PRIVY COUNCIL

Jadunath Roy

Vs.

Parameswar Mullick

P.C.A.No.79 of 1938
(Lord Thankerton, Lord Romer and Sir George Rankin JJ.)

30.10.1939

JUDGMENT

SIR GEORGE RANKIN J.

1. By three English mortgages executed in 1923 and 1924 one Bhuban Mohan Mullick (a Hindu governed by the Dayabhaga) mortgaged to appellant 1 and the father of the other four appellants his one-eighth share in certain immovable property. The capital sums secured amounted to Rs. 2,35,000. On 24th April 1925 he died intestate, leaving him surviving a widow, Sm. Annabati Dassi, a minor son Biswanath and an unmarried daughter Sm. Parbati Dassi (also a married daughter who need not here be further mentioned). By the decree under appeal which is dated 28th January 1937 it has been held by the High Court at Fort William in Bengal that the maintenance of the widow and unmarried daughter is a charge upon the interest of the mortgagees under the mortgages. This conclusion is prima facie opposed to the rights of the parties; indeed it does not in the end appear to have been doubted by the Courts in India that while the ladies would have a claim to a charge upon any property coming to Biswanath as heir to his father, the interest of the father's mortgagees was not such property and is not liable upon the death of the mortgagor to be burdened with the maintenance of his widow or daughter. In order to trace the steps by which a contrary result has been arrived at by the High Court it will clearly be important to bear in mind throughout that the appellants' mortgages were all taken from Bhuban Mohan in his lifetime and not from his son after his death.

2. The appellants brought a suit upon their mortgages in the High Court on 7th June 1926 impleading Biswanath. They obtained a preliminary decree on 12th January 1928 and a final decree for sale on 21st January 1929. On 11th January 1930 they

purchased the mortgaged property at the execution sale and obtained a sale certificate on 19th February 1930 in respect thereof.

3. On 30th August 1929 - some seven months after final decree and some five months before the execution sale-the partition suit out of which the present appeal arises was brought in the Court of the Subordinate Judge, 24-Parganas. The one-eighth share which Bhuban Mohan had mortgaged was his share in certain property which had belonged to his grandfather Kunja Bihari Mullick. Kunja had died in 1899 leaving a will whereby after giving certain pecuniary legacies he directed that the residue of his estate should go in equal shares to his three sons and a grandson by a deceased son. His fourth son was Pulin Behari who died intestate on 28th December 1919 leaving him surviving two sons Bhuban Mohan and another. Hence Bhuban Mohan had a one-eighth share in a number of properties which had belonged to his grandfather and by the mortgages of 1923 and 1924 be had incumbered his share in some (not all) of these properties. The partition suit was brought by Murari Mohan, a son of Kunja's eldest son. Biswanath was impleaded as defendant 6, Annabali, his mother, and Parbati, his sister, were defendants 13 and 15 respectively. The appellants were not made parties to the suit. By a written statement filed on behalf of Biswanath, Parbati and the widow it was submitted that Biswanath's one-eighth share should be allotted to him subject to the claim of his mother and sister for maintenance. On 1st October 1929 a preliminary decree for partition was pronounced declaring the share of Biswanath to be one-eighth subject to the charge for maintenance and other expenses of his mother, defendant 13, and marriage expenses and maintenance of his unmarried sister, defendant 15. Neither in the pleadings nor in the decree was anymention made of the mortgages to the appellants nor was any decision given with respect to the appellants' rights. The direction to the commissioners of partition was a general direction to make the valuation and allotments of the properties "according to the aforesaid shares" though in the case of some of the shares other than Biswanath's the decree provided for the maintenance of females being charged not on all the property allotted to each particular share but only on a sufficient part thereof.

