

## ORIGINAL CIVIL.

*Before Greaves J.*

1916

April 17.

BASANTA KUMAR DAS

v.

KUSUM KUMARI DAS.\*

*Practice—Partition suit—Parties—Review—Civil Procedure Code (Act V of 1908) s. 152, O. XLVII, r. 1.—Partition of undivided share—Fraudulent representation.*

Where the mortgagees of the plaintiffs' share in a partition suit applied (i) to be added as parties to the suit, and (ii) for revocation of an order made by another Judge directing a sale of the one-fourth share of certain premises which is one of the properties to be partitioned in the suit on the ground that the conduct of the mortgagors and their attorneys was fraudulent and that the said order was made without jurisdiction:—

*Held*, that one Judge cannot set aside an order made by another Judge, even though the order be wrong. The remedy lies in review on the grounds set out in Order XLVII, r. 1.

*Sharup Chand Mala v. Pat Dasse* (1), *Jatra Mohun Sen v. Aukhi Chandra Chowdhry* (2) referred to.

THIS was a rule *nisi* obtained by the mortgagees of the plaintiffs' share in a partition suit.

The mortgagees applied (i) to be made parties to the suit, and (ii) for the setting aside of an order made by Chaudhuri J., on the application of Girirani Dasi, one of the defendants for the sale of one-fourth share of premises Nos. 4 and 5, Jackson Ghât Street, which is one of the properties to be partitioned in the suit. Several mortgages were executed on various dates, subsequent to the date of the institution of the

\* Application in Original Civil Suit No. 472 of 1910.

(1) (1887) I. L. R. 14 Calc. 627. (2) (1896) I. L. R. 24 Calc. 334, 336.

suit, purporting to charge the plaintiffs' undivided half share in the estate of Dinabandhu Das, which estate was the subject-matter of the partition suit. A decree was passed, after the mortgages were executed, whereby it was declared that the plaintiffs were entitled to a one-third share and not one-half share in the estate of Dinabandhu Das. On this ground the mortgagees charged the mortgagors and their attorneys with fraudulent representation. On the 9th August 1915, Chaudhuri J. made an order for the sale of the one-fourth undivided share of Nos. 4 and 5, Jackson Ghat Street.

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*Mr. S. R. Das*, for the mortgagees, submitted that the Court could make no order for sale of the undivided share of the Jackson Ghât Street property so as to affect his mortgage. The real point is, is the property ordered to be sold the subject-matter of the suit? It is an undivided one-fourth share, other persons who are not parties to this suit being interested in the remaining three-fourths. This remaining one-fourth share could not possibly be partitioned.

*Mr. B. C. Mitter*, for Girirani Dasi, one of the defendants in the partition suit, in opposing the application, submitted that in an interlocutory application charges of fraud could not be dealt with, nor could an order made by one Judge be set aside by an interlocutory order made by another Judge. That the mortgagees could not be made parties. That an undivided share can be partitioned. It can be allotted to one or other of the parties or it can be sold and the sale-proceeds divided. The undivided share of the Jackson Ghât Street property was therefore one of the properties the subject-matter of this suit, and the mortgagee *pendente dite* is bound by the order. He cited the following authorities: *Purushottam v. Atmaram*

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*Janardan* (1), *Foolcoomary Dasi* v. *Wooday Chunder Biswas* (2), *Mohindrobhoosun Biswas* v. *Shosheebhoosun Biswas* (3), *Mahomed Kazim Shah* v. *R. S. Hills* (4), *Hem Chunder Ghose* v. *Thako Moni Debi* (5).

*Mr. N. N. Sircar* (with him *Mr. Goswami*), for the purchaser, *Shamermull Parruck*, supported *Mr. Mitter*.

*Mr. P. N. Chatterji*, for *Kusum Kumari Dasi*, the first defendant in the partition suit, also supported *Mr. Mitter*.

*Mr. S. R. Das*, in reply. No doubt by consent an order could be made for the sale of the undivided share, and the sale-proceeds divided. But that would not be a partition. The only power to sell for the purposes of the partition is under the Partition Act, where under certain circumstances, which are not present in this case, the Court may direct a sale for the purposes of partition. Undoubtedly he took the mortgage pending this partition suit and he is bound by all such orders made in this suit which are (i) strictly necessary for the purposes of the partition and (ii) in respect of property capable of being partitioned in this suit. The undivided share of the Jackson Ghât Street property could not be partitioned in this suit; it was therefore not a subject-matter of this suit, and any order made in this suit in respect of that property is without jurisdiction and cannot affect him. Under partition every member is entitled to a separate and exclusive possession of the share given to him. The plaintiffs have not that separate and exclusive share. So far as a Mitakshara family is concerned there is no difficulty in partitioning an undivided share. He referred to *R. C. Mitra's Law of Partition*, pp. 302, 396; *Maine's Hindu*

(1) (1899) I. L. R. 23 Bom. 597. (3) (1880) I. L. R. 5 Calc. 882.

(2) (1898) I.L.R. 25 Calc. 649, 652. (4) (1907) I.L.R. 35 Calc. 388, 392.

(5) (1893) I. L. R. 20 Calc. 533.

Law, p. 688, s. 492, and *Srimohan Thakur v. Macgregor* (1). He relied on *Purushottam v. Atmaram Janardan* (2).

[GREAVES J. You do not attack this sale as being fraudulent?]

No, not against any party other than my mortgagee.

The Court has inherent power to recall any order made without jurisdiction: *Hiralal Mukerji v. Premamoyee Debi* (3).

