

CIVIL REVISION.

Before Rau and Akram J.J.

PRAFULLA KUMAR MITRA

v

DHIRENDRA LAL DATTA.*

1940

Mar. 5, 11.

Partition suit—*Parties*—*Mortgagee of undivided share, when can be added as a party*—Code of Civil Procedure (Act V of 1908), O. I., r. 10(2).

The language of O. I., r. 10(2) of the Code of Civil Procedure is wide enough to permit the addition of the mortgagee as a party to a partition suit, one of the questions involves in which is the extent of the mortgagor's share.

The general practice of allowing the mortgagee merely to watch the proceedings at the allotment stage will not meet the requirements of the case in a partition suit in which the extent of the mortgagor's share is in dispute.

Jadu Nath Ray v. Parameswar Mallik (1) relied on.

Khetterpal Sritrutno v. Khelal Kristo Bhuttacharjee (2) referred to.

CIVIL RULE obtained by the mortgagee petitioner under s. 115 of the Code of Civil Procedure against an order adding him as a party defendant in a partition suit.

The facts of the case and the arguments in the Rule are sufficiently stated in the judgment.

Chandra Sekhar Sen for the petitioner.

Gopendra Nath Das and *Sachindra Chandra Das Gupta* for the opposite party.

Cur. adv. vult.

RAU J. This Rule is directed against an order of the second Subordinate Judge at Alipore adding the petitioner as a party defendant to a partition suit brought by opposite party No. 1 against his brothers,

*Civil Revision, No. 1253 of 1939, against the order of Nikunja Bibari Banerji, Second Subordinate Judge at Alipore, dated July 12, 1939.

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opposite parties Nos. 2 and 3. The facts are briefly these :—

Opposite party No. 1, Dhirendra Nath Datta, brought a suit for partition against his brothers Surendra Lal Datta and Rabindra Nath Datta (who are opposite parties Nos. 2 and 3 respectively) claiming a one-third share in their joint paternal properties, which include premises Nos. 28/1, Wellington Street, Calcutta. Surendra Lal and Rabindra Nath appeared in due course and filed written statements. The defence of Surendra Lal was that Rabindra Nath had been suffering from congenital, complete and absolute idiocy and consequently that he himself, Surendra Lal, was entitled to a half share in the properties.

Rabindra Nath in his written statement raised no objection to the properties being partitioned.

One of the issues raised on the aforesaid pleadings was :—

Is the defendant No. 2, Rabindra Nath, suffering from congenital, complete and absolute idiocy and lunacy as suggested by defendant No. 1, Surendra Lal ? If so, is he entitled to inherit his paternal properties ?

The petitioner in this Rule had, before the institution of the aforesaid partition suit, advanced a sum of Rs. 500 to Rabindra Nath on a mortgage of Rabindra Nath's share in premises Nos. 28/1, Wellington Street. In June, 1939, after the institution of the partition suit, the petitioner applied to the Subordinate Judge for leave to institute a suit for enforcement of the above mortgage against Dhirendra Lal, the plaintiff in the partition suit, who meanwhile had been appointed receiver of the properties in the suit. The application was opposed by Surendra Lal and, while opposing it, he made a substantive application for adding the petitioner as a party in the partition suit. On July 12, 1939, the Subordinate Judge granted the application and ordered the mortgagee to be added as a defendant in the partition suit on the ground that the addition would avoid multiplicity of proceedings. It is against this order that the present Rule is directed.

The advocate for the petitioner contends that, in ordering the addition of the mortgagee as a party, the Subordinate Judge exceeded the jurisdiction conferred by O. I., r. 10(2) of the Civil Procedure Code. The sub-rule in question empowers the Court only to add—

the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit.

The argument is that the questions involved in the partition suit are questions relating to the paramount title of the several parties, whereas a mortgagee is only concerned with a derived and subordinate interest.

The question whether a mortgagee should be added as a party in a partition suit may arise in two classes of cases: (i) where the extent of the mortgagor's share is not in dispute in the partition suit and (ii) where the extent of the mortgagor's share is in dispute. In the former class of cases the mortgagee's interest in the partition proceedings will only be to see that his mortgagor is given a proper allotment. In this class of cases the practice in Bengal has been not to add the mortgagee as a party, but to give him leave to attend the proceedings as a "quasi-party". *Khetterpal Sritirutno v. Khelal Kristo Bhuttacharjee* (1). We are not aware of any reported case of the second class where this practice has been followed. On the other hand the practice in all partition cases in certain other provinces of India and according to some authorities, in England also, would seem to be to join mortgagees as parties, as a matter of course wherever the mortgage is on an undivided share of the property. In *Jadu Nath Ray v. Parameswar Mallik* (2) (a case of the first type) their Lordships of the Judicial Committee, after referring to the Bengal practice and the practice elsewhere go on to observe.—

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

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(1) (1894) I. L. R. 21 Cal. 904.

(2) I. L. R. [1940] 1 Cal. 255, 251.

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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.

It would seem to follow from these observations that, in any partition case, where the extent of the mortgagor's share is in dispute, the practice of allowing the mortgagee merely to watch the proceedings at the allotment stage will not meet the requirements of the case. So far, therefore, as decided cases go, they support the Subordinate Judge's order in the present case, since the extent of the mortgagor's share is in dispute here.

The language of O. I., r. 10(2) appears to be wide enough to permit the addition of the mortgagee as a party in the present partition suit, one of the questions involved in the suit being the extent of the mortgagor's share. Indeed, the practice of certain other High Courts in India would hardly have been referred to without disapproval by the Judicial Committee in *Jadu Nath Ray v. Parameswar Mallik (supra)*, if it had been in conflict with the provisions of the above sub-rule. Nor can there be any doubt that the addition of the mortgagee in the present case should avoid multiplicity of proceedings. The Rule is, therefore, discharged with costs, the hearing fee being assessed at two gold mohurs.

AKRAM J. I agree.

Rule discharged.

A. A.