NOTE.—Please substitute for copy of Judgment previously issued.

Privy Council Appeal No. 87 *of* 1923.

Bengal Appeal No. 8 *of* 1921.

The Midnapur Zamindary Company, Limited - - - *Appellants*

v.

Kumar Naresh Narayan Roy and others - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 7TH APRIL, 1924.

Present at the Hearing:

LORD ATKINSON.
LORD SHAW.
LORD BLANESBURGH.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* SIR JOHN EDGE.]

This is an appeal by the defendants, The Midnapur Zamindary Company, Limited, which will be hereafter referred to as The Midnapur Company, against a decree, dated the 17th January, 1921, of the High Court at Calcutta, which affirmed a decree, dated the 19th August, 1915, of the Subordinate Judge of Nadia, by which the claim of the plaintiff, Kumar Naresh Narayan Roy, in Suit No. 557 of 1912, had been decreed with costs. The other parties to the litigation are Rani Hemanta Kumari Debi and the Secretary of State for India in Council, who are defendants and respondents, but they have not appeared and are not represented in this appeal.

The suit in which this appeal has arisen was brought in the Court of the Subordinate Judge of Nadia on the 8th August, 1912, by the plaintiff, who is of the Putia Raj family, and who claimed a decree for the partition of certain lands in which he and the

Midnapur Company were co-sharers, a declaration that the Midnapur Company had no jote rights in any of the lands of which he sought partition, and a decree for possession after partition by ejectment of the Midnapur Company, and other reliefs.

By the written statement of the Midnapur Company it was denied that the plaintiff was entitled to a decree for partition. The right of the plaintiff to a decree for partition is not now disputed. Partition is the remedy which a co-owner has if he and the other co-owners cannot agree as to how the lands which they hold in common should be managed. See *Robert Watson and Co.* v. *Ram Chand Dutt*, 17 I.A. 110.

There were two, and, in the opinion of their Lordships, only two, substantial defences, if proved, put forward by the Midnapur Company to the plaintiff's suit. The first of these defences was that the plaintiff had not been in possession within twelve years of the 8th August, 1912, of the lands in question in which he alleged that the Midnapur Company had no jote rights, and, consequently, that his claim to eject the Midnapur Company from those lands was barred by the limitation of Article 142 of the First Schedule to the Indian Limitation Act, 1908. The other substantial defence, if made out, was that the Midnapur Company held jote rights in the lands in question. These two defences their Lordships will consider later. There were two other matters which were put forward by the Midnapur Company in the assertion of their claim to jote rights in the lands in question. One of them was an order which was made on 20th September, 1909, by Mr. Ezekiel, the Collector, that the Midnapur Company should be recorded in the settlement papers as tenants with rights of occupancy. That order applied to the lands now in question and was not appealed from. It was made in the course of a new settlement from year to year. The other matter to which their Lordships allude was the contention that the plaintiff was estopped from challenging the right of the Midnapur Company to jote rights by a kabuliyat of the 9th February, 1912, to which he was a party, and by which the plaintiff had undertaken to respect the recorded rights of raiyats and others. These latter two defences were carefully considered by the High Court in its judgment in this suit, and their Lordships agree with the High Court that they do not afford defences to the claim of the plaintiff.

The evidence as to the rights of the parties was carefully considered by the Subordinate Judge who tried the suit, and the High Court agreed with him in all material matters. The history of the lands in question, which are chur lands in the alluvial plains of the river Pabma, and of how those lands have from time to time been dealt with by the Government, by the plaintiff, and by the Midnapur Company and their predecessors in title, including Robert Watson and Co., has, so far as is material, been very fully and most carefully stated in the admirable judgment of the High Court of Sir John George Woodroffe and Hugh Walmsley, JJ., and with the conclusions expressed by those learned Judges

their Lordships agree. They will, however, refer to some other matters which in their opinion bear upon the case, and will then state what is their conclusion as to the two defences which, if proved, would be substantial defences to the claim of the plaintiff to eject the Midnapur Company.

