

(1926) 02 CAL CK 0013
In the Calcutta High Court

Nrisingha Ranjan Mukherjee and Another	APPELLANT
Vs	
Sm. Soudamini Dasi and Others	RESPONDENT

Date of Decision : 23-02-1926

Acts Referred:

Estates Partition Act, 1897 — Section 99

Citation : 95 Ind. Cas. 516

Hon'ble Judges : N.R. Chatterjea, Acting C.J.;Page, J;Hugh Walmsley, J;Cuming, J;Chakravati, J

Bench : Full Bench

Judgement

Cuming and B.B. Ghose, JJ.—(December 2,1925.) The suit out of which this appeal arises was brought for khas possession of a piece of homestead land on ejectment of defendant No.1 after service of notice to quit. The facts on which the question of law which arises for decision in this appeal may be shortly stated thus: The land in dispute along with other properties belonged to one Kshetra Mohan Mukherji and his cosharers, Kshetra Mohan being entitled to 1/5th share of the whole. He died leaving his childless widow Tripura Sundari as his heir. During her lifetime her co-sharers who had a 4/oth share in the property granted a mokarrari mourashi lease of the land in suit to one Dina Nath Mukerji by accepting a kabuliyat executed by the tenant, dated 30th September 1891. Tripura Sundari died sometime in 1904. Plaintiff inherited the properties as the reversionary heir of her husband. Defendant No.1 obtained by assignment the interest of Dina Nath in the land in dispute. Under a decree for partition by a Civil Court in a partition suit between the plaintiff and his co-sharers the disputed land along with other lands was allotted to the plaintiff. It has been found by the Court of Appeal below that neither Tripura Sundari nor the plaintiff had granted or acknowledged the mokarrari mourashi right of the tenant in the land. The question then arises as to whether the plaintiff obtained the land in dispute on its being allotted to him by the decree in the partition suit subject to the permanent lease granted by his former co-sharers or not. The Trial Court decided in favour of the plaintiff relying on an unreported decision pf the High Court. On appeal by

the defendant the Subordinate Judge has held that the plaintiff is bound by the lease and has dismissed the suit. The plaintiff appealed to this Court, and he being dead his representatives were substituted on the record.

2. It is contended on behalf of the appellants that they are entitled to the land allotted to their predecessor free from the mokarrari interest created on the land by the former co sharers of their predecessor. Reliance has been placed on the general principle of equity which was given effect to by the Privy Council in the case of *Byjnath Lall v. Ramooddeen Chowdhury* 1 I.A. 106 : 21 W.R. 233 : 3 S. P.C.J. 333 : 2 SP.C.J. 942 (P. C.) which was a case of a mortgage by a co-owner of joint property. Their Lordships say:--" It is, therefore, clear that the mortgagor had power to pledge his own undivided share in these villages; but it is also clear that he could not, by so doing, affect the interest of other sharers in them, and that the persons who took the security took it subject to the right of those sharers to enforce a partition, and thereby to convert what was an undivided share of the whole into a denned portion held in severalty." Their Lordships were further of opinion that the mortgagee had not only the right to accept what had been allotted to his mortgagor but that was, in the circumstances of the case, his sole right, and that, he could not successfully have sought to charge any other parcel of the estate in the hands of any of the former co owners. This principle of equity was applied to the case of a lease by a co-owner in *Joy Sankari Gupta v. Bharat Chandra* 26 C. 434 : 3 C.W.N. 209 : 13 Ind. Dec. (n. s.) 880. and in *Tarini Kanta Majum-dar v. Ishur Chandra Chakravarti* 18 Ind. Cas. 210 : 21 C.L.J. 603. In those cases the partitions were by the Collector under the Estates Partition Acts, but it is contended that the decisions turned upon the principle of equity recognised in *Byjnath's* case 1 I.A. 108 : 21 W.R. 233 : 3 Sar. P.C.J. 333 : 2 S P.C.J. 942 and not on any special provisions of the different Partition Acts. Lastly, the unreported decision in Appeal from Appellate Decree No. 384 of 1913 is relied on in support of the appellants' contention. That case related to another piece of land appertaining to the same estate as the land in the present case and depended upon the effect of the same partition decree as in this. There is absolutely no distinction between that case and the present case. On the other hand, the principle in *Byjnath's* case 1 I.A. 108 : 21 W.R. 233 : 3 S. P.C.J. 333 : 2 SP.C.J. 942. was not applied to the case of a lease in *Shaik Khan Ali v. Pestonji* 1 C.W.N. 62. This case was distinguished in the casa of *Joy Sankari Gupta v. Bharat Chandra* 26 C. 434 : 3 C.W.N. 209 : 13 Ind Dec. (N.S.) 880 on the ground that the partition in *Shaik Khan Ali's* case (4) was by the Civil Court. There does not, however, seem to be any distinction on principle where the special provisions of the Estates Partition Act do not come into play. *Shaik Khan Ali's* case 1 C.W.N. 62 was followed in *Bainddi Mandal v. Kailash Chandra Sardar* 64 Ind. Cas. 448 : 35 C.L.J. 166, in which also a distinction is made between the case of a lease and a mortgage. It may be pointed out that the principle in *Byjnath's* case 1 I.A. 106 : 21 W.R. 233 : 3 Sar. P.C.J. 333 : 2 SP.C.J. 942 has been applied, where there has been a partition under a decree of the Civil Court, in the case of a mortgage by a co-owner. See *Hem Chundur Ghose v. Thako Moni*

