

APPELLATE CIVIL.

Before N. R. Chatterjéa and Richardson JJ.

1916

Feb. 28.

SALIMULLAH

v.

PROBHAT CHANDRA SEN.*

Hindu Law—Partition—Right to partition—Partition between co-owners—Reversionary interest—Administrator's power to transfer property—Permanent leases—Prolate and Administration Act (V of 1881) s. 90

Where plaintiffs in a suit for partition were in joint possession of certain property with the defendants as co-sharers under leases which purported to be permanent leases granted to them under an arrangement sanctioned by the Court, and where the only person at the time of the suit interested in challenging the plaintiffs' right was a party to the suit and did not contest the suit:—

Held, that the plaintiffs were entitled to partition and the fact that the partition would have to be set aside if the reversioner on coming into possession of the property succeeded in a suit for setting aside the leases, was not sufficient ground for refusing the plaintiffs the right to partition.

Sundar v. Parbati (1) and *Bhagwat Sahai v. Bipin Behari Mitter* (2) followed.

SECOND APPEAL by Nawab Sir Salimullah Bahadur and others, the plaintiffs.

One Madhu Sudan Das died possessed of certain properties and leaving him surviving his widow, Shyam PEARI, and four sons, Mohini Mohan, Radhika Mohan, Lal Mohan and Khettra Mohan. Subsequently, the interest of Khettra Mohan in the estate of his

* Appeals from appellate decrees, Nos. 1495, 1656 and 1657 of 1913 against the decree of F. W. Ward, District Judge of Tipperah, dated Feb. 6, 1913, affirming the decree of Satkauri Haldar, Subordinate Judge of Tippera, dated Feb. 26, 1912.

(1) (1889) I. L. R. 12 All. 51; (2) (1910) I. L. R. 37 Calc. 918;
L. R. 16 I. A. 186. L. R. 37 I. A. 198.

deceased father devolved on Mohini Mohan and that of Radhika Mohan and of Lal Mohan on their widows, Gobinda Rani and Priya Moiee, respectively. On the 27th September, 1890, Mohini Mohan executed a mortgage in favour of the Eastern Mortgage and Agency Co., Ltd., for the sum of Rs. 2,50,000 and in pursuance of the conditions therein contained he also executed a power of attorney, whereby he conferred on Messrs. Garth and Weatherall the entire management of the mortgaged property and undertook not to interfere with the same in any way. On the 28th December, 1896, Mohini Mohan died and his estate devolved on his mother Shyam PEARI. On the 29th January, 1897, one Soshi Bhusan Guha obtained letters of administration to Mohini Mohan's estate. In consequence of certain difficulties having arisen in the proper management of the estate of the deceased mortgagor, a deed was executed on the 3rd April, 1897, between Soshi Bhusan Guha as administrator, the said company as mortgagee and Messrs. Garth and Weatherall, whereby the mortgaged properties were transferred to the latter as *ammulheteers*, managers and trustees with powers to manage the said properties and to grant perpetual leases. On the 1st May, 1897, sanction of the District Judge of Dacca was obtained to this deed of trust by Soshi Bhusan Guha as required by section 90 of the Probate and Administration Act. Under a separate indenture Priya Moiee also executed an usufructuary mortgage for a term of years in respect of her share in her deceased husband's estate as well as a trust deed with similar powers in favour of Messrs. Garth and Weatherall. Some time after executing these deeds Priya Moiee died and her interest in the estate was inherited by Shyam PEARI, who thus became interested in the shares of Mohini Mohan, Lal Mohan and Khettra Mohan, while the interest of

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Radhika Mohan still remained in Gobinda Rani, who was living at the time of the present suit. Under the powers conferred on the trustees, two *dar-sikmi* tenures and a *patni taluk* in respect of certain shares in Shyam Peari's and Priya Moiee's properties were granted to the plaintiffs by the trustees in 1903 and thereafter the plaintiffs continued in joint possession with the other co-owners, none of whom ever objected to the joint possession. Within a year of the grant of letters of administration to Soshi Bhusan Guha the administration ceased. On the 1st September, 1910, the plaintiffs filed three suits for partition against all the co-owners. Two of these suits were in respect of the *dar-sikmi* tenures and one in respect of the *patni taluk*. The plaintiffs alleged that owing to the disagreement amongst the co-owners, the plaintiffs always had difficulties in connection with the collection of rents and as the defendants were unwilling to agree to an amicable partition, these suits were brought. Some of the defendants contested the plaintiffs' claim. Both the Courts below dismissed these suits dealing with them jointly. The plaintiffs, thereupon, appealed to the High Court.

