APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan, Acting Chief Judge and Mr. Justice A. G. P. Pullan.

1929
February 22.

RAJENDRA NATH SANYAL (DEFENDANT-APPELLANT) *v.* MAHABIR PRASAD (PLAINTIFF) AND OTHERS (DEFENDANTS-RESPONDENTS).*

Res Judicata—*Suit for partition by the sons against their Hindu father joining his mortgagee—Mortgage held good only in part against all members of the family—Mortgagee's appeal that father's share be held liable for whole amount unsuccessful—Suit by mortgagees to recover the whole amount from father's share, whether barred by the rule of* res judicata—*Point waived in first court but raised and decided in appeal, whether operates as* res judicata—*Partition suit—Decision between defendants* inter se *is a decision* inter partes.

It is not possible in a suit for partition to make a hard and fast line between the plaintiffs and the defendants and to say that the decision is not *inter partes* because it is a decision affecting the right of one defendant as against another, for in partition cases the defendants become decree-holders as much as the plaintiff.

Where a point is waived in the first court but is argued and decided in appeal the finding of the appellate court operates as *res judicata*.

Where the sons of a Hindu father brought a suit for partition of their share in the family property against the father and joined the mortgagee also as a defendant who contested it and being dissatisfied with the decision appealed against it amongst others on the ground that the share of the executant of the mortgage deed should be held liable for the entire amount due under the deed and the point was decided against him who then brought a suit on the basis of his mortgages claiming the sum decreed to him in the previous suit against all the members of the family and from the father's share the balance which was disallowed in that suit, *held*, that the claim against the father's share was barred by the rule of *res judicata* as the point was raised in appeal in the previous suit and was decided there and that the fact that the

*First civil appeal no. 98 of 1928, against the decree of M. Humayun Mirza, Subordinate Judge of Lucknow, dated the 24th of July, 1928.

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mortgagee and the father were both impleaded as defendants in that suit could not bar the operation of that rule. *Nalini Kant Lahiri* v. *Sarnamovi Debya* (1) *and Midnapur Zamindari Company, Ltd.* v. *Naresh Narayan Roy* (2), relied on.

Messrs. *M. Wasim, Ali Zaheer* and *B. N. Roy*, for the appellant.

Messrs. *A. P. Sen and Makund Behari Lal*, for the respondents.

HASAN, A. C. J. and PULLAN, J. :—The suit out of which this appeal arises was brought by the plaintiff to recover a sum of Rs. 21,000 which he claimed to be due on three mortgages, dated the 29th of April, 1918, the 7th of June, 1918 and the 17th of June, 1920, alleging that the entire mortgaged property was liable for payment of the entire amount, but asking in the alternative that the court might separate the liability holding the whole property to be liable for the sum of Rs. 13,871-8-0 and the share of defendant No. 1 alone to be liable for the remainder. The whole property has passed into the hands of defendant No. 5 who is the appellant before us. The lower court (the Subordinate Judge of Lucknow) decreed the suit and the appellant has appealed mainly on the ground that in virtue of a decision of a Bench of the Judicial Commissioner's Court dated the 27th of February, 1925, the whole amount due to the mortgagee at the time when the suit was brought was paid on the 30th of March, 1928, and consequently nothing was due.

The question of *res judicata* arises in the following manner. The mortgages were executed by one Jwala Prasad and they were declared to be binding on the joint family property. The three sons of Jwala Prasad brought a suit for partition against their father and impleaded the mortgagee. It is clear from their plaint that their object was to release their shares in the family

(1) (1914) L. R., 41 I. A., 247. (2) (1924) L. R., 51 I. A., 293.

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property from the burden of these mortgages. The suit was defended by the mortgagee who pleaded that this was not joint family property; but if it were held that the property were joint property all the members of the family were liable to pay the debt. The suit was fought out on these pleas, and the mortgagee being dissatisfied with the decision of the court of first instance appealed to the Judicial Commissioners of Oudh. One of his grounds of appeal was as follows :—

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> "That the court below should have declared that in any event the 8 annas share belonging to the executants of the deeds in suit was liable for the entire amount due under terms of these deeds."