Debi 20 C 533 : 10 Ind. Dec. 362.

3. It would thus appear that there is a clear conflict of decisions in this Court as to the application of the rule of equity in Byjnath's case 1 I.A. 106 : 21 W.R. 233 : 3 S. P.C.J. 333 : 2 S P.C.J. 942 to the case of a lease granted by a co-owner, particularly between the unreported case mentioned above and the cases of Shaik Khan Ali v. Pestonji 1 C.W.N. 62 and Binaddi Mandal v. Kailash Chandra Sardar 64 Ind. Cas. 448 : 35 C.L.J. 166 which question requires decision by a Full Bench.

4. Another small point argued by the appellant is that the Subordinate Judge is wrong in dismissing the whole suit. The plaintiff became the owner of the entire land by the partition decree. If the mokarrari lease is held binding on him to the extent of 4/5th share he is entitled to joint possession with the defendant No. 1 to the 1/5th share to which the defendant had no permanent right. This proposition is not contested by the learned Advocate who appeared for the respondent.

5. The question referred to the Full Bench is-

Whether a person to whom a parcel of land has been allotted by a decree for partition of a Civil Court takes it subject to a permanent lease granted by his former co owners without his concurrence when the land was the joint property of all the co-sharers.

6. If it is answered in the negative, plaintiff will be entitled to a decree for ejectment for the entire land. If answered in the affirmative the question whether he is entitled to joint possession of 1/5th share will arise. The appeal being from an appellate decree is referred for final decision to the Full Bench,

7. Dr. Dwarka Nath Mitter (with him Babu Narayan Ch. Kar), for the Appellants

8. Mr." K. C.Chakravarti" (with him. Babu Panchanan Ghoshal), for the Respondents. ,

9. Babu Biraj Mohan Mojamdar, for the. Deputy registrar.

N.R. Chatterjea, A.C.J.

10. The question referred to the Full Bench is:

Whether a person to whom a parcel of land has been allotted by a decree for partition of a Civil Court takes it subject to a permanent lease granted by his former co-owners without his concurrence when the land was the joint property of all the co-sharers.

11. The plaintiff's predecessor-in-title had 1/5th share in the land in dispute along with other properties. His co-sharers who owned the remaining 4/5th share granted a permanent lease in respect of their shares to the defendant's predecessor-in-title The plaintiff brought a suit for partition in the Civil Court, and the disputed land was allotted to him in his share on partition. He then

brought a suit for ejecting the defendant after service of notice to quit. The defence was that the plaintiff's predecessor-in-title also had granted the lease, but the finding is against the defendant. It is not disputed that the plaintiff is entitled to joint possession in respect of 1/5th share and the question for consideration as stated above is, whether the land is subject to the permanent lease granted by the co-sharers owning the 4/5th share before the partition.

