APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Beverley.

HEM CHUNDER GHOSE AND OTHERS (DEFENDANTS NOS. 8, 9 AND 10) *v.* THAKO MONI DEBI (PLAINTIFF) AND OTHERS (DEFENDANTS NOS. 1 TO 7).* 1893 *Feb.* 10.

Partition—Mortgage by one owner of undivided share of estate—Rights of mortgagee on partition where the undivided share is allotted to a sharer other than the mortgagor.

Where *A* mortgaged to the plaintiff his undivided share in certain land which he held jointly with *B*, and subsequently to the mortgage, by a decree in a partition suit to which the plaintiff was not a party, the mortgaged property was allotted to *B*, other property in substitution being allotted to *A*, *Held*, in a suit against *B* and the representatives of *A*, to recover the sum due on the mortgage by sale of the mortgaged property, that the plaintiff could not proceed against the mortgaged property which had been allotted on partition to *B*, but should be allowed to proceed against that which had been allotted in substitution to *A*, his mortgagor.

Byjnath Lall v. *Ramoodeen Chowdhry* (1) followed in principle.

THIS was a suit brought against the sons and heirs of one Ram Gobind Ghose (defendants 1 to 7) for the principal and interest due on bonds, dated 5th Sraban 1285 (30th July 1878) and 6th of Bysack 1292 (18th April 1885), executed by Ram Gobind in favour of the plaintiff, by which he mortgaged a certain plot of land to the plaintiffs as security for a loan of Rs. 1,000. The plaintiffs prayed for a sale of the mortgaged property to satisfy their claim.

The defendants 8, 9 and 10 intervened and were made parties to the suit as claiming a 3-anna 3-gunda share in the mortgaged property, which they stated had been the *ijmali* property of themselves and the deceased Ram Gobind Ghose, and that in a partition suit instituted by them in 1885, against Ram Gobind, the

* Appeal from Appellate Decree No. 1565 of 1891, against the decree of R. R. Pope, Esq., District Judge of Hooghly, dated the 24th of June 1891, affirming the decree of Baboo Kedar Nath Mozoomdar, Subordinate Judge of that district, dated the 8th of April 1890.

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mortgaged property, with the exception of 5 cottahs which were left joint, had been allotted by the Court to the defendants 8, 9 and 10. These defendants submitted that the plaintiff had no right to proceed against the property which had been allotted to them on partition, and this defence was the only one material to this report.

The Subordinate Judge decreed the plaintiffs' suit against the intervening defendants, and an appeal from his decision by them was dismissed by the Judge, who affirmed the decree of the first Court.

The defendants 8, 9 and 10 appealed to the High Court on the ground (*inter alia*) that the lower Court were wrong in holding that, the partition having taken place after the mortgage, and the mortgagee not having been a party to the partition suit, the mortgagee was not barred from proceeding against the mortgaged property. They contended that the plaintiff should have been allowed to proceed against the property which on the partition fell to the share of the mortgagor, and not against the property allotted to the defendants 8, 9 and 10.

Dr. *Rash Behary Ghose* and Baboo *Bhuban Mohan Das* for the appellants.

Dr. *Troylukho Nath Mitter* for the respondents.

The judgment of the Court (MACPHERSON and BEVERLEY, JJ.) was as follows:—

The appellants before us are persons who intervened and were made defendants in the Court of first instance. It has been found that the mortgaged property, consisting of 2 bighas of raiyati land within specified boundaries, was the *ijmali* property of the mortgagor, the father of the first seven defendants, and of the appellants; that the appellants' share of it was 3 annas 3 gundas 1 cowrie 1 kranti, and that subsequent to the execution of the mortgage bonds there was a partition under a decree of Court by which the 2 bighas in question, with the exception of a small portion which was left joint, was allotted to the appellants. The latter were not concerned in the mortgage, and the mortgagee was not a party to the partition suit.

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Both the Courts have held on those facts that the mortgagee was not affected by the partition, and that the mortgaged property, with the exception of the appellants' share, should be sold in satisfaction of the mortgage debt just the same as if no partition had been made. It is contended that this decision is wrong, that the mortgagee has no charge on that portion of the property which was allotted on partition to the appellants, and that the effect of the partition was to transfer the lien to the property which the mortgagor obtained in substitution of that which he had mortgaged. In support of this contention the case of *Byjnath Lall* v. *Ramoodeen Chowdhry* (1) has been cited. That case differs from this in these respects, that the partition had there been made by the Collector under Regulation XIX of 1814, and that the mortgagee was seeking to enforce his remedy not against the property which had been actually mortgaged, but against the property which had been allotted to the mortgagor on partition in substitution of the mortgaged property. Their Lordships held not only that he had a right to do this, but that it was in the circumstances of the case his sole right, and that he could not successfully have sought to charge any other parcel of the estate in the hands of any of the former co-sharers.

