

Before Mr. Justice Banerji and Mr. Justice Ryves.

BANKE LAL AND ANOTHER (DEFENDANTS) v. SHANTI PRASAD AND OTHERS
(PLAINTIFFS) AND BIRJ LAL AND OTHERS (DEFENDANTS)*

1913
April, 25.

Act No. IV of 1893 (Partition Act), sections 1, 2 and 3—Partition—Mortgagee rights in a revenue-paying mahal—Application for sale by owners of less than a moiety—Act (Local) No. III of 1901 (United Provinces Land Revenue Act), section 107.

Mortgagee rights merely in a revenue-paying mahal do not fall within the purview of the United Provinces Land Revenue Act, 1901, for the purposes of partition: consequently the provisions of the Partition Act, 1893, apply to the partition amongst co-owners of such rights. But an order for sale of the mortgagee rights under section 2 of the Partition Act will not be valid unless based upon the request of a party or parties interested to the extent of one moiety or upwards.

THE facts of this case were as follows:—

In a suit for partition a preliminary decree was passed, and for the purpose of preparing a final decree the court appointed a commissioner and a receiver. Amongst the properties the subject of the partition were the mortgagee rights in one half of a village called Sundhawra. One of the defendants in the partition suit applied to the court apparently under section 2 of the Partition Act, 1893, praying that the mortgagee rights might be sold by auction to the highest bidder among the parties. The interest of the applicant, however, amounted to only one-quarter of the said rights. The application was opposed by other parties to the partition proceedings: but after calling for a report from the receiver, the court passed an order directing the sale of the mortgagee rights to the highest bidder amongst the co-sharers. Against this order the two opposing defendants appealed to the High Court.

Munshi *Haribans Sahai*, for the appellants.

Mr. *M. L. Agarwala*, for the respondents.

BANERJI and RYVES, JJ:—Banwari Lal, Parsotam Das and Ramrich Pal brought a suit for partition of their shares in certain joint property. A preliminary decree was passed in that suit, and for the purpose of preparing a final decree the court appointed a commissioner and receiver. Among the properties ordered to be partitioned are mortgagee rights in one half of the village Sundhawra. On the 15th of May, 1912, Shanti Prasad, who was one of the defendants, and the extent of whose share, as also the share of his minor brother Ram Kunwar, is one quarter, applied to

* First Appeal No. 342 of 1912, from a decree of Pirthavi Nath, Subordinate Judge of Bareilly, dated the 16th of May, 1912.

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the court, apparently under Act IV of 1893, praying that the mortgagee rights be sold by auction to the highest bidder among the parties. This application was opposed by Banker Lal and Ratan Lal. On reference by the court to the receiver and on obtaining a report from him, the court made an order directing the sale of the mortgagee rights to the highest bidder among the co-sharers. The present appeal has been preferred against this order and it is contended that the Partition Act (No. IV of 1893) does not apply to a case like this, inasmuch as the property in question is property paying revenue to Government. Clause (4) of section 1 of the Act is referred to in support of this contention. That clause provides that nothing contained in the Act shall be deemed to affect any local law providing for the partition of immovable property paying revenue to Government. Partition of immovable property paying revenue to Government in these provinces is to be effected under the provisions of the Land Revenue Act, No. III of 1901. Under that Act, separate mahals cannot be formed of mortgagee rights as between the holders of a mortgage. The partition contemplated by that Act is a partition of zamindari rights, and if partition is sought of zamindari rights in respect of property which is under a mortgage, as against other co-sharers of the zamindari rights, the application for partition should, as required by section 107 of the Act, be made by the mortgagor and the mortgagee jointly. In our opinion that Act has no application to a case like this. Under Act IV of 1893, at the request of shareholders interested individually or collectively to the extent of one moiety or upwards, the court may direct a sale of the property ordered to be partitioned and distribution of the proceeds, and where such an order is made, any of the parties other than the applicant may apply for leave to buy at a valuation the share or shares of the party or parties asking for sale. In the present case Shanti Prasad and his brother who applied for sale of the mortgagee rights were share-holders only of one-fourth and not of a moiety. Therefore they alone could not ask the court to sell the mortgagee rights. Other share-holders may have expressed their consent to the sale of the mortgagee rights. But they made no request to the court in that behalf. Therefore, it seems to us, that the court was not competent to take action under section 2 of the Act. If action had been taken under that section, and the court had decided

that the property ought to be sold, the share-holders other than the applicant could under section 3, have applied for a valuation and the court in that case should have ordered a valuation to be made. Neither of these proceedings appears to have been taken. There being no application either under section 2 or under section 3, the court was not competent to make the order passed by it. We must, therefore, set aside its order of the 16th of May, 1912. It will be open to the parties or such of them as may choose to do so, to ask the court to take action under section 2, and in that case, it will be open to other share-holders to apply under section 3, and if such application be made, it will be the duty of the court to proceed under the provisions of sections 2 and 3. The order complained of is an illegal order. We accordingly allow the appeal, and set aside that order. Under the circumstances we direct the parties to pay their own costs in both courts.

Appeal allowed.

Before Mr. Justice Banerji and Mr. Justice Ryves.

TODAR MAL AND OTHERS (JUDGEMENT-DEBTORS) v. PHOLA KUNWAR
(DECREE-HOLDER)*

Act No. IX of 1908 (Indian Limitation Act), schedule I, article 128—Execution of decree—Limitation—Step in aid of execution—Application for transfer of decree—Civil Procedure Code (1882), section 228.

Held, that an application made to the court passing a decree to transfer it for execution to another court is an application to take a step in aid of execution within the meaning of article 128 of the first schedule to the Indian Limitation Act, 1908. *Chandra Nath Gossami v. Gurroo Prosunno Ghose* (1) followed;

THE facts of this case were as follows :—

A preliminary decree for sale was passed on the 1st of September, 1897, and it was made absolute on the 17th of November, 1900. The last application for execution, admittedly within time, was made on the 11th of May, 1906. On the 5th of September, 1908, the decree-holder applied to the court at Bareilly, which had passed the decree, to transfer it for execution to the court at Shahjahanpur. This application was made under section 228 of the Code of Civil Procedure, 1882. The certificate asked for was granted, and thereupon an application for execution was made in the court at Shahjahanpur on the 8th of February, 1910.

* First Appeal No. 43 of 1913, from a decree of Gokul Prasad, Subordinate Judge of Shahjahanpur, dated the 12th of September, 1912.

(1) (1895) I. L. R., 22 Calc., 375.

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