasons for his judgment. They have only short notes of the judgments of Judges Nos. 2, 4, and 5. But they have full judgments by Judges No. 3 and No. 6.

Judge No. 3, as already stated, proceeded entirely upon his construction of the plaint and the decree as following the plaint.

Judge No. 6 proceeded principally upon the same grounds, but gave the opposite construction to the plaint and decree. He also relied upon some statements by the pleader and some depositions which he thought could not have been brought to the notice of Judge No. 3.

As to the High Court, it has been contended on behalf of the appellants that the learned Judges erred in treating the question at large and as open, upon the merits, notwithstanding the first decree, which having been appealed and affirmed was binding upon them, and to the true construction of which they were limited. There is some ground for this observation; but by the time the case came before the High Court there had been the several previously mentioned decrees or orders, and the point which was taken on behalf of defendant No. 1 was that

the order of Judge No. 3 concluded the case in his favour. It is in disallowing this contention that the observations which have been criticised were made, though no doubt the language is capable of wider application.

There may be, in the judgment, certain references to the facts of the case. But, upon the whole, the judgment of the High Court seems to have been directed to the proper construction of the decree.

During the argument before their Lordships the parties have taken up both points. Either party has urged that the construction of the decree is in his favour. Either has urged that if the facts of the case are to be looked into they are with him.

Their Lordships do not propose to express any opinion as to what are said to be the facts of the case. They think that the only matter to be inquired into is the construction of the decree. Those lands and those lands only of which the plaintiff sought partition were ordered to be partitioned. They and they only should now be partitioned.

But while they thus confine themselves to the construction of the decree their Lordships desire that it be not supposed that if the matter were *res integra* they would have come to a different conclusion. They make no pronouncement upon this question. They address themselves to the construction of the decree; and the first matter to be inquired into is the construction of the plaint. The plaint starts by assuming possession by the common ancestor of the revenue-free lands in question, which are stated to be in extent 8 puras, 7 aras, and certain fractional quantities equalling according to the more common Indian measurement 663 bighas. It then states the descent of the parties and proceeds as follows, paragraph 4:—

"That a partition having been regularly made of the aforesaid 4 annas, zemindari No. 77 by the Collector of the district of Mymensingh in 1852, the . . . share of the plaintiff's father . . . . was partitioned and recorded as estate No. 5253, the . . . . share of the defendant No. 1's father, ... as estate No. 5254."

It then states the shares of the other defendants and proceeds:—

"That at the time of the said partition the aforesaid rent-free Brahmattar holding, mentioned in paragraph 2, that is, the property mentioned in schedule No. 1 to this plaint, had been allotted and partitioned along with those zemindaris by the Amin who made the partition, but defendant No. 1's father having objected that the aforesaid land was rent-free land and that partition of it could not be made by a Revenue Court along with those zemindaris, the case went up to the Honourable Sudder Board, and at last under an order of the Sudder Board, dated 10th August, 1852, the partition and the partition allotment of the rent-free land mentioned in schedule No. 1 were set aside, and it has since then remained as uncontested rent-free rasadi ejmali property among the co-sharers according to their respective shares."

Paragraph 5, after stating possession according to title proceeds as follows:—

"That in this state the aforesaid rent-free land of schedule No. 1 was, at the special request of defendant No. 1's father, taken up for Thakbust measurement as property jointly held and possessed by the said co-sharers according to their respective shares as mentioned above, and it was measured and mapped as (Thak) chucks Nos. 1, 2, 3, 4, 6, and 7, and the plaintiff is malik and possessor of"—

his share, defendant No. 1 of his share, " of the aforesaid joint-rent-free land." " Rent-free " is equivalent to revenue-free.

Paragraph 6 deals with the Khanabari lands of the holding, disputes as to which there is good ground for saying led to these proceedings for partition. They are said to be set forth in schedule 2. As to them it is suggested in general terms in this paragraph as it is in paragraph 7 that the parties should each have the dwelling houses with their appurtenances which they have been accustomed to occupy, and that the idols and temples should be held in common. Paragraph 7, omitting a portion of it not material to the present controversy, is as follows :—

"That the rent-free lands of schedules Nos. 1 and 2 were never partitioned, they are the ejmali right of all the co-shares. Out of all these lands, those which the parties are holding possession of as their respective khamars have not been received, (?) as they ought to have been, having regard to the condition and value and to the respective rights [of the parties]; but the plaintiff and the defendants have each been holding distinct and separate possession of some portions and joint possession of other portions of the aforesaid lands as lands of their dwelling-house and khamars, subject to a partition which is to effect a proportionate distribution of the entire land according to the shares of all the co-sharers. . . . . That the land of schedule No. 2 out of the lands of schedule No. 1 forms the Khanabari of Ganga Debya, the predecessor of the parties; it is a very valuable property; and the dwelling-houses of the plaintiff and the co-sharer defendants being situate on that land of schedule No. 2, partition should be made of it amongst the co-sharers according to their respective rights and shares and of the quantity and kind of land that ought to be received by each, keeping in view the necessity and convenience of each and the value of the land, and the partition of the remaining lands of schedule No. 1 should be made, having regard to the convenience of the co-sharers and the value of land."

