APPELLATE CIVIL.

Before Das and Ross, J.J.

BENARASI PRASHAD

v.

MOHIUDDIN AHMAD.*

Estate Partition Act, 1897 (Bengal Act V of 189 sections 94 and 95—Separate accounts, whether destroyed b partition—Contract Act, (Act IX of 1872), section 56- Transfer of Property Act (Act IV of 1882), section 73.

There is nothing in the Estates Partition Act, 1897, support the proposition that partition does not destroy separ accounts.

Sections 94 and 95 of that Act imply that separate acco can have no further existence after a partition, because tion 94 provides for the separate liability of the sepa estate for the amount of land-revenue specified in the n to be issued under that section and requires the propriet enter into a separate engagement for the payment of land-revenue; and section 95 enacts that from the da the notice each separate estate shall be separately liab the amount of land-revenue assessed upon it under the If any further protection is required by way of se account it would seem that a separate account m freshly opened.

Section 56 of the Contract Act, 1872, has no app to a case where the impossibility, if any, is due to the of the contracting party himself.

Under section 73 of the Transfer of Property Ac the mortgagee has a charge upon the surplus proce the sale of the mortgaged properties for arrears of ment revenue. But the existence of this statutory no bar to his seeking a decree against the successo mortgagor.

* Appeal from Original Decree No. 213 of 1920, from a Babu Haribar Charan, Subordinate Judge, Patna, dated the 1 1920.

Appeal by the plaintiff.

In *mauza* Anantpur Kukaria, *tauzi* No. 216, agarnath Choudhury had a share of 9-annas 11-*kauris* *bauris* 12-*phauris*, Birjan Chaudhury had 4-annas -*dams* 4-*kauris* 5-*bauris* 8-*phauris*, Baijnath Chaudry had 1-anna 12-*dams* 4-*kauris* 10-*bauris*, making total of 15-annas 4-*dams*. The remaining 16-*dams* longed to Dodraj Mahto, Keshwar Mahto and ussammat Keola Kuer, the last named having 3-*dams* share. On the 2nd October, 1900, Birjan audhury executed an *ijara* in respect of 1-anna *dams* of his share in consideration of Rs. 4,000 in our of one Radha Kishun. The plaintiff acquired *ijara* interest. The share of 15-annas 4-*dams* was in execution of a decree for money to one Pachkouri who defaulted in payment of the Government nue whereupon the share was brought to sale and hased by Jung Lal, Khairuddin and Hulas Behari, in turn sold privately to Mukhund Lal, Janki Das Wilayeti Begam in 1916. In the meantime, in Dodraj Mahto and Keshwar Mahto had applied artition of their 13-*dams* share and this share e *tauzi* No. 14394, while the remaining 15-annas s share became *tauzi* No. 12039. The partition lace on the 2nd March, 1917, and possession was red on the 1st June of that year. On the 7th ber, 1917, Janki Das and Wilayeti Begam sold nterest to one Leaqat Hossain. Mukhund Lal eaqat Hossain defaulted in payment of the ber *kist* of the Government revenue in 1917 and o. 12039 was sold on the 7th January, 1918, ars of Government revenue and purchased by hiuddin whose co-sharers were Jung Bahadur fiz. The effect of the sale of *tauzi* No. 12039 nnul the plaintiff's encumbrance. He, thereught this suit on the 22nd March, 1919, to set sale as fraudulent and also for a decree for against such of the defendants as might be ble for the same. Amongst the defendants, ts 9 to 15 were descendants, direct or

collateral, of the original mortgagor. The Subordinate Judge dismissed the suit and the plaintiff appealed.

Sections 94 and 95 of the Estates Partition Act, 1897, which are referred to in the judgment, run as follows:

94. (*1*) The Collector shall then proceed to give the several proprietors possession of the separate estates allotted to them, and, if necessary, may require the assistance of the Magistrate in giving such possession; and shall be caused to be served on every recorded proprietor of a separate estate a notice—

(*a*) informing him that from the date specified in such notice the separate estate assigned to him, as described in the extract from the partition paper prepared and delivered or tendered to him under section 59 or section 93, as the case may be, will be deemed to be separated from the parent estate, and to be separately liable for the amount of land-revenue specified in the notice, and

(*b*) calling upon him to enter into a separate engagement for the payment of such land-revenue.

(*2*) The date specified in such notice shall be not more than three months after the proprietors have been given possession of their respective separate estates as provided in sub-section (*1*).

95. From the date specified in such notice, each separate estate shall be borne on the revenue-roll and General Register of the Collector as a distinct estate separately liable for the amount of land-revenue assessed upon it under this Act, and shall be so liable whether or not the proprietor has entered into a separate engagement for the payment of the amount of land-revenue so assessed upon the estate.

