

## LETTERS PATENT APPEAL.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice,  
and Mr. Justice Mosely.

## DAW SHIN v. ARJANDAS.\*

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July 29.

*Mortgage by a co-sharer—Undivided share in joint properties—Mortgagee's security subject to right of co-sharers to enforce partition—Mortgage followed by partition—Allotment of properties to other co-sharers—Absence of fraud—Allotment free of mortgage—Mortgagee's rights only against properties allotted to mortgagor—Mortgage by co-sharer during pendency of administration suit—Partition under decree—Doctrine of lis pendens.*

Where one of two or more co-sharers mortgages his undivided share in 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 the 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 of his undivided share.

If a co-sharer mortgages his undivided share in an estate during the pendency of an administration suit and a partition is effected by a decree of the Court the above principle applies. It is immaterial whether or not the doctrine of *lis pendens* applies in a given administration suit.

*Mohammad Afzal Khan v. Abdul Rahman*, I.L.R. 13 Lah. 702 (P.C.), followed.

*Byjnath Lall v. Ramooddeen Chowdry*, 1 I.A. 106 ; *Chutterput Singh v. Maharaj Bahadoor*, 32 I.A. 1 ; *Jogendra Chunder Ghose v. Fulkumari*, I.L.R. 27 Cal. 77 ; *Puran Chand v. M. N. Mukherji*, I.L.R. 55 Cal. 532 (P.C.), referred to.

*P. K. Basu* for the appellants. When the estate of a deceased person is under administration by the Court a purchaser from an heir buys subject to any disposition which has been or may be made of the deceased's estate in due course of administration. *Chutterput Singh v. Maharaj Bahadoor* (1).

If a share in a property is transferred by a person entitled to the share in the course of administration of

\* Letters Patent Appeal No. 7 of 1940 from the judgment of this Court in Civil 2nd Appeal No. 192 of 1939.

the property by the Court, the transfer is subject to any later orders of the Court in respect of such property. *Puran Chand v. Mukherji* (1).

If a person has mortgaged his undivided share in property, and therefore a *bona fide* partition of the property takes place between the co-sharers, the mortgagee can enforce his mortgage against the property allotted to his mortgagor. He cannot claim to enforce his mortgage on any part of the property allotted to other co-sharers. This wider principle applies irrespective of the doctrine of *lis pendens*. *Byjnath Lall v. Ramooddeen* (2). This case has been applied by their Lordships of the Privy Council in *Mohammad Afzal Khan v. Abdul Rahman* (3).

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*K. C. Sanyal* for the respondents. The point now taken was never urged and the Privy Council cases now cited were not placed before the learned Judge on second appeal. If a co-heir purports to mortgage or transfer a certain specified property belonging to the estate, it would be subject to a partition effected afterwards. But in the present case the co-heir has mortgaged all his one-third share which he has in all the properties of the estate, and that mortgage remains unaffected by the partition.

MOSELY, J.—This Letters Patent Appeal must be allowed.

The facts are, briefly, that in the course of an administration suit one of the parties, a co-owner (Maung Aung Pe), mortgaged his undivided share of the properties. The mortgage deed specifies the various properties which comprised the estate. At that time Aung Pe presumably thought that he was entitled

(1) I.L.R. 55 Cal. 532, 536 (P.C.). (2) 1 I.A. 106, 120, 121.

(3) I.L.R. 13 Lah. 702.

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to a one-eighth share and mortgaged that. He was subsequently awarded a one-third share and again mortgaged the balance of that to the respondents. After this a final decree was passed on a compromise between Aung Pe and the only other co-heir, Ma Saw Kin, who was entitled to a share in the properties, for the third co-heir U Tun Aung Gyaw had admittedly by then taken out more than his share of the estate. At this partition the house and site now in question went to Ma Saw Kin with other properties while Aung Pe again received other properties still. After this Ma Saw Kin transferred the properties in suit, the house and site, to her children, who again transferred them to the present appellants, Daw Shin and Daw Tin.

The respondents sued Aung Pe and obtained a mortgage decree against him, and at the auction bought the property in themselves. They then sued Daw Tin and Daw Shin in the suit now under appeal for possession of Aung Pe's one-third share in this house and site. The suit was dismissed in the trial Court and in appeal by the learned District Judge, it being held that the suit was not maintainable. In second appeal to this Court however it was said that Aung Pe had only mortgaged his one-third interest, and that that transaction did not affect Ma Saw Kin's interests. The registered mortgage by Aung Pe was constructive notice to Ma Saw Kin. The learned Judge held that what Ma Saw Kin received at partition was only a two-thirds share in this house and site, or that what she received was subject to the mortgage of Aung Pe's one-third share in it. It was said that the doctrine of *lis pendens* does not necessarily apply to administration suits, which are not suits for the recovery of specific immovable property, and that for the above-mentioned reasons it should not be applied here.

Authorities were not cited to the learned Judge in second appeal, which convincingly show that irrespective of the doctrine of *lis pendens* this suit was not maintainable. One of these authorities was cited in the trial Court, namely, *Jogendra Chunder Ghose v. Fulkumari Dassi* (1), which itself followed one of the leading authorities cited to us, *Byjnath Lall v. Ramoodeen Chowdry* (2).

It was laid down there that a mortgage of an undivided share in land may be enforced against lands which under a revenue partition have been allotted in lieu of such share, whether such lands be in the possession of the mortgagor or of one who has purchased his right, title and interest. But lands allotted in severalty by the revenue partition to the co-sharers of the mortgagor are not subject to the mortgage.

Another decision of their Lordships of the Privy Council is *Chutterput Singh v. Maharaj Bahadoor* (3), where it was said, that when the estate of a deceased person is under administration of the Court, a purchaser from an heir buys subject to any disposition which has been or may be made of the deceased's estate in due course of administration. In that case the transaction in question was one dealing with one specific property only.

In *Puran Chand Nahatta v. Monmotho Nath Mukherji* (4) their Lordships dealt with a case similar to the present one. The head-note reads as follows :

" In a suit to ascertain and administer the trusts under a deed a decree was made declaring one of the parties entitled to a one-sixth share in the surplus income, and that the trustees should have their costs out of the trust property. The beneficiary thereupon mortgaged his share. Under a later order in the suit part of the property was sold to realize the trustees' costs.

(1) (1899) I.L.R. 27 Cal. 77.

(2) (1874) 1 I.A. 106.

(3) (1904) 32 I.A. 1, 16.

(4) (1927) I.L.R. 55 Cal. 532 (P.C.).

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Held that the mortgagee's rights were subject to the sale, and the mortgage was consequently not an encumbrance upon the title of the purchasers."

Perhaps the authority most on all fours with the present case is another decision of their Lordships, *Mohammad Afzal Khan v. Abdul Rahman* (1). The decision there was to the effect that 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.

That was a case of mortgage of an undivided share of some only of the properties held jointly. This case, like *Byjnath Lall v. Ramoodeen Chowdry* (2) and *Puran Chand Nahatta v. Monmotho Nath Mukherji* (3), was a mortgage of an undivided share in all the properties. But that distinction makes, I conceive, no difference.

It is clear then that the respondents could not enforce their mortgage against this property, which had been transferred by partition by Aung Pe, and this appeal must be allowed.

In the result, the suit will be dismissed with costs throughout, costs of this appeal five gold mohurs.

ROBERTS, C.J.—I agree and have nothing to add.

(1) (1932) I.L.R. 13 Lah. 702 (P.C.).

(2) (1874) 1 I.A. 106.

(3) (1927) I.L.R. 55 Cal. 532 (P.C.).