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that the judgment of the Judicial Commissioner and the judgment of the Commissioner of the Tenasserim Division should be reversed and the decision of the District Judge restored with the variation above mentioned.

The respondents must pay the costs of this appeal and the costs in the three Courts below.

*Appeal allowed.*

Solicitors for the appellant : Messrs. *Latley & Hart.*

Solicitor for the respondents : Mr. *B. R. Heaton.*

C. B.

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## ORIGINAL CIVIL.

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*Before Mr. Justice Sale.*

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 May 14.

KHETTERPAL SRITIRUTNO *v.* KHELAL KRISTO BHUTTACHARJEE  
 AND BY REVIVOR

KALLY CHURN BHUTTACHARJEE AND OTHERS *v.* DURGA CHURN  
 BHUTTACHARJEE AND OTHERS, AND

IN THE MATTER OF SUIT 334 OF 1889.

SRISTIDHUR COUCH *v.* KALLY CHURN BHUTTACHARJEE  
 AND OTHERS.\*

*Costs—Civil Procedure Code (Act XIV of 1882), s. 222—Costs of partition charged under that section on shares of parties in partition suit—Mortgage by one sharer of undivided shares—Liability for costs of partition of mortgagee not party to partition suit—Application in suit by person not party to suit—Remedy by supplemental suit—Procedure.*

*K. S.* and *K. B.* were joint owners of certain properties. In 1886 *K. S.* mortgaged his undivided share to *S. C.* in consideration of a loan advanced by *S. C.* to him. In 1887 *K. S.* brought a suit, to which *S. C.* was not made a party, against *K. B.* for partition, and on 27th April 1888 obtained a decree under which a commission of partition was issued. In the course of the suit both *K. S.* and *K. B.* died, *K. B.* on 2nd September 1888, and *K. S.* on 30th March 1892, and by orders of Court their sons were put on the record in place of their respective fathers. The return to the commission of partition was made on 24th February 1892, and on 20th July 1893 an order was made confirming the return, and, under section 222 of the Civil Procedure Code, charging the costs of suit and of the commission of partition to the shares of the plaintiffs and defendants, respectively, in the suit. Meanwhile in July 1889 *S. C.* brought a suit on his mortgage and obtained a decree, dated 5th August 1889, for an account and sale, and in that suit a final order for sale was made

\* Application in Original Civil Suits Nos. 217 of 1887 and 334 of 1889.

on 5th January 1891, which however was only filed on 19th August 1893. Under that order the property was advertised for sale, the return to the commission of partition being set out in the abstract of title as part of the title, and the property to be sold being described as a divided moiety. In an application, made both in the partition and mortgage suits, by the defendants in the partition suit, for an order for sale of a portion of their share of the property in order to pay the costs of the suit and of the partition and other debts and liabilities for which they were liable, *Held*, that the mortgagee having had the benefit of the partition, and having accepted and approved of it as part of his title, as shown by the proceedings for sale, was, though not a party to the partition suit, bound by the equities attaching to the mortgaged property as incidents of the partition. He was therefore liable in respect of a proportionate share of the charge for costs of the partition created by the order of Court made in that suit under section 222 of the Civil Procedure Code, and such proportionate share of those costs should be deducted in priority out of the proceeds of the sale of the mortgaged property.

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The defendants in the partition suit, however, not being parties to the mortgage suit, such an order could not be properly made at their instance, but they should enforce the charge for costs against the mortgagee by supplemental suit, and the Court stayed the sale of the property for a reasonable time to give the parties an opportunity of moving for stay of the sale in any such suit as might be instituted.

This was an application by Durga Churn Bhuttacharjee and Uma Churn Bhuttacharjee, two of the defendants in a revived partition suit No. 217 of 1887, in which a decree for partition had been made, and a commission of partition issued, that the Registrar might be at liberty to sell certain property and pay thereout their debts and liabilities, and the costs of the suit, and of the commission of partition.

The petition stated that by a decree made by the High Court on 27th April 1888 in a suit (217 of 1887) brought by Khetterpal Sritirutno against Khelal Kristo Bhuttacharjee, the plaintiff and defendant were declared to be jointly entitled to certain property in equal shares, and it was ordered that the property should be partitioned between them, and that a commission of partition should issue, and accounts and enquiries were directed to be taken: (1) an account of the rents and profits of the property which may have come into the hands of the parties respectively or to other persons by their order or for their use; (2) an enquiry as to what were the valid and subsisting debts owing by