12. The general principle is that a co--barer in joint property cannot by dealing with such property affect the interest of the other sharers therein. In the case of *Byjnath Lall v. Ramoodeen Ghoudhury* 1 I.A. 108 : 21 W.R. 233 : 3 Sar. P.C.J. 333 : 2 S P.C.J. 942 . there was a mortgage of an undivided moiety in some villages forming a joint and undivided estate. Their Lordships observed: "It is, therefore, clear that the mortgagor had power to pledge his own undivided share in these villages; but it is also clear that he could not, by so doing, affect the interest of the other sharers in them, and that the persons who took the security took it subject to the right of those sharers to enforce a partition, and thereby to convert what was an undivided share of the whole into a defined portion held in severalty." It is true that in that case it was the mortgagee who was seeking to enforce his remedy not against the property mortgaged to him, but against property which had been allotted to the mortgagor on partition in substitution of the mortgaged property. But their Lordships held not only "that he has a right to do so, but that this, ?in the circumstances of the case, was his sole right, and that he could not successfully have sought to charge any other parcel of the estate in the hands of any of the former co-sharers."

14. The principle of *Byjnath's* case 1 I.A. 106 : 21 W.R. 233 : 3 Sar. P.C.J. 333 : 2 S P.C.J. 942 (P.C.) has been applied to a number of cases relating to mortgage. The partition in *Byjnath's* case 1 I.A. 106 : 21 W.R. 233 : 3 Sar. P.C.J. 333 : 2 Suth. P.C.J. 942 (P. C.) was under Regulation XIX of 1814, but the equitable principle enunciated has been applied to a case in which the partition was made by a Civil Court: see *Hem Chundur Ghose v. Thako Moni Devi* 20 C. 533 : 10 Ind. Dec. 362. The learned Judges in that case observed: "In the absence therefore of any fraud in effecting the partition, the plaintiff has no right to proceed against that portion of the undivided mortgaged property which on partition was allotted to the appellants, but he can proceed against that portion of the undivided property which was allotted to the mortgagor defendants in substitution of their undivided share in the portion mortgaged." A similar view was taken by *Mookerjee and Holmwood, J J.*, in *Hakim Lal v. Ram Lai* 6 C.L.J. 46. The partition in that case was under the Estates Partition Act, but the learned Judges observed: "It is well-settled, as was laid down by their Lordships of the Judicial Committee in *Byjnath Lall v. Ramoodeen Chowdhury* 1 I.A. 108 : 21 W.R. 233 : 3 Sar. P.C.J. 333 : 2 S P.C.J. 942 (P. C.) that the mortgagee of an undivided share in joint property is entitled only to property allotted on partition to the mortgagor if the partition was fair and equal and is not vitiated by fraud."

15. In *Bhup Singh v. Chedda Singh* 58 Ind. Cas. 171 : 42 A. 596 : A.L.J. 207 : 2

U.P.L.R. 345, the learned Judges referring to Byjnath's case 1 I.A. 106 : 21 W.R. 233 : 3 Sar. P.C.J. 333 : 2 S P.C.J. 942 observed: "It is immaterial whether the partition was made by the Revenue Authorities, or by the Civil Court, or by arbitration or by private arrangement, and it is not necessary that the mortgagee should have been a party to the partition- It is one of the incidents of a mortgage of an undivided share that the mortgagee cannot follow his security into

16. The hands of a co-sharer of the mortgagor who has obtained the mortgaged share upon partition. Of course, if the partition is tainted with fraud or if in making the partition the encumbrance was taken into account and the partition was made subject to the encumbrance, the result will be different; but in the absence of fraud or the circumstance mentioned above the mortgagee of remedy is against the share or property which the mortgagor has obtained under the partition.

