(1894) 05 CAL CK 0015

In the Calcutta High Court

Khetterpal Sritirutno APPELLANT

Vs

Khelal Kristo Bhuttacharjee and by revivor
 Kally Churn Bhuttacharjee and Others Vs Durga Churn Bhuttacharjee and Others
 Sristidhur Couch Vs Kally Churn Bhuttacharjee and Others RESPONDENT

Date of Decision : 14-05-1894

Acts Referred:

Citation : (1894) ILR (Cal) 904

Hon'ble Judges : Sale, J

Bench : Single Bench

Judgement

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

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

3. 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.

4. 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.

5. 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.

6. 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 u/s 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.

7. 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 mortgage having been executed prior to the institution of the partition suit, the doctrine of Us pendens does not apply. If, however, the mortgagee bad 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.

8. It is objected, however, that this order cannot be made at the in stance 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.

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

