1879

SURBO-MUNGOLA DABEE v. MOHENDRO-NATH NATH.

WHITE, J. (allowed evidence of the execution of the will to be given in Court, and made the following decree):—Declare that the trust for the erection of a bathing-ghaut and temples is void for uncertainty; that the residue of the testator's property is undisposed of; and that the plaintiff, as sole heiress of the testator, is, as such, entitled to the whole of his property after payment of his debts. Usual administration accounts. The Court Receiver to take possession of the testator's property, to convert such as does not consist of money or Government securities into money, and invest the whole in Government securities. Power to dispose of the property by private contract or public sale. Costs of all parties up to decree to be paid out of the estate on scale No. 2. Reserve further directions.

Attorney for the plaintiff: Baboo *Moraly Dhur Sen.*

Attorney for the defendants: Baboo *Gunnesh Chunder Chunder.*

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Maclean.

1878
June 19.

SHARAT CHUNDER BURMON AND OTHERS (DEFENDANTS) *v.* HURGOBINDO BURMON AND OTHERS (PLAINTIFFS).*

Co-sharers of Undivided Estate—Assignee of Co-sharer, Rights of—Partition under Regulation XIX of 1814—*Jurisdiction.*

The plaintiffs and defendants were owners of an undivided estate. Besides their share as part-owners, the plaintiffs held some of the estate as tenants and some as purchasers from some of their co-sharers in the estate. The whole estate was partitioned under Reg. XIX of 1814, and on such partition the lands which the plaintiffs held as tenants and as purchasers were allotted to co-sharers other than those under whom the plaintiffs held or from

* Special Appeal, No. 214 of 1877, against the decree of Baboo Nobin Chunder Ghose, Second Subordinate Judge of Zilla Mymensingh, dated the 16th of November 1876, reversing the decree of Baboo Mohendro Nath Roy, Munsif of Chowkie Bajitpore, dated the 20th of January 1876.

1878

SHARAT CHUNDER BURMON v. HURGOBINDO BURMON.

whom they purchased. In a suit by the plaintiffs for declaration of their title to those lands, and for a re-distribution of the shares: *Held*, the Court had no jurisdiction to entertain a suit to alter a partition effected by the revenue authorities. *Held* also, in accordance with the principles laid down by the Privy Council in *Byjnath Lall* v. *Ramoodeen Chowdhry* (1), *viz.*, that one co-sharer in a joint and undivided estate cannot deal with his share so as to affect the other co-sharers, but his assignee takes subject to their rights, that the plaintiffs were not entitled to the relief they sought for, and their suit must be dismissed.

THE facts of this case sufficiently appear from the judgment of the Court.

Baboo *Nullit Chunder Sen* and Baboo *Bharutt Chunder Dutt* for the appellants.

Baboo *Taruck Nath Palit* for the respondents.

MACLEAN, J.—In this case the plaintiffs and defendants were owners of an undivided estate, which they brought to partition under Reg. XIX of 1814. The partition appears to have been duly carried out, and the lands divided amongst the co-sharers according to their interests in the estate.

The plaintiffs bring this suit for a declaration of their mokurrari jamai rights in the whole of a plot of land described as dag 153 and in $\frac{10}{16}$ of a plot described as dag 152, and ask the Civil Court to direct that the partition award may be altered, and dag 153 allotted to the share of defendants 1 to 5, and $\frac{10}{16}$ of dag 152 allotted to the share of defendants 1 to 6 and 48, and the rest of dag 152, to the share of themselves and defendants 39 to 43. The plaintiffs appear to have made a similar application to the Revenue authorities, and base their action on the refusal to grant their request.

Three of the defendants (24, 25, 30) appeared in the Munsif's Court, and disputed the jurisdiction of the first Court to interfere with the proceedings of the Revenue authorities. They also denied the plaintiffs' title to, and possession of, the lands they claimed.

(1) 21 W. R., 233.

1878

SHARAT CHUNDER BURMON v. HURGOBINDO BURMON.

The case was in the first instance thrown out by the Munsif, who held, that no suit would lie under the circumstances. This decision was reversed on appeal, and on re-trial the Munsif found that the plaintiffs had failed to make out their title, and were not entitled to ask for a re-distribution of the lands.

The Subordinate Judge on appeal considered that the plaintiffs had a good title, which had not been affected by the partition-proceedings, and accordingly reversed the Munsif's decision to that extent, and gave the plaintiffs a declaratory decree. The prayer for re-distribution was rejected.

In special appeal it is contended before us, that this suit cannot be maintained, that the plaintiffs' remedy lies against those persons from whom they derive their title, and not against those to whom the lands they claim may have been allotted. As the effect of the partition was to bring all the lands of the undivided estate under division, notwithstanding any private and separate occupation, it is important to ascertain exactly what the position of the plaintiffs were, as that seems to have been but imperfectly understood by the pleaders.

