

Before Sir Richard Garth, Knight, Chief Justice. and Mr. Justice Macpherson.

KIRTY CHUNDER MITTER (PLAINTIFF) v. ANATH NATH DEY (DEFENDANT).*

1883
June 8.

Decree for partition—No return to Commission—Mortgage of share—Purchase by a stranger of portion of the lands included in the Decree—Suit by him for partition.

A and *B* were the joint owners in equal shares of certain property. In 1869 *B* mortgaged his share to *A* under a mortgage deed drawn up in the English form. Later on, in 1869, *A* brought a suit against *B* for partition, and in 1870 obtained a decree appointing a Commissioner of partition and directing the partition. No return was made to this Commission, and no actual partition came to. In 1873, *A* obtained a decree for an account, and for payment, or in default for sale of the property. In 1878, *B*'s share was put up for sale, and purchased by *C*, and *C* was put into possession. In 1881, *C* brought a suit against *A* for partition. *Held*, that the decree obtained by *A* in 1873 put an end to *B*'s right to redeem, unless he paid the amount found due against him, and therefore at the time of the sale to *C*, *B*'s right to redeem had ceased to exist, and the property was no longer subject to partition under the decree of 1870, and therefore the partition asked for under the suit of 1881 could be granted.

Anath Nath Dey and Monmotho Nath Dey, the adopted sons of one Promotho Nath Dey, deceased, were the joint owners in equal shares of certain garden land and premises situate in the district of the 24-Pergunnahs. On the 12th March 1869, Monmotho Nath Dey mortgaged to Anath Nath Dey his undivided moiety in the said premises under a deed of mortgage drawn up in accordance with the form of mortgage prevalent in England. Monmotho Nath Dey failed to pay the principal or interest due under the said mortgage, and Anath Nath, in the month of January 1872, instituted a suit in the High Court against him for the recovery of the money due under the mortgage.

On the 7th July 1873 the High Court passed a decree for an account, and directed that, if the said Monmotho Nath Dey should fail to pay what might be found due on such an account, the said mortgaged property should be sold. Monmotho Nath failed

* Appeal from Original Decree No. 97 of 1882, against the decree of Baboo Kristo Mohun Mookerjee, Second Subordinate Judge of the 24-Pergunnahs, dated the 11th January 1882.

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to pay what was due on the finding of such account, and the property was therefore put up to sale, and at such sale the plaintiff in this case, one Kirty Chunder Mitter, became the purchaser for Rs. 31,000, and on the 10th March 1881 a regular conveyance was drawn up and entered into by the Registrar of the High Court.

It appeared from the record that in 1869 a suit (subsequently to the mortgage) had been brought by Anath Nath Dey and Monmotho Nath Dey for partition of certain properties, including the garden land and promises in question in the suit, and that in January 1870 the High Court passed a decree appointing Commissioners, and directing them to grant partition. It further appeared that no return was ever made to that commission, so that therefore no actual partition had been come to.

On the 11th July 1881 Kirty Chunder, having previously been put into possession, brought the present suit for partition of the properties.

The present defendant Anath Nath Dey contended that the present suit would not lie, inasmuch as the suit above mentioned brought by him against Monmotho Nath Dey in 1869 was for the partition of the same property, and moreover, that that suit was still undisposed of, inasmuch as no regular partition had been come to, and therefore the plaintiff purchased *pendente lite*.

The Subordinate Judge found that the property in suit was the subject-matter of partition in the suit still pending before the High Court, and that no final order had been passed in such suit, and therefore under s. 12 of the Civil Procedure Code held that he had no jurisdiction to try it, and dismissed the plaintiff's suit.

The plaintiff appealed to the High Court.

Mr. Evans (Baboo Rashbehary Chose and Baboo Grish Chunder Chowdhry with him) for the appellants contended that s. 12 was only the correlative of s. 13. Section 12 provides, that if an issue be in course of trial in a pending case (the relief sought being the same), the Court shall not entertain another suit to try the same issue, and grant the same relief. Section 13 says, if any issue has been tried, it shall not be heard over again

Neither of these sections refer to cases like this, where there is no issue between the parties, but only administration of relief on admitted rights.

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1st.—This section (12) does not cover the whole ground covered by the doctrine of *lis pendens*. The bar (if any) in this case is not under this section but under the general rule of *lis pendens*, that a purchaser *pendente lite* will be bound by the final decree, and need not be made a party, and the rule as to comity of Courts which prevents one Court taking up a matter which is being dealt with by another competent Court even in the way of administrative relief to partition. But the doctrine of *lis pendens* does not apply here, because there is no active prosecution of the suit—*Kinsman v. Kinsman* (1); Fisher on Mortgages (3rd edn.) Vol. I, p. 583, s. 962; of Transfer of Property Act, s. 52; and there is no want of comity because the High Court is not dealing with the matter and the High Court suit has abated, and is practically at an end.

2nd.—The plaintiff cannot obtain the relief he is admittedly entitled to in the other suit through the fault of the defendant who is plaintiff in that suit.

3rd.—The defendant (plaintiff in the old suit) has himself caused the alienation to be made by a sale by the High Court, which had cognizance of the old suit, and has thus discharged the property from the operation of the old suit with the assent of the High Court through which he sold; he therefore sold it clear of the *lis pendens* by his own act and cannot complain.

4th.—The defendant in the old suit had only the equity of redemption, and the plaintiff in the old suit had the legal estate before the old suit commenced. He has transferred this estate to the plaintiff in the suit with the assent of the Court, and therefore cannot say that the plaintiff in this suit is a purchaser from the defendant in the old suit, and therefore to be bound by the proceedings in the old suit.

