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J. V. W.

1902

RAMPAL  
SINGH  
v.  
BALBHADDAR  
SINGH.

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July 2.

## APPELLATE CIVIL.

*Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.*

MAHADEO PRASAD (PLAINTIFF) v. TAKIA BIBI AND OTHERS

(DEFENDANTS).\*

*Civil and Revenue Courts—Jurisdiction—Act No. XIX of 1873 (N.-W. P. Land Revenue Act), section 241(f)—Partition—Suit by person not a party to the partition proceedings to obtain in a Civil Court a declaration that a partition carried out in a Revenue Court was fraudulent and injurious to his interest.*

If by a fraud practised upon outside parties, such as mortgagees, or by fraud practised upon the Revenue Court itself, a collusive and fraudulent partition is carried through in that Court, the person who is damaged by such fraudulent proceedings is not without a remedy in the Civil Court. The Civil Court has no jurisdiction whatever to set aside a partition effected in the Revenue Court; but it is not without jurisdiction to investigate a question of fraud, and, if fraud be established, to make a declaration that proceedings carried out in any Court were fraudulent proceedings, and to give relief accordingly. *Byjnath Lall v. Ramoodeen Chowdry* (1), *McCormick v. Grogan* (2) and *Barnesly v. Fowl* (3) referred to. *Muhammad Sadiq v. Laute Ram* (4) distinguished.

IN this case the plaintiff brought his suit in the Court of a Subordinate Judge to obtain a declaration that certain partition proceedings, which had been carried out in a Court of Revenue under the arbitration sections contained in the North-Western Provinces Land Revenue Act, 1873, were fraudulent and void as against him. Eight persons, the co-sharers, parties to the partition, were made defendants to the suit. The plaintiff alleged that under two deeds, dated the 19th of September, 1889 and the 20th of March, 1890 respectively, the ancestor of the defendants Nos. 1 to 6 had mortgaged to the ancestor of the plaintiff a 5 anna 4 pie share in the mauza in question.

\* Second Appeal No. 927 of 1900, from a decree of J. H. Cuming, Esq., District Judge of Azamgarh, dated the 26th of June, 1900, confirming a decree of Babu Jai Lal, Subordinate Judge of Azamgarh, dated the 5th of April, 1900.

(1) (1873-4) L. R., 1 I. A., 106.

(2) (1869) 4 F. and I. A., 82.

(3) (1749) 1 Vesey (Senior), 283.

(4) (1901) I. L. R., 28 All., 291.

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On the 22nd of April, 1897, the plaintiff obtained a decree for sale on this mortgage. After the plaintiff had obtained his decree for sale, namely, on the 26th of May 1897, the defendants Nos. 7 and 8 applied for partition of the property, and a partition was carried out by means of arbitration. The plaintiff alleged that this partition was altogether fraudulent; that property of little value was allotted to defendants Nos. 1 and 6, whilst the valuable portion of the property was allotted to defendants Nos. 7 and 8, this being done with the object of prejudicing and defeating the plaintiff's claim as mortgagee. The partition proceedings were carried out in the Court of Revenue, and confirmed on the 15th of October, 1898. On the 21st of March 1899 the plaintiff purchased the share of the defendants Nos. 1 to 6 in the property, at a sale held in execution of his decree against them, the property being sold as an undivided share of the zamindari and not as a divided share. The present suit was instituted on the 8th of November, 1899. The main defence of the defendants was that, having regard to section 241(f) of the Land Revenue Act, 1873, the suit was not cognizable by a Civil Court.

The Court of first instance (Subordinate Judge of Azamgarh) accepted this defence and dismissed the suit, and an appeal by the plaintiff was dismissed on the same ground by the District Judge.

The plaintiff thereupon appealed to the High Court.

Pandit *Sundar Lal* and Munshi *Gokul Prasad*, for the appellants.

Mr. *Abdul Raof* and Maulvi *Ghulam Mujtaba*, for the respondents Nos. 7 and 8.