The lands in suit are comprised in an estate which has been periodically settled under Regulation 2 of 1819. As has been mentioned, they are chur lands. The proprietary interest in the lands is admittedly vested in the plaintiff and the Midnapur Company as co-sharers, who hold the lands in common. Where lands in India are so held in common by co-sharers, each co-sharer is entitled to cultivate in his own interests in a proper and husbandlike manner any part of the lands which is not being cultivated by another of his co-sharers, but he is liable to pay to his co-sharers compensation in respect of such exclusive use of the lands. Such an exclusive use of lands held in common by a co-sharer is not an ouster of his co-sharers from their proprietary right as co-sharers in the lands. When co-sharers cannot agree as to how any lands held by them in common may be used, the remedy of any co-sharer who objects to the exclusive use by another co-sharer of lands held in common is to obtain a partition of the lands. No co-sharer can, as against his co-sharers, obtain any jote right, rights of permanent occupancy, in the lands held in common, nor can he create by letting the lands to cultivators as his tenants any right of occupancy of the lands in them. Their Lordships may refer on this subject of separate cultivation by a co-sharer of lands held in common to what Sir Barnes Peacock said in delivering the judgment of the Board in *Robert Watson and Co.* v. *Ram Chand Dutt*, 17 I.A., at pages 120–121. He then said :—

> "In India a large proportion of the lands, including many very large estates, is held in undivided shares, and if one shareholder can restrain another from cultivating a portion of the estate in a proper and husbandlike manner, the whole estate may, by means of cross injunctions, have to remain altogether without cultivation until all the shareholders can agree upon a mode of cultivation to be adopted, or until a partition by metes and bounds can be effected—a work which, in ordinary course, in large estates would probably occupy a period including many seasons."

In that case the Board made a declaration that Robert Watson and Co., who were the plaintiffs, should recover from the defendant a sum of money, calculated at a specified rate per bigha per year, as compensation for the exclusive use by the defendant of the bighas which had been occupied by him.

Their Lordships are not certain that the Midnapur Company has in recent years, if at all, been cultivating any part of the lands in question. If the Midnapur Company has been, in fact, cultivating any of these lands, it cannot by such separate use of the lands have acquired any jote rights in them. Even if the Midnapur 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. The Midnapur Company alleges as a defence to this suit that tenants of the Midnapur Company, who are not tenants of the co-sharers, have acquired under the Midnapur Company jote rights, rights of occupancy, in the lands in suit. Such rights of occupancy, if they existed, would be raiyati jote rights, but a raiyat cannot acquire under Section 180 of the Bengal Tenancy Act, 1885, a right of occupancy in chur land until he has held the land for twelve continuous years, and no evidence has been brought to the attention of their Lordships that any raiyat had held any of the lands in suit for twelve continuous years before suit as a tenant of the Midnapur Company, even if a holding of lands by a raiyat under the Midnapur Company, and not under the co-sharers, could confer a right of occupancy on the raiyat as against the co-sharers. In Bengal a co-sharer has no more power to confer a right of occupancy on a raiyat than a middleman would have, and in Bengal a middleman cannot obtain as a middleman a right of occupancy in himself, much less can he create in his tenant a right of occupancy in lands held by him as a middleman. See the judgment delivered by Lord Dunedin in *Midnapur Zamindary Company* v. *Naresh Narayan Roy*, 48 I.A., at page 55. See also the cases referred to at page 116 of the commentary on the Bengal Tenancy Act, 1885, by W. Finucane and Ameer Ali (Syed), edited by F. G. Wigley, Calcutta, 1904.

Their Lordships return now to the Company's substantial defences to the suit, the first of which is that the suit is barred by the limitation of Article 142 of the First Schedule to the Indian Limitation Act, 1908. This raises the question as to what was the possession of the lands in question in this suit which the plaintiff obtained on the 26th July, 1902, and the 20th June, 1903, under a decree for possession of the High Court at Calcutta of 1899 in a suit No. 6 of 1891, in which the plaintiff and Robert Watson and Co., who were predecessors in title of the Midnapur Company, were parties. It must be remembered that the plaintiff and Robert Watson and Co. were co-sharers of the lands now in suit, which the plaintiff and the Midnapur Company hold in common as co-sharers. Robert Watson and Co. had been denying the right of the plaintiff as a co-sharer in the lands. A Commissioner was appointed to deliver possession to the decree holders, and he delivered possession under Section 264 of the Code of Civil Procedure of 1882 by the usual modes of sticking bamboos and the beating of drums, and by proclaiming aloud in Bengali, in the presence of a number of persons of the vicinity, the terms of the decree of the High Court and of the parwana of the Court of the Subordinate Judge of Nadia. In India, persons are not permitted to take forcible possession; they must obtain such possession as they are entitled to through a Court. The plaintiff was not entitled to get possession by ousting his then co-sharers, Robert Watson and Co., from possession of lands which they were entitled to hold in common as co-sharers; the possession which the plaintiff got was a

possession of the lands in his proprietary right as a co-sharer. The High Court had declared that there were no jote rights in the lands. The possession which the plaintiff got in 1902 and in 1903 was within twelve years of the 8th August, 1912, and the suit was not barred by the law of limitation.