Mr. B. Chakravarti, with him *Babu Surendra Nath Guha*, for the appellants. Under section 90 of the Probate and Administration Act the administrator, in whom the entire property vested for all purposes, had full powers to alienate the property or any portion of it and to create trusts, provided the previous sanction of the Court was obtained. The words of that section were quite general. This sanction was obtained. The permanent leases granted by the trustees, Messrs. Garth and Weatherall, to the plaintiffs in respect of these properties were not void, but voidable. They had complete authority to enter into the

leases which were executed in the course of their management. As regards the leases of the properties belonging to the share of the widow Priya Moiee, they were on the same footing also, that is to say, they were not void, but voidable. The only persons entitled to avoid them was not any of the contesting defendants, who had no immediate interest in the property, but Syam PEARI who was made a party to the suit and did not oppose it. The plaintiffs being in joint possession with the defendants were, therefore, entitled to partition. The cases of *Bhagwat Sahai v. Bipin Behari Mitter* (1), *Shubhadra Dassya v. Chandra Kumar Nag* (2), *The Eastern Mortgage and Agency Co., Ltd. v. Rebati Kumar Ray* (3) and *Sundar v. Parbati* (4) were relied on.

Babu Jogesh Chandra Ray (with him *Babu Jatindra Nath Bose* and *Babu Kshitish Chandra Neogi*), for the respondents. Messrs. Garth and Weatherall were not entitled to confer any title on the lessees. The trustees' powers were conferred on them by the administrator who had no right to delegate his authority. The sanction required in section 90 of the Probate and Administration Act must be sanction in each case. General sanction would not do. It was necessary to obtain particular sanction in each case. In order to maintain a suit for partition, the plaintiffs must prove that they had both title to and possession of the properties to be partitioned. In the present suit the leases were not granted by the administrator. In fact administration had ceased long before the leases were granted and the powers of the trustees had consequently terminated. The cases of permanent leases granted by the administrator himself had

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(1) (1910) I. L. R. 37 Calc. 918 ; (3) (1906) 3 C. L. J. 260.

L. R. 37 I. A. 198.

(4) (1889) I. L. R. 12 All. 51 ;

(2) (1903) 8 C. W. N. 54.

L. R. 16 I. A. 186.

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no application to this suit. The plaintiffs had merely a limited interest in the properties.

A person entitled to a limited interest cannot be said in all cases to be entitled to partition: see *Hemadri Nath v. Rammi Kanta Roy* (1). In each case it must be shown that a co-owner was entitled to partition as a matter of right before partition would be allowed. The case of *Sundar v. Parbati* (2) was one between two co-widows claiming under the same title and had no application to the present suit. Even two co-widows were not entitled to enforce an absolute partition. The cases of *Gajapathi Nilamani v. Gajapathi Radhamani* (3), *Jijoyiamba Bayi Saiba v. Kamakshi Bai Saiba* (4) were relied on. A Hindu widow was not entitled to alienate the estate inherited from her husband where such alienation might prejudice any reversionary heirs: see *Bhugwandeem Doobey v. Myna Bai* (5). Having regard to all the circumstances this was not a case in which partition should be granted.

Mr. B. Chakravarti, in reply, referred to the case of *Bhagwat Sahai v. Bipin Behari Mitter* (6).

N. R. CHATTERJEA AND RICHARDSON JJ. These appeals arise out of suits for partition, and the Courts below have dismissed the suits upon a preliminary point, namely, that the plaintiffs had not acquired any such interest in the properties as to entitle them to maintain a suit for partition.

It appears that one Madhu Sudan Das left four sons, Mohini Mohan Das, Radhika Mohan Das, Lal,

(1) (1897) I. L. R. 24 Calc. 575, 580.

(4) (1868) 3 Mad. H. C. 424.

(2) (1889) I. L. R. 12 All. 51 ;

(5) (1867) 11 Moo. I. A. 487.

L. R. 16 I. A. 186.

(6) (1910) I. L. R. 37 Calc. 918 ;

(3) (1877) I. L. R. 1 Mad. 290 ;

L. R. 37 I. A. 198.

L. R. 4 I. A. 212.

Mohan Das and Khettra Mohan Das. Khettra Mohan's interest devolved upon Mohini Mohan. Radhika Mohan's interest devolved upon his widow Gobinda Rani and Lal Mohan's interest was inherited by his widow Priya Moiee. Mohini Mohan Das obtained a loan of Rs. 2,50,000 from the Eastern Mortgage and Agency Company under a deed of mortgage dated the 27th September, 1890. One of the conditions upon which and subject to which the said company agreed to grant the said loan was that the mortgaged properties should be managed entirely and without any interference from the said mortgagor by Mr. Garth and Mr. Weatherall, and Mohini Mohan executed a power of attorney in their favour. Mohini Mohan died on the 28th December, 1896, and Letters of Administration of his estate were granted to one Soshi Bhusan Guha on the 29th January, 1897. The mortgagees, it appears, subsequently found that there were difficulties in the way of management of the estate and in the conduct of law suits which could be avoided if the properties were vested in trustees. An indenture transferring the mortgaged properties to Messrs. Garth and Weatherall as trustees with powers to manage them, which included the power to grant perpetual leases, was accordingly drawn up and submitted by the administrator to the District Judge of Dacca who sanctioned it on the 1st May, 1897. On the 3rd April, 1897, the indenture was executed between the administrator Soshi Bhusan Guha representing the estate of the mortgagor Mohini Mohan Das, the Eastern Mortgage and Agency Company the mortgagees, and Messrs. Garth and Weatherall the trustees transferring the properties to the latter as *am-mukhtears*, managers and trustees. Priya Moiee executed an usufructuary mortgage in respect of her share in favour of the said Messrs. Garth and Weatherall for a term of years and

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also a trust deed with similar powers. These trustees granted certain permanent leases, *dar-sikmi* tenures in two of the cases, and a *patni taluk* in the third, in favour of the plaintiffs in 1903 in respect of certain shares in some properties and the plaintiffs remained in joint possession of those shares with the other co-owners since 1903; and in September, 1910, the plaintiffs brought these suits for partition against those other co-sharers.