STANLEY, C.J. (BANERJI, J., concurring). — The plaintiff's suit was brought for a declaration that certain partition proceedings, which were carried out in the Revenue Court by means of the arbitration clauses of the Revenue Act, were fraudulent and void as against him, he being a mortgagee of certain shares in the property which was so partitioned. Under two deeds, dated the 19th of September, 1889 and the 20th of March, 1890, the ancestor of the defendants Nos. 1 to 6 executed a simple mortgage in favour of the plaintiff's ancestor of a 5 anna 4

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pie share in mauza Pardhanpur. On the 22nd of April, 1897, the plaintiff obtained a decree for sale on foot of his mortgage. The defendants Nos. 7 and 8 are co-owners of the property along with the defendants Nos. 1 to 6. After the plaintiff had obtained his decree for sale, namely, on the 26th of May, 1897, the defendants Nos. 7 and 8 applied for partition of their property and a partition was carried out by means of arbitration. It is alleged in the plaintiff's claim, seeking to have the partition proceedings declared fraudulent and void as against him, that the partition was altogether fraudulent; that property of little value was allotted to the defendants Nos. 1 to 6, whilst the valuable portion of the property was allotted to defendants Nos. 7 and 8, and this with a view to prejudice and defeat the plaintiff's claim as mortgagee. The partition proceedings were carried out in the Revenue Court, and confirmed on the 15th of October, 1898. On the 21st of March, 1899, the plaintiff purchased the share of the defendants Nos. 1 to 6 in the property at a sale held in execution of his decree against them, the property being sold as an undivided share of the zamindari, and not as a divided share. The present suit was instituted on the 8th November 1899, and the main defence which has been relied on by the defendants is, that under section 241(f) of Act No. XIX of 1873, the claim is not cognizable by the Civil Courts. This contention has found favour with both the lower Courts, and the claim of the plaintiff was accordingly dismissed. Hence the present appeal.

Much reliance in argument has been placed by the respondents' counsel upon the case of *Muhammad Sadiq v. Larute Ram*, (1) recently decided in this Court. In that case it was decided by a Full Bench of this Court that if a party to a partition which is being conducted by the Revenue authorities under the Land Revenue Act of 1873, desires to raise any question of title affecting the partition, he must do so according to the procedure laid down in sections 112 to 115 of that Act, and that if a question of title affecting the partition, which might have been raised under these sections during the partition proceedings, is not so raised and the partition is

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completed, section 241(f) of the Act debars *the parties to the partition* from raising subsequently in a Civil Court any such question of title. It is to be noticed in the first place that in that case the party who sought to raise the question of title, and to impeach the partition proceedings was himself a party to those proceedings. This is important to bear in mind. In the case now before the Court the plaintiff, who is a mortgagee, was not a party to the proceedings in the Revenue Court; as a matter of fact, he made an application to the Revenue Court to be added as a party to the proceedings, but his application was ultimately rejected. In the case of *Muhammad Sadiq v. Laute Ram* the Chief Justice, Sir Arthur Strachey, stated the law on the subject as follows. He observed:—"The enactment in clause (f) is not merely that a Civil Court is not to alter the distribution of the land made on partition, but that it is not to 'exercise any jurisdiction over the matter' of such distribution of the land. That would, I think, exclude a suit in a Civil Court which sought a declaration impugning the distribution which by partition the Revenue authorities had effected. The object of such a declaration could only be to obtain in some manner an alteration in the distribution that had been made. If such a declaration were binding upon the Revenue Court so as to compel the Revenue Court to alter the distribution, it would clearly be an exercise of jurisdiction in the matter of the distribution. If the declaration were not binding on the Revenue Court it would be a mere *brutum fulmen*." Now it is to be observed that in the case with which the learned Chief Justice was dealing there was no allegation of fraud. It was also a question between the parties to the partition, and undoubtedly under the Partition Act such questions could have been raised and determined by the Revenue Court; and we take it that the learned Chief Justice in laying down the law as he has done, did so without reference to cases in which partition proceedings have been carried through in the Revenue Court fraudulently and collusively and to the detriment of mortgagees, as is alleged to be the case in the present suit. We are disposed to think that if by a fraud practised upon outside parties, such as mortgagees, or by fraud practised upon the Revenue Court itself, a

