

APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K.C.I.F., Chief Justice, Mr. Justice Stephen and Mr. Justice Woodroffe.

1907
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 Dec. 19.

SHAHEBZADA MAHOMED KAZIM SHAH

v.

R. S. HILLS.\*

*Priority—Partition—Owely—Allotment on partition—Mortgagee—Charge for owely.*

Where co-sharers have been awarded certain sums of money as owely on a partition decree, they are entitled to priority over the mortgagees of a portion of the property partitioned.

APPEAL by the defendants, Shahebzada Mahomed Kazim Shah, Shaetzada Wally Mahomed Shah, and Shahebzada Mahomed Karim Shah, from the judgment of Harington J.

This was a suit brought by the plaintiff, Robert Savi Hills, against the 1st defendant, Shahebzada Fateh Mahomed Shah, for an account of what was due to him on two deeds, one dated the 13th April 1904, by which the 1st defendant mortgaged his undivided  $\frac{7}{10}$ th share in 52, 52-1, and 52-2 Park Street, and 1, Russa-Road, in favour of the plaintiff, and another dated the 10th April 1905 under which there was assigned to the plaintiff a mortgage which had been created by the 1st defendant on his share in the Park Street property in favour of one Munshi Abdul Jalil. The 1st defendant, Shahebzada Fateh, did not dispute the plaintiff's claim, but the 2nd, 3rd and 4th defendants, the Shahs, claimed priority over the above mentioned mortgages for two sums of Rs. 37,000 and Rs. 9,500 respectively payable as owely money which under a decree for the partition of the joint property had been declared a charge on the shares allotted to the mortgagor. The other set of defendants claimed under another mortgage which the plaintiff respondent admitted was prior to his. Harington J. in his judgment dated the 12th December

\* Appeal from Original Civil, No. 62 of 1907, in Suit No. 461 of 1906.

1906 held, that no agreement (*e.g.*, such as in this case, viz. that the owelty money should be a charge on the Park Street property) between the parties to a partition suit even though embodied in a High Court decree could affect the rights of a mortgagee who was no party to the proceedings. That the Shah defendants had given up possession of the share in No. 52-2 Park Street without getting payment, thereby surrendering the security which they had for enforcing the payment of owelty, and had done so by making an arrangement by which they affected to create a charge on the property comprising the mortgagor's  $\frac{7}{10}$ th share, and they would be, but for the agreement, in the position of ordinary judgment-creditors entitled to execute their decree for owelty money against the mortgagor's property by attachment and sale; but such sale would be subject to any encumbrances created by the mortgagor. The learned Judge further held that the Shah defendants were entitled to a mortgage decree for the sums claimed as owelty, but that such sums were to be paid after the other charges had been satisfied.

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From this judgment the Shah defendants appealed.

*Mr. S. P. Sinha (Standing Counsel) (Mr. Buckland with him)*, for the appellants. A mortgagee of an undivided share in the absence of fraud is bound by the partition proceedings: *Byjnath Lall v. Ramoodeen Chowdry* (1), *Sharaf Chunder Burmon v. Hurgobindo Burmon* (2), *Hem Chunder Ghose v. Thako Moni Debi* (3), *Khetterpal Sritirutno v. Khelal Kristo Bhattacharjee* (4), *Pullamma v. Pradosham* (5), *Amolak Ram v. Chandan Singh* (6), *Ghose's Law of Mortgage in India*, 3rd Ed., page 353. Each co-sharer is entitled to partition or to mortgage his share. When the defendants took the property they took an undivided share, and the only way they can disturb the partition is to show that there has been fraud. The property being subject to a charge must be taken subject to that charge.

*Mr. Garth (Mr. S. R. Dass with him)*, for the respondent (2nd defendant). In the first place the partition decree is a con-

(1) (1874) L. R. 1. I. A. 106, 118.

(2) (1878) I. L. R. 4 Calc. 510.

(3) (1898) I. L. R. 20 Calc. 533.

(4) (1894) I. L. R. 21 Calc. 904.

(5) (1895) I. L. R. 18 Mad. 316.

(6) (1902) I. L. R. 24 All. 433.

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sent decree. Under the present practice, mortgagees are not made parties to a partition suit, but Sale J. has held that a mortgagee can watch proceedings, *Khetterpal Sritirutno v. Khelal Kristo Bhattacharjee*(1). I do not understand how a mortgagee can attend in this manner. My mortgage was after the partition suit, but it was before the partition. In the Privy Council case *Byjnath Lall v. Ramoodeen Chowdry*(2), the learned Judge did not consider the question of an unequal partition in the absence of fraud. The point is still open as to what the rights of mortgagees of an undivided share are. In the partition suit the parties themselves do not say that the mortgagees are to have priority. The case of *Hem Chunder Ghose v. Thako Moni Debi*(3) is distinguishable from the present, in that case the parties had equal shares, but here that is not so. The parties have not said, nor has the Court said, that the mortgagees are to have priority. I submit therefore that the judgment of the Court below was right, and this appeal should be dismissed.

*Mr. Hyam*, for the plaintiff respondent. I do not claim priority as between the appellants and myself.

*Mr. Sinha*, in reply.

MACLEAN C.J. The question in this appeal is whether or not, in the circumstances I am about to state, the present appellants, to whom two sums of Rs. 37,000 and Rs. 9,500 have been awarded by way of owelty on partition, are entitled to priority over certain mortgagees, whom I will refer to as the Roy mortgagees, on a portion of the property which was partitioned.

