

**PRIVY COUNCIL.**

*Before Lord Wright, Sir Lancelot Sanderson and Sir  
Dinshah Mulla.*

MOHAMMAD AFZAL KHAN (PLAINTIFF)

*versus*

ABDUL RAHMAN AND OTHERS (DEFENDANTS).

(ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONERS,  
NORTH-WEST FRONTIER PROVINCE.)

*Mortgage—Partition—Effect of Partition on Mortgage  
of undivided share in tenancy in common—Mortgaged Land  
allotted to another co-sharer—Attachment—“ Private Transfer ”  
Partition Decree on Award without intervention of Court  
—Code of Civil Procedure, Act V of 1908, section 64.*

Where one of two or more co-sharers mortgages his undivided share in some of the properties held jointly, the mortgagee takes the security subject to the right of the other co-sharers to enforce a partition and thereby to convert what was an undivided share of the whole into a defined portion held in severalty. If the mortgage, therefore, is followed by a partition and the mortgaged properties are allotted to other co-sharers, they take the allotted properties, in the absence of fraud, free from the mortgage, and the mortgagee can proceed only against the properties allotted to the mortgagor in substitution for his undivided share.

A transfer of property made under a decree for partition is not a “ private transfer ” within the meaning of section 64 of the Code of Civil Procedure, 1908, so as to make the transfer void as against claims enforceable under the attachment.

Both the above principles apply although the decree for partition has been made pursuant to an award in an arbitration without the intervention of the Court.

*Byjnath Lall v. Ramoodeen Chowdhry* (1), applied.

Decree affirmed.

*Appeal (No. 102 of 1931) from a decree of the  
Court of Judicial Commissioner, N.-W. F. P. (July 1,*

1930) reversing a decree of the Subordinate Judge of Peshawar (November, 22, 1929).

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The appellant instituted a suit for a declaration that the share of defendant No. 1 (respondent No. 3) in certain mortgaged and attached properties was liable to be attached and sold in execution of the plaintiff's decree against that defendant, that the property was lawfully mortgaged with the plaintiff, and that defendants Nos. 2 and 3 (respondents Nos. 1 and 2) had no title to more than one-third share in the property.

The facts appear from the judgment of the Judicial Committee.

The main question in the appeal was as to the effect of a partition decree made in pursuance of an award in arbitration, the reference being made without the intervention of the Court, upon a mortgage of an undivided share in part of the partitioned property and upon an attachment of other parts thereof.

The Court of the Judicial Commissioner, reversing the decree of the trial Judge, dismissed the appellant's suit upon grounds which appear from the judgment of the Judicial Committee.

DUNNE K. C. and NARASIMHAM (with them K. SHRINAVAS RAO), for the appellant :—

The partition did not affect the appellant's right to enforce the mortgage according to its terms. There is no statutory provision depriving him of that right, and no decision of the Board applicable to the facts of the case. In *Byjnath Lall v. Ramoodeen Chowdry* (1) the partition was made under Regulation XIX of 1814 which, as pointed out in the judgment, was carefully designed to secure a fair partition, and the

(1) (1874) L. R. 1, I. A. 106.

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partition there was already proceeding when the mortgage was executed. In the present case the partition was four years later than the mortgage and was made in pursuance of a private arbitration to which the appellant was not a party. The trial Judge rightly held that the arbitration was collusive. Further, in the case above referred to the suit was to enforce a mortgage against property allotted to the mortgagor upon the partition, the observation that that was the only property against which the mortgage could be enforced was *obiter*. Neither did the partition affect the attachment. The partition, being made in pursuance of an arbitration without the intervention of the Court, operated as a "private transfer" within the meaning of section 64 of the Code of Civil Procedure, 1908, and was therefore void as against the appellant.

DE GRUYTHER K. C. and PARIKH for the respondents Nos. 1 and 2 :—

(Respondent No. 3 did not appear).

Since the judgment of the Board in 1874, a series of decisions in India have consistently upheld the principle that a mortgagee of an undivided share of joint property takes the security subject to the right to partition, and that after a partition the mortgage can be enforced only against such property as is allotted to the mortgagor. Among the latest of those decisions are *Bhup Singh v. Chedda Singh* (1) and *Niranjan Mukerjee v. Sondamini Dassi* (2). The principle applies although the partition decree is made pursuant to an award in a private arbitration : *Amolak Ram v. Chandan Singh* (3), *Muthia Raja v.*

(1) (1920) I. L. R. 42 All. 596, 606. (2) (1926) I. L. R. 53 Cal. 694.

(3) (1902) I. L. R. 24 All. 483.

