

Haji Mohammad Afzal Khan - - - - - *Appellant*

v.

Malik Abdul Rahman and others - - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF THE NORTH-
WEST FRONTIER PROVINCE.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 14TH JULY, 1932.

Present at the Hearing :

LORD WRIGHT.

SIR LANCELOT SANDERSON.

SIR DINSHAH MULLA.

[*Delivered by Sir DINSHAH MULLA.*]

The questions involved in this appeal relate to the effect of a partition of joint properties effected by a decree, where the decree is one made on an award, on a prior mortgage and a prior attachment of the share of one of the co-owners in some of the properties.

Haji Malik Rahman, a Mahommedan, died in or about 1910, leaving a will dated the 12th June, 1910, whereby he devised certain immovable properties to his son Malik Mohib Ali, who is the third respondent in this appeal, and his two grandsons Sardar Ali and Sabz Ali, in three equal shares. On the death of Haji Malik Rahman, the third respondent entered into possession of the properties and recovered the rents and profits thereof on behalf of the family. Sabz Ali died in 1914 leaving two children, who are the first and second respondents in this appeal, and on his death his one-third share in the above-mentioned properties passed to them. The first and second respondents were both minors at the date of their father's death and also at the date of the suit out of which the present appeal arises.

On the 26th April, 1923, the third respondent and his son Sardar Ali executed a mortgage of some of the properties in favour of the appellant to secure payment of Rs. 100,000, lent and advanced to them by the appellant. The mortgage purported to be one with possession.

On the same day the appellant granted a lease of the mortgaged properties to the mortgagors at an annual rent of Rs. 12,000.

Some time thereafter Sardar Ali died without leaving any issue, and on his death his one-third share passed to his father, the third respondent, as his heir. The third respondent thus became entitled to a two-thirds share in the properties, the remaining one-third being the share of the first and second respondents.

The rent under the lease fell into arrear, and the appellant obtained three decrees for arrears for various periods against the third respondent, and in execution of the decrees attached four immovable properties, being properties other than those comprised in the mortgage, but forming part of the properties bequeathed by the will of Haji Malik Rahman.

Subsequently, on the 19th August, 1926, Musammat Tajwar Sultan was appointed guardian of the person and property of the first and second respondents. Soon after her appointment she demanded their one-third share in all the properties from the third respondent. This was followed by a reference to arbitration on the 4th September, 1926, and an award was made on the 7th January, 1927. The third respondent made a statement before the arbitrators, but he did not disclose the mortgage to them. By their award the arbitrators awarded to the first and second respondents in lieu of their one-third share and the mesne profits thereof (1) some of the properties comprised in the mortgage, and (2) all the four properties attached as aforesaid. On the 10th February, 1927, a decree for partition was passed in terms of the award under clause 21 of Schedule II of the Civil Procedure Code, and the first and second respondents were in execution of the decree put in possession of the properties allotted to them. It is upon the effect of this award and decree that the decision of the questions in this appeal depends.

Subsequently an application was made on behalf of the first and second respondents under Order 21, rule 58, of the Code, to release the four properties from attachment, and the attachment was raised by an order dated the 18th January, 1928.

Thereupon, on the 13th December, 1928, the appellant brought the suit out of which this appeal arises in the Court of the Subordinate Judge of Peshawar to establish his right to attach the two-thirds share of the third respondent in the four properties, and for a declaration that he was entitled to proceed against the mortgaged properties to the extent of the two-thirds share of the third respondent in them. The plaint stated that the arbitration proceedings were collusive, and that

even if they were not, neither the award nor the decree made on it could affect the appellant's rights under the mortgage or the attachment, as they both were of a date prior to the reference to arbitration. It would appear from the plaint that the appellant conceded that neither the mortgage nor the attachment was binding on the one-third share of the first and second respondents.

The Subordinate Judge held that the arbitration proceedings were collusive, and passed a decree for the appellant on the 22nd November, 1929.

On appeal the Court of the Judicial Commissioner, North-West Frontier Province, considered that the suit was one under Order 21, rule 63, of the Code, and that no claim in respect of the mortgage could be included in such a suit, and the claim was accordingly not entertained. As to the attachment they held that there was no evidence to show that the award was obtained by fraud, and that the order releasing the properties from attachment was therefore correct. Accordingly they reversed the decree of the Subordinate Judge, and dismissed the plaintiff's suit. It is from this decree that the present appeal to His Majesty in Council has been brought.

