

# CALCUTTA HIGH COURT

Baldeodas Bajoria

Vs

Sarojini Dasi

(B.B Ghose and Bose ,JJ.)

29.05.1929

## JUDGMENT

### **B.B. Ghose, J.**

1. This is an appeal by defendants Nos. 4 and 5, which arises out of a suit for partition. A preliminary decree has been made by the learned Subordinate Judge and the appeal is directed against that preliminary decree. The property, which is the subject-matter of this appeal, originally belonged to two brothers; Harinarayan and Haribangsha. Haribangsha died in the year 1900, leaving him surviving his widow and three sons. Harinarayan got his share partitioned in the year 1905. The three sons of Haribangsha purchased the share of Harinarayan, which had been partitioned previously, by a conveyance dated the 31st of May, 1922. On that very day, the three brothers mortgaged the entire interest in the house to a third person, with which we are not concerned in this litigation. On the 12th of October, 1923, these three brothers again mortgaged the property to defendant No. 5. On the 1st of September, 1924, these three brothers again executed a mortgage of this very property in favour of their mother. The defendant No. 5 brought a suit on his mortgage on the 10th of November, 1924, and a preliminary decree was made on the 22nd of January, 1923. In the meantime, defendant No. 4 was appointed Receiver by an order of the Court in accordance with the terms contained in the indenture of mortgage dated the 12th of October, 1923. The Receiver remained in possession of the property on behalf of the mortgagors and the mortgagee. The present suit for partition was brought by one of the sons of Haribangsha on the 17th of April, 1925, and two items of properties were included in his suit. There is no dispute with regard to item No. 1, with which the present appellants have no concern and the whole dispute centres round item No. 2, which had been mortgaged to defendant No. 5. During the pendency of this suit for partition a final decree in the mortgage suit of defendant No. 5 was made on the 19th of March, 1926, and the property was sold on the 7th August, 1926, and purchased by defendant No. 5, as the lower Court finds and as is contended for on behalf of the respondent. But it is alleged that there were other purchasers who were trustees with regard to some charitable trust: that, however, is a matter with which we are not concerned and this was not discussed in the Court below. The Receiver was discharged by the order of the Court and the defendant No. 5 took possession of the disputed property as purchaser. In the partition suit the two brothers of the plaintiff were defendants Nos. 1 and 2 and his mother was defendant No. 3, defendant No. 4 was the Receiver and defendant No. 5 was the mortgagee who subsequently became the purchaser.

2. The question, which is in debate in this Court and which was the subject-matter of dispute in the Court below, is whether the mother is entitled to a fourth share of the property including property No. 2 according to the provisions of the Hindu Law, on a partition being made among the sons. There is one small matter which has not been much debated that a half share of the property is not the ancestral property of the brothers and, therefore, if the widow of Haribangsha is entitled to a share on a partition between her sons she would get only a fourth share of the half share of item No. 2. But the real controversy is whether she would get any share under the circumstances of this case. The learned Subordinate Judge has held that the plaintiff and the defendants Nos. 1 and 2 have got no subsisting right to property No. 2, which has been described as the Strand Road premises, and their suit for partition with regard to that plot must fail. He has, however, made a decree to this effect that defendant No. 3, the mother would get a fourth share of both the properties Nos. 1 and 2 and the plaintiff and defendants Nos. 1 to 3 would each get a fourth share of the property No. 1. As I have already stated, that, assuming that the learned Judge is right, the lady would be entitled to get an eighth share of the property No. 2. But it is contended, on behalf of the appellants, that, under the circumstances of this case, the lady would be entitled to get no share in property No. 2. Their case is that the principle of Hindu Law, upon which the learned Subordinate Judge has relied, is not applicable in this case and that his decision is, therefore, liable to be reversed. On behalf of the respondents, reliance is placed upon the well-known case of *Jogendra Chunder Ghose v. Fulkumari Dassi*<sup>1</sup> In that case Mr. Justice Banerjee laid down the principle on which, according to the Hindu Law, the mother is entitled to get a share on a partition made among the sons born of her womb of the property inherited from the father. The learned Judge, after quoting the text from Dayabhaga, observes: "With reference to the above passage from the Dayabhaga, it has been held, and it must now be taken as settled law, that the mother's right to claim a share arises only when her sons come to a partition, in other words, that she cannot enforce her claim to a share so long her sons remain joint and do not ask for partition. But there is nothing said in this passage, or in any other authoritative text of Hindu Law, as to a mother's right to a share on partition being so absolutely non-existent before partition, that it may be defeated by any of her sons alienating his share before coming to a partition."