As to the other material defence, which is one of *res judicata*, their Lordships feel that they cannot add anything to what Sir John George Woodroffe and Hugh Walmsley, JJ., said in their judgment on that subject, with which they agree. But to prevent the possibility of any further doubts being suggested at any time on that matter, their Lordships repeat what those learned Judges said. Referring to the litigation which began in 1891, they said :—

"We now pass to the issue of *res judicata*, the facts as to which are as follows :—

"In the plaint in Title Suit 6 of 1891, the plaintiffs, *i.e.*, members of the Puria Raj family, alleged that the Revenue authorities had been wrong in holding that Watson and Co., and not the plaintiffs, were in possession of the land that was being settled in 1887, and that Watson and Co. dispossessed them by virtue of the order of the Board of Revenue that the settlement was to be with Watson and Co. They admitted that Watson and Co. owned an undivided share of 3 annas odd with themselves in the mahal. Their prayers were as follows :—

(*a*) For a declaration that the land appertained to towzi No. 814 ;

(*b*) For a declaration that they were entitled to get settlement from the Collector ;

(*c*) For recovery of possession ;

(*d*) For mesne profits, provisionally estimated at Rs. 1,692.

"The defence was (*a*) that some of the land in suit, viz., 1,558 bighas 1 k. 10 ch., had accreted to their estates chur Hogulberia and Niamatpur, as held by the Revenue authorities ; (*b*) that the remainder had accreted to their estates Udainagar, Temadia and others ; (*c*) that they had acquired a right by adverse possession ; and (*d*) that the plaintiffs could not in any event obtain khas possession. Other pleas were raised, but we are not concerned with them.

"It was found that the plaintiffs' claim was barred as to the 1558-1-10 by adverse possession for twelve years, but that the remainder of the land was an accretion to mahal No. 814, and that the defendants had not been in adverse possession for the statutory period. These findings of the first Court were upheld on appeal.

"Regarding khas possession an issue was framed as follows :—'Are the plaintiffs entitled to recover khas possession of the land in suit ? Have the defendants any jotedari right in the land ?' But, on December 28th, 1893, the plaintiffs' pleader made a statement in these words : 'The plaintiffs claim only a right to the settlement of the disputed land and no other right.' On the same day the defendants' pleader made a statement, and asserted that, in any event, khas possession could not be given because the defendants had jotedari right in the land. As a result of the statement made by plaintiffs' pleader, the learned Judge did not decide the issue. He said : 'The plaintiffs do not ask for khas possession. Hence it is not necessary to enquire whether the defendants have a jotedar right in the lands.'

"Watson and Co. preferred an appeal, and raised the question that the Judge had left open, in the eighteenth and nineteenth paragraphs of their memorandum. It will be seen from these grounds that the appellants who now contend that the decision of the issue was unnecessary, expressly invited this Court to decide it. The eighteenth of their grounds of appeal

ran as follows: 'For that the learned Sub-Judge having held that it was not necessary to enquire whether the appellants have jotedari right in the lands in suit, has erred in giving a decree for possession of the same to the plaintiffs.' The nineteenth ground was equally explicit and ran: 'For that it should have been held that the appellants are entitled to hold most of the disputed lands in jote rights and that the plaintiffs have no right to evict them from the same without determining their tenancy in the manner prescribed by law.' The point was pressed in argument before this Court, but it was held that there was no evidence in support of the contention.

"The decree that was drawn up in this Court made no express mention of the decision on this point in terms: it affirmed the First Court's decree with modifications intended to remove uncertainties.

"In the present suit the plaintiff says that the decree was to the effect that the Raj should get possession after ejectment of Watson and Co., that Watson and Co. were ejected and possession delivered. The statement continues: 'But the plaintiff has not in reality got possession of the decreed lands in proper order even in spite of their having obtained possession in manner aforesaid and the defendant Company have illegally and without any right been still holding possession of the whole of the decreed lands.'

"The prayers are as follows:—(*a*) For a declaration that the Company has not, never has had, and never can have, jote rights in the lands covered by the decree in Title Suit No. 6 of 1891; (*b*) for a partition of those lands and of the land in towzi No. 814 as it was in 1891; (*c*) for possession of the separate share of 5 a. 16 g. 2 k. 2 kr. to be allotted to the plaintiff by the ejectment of the defendant Company; and (*d*) for an account and mesne profits, &c.

