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the plaintiff-appellant's title to full proprietary rights and no improper assertion of under-proprietary rights, for the defendants-respondents have never claimed at any time proprietary rights and did not claim such under-proprietary rights as could be determined by a civil court. We, therefore, uphold the decision of the learned Subordinate Judge and dismiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Gokaran Nath Misra.

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March, 12.

BADRI DIN AND OTHERS (DEFENDANTS-APPELLANTS) v. MUNESHWAR BAKHSI SINGH AND OTHERS (PLAINTIFFS-RESPONDENTS).*

Partition proceedings in revenue courts—Co-sharer not setting up his rights in certain plots allotted to another co-sharer, right of, to raise the point in a subsequent suit—mortgagee from a co-sharer in undivided property, remedy of, if the mortgaged land falls in the share of another co-sharer on partition.

Where in a partition proceeding before revenue courts a co-sharer, who had been in possession of a particular plot under a mortgage, which he claimed to have become irredeemable, failed to set up his proprietary rights with regard to it, held, that it was no more open to him to raise the point in a suit for possession brought by the co-sharer to whose share it had fallen after the partition proceedings had become final.

Held further, that if a person takes a mortgage of property which is the joint and undivided holding of two or more persons and the mortgage is executed in his favour only by one co-sharer, the mortgagee takes the mortgage subject to the risk that he is liable to be dispossessed and deprived of

* Second Civil Appeal No. 74 of 1925, against the decree of Sheo Narain Tewari, Subordinate Judge of Bara Banki, dated the 15th of October, 1924, reversing the decree of Shiva Charan, Munsif of Fatehpur, Bara Banki, dated the 18th of April, 1923.

his security if the mortgaged property falls into the share of a co-sharer besides his own mortgagor. His remedy, if he thereby loses his security, is to call upon his mortgagor, or his heirs or representatives, to give him another property in security and if he or they refuse to do so, to bring a suit for damages against him or them.

Mr. *Naimullah*, for the appellants.

Mr. *Khalig-uz-zaman*, for the respondents.

MISRA, J.^c.—This is a defendants' appeal arising out of a suit for possession brought in the Court of the Munsif of Fatehpur, district Bara Banki. The suit was brought by the plaintiff for possession of a plot of land No. 1627 new/No. 1439 old, area 1 bigha 9 biswas, situate in village Basarah, district Bara Banki. The plaintiff alleged that the said plot of land had fallen into his share by virtue of a partition effected in the year 1913 and he had thus become the owner of the said land and was entitled to recover possession from the defendants who refused to hand over to him possession of the same.

The defendants set up mortgagee rights in respect of the land in suit. They contended that they had long been in possession of the plot in dispute and had perfected their title by adverse possession and could not now be ejected by the plaintiff.

The learned Munsif of Fatehpur, who tried the case, held that the defendants were in possession of the property as mortgagees since the year 1882 and consequently the plaintiffs, who were no doubt owners of the land in suit, inasmuch as the land had been allotted to them by partition, could not get possession from the defendants. On this finding he dismissed the plaintiffs' suit.

On appeal the learned Subordinate Judge of Bara Banki remanded the case for determination

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of the specific mortgage under which the defendants held the land. The learned Munsif returned a finding to the effect that the documentary evidence showed that the mortgage had been executed in favour of Ram Ghulam, grandfather of the defendants, in the year 1882, by two persons called Gur Sahai and Bhabuti, who were not ancestors of the plaintiffs. The learned Subordinate Judge accepted this finding and held that the plea of having become proprietors under an irredeemable mortgage could not now be raised by the defendants in face of the partition proceedings, and that the mortgage under which the defendants held the land in suit having been executed by persons who were not ancestors of the plaintiff was not binding on the plaintiffs and consequently he was entitled to recover possession of the land. He, therefore, allowed the appeal and decreed the plaintiffs' suit.

The defendants have now come up to this Court in second appeal and the same points have been argued again before me.