Paragraph 8 makes general averments as to the disputes between the parties which have arisen from the conditions of joint tenure and occupancy, and the desirability of partition.

By paragraph 9 the plaintiff humbly prays :—

"That after making a measurement, classification and assessment of all the rent-free Brahmattar lands of chucks Halka Nos. 1, 2, 3, 4, 6 and 7 of the Thakbast map of 1854, which are lands of schedule No. 1 of this plaint, situate in Gouripur known as Kalipur . . . . and then distinctly separating and marking off plaintiff's one-third share of Ganga Debi's Khanabari lands of schedule No. 2, with" [certain excepted lands] "which should be kept in ejmali, from the other two-thirds share . . . . , the Court after specific separation and demarcation of the lands in the plaintiff's one-third . . . . share of the rest of the lands mentioned in schedule No. 1 along with the aforesaid demarcated

lands, may make over one saham to the plaintiff . . . . and give him possession of it."

Certain consequential relief is prayed and then follow :—

"*Remarks.*

"1. The parties may probably raise an objection if I give some other private boundaries of the entire rent-free lands mentioned in schedule No. 1, and as those lands have been described and identified as chucks Nos. 1, 2, 3, 4, 6 and 7 of the Thakbast map, it is prayed that the Court may do the partition work of those lands by retaining that map as part of this plaint.

"2. Let it be stated here that although in the thak map the writer has by mistake put 'No. 84' in the place of chuck 'No. 4,' it has been correctly described and shown as chuck No. 4 in the index of the field-book and in other places."

The other remarks are not material.

"*Schedule No* 1.

"The lands of chucks Nos. 1, 2, 3, 4, 6 and 7 of the thakbust map of 1854, which are known as the rent-free village Brahmattar lands of the late Ganga Debya, situate in village Gouripur known as Kalipur, appertaining to Gouripur Gopalpur, in pergunnah Mymensingh, district Mymensingh, measuring 8p. 7a, 14c. 1 powa."

Schedules Nos. 2 and 3 need not be stated.

It will be observed that the lands to be partitioned are stated in the plaint as being chucks 1, 2, 3, 4, 6, and 7 of the Thakbast map of 1854. Two copies of this map are among the documents in the case. They vary in this respect that Exhibit 13 has some numbers not shown in Exhibit 2; and their Lordships have been invited by counsel for the appellants to take the two together.

The original has been torn and defaced in several places, and some lines and probably some figures are missing.

At the top of the map it is stated to have been prepared on various days in January 1854.

It shows six areas of land separately marked out by black lines round them.

The plaintiff says that those proceeding from left to right are the chucks 1, 2, 3, 4, 7, and 6 mentioned in his plaint; and a reference to the Halkawari Index, which is the document described in the plaint as the "index of the field-book," shows that at one time at any rate they bore these numbers. There is a large expanse of uncoloured and, except in respect of some buildings, undelineated surface surrounding and separating these areas. Part of this space represents, according to the letterpress on the map, the area of two other zemindaris Nos. 78 and 79 at one time united with No. 77. The letterpress states that this area is numbered 8 and coloured white. Part of the space is shown by remarks upon the map to belong to other zemindaris. Then there is a lake numbered 5 and coloured blue, which is still common to zemindaris 77, 78, and 79.

The first area, the original chuck No. 1, is divided into several sub-divisions, not in the sense that the whole is carved into sub-divisions, but that a number of pieces have been carved out leaving a residuum. These pieces are all coloured, the colours shading inwards, and being either red or brown. In the centre of each of these pieces is a number beginning with 9, the first free number, and proceeding to 19. Nos. 10, 11, 12, 13, 16, 17, and 19 are brown, the others are red. Then there is the residual space, an irregular piece, mainly central, but reaching to the outside at the W. and at the S.; and in the middle of this residual space stands the figure 1.

Chuck No. 2, which is, as has been said, much smaller than the others, has no divisions.

Chucks Nos. 3 and 6 contain, like No. 1, a number of sub-divisions, each marked in the centre with continuing numbers, the first being No. 20, some being coloured brown, some red.

In each case there is an irregular residual space expanding from the centre of the chuck, and in the centre of this residual space the figures 3 and 6 are respectively placed.

The same observation may be made of chuck No. 4, with the correction made by the plaintiff and assented to by defendant No. 1, that the figure 84 appears by mistake for 4.

On chuck 7 there is no No. 7, and it is difficult to trace any residual space; but this portion of the map is much defaced. The last sub-divisional number is 124.

The contention on behalf of defendant No. 1 is that the numbers as they now appear on the map represent the residual space on which they stand, and not the old chucks.

At the bottom of the map as it now appears, though this portion of the letterpress has probably been added since 1854, there is a statement in tabular form of the number of the mehals, the names of the maliks (or owners) and present possessors, and the number of chucks demarcated.