No objection was raised in the grounds of appeal to the partition. It was an appeal fought out by the mortgagee and the sons of the mortgagor in order to determine how much was due to the mortgagee and what property was liable for that amount. The Judicial Commissioners held, that the family property should not be burdened with the mortgage at the high rate of interest of Re. 1-9-0 per cent. per month, and accordingly cut down the amount due to the mortgagee, declaring it to be Rs. 9,689-12-0 on which simple interest at 12 per cent. per annum would run from the 17th of June, 1920. For this amount the court found the entire property in suit to be liable.

The mortgagee now wishes to realize the whole amount which he claimed as due to him in the former suit. He claims from the shares of all the members of the family the sum decreed by the Judicial Commissioners with interest up to date, but he claims from the separated share of the father not only the balance which was disallowed by the Judicial Commissioners but also a large sum by way of interest representing the difference

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between the interest at Re. 1 per month and the interest at Re. 1-9-0 per month on the whole mortgage money. He does not however claim compound interest.

It will be seen that his claim as against the property of defendant No. 1, namely the father, reproduces the ground of appeal before the Judicial Commissioners which we have already quoted. It is this question which we are asked to find to have been decided by the judgment of the Judical Commissioners. The lower court has decided on this point in favour of the plaintiff, on the ground that the previous suit was between the sons on one side and the father and the mortgagee on the other. He says that the mortgagee in that case wanted the entire burden to be thrown on the entire property :—

> "There was no question at all of any claim being set up by the mortgagee as to the declaration of his rights against the separated share of the father."

He went on to say that this was purely a point between the defendants *inter se*, and the decision of the same was not required at all. As to the judgment of the Judicial Commissioners he observed that they disallowed this contention because "they were not concerned with it, and as it was not raised in the first court this was never a decision of the point on its intrinsic merit. The question was not a *res judicata* between the parties for those reasons."

In our opinion this finding of the learned Subordinate Judge is erroneous. It is not possible in a suit for partition to make a hard and fast line between the plaintiffs and the defendants and to say that the decision is not *inter partes* because it is a decision affecting the right of one defendant as against another. In partition cases the defendants become

decree-holders as much as the plaintiff and we are not prepared to say that there is no decision between the mortgagee and defendant No. 1 merely because for the purposes of the suit they were both impleaded as defendants. This principle has been laid down more than once, but we would refer only to the decision of their Lordships of the Judicial Committee in *Nalini Kanta Lahiri* v. *Sarnamoyi Debya* (1). The second point on which the lower court has gone wrong is in his finding that the mortgagee did not set up any claim to a declaration of his rights against the separated share of the father. He did so in his grounds of appeal to the Court of the Judicial Commissioners, and this matter was argued in that court as appears from the judgment. Lastly the lower court went wrong in saying that the learned Judges in appeal "disallowed this contention as they were not concerned with it." Nowhere in their judgment do the learned Judicial Commissioners state that they were not concerned with this question and we do not understand how any such meaning can be read into their judgment. The relevant passage appears on page 36 of Part III of the printed book beginning at line 12. It runs as follows :—

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> "The appellants' learned Counsel argued that the father's separated property after partition should at least be made liable for payment of the compound interest and of the other items disallowed by this Court. We have read the written statement of the defendants-appellants and find no such plea raised therein. We have been told that the appellants will not be satisfied with a decree for their whole claim passed against the

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separated property of the father alone. The liability of the joint family property is to be considered in accordance with the circumstances existing at the time of each mortgage and not with reference to a future partition. This new plea of the appellants cannot be entertained. The question was not before the lower court, so ground of appeal No. 4 that the lower court should have declared the separated 8 annas share of the father liable for the entire amount due on the three deeds is without substance."

In view of these observations it is not open to the respondents to say that this plea was not raised in the previous suit. It does not matter whether the plea was raised in the court of first instance or in the court of appeal. We would refer to a case decided by their Lordships of the Judicial Committee: *Midnapur Zamindari Company, Ltd.* v. *Naresh Narayan Roy* (1) in which a point was waived in the first court but argued and decided in appeal and it was held that that finding operated as *res judicata;* nor can the respondent plead that this was not a substantial issue. It was an issue which he himself raised in appeal and considered necessary for the purposes of his case. Lastly the respondent has failed to convince us that the issue was not heard and finally decided by a competent court. We have already quoted the observations of the Judicial Commissioners which show that the point was argued before them and we consider that the same passage shows that the matter was decided. It is nowhere stated in section 11 of the Code of Civil Procedure