Hasan Imam (with him *Sunder Lal*), for the appellant: Before the partition there were two separate accounts. There is no order closing them and the fact that there has been a partition cannot destroy the existence of separate accounts which must be taken to have continued even after the partition and, therefore, a sale could take place only of the share in default [*see* sections 15 and 16 of the Estates Partition Act]. That being so, the sale of the entire estate is illegal, and has not the effect of wiping out the appellant's encumbrance. Moreover it appears that there was a separate account even after the partition inasmuch as the land-revenue of each of the proprietors remained the same. It was, therefore, necessary to ascertain

1924.

BENARASI PRASHAD v. MOHIUDDIN AHMAD.

which share was in default, because only the share in default could be sold and not the entire estate; and in the latter event the applicant's encumbrance will still subsist.

In case the sale is upheld, the appellant is entitled to get his money from the heirs of the mortgagor who had covenanted to repay it.

Sultan Ahmed (with him *Mohamad Hasan Jan* and *Bimla Charan Sinha*), for respondents 1 to 8: The contention of the appellant that partition does not destroy the separate account already opened, cannot be sustained. Sections 15 and 16 of the Estates Partition Act have been referred to by the appellant, but, in order that these sections should apply, the arrears must be shown to have accrued before the partition or in course of the partition. It is admitted, however, that the sale did not take place for the arrears accruing due before the partition or in course of the partition. In these circumstances sections 15 and 16 have no application to the present case. Section 74A of the Land Registration Act, on the other hand, clearly contemplates the closing of a separate account by the Collector when the state of things no longer represents the existing facts. The plea that the separate accounts had not been closed was never urged in the Courts below. In fact, in the grounds of appeal before the Commissioner, the appellant seems to have, by implication, admitted the closing of the separate accounts.

Tribhuan Nath Sahai, for respondents 9 to 15: Inasmuch as it is not shown that there was any legal necessity for the loan we cannot be bound by the mortgage. The document on its proper construction discloses nothing but a personal contract by Birjan. Assuming, however, that the heirs are bound by the contract, they are protected by section 56 of the Contract Act inasmuch as the covenants have become impossible of performance under section 34 of the Act

[see *Inder Pershad Singh* v. *C. Mpbell* (1) and *Goculdas Madhavji* v. *Narsu Yenkuji* (2)].

The next point is that under section 73 of the Transfer of Property Act, the mortgagee had a charge on the surplus of the sale-proceeds for the amount remaining due on the mortgage. He cannot, therefore, hold us liable for the payment of the mortgage-money unless he has first proceeded against the surplus amount.

Lastly, the suit is barred by limitation under Article 120, Schedule 1 of the Limitation Act, as it has been brought more than six years after the date when the mortgage-money became repayable. I rely on *Surja Prasad* v. *Golab Chand* (3) and *Bhagawat N. Chowdhury* v. *Suba Lal Jha* (4).

Hasan Imam, in reply: When there was a separate account before the partition and again a separate account after the partition, it will be presumed that there was a continuity in the separate account being open. It lay upon the respondents to prove the contrary.

S. A. K.

Ross, J. (after stating the facts, set out above, proceeded as follows):—

Three points were taken by the learned Counsel for the appellant. In the first place, it was contended that the revenue-sale was brought about by fraud; in the second place that in *tauzi* No. 216 separate accounts had been opened (*1*) for 9-annas and odd share of Jagarnath Chaudhury; (*2*) for the 6-annas and odd share of Birjan and Baijnath Chaudhury; and (*3*) an *ijmali* account for the remaining share; that the partition did not affect these separate accounts and in fact at the time of the revenue-sale in 1918 separate accounts were in existence. Consequently under

(1) (1881) I. L. R. 7 Cal. 474.
(2) (1889) I. L. R. 13 Bom. 630.
(3) (1900) I. L. R. 27 Cal. 762.
(4) (1908) 7 Cal. L. J. 195.

1924.

BENARASI PRASHAD v. MOHIUDDIN AHMAD.

ROSS, J.

section 13 of the Bengal Land Revenue Sales Act of 1859 only the separate account in default should have been sold and the encumbrance has consequently not been cancelled. And in the third place, that in any case there should be a decree against defendants 9 to 15 for Rs. 4,000.

The case of fraud was not argued very seriously. The allegation is that Mohiuddin was *farzidar* of Mukhund and Leaqat and that these persons being aware of the encumbered nature of the property intentionally defaulted in order that the encumbrances might be got rid of by the sale for arrears of Government revenue. The only substantial basis for this contention is a connection between Mohiuddin and Leaqat through Latif, the husband of Wilayeti Begam; but this in itself is obviously not sufficient.

