Privy Council Appeal No. 81 *of* 1917.

Allahabad Appeal No. 15 *of* 1915.

Ram Tahal Naik and Another - - - *Appellants,*

v.

Bhagwati Prasad - - - - - *Respondent,*

FROM

THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN PROVINCES, ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH MAY, 1918.

Present at the Hearing:

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

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

On the 21st January, 1861, a concession of a tract of waste land measuring 871 acres equal to 1,416 bighas was granted by the Lieutenant-Governor of the North-Western Provinces to Prithipal Naik and Bindeshri Prasad Naik. The plaintiff in the present suit who is the respondent before their Lordships has now the estate and interest of Bindeshri, having foreclosed upon a mortgage granted to him by Bindeshri. The appellants who are the defendants in the suit are the successors in interest of Prithipal. The terms of the concession were that the grantees should within twenty years clear the whole tract—

"with the exception of 213 acres of irremediably barren land, and one-fourth or 164 acres of the remaining culturable land, which is left at the disposal of the grantee, if the conditions are fulfilled."

Though the warrant was granted in 1861 the concession dated from 1857, so that the period of twenty years expired in 1877. The whole concession was for fifty years during which the lands were to pay a jama, or rent, to the Government increasing at various periods according to a table—

"and provided, the said conditions be well and truly fulfilled, then from and after the lapse of the same term, the lands are to be holden

on the same conditions and subject to the same rules and regulations as all other landed tenures, paying revenue to the British Government in the North-Western Provinces."

Though the grant was joint it appears that the grantees operated separately, each attacking a different part of the jungle and introducing cultivators who cleared and peopled and became occupiers paying their quit rents to and looking to that grantee who had introduced them.

In 1877 Bindeshri took proceedings to have the estate partitioned; but objection was made on behalf of the predecessor in title of the defendants, and the proceedings coming to the notice of the Government an order was issued by the Board of Revenue staying them on the ground that there could be no partition until the term of the expiry of the grant; and the case was struck off on the 6th September, 1877. The property was recorded from time to time in the Government books as jointly owned in half shares by the representatives of the two parties; and up to 1907 the rent was paid in halves. In 1907 a new rent was fixed which the parties agreed to pay jointly.

Disputes having arisen between them Ram Tahal applied to the Revenue Officer for partition, and the present plaintiff objected in his turn to any partition sought for on the ground that—

"the objector is a recorded proprietor of an 8-anna share, but by reason of the fact that his predecessors caused (the land) to be brought under cultivation, he is in adverse proprietary possession of a larger area, and hence he should be given as much area as is in his possession, and equal division should not be made."

After hearing the parties the officer presiding in the Revenue Court came to the following conclusion :—

"that the objector or his predecessors are not the owners of more than a moiety share. But as adverse possession and the right of ownership are in question in this case and as the objector says that he is the owner of as much area as he has brought under cultivation, it would be proper if the matter is decided by a civil court. Hence the objector is directed to have his rights determined by a civil court within three months."

The order of the Revenue Officer was made on the 3rd March, 1911, and on the 2nd June the plaintiff began the present suit, and it is important to see how he then stated his case. After stating the grant in 1861, and describing the grantee under whom he claims title as Bhairo Naik and the other grantee as Harnam Naik, he proceeded as follows :—

"2. Subsequently, the grantees divided the said jungle Harnampur into four lots and demarcated the same and by cutting off the jungle made boundary lines. Bhairo Naik aforesaid became the owner of lots Nos. 1 and 2, and Harnam Naik aforesaid of lots Nos. 3 and 4. . . .

"3. Both holders of the lots at their expense and labour got the

jungle of their lots cut down without having had anything to do with the holder of the other lots, populated the jungle land and got their respective 'tolas' (hamlets) inhabited. Each holder of the lot continued to make collections in his lot, to institute suits for arrears of rent and for ejectment, take summary proceedings, &c., to pay the Government revenue, to look after his lot, to realise lease money of the jungle, and to appropriate the produce of 'mahua' and other trees without having had anything to do with the holder of the other lots, and to lease out his portion of the jungle. This nature of separate possession and enjoyment as a proprietor having adverse rights has, since the time of partition up to this date, been in force for several periods of twelve years' limitation between the principal grantees and their heirs and representatives."

"5. The partition and the demarcation, referred to in paragraph 2 of this plaint, was made privately and the grantees and their heirs did not at any time through lukewarmness get that partition recorded in the Government papers. In them, out of the entire Harnampur, an 8-anna share stood recorded in the name of Bindeshri Naik . . . . and another 8-anna share in the name of the heirs of Harnam Naik. . . . .

"6. The area of the entire mauza Harnampur aforesaid is 1,416 bighas 10 biswas, but the area of partition lots Nos. 1 and 2 belonging to the plaintiffs is 839 bighas 2 biswas 15 dhurs, which slightly exceeds one-half, and in both of them there stand at present 'mahua' trees and several hamlets and there is a large amount of 'sair' income. As against this there are neither hamlets in partition lots Nos. 3 and 4 belonging to the defendants, nor are there so many hamlets, 'mahua' trees and 'sair' and other incomes, because the holders of lots 3 and 4 have cut down 'mahua' and other trees and have appropriated them."

