

Before Justice Sir Edward Bennet and Mr. Justice Verma

1939
January, 10

BALBHADDAR SINGH AND ANOTHER (DEFENDANTS) *v.*
RAGHUBIR SINGH AND OTHERS (PLAINTIFFS)*

Land Revenue Act (Local Act III of 1901), section 111—Partition—Question of proprietary rights—Usufructuary mortgage of specific plots in a joint khata by one co-sharer—Subsequent application for partition by that co-sharer—Objection by the other co-sharer that his rights were not subject to any mortgage charge and that the mortgaged plots should not be assigned to his patti—Objection raising question of proprietary rights—Objector directed to file civil suit—Suit filed by another member of the joint family—Suit competent—Order of Assistant Collector directing objector to file civil suit—Appeal lies to Collector—Land Revenue Act, section 211.

A co-sharer in a joint khata made a usufructuary mortgage of certain specific plots in the khata. Subsequently the representatives in interest of the mortgagor applied for partition, and another co-sharer made an objection, on behalf of himself and the other members of his joint family, claiming that their right in the khata was not subject to any mortgage charge and that the mortgaged plots should not be assigned to their patti. The Assistant Collector directed him, under section 111(b) of the Land Revenue Act, to get the question decided by a civil suit. Accordingly a suit was instituted, not by the objector himself but by two other members of the joint family, all the remaining members including the objector being made *pro forma* defendants:

Held (1) that the objection raised a question of proprietary right, within the meaning of section 111 of the Land Revenue Act. The question was not one of the determination of the rights of the mortgagor and the mortgagee in the particular plots; what the objectors sought was a decision that they were not representatives of the mortgagors and consequently the mortgaged plots should not be assigned to their patti. The question was quite different from one of the investigation and determination of the existence or non-existence of a mortgage charge on any particular part of the property.

(2) The order of the Assistant Collector under section 111(b) of the Land Revenue Act was appealable to the Collector by

*Second Appeal No. 626 of 1936, from a decree of Shiva Harakh Lal, Additional Civil Judge of Azamgarh, dated the 5th of February, 1936, modifying a decree of Suraj Prasad Dube, Munsif of Haveli, dated the 12th of September, 1934.

virtue of sections 210 and 211 of the Act, and the failure to file such appeal should debar the questioning in the civil suit of the propriety of that order on the ground that the objection raised did not involve a question of proprietary right.

(3) Although the suit in the civil court was not filed by the objector who was directed to file it, yet, as the objection was made on behalf of all the members of the joint family to which the objector belonged and the suit was filed by other members of the joint family and all members thereof including the objector were made parties to it, the suit was competent and maintainable.

Mr. *A. P. Pandey*, for the appellants.

Mr. *Shiva Prasad Sinha*, for the respondents.

BENNET and VERMA, JJ.:—This is a second appeal by defendants first party against a decree of the lower appellate court in favour of the plaintiffs. The circumstances are that there was a partition suit before the revenue court on the application of the defendants first party and an objection was raised by the plaintiffs and the defendants second party who formed a joint Hindu family and who comprised five persons. This objection was filed by Banwari Singh on behalf of himself and these other four persons. The objection was to the effect that the proprietary right of these five persons was not subject to any mortgage charge and therefore that certain specific plots of which the proprietary right had been mortgaged by Prag and Thakuri, predecessors of other co-sharers, in favour of Anmol Singh and others in khata khewat No. 1 should not be assigned to the patti prepared for the objectors in the partition. The revenue court made an order of reference to the civil court in the following terms: "Objection 3. The objector is directed to get it decided in civil court by instituting a suit within three months in that court. Assistant Collector, first class, 15th July, 1933." The trial court dismissed the suit and the lower appellate court has decreed it. One of the questions argued in appeal is ground No. 3 that no permission

1939

BALBHAD-
DAR
SINGH
v.
RAGHUBIR
SINGH

1939
BALBHAD-
DAR
SINGH
v.
RAGHUBIR
SINGH

was given to Banwari Singh as the representative of the family. Now the lower appellate court has found that these five persons formed a joint Hindu family and that the application was made by Banwari Singh for himself and on behalf of the other four persons. The actual suit has been brought by two of these persons as plaintiffs, Raghubir Singh and Raja Ram Singh, and Banwari Singh, Subedar Singh and Ram Nath Singh are defendants second party. We see no reason to consider that the reference is in any way improper or that it was not open to the civil court to entertain this suit on behalf of the two plaintiffs who joined the other three persons as defendants to whom direction had been given to sue.