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that a decision to be final for the purposes of that section must be on the merits. But as a matter of fact we do not find that the Judicial Commissioners refused to entertain the ground of appeal before them because it had not been raised in the court below. They clearly considered whether the mortgagee would accept a decree for the whole claim against the separated property of the father alone; and they found that he would not. From this they proceeded to consider the claim as against the unseparated property and they found that the claim stood against the property as it was at the time when the mortgages were executed and not against the property after partition. It must be remembered that when the Judicial Commissioners decided the appeal the property had already been partitioned and so it was possible for them to state how much could be claimed from the separated properties. But they did not do so. They found, first, that the joint family property was liable, not the separated property, and secondly, that the liability of the joint family property was to be considered in accordance with the circumstances existing at the time of the mortgages. They followed up this finding by saying "In the result we modify the preliminary decree of the lower court and declare the entire property in suit to be liable for the following payments to the defendants-appellants." Thereafter follows the calculation on which the decree was based. In our opinion this is a complete and final decision that the mortgagee had no claim against any property except the joint family property as it stood at the time of the mortgages and before the partition. This judgment therefore operates as *res judicata* in the present case, and the plaintiff cannot now claim to recover from the separa-

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ted property of the father the balance of the money which was disallowed as against the family property.

An attempt was made to show that on the merits of the case the plaintiff should have been able to recover from the separated property of the father, but in view of the fact that the matter has in our opinion been finally decided on the merits by the Judicial Commissioners we are not prepared to enter into this question.

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Having decided the question of *res judicata* in favour of the appellant we have only got to see whether the plaintiff-mortagagee has received the full amount due to him in the terms of the order of the Judicial Commissioners. A calculation has been made in certain lists which have been appended to the amended plaint from which it appears that the total amount due in accordance with the findings of the Judicial Commissioners was Rs. 9,689-12-0 as principal and Rs. 8,689-12-0 as interest. The total is Rs. 18,379-8-0. The payments prior to the suit were Rs. 4,661 shown in list B(1) and Rs. 3,457-10-0 shown in list B(2). Subsequently the appellant deposited a sum of Rs. 10,513-4-8. The total of these amounts is Rs. 18,631-14-8 which represents the total amount due at the time when the payment was made on the 30th of March, 1928, the suit having been filed on the 26th of January, 1928. We understand that the sum of Rs. 10,513-4-8, which was deposited on the 30th of March, 1928, has already been paid to the plaintiff and there is therefore nothing due to him. When however the plaintiff filed his suit this sum was still due and we do not consider that he should have to pay the whole of the costs of the suit. We therefore allow this appeal with costs in this Court and set aside the order for

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a preliminary decree for sale passed by the lower court but order that the parties shall bear their own costs in the court below.

Appeal allowed.

APPELLATE CRIMINAL.

Before Sir Louis Stuart, Knight, Chief Judge and Mr. Justice Muhammad Raza.

BISHESHWAR (APPELLANT) *v.* KING-EMPEROR (COMPLAINANT-RESPONDENT).*

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May, 3.

Failure to write a judgment as required by the Code of Criminal Procedure, effect of—Trial of accused by the court of sessions for several offences some triable by jury and some by assessors—Summing up by the Judge covering both charges and dictating heads of charges at great length—Accused acquitted of charge tried by jury but convicted on the charge tried by the Judge with the jurors acting as assessors—Judgment in the trial by assessors not full and elaborate on points dealt with in the other judgment, effect of—Indian Penal Code, sections 375 *and* 396.

Where a person was charged at the same trial with several offences some of which were and some were not triable by jury and he was under the provisions of section 269 of the Code of Criminal Procedure tried by the Court of Sessions Judge and a jury for such of those offences as were triable by jury and by the Court of Sessions with the aid of the jurors as assessors for such of them as were not triable by jury and the Sessions Judge stated both cases for the benefit of the jury and his summing up which was very clear and full covered both charges and he dictated the heads of charges at great length and the jury acquitted him of the charge under section 395 but as assessors, they found him guilty under section 396 of the Indian Penal Code and the Judge agreeing with them convicted the accused by writing

*Criminal Appeal No. 198 of 1929, against the order of M. Mahmud Hasan, 3rd Additional Sessions Judge of Lucknow, dated the 15th of February, 1929.