4. On 12th December 1929 (before the execution sale) and also on 14th January 1930, (after the sale but before confirmation) the appellants applied to the Subordinate Judge that they might be made parties to the partition suit. By orders dated 29th January and 12th April 1930 the Subordinate Judge refused their request on the ground that it was not necessary at that stage to make them parties; but he directed the commissioners of partition to hear the appellants' submissions. This order was challenged in the High

Court and on 14th July 1930, a Division Bench of the High Court set it aside directing that the present appellants should be added as parties to the suit as from 12th April 1930, on which date their application was rejected, the proceedings taken before the said 12th April 1980 being binding upon them just as much as they would be binding upon their predecessor-in-interest.

5. The Subordinate Judge having amended the plaint on 12th September 1930, in accordance with this decision, the appellants (now defendants 17 to 21) on 17th September applied to him to set aside or amend the preliminary decree in so far as it declared charges upon the share of Biswanath in favour of his mother and sister. This application was by order dated 23rd February 1931, refused on the ground that by virtue of the High Court's decision the decree that was passed on 1st October 1929 is as binding upon them as upon their predecessor-in-interest and it is clearly not open to them to challenge anything that was done in relation to the proceedings in Court prior to 12th April last.

6. The argument of the appellants' pleader, "that it is not defendant 6 who should really be treated as their predecessor-in-interest," was repelled on the ground that it was contrary to the language of the appellants' previous petitions and the appellants were reproached for seeking to evade the express terms of the High Court's judgment. On 31st July 1931 the appellants applied for separate allotment of their share to them and this was granted (21st November 1931) without discussing the question of the charges in favour of Biswanath's mother and sister. The commissioners of partition, on 17th January 1934 made their final report allotting certain properties to the appellants but directing that these should remain charged as a security for the payment of the maintenance and other expenses of defendants 13 and 15. The appellants having objected to this direction, their objections were heard and were allowed by order dated 8th May 1934. This order was not passed by the same learned Judge who had previously dealt with the case but by his successor (Babu Kali Prasanna Bagchi). After pointing out that the claim of the ladies to have priority over the appellants was untenable in law by reason that the mortgages had been granted by Bhuban Mohan in his lifetime and not by Biswanath after his father's death, the learned Subordinate Judge noticed that this question had not been argued or considered by the High Court, and concluded that no order had been passed in the matter. He did not think that the appellants were entitled to an order setting aside the preliminary decree and he regarded their previous application to that effect as ill-advised and rightly rejected. "But," he said, a partition suit in which a preliminary decree has been passed is still a

pending suit and the rights of the parties who are added after the preliminary decree have to be adjusted at the time of the final decree. Defendants 17 to 21 cannot ask for setting aside the preliminary decree but they can reasonably claim that at the time of the final decree they should get an allotment as purchasers and their rights should be adjusted.

7. Accordingly he ordered that the properties allotted to Biswanath and those only should stand charged with the maintenance of his mother and sister, and not the properties allotted to the appellants. A final decree for partition was passed on 12th May 1934, in accordance with this direction. From this final decree Biswanath, his mother and his sister on 28th June 1935 appealed to the High Court, whose decree is dated 28th January 1937. The view taken by the learned Judges was that by virtue of the order of this Court passed on 14th July 1980, the preliminary decree in the suit for partition passed on 1st October 1929 would not be allowed to be altered or modified in any way in the present proceedings for partition.

8. They agreed with the views expressed in the order dated 23rd February 1921, by the learned Subordinate Judge (Babu D. L. Sen Gupta) who had dealt with the application of 17th September 1930, to set aside or modify the preliminary decree, and considered that the appellants were seeking to nullify the effect of a decision inter partes by the High Court.

9. The final decree for partition as settled by the High Court is now before their Lordships on appeal but the appeal appears to turn solely on the High Court's order of 14th July 1930, a reported decision, *Jadunath Roy v. Murari Mohan,* which must necessarily have effect upon the procedure adopted in partition cases by the Courts of the province and elsewhere. It is unfortunate that no appearance has been made by the respondents and no argument heard on their behalf with reference to that decision, but their Lordships cannot omit to examine it.