5th.—There is no *lis contestatio*, and there is nothing that the defendant can complain of.

6th.—There is not any suit pending before the High Court

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except in name, and no interference with the High Court, and plaintiff cannot get any relief except by this suit.

Baboo *Rajendronath Bose* for the respondent.

The judgment of the Court (GARTH, C. J., and MACPIERSON, J.) was delivered by

GARTH, C. J.—This suit was brought by the plaintiff for a partition of a large estate of which he purchased an eight annas share in the year 1878, under the following circumstances:—

The estate in question was part of a much larger property situate partly in Calcutta, and partly in the Mofussil, which belonged jointly to the defendant and one Monmotho Nath Dey, in equal shares.

By a mortgage made in the English form, dated the 12th of March 1869, Monmotho Nath Dey mortgaged to the defendant his half share in the estate in question, subject to the usual proviso for redemption.

Default having been made in payment of the mortgage money, a suit was brought in this Court by the present defendant in the year 1873 against the mortgagor for the recovery of the principal sum and interest and for other relief.

On the 7th of July of the same year the High Court made a decree by consent of the parties, by which an account was to be taken in the usual way, to ascertain the amount due for principal and interest; and it was further ordered, that if the mortgagor failed to pay that amount by a certain day, the mortgaged estate should be put up for sale by public auction.

Under this decree the account was taken, and the sum found due to the defendant was not paid by the mortgagor; and consequently the estate was put up for sale by auction, and purchased by the present plaintiff on the 24th of June 1878.

The plaintiff has since obtained possession, and he then, on the 11th of July 1881, brought this suit against the defendant for a partition.

The defendant's answer was, that in the year 1869 he brought a suit in this Court, against Monmotho Nath Dey for a partition of all the properties which belonged to them jointly, and amongst others of the estate in question; that a decree was made in that

suit for partition on the 21st of January 1870 ; and that a Commissioner was appointed under that decree, who has commenced, but only partially carried out, the partition.

The defendant, therefore, contends that as the estate in question was purchased by the plaintiff pending the partition proceedings, it is still subject to the former decree, and the plaintiff has no right to bring this suit to obtain a separate partition of it.

The lower Court holds that as the decree in the former suit directed this property to be partitioned, and as it has not been shown that the former suit has come to an end, the plaintiff's suit should be dismissed.

On appeal it has been contended that the lower Court is wrong upon the ground, that as the mortgage of 1869 was made previously to the partition suit in that year, and as by the proceedings in the mortgage suit any interest which Monmotho Nath Dey might have had is at an end, the property in question is no longer the subject of the former suit, and consequently there is no reason why a decree for partition in this suit should not be made.

We think that there is much reason in this contention. We have ascertained by a reference to the records of this Court that the mortgage by Monmotho Nath Dey to the present defendant in 1869 was made previously to the suit for a partition ; and it therefore only remains to consider, whether, at the time when this suit was brought, the property in question, or any interest in it, was liable to be partitioned in the former suit.

The mortgage of 1869 being in the English form, the legal estate in the property passed to the mortgagee, and all that remained to the mortgagor at the time when the partition suit was brought in 1869, was an equity of redemption, or the bare right to redeem the property on payment of the mortgage money and interest.

It is possible that this right, if it had continued in the mortgagor, might have been made the subject of partition in the former suit ; but we consider by the act of the defendant himself that the right has long ceased to exist. The decree which the defendant obtained in the mortgage suit in the year 1873 put an end to Monmotho Nath's right to redeem, unless he paid the amount

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found to be due on the day named in the decree; and therefore at the time when the property was sold to the plaintiff, Monmotho Nath's interest in it had ceased to exist. It follows, therefore, that at the time when this suit was brought, that property was no longer subject to partition under the former suit, and the defence which the defendant has set up to this suit cannot avail him.

This result is certainly a fortunate one in the interests of justice; because it clearly appears, from the facts before us, that nothing has been done in the former partition suit for many years past and nothing more is likely to be done. One out of the two Commissioners appointed is dead; Monmotho Nath himself is dead also; and as the latter sold or squandered away all his property before he died, it seems improbable that any one will administer to his estate. So that had this defence been available to the defendant, the plaintiff might have had extreme difficulty in obtaining a partition of the property.

A decree will be made for a partition on the usual terms, and as the defendant has set up a defence which turns out to be unfounded, we think that he should pay the plaintiffs' costs in both Courts, but not of course the costs of the partition.

Appeal allowed.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Macpherson.

RUSSICK DAS BAIRAGY AND ANOTHER (DEFENDANTS) v. PREONATH MISREE AND ANOTHER (PLAINTIFFS).*

Minor, Suit by—Permission of Court to Guardian to sue—Discretion of Court—Act XL of 1858—Civil Procedure Code (Act XIV of 1882), s. 440—Return of Plaintiff.

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 September 6.

A volunteer guardian has no right to sue on behalf of a minor; the accord or refusal of permission to sue is a matter in the discretion of the Court.

Where a suit is brought in violation of s. 440 of the Code of Civil Procedure, or of the provisions of Act XL of 1858, the proper course for a Court to pursue is to return the plaint, in order that the error may be rectified.

* Appeal from Appellate Decree No. 576 of 1882, against the decree of Baboo Amirto Lal Chatterjee, Subordinate Judge of Nuddea, dated the 16th of January 1882, affirming the decree of Baboo Bhubun Mohun Roy Chowdhry, Second Munsiff of Bongong, dated the 27th of December 1879.