3. He then proceeds in this way: "In my opinion, the correct view to take of this right would be to hold that it is an inchoate right as long as no partition is come to amongst the sons, and it becomes actually enforceable only when the sons come to a partition; or in other words, that the right, when it becomes enforceable by reason of a partition being come to among the sons, is enforceable, not only as against the sons, and as regards so much only of the joint property as at the date of partition is in the hands of the sons, but also as against any person deriving title from any of sons, and as regards the property to which they may have so derived title, subject to certain qualifications and limitations."

4. In that case, during the pendency of the suit for partition by one of the sons, another son sold his share in the joint property. It was held by the Court that, by reason of the sale, the interest obtained by the purchaser is subject to the rule of *lis pendens* and that he cannot stand on a higher footing than that of his vendor and when the partition is made, if his vendor was a party to the suit, the mother would get a share; that right cannot be defeated during the pendency of the suit by one of the sons transferring his interest in favor of a third party. This principle has been elaborated in a subsequent case of *Amrita, Lal Mitter v. Manick Lal Mullick*<sup>2</sup> where Mr. Justice Ameer Ali, sitting alone, held that this principle is applicable where a stranger to the family purchases the interest of one of sons and then seeks for partition of the joint family property. The

question has again been discussed in the case of *Jogobondhu Pal v. Rajendra Nath Chatterjee*<sup>3</sup> by Mr. Justice Mookerjee. But the principle has not been carried further than what was laid down by Mr. Justice Banerjee. In this case, the appellant contends that he is entitled to the property by virtue of his purchase, in the same state in which it was at the time of the mortgage; or, in other words, that any subsequent alienation made by the mortgagor would not affect his interest. That proposition is uncontroverted. But if the mother could get any right in the present suit by reason of the partition, that would not be by reason of any right created by the mortgagor, but under the Hindu Law; and I doubt whether the principle enunciated by the appellant would apply to such case. In this case, in my opinion, the plaintiff had a right to bring the suit for partition at the time when he brought the suit. Although there had been a preliminary decree for partition, the title of the plaintiff to his share of the property was not extinguished by that preliminary decree on mortgage, but he had still a subsisting interest in the share of the property by reason of succession to his father. The plaintiff's right to bring the suit was not affected. The mother's right to claim a share, however, arises, as Mr. Justice Banerjee laid down, only on a partition, no matter whether the partition is made amicably or as the result of a decree by a suit. The mere bringing of a suit for partition by one of the sons does not confer any right on the mother to have a share according to the view expressed by Mr. Justice Banerjee. If the suit for partition is withdrawn, the mother cannot claim any share, nor can she insist that the suit must be carried on to a decree. If the partition suit is dismissed by the Court for some reason or other, then the mother would not get any share in the property. It is only when the property is actually partitioned, the mother would get a share equal to that of her sons. She is not even a necessary party to the suit, having no interest in the property when the suit is brought. She can only come in to watch the proceedings to safeguard her interest when the partition is effected. Now, it is contended on behalf of the respondent that defendant No. 5 is bound by the rule of *lis pendens* as was applied in the case of *Jogendra Chunder Ghose v. Fulkumari Dassi*<sup>4</sup> cited above. The difficulty in this case is that that principle cannot be applied to this case: Here, defendant No. 5 has acquired the interest of the plaintiff as well as the defendants, who had interest in the property. It is a fundamental principle that a man cannot sue himself and the defendant standing in the shoes of the plaintiff with regard to this property cannot continue the suit for partition with regard to this very property. The plea, therefore, must fall to the ground by reason of the purchase of defendant No. 5 and as the learned Subordinate Judge says, the plaintiff and defendants Nos. 1 and 2 cannot ask for partition of property No. 2. That being so, the mother would not be entitled to any share of property No. 2 by reason of the fact that her sons had no interest in the property and this property could not be the subject of partition. Whether she would have a charge for her maintenance against the property in the hands of the purchaser is another matter. That question cannot arise in a suit for partition and if she has any right, the question must be left open to be debated in a subsequent suit.

5. The result, therefore, is that the judgment and preliminary decree of the Subordinate Judge should be modified to this extent that the suit for partition with regard to property No. 2, i.e., the Strand Road premises, should stand dismissed and, therefore, any claim of defendant No. 3 will also stand dismissed; and the appeal is allowed to this extent. The appellant is entitled to his costs from the respondent who has appeared hearing-fee being assessed at three gold mohurs.

**Bose, J.**

6. I agree.

## Cases Referred.

127 C. 77 : 4 C.W.N. 254

227 C. 551 : 4 C.W.N. 764

366 Ind. Cas. 121 : 34 C.L.J. 29

427 C. 77 : 4 C.W.N. 254