Here it is that zemindaris Nos. 78 and 79 appear as numbered 8 and coloured white, and the lake as being common property and numbered 5. Then appear in the column of mehals the five new zemindaris 5253, 5254, 5406, 5407, and 77, with the share which each represents, and in the column of maliks the plaintiff, defendant No. 1, and the other defendants with their shares again repeated, the fractions being added up to show the sixteen annas or total, followed by the word "ejmali," meaning in joint holding.

Bracketed against this in the chuck column are the words and figures following:—

"1, 2, 3, 4, 5 [*sic*], 6 and 7, these six chucks have been marked under sanction of the Board."

Then follows an enumeration of sixty-three figures beginning with 10 and ending with 124. Then the figures and word '69 chucks."

The number 69 is the sum of the 6 and the 63; and there-

fore the 6 and the 63 are mutually exclusive. Hence it follows that the 6 do not represent the large areas as the plaintiff now contends, but the smaller or residuary areas in accordance with the contention of defendant No. 1. The letterpress on the map therefore confirms the inference to be drawn from the pictorial statement.

But the plaintiff may rely upon the Halkawari Index to which he refers in his plaint. This is in two parts. The first part, undated, shows the larger areas as chucks, and gives to each of them the numbers 1 to 7, and describes them as being "ejmali." The second part, which is the part specifically referred to in the plaint as showing that No. 84 on the map should be really 4, bears an imperfect date only. It may have been composed in 1855 or 1856. It gives the measurements of the sub-divisions.

The chucks of larger area now become mere reference numbers. Chuck No. 2 not being sub-divided is omitted, and the chuck numbers begin at 9 and proceed to 124, and correspond with the sub-divisions on the map.

The numbers 9 to 124 which are stated in the table on the map to be ejmali and which are coloured brown on the map are said in this second part to be ejmali. There are four numbers specially dealt with, two of which are coloured blue on the map, and the balance forty-nine which are those coloured red on the map are stated to be the mehal of the father of defendant No. 1.

It is these forty-nine areas which form the substance of the controversy. They are those of which defendant No. 1 resists partition. As to the sixty-three and the residual areas all parties are content that they should be partitioned. The residual areas are omitted from part 2 of the index. This would be so if they were taken as having been previously marked off by the order of the Board of Revenue, as stated in the letterpress on the map.

The second paragraph of the index confirms the inference to be drawn from the map that from the time of sub-division the Nos. 1, 3, 4, 6, and 7 stand for the residual, and not for the old large, chucks ; and that the plaintiff when he put forward the map, as showing that of which he desired partition thereby represented that the partition sought was for the residual chucks, with the undisputed and undivided No. 2.

Counsel for the appellants endeavoured to meet this difficulty by the suggestion that it was not the map as it stood that was put forward, but the map as it had stood, or should have stood in 1854 before the sub-divisions were made, and he relied upon the language of the plaint where it is called "the map of 1854." But it is the map of 1854, so described at the top of it. There are further markings on it which with the assistance of the Halkawari Index their Lordships may infer but not with certainty, to have been made later than 1854 to wit in 1855 or 1856 ; but the plaintiff in his

plaint makes no such averment. Assuming that they were so made, their Lordships have still to consider what meaning the plaintiff conveyed to the defendants and to the Court. He asked for partition of certain numbers on the map of 1854; he put forward the document, and asked that it be treated as part of his plaint. If the document is looked at, the numbers represent the smaller areas; if he meant the Court to treat the document as if a number of markings and much of the letterpress upon it were obliterated he should have said so; and further, to avoid uncertainty he should have specified what markings, and what part of the letterpress were to be taken as obliterated.

In the last resort an attempt was made to show from the statements of the pleaders, made when the case came on for trial that, whatever might be the pleading, defendant No. 1 knew that the larger areas were being contended for.

This is sought to be extracted from the statements of the defendants' pleader, that, out of the lands under claim, some are in the distinct and separate possession of the co-sharers, and the others are in ejmali, that there are no documents to show that they have ever been partitioned, but that they have been held in distinct and separate possession for long periods of time. It is said, here is an admission that the parties are dealing with the larger chucks, and defendant No. 1 is setting up no title but that of possession. But this begs the question: If the smaller areas were intended, it would equally be the case that within these smaller areas which have not been partitioned there were lands and dwellings of which the parties claimed separate possession. Certainly this would be the case with regard to residual area No. 4, in which were the Khanabari or homestead lands. These lands gave rise to the original dispute. It was with regard to them that the plaintiff made statements as to separate possession in his plaint, and in the statement by his pleader, and it is in respect of these Khanabari lands that the defendant's pleader, as he proceeds to detail, asserts separate possession of parts on behalf of his client.

It remains therefore that the plaintiff got partition of those lands of which he expressed himself to be seeking partition, that these were chuck No. 2, and the residual areas of the other chucks, but not the whole chucks, and that the judgment of the High Court is right.

Their Lordships will therefore humbly recommend His Majesty that the decree of the High Court should be affirmed, and that this appeal should be dismissed; but that in the peculiar circumstances of the case there should be no costs of the appeal.

In the Privy Council.

SRIMATI BHABATARINI DEBI CHOWDHURANI AND OTHERS

v.

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DELIVERED BY
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