Reference was also made to the evidence of some witnesses and in particular to the following: In the first place, the evidence of Ram Babu, plaintiff's witness No. 2 was referred to. This witness stated that he attended the sale but did not bid as Maulavi Latif told him that there was an encumbrance on the estate and so he should not purchase it. He also says that Janki Das, Mukhund and Latif paid the money. In his cross-examination he admits that he knew that:

"when an entire village is sold the encumbrance does not form a burden on it and that Anantpur Kukaria was sold as an entire *mahal* and not a share in it"

and consequently his evidence is self-contradictory and inconclusive. As to the payment being made by Janki and Mukhund, his cross-examination on this point shows that his evidence was without a basis of real knowledge. In the second place, reliance was placed on the evidence of Bansi Lal, plaintiff's witness No. 3 a municipal commissioner and honorary magistrate. The evidence of this witness was directed to show that Jung Bahadur was connected with Mukhund. The learned Subordinate Judge has said that the story told by this witness is absurd and I do not think it can be

described in any other way. The idea of carefully fixing a meeting between Jung Bahadur and Mangal Chand in order to consider terms of settlement only to be told when the meeting took place that Jung Bahadur had no authority to settle, is not credible. Jung Bahadur in his evidence has given a credible account of the purchase. He says that he and Hafiz and Mohiuddin all intended to bid but having ascertained each other's intentions, they came to terms and purchased jointly. I see no reason to doubt this. The only comment that was made on the evidence of this witness is that he made a mistake about the name of Hafiz. It is possible for a Hindu to mistake a Muhammadan name and there seems to be no ground for suspicion in this. He denies expressly that he was a *farzidar* for the previous owners.

In my opinion, therefore, no case of fraud in connection with the revenue-sale has been established.

The main argument is the argument relating to separate accounts. The argument is ingenious and although Mr. *Hasan Imam* earnestly contended that it is to be found in the plaint and in the grounds of appeal to the Commissioner, after a careful persual of these documents, I have been unable to discover it. Paragraph 28 of the plaint says :

> " That separate accounts Nos. 1 and 2 had been opened for 15-annas and 4-*dams* share only, and as a matter of fact the share which had been sold for the arrears of land-revenue was 15-annas and 4-*dams* only."

This is the principal reference in the plaint to the separate accounts and the point there taken is entirely different. In the grounds of appeal to the Commissioner it is clearly contemplated, although it is not expressly stated, in the first ground, that the separate accounts had been closed. The point is an entirely new point and the result is that there is very little evidence to go upon.

With regard to the statement of the law that partition does not destroy the separate accounts, there is nothing in the statute to support it and no authority was cited for the proposition. The statute law which

1924.

BENARASI PRASHAD v. MOHIUDDIN AHMAD.

ROSS, J.

was referred to was sections 15 and 16 of the Estates Partition Act. Section 15 has no application because the arrears in the present case accrued after the partition. Section 16 has no application either, for the same reason and also because the present sale is not a sale of a share but the sale of an entire estate. Section 74A of the Land Registration Act contemplates the closing of a separate account by the Collector when the state of things no longer represents existing facts. The argument is that even after the partition the land-revenue for which each of these proprietors was liable remained the same. That may be so but the shares were in fact different. Thus whereas before the partition Mussammat Keola had 3-*dams* in the whole estate, after partition she had a larger interest in a smaller property. Sections 94 and 95 of the Estates Partition Act would seem to imply that the separate accounts can have no further existence after a partition, because section 94 provides for the separate liability of the separate estate for the amount of land-revenue specified in the notice to be issued under that section and requires the proprietor to enter into a separate engagement for the payment of such land-revenue; and section 95 enacts that from the date of the notice each separate estate shall be separately liable for the amount of land-revenue assessed upon it under the Act. If any further protection is required by way of separate account, it would seem that a separate account must be freshly opened. And as far as the facts can be discovered, that is what happened in the present case.

All that Mr. *Hasan Imam* had to rely upon was *Exhibit 15*, Register *D*, in respect of *mauza* Rukhai. Now it is admitted that in *tauzi* No. 216 separate account No. 1 was the account of Jagarnath Chaudhury, separate account No. 2 was the account of Birjan and Baijnath while the remainder was an *ijmali* account. That remainder included the share of Keola Kuer. After the partition we find a different state of affairs. *Exhibit 15* shows that separate account No. 1

was the account of Keola Kuer whereas the *ijmali* account was the account of the remaining proprietors of the 16-annas. Moreover it appears that this separate account No. 1 of Keola Kuer was opened in case No. 254 of 1917-18, evidently a fresh proceeding altogether. It is true that this document, *Exhibit 15*, does not show when that separate account was opened. But there is no reason to suppose that it was opened before the sale for the arrears of the September *kist*. So far as *Exhibit 15* goes, the account might have been opened between the date of the default and the date of the sale; and the ordinary presumption would favour this view, because if there had been a separate account in existence, presumably the Collector would have acted according to the provisions of section 13 of the Sale Law. I find, therefore, no illegality in the sale of the entire estate for the arrears of the September *kist* of 1917.