16. It is unnecessary to consider the effect of a private partition, but it appears to be well-settled that the principle of Byjnath's case 1 I.A. 106 : 21 W.R. 233 : 3 S P.C.J. 333 : 2 S P.C.J. 942 applies to cases of mortgages whether the partition is under the Partition Act, or by a decree of the Civil Court. There is, however, a divergence of opinion as to whether the principle applies to a case of lease.

17. In *Sharat Chunder Burmon v. Hurgobindo Burmon* (9), the Court had to consider the case of a lease (mokarrari lease) granted by a co sharer before partition. The partition was under the Partition Act, but the learned Judges (Mitter and Maclean, JJ.) observed that the principle [in Byjnath's case 1 I.A. 106 : 21 W.R. 233 : 3 S P.C.J. 333 : 2 S P.C.J. 942 (P. C.)] "is applicable to all assignees of any interest whatever." In *Joy Sankari Gupta v. Bharat Chandra* 26 C. 434 : 3 C.W.N. 209 : 13 Ind Dec. 880 the partition was effected under the Estates Partition Act but Maclean, C. J. and Banerjee, J., said (at page 439*): "But even if Section 128 of the Bengal Act VIII of 1876 be not applicable to this case, still we think that, according to the general principles of equity, the mortgagor in question, if it was created by defendant No. 7 alone, could not affect the lands allotted to the share of any other co-sharer upon a partition by the Collector, but could hold good only in respect of lands allotted to the mortgagor's share." see also *Tarini Kanta Majumdar v. Ishur Chandra Chakravarti* 18 Ind. Cas. 240 : 21 C.L.J. 603.

18. A contrary view, however, was taken in the case of *Shaik Khan Ali v. Pestonji* 1 C.W.N. 62. There, a lease was granted in respect of one third share of certain property pending a suit for partition. Petheram, O.J. and Rampini, J., observed: "At the time when this lease was granted by undivided co-sharers, they had a perfect right to grant the lease which would cover their undivided shares, and these shares were their shares, in the piece of land included in the lease.

19. I quite fail to see how any subsequent dealing with the property by partition,

sub-sequent to the creation of the estate by a lease and by a person who had a perfect right to create it could have affected the right of the lessee.

20. With great respect for the opinion of the learned judges I think that a co-sharer has not a "perfect right" in dealing with joint property in so far as it affects the rights of the other co-sharers. The opinion of the learned Judges is opposed to the principle laid down by the Judicial Committee in *Byjnath's case* 1 I.A. 106 : 21 W.R. 233 : 3 Sar. P.C.J. 333 : 2 S.P.C.J. 942, viz., that a co-sharer cannot by pledging his share affect the interest of the other sharers in it.

21. The case of *Shaik Khan Ali v. Pestonji* 1 C.W.N. 62 was followed in *Bainaddi Mandal v. Kailash Chandra Sardar* 64 Ind. Cas. 448 : 35 C.L.J. 166 where the learned Judges (Richardson and Cuming, JJ.) observed that "the difference between the leasee and the mortgagee is this, that in the case of a lease followed by possession of the property demised, the title of the lease is complete, while in the case of a mortgage, the land is merely hypothecated and no title thereto is perfected until the security is enforced : see *Byjnath Lall v. Ramooddeen Chowdhury* 1 I.A. 106 : 21 W.R. 233 : 3 Sar. P.C.J. 333 : 2 S.P.C.J. 942 (P.C.). "There is no doubt a difference between the interest of a mortgagee and a lessee as pointed out by the learned Judges, but we are unable to hold that there is any difference between a mortgage and a lease so far as rights of the co-sharers are concerned in *Freeman on Co-tenancy and Partition*, 2nd Edition, Section 199) the principle is stated as follows:—"A lease or deed by one tenant in common to a stranger of a portion of the joint estate, although voidable by the co-tenants who do not join therein, is valid between the parties and against all persons unless so avoided. If the title of the co-tenant entitled to disaffirm the conveyance becomes vested in the one by whom it was executed, the newly acquired title of this lessor or grantor will enure by estoppel to the benefit of the lessee or grantee. Such a conveyance is undoubtedly void so far as it undertakes to impair any of the rights of the other co-tenants. It will not justify the grantee in taking exclusive possession of the part described in his deed. It will not deprive the other co-tenants of the right to enjoy every part and parcel of the real estate; nor can it, to any extent, prejudice or vary their right to a partition of the common property. The grantee is liable to lose all his interest in the parcel conveyed to him, by its being set off to some other of the co-tenants upon partition. But although the deed does not impair the rights of the other co-tenants, it by no means follows that they may treat it as void, or entirely disregard it. While falling short of what it professes to be, it nevertheless operates on the interest of the grantor, by transferring it to the grantee."

