

Before Mr. Justice Ashworth and Mr. Justice Iqbal Ahmad.

1927
February,
25.

SHAGUN CHAND AND ANOTHER (DEFENDANTS) v. DATA RAM AND OTHERS (PLAINTIFFS).*

Civil Procedure Code, order I, rule 10(2)—Mortgage—Partition of mortgaged property prior to preliminary decree—Parties added as defendants in application for final decree—Hindu law—Partition—Evidence of partition having taken place.

Pending a suit for sale on a mortgage, the mortgaged property was partitioned, but the preliminary decree was passed as against one defendant only. When, however, the plaintiffs came to apply for the final decree, they joined certain other persons, upon the ground that by reason of the partition they had obtained possession of portions of the mortgaged property since the passing of the preliminary decree. But no formal application was made to add these persons as parties to the record.

Held, that it was not competent to the court to add (*per* ASHWORTH, J.), or at any rate the court should not have added (*per* IQBAL AHMAD, J.), the names of these persons to the array of parties, and their names should be struck off.

Held, also, by ASHWORTH, J., that the bringing of a suit for partition is only presumptive evidence of separation and that evidence may be rebutted by other evidence such as the fact of the withdrawal of the plaint on the ground that separation had not taken place or was not desired, but not by evidence merely of withdrawal of the plaint. *Palani Ammal v. Muthuvenkatachala Moniagar* (1), referred to.

THIS was a second appeal arising out of an application for the framing of a final decree in a mortgage suit. One Shyam Sundar Lal executed a mortgage-deed in favour of Lala Data Ram and Musamat Bundi, applicants for the final decree. They

* Second Appeal No. 1806 of 1924, from a decree of Abdul Halim, Additional Judge of Meerut, dated the 15th of May, 1924, confirming a decree of Har Govind Bajel, Subordinate Judge of Muzaffarnagar, dated the 9th of October, 1923.

1927

SHAGUN
CHAND
v.
DATA
RAM.

obtained a decree against him. Subsequent to the institution of the suit, Shyam Sundar Lal purported to partition the mortgage property along with other property between himself and the present appellants. Data Ram and Musammât Bundi consequently only asked for and obtained a preliminary decree against Shyam Sundar Lal. In their application, however, for a final decree they joined the appellants on the ground that they had obtained possession under the partition deed. No application was made to the court under order I, rule 10(2), of the Code of Civil Procedure, for joining them as a party and no order was passed by the court under order I, rule 10(2), declaring that they were necessary parties and allowing their names to be joined as defendants.

The final decree was framed not only against Shyam Sundar Lal but also against the appellants. Both the lower courts held that inasmuch as Shyam Sundar Lal, in the year 1914, long before the present litigation, had applied for partition of his share in some villages, he had indicated that he had become separate from the other members of the joint family. They held that this was conclusive evidence of separation, notwithstanding that it was shown that he had withdrawn the suit for partition.

The added defendants appealed to the High Court.

Dr. *Kailas Nath Katju*, for the appellants.

Babu *Piari Lal Banerji* and *Munshi Kailas Chandra Mital*, for the respondents.

The judgement of ASHWORTH, J., after stating the facts as above, thus continued:—

In this appeal two points arise for decision. The first point is whether the final decree was rightly

1927

SHAGUN
CHAND
v.
DATA
RAM.

Askerorth.
J.

given against the appellants. I am of the opinion that the proceedings for a final decree are merely a continuation of the suit as instituted for the purpose of a preliminary decree and that the provisions of order I, rule 10(2), of the Code of Civil Procedure, governing the joinder of an additional party during the pendency of a suit will apply to this case. As the sole question in the suit was whether the plaintiff was entitled to a decree against Shyam Sundar Lal in respect of his interest in the mortgaged property, neither the plaintiff nor the court (*suo motu*) could add the appellants at any time as defendants; still less could they add them as defendants after a preliminary decree excluding them had been passed. The court, therefore, in my opinion, had no jurisdiction to add these appellants as parties. Nor indeed did it do so. The inclusion of their names as judgement-debtors under the final decree was not due to any order of the court for their names to be added as defendants, but merely due to the fact that the plaintiff had included their names in his application for a final decree. It cannot be said that the mere fact of the court having included their names in the decree amounted to an order under order I, rule 10(2). I would, therefore, hold that no decree should have been granted against the appellants.

The second point taken by the appellants is that if they were parties to the proceedings for a final decree they should have been given an opportunity of rebutting by evidence the presumption of separation arising out of Shyam Sundar Lal's plaint in the partition suit of 1914. According to the latest decision on the subject by the Privy Council in *Palani Ammal v. Muthucenkatachala Moniagar* (1) the bringing

(1) (1924) I.L.R., 48 Mad., 254.