The only other point which remains to be considered is the claim against defendants 9 to 15. This claim is based upon the terms of the *ijara*. That instrument is a mortgage. There is a loan, and a security for the loan contained in the following terms:

"If I fail to make payment of the entire *sarpeshgi* to the *ijaradar* by the end of *Jeth* of 1314, *Fasli*, then until repayment of the entire *sarpeshgi* this *ijara* transaction shall continue to hold good with all the terms laid down above."

The mortgagor covenants as follows:

"If the whole or portion of the leasehold property be sold at auction by the Civil Court or the Collectorate on account of arrears of land-revenue, road and public works cesses or of any other Government demand, arising out of default on my part or the part of any of my co-sharers, or for any other reason, and if the *ijaradar* be thrown out of possession of the leasehold property due to any act on the part of me, the executant, then the *ijaradar* shall be at full liberty to realize the full amount of *sarpeshgi* together with interest at 1 *per cent. per mensem* out of the surplus sale proceeds of the leasehold property or from the other *nami* and *benanmi* properties, or from the person of me, the executant to which I or my heirs and representatives shall not take any objection whatsoever."

The learned Counsel for the appellant claims that under this covenant he is entitled to a decree for the principal

1924.

BENARASI PRASHAD v. MOHIUDDIN AHMAD.

ROSS, J.

sum of Rs. 4,000 with interest against the representatives of the mortgagor Birjan Chaudhury. Defendant No. 9 is the son and defendants 13 to 15 are the grandsons of Birjan Chaudhury. Defendants 10 to 12 are the grandsons of Baijnath Chaudhury. The plaint does not allege that Baijnath and Birjan were joint but, on the contrary, specifies their shares in the property and therefore they were presumably separate. The liability would, therefore, be confined to the sons and grandsons of Birjan. Various objections to this liability were urged by the learned Vakil for these respondents. First it was suggested that the cause of action arose in 1907 when the loan became repayable and that the suit was barred by time. But by the terms of the *ijara* the money became repayable in *Jeth* 1314 and every subsequent *Jeth*, and the cause of action under a usufructuary mortgage would arise only on dispossession. Secondly, it was said that after the interest of Birjan Chaudhury had been sold by the Civil Court on a date not specified in the plaint the covenants of the *ijara* became impossible of performance and, therefore, these respondents are protected by section 56 of the Contract Act. Section 56, however, has no application to such circumstances as these where the impossibility, if any, is due to the default of the contracting party himself. Thirdly, it was said that under section 73 of the Transfer of Property Act, the plaintiff had a charge upon the surplus sale-proceeds after the sale for arrears of Government revenue. This is true and he might have followed the surplus sale proceeds of the property. But he was not bound to do so and the existence of this statutory charge is no bar to his seeking a decree against the successors of Birjan Chaudhury. The decree, however, must be limited to the assets of Birjan Chaudhury in the hands of these defendants. Finally it was said that there must be an account of the rent of Rs. 75 a year reserved in the *ijara* and that unless it is proved by the plaintiff that this rent was regularly paid, he is not entitled to the full sum of Rs. 4,000. But this question does not

arise on the pleadings. Paragraph 10 of the written statement of the defendants 9 and 10 says :

" The plaintiff has no right to obtain a decree for the *ijara* money, inasmuch as he has failed to make any allegation about the payment of the rent reserved, and to produce any account for the period of *ijara*."

There is no allegation that the rent was not paid. This question was not put in issue and no evidence was given about it and the point is not open to the respondents.

There must, therefore, be a decree against respondents 9 and 13 to 15 for a sum of Rs. 4,000 with interest at 1 *per cent. per mensem* from the 28th March, 1918, until the date of the decree; the amount of the decree to carry future interest at 6 *per cent. per annum* and to be realizable only from the assets of Birjan Chaudhury, the mortgagor, which have come to the hands of these defendants. To this extent the appeal is decreed with costs against defendant 9 and 13 to 15 and is dismissed against the other defendants, with costs to defendants 1, 2 and 3. The costs will be in proportion to success.

DAS, J.—I agree.

Appeal decreed in part.

REVISIONAL CRIMINAL.

Before Adami and Bucknill, J.J.

JAMUNA SINGH

v.

KING-EMPEROR.*

1924.

March, 11.

Code of Criminal Procedure 1898 (*Act V of* 1898), *section* 257—*Duty of the court to examine all witnesses cited by the accused.*

One of two accused persons who were alleged by the prosecution to be the ringleaders in the offence charged asked

* Criminal Revision No. 93 of 1924, from a decision of A. N. Mitter, Esq., Officiating Sessions Judge of Saran, dated the 28th January, 1924, affirming a decision of Babu Matukdhari Singh, Deputy Magistrate of Chapra, dated the 17th December, 1923.