*Cur. adv. vult.*

GREAVES J. This is an application made in a partition suit by the mortgagees of the plaintiffs' shares asking (i) to be added as parties and to be allowed to appear in all proceedings in this Court and before the Commissioner of Partition and the Receiver at their own costs, such costs to be added to their claim as mortgagees, (ii) for revocation of an order of the 9th August 1915, directing (*inter alia*) a sale of the one-fourth share of the premises Nos. 4 and 5, Jackson Ghât Street, which is one of the properties to be partitioned in the suit for the purpose of defraying the costs of the suit. Other relief is also sought. The suit was instituted on the 17th May 1910. The mortgages were respectively executed on the 5th August 1910, the 26th July 1911, the 29th May 1912 and the 30th August 1913, and purported to charge the plaintiffs' undivided half share in the estate of one Dinabandhu Das, which estate is the subject-matter of the partition suit.

A decree was made in the suit on the 4th January 1912, from which it appears that the plaintiffs were entitled to a one-third and not a one-half share in the

(1) (1901) I. L. R. 28 Calc. 769, 787. (2) (1899) I. L. R. 23 Bom. 597.

(3) (1905) 2. C. L. J. 306, 308.

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estate of Dinabandhu Das, and the mortgagees charge their mortgagors, the plaintiffs and their attorneys with fraudulently representing that they were entitled to a one-half share, whereas they in fact knew that they were only entitled to a one-third share. On the 9th August 1915, an order was made by Mr. Justice Chaudhuri giving liberty to sell the moveables and the one-fourth undivided share of 4 and 5, Jackson Ghât Street, free from encumbrances for the purpose of paying the costs already incurred in the suit and the expenses of the partition.

The parties to the suit agreed among themselves that the one-fourth share in 4 and 5, Jackson Ghât Street, should be offered to the co-sharer for Rs. 35,000. A contract at this price was eventually entered into, not with the co-sharer but with another person whose name was disclosed at a late stage. The conveyance has been approved, the earnest money has been paid, and the 20th March last was fixed for completion.

I should say here that upon the materials before me the applicant has not satisfied me that the sale was not fair and aboveboard and that the price was not a fair one, and I see no grounds for believing, upon the materials before me, that the sale was collusive or fraudulent. So far as the applicant asks to be added as a party and to attend the proceedings at his own expense, I should have been disposed to accede to his application having regard to the conduct of the mortgagors, but I understand that he does not now desire this unless I am prepared to set aside the sale on the ground that Mr. Justice Chaudhuri's order was made without jurisdiction. This is the substantial question which has been argued before me. It is said that Mr. Justice Chaudhuri had no jurisdiction to make such an order as he did, as the one-fourth share of Nos. 4 and 5, Jackson Ghât Street cannot be partitioned

in this suit in the absence of the other co-sharers therein.

It is said that this is a suit for partition by metes and bounds, and there can be no partition by metes and bounds of a one-fourth undivided share, that there is no power to direct a sale, as such power only arises under the Partition Act, and a case like this does not fall within the provisions of the Act empowering a sale; and, lastly, it is said that there can be allotment of the share in the suit to one of the parties thereof as there could be no separate and exclusive user of an undivided one-fourth share.

For these reasons, it is said that Mr. Justice Chaudhuri's order was wrong and made without jurisdiction, and I am asked to so hold. I express no opinion as to the correctness or otherwise of the order of Mr. Justice Chaudhuri. I think it would be quite wrong for me to do so, and I know of no provision of the Code of Civil Procedure which empowers me to sit in appeal, as I am asked to do, upon Mr. Justice Chaudhuri's order. Section 152 of the Civil Procedure Code provides for the correction of clerical or arithmetical mistakes in orders, and this application certainly does not fall within the provisions of that section.

Order XLVII, rule 1 (the review order) provides for a review if there is some mistake or error on the face of the record, or if it is shown that the decision of the Court has proceeded upon a mistaken view of the law, and decided a case contrary to a decision which is binding upon the Court to which the application for review is made: see *Sharip Chand Mala v. Pal Dasse* (1), *Jatra Mohun Sen v. Aukhil Chandra Chowdhry* (2).

In the present case, I can find no mistake or error

(1) (1887) I. L. R. 14 Calc. 627. (2) (1896) I. L. R. 24 Calc. 334, 335.

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on the face of the record, nor have I been referred to any authority which has decided that an undivided share cannot be partitioned in a suit constituted like the present suit. Accordingly, in my opinion, the provisions of Order XLVII, rule 1, are not applicable to this case. Lastly, I was asked to say that the Court has inherent jurisdiction to review its own orders and that this is a case for the exercise of such jurisdiction. This may be so in a case of fraud or under special circumstances, but, in my opinion, the principle does not apply here.

I think, therefore, that this application is misconceived and that the Rule must be discharged with costs. But I direct the Taxing Officer in taxing the costs to disallow the entire costs of the affidavit of Shamermull Parruck filed on the 4th April 1916. That affidavit sets out in full an enormous number of letters, most of which are quite immaterial, and the affidavit seems to me to be drawn entirely for the purpose of making costs.

I also direct the Taxing Officer to look carefully into the affidavit of Soshee Bhusan Dutt, filed on the 6th April 1916, to ascertain if, as was stated to me, it is practically in identical terms with other affidavits filed on this application, and if this so appears I direct him to disallow the costs of this affidavit.

L. R.

*Rule discharged.*

Attorneys for the applicants: *B. N. Basu & Co.*

Attorneys for the defendants: *J. N. Mitter, B. N. Mitter and N. N. Sen & Co.*