*Appala Raja* (1), *Pullamma v. Pradosham* (2). Section 44 of the Transfer of Property Act, 1882, does not affect the inherent right to partition. The evidence did not show fraud or collusion in connection with the arbitration. A partition decree, though made in pursuance of an award in a private arbitration, does not operate as a "private transfer" within the meaning of section 64 of the Code of Civil Procedure, 1908: *Qurban Ali v. Ashraf Ali* (3), *Narayana Ayyar v. Birjari Bivi* (4), *Kasi Viswanatham Chettiar v. Kamaswami Nadar* (5); see also Order XXI, rule 54. Great inconvenience would be caused if an attachment held up the right to partition.

DUNNE K. C. replied.

The judgment of their Lordships was delivered by—

SIR DINSHAH MULLA—The questions involved in this appeal relate to the effect of a partition of joint properties effected by a decree, where the decree is one made on an award, on a prior mortgage and a prior attachment of the share of one of the co-owners in some of the properties.

*Haji Malik Rahman*, a Muhammedan, died in or about 1910, leaving a will dated the 12th June, 1910, whereby he devised certain immovable properties to his son *Malik Mohib Ali*, who is the third respondent in this appeal, and his two grandsons *Sardar Ali* and *Sabz Ali*, in three equal shares. On the death of *Haji Malik Rahman*, the third respondent entered into possession of the properties and recovered the rents and profits thereof on behalf of the family. *Sabz Ali* died in 1914 leaving two children, who are

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(1) (1910) I. L. R. 34 Mad. 175.

(3) (1882) I. L. R. 4 All. 219.

(2) (1895) I. L. R. 18 Mad. 316.

(4) (1921) I. L. R. 45 Mad. 103.

(5) (1918) 35 Mad. L. J. 441.

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the first and second respondents in this appeal, and on his death his one-third share in the above-mentioned properties passed to them. The first and second respondents were both minors at the date of their father's death and also at the date of the suit out of which the present appeal arises.

On the 26th April, 1923, the third respondent and his son Sardar Ali executed a mortgage of some of the properties in favour of the appellant to secure payment of Rs. 1,00,000, lent and advanced to them by the appellant. The mortgage purported to be one with possession.

On the same day the appellant granted a lease of the mortgaged properties to the mortgagors at an annual rent of Rs. 12,000.

Some time thereafter Sardar Ali died without leaving any issue, and on his death his one-third share passed to his father, the third respondent, as his heir. The third respondent thus became entitled to a two-thirds share in the properties, the remaining one-third being the share of the first and second respondents.

The rent under the lease fell into arrear, and the appellant obtained three decrees for arrears for various periods against the third respondent, and in execution of the decrees attached four immovable properties, being properties other than those comprised in the mortgage, but forming part of the properties bequeathed by the will of *Haji* Malik Rahman.

Subsequently, on the 19th August, 1926, *Mussamat* Tajwar Sultan was appointed guardian of the person and property of the first and second respondents. Soon after her appointment she demanded their one-third share in all the properties from the

third respondent. This was followed by a reference to arbitration on the 4th September, 1926, and an award was made on the 7th January, 1927. The third respondent made a statement before the arbitrators, but he did not disclose the mortgage to them. By their award the arbitrators awarded to the first and second respondents in lieu of their one-third share and the mesne profits thereof (1) some of the properties comprised in the mortgage, and (2) all the four properties attached as aforesaid. On the 10th February, 1927, a decree for partition was passed in terms of the award under clause 21 of Schedule II of the Code of Civil Procedure, and the first and second respondents were in execution of the decree put in possession of the properties allotted to them. It is upon the effect of this award and decree that the decision of the questions in this appeal depends.

Subsequently an application was made on behalf of the first and second respondents under Order XXI, rule 58 of the Code, to release the four properties from attachment, and the attachment was raised by an order, dated the 18th January, 1928.

Thereupon, on the 13th December, 1928, the appellant brought the suit out of which this appeal arises in the Court of the Subordinate Judge of Peshawar to establish his right to attach the two-thirds share of the third respondent in the four properties, and for a declaration that he was entitled to proceed against the mortgaged properties to the extent of the two-thirds share of the third respondent in them. The plaintiff stated that the arbitration proceedings were collusive, and that even if they were not, neither the award nor the decree made on it could affect the appellant's rights under the mortgage or the attachment, as they both

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were of a date prior to the reference to arbitration. It would appear from the plaint that the appellant conceded that neither the mortgage nor the attachment was binding on the one-third share of the first and second respondents.

The Subordinate Judge held that the arbitration proceedings were collusive, and passed a decree for the appellant on the 22nd November, 1929.

On appeal the Court of the Judicial Commissioners, North-West Frontier Province, considered that the suit was one under Order XXI, rule 63 of the Code, and that no claim in respect of the mortgage could be included in such a suit, and the claim was accordingly not entertained. As to the attachment they held that there was no evidence to show that the award was obtained by fraud, and that the order releasing the properties from attachment was therefore correct. Accordingly they reversed the decree of the Subordinate Judge, and dismissed the plaintiff's suit. It is from this decree that the present appeal to His Majesty in Council has been brought.