The main ground which learned counsel for the appellants has argued is not really contained definitely in his grounds of appeal at all. What he has argued is based on certain rulings and is to the effect that the question referred cannot be referred by a revenue court under section 111 of the Land Revenue Act, and that a civil court has no jurisdiction to entertain such a question on such a reference. The rulings on which learned counsel relies are as follows: In *Jagdish Prashad v. Chimman Lal* (1) a Bench of this Court had before it a case where an Assistant Collector had passed a decree under section 111 of the Land Revenue Act. The question which arose before the High Court was whether the decree of the Assistant Collector was appealable under section 112 to the District Judge, and the Court held that it was not. It was further held that a finding by an Assistant Collector that a person claiming to be a usufructuary mortgagee of a particular share was or was not in possession of the share was not a finding determining a question of proprietary title within the meaning of section 111. In the discussion of these points on page 110 of the report there is one solitary sentence as follows: "It seems clear to us that the question of the existence or otherwise of a mortgage

(1) (1909) 5 Indian Cases, 107.

charge upon particular property is not one which legislature intended to be determined in the course of partition proceedings. The question whether a person claiming to be a usufructuary mortgagee is or is not actually in possession is one which an Assistant Collector conducting a partition may have to determine." We do not think that this ruling is intended to lay down any dictum which has any bearing on the present case. There are two rulings by Mr. LINDSAY as Judicial Commissioner of Oudh on which the appellant relies. One of these is *Balwant Singh v. Sardar Singh* (1). There was no question there of an order of reference under section 111 of the Land Revenue Act. The question was whether after a partition proceeding had terminated, a civil suit would be barred under section 233(k) of the Land Revenue Act. The suit was one for a declaration that certain persons entered as mortgagees had no right as mortgagees. It was held that such a suit was not barred under section 233(k). On page 617 Mr. LINDSAY quoted the passage from *Jagdish Prasad v. Chimman Lal* (2) which has been quoted above. In *Bisheshar Singh v. Brij Bhookhan Singh* (3) Mr. LINDSAY had before him certain appeals in which there had been civil suits by the plaintiffs seeking to enforce proprietary titles recognized in partition proceedings and where the defendant pleaded that an entry in the partition papers describing the defendant as mortgagee was conclusive against the plaintiffs. It was held that such entry was not conclusive between the mortgagor and the mortgagee and that such questions between mortgagor and mortgagee are not the proper subjects for decision by a revenue court in a partition. On page 301 the judgment states: "On the other hand, it is equally clear that the law relating to partitions made by the revenue courts does not contemplate the investigation by those courts of the existence or non-existence of mortgage

1939

 BALBHAD-
 DAR
 SINGH
 v.
 RAGHUBIR
 SINGH

(1) (1917) 39 Indian Cases, 618.

(2) (1909) 5 Indian Cases, 107.

(3) (1917) 43 Indian Cases, 300.