It may be mentioned here that on the death of Mohini Mohan and Priya Moiee, their estate devolved upon Shyam Peari. The Court of appeal below held that section 90 of the Probate and Administration Act does not empower an administrator appointed under the Act to delegate his powers to others; that even if the trust deed was valid, Soshi Bhusan being dead his administration ceased many years ago, and the "sub-trustees" could not grant leases after their own trusteeship ceased; and that in any case they had no right to grant permanent leases it being nowhere provided that their possession was to be permanent. As regards Priya Moiee, the Court below observes that it was not the case of the plaintiffs that she executed the leases for legal necessity, and she having died, any permanent leases granted in respect of her share by the said trustees are voidable.

That Court accordingly held that the leases set up by the plaintiffs were voidable and that "it is clearly then undesirable that a partition should be effected until it is definite that such leases are not so voidable."

It is unnecessary to consider in the present cases whether the leases obtained by the plaintiffs from Messrs. Garth and Weatherall are valid or voidable at the instance of the reversioner after the death of Shyam Peari. The plaintiffs are in joint possession of

the shares with the defendants as co-sharers, under leases which purport to be permanent leases, granted to them under an arrangement sanctioned by the Court. The only person at present interested in challenging their right is Shyam Peari who is a party to the suit and she does not contest the suit. The contending defendants have no interest whatever either present or future in the shares in respect of which the plaintiffs claim to be lessees, and the plaintiffs have been in possession jointly with them ever since 1903 without any objection on the part of the defendants. In fact in some rent suits these defendants made the present plaintiffs parties-defendants as co-sharer landlords. We think that under the circumstances the principle laid down in the case of *Sundar v. Parbati*(1) applies. In that case two Hindu widows were in lawful possession of properties of their deceased husband and one of them brought a suit for partition against the other. There was a question in that case whether there had been a valid adoption made by the deceased husband and whether the estate had been given to the said adopted son by a will of the deceased. The Judicial Committee held that apart from those questions, the fact of joint possession by the two widows of the estate which belonged to the testator ever since the death of the adopted son appeared to them sufficient for disposing of the suit in favour of the plaintiff. Referring to the possession of the widows, their Lordships observe.—“Their possession was lawfully attained, in this sense, that it was not procured by force or fraud, but peaceably, no one interested opposing. In these circumstances it does not admit of doubt that they are entitled to maintain their possession against all comers except the heirs of Premsukh

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(the adopted son) or of Baldeo Sahai (the deceased husband) one or other of whom (it is unnecessary to say which) is the only person who can plead a preferable title. But neither of these possible claimants is in the field and the widows have therefore, each of them, an estate or interest in respect of her possession, which cannot be impaired by the circumstance that they may have ascribed their possession to one or more other titles which do not belong to them."

The same consideration applies to this case. It is contended on behalf of the respondents that the Court ought to take into consideration the fact that on the death of Shyam Peari, the reversioner may bring a suit for setting aside these alienations, and that if he succeeds in doing so, the partition would have to be set aside. That we think is not a sufficient ground for refusing the plaintiffs the right to partition which they have at present in respect of their possession. In the case of *Bhagwat Sahai v. Bipin Behari Mitter* (1), it was held by this Court that the *mokararidars* (the plaintiffs in that case for partition) had not such a permanent interest as to ensure that any partition then effected would be of enduring effect, on the ground that the *mokararidars* in that case might incur forfeiture in certain contingencies mentioned in the lease. Their Lordships in overruling the decision observed as follows:—

"But those learned Judges held that the right of partition, which would otherwise have belonged to the appellants, the *mokararidars*—was lost by reason of the fact that their *mokarari* is liable to forfeiture in certain contingencies and therefore is lacking in the permanence of interest necessary to support a claim for partition. Their Lordships are of opinion

(1) (1910) I. L. R. 37 Calc. 918 ; L. R. 37 I. A. 198.

that the distinction thus introduced cannot be supported.

“The title of the appellants is a permanent title, though liable to forfeiture in events which have not occurred and the rights incidental to that title must in their Lordships’ opinion be those which attach to it as it exists without reference to what might be lost in future under changed circumstances.”

Having regard to the circumstances already stated and to the fact that the only person who is now interested in challenging the title of the plaintiffs has not contested the suit at all, we think the Courts below are wrong in dismissing the suit upon the preliminary ground mentioned above.

The decrees of the Courts below are accordingly set aside and the cases sent back to the Court of first instance in order that they may be tried on the merits.

Costs of these appeals will abide the result.

O. M.

Appeal allowed; case remanded.

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