In paragraph 7 the plaintiff referred to the map in which the lots he claimed are coloured green, and the defendants' lots white.

They are checkerwise, the N.E. and S.W. lots being coloured green and the N.W. and S.E. white. There are some small enclaves, coloured yellow and red, in regard to which special allegations were made.

He prayed that it might be declared by the Court that the property "stood partitioned privately between the parties; that according to it the plaintiff is the owner of lots Nos. 1 and 2 shown in the map annexed . . . . of which the aggregate is 839 bighas" and a fraction.

The material allegations in the defendant's written statement are to be found in paragraphs 12, 14, and 15, and are as follows:—

"12. Neither a public nor a private partition was ever made of mauza Harnampur, nor was any share ever delimitated, nor was any lot ever prepared. All the allegations made by the plaintiff are wrong, and the claim has been improperly brought."

"14. At the recent settlement, the predecessors of the plaintiffs themselves admitted that the village was joint and verified the settlement papers and put down this express provision that the waste land was in joint ownership and that no sharer was alone entitled to populate the joint waste land and that if any co-sharer did so the land will

not be considered as in his exclusive possession till a partition was made."

"15. The village is joint but the plaintiff and the defendants and their predecessors have all along been in possession of equal shares, *i.e.*, half and half of the jungle and have been making collections and have been paying revenue to Government half and half."

When the case came before the Subordinate Judge certain statements and admissions were recorded by him, which, so far as material, are as follows :—

"The pleader for the plaintiff has stated that after the acquisition of the jungle the parties had begun to cultivate the jungle separately from the commencement of 1861, that the predecessors of the parties had partitioned the jungle before it was brought under cultivation, that the plaintiffs began to cultivate the portion of the jungle which is shown by green colour in the map filed by the plaintiff, that the defendants began to cultivate the portion of the jungle which is shown by white colour in the said map, *i.e.*, at the beginning of the land being brought under cultivation it was about 1861 and 1862 settled between the parties that the plaintiff would bring under cultivation the plot of land represented by green colour and that the defendant would bring under cultivation the land represented by white colour, that lands represented by red and yellow colour were also given to the plaintiff for bringing under cultivation, that accordingly about 1861 and 1862 it was settled that the land which was brought under cultivation by a certain person should be considered to be his property, that it was also settled that the land represented by white colour, would, after its having been brought under cultivation, be the property of the defendants and that the rest of the land, *i.e.*, the land represented by green, red, and yellow colours would be (?) the property of the plaintiffs, and that after the year 1862 and before the year 1877 no partition had taken place between the parties. The plaintiff states that partition took place between the parties in 1877, that before it only one other partition of which a mention has been made above had taken place between the parties about 1861 or 1862, that in 1877 there arose a necessity for partition inasmuch as the plaintiff had cultivated land more than his share, *i.e.*, the area of the land represented by green colour which was cultivated by the plaintiff was found to be more than the area of the land represented by white colour, that consequently there arose a dispute between the parties in 1877, that it was the consequence of interference on the part of the defendant, ..."

"Pleader, and counsel for defendant No. 2, have stated that no partition of any kind ever took place between the parties either in 1861 or 1877 or in any other year, that the whole of the jungle is joint between the parties, that the jungle was brought under cultivation by the parties jointly, that the 'tolas' also were settled jointly, that some 'tolas' were taken possession of by the plaintiff and others by the defendant, that one party was in possession with the consent of the other, that up to this time no compromise was entered into between the parties as to which land belongs and to whom, that rent was realised from some tenants by the plaintiff and from others by the defendant, that the separate possession of the parties commenced since 1314 Fasli when the Revenue Court had passed an order that separate 'siyahas' should be filed. . . . ."

Some oral evidence not very material was given and the documents were filed. On these materials the Subordinate

Judge came to the conclusion that there was no partition, as alleged by the plaintiff, either in 1861 or in 1877; that there was sufficient evidence to show that the parties had been in separate possession of several portions of the property, two plots only being in dispute; that each had populated his portion and might have also personally improved it and had received quit rents from it; but that there had been no adverse possession, though there had been some arrangement between the parties to hold plots separately; that it was not the intention that either should take the land cleared by him or that it should become his separate property, and that there was no reason why there should not be an ordinary partition. He therefore held that the plaintiff was not entitled to any relief and dismissed his suit, presumably leaving the parties to return to the Revenue Court for an ordinary partition.

The plaintiff appealed to the High Court, which on the 7th December, 1914, reversed the decision and stated—

"that the only inference that can be drawn is that the plaintiff is absolutely entitled to so much of the property mentioned in his claim as he or his predecessors in title have been in separate and exclusive occupation of, and that the defendants have no right to have that property partitioned. There may, however, be some dispute as to whether or not the plaintiff has been in such separate and exclusive occupation of the entire property claimed by him. We think it safer, therefore, before finally deciding the appeal to refer certain issues on this question."