1939

BALBHAD-
DAR
SINGH
v.
RAGHUBIR
SINGH

charges upon particular portions of the property which forms the subject-matter of the partition proceedings. The revenue courts are concerned only with the division of the joint *proprietary* interests in the mahal which is to be partitioned." This is all the authority on the proposition which learned counsel has produced. Now it appears to us that the question which the plaintiffs raised is one which is quite different. The finding of the lower courts is that the defendants first party are some of the representatives of the original mortgagors and that the plaintiffs and defendants second set are none of them representatives of the original mortgagors. No question as to the rights of the mortgagor and mortgagee or their representatives is raised by the plaintiffs. What the plaintiffs desire is that it should not be incumbent on them to have to raise any such question hereafter. A partition is being made and under the mortgage deed in suit certain specific plots were mortgaged by Prag and Thakuri whose position at the time was that they were co-sharers with the predecessors of the plaintiffs in an undivided khewat No. 1. The plaintiffs ask that a finding should be made that the plaintiffs are not representatives of the mortgagors, and that on such a finding by the civil court the plaintiffs will be able to ask the partition court that those particular numbers in the mortgage deed shall not be assigned to the new patti which will be formed for the plaintiffs and defendants second set. In other words, the plaintiffs do not wish to have to come as litigants before the court in connection with this mortgage. The point, therefore, is not one of the determination of the rights of mortgagor and mortgagee but determination of quite a different question, namely whether the plaintiffs should become involved in such a matter in the courts by assignment to the plaintiffs of any of the numbers included in the mortgage deed. It is a failure to appreciate this distinction which has led to this contest in the civil court. It appears to us that the distinction is

a very clear one and that in regard to this preliminary question no defect arises from the absence of the mortgagees from the present litigation. The mortgage is an old one and original parties are long dead and no question arises of enforcing any personal obligation. The rights of the usufructuary mortgagees are confined to the actual numbers which are in the mortgage deed. It is obviously a matter of indifference to the mortgagees as to the patti in which the revenue court places these numbers by the partition suit. The rights of the mortgagees will remain for those numbers, no matter what patti embraces those numbers.

Learned counsel argued at considerable length that it could not be said that this question was one of proprietary right. Now, in our opinion, this point is sufficiently answered by the definition of mortgage in section 58 of the Transfer of Property Act, sub-section (a): "A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced, etc." The mortgage in question is, of course, a usufructuary mortgage. Now learned counsel argued that if there had been no partition suit, this present suit would have lain in the civil court; but he considers that section 58 does not imply that a mortgage is a transfer of an interest in proprietary rights. He was not able to say what kind of rights were dealt with by a mortgage if the rights were not proprietary rights in a case like the present where the mortgagors were sharers of the proprietary rights in an undivided mahal. It appears to us that the Transfer of Property Act in dealing with the definition of mortgage in section 58 does lay down that a mortgage is a transfer of the proprietary rights in a case like the present where the mortgagor is the owner of such proprietary rights and makes a mortgage of them. Of course, other rights than proprietary rights may also be mortgaged, but that is not the point. The mortgage therefore was clearly a mortgage of proprietary rights. The plaintiffs

1930

 BALBHAD-
 DAR
 SINGH
 v.
 RAGHUBIR
 SINGH

1939

BALBHAD-
DAR
SINGH
v.
RAGHUBIR
SINGH

come forward with the claim that they desire a declaration that their proprietary rights in this mahal have not been encumbered by any usufructuary mortgage. Clearly, in our opinion, this is a question of proprietary rights and one which may properly be the subject of an order of reference under section 111 of the Land Revenue Act.

There is also another objection to the appeal and that is that this question of the alleged invalidity of the order of reference is one which the appellants could have raised properly by way of appeal from that order. Learned counsel contended and the lower courts have held that no appeal lay from that order. This appears to us to be an error of law. The particular order was passed by an Assistant Collector by whom the partition was being conducted. Section 133 on which learned counsel relied deals only with appeals from the order of a Collector and therefore has no application to the present case. The proper section is section 210 which in sub-section (1)(a) provides for an appeal to the Collector from orders passed by any Assistant Collector. Section 211 provides: "Unless an order is expressly made final by this Act, an appeal shall lie to the court authorised under section 210 to hear the same from every original order passed in any proceedings held under the provisions of this Act." There is no provision in section 111 that the order of reference shall be final and therefore an appeal would lie from that order of the Assistant Collector to the Collector. Now if the appellants had desired to question the validity of that order of reference, it was open to them to do so by way of appeal to the Collector and they acquiesced in that order and did not make any appeal. We think this also would be a bar to raising the point that the reference did not involve a question of proprietary right. But we do not base our order in this appeal on this point. It appears to us that the case was clearly one in which a question of proprietary right was raised and that the

question has been properly made the subject of a reference and has been properly entertained by the civil court.

