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IN THE MATTER OF THE PETITION OF BHEKRAJ KOERI.

v. *Mohesh Lall* (1) there was no irregularity; and yet the High Court interfered, as the judgment-debtor had misled the lower Court.

Baboo *Madhub Chunder Ghose* for the respondent.—The Full Bench, in *Tej Ram* v. *Harsukh* (2), held, that the High Court has, under s. 15 of the Charter Act, administrative, but not judicial powers. And in the case of *In the matter of the petition of Jankee Bullub Sein* (3), the order made was most arbitrary, but the High Court held they had no power to interfere.

The Full Bench did not decide the question referred to them, but gave a short opinion for guidance of the Division Bench in the following form:—

GARTH, C. J.—Upon the assumption contained in the question referred, we are of opinion that the Court has power, under proper circumstances, to set aside the sale, notwithstanding the Judicial Commissioner's order.

Upon this opinion being pronounced by the Full Bench, the case was sent back to the Division Bench to determine, *1st*, whether the requirements of s. 290 were, or were not, essential to the validity of the sale; and, *2ndly*, assuming this to be so, whether, under the circumstances of the case, the sale ought to be set aside; but upon the matter coming on again before the Division Bench, the case was, at the suggestion of the Court, compromised by the parties.

ORIGINAL CIVIL.

Before Mr. Justice Wilson.

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April 8.

MOHINDROBHOOSUN BISWAS *v.* SHOSHEEBHOOSUN BISWAS.

Practice—Suit for Partition—Adding Parties—Mortgagee of Interest of Co-owner—Civil Procedure Code (Act X of 1877), s. 32.

In a suit for the partition of joint family property, the mortgagees of the right, title, and interest of the plaintiff applied under s. 32 of the Civil Procedure Code to be added as parties.

(1) 3 C. L. R., 137.
(2) I. L. R., 1 All., 101.
(3) B. L. R., Sup. Vol., 716; S. C., 7 W. R., 519.

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Held, that their presence was not necessary in order "to enable the Court effectually and completely to adjudicate and settle all the questions involved in the suit" within the meaning of s. 32.

Held also, that that section does not contemplate any application to the Court by the person proposed to be added.

THIS was a suit for the partition of joint family property. An application was now made by petition on behalf of the mortgagees of the right, title, and interest of the plaintiff in the properties which were the subject-matter of the suit, that they might be added as parties.

Mr. *Hill* for the applicants. — Under Act VIII of 1859, no doubt, we would be interested parties. The legal estate is in us, and if the Court has notice that the legal estate in any share is outstanding, the Court must have the person having title before it in order to partition. In *Miller* v. *Warmington* (1), Sir T. Plumer, M. R., says:—"It is essential to partition to have the legal title before the Court; it would be a decisive answer that your title is only equitable, for then how could the conveyances be made, if any should be necessary?" In an *Anonymous case* (2) before Lord Hardwicke, his Lordship said,—that "where a bill is brought for a partition, a conveyance must be decreed, and therefore all parties necessary to make such conveyance must be made parties, and brought before the Court." In *Cornish* v. *East* (3), it was held, where one tenant in common had leased his share, that, on a bill for partition, the lessee was a necessary party. That is a weaker case than the present, for there the legal estate was in the lessor. A similar principle was applied in *Solomon* v. *Solomon* (4). There some of the plaintiffs, who had an equitable interest in the property in question, mortgaged their interests pending the suit, and it was held at the hearing that the mortgagee was a necessary party. If we are mortgagees of the entire interest of one of the parties to the suit, we are necessary parties. It matters little how the fact is brought to the knowledge of the Court. The plaintiff cannot

(1) 1 Jac. and W., 493.
(2) 3 Swan., 139.
(3) 2 Cox's Eq. Cas., 27.
(4) 13 Sim., 516.