The facts lie within a very narrow compass and are as follows:

A suit was instituted some time in 1901 to set aside a certain trust-deed. To that suit all the parties either interested under the trust or who would be interested if the trust-deed were set aside were parties; and some of them apparently were minors. The result of that suit was that the trust-deed was set aside and, upon that decree being passed, the minors ceased to

(1) (1894) I. L. R. 21 Calc. 904. (2) (1874) L. R. 1 I. A. 106, 118.

(3) (1893) I. L. R. 20 Calc. 533.

have any further interest in the estate. By the decree in that suit, which is dated the 8th of August 1904, all the parties who, upon the trust-deed being set aside, became entitled to the property in certain shares, agreed amongst themselves to have it partitioned. The estate at the time was vested in the Official Trustee; and, under the decree, the Official Trustee was ordered to convey to Fateh Mahomed Shah, the mortgagor, to the Roy mortgagees, the house and premises No. 52-2 Park Street in Calcutta. By the same decree it was ordered and decreed "with the like consent (*i. e.* of all the parties interested in the properties) that Fateh Mahomed Shah (the mortgagor) should pay to the present appellant two several sums of Rs. 37,000 and Rs. 9,500 as in the decree directed, and it was declared with the like consent that the said two sums of Rs. 37,000 and Rs. 9,500 respectively formed a charge upon the premises No. 52-2 Park Street allotted to Fateh Mahomed Shah, and that the allotments made to the various parties (including the mortgagor) should stand charged with the respective incumbrances and charges created by them respectively over their respective shares and interests in the aforesaid properties."

The mortgages under which the Roys claim are dated (1st) the 29th of January 1902, (2nd) the 2nd of June 1902, and (3rd) the 2nd of September 1902; and they were mortgages to secure an aggregate principal sum of Rs. 18,000 with interest at 18 per cent. per annum with quarterly rests. The security was the share of the mortgagor in the various properties which had not then been partitioned. The result of the partition proceedings was to give to the mortgagor the house No. 52-2 Park Street, subject to the charge for the two sums of Rs. 37,000 and Rs. 9,500, and the question now is as between the present appellants and the Roy mortgagees, whether the appellants are entitled, in respect of those sums, to priority over the Roy mortgagees. The learned Judge in the Court of first instance has held that they are not; and consequently they have appealed.

It is quite clear that after the partition was effected, the mortgagee was entitled to regard his mortgages as attaching to the house No. 52-2 Park Street, in substitution for the security on the mortgagor's undivided share in the property generally.

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The security was shifted, as the result of the partition, from the undivided share of the mortgagor on to the property directed to be conveyed to him under the decree.

This is not disputed. Then arises the question of priority. To determine that question it becomes necessary to ascertain what was the substituted property which the mortgagor took under the partition. It is clear that all he took was the house No. 52-2 Park Street, subject to the charges of Rs. 37,000 and Rs. 9,500 in favour of the appellants; and it can only be upon that, that the Roy mortgagees can rank as mortgagees, that is, upon No. 52-2 Park Street subject to the charges created by the decree. But it is said that this was a consent decree. That does not seem to me to make any real difference unless the Roys can show that the partition effected was either the result of fraud, or unfair or improper as against the mortgagee who was not a party to the partition proceedings.

Undoubtedly, a person who advances money upon a mortgage of property which the mortgagor holds in an undivided share must be taken to take it subject to the liability of the property to be subsequently partitioned. Now, what is the attitude of the Roy mortgagees in this suit? Do they approbate or do they reprobate the partition proceedings? If we look at paragraph 2 of their written statement they ask that their mortgage may be regarded as the first charge upon the premises, No. 52-2 Park Street, "if it is shown that the partition was fair and proper." There is absolutely nothing to show, nor have we heard any argument, that it was unfair or improper.

The plaintiff then has come into Court upon the footing of adopting the partition proceedings; and if they adopt these proceedings their mortgage can only be on the interest of their mortgagor under the partition.

That interest has been already stated. This concludes the matter.

A point was made that the appellants must be taken to have surrendered their security, because the possession of the house No. 52-2 Park Street had, in accordance with the decree, been handed over to the mortgagor by the Official Trustee. I am unable to appreciate that argument. I cannot see why, if the

mortgagor were put into possession by the Official Trustee, and in accordance with the decree, the appellants have lost their right to the charge which is specifically created by that decree in their favour.

There is one argument of Mr. Garth which I ought to notice. It is said that if a transaction of this sort can stand, the result may be that co-sharers may on a partition, knowing that one of them has mortgaged his share, so arrange matters that he should get no portion of the immoveable property on the partition, but receive the whole of his share in cash, the effect of which would be to defeat the rights of his mortgagee. We are not dealing with that case now: there is no suggestion that this partition was unfair, improper, at any rate, there is no evidence of it. If such a case arise, as Mr. Garth suggests, I dare say the Courts will be able to deal with it satisfactorily.

The appeal must succeed. The appellants must have, as between themselves and the Roy mortgagees, who must pay them, the costs of this appeal and also the extra costs which have been occasioned by the raising of the present point in the Court of first instance and which they were ordered to pay.

Mr. Sinha's clients, the defendant appellants, must in the first instance pay the plaintiff's costs and may add them to their security.

STEPHEN J. I agree. I would add that it is quite plain that the appellant's claim, which is a charge upon the property, constitutes a deduction from the *corpus* of the property and is not affected by any dealings with the possession of the property on which the decision of the Judge of the Court of first instance is based.

WOODROFFE J. I agree with the judgment of the learned Chief Justice.

Attorney for the appellants: *Narendra Nath Mitter.*

Attorneys for the respondents: *Gregory & Jones, Sashi Sekhar Bonerjee and Kali Das Bhanja.*

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