"There is no dispute about the identity of the land now in suit with the land of the previous suit.

"Now, had the matter rested where the Subordinate Judge left it, no such question as we have to discuss would have arisen. Whether the suit might and should have been properly determined without entering into the question of the tenancy right as the plaintiff apparently wished to do, we need not now enquire. For, in fact (as we have seen), the present appellants directly insisted on the point being tried, and alleged that the First Court should have done so. It was contended before us that whatever the appellants might have done in this respect, the issue in fact was not a necessary or proper one to be tried in that suit, and that it is open to us to say so. But we must see first whether this Court adjudged otherwise, that is, whether this Court having the question before its mind decided that the issue did arise. If so, that decision would be as much *res judicata* as the final determination of the issue on the merits. If we are of opinion that the Court did so decide, we are not concerned to see whether it did so rightly or not, and indeed cannot do so. Now this is not a case, as not infrequently happens, where incidentally some point is decided which is not necessary, which was not of first-rate importance or especially brought to the notice of the Court. The plaintiff had excluded the question by the statement of his pleader. The First Court had therefore expressly stated that it could not decide it. The defendant, the present appellant, has expressly urged that the Judge was wrong in not deciding this question even though his action was based on the plaintiff's adviser's statement and he asked this Court expressly to decide it. As the Court did so, it seems to us that we ought to assume not that it did something which was unnecessary, but that in so far as it decided the point raised, it must also have decided that the then defendant's objection that the point should be tried was a good one and that the issue was one which did arise in the suit.

"Then what did the learned Judges say? Maclean, C.J., after disposing of the question of reformation, sets out the three contentions of the then defendants and present appellants, the third of which was that the

defendants are entitled to jotedari right. On this the Chief Justice held that no such rights were anywhere recorded, nor was there any evidence of such rights. It was, he said, for the then defendants and present appellants to make out such right, but that they had not succeeded in doing so. Banerji, J., states the contention 'that the plaintiffs cannot claim khas possession as the defendants had jotedari rights in the greater part of the lands in suit.' He says that that was part of the defence which it was necessary to consider. He then points out that the First Court did not consider the question of jotedari right necessary to be determined, and expressly refers to the ground of appeal that the First Court ought to have determined the question of tenancy right, and held that the possession to which the then plaintiff was entitled was subject to the tenant right of the present appellants. It is quite clear from the above that the then defendants' case was present to the minds of the Court. The learned Judge then proceeded to decide it and held that there was no jote right. If the learned Judges had thought the issue unnecessary, they would presumably have said so and not decided it. But they did decide it. Can it be said under these circumstances that the point was not raised, that the Court did not consider it to be a necessary issue and did not impliedly decide that it was necessary and did not decide the issue on the merits? We think the answer is clearly in the negative. Then what of the decree? It is true that it does not expressly refer to the tenancy right, but it gave a decree for possession. What, then, did it intend to give? For the appellant it is said that all that was given was possession as co-proprietor and that the question whether such possession was free of the alleged tenancy right was left untouched. But if so, what was the necessity of discussing the question in the judgment? We ought not, we think, to assume that the Judges discussed a question which was irrelevant to the case, and then granted no relief in respect of it: but rather that as they had discussed and negatived the alleged tenancy right in the judgment they intended to, and did, give a decree which should give effect to these findings. If so, the learned Judges' decree in effect gave to the respondents before us a right to the lands in that suit free of the alleged tenancy right claimed. We are of opinion therefore that the issue as to the appellants' right is *res judicata*."

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs, but that the decree of the Subordinate Judge be varied by substituting for his order as to mesne profits an order that the Midnapur Company is to pay compensation to the plaintiff for the exclusive use by the Midnapur Company themselves or by their tenants of the lands in suit from the 8th August, 1906, until partition has been effected and possession of the lands falling on partition to the plaintiff has been delivered to the plaintiff. Such compensation is to be ascertained and assessed in the High Court or in the Court of the Subordinate Judge of Nadia as the High Court may direct, and the plaintiff's costs, which may be incurred in the ascertaining and assessing of such compensation, are to be paid to him by the Midnapur Company.

In the Privy Council.

THE MIDNAPUR ZAMINDARY COMPANY, LIMITED,

v.

KUMAR NARESH NARAYAN ROY AND OTHERS.

DELIVERED BY SIR JOHN EDGE.

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