22. The principle laid down by the author is similar to that enunciated by *Byjnath's case* (1).

23. I may refer to the decision of *Fletcher and Smither, JJ.*, in the unreported case* S. A. No. 384 of 1913, decided 30th March 1917. That case arose out of the very same partition with which we are dealing in the present case, and the question to be considered was to what extent, if at all, the plaintiff was bound by

the lease granted by the other four co-sharers. The learned Judges following Byjnath's case 1 I.A. 106 : 21 W.R. 233 : 3 Sar. P.C.J. 333 : 2 S P.C.J. 942 held that "a person taking an interest from persons who have an undivided interest in the property takes subject to the rights of the other co-sharers who are not bound by the transaction, namely, that if the property comes to be partitioned, the rights of the other co-sharers not bound by the lease, as it is in the present case, would not be affected by the grant of the lease.

24. It is contended on behalf of the respondents that it was for the plaintiff (appellant) to show that his interest had been affected, in other words that the lease had not been taken into account in making the allotments on partition. But the plaintiff was allotted the disputed land on partition : he had not granted any lease. It was, therefore, for the defendant to show any equitable circumstances which would render the lease binding upon the plaintiff.

25. I would accordingly answer the question referred to the Full Bench in the negative.

Walmsley, J.

26. I agree.

Cuming, J.

27. I also agree.

Page, J.

28. I have had the advantage of reading the judgment of the learned Acting Chief Justice, and I agree that a negative answer should be given to the question referred to the Full Bench.

Chakravarti, J .

29. The question referred to the Full Bench runs as follows:

Whether a person to whom a parcel of land has been abetted by a decree for partition of a Civil Court takes. it subject to a permanent lease granted by his former Co owners without his concurrence when the land was the joint property of all the co sharers.

30.The principle that the interest of a co-sharer in a joint property is not affected by a mortgage created by another co sharer and the charge so created on partition falls upon the land exclusively allotted to the share of the co-sharer who created such charge has been laid down by the Judicial Committee in the case of Byjnath Lall v. Ramoodeen Chowdhury 1 I.A. 106 : 21 W.R. 233 : 3 S. P.C.J. 333 : 2 S P.C.J. 942 and the question here is, does the same principle apply to other encumbrances created by a co-sharer, namely, a grant of a permanent tenure by him. On principle there seems to be no distinction. The principle laid down in the case above cited has been recognised by the Legislature in Section 99 of the Estates Partition Act, so far as under-tenures are concerned. The

incumbrance so created is transferred to the lands which fall on a pattition to the grantor of such tenures.

31. In my opinion whether the partition is effected by the Collector or the Civil Court, the same equitable principles are applicable.

32. The co sharer who granted no permanent tenure parts with his unencumbered rights in the lands which fall into the exclusive allotment of his cc-sharer who granted the lease and it is only just that the lands which fall to him in entirety should be lands unencumbered as was his share when the lands were joint. The grantee of such a tenure cannot jultly complain of such transter because he took the tenure subject to the right of the other co-sharer to a just and equitable partition. I have no hesitation, therefore, in following the case of Joy Sankari Gupta v. Bharat Chandra 26 C. 434 : 3 C.W.N. 209 : 13 Ind Dec 880 and I, therefore, answer the question referred to the Full Bench in the negative.

N.R. Chatterjea, A.C.J.

33. The result is that the appeal is allowed and the decree of the Court of first instance restored.