

Jas Kunwar Vs. Pema

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Court : Allahabad

Decided On : Jul-24-1913

Reported in : (1913)ILR35All527

Judge : Ryves and ;Piggott, JJ.

Appellant : Jas Kunwar

Respondent : Pema

Judgement :

Ryves and Piggott, JJ.

1. The facts out of which this appeal arises are as follows: Mohan Singh was the owner of some zamindari property. He had three sons, Prem Singh, Gaila and Pema. Prem Singh died in the life-time of his father, leaving surviving him a widow, Musammat Jas Kunwar (plaintiff respondent). After the death of Mohan Singh, his property was recorded in the names of Gaila, Musammat Jas Kunwar and Pema. Subsequently Gaila died and the names of his widow and sons were recorded in the khewat instead of his own name. On the 13th of November, 1911, Musammat Jas Kunwar instituted a suit in the Revenue Court for imperfect partition in respect of a one-third share of the property which had originally belonged to Mohan Singh, stating in her plaint that she was 'the owner, zamindar and co-sharer of one-third out of one-fourth share in the holdings bearing khewat Nos. 22, 23 and 33 in mauza Nehru,' and was in possession thereof. The reason for seeking partition,

she alleged, was because there were constant disputes between the parties owing to the property being joint. Pema, defendant appellant, objected under Section 111 of the Revenue Act, on the ground that Musammat Jas Kunwar's name had been entered in the Revenue papers merely for her consolation, and that she was not in possession as a co-sharer, but had been receiving maintenance only, and that was all that she was entitled to.

2. The first court framed, among others, two issues, as to the entry of Musammat Jas Kunwar's name in the khewat and as to her possession. That court decided both these issues in the plaintiff's favour and disallowed Pema's objection. On appeal the learned District Judge found as follows:

3. 'It appears that Musammat Jas Kunwar has been in possession of her husband's share, and I find accordingly. As her husband predeceased her father-in-law, it appears that she was allowed her husband's share on her father-in-law's death, in lieu of maintenance and by way of consolation and she was recorded at Mohan Singh's death as a co-sharer. She is entitled then to partition of the share recorded in her name. It is clear that Musammat Jas Kunwar has not absolute ownership.' He dismissed the appeal.

4. It has been contended before us that, on the facts found, Musammat Jas Kunwar is not entitled to partition, because she cannot be said to be a co-sharer, and the mere fact that she is recorded in the khewat as such, does not make her a co-sharer. It is argued that she has not even the limited estate of a Hindu widow in possession of her deceased husband's share. As her husband died in the life-time of her father-in-law, the utmost that she was entitled to was maintenance, and the findings of the court below amount to nothing more than this, that the family, instead of paying her a certain sum annually, put her in possession of a share of the family property in lieu of maintenance.

5. No doubt her brothers-in-law, the real co-sharers of the property, might have agreed to give her an absolute title to the share which would have belonged to her husband, if he had been living, or any other share, but the finding of the lower appellate court that she has not an absolute ownership, shows that this was not done.

6. In our opinion, this contention is correct. Under Section 107 of the Revenue Act, a recorded co-sharer of a mahal may apply for partition to the Revenue court, On such application being properly made, the Collector is required to issue a proclamation calling on the other recorded co-sharers in the mahal to appear and state their objection, if any, to the partition. If objection is made by a recorded co-sharer the court may, under Section 111, if the objection involves a question of proprietary title which has not already been determined by a court of competent jurisdiction, inquire into the merits of the objection. This shows that the mere fact that the applicant for partition is recorded as a co-sharer, and has been in possession of his share, does not entitle him to obtain partition. If a person, although recorded as a co-sharer and in possession, is proved not to be in fact a co-sharer, the court cannot make a partition in his favour. This view was adopted as long ago as 1867 in the case of Bhoop Singh v. Phool Kower (1867 N.W.P., H.C.R., 868. There it was held that the proprietary right to a share in an undivided estate, which includes and carries with it a right to claim and enforce a partition of that share, must be a right of absolute and unlimited nature, and does not belong to a Hindu widow who has been placed in possession of her deceased husband's share for her maintenance. Consequently where the widow is not an absolute proprietor, but simply an assignee of the profits for her maintenance, she cannot claim partition of the share so assigned.

7. Act No. XIX of 1863 was in force when that case was decided. We have examined its provisions and find that they are substantially the same as in the present Revenue Act; only there the term 'proprietor' is used instead of 'co-sharer.' But in our opinion, more especially having regard to Section 111 of the present Act, we think the two words are synonymous. That decision was considered in Jhunna Kuar v. Chain Sukh (1881) I.L.R., 3 All., 400, where it was affirmed, although a distinction was drawn between a widow who was not an absolute proprietor but simply an assignee of the profits for her maintenance, and a childless Hindu widow who had succeeded to her deceased husband's share in a mahal, such share having been his separate property, and was recorded as a co-sharer in the mahal.

8. On behalf of the respondent, we were pressed with the decision in *Habibulla v. Musammat Kushimba* (1906) 3 A.L.J., 484. That case, in our opinion, has no application here. There a Muhammadan widow in possession of her deceased husband's property in lieu of her dower, and who was recorded as a co-sharer, sought partition. An objection was raised by one Habibulla, who was not himself a recorded co-sharer, on the ground that the widow's possession was analogous to that of a mortgagee, and that therefore under the proviso to Section 107 she was not entitled to partition. On appeal this Court only decided two points; and that case is therefore only an authority for what it actually decided. It hold (1) that Habibulla not being a recorded co-sharer, could not raise objections under Section 111, and (2) that the widow was not a mortgages within the meaning of Section 107. The very point we have to decide has come up for determination before another Bench of this Court since the arguments before us were concluded in *Musammat Kailashi Kunwar v. Badri Prasad* [S.A. No. 344 of 1913, decided on the 17th of July, 1913, by the learned Chief Justice and Banerji, J.]. The facts of that case are on all fours with the case before us and we are fortified in our opinion by that decision.

9. In *Bhupal Singh v. Mohan Singh* (1807) I.L.R., 19 All., 324 this Court, relying on two previous decisions of *Phopi Ram v. Rukmin Kuar* Weekly Notes, 1895, p. 84 and *Imam-ud-din v. Surjaiti* Weekly Notes, 1895, p. 85, has hold that a Hindu widow in possession in lieu of maintenance, and recorded as a 'co-sharer,' was not entitled to sue for pre-emption as a 'co-sharer' in the mahal. The result is we allow the appeal, and, setting aside the decrees of the courts below, dismiss the plaintiff's suit with costs in all courts.