10. A partition necessarily affects the interest of a mortgagee of an undivided share, since after the partition his security is upon the divided share or the separate allotment. For this reason, some High Courts in India would appear to join such mortgagees as parties to the suit as a matter of course, and by some English authorities [cf. Daniel's Chancery Practice (Edn. 8) p. 198] the practice is considered to be that while a mortgagee upon the whole estate is not a necessary party a mortgagee of one of the undivided portions would be a necessary party [cf. *Swan v. Swan,* The practice in Bengal follows the lines laid down by Sir Arthur Wilson in 1880 in *Mohindro*

Bhoosun v. Soshee Bhoosun, (1880) 5 Cal 882 where a person having a disputed claim to be a mortgagee from the plaintiff in a partition suit applied to be joined. In refusing the application Sir Arthur Wilson said:

> In *Khetterpal Sritirutno v. Khelal Kristo Bhuttacharjee,* stated the practice succinctly:
> A mortgagee is not a necessary party to a partition suit but he may and frequently does obtain leave to attend the proceedings as a quasi-party.

11. The question as between the plaintiff and the defendant is who is entitled to the property in dispute? To determine that question it is not necessary that the mortgagees should appear; they will not be bound by any finding come to in their absence. In case of a decree for partition being made the mortgagees should have leave to come in and attend the partition proceedings.

12. The mortgagee of an undivided share might be prejudiced if that share did not receive a proper allotment in severalty, and it is for the benefit of all other persons interested in the joint property that such a mortgagee should be bound by the allotment. Hence it will in general meet the case if he is allowed to attend and be heard at that stage at which the making of a proper allotment is effected, just as in other types of cases a person interested only in the result of a particular account may be allowed to attend at the taking of that account, especially if it be in the interests of others that he should not thereafter dispute the result. It is a fundamental condition of this practice in partition cases in Bengal that the extent of the share should not be in dispute; on that assumption an important advantage of the practice is that it lightens the partition suit by avoiding the necessity of deciding as to the existence and validity of the mortgages claimed over the undivided shares.

13. So far as regards the application made and decided in the present case before the execution sale had been confirmed, it is not necessary to examine or criticize the order of the learned Subordinate Judge. He may have been right in applying the ordinary practice and he had discretion in the matter. But if he was right, he was right entirely because it was not necessary in order to safeguard the appellants' interests that they should be made parties, because without being parties to the suit they could be heard by the commissioners of partition on the question of the allotment proper to be made to answer the one-eighth share over which they claimed to have security, and because as to all else, in Sir Arthur Wilson's words, "they will not be bound by any finding come to in their absence."

14. The learned Subordinate Judge's order of 12th April 1930 is however in a very different position. The effect of the sale under the mortgage decree was to divest Biswanath, his mother and his sister of all interest in the property comprised in the mortgages made by his father in 1923 and 1924. The ladies' interest was gone equally with his. Both his interest and theirs were derivative interests in the equity of redemption and arose to them only on the death of Bhuban Mohan in 1925. While the purchaser at an execution sale under a mere money decree gets no more than the right, title and interest of the judgment-debtor at the date of the sale, the purchaser under a mortgage decree gets the right, title and interest in the mortgaged subjects which the mortgagor had at the date of the mortgage and charged thereby. Buying the mortgaged property free from incumbrances he gets, as it is sometimes put, the title both of the mortgagee and of those interested in the equity of redemption. He is not a mere successor-in-interest of the owner of the equity of redemption at the date of the sale. The position of the partition suit so far as regards the property now in question was that as a result of the execution sale the suit had become defective : there was no longer any party before the Court who had any interest in this property. It was to the interest of all other parties that the suit should be properly constituted and it was not within a judicial discretion to insist that the suit should go on as regards this property behind the backs of the new owners. As Sale J. had said in the case already cited :

> If the mortgagee had proceeded to a sale pending partition the purchaser would have become a necessary party to the partition suit.

