1869

RANI SAMEE SUNDARI DEBI v. MESSR. JARDINE SKINNER

The Judge attempts to distinguish the present case from those cited on the ground that the parties here are putnidars. But we think it may be laid down broadly that in all cases of joint ownership each party has a right to demand and enforce partition; in other words a right to be placed in a position to enjoy his own right separately, and without interruption or interference by others; see Spence's Equitable Jurisdiction, Vol. 1, page 653; Story's Equity Jurisprudence, Sections 648-649.

The zemindars have nothing to do with this question. They have been made defendants, and had they merely appeared for the protection of their own interests, they would have been entitled to their costs. Those who have appeared and opposed the partition must bear their own costs. The partition will of course not affect the liabilities of the parties under their several contracts with the zemindars. The decision of the lower Appellate Court must be reversed. The respondents must pay the costs of the appeals in the lower Appellate Court and in this Court. The case must be remanded to the first Court, in order that an Ameen may be appointed to survey and make a partition as between the plaintiffs and the defendants; on the Ameen making his report, either party will be at liberty, if dissatisfied to except to it in the usual way.

The costs of the suit in the first Court and of the partition are the necessary expenses of obtaining a partition by a decree of Court caused not by any wrongful act of the defendants, but by the nature of the tenancy, *viz.*, a tenancy of an undivided share of an estate. The plaintiff for her own advantage, convenience, and security is desirous of exercising her right of exchanging her undivided share for an equivalent share of that estate to be held in severalty. The defendants hold subject to the plaintiff's right to demand such partition. The plaintiff and principal defendants must therefore each bear their own costs of the suit in the first Court, and the costs of the partition will be divided between the parties in proportion to their respective shares in the estate.

Before Mr. Justice L. S. Jackson and Mr. Justice Markby.

GORACHAND GOSWAMI AND OTHERS (PLAINTIFFS) *v.* RAGHU MANDAL AND OTHERS (DEFENDANTS.)*

1869
July 15.

Act VIII. of 1859, *s.* 119—*Appeal—Ex parte Judgment.*

Section 119, Act VIII. of 1859, does not apply to a defendant who is only absent on an adjourned hearing. It relates only to one who has never appeared.

Baboos *Banshidar Sen* and *Gris Chandra Mookerjee* for appellant.

Baboos *Krishna Sakha Mookerjee* and *Nilmadhab Sen* for respondent.

* Special Appeal, No. 169 of 1869, from a decree of the Judge of West Burdwan, dated the 3rd November 1868, reversing a decree of the Moonsiff of that district, dated the 14th May 1868.

1869

GORACHAND GOSWAMI v. RAGHU MANDAL.

JACKSON, J.—The only ground taken before us in this special appeal is that the lower Appellate Court had no jurisdiction to entertain the appeal, inasmuch as the case had been decided against the defendant *Ex-parte*. This contention is founded upon section 119 of Act VIII. of 1859; but that section will not support the argument. The words of that section are "no appeal shall lie from a judgment passed *Ex-parte* against a defendant who has not appeared." In this case the defendant not merely had appeared, but he had been present at the first hearing of the cause, and was merely absent at the adjourned hearing, that is, when the adjourned hearing commenced; but came into Court before the Moonsiff had actually recorded the judgment, and also his evidence was on the record. The special appeal must be dismissed with costs.

MARKBY, J.—I am of the same opinion.

Before Mr. Justice L. S. Jackson and Mr. Justice Markby

1869
July 26.

CHINTAMANI SEN (PLAINTIFF) *v.* ISWAR CHANDRA AND OTHERS (DEFENDANTS.)*

Act VIII. of 1859, *s.* 246—*Right of one Decree-holder against another.*

Two several judgment-creditors attached certain property which was released upon the claim of a third party, under section 246 of Act VIII. of 1859. One of them sued the successful claimant, and obtained a decree declaring the property in dispute to belong to the judgment-debtor, and thereupon caused the property to be sold, and became the purchaser thereof. Thereupon, an assignee of the other judgment-creditor sued him, alleging an earlier lien, and praying a sale in satisfaction thereof. The defence set up was that at the plaintiff did not come into Court to set aside the order under section 246, within a year from the date thereof, he was barred from bringing the present suit.

Held, that the omission to bring a separate suit for that purpose did not bar him from obtaining a declaration of his prior lien.

Baboo *Gopal Lal Mitter* for appellant.

Baboo *Krishna Sakha Mookerjee* for respondent.

THE facts of the case sufficiently appear in the judgment of

JACKSON, J.—It appears to me that the decision of the lower Appellate Court is erroneous. The suit relates to certain property which belonged originally to one Ala Hafez. This person mortgaged the property in question to Bani Madhab on the 12th Aghran 1268. Immediately afterwards, that is to say, on the 12th Pash, he mortgaged the same property over again to Iswar Chandra, and Iswar Chandra it seems, had no notice of the first mortgage. Both mortgagees brought suits against Ala Hafez and got decrees for the money advanced, respectively, with a declaration that the property was liable to be sold in satisfaction of their decrees, and they both subsequently attached the property.

* Special Appeal, No. 200 of 1869, from a decree of the Subordinate Judge of Beerbhoom, dated the 5th December 1868, affirming a decree of the Moonsiff of that district, dated the 15th of June 1868.