

APPELLATE CIVIL.

Before Mr. Justice Baguley, and Mr. Justice Mesely.

A.L.A. CHETTYAR FIRM

v.

MAUNG PO TAW AND ANOTHER. *

1938

Feb. 14.

*Partition of an estate—Commissioner appointed by Court effecting a partition—
Order of Court confirming partition—Stamp—Instrument of partition—
Burma Stamp Act, s. 2.*

Where a Commissioner appointed by the Court effects a partition of an estate and the Court confirms the partition, the formal order of the Court should embody the terms of the partition and must be duly stamped as an instrument of partition under s. 2 of the Burma Stamp Act.

P. K. Basu for the appellant.

Ba So for the respondents.

BAGULEY, J.—This case is really very simple. U Khet and his wife Ma Shwe were a married couple. Ma Shwe died in 1927 leaving joint debts and joint properties. In 1929 to satisfy the joint debts U Khet executed a mortgage in favour of the A.L.A. firm. Next year he re-married and in 1932 U Khet's eldest son Po Taw filed a suit for a quarter share in the estate. Later on the A.L.A. firm filed a suit for sale of the property mortgaged to it, joining Po Taw and the other descendants of Ma Shwe as legal representatives of Ma Shwe to give them a chance of redeeming the property. The A.L.A. firm got a decree, Po Taw having put in an appearance and then withdrawn from the case, and the property was put up for sale and the firm bought it. Meanwhile Po Taw's suit for a

* Civil First Appeal No. 126 of 1937 from the order of the Assistant District Court of Hanthawaddy in Civil Execution Case No. 16 of 1936.

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quarter share of the estate had been proceeding : the usual preliminary decree for accounts had been passed and a Commissioner appointed who, although he took an account of the properties and the mesne profits etc., completely ignored the evidence of debts due by the deceased, although evidence was given about them and a final decree was passed giving Po Taw a one quarter share in the assets left by Ma Shwe. No word whatever is said with regard to the debts which she left. This of course is entirely wrong, as an *orasa* son could only get a one quarter share in the net estate left by Ma Shwe [*vide Ma Shwe Yu v. Ma Kin Nyun* (1), which was approved by the Privy Council in *Maung Sein Shwe v. Maung Sein Gyi* (2)], as it existed at the time of the re-marriage.

In due course Po Taw applied for execution of his decree for partition. When the Commissioner went on the land to make a division the A.L.A. firm filed an application pointing out that they had bought in the property left by U Khet in execution of their mortgage decree and asking that the Inspector of Land Records should refrain from making a partition. Po Taw objected and the learned Assistant District Judge passed the order against which the present appeal has been filed.

The learned Judge says :

"In the circumstances of the case it is advisable for A.L.A. Firm to file a suit against Po Taw. I disallow the objection of the A.L.A. Firm. The partition made by the Inspector of Land Records is confirmed."

The learned Judge then passed a formal order :

"It is ordered that the partition made by the Inspector of Land Records be confirmed."

(1) (1929) I.L.R. 7 Ran. 240.

(2) (1934) I.L.R. 13 Ran. 69.

This formal final order does not embody the terms of that partition, nor has it been engrossed on a stamp paper, thereby offending the provisions of the Stamp Act, because it is an instrument of partition as defined by section 2 of that Act.

The learned Judge gives no particular reason as to why the A.L.A. firm should not come in under section 47 of the Civil Procedure Code. Section 47 says :

“All questions arising between the parties to the suit in which the decree was passed, or *their representatives*, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.”

By buying in the right title and interest of U Khet through the execution proceedings arising under the mortgage suit the A.L.A. firm stepped into the shoes of U Khet and therefore became his representative. U Khet is the judgment-debtor in Civil Execution No. 16 of 1936 which arises from suit No. 32 of 1932, and the question arises as between the A.L.A. firm and Po Taw as to whether the partition decree leaves anything at all to partition as between U Khet and Po Taw. The A.L.A. firm as the representative of U Khet is entitled to come in for settlement of this question under section 47, and the executing Court should have dealt with the matter in its execution proceedings and not have referred the A.L.A. firm to a separate suit.

The appeal is allowed, the order dismissing the A.L.A. firm's petition in the execution proceedings will be set aside and the Court must go into it on its merits and decide it in the execution proceedings; the respondents to pay the costs of the appellant in this Court, advocate's fee three gold mohurs.

MOSELY, J.—I agree.

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