It is clear that they were part-owners of an undivided estate, and it cannot now be maintained that they did not join with all their co-sharers in applying for partition. In addition to their shares as part-owners they held the lands in suit as tenants, and partly as purchasers from some of the other co-sharers; and when they applied to the Collector to allot these lands to the shares of those from whom they obtained them, they were met by the objection that this could not be done for several reasons, one of which was, that all of those persons were not then applicants; whether they subsequently joined the other applicants, and whether there has been a complete division, is not quite clear. Probably there has,—but the fact remains that the Revenue authorities have effected the partition, and the Civil Court cannot touch the distribution made by them. The plaintiffs' suit therefore, so far as it asks that land may be taken from the shares to which it has been allotted and put into other shares, cannot succeed.

As for their prayer for a declaration of their title, which the Subordinate Judge finds to be a good title, we think that it

ought not to be granted. The Subordinate Judge lays down that the transfer of land by a shareholder must be recognized in making the divisions, and that any other shareholder consenting to receive land in the possession of a third party undertakes to put up with the incumbrance. This is an incorrect exposition of the law. In the first place, assuming that the whole of the lands were not held jointly, but that some of them were held in severalty by some of the shareholders, the Revenue authorities would not be bound to proceed with the division if they found that the separate enjoyment of some of the lands affected the proper incidence of the Government revenue. In this case, however, the estate was dealt with as a joint undivided estate on the application of all the co-sharers, and we must, therefore, assume that there was no previous partition which the Collector would recognize; and to say that any co-sharer took his allotment of land subject to incumbrances created by another co-sharer, is not only not warranted by any law, but it is clearly opposed to the law relating to partitions as explained by the Privy Council. We find it laid down in *Byjnath Lall* v. *Ramoodeen Chowdry* (1), that one co-sharer in a joint and undivided estate cannot deal with his share so as to affect the interests of other sharers, and persons who take any security from one co-sharer do so subject to the right of the others to enforce a partition; and further, that a mortgagee who takes such a security in the share of one co-sharer, who has no privity of contract with the other co-sharers, would have no recourse against the lands allotted to such co-sharers, but must pursue his remedy against the lands allotted to the mortgagor.

We think that this principle is applicable to all assignees of any interest whatever,—and that it ought to govern this case. The plaintiffs set up to be assignees of the interests of some of the shareholders in respect of the lands referred to in this suit. The other shareholders are not privy to the contract between the plaintiffs and their assignors; and as the lands have been allotted to the appellants, the plaintiffs' remedy lies not against the appellants to whom they have been allotted, but

(1) 21 W. R., 233.

1878

SHARAT CHUNDER BURMON v. HURGOBINDO BURMON.

against the plaintiffs' assignors. The Subordinate Judge was wrong in laying down that the lands were allotted subject to the plaintiffs' incumbrance on them, and we reverse his decree, declaring the plaintiffs' title, and restore the Munsif's decree, dismissing the plaintiffs' suit with costs. The plaintiffs will also pay the costs of this appeal.

Appeal allowed.

ORIGINAL CIVIL.

Before Mr. Justice Broughton.

1878
Sept. 11 & 12.

FEHRSEN *v.* SIMPSON.

Will—Power of Appointment—Execution of Power.

A testator, after giving certain specific bequests, disposed of his property as follows: "I request that the interest of my property, invested in Government securities, be disposed of from time to time as follows:—*First*,—to my dear son *A* two shares; to my two dear daughters *B* and *C*, each one share; the interest to be paid to them quarterly or half-yearly as may be most convenient. *Second*,—I request that these shares shall not be transferable during their lifetime. *Third*,—at the demise of any of my children without issue, any such share to be divided in the above proportion to the survivors. *Fourth*,—in the event of issue, they may bequeath their share to any one of their children they may select, subject to the above conditions." *C* married in 1874, and, by a settlement made in consideration of the marriage, her share was assumed to be assigned to trustees upon certain trusts. In 1875, *C* and her husband made the following joint will:—"We do hereby constitute the survivor of us to be executor or executrix in our estate and sole heir of the same, together with the child or children begotten in our marriage." *C* died shortly after the execution of the above will, leaving one child. In a suit by *C's* husband and the trustees of the settlement of 1874 for the administration of the testator's estate and for the construction of his will,—*Held*, that the settlement of 1874 could not operate upon *C's* share in consequence of the direction of the testator, that it should not be transferred in the lifetime of *C*, and that the plaintiffs took nothing under the settlement.

Held also, that the power of appointment given by the will of the testator had not been properly exercised by the joint will, and that the child of *C* took the whole of her mother's share.