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the joint family ; and (3) how such debts were to be provided for ; that by the said decree it was also ordered and decreed that the parties should pay their own costs of the suit up to and including the decree to be taxed by the taxing officer of the Court as between attorney and client on scale No. 2, and that the expenses of the commission of partition should be borne by the parties in proportion to the value of their respective shares ; that on 2nd September 1888 Khelal Kristo Bhuttacharjee died, and his five sons (two of whom, the petitioners Durga Churn Bhuttacharjee and Uma Churn Bhuttacharjee, were adults, and the three others Gouri Churn Bhuttacharjee, Bhabani Churn Bhuttacharjee, and Umbica Churn Bhuttacharjee were minors under 18 years of age), were by an order of Court, dated 28th February 1889, put on the record as defendants in the place of their father ; and they duly entered appearance in the revived suit, and by an order of Court, dated 26th July 1889, Nundo Lall Mookerjee was appointed guardian *ad litem* of the minor defendants ; that in pursuance of the decree of 27th April 1888 a commission of partition was issued to the Registrar of the Court to make the partition as directed by the decree ; that on 30th March 1892, pending the proceedings for partition before the said Commissioner, the plaintiff Khetterpal Sritrutno died, leaving six sons his heirs and representatives ; that on 24th February 1892 the Commissioner made his return to the 'commission of partition, whereby he allotted to the plaintiff a moiety of the properties in suit, and the remaining moiety to the substituted defendants in the suit ; that on 10th May 1892 by order of Court the suit was revived and the names of the sons of the plaintiff, namely, Kally Churn Bhuttacharjee, Tara Churn Bhuttacharjee, Bhoirab Chunder Bhuttacharjee, Bogola Churn Bhuttacharjee, Tripura Churn Bhuttacharjee, and Matungee Churn Bhuttacharjee (the last of whom was a minor, for whom his brother Kally Churn was appointed next friend) were put on the record of the suit in the place of their father Khetterpal Sritrutno ; that on 20th July 1893, the Court, on the suit coming on for hearing for further direction, confirmed the return of the Commissioner, ordered that the parties should be put into possession of their allotments under the partition, and that the costs of all parties of the suit and commission of partition should

form a charge on the respective shares allotted by the return to the commission of partition ; that the costs (together with debts and liabilities due by the estate of Khelal Kristo Bhuttacharjee) amounted to a sum which the petitioners had no means of paying except by sale of a portion of the property allotted to them and the other defendants on the partition ; that the share of the plaintiffs in the joint properties, was, before the institution of the partition suit, mortgaged to one Sristidhur Couch, who on 5th August 1889 had obtained a decree in a suit (334 of 1889) brought on his mortgage, and under an order of the 5th January 1891 had caused the property to be advertized for sale on 31st March 1891 ; and that the mortgagee had obtained a material benefit from the partition, inasmuch as his mortgagor's interest was now decided and ascertained.

The petitioners asked, therefore, for an order that the Registrar should be at liberty to sell so much of the properties allotted to them and the minor defendants as might be necessary for payment of the costs of the suit and commission of partition and the debts and liabilities of the defendants, and out of the proceeds pay such costs and debts and liabilities, and also out of the proceeds of sale in suit No. 334 of 1889, in which Sristidhur Couch was plaintiff, and Kally Churn Bhuttacharjee and others were defendants, pay the proportionate share of the costs of the commission of partition payable by the plaintiffs to the petitioners and the minor defendants in the suit.

From an affidavit filed on behalf of Sristidhur Couch, the plaintiff in suit No. 334 of 1889, it appeared that the plaintiff Khetterpal Sritirutno had mortgaged to him on 11th January 1886 his undivided half share in the property, the subject of the partition suit, for Rs. 15,000 with interest at 10 per cent. ; that, on default being made in payment of the amount, suit No. 334 of 1889 was instituted in 1889 against Khetterpal Sritirutno on the mortgage, and on 5th August 1889 Sristidhur Couch obtained a decree in that suit, under which the sum of Rs. 22,000 odd was found on the report of the Registrar, which was duly confirmed by the Court, to be due to him, and a day was fixed for the payment by the defendant of the sum due ; but default was made in payment, and Sristidhur Couch obtained

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an order, dated 5th January 1891, for sale of the property; that after the death of Khetterpal Sritirutno the suit was revived against his sons who were substituted for their father as parties defendants on the record; and that under the order of the 5th January 1891 the property had been advertized for sale on 31st March 1894, on behalf of Sristidhur Couch. It was therefore submitted that there were no grounds for the application.

Mr. *R. Mitter* for the applicants.

Mr. *T. A. Apear* for the minor defendants in suit 217 of 1887.

Mr. *Chuckerbutty* for the plaintiffs in suit 217 of 1887.