Regarding the plea that the defendants had become owners of the plot in suit by virtue of an irredeemable mortgage, it is clear that the entries in their names as mortgagees existed only from the year 1882 when Ram Ghulam applied for mutation of names in his favour (vide exhibits 5, 6 and 7 the last being the order, dated the 22nd of September, 1882, allowing mutation in the name of Ram Ghulam). This was what the learned Munsif found on remand and his finding was accepted by the learned Subordinate Judge in appeal. It is, therefore, clear that the position of the defendants as mortgagee dates, as is stated above, from the year 1882, and no question, of the mortgage being irredeemable, arises at all in the

case. Even if the mortgage had been irredeemable the defendants would not now, after the partition proceedings have become complete, be able to raise that question when they did not raise it in the revenue court at the time of partition. They are co-sharers in the village and were parties to the partition proceedings, and it was incumbent on them during the course of those proceedings to have set up their proprietary rights with regard to the plot in dispute, if they had succeeded in acquiring such rights on the basis of an irredeemable mortgage. If they did not raise such a title then it is no more open to them to raise it now after the partition proceedings have become complete and final. I am supported in this view by a decision of a Bench of the late Court of the Judicial Commissioner of Oudh in *Bisheshar Singh and another v. Brij Bhookhan Singh and others* (1) decided by LINDSAY, J. C., and KANHAIYA LAL, A. J. C.

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It has been contended by the learned Pleader for the appellants with great earnestness that even if the title of the defendants as proprietors holding under an irredeemable mortgage has not been established or cannot be entertained now, their title as mortgagees at any rate must be recognized, and the plaintiff is not entitled to take possession of the land in suit without redeeming the mortgage in their favour. In my opinion this contention also has no substance. It has been definitely found, for which there is satisfactory evidence on the record, that the mortgage relied on by the defendants was made in favour of their grandfather, Ram Ghulam, by one Debi Singh, father of Gur Sahai and Bhabuti. The evidence of this is to be found in exhibit 5, an application dated the 10th of June, 1882, filed by Ram

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Ghulam, praying for mutation in his favour, and exhibit 6, the statement of Gur Sahai and Bhabuti. Gur Sahai and Bhabuti subsequently sold their share to one Lalta Prasad whose name is now recorded in the *khevat* as the owner of the share originally owned by Gur Sahai and Bhabuti. The position, therefore, is that the defendants-appellants are mortgagees of a plot of land which was originally in a joint and undivided *patti* by virtue of a mortgage executed by a co-owner of the same, named Debi Singh. On partition the said land has now fallen into the share of the plaintiff. The defendants-appellants cannot, therefore, properly refuse to deliver possession of the said land to the plaintiff to whose share it has been allotted. It is a well-recognized rule of law that, if a person takes a mortgage of property which is the joint and undivided holding of two or more persons and the mortgage is executed in his favour only by one co-sharer, the mortgagee takes the mortgage subject to the risk that he is liable to be dispossessed and deprived of his security if the mortgaged property falls into the share of a co-sharer besides his own mortgagor. His remedy, if he thereby loses his security, is to call upon his mortgagor, or his heirs or representatives to give him another property in security and if he or they refuse to do so to bring a suit for damages against him or them.

This principle of law was laid down by their Lordships of the Privy Council so far back as 1874 in the case of *Byjnath Lal v. Ramoodeen Chowdry and others* (1). This has been the universally accepted rule in this country since the aforesaid decision—vide *Hem Chunder Ghose v. Thako Moni Debi* (2), *Amolak Ram v. Chandan Singh* (3) and *Mahadin v. Sheo Prasad* (4).

(1) L.R., 1 I.A., 106; 21 W.R., 238. (2) I.L.R., 20 Cal., 533.

(3) I.L.R., 24 All., 488.

(4) 16 C.C., 161.

Under the circumstances, it is clear that the defendants-appellants cannot resist the claim of the plaintiffs-respondents to get possession over the plot in dispute of which they have become owners by its allotment to them at the time of partition. The suit of the plaintiffs was, therefore, rightly decreed by the lower appellate court.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

[On Appeal from the Court of Judicial Commissioner of Oudh at Lucknow.]

BALBHADDAR SINGH AND ANOTHER (PLAINTIFFS-APPELLANTS) *v.* BADRI SAH AND ANOTHER (DEFENDANTS-RESPONDENTS.)*

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March, 16.

Malicious prosecution—Claim for malicious prosecution, essentials of—Proof of innocence of the charge whether necessary—Termination of proceedings in plaintiff's favour, meaning of—Alleged invention of story implicating plaintiff, onus of proof of—Private individual giving information to authorities and causing trouble, liability for malicious prosecution of.

Held, that in an action for malicious prosecution it is not necessary for the plaintiff to prove that he was innocent of the charge upon which he was tried. He should simply prove that the proceedings complained of terminated in his favour if from their nature they were capable of so terminating.

Where on account of the disclosure contained in the confession of a certain person criminal proceedings were threatened against the plaintiffs for being implicated in a murder, *held*, that in the action for malicious prosecution it was

* Present :—Viscount DUNDIN, Lord BLANESBURGH, Sir JOHN EDGE, and Mr. AMER ALI.