Two contentions were raised on behalf of the appellant before their Lordships. The first was that where one of several co-sharers mortgages his undivided share in some of the properties held jointly by them, and the properties so mortgaged are allotted on a partition by arbitration without the intervention of the Court to the other co-sharers, the partition, being subsequent in date to the mortgage, cannot affect the rights of the mortgagee to enforce his charge against the share of the mortgagor in the mortgaged properties. The second was that where the interest of one of several co-sharers in some of the properties held jointly by them is attached in execution of a decree

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against him, and those properties are subsequently allotted to the other co-sharers on a partition by arbitration without the intervention of the Court, a transfer by the judgment-debtor of the interest so attached to the other co-sharers is a private transfer within the meaning of section 64 of the Code of Civil Procedure, and therefore void as against the claim of the attaching creditor, even if the transfer was made pursuant to a decree passed on the award. It was not contended before their Lordships that the partition was unfair or that it was made with the object of defrauding the appellant.

The respondents abandoned before their Lordships the contention as to misjoinder of claims that had prevailed with the Appellate Court, and invited their Lordships to decide the question in respect of the mortgage on its merits.

As regards the first point, their Lordships are of opinion that where one of two or more co-sharers mortgages his undivided share in some of the properties held jointly by them, the mortgagee takes the security subject to the right of the other co-sharers to enforce a partition and thereby to convert what was an undivided share of the whole into a defined portion held in severalty. If the mortgage, therefore, is followed by a partition, and the mortgaged properties are allotted to the other co-sharers, they take those properties, in the absence of fraud, free from the mortgage, and the mortgagee can proceed only against the properties allotted to the mortgagor in substitution of his undivided share. This was the view taken by the Board in *Byjnath Lall v. Ramoodeen Chowdry* (1). In that case the partition was made by the Collector under Regulation XIX of 1814 (Bengal), and

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the mortgagee was seeking to enforce his remedy not against the properties mortgaged to him, but against the properties which had been allotted to the mortgagor in lieu of his undivided share; but the Board held that not only he had a right to do so, 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. Their Lordships think that the principle enunciated in that case applies equally to a partition by arbitration such as the one in the present case. Their Lordships are therefore of opinion that the appellant is not entitled to enforce his charge against the properties allotted to the first and second respondents. The third respondent (the mortgagor) has not appeared before their Lordships, and their Lordships express no opinion as to any other rights which the appellant may have in respect of his mortgage.

It was brought to their Lordships' notice that on the 27th October, 1926, a suit had been brought by the appellant on the mortgage in the Court of the Subordinate Judge of Peshawar, and that a decree for money was passed in his favour on the 27th February, 1928, which was altered into a mortgage decree on the 29th January, 1931. No argument was addressed to their Lordships as to the effect of these proceedings on the present suit, and their Lordships express no opinion as to this either.

The second question falls to be decided under section 64 of the Code of Civil Procedure, which is as follows :—

“ Where an attachment has been made, any private transfer or delivery of the property attached or of any

interest therein . . . . . contrary to such attachment, shall be void as against all claims enforceable under the attachment.”

A decree for partition may be made (1) in a suit for partition heard and decided by the Court itself; or (2) it may be made on an award in a similar suit, where the matters in difference between the parties to the suit are referred to arbitration by an order of the Court made on the application of the parties; or (3) it may be made on an award, where the matters in difference are referred to arbitration without the intervention of the Court, as in the present case.

It was not disputed before their Lordships that a transfer of property made pursuant to a decree in the first two cases was not a “private” transfer. But it was argued that a transfer made pursuant to a decree in the third case stands on a different footing, for the proceedings in that case originate not with a suit but with a private agreement to refer, and the transfer, therefore, must be regarded as a private transfer within the meaning of section 64 and void as against the attaching creditor. Their Lordships are unable to accept this argument. They think that a transfer made pursuant to a decree in the third case is as much a transfer under an order of the Court as a transfer in the first two cases, and not a private transfer. As in the first two cases, so in the third, if the party against whom the decree is passed fails to transfer the property as required by the decree, the transfer may be enforced by proceedings in execution, and this is what actually happened in the present case. The third respondent did not deliver possession to the first and second respondents of the properties allotted to them under the decree until after execution had been

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taken out against him. Such a transfer cannot be said to be a private transfer within the meaning of section 64, because the initial step which led eventually to the decree was not a suit for partition, but an agreement to refer the question of partition to arbitration. Their Lordships, therefore, consider that the appellant is not entitled to proceed in execution against the properties allotted to the first and second respondents.

In the result, their Lordships are of opinion that this appeal fails, and that it should be dismissed, and their Lordships will humbly advise His Majesty accordingly. The appellant must pay the costs of the first and second respondents before this Board.

A. M. T.

*Appeal dismissed.*

Solicitor for appellant—*R. S. Nehra.*

Solicitors for respondents Nos. 1 & 2—*T. L. Wilson & Co.*

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