collusive and fraudulent partition is carried through in that Court, the person who is damnified by such fraudulent proceedings is not without a remedy in the Civil Court. It is true, no doubt, that the Civil Court has no jurisdiction whatever to set aside a partition effected in the Revenue Court, but it is not without jurisdiction to investigate a question of fraud, and if fraud be established, to make a declaration that proceedings carried out in any Court were fraudulent proceedings, and to give relief accordingly. In the well known case of *Byjnath Lall v. Ramoodeen Chowdry* (1) their Lordships of the Privy Council guardedly abstained from expressing the opinion that there would not be redress for a fraud such as we have referred to; on the contrary, we gather from their judgment that a person who has been prejudiced and injured by malpractices such as have been alleged here will not be without remedy in the Civil Court. In that case it was decided that a mortgage of an undivided share in land may be enforced against such lands as under a *batwara* or revenue partition may have been allotted in lieu of such share, and also that lands allotted in severalty by the *batwara* to the co-sharers of the mortgagor will not be subject to the mortgage. That was a case in which there was no allegation of fraud whatever. In delivering the judgment of their Lordships, Sir Montague E. Smith observes:—"It was argued that, as the mortgagee could not be a party to the *batwara* proceedings, so upon general principles of jurisprudence he could not be held to be bound by them; that consequently he was at liberty to enforce his rights against an undivided share in every parcel specified in the mortgage deed, to whichever of the co-sharers such parcel might have been allotted, but that he could not claim more. The objection that, in such a case, he must either forfeit part of his security or pursue his remedy against those with whom he had no privity of contract, was met by the suggestion that the co-sharers thus injuriously affected would, upon the principle of implied warranty, such as exists in this country on a title acquired by partition or exchange, have a remedy over against the mortgagor, even if the consequence of that were the re-opening of the partition. And

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it was further argued that if the contention of the appellant concerning a partition by *batwara* were correct, it must be equally true of a partition by private arrangement; and that in either case an unequal partition might be effected by collusion between the mortgagor and his co-sharers with the object of defrauding the mortgagee. Upon this it is to be observed that fraud would be a substantive ground for relief, and that if the fraud supposed were effected by private arrangement, the mortgagee would have a clear remedy against all who were parties to it in the Civil Court. In the more improbable case of such a fraud being effected by means of *batwara* proceedings, his remedy might be more difficult by reason of the finality of the partition and the incapacity of the Civil Court to entertain a suit to disturb it. But without entering into these nice questions, which do not directly arise on this appeal, their Lordships deem it sufficient to observe that the finality of such a partition cannot be greater than that of the purchase of an estate at a sale for arrears of the public revenue; and that even in this latter case, Courts of Justice have found the means of relieving the person injuriously affected by fraud." In this decision of their Lordships there is a clear indication that if a fraud has been practised, the person or persons injured by it will be able to obtain redress in the Civil Courts, notwithstanding the difficulties which may be thrown in their way by reason of the finality of the partition proceedings carried out in the Revenue Court. That an Act of Parliament will not stand in the way of relief being given in a case of the kind is laid down by Lord Westbury in the well known case of *McCormick v. Grogan* (1). I only quote this case for the statement made by Lord Westbury in his judgment, which is as follows:—"The Court of Equity has from a very early period decided that even an Act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an Act of Parliament intervenes, the Court of Equity, it is true, does not set aside the Act of Parliament, but it fastens on the individual who gets a title under that Act, and imposes upon him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud." In the earlier

(1) (1873-4) 4 B. and L. A., 82; at p. 88.

case of *Barnesly v. Powel* (1) it was laid down to the effect that though the Court of Chancery could not set aside the judgment of a Common Law Court obtained against conscience, it would consider the person who had obtained the judgment fraudulently as a trustee, and would decree him to reconvey any property that he might have become possessed of under the judgment on the ground of laying hold of his conscience so as to make him do what was necessary to restore matters as before.

Now the lower Courts in this case have not entertained the question of fraud which was raised in this suit. They have confined themselves to a decision of the case upon the preliminary point that the suit was not cognizable by the Civil Court. In this we are unable to agree with them for the reasons which we have stated. We think that if the plaintiff is able to substantiate a case of fraud, such as he alleges, it is open to the Civil Courts to declare that the proceedings in the Revenue Court were fraudulent. We also think that if this issue be found in favour of the plaintiff the decision of the Court need not necessarily be a mere *brutum fulmen* and end with the finding of fraud. If it be found that the plaintiff has been damnified by the proceedings in the Revenue Courts, we are of opinion that the Civil Court will be able to redress the wrong. It would be premature for us to say what the nature of the redress may be. It will be for the Court to ascertain first that fraud has been committed. If it finds that fraud has been committed, it will be necessary to consider whether the plaintiff has been thereby damnified, and if it is found that the plaintiff has been damnified, it will then be for the Court to consider in what way under the circumstances, and having regard to all the facts, it can best give redress to the plaintiff.

For these reasons we allow the appeal, set aside the decrees of the lower Courts, and remand the case to the Court of first instance with directions to readmit the suit under its original number in the register and proceed to determine it on the merits, bearing in mind the observations which we have laid down above. The costs here and hitherto will abide the event.

*Appeal decreed and cause remanded.*

(1) (1749) 1 Vesey (Senior), 283; at p. 285.

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