Mr. *Sinha* for the mortgagee (plaintiff in suit 334 of 1889.)

**SALE, J.**—This application is free from doubt except so far as it seeks to affect the plaintiff in the mortgage suit.

The facts are briefly as follows: Khetterpal Sritirutno and Khelal Kristo Bhuttacharjee were joint owners of certain properties.

On the 11th of January 1886 Khetterpal Sritirutno executed a mortgage of his undivided share in most of these properties in favour of Sristidhur Couch to secure the repayment of a loan obtained from him. In 1887 Khetterpal brought this suit against his co-owner for an account and partition and obtained a decree, dated 27th April 1888, under which a commission of partition was issued. The Commissioner's return is dated 24th February 1892.

In the course of the proceedings both the original plaintiff and the original defendant died, and there was considerable delay in reviving the suit.

On the 20th July 1893 an order was obtained confirming the return and charging the costs of suit and of the partition upon the properties, the subject of the suit.

In July 1889 Sristidhur Couch brought a suit upon his mortgage, and on the 5th of August 1889 obtained a decree for an account and sale. The Registrar's report on the result of the account is dated 24th January 1890. A final order for sale was obtained on the 5th of January 1891, but it remained unfiled for two years and seven months, that is until the 19th August 1893, a month after the date of the order for the confirmation of the return. The mortgagee, though in a position to

proceed to a sale under the order of the 5th January 1891, waited until after the partition was completed, and until after the return was confirmed, his object obviously being to obtain the benefit of the partition which was being effected in the partition suit.

As the result of the partition the mortgage now attaches to a divided share. The costs of the partition by which this result has been obtained were charged upon the properties under section 222 of the Civil Procedure Code. This section is a new provision, the object of which is to secure the payment of costs, and it is of special value in partition suits to which it is now generally applied. The mortgagee is entitled to the benefit which has resulted from the partition, but the question is whether he can claim that benefit, and at the same time disclaim liability in respect of the charge for costs created by the Court under an express provision of the Code. His contention is that not being a party to the partition suit he is not bound by the order creating the charge.

A mortgagee is not a necessary party to a partition suit, but he may, and frequently does, obtain leave to attend the proceedings as a quasi-party. The mortgagee in the present case did not obtain leave to attend the proceedings in the partition suit, but in the relation in which he stands to the mortgagor he is equally with him bound by the partition. It would of course be open to him to impugn the partition on the ground of fraud, but there is no suggestion of any such ground of complaint existing in the case. On the contrary, it appears from the proceedings before the Registrar under the order for sale that the return of the Commissioner is set forth in the abstract of title as part of the title, and the property to be sold is described in the notification of sale as the divided northern moiety. The mortgagee has thus signified his approval and acceptance of the return. He objects to nothing connected with the partition proceedings except the order confirming the return, so far as it directs the costs to be charged on the property. Is he entitled to say that his title, though derived from the mortgagor, is yet so distinct as to be free from the equities attaching to the property as an incident of the partition? The point is new. The mortgagee

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having been executed prior to the institution of the partition suit, the doctrine of *lis pendens* does not apply. If, however, the mortgagee had proceeded to a sale pending the partition, the purchaser would have become a necessary party to the partition suit, and would in the matter of costs have been subject to the liability of his predecessor in title. Is the mortgagee entitled to be placed in a better position? In my opinion the mortgagee, having adopted the partition proceedings, and having accepted the divided share, must take this share subject to the charge for a proportionate share of the costs of the partition as distinguished from the costs of suit, and this proportionate share of the costs ought to be deducted in priority out of the sale-proceeds of the mortgaged property.

It is objected, however, that this order cannot be made at the instance of the defendants in the partition suit, who are not parties to the mortgage suit. This objection, though purely technical, is not without force, and, being pressed, I shall give time to the present applicants to take the necessary steps by supplemental suit or otherwise to enforce this charge for costs as against the mortgagee. This application, therefore, so far as it affects the mortgagee, must stand over for disposal until after hearing of the new suit. The property if sold with notice of the charge cannot be expected to fetch its full value, and such sale would probably be followed by litigation. I shall therefore direct the sale to stand over for a reasonable time in order to give the parties an opportunity for moving for stay of the sale in any new suit which may be instituted.

An order in terms of the remaining part of the application will be made.

Attorney for the petitioners : Baboo *W. C. Bonnerjee*.

Attorney for the minor defendants : Baboo *Bepin Behary Bonnerjee*.

Attorney for the plaintiffs in suit No. 217 of 1887 : Messrs. *Remfry & Rose*.

Attorney for the plaintiff in suit No. 331 of 1889 : Mr. *Swinhoe*.

J. V. W.