15. The learned Judges of the High Court were right therefore in directing that the appellants should be made parties. But the observation at the end of their judgment that "it goes without saying" that all proceedings taken before 10th April 1930 would be binding upon the appellants just as much as they would be binding upon "their predecessor-in-interest" is not easy to interpret or accept. It may have been directed only to this-that there was no need to invalidate what had already been done in the suit merely because the appellants had not been parties at the time, that partition could proceed under the preliminary decree, the appellants' rights being adjusted there under. Sale J., on a question of the costs of partition had harmlessly referred (in the case already cited) to the original mortgagor as predecessor-in-title of a purchaser at a mortgage sale meaning no more than that he was the person who had previous to the sale represented the share in question before the Court. He had held that the purchaser could not take advantage of the partition and at the same time repudiate all liability for costs of partition incurred before his purchase. After referring to this passage in the judgment of Sale J., the learned Judges in the present case may have had similar

matters in mind when they employed the same language, and the phrase "it goes without saying" suggests some such interpretation rather than a decision upon an important matter which had not been argued. But two Courts in India have interpreted the order made as a decision to the effect that because the preliminary decree of 1st October 1929 rightly held the mother and sister of Biswanath to have a charge for maintenance upon what he inherited, the appellants-at one time mortgagees from his father and now purchasers of the whole original interest of his father-were liable to maintain his mother and sister out of the property and that partition should be made accordingly. This interpretation runs some risk of doing an injustice to the learned Judges, but if their Lordships may assume against the appellants that the order of the High Court involved an erroneous opinion to the effect that the preliminary decree of 1st October 1929 bound the mortgagees, it still remains that the appellants had since the passing of that decree become purchasers of the whole interest in the share and that no decision as to their rights as purchasers had at any time been given in the suit. Their Lordships are not prepared to hold that the order of 14th July 1930 must needs be construed, contrary to the rights of the parties, as holding that after the execution sale the ladies had the same rights against the purchasers as they had against Biswanath's interest in the equity of redemption.

16. It is manifest that the ladies' interest in the equity of redemption equally with Biswanath's must be regarded as having passed to the appellants, if it is not regarded as having come to an end. At no time was it correct to treat the appellants as mere assignees of Biswanath's interest. Before the sale their interest was as mortgagees and was not represented in the suit. After the sale when they were made parties their interest as complete owners was before the Court-an interest which at no time had belonged to Biswanath. At no time was it correct or sufficient to regard Biswanath as "their predecessor-in-title;" upon any question as between Biswanath and other persons claiming to be interested in the equity of redemption, a decision charging or limiting his interest had no bearing upon the rights of the appellant's whether before the execution sale or afterwards.

17. Their Lordships fully agree with the observation made by the learned Subordinate Judge who passed the final decree in his order of 8th May 1934, whereby he allowed the objections of the appellants to the commissioner's report on the ground that a partition suit in which a preliminary decree has been passed is still a pending suit and the rights of parties who are added after the preliminary decree have to be adjusted at the time of final decree.

18. In this view it becomes unnecessary to consider whether, if the High Court's order of 14th July 1930, was binding upon the Division Bench who heard the appeal from the final decree, it necessarily follows that it could not be disturbed on appeal to His Majesty in Council.

19. Their Lordships will humbly advise His Majesty that this appeal should be allowed, the decree of the High Court dated 28th January 1937 set aside, and the final decree of the learned Subordinate Judge restored. The respondents 9, 15 and 17 who appealed to the High Court must pay the costs of the present appellants incurred in the High Court and of this appeal.

Appeal allowed.

Cases Referred.

(1931) 18 AIR Cal 594=134 IC 307=35 CWN 296,

(1819) 8 Price 518=22 RR 770 ; Sinclair v. James, (1894) 3 Ch 554=63 LJ Ch 873=8 R 637=71 LT 483.

(1894) 21 Cal 904 at p. 909