These issues, which were necessary because of the dispute as to the separate possession of two plots, as already mentioned, were found by the Subordinate Judge in favour of the plaintiff, and on the matter coming back to the High Court on the 7th April, 1915, the appeal was allowed, the decree of the Court below was set aside, and the plaintiff's claim was decreed in full.

It is from this decree that the present appeal is brought.

The defendants being content to have a partition, if they get half the property, while the plaintiff puts forward a claim for more than a half in quantity and for a better share in quality, the burden is upon him of making out his case, and he appears to have been uncertain as to what were the grounds upon which he should rest his claim. Before the Revenue Officer he asserted that he was in adverse proprietary possession of the larger area and should be given as much as was in his possession. When he filed his plaint, he alleged that the original grantees divided the jungle and demarcated the same with boundary lines. He gave no date, and offered no evidence of any physical demarcation, but he stated that it had been done by the original grantees. He asserted adverse possession as a second ground. When his pleader came before the Subordinate Judge, he put a partition by agreement as having taken place about 1861 or 1862, and a second partition about 1877.

As the Subordinate Judge rightly stated, there could be no question of adverse possession as between co-sharers. There was no evidence of any partition by agreement in 1877. On the contrary, it was in that year that an attempt was made to have an official or judicial partition, which failed because the time was not ripe.

The plaintiff's case, therefore, must rest upon a consensual partition in 1861. No doubt the two grantees did not proceed to plant the jungle in common, but each took a part; and no doubt the representatives of either are found in possession or in receipt of rent from the tenants of particular portions of the land; and it might be possible to draw from these facts the inference that there had been a partition by consent. But the Subordinate Judge states that in his opinion—

"there was no partition in 1861 or about it, and there could not have been any. At that time the parties did not know anything about the quality of the land and the jungle was not cleared and all the land was waste."

It is on this point that the Judges of the High Court differ from him. Their opinion, as expressed in their judgment when they remanded the suit, is expressed in the following language:—

"Where it is shown that a jungle plot has been divided between the grantees and that each has separately developed and populated his own defined portion, the only reasonable inference that can be drawn from the circumstances would be that the parties had partitioned the plot between them, each taking the particular plot which he subsequently developed."

This almost reads like begging the question. What has not to be assumed but shown is that the jungle had been divided between the grantees, and to show this there is nothing but the separate possession, which may have been intended to have been definite or may have been intended to be only provisional. And there are two facts which make against the theory of a definite consensual partition.

1st. The parties have always paid the jama in equal shares, and have been recorded as having equal shares.

2nd. When the original grant was made it was recognised that out of the whole area of 871 acres, 213 were "irremediably barren"; and one quarter or 164 acres of the "remaining cultivable land" was left at the disposal of the grantees to cultivate or not as they thought proper. It was stated at the Bar—and it seems likely from the papers—that, notwithstanding the licence given to the grantees, the greater part of the whole 871 acres has by this time been brought into cultivation. Some, however, must still remain uncultivated, as appears by the schedule to the decree in which items 104 and 105 in what is claimed as Plot No. 1, and items 62 and 63 in what is claimed as Plot No. 2 are described as "new [or] old barren land," and item 106 in No. 1 is described as "jungle."

It may be presumed that the land which was required by the terms of the grant to be brought into cultivation was brought into cultivation at the end of the twenty years fixed by the grant, that is in 1877, but there is nothing to show at what periods the rest was brought into cultivation, and particularly—for this is a date of some importance—whether all or some of it was brought into cultivation before or after the year 1887–1888.

Now, in the "khewat" for that year there is, as required by Act XIX of 1873, a statement as to the bringing of joint waste land under cultivation, and that statement is in the following words:—

> "No co-sharer is allowed to bring any portion of the joint waste land under cultivation without the consent of all the (other) co-sharers. If any one does so the land will not be deemed to be his exclusive property until partition is effected."

This statement was expressly relied upon by the defendant, Ram Tahal Naik, in paragraph 14 of his written statement, and if it was a deliberate statement made with reference to the particular case, it bears strongly against the theory of a previous partition. It was suggested on behalf of the respondent that this entry was common form only or matter of routine, but this is mere surmise. The Subordinate Judge thought that the entry was of importance. It has, unfortunately, not been noticed in the judgment of the High Court, and their Lordships are without any explanation of it except the suggestion made at the Bar. In this state of things it cannot be said that the plaintiff has proved his exceptional claim, and there is no reason why there should not be a partition in equal moieties. When it is made the Collector will proceed in accordance with the provisions of Section 117 of Act 3 of 1901, and he will, as far as he can, first allot to each applicant "such lands (if any) as are held by him as his sir or in severalty," subject always to the provision in Section 123. He will also give to the plaintiff all the advantages which are reserved to him by Section 119. The Subordinate Judge rightly calls attention to these provisions and to the general law allowing compensation for improvements made by a co-sharer. Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed; that the decree of the High Court should be reversed with costs, and the decree of the Subordinate Judge restored; and that the respondent should pay the costs of this appeal.

In the Privy Council.

RAM TAHAL NAIK AND ANOTHER

v.

BHAGWATI PRASAD.

DELIVERED BY

SIR WALTER PHILLIMORE, BART.

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1918.