Two contentions were raised on behalf of the appellant before their Lordships. The first was that where one of several co-sharers mortgages his undivided share in some of the properties held jointly by them, and the properties so mortgaged are allotted on a partition by arbitration without the intervention of the Court to the other co-sharers, the partition, being subsequent in date to the mortgage, cannot affect the rights of the mortgagee to enforce his charge against the share of the mortgagor in the mortgaged properties. The second was that where the interest of one of several co-sharers in some of the properties held jointly by them is attached in execution of a decree against him, and those properties are subsequently allotted to the other co-sharers on a partition by arbitration without the intervention of the Court, a transfer by the judgment-debtor of the interest so attached to the other co-sharers is a private transfer within the meaning of section 64 of the Civil Procedure Code, and therefore void as against the claim of the attaching creditor, even if the transfer was made pursuant to a decree passed on the award. It was not contended before their Lordships that the partition was unfair or that it was made with the object of defrauding the appellant.

The respondents abandoned before their Lordships the contention as to misjoinder of claims that had prevailed with the Appellate Court, and invited their Lordships to decide the question in respect of the mortgage on its merits.

As regards the first point, their Lordships are of opinion that where one of two or more co-sharers mortgages his undivided share in some of the properties held jointly by them, the mortgagee takes the security subject to the right of the other co-sharers to enforce a partition and thereby to convert what was an undivided

share of the whole into a defined portion held in severalty. If the mortgage, therefore, is followed by a partition, and the mortgaged properties are allotted to the other co-sharers, they take those properties, in the absence of fraud, free from the mortgage, and the mortgagee can proceed only against the properties allotted to the mortgagor in substitution of his undivided share. This was the view taken by the Board in *Byjnath Lall v. Ramoodeen Chowdry* (1874) L.R. 1 Ind. App. 106. In that case the partition was made by the Collector under Regulation XIX of 1814 (Bengal), and the mortgagee was seeking to enforce his remedy not against the properties mortgaged to him, but against the properties which had been allotted to the mortgagor in lieu of his undivided share; but the Board held that not only he had a right to do so, but that it 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-sharers. Their Lordships think that the principle enunciated in that case applies equally to a partition by arbitration such as the one in the present case. Their Lordships are therefore of opinion that the appellant is not entitled to enforce his charge against the properties allotted to the first and second respondents. The third respondent (the mortgagor) has not appeared before their Lordships, and their Lordships express no opinion as to any other rights which the appellant may have in respect of his mortgage.

It was brought to their Lordships' notice that on the 27th October, 1926, a suit had been brought by the appellant on the mortgage in the Court of the Subordinate Judge of Peshawar, and that a decree for money was passed in his favour on the 27th February, 1928, which was altered into a mortgage decree on the 29th January, 1931. No argument was addressed to their Lordships as to the effect of these proceedings on the present suit, and their Lordships express no opinion as to this either.

The second question falls to be decided under section 64 of the Civil Procedure Code, which is as follows:—

“Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein contrary to such attachment, shall be void as against all claims enforceable under the attachment.”

A decree for partition may be made (1) in a suit for partition heard and decided by the Court itself; or (2) it may be made on an award in a similar suit, where the matters in difference between the parties to the suit are referred to arbitration by an order of the Court made on the application of the parties; or (3) it may be made on an award, where the matters in difference are referred to arbitration without the intervention of the Court, as in the present case.

It was not disputed before their Lordships that a transfer of property made pursuant to a decree in the first two cases was not a “private” transfer. But it was argued that a transfer

made pursuant to a decree in the third case stands on a different footing, for the proceedings in that case originate not with a suit but with a private agreement to refer, and the transfer, therefore, must be regarded as a private transfer within the meaning of section 64 and void as against the attaching creditor. Their Lordships are unable to accept this argument. They think that a transfer made pursuant to a decree in the third case is as much a transfer under an order of the Court as a transfer in the first two cases, and not a private transfer. As in the first two cases, so in the third, if the party against whom the decree is passed fails to transfer the property as required by the decree, the transfer may be enforced by proceedings in execution, and this is what actually happened in the present case. The third respondent did not deliver possession to the first and second respondents of the properties allotted to them under the decree until after execution had been taken out against him. Such a transfer cannot be said to be a private transfer within the meaning of section 64, because the initial step which led eventually to the decree was not a suit for partition, but an agreement to refer the question of partition to arbitration. Their Lordships, therefore, consider that the appellant is not entitled to proceed in execution against the properties allotted to the first and second respondents.

In the result, their Lordships are of opinion that this appeal fails, and that it should be dismissed, and their Lordships will humbly advise His Majesty accordingly. The appellant must pay the costs of the first and second respondents before this Board.

HAJI MOHAMMAD APZAL KHAN

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MALIK ABDUL RAHMAN AND OTHERS.

DELIVERED BY SIR DINSHAH MULLA.

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