The principle upon which that case was decided appears to us to apply equally to the present one. The mortgagee was not a party to the partition suit, but he was not a necessary party; he could not have enforced a partition, nor could he have resisted a fair partition at the instance of any of the co-sharers. There is no allegation here that the partition was effected by fraud or collusion between the mortgagor and his co-sharers, and, as pointed out, if there had been fraud with the object of defrauding the mortgagee, the latter would have had a clear remedy against all who were parties to it. If, then, the partition is not challenged on the ground of fraud, the case stands thus:—

What was mortgaged was joint undivided property in which the appellants had a 3-anna odd-gunda share; their co-sharers, the mortgagors, could undoubtedly pledge their own undivided shares,—at least it is no part of the appellants' case that they could

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not do so, but they could not by such mortgage affect the interest of the other co-sharers. The mortgage was subject to the right of those sharers to enforce a partition and, as their Lordships held in the case referred to, thereby to convert what was an undivided share of the whole into a defined portion, held in severalty. In the absence, therefore, of any fraud in effecting the partition, plaintiff has no right to proceed against that portion of the undivided mortgaged property which on partition was allotted to the appellants, but he can proceed against that portion of the undivided property which was allotted to the mortgagor-defendants in substitution of their undivided share in the portion mortgaged. We must set aside the decrees of the lower Courts directing the sale of the mortgaged property, with the exception of the 3-anna odd-gunda share belonging to the appellants, and remand the case in order that it may be determined exactly what portion of the mortgaged property was on partition allotted to the appellants. Against that portion the plaintiffs can have no charge. They will of course be at liberty to bring to sale the share of the mortgagor-defendants in the portion which was left undivided, as well as any property which has been allotted to the latter in substitution of what was mortgaged, and this is a point which the Court will also have to determine, if it can do so. The parties will be at liberty to adduce further evidence on the matters referred to.

Another question raised in the appeal is that the plaintiffs are not entitled to the full amount of the interest decreed, and that this could not in any event be made a charge on the property. By the terms of the bond, dated the 5th Sraban 1285, interest was to run on the principal, Rs. 1,000, at one per cent. per mensem, and the whole amount was to be repaid in Assar 1288. In Bysack 1292 the mortgagor executed another bond in which, after referring to the execution of the first bond and the omission to pay the money due under it, he undertakes to pay off the aforesaid Rs. 1,000 with interest at the same rate in Chait 1294, and as security he hypothecates the same property which was mortgaged in the first bond. Neither bond contains any stipulation for the payment of interest after due date. The effect of the second bond was, we think, to make the interest run continuously

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up to Chait 1294, and to make it a charge on the property. The first Court allowed interest after due date at the rate of 12 per cent. per annum, considering that a reasonable rate. Even if any question had been raised in the lower Appellate Court, and no question was raised, there is no ground on which we could hold on second appeal that the interest allowed by the first Court after due date was unreasonable. That interest cannot, however, be made a charge on the property: it is not a charge by the terms of the deed.

The appeal must be decreed and the case remanded as above directed. The appellants are entitled to their costs in this Court.

Appeal allowed.

J. V. W.

APPELLATE CRIMINAL.

Before Mr. Justice Prinsep, Mr. Justice Pigot, and Mr. Justice Hill.

THE QUEEN-EMPRESS *v.* CHANDRA BHUIYA AND 12 OTHERS.*

1892
Dec. 22.

Criminal proceedings, irregularity in—Irregularity prejudicing the accused—Rioting, countercharges of—Cross cases tried together—Evidence in one case considered in the other—Criminal Procedure Code (Act X of 1882), ss. 233, 239, 309, 342, 344, 537—Illegality—Fight between two parties not "transaction."

Where two cross cases of rioting and grievous hurt were committed separately for trial before a Sessions Judge, who, having heard the evidence in the first case, heard the evidence in the second case, examined some of the accused in the one case as witnesses for the prosecution in the other and *vice versâ*, and subsequently heard the arguments in both the cases together, and the opinions of the assessors (who were the same in both the cases) were taken at one time, and both the cases were dealt with in one judgment:

Held, that this mode of trial, although irregular, did not prejudice the accused in their defence, and that under such circumstances a retrial was not made necessary by reason of such irregularity.

* Criminal Appeal No. 627 of 1892, against the order passed by F. H. Harding, Esq., Sessions Judge of Mymensingh, dated the 2nd May 1892.