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object; he has covenanted to allow us to have peaceable possession and to receive the rents, and, having merely an equitable title, cannot object to our being made parties. He admits that he has executed the deed. Until it is set aside, it is binding against him. The cases decided under the English Judicature Act do not touch this case. [WILSON, J.—Is their any case under the English Act of an outsider being added on his own application?] Section 32 of the Civil Procedure Code says,—that "the Court may, on or before the first hearing, order . . . that 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, be added." Here one of the questions is as to conveyances which will have to be executed. [The *Advocate-General*.—In partition suits between natives, mutual conveyances and releases are not executed.] It is always provided in the decree that mutual conveyances and releases shall be executed. There is no statutory form of decree in the Code, but the principle of English law applies here. If the person in whom the legal estate is outstanding is a necessary party in England, he is a necessary party here.

Mr. *Trevelyan* for the plaintiff.—Unless a person who is a party to the suit raises the question as to conveyances Mr. Hill's arguments fail. If none of the parties require conveyances, his clients cannot raise the question. If there is any case of collusion or fraud, they can come in to set it aside. We "ought" not to have made them parties. That is the question now before the Court. If they come in, there will have to be an issue as to the mortgage. They cannot be plaintiffs. The cases which have been referred to, are cases in which the mortgage was admitted. If Mr. Hill's clients are added as parties, the plaintiff will be entitled to amend the plaint, and seek to set aside the mortgage. The cases where persons have been added are cases where the parties to the suit wish to have them added. Section 32 refers to the class of cases mentioned in the previous sections,—that is to say,

"persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative, in respect of the same cause of action." If the wrong person has been made plaintiff, any other person may be added or substituted. The plaintiff has the option of joining all or any of the persons liable on the same contract. The issues in this suit are as to the right to this property. Those issues can be decided without the presence of the mortgagees.

The *Advocate-General* (Mr. *G. C. Paul*) for the principal defendant.—If the mortgagees are added as parties, the plaintiff will have the right to an issue as to the mortgage, and the suit would be multifarious as far as my client is concerned.

Mr. *Bonnerjee* and Mr. *Allen* for the other defendants.—It is unnecessary now to have the mortgagees made parties. They can come in and attend the partition-proceedings.

Mr. *Hill* in reply.—It would not be necessary to raise an issue as to the mortgage. If the conveyance to us is admitted, then the mortgagees stand in the plaintiff's shoes, and have all the rights that the plaintiff has, and are entitled to be present at the partition-proceedings when the shares are ascertained, and to protect their interests.

WILSON, J.—I do not think that there is any sufficient reason for making the order asked for. The application is under s. 32 of the Civil Procedure Code. The words of the section are as follows: "The Court may, on or before the first hearing, upon the application of either party, and on such terms as the Court thinks just, order that the name of any party, whether as plaintiff or as defendant, improperly joined, be struck out; and the Court may, at any time, either upon or without such application, and on such terms as the Court thinks just, order that any plaintiff be made a defendant, or that any defendant be made a plaintiff, and that the name of any person who ought to have been joined, whether as plaintiff or as defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and

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completely to adjudicate upon and settle all the questions in the suit, be added."

In the first place this does not contemplate any application by the person proposed to be added.

The Court has a discretion as to whether it will act or not, and no doubt facts may be proved before it which would justify it in acting. But I do not think that any facts have been shown which make it necessary to have the mortgagees added as parties. At this stage of the suit their presence is not necessary "to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit." 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.

Application refused.

Attorney for the applicants: Mr. *Pittar.*

Attorneys for the plaintiff: Messrs. *Mookerjee and Deb.*

Attorneys for the defendants: Messrs. *Swinhoe, Law and Co.*; Baboo *Gonesh Chunder Chunder*, Messrs. *Dignam and Robinson.*

Before Mr. Justice Wilson.

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April 2.

KHETTER CHUNDER MOOKERJEE *v.* KHETTER PAUL SREETERUTNO.

Evidence Act (I of 1872), ss. 65, 90—Secondary Evidence—Document more than thirty years old—Proof of Execution.

Secondary evidence of the contents of a document requiring execution, which can be shown to have been last in proper custody, and to have been lost, and which is more than thirty years old, may be admitted under s. 65, cl. (*c*) and s. 90 of the Evidence Act, without proof of the execution of the original.

IN a suit to recover possession of certain immoveable property, the plaintiff claimed to be entitled as heir of one Shib