1927

SHAGUN
CHAND
v.
DATA
RAM.

of a suit for partition is only presumptive evidence of separation and that evidence may be rebutted by other evidence, such as the fact of the withdrawal of the plaint on the ground that separation had not taken place or was not desired (but not merely by evidence of withdrawal of the plaint). This being so, it would have been necessary but for my finding on the first point to have remanded the case to give the appellants an opportunity to produce their further evidence. Having regard, however, to my finding that the appellants were improperly joined as judgment debtors in the decree, the order that I would pass is that the decree of the lower court should be modified so as to exclude their names. The remaining names will remain on the ground that the decree was rightly passed against defendants Nos. 1 and 2 and that the other defendants have not appealed.

IQBAL AHMAD, J. :—I agree in the order proposed, but I prefer to base my decision on grounds other than those assigned by my learned brother. It is apparent, from the facts stated in the judgement of my learned brother, that a partition was effected by the appellants and Shyam Sundar Lal, the mortgagor, during the pendency of the suit filed by the mortgagees on the basis of the mortgage-deed executed by Shyam Sundar Lal, and before the passing of the preliminary decree in favour of the mortgagees. The mortgagees decree-holders applied for a final decree, not only against the persons who were defendants to the suit as originally brought, but also against the present appellants, and certain other transferees from the mortgagor. The decree-holders asserted that the partition effected by Shyam Sundar Lal and the appellants was collusive and was made

1927

SHAGUN
CHAND
v.
DATA
RAM.

Iqbal
Ahmad, J.

with a view to deprive them of their rights as mortgagees, and as such, could not affect their right to obtain a final decree with respect to property covered by the preliminary decree, and that in order to avoid future complication it was necessary, in the ends of justice, to bring the appellants on the record of the mortgage suit and to pass a final decree as against them as well. In view of the provisions of section 2 (2) of the Code of Civil Procedure it cannot be doubted that the mortgage suit filed by the mortgagees was continuing when the application for the preparation of the final decree was made by them. That being so, I am not prepared to hold that under no circumstances has the court jurisdiction, after the passing of the preliminary decree and before the final decree has been passed, to implead as defendants to the suit persons who were not originally impleaded as defendants and were not parties to the preliminary decree. But the question whether or not persons who were not originally made defendants, should be made defendants in the suit is a question entirely within the discretion of the court, as is apparent by the provisions of order I, rule 10(2), of the Code of Civil Procedure. Having regard to the complicated nature of the questions that arise for consideration in this case, because of the respective allegations of the parties as regards the jointness or separation of Shyam Sundar Lal and the appellants, and as regards the collusive nature or otherwise of the partition effected during the pendency of the mortgage suit, it appears to me that the trial court should have, in the exercise of its judicial discretion, refused to bring upon the record the appellants before us. Moreover, as pointed out by my learned brother, evidence that the appellants wanted to lead has been shut out by the court of first instance. For the reasons given above

it appears to me that, in the circumstances of the present case, the applicant should not have been allowed to implead the appellants as parties to the mortgage suit after the passing of the preliminary decree and the question arising between the parties should have been left to be determined either in execution proceedings or by means of a separate suit.

BY THE COURT.—It is ordered that the appeal be allowed with costs to the appellants in both courts against the applicants in the court below and that the names of the appellants be removed from the array of judgement-debtors under the decree.

Appeal allowed.

REVISIONAL CIVIL.

Before Mr. Justice Boys and Mr. Justice Kendall.

V. E. SMITH (DEFENDANT) *v.* THE INDIAN TEXTILE COMPANY (PLAINTIFF).*

1927
February,
25.

Jurisdiction—British-Indian Courts—Foreigners temporarily resident in British India not excepted from the jurisdiction.

The Code of Civil Procedure extends to the whole of British India and there is no limitation in it or in any other Act in force in India excepting foreigners from the jurisdiction of British-Indian Courts. *Gurdyal Singh v. Raja of Faridkot* (1), referred to.

THE plaintiff in this case filed a suit in the Court of Small Causes at Benares on the allegation that, in pursuance of a conversation with Mr. Smith, defendant No. 1, and on assurances given by him, he had supplied certain goods to Mr. Smith and to the second defendant, Mr. Roche; that later Mr. Smith

* Civil Revision No. 92 of 1926.

(1) (1894) I.L.R., 22 Calc., 222.