No further point was argued by learned counsel for the appellants. On the other hand, it appears to us that a portion of the decree of the court below is invalid, namely, the second portion in which the court states in its order: "If, however, for any reasons the revenue court allots any of the disputed plots to the plaintiffs and defendants second parties, the latter shall not be bound by the mortgage but shall take the plot free from the mortgage, leaving the mortgagee to demand of the mortgagor's representatives other security in lieu thereof." This portion of the order appears to be invalid, firstly because the order of reference merely refers to the objection and the objection does not raise any point of this nature. Secondly, it appears to be superfluous for the civil court to go into this question. What the revenue court desired to have was a finding on the allegation of the objectors that the shares of the objectors were free from any mortgage charge and on obtaining that finding doubtless the partition court will not allot to the objectors any number which is mentioned in the mortgage deed. It is not necessary for the civil court to go further and to consider what results would arise if any such numbers were allotted to the objectors, and further we do not consider that the civil court is entitled to decide what would be the result of such an allotment in a case where the mortgagees' representatives are not parties. In particular, we note that the civil court has not shown any authority for its proposition that the numbers allotted to the objectors would then be free from the mortgage charge and that other numbers should be subject to a mortgage charge in their place.

We therefore set aside this latter portion of the decree of the lower appellate court and we maintain the former portion of the decree of the lower appellate court which provides for the declaration that the plaintiffs and

1939

BALBHAD-
DAR
SINGH
v.
RAGHUBIR
SINGH

1939

BALBHAD-
DAR
SINGH
v.
RAGHUBIR
SINGH

defendants second set are not the mortgagors or the representatives of the mortgagors in respect of the plots in suit and the defendants first set are some of the representatives of the mortgagors of the plots in suit and that the entries in the khataunis that the plaintiffs and defendants second set are mortgagors are incorrect.

As the point on which we have allowed the appeal was not taken in the grounds of appeal clearly, we do not consider that any costs should be allowed on account of this ground. We therefore allow the appeal only to the extent indicated above and dismiss the rest of the appeal and direct that the respondents plaintiffs shall obtain costs of the appeal.

Before Justice Sir Edward Bennet and Mr. Justice Verma

1939
January,
11

SUNDAR LAL AND ANOTHER (OBJECTORS) v. BANARSI
DAS AND OTHERS (DECREE-HOLDERS)*

Provincial Insolvency Act (V of 1920), section 28(6)—Secured creditor—"Otherwise deal with his security"—Personal decree obtained by mortgagee under order XXXIV, rule 6—Such decree can be executed against property of a discharged insolvent—Such decree not a "debt provable under the Act"—Provincial Insolvency Act, sections 34(2), 44(2).

A personal decree obtained under order XXXIV, rule 6, of the Civil Procedure Code by a secured creditor is not a debt provable in insolvency and an order of discharge cannot affect the rights of the secured creditor to execute such a decree against the property of the discharged insolvent. The words, "otherwise deal with his security", in section 28(6) of the Provincial Insolvency Act cover the application of the mortgagee decree-holder under order XXXIV, rule 6, and a secured creditor is entitled by this sub-section to obtain a decree under order XXXIV, rule 6 and to deal with the security by the method allowed by that rule. The order of discharge cannot take away the statutory right of the mortgagee decree-holder under order XXXIV, rule 6.

This right is not affected by any consideration of the sequence of the dates of the mortgage decree, personal decree, adjudication order, order of discharge, execution proceeding, etc. The

*First Appeal No. 405 of 1937, from a decree of Shankar Lal, Civil Judge of Muzaffarnagar, dated the 17th of July, 1937.