Privy Council Appeal No. 28 *of* 1935.
Bengal Appeal No. 6 *of* 1934.

Pratapmull Agarwalla *alias* Pratapmull Bagaria and another *Appellants*

v.

Dhanabati Bibi *alias* Dhanoo Bibi and others - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 4TH NOVEMBER 1935

Present at the Hearing:

LORD THANKERTON.
SIR LANCELOT SANDERSON.
SIR GEORGE RANKIN.

[*Delivered by* SIR LANCELOT SANDERSON.]

This is an appeal by the plaintiffs in Suit No. 561 of 1933 from a decree of the High Court of Judicature at Fort William in Bengal in its appellate jurisdiction dated the 5th June, 1934, which reversed a decree passed by the said High Court in its original civil jurisdiction dated the 21st of November, 1933, and dismissed the plaintiffs' suit with costs.

The plaintiffs carry on business under the name and style of Pratapmull Rameswar as moneylenders. Chunilal Johury and his son, Motilal Johury, constituted a joint Hindu family governed by the Mitakshara law and from time to time the plaintiffs lent them money which they alleged was for legal necessity and for the benefit of the borrowers and their family on the security of properties belonging to them. On the 21st December, 1927, plaintiffs lent Chunilal and Motilal Rs.25,000 at 8 per cent. interest on mortgage; on the 12th October, 1928, they lent them a further sum of Rs.2,00,000 at 7½ per cent. interest on mortgage and on the 11th March, 1929, they lent them Rs.35,000 at 7 per cent. interest on mortgage. The mortgages were upon the joint ancestral family property. Subsequent to these transactions Motilal had two sons born to him, viz., Narendra Singh Johury, born in October, 1929, and Basant Singh Johury, born in January, 1931, each of whom on birth became a member of the joint Hindu family.

On the 26th of March, 1930, Motilal instituted in the High Court at Calcutta a suit numbered 655 of 1930 for the

partition of the joint family property, for the appointment of a receiver and other reliefs. The defendants in the suit were Chunilal Narendra Singh, Dhanabati, the wife of Chunilal and Narendra who was in the first instance called " Khoka ". In July, 1931, Basant Singh was added as a party and the name " Narendra " was substituted for " Khoka " in respect of the elder son.

On the 9th May, 1931, the plaintiffs filed in the said High Court a suit, No. 1010 of 1931, on the said mortgages against Chunilal, Motilal, Narendra Singh and Basant Singh. In that suit Musammat Dhanabati, the wife of Chunilal was guardian *ad litem* of the minor defendants, Narendra Singh and Basant Singh.

On the 19th June, 1931, Dhanabati, *alias* Dhanoo Bibi, filed her written statement in the " partition " suit. She claimed that she was entitled to a share in the joint estate equal to that of the plaintiff, Motilal, and that her share should be allotted to her in severalty.

She prayed further that the joint estate should be charged with maintenance at the rate of Rs.500 per month and that a receiver should be appointed to enforce the same.

On the 2nd of July, 1931, terms of settlement of the mortgage suit (No. 1010 of 1931) were agreed and were embodied in a document of that date, which was executed by Chunilal, Motilal, and Dhanabati, as guardian *ad litem* of the infant defendants Narendra and Basant and the solicitors for the plaintiffs.

On the 8th July, 1931, a consent decree embodying the terms of settlement was made.

By the terms thereof the defendants were to pay the sum of Rs.3,03,328—1—3 within a year from the date of the aforesaid agreement, and in default of payment the mortgaged premises or a sufficient part thereof were to be sold with the approbation of the Registrar of the High Court instead of by the Receiver appointed in the said suit.

On the 25th August, 1931, a preliminary decree in the partition suit (No. 665 of 1930) was made.

By the said decree it was declared that Dhanabati was entitled to three equal ninth parts or shares of the properties, a commissioner was appointed and he was directed to make a division of the properties into nine equal parts and to allot to Dhanabati three equal ninth parts or shares to be held and enjoyed by her in severalty as a Hindu wife under the Mitakshara school of Hindu Law.

It appears that nothing further was done in the partition suit after the said preliminary decree and no division of the property was carried out by the commissioner.

On the 3rd of May, 1932, an order was made in the mortgage suit for payment of the income of the mortgaged property, which was in the hands of the Receiver, to the plaintiffs, without prejudice to the alleged rights of Dhanabati.

On the 14th July, 1932, Chunilal and Motilal were adjudicated insolvent.

It appears that the plaintiffs in the mortgage suit (No. 1010 of 1931) applied to the High Court that Dhanabati and Jashwati Bibi, who is the wife of Motilal, should be added as parties to the suit; this application was dismissed on the 22nd of February, 1933.

By the order of the Court of that date the Official Assignee of Calcutta was added as a party to the suit.

On the 11th March, 1933, the suit, No. 561 of 1933, in which this appeal arises, was instituted by the present appellants, who are the mortgagees under the abovementioned mortgages. The defendants in the suit are Dhanabati, Jashwati Bibi, Narendra, Basant (the last two being minors), and the Official Assignee of the estate of Chunilal and Motilal. The main allegations on which the suit was based were as follows :—

> " 8A. The plaintiffs state that the said partition was made with the object of creating complications and saving one-third of the properties from the mortgages of the plaintiffs by having the same allotted to the defendant Dhanabati.
>
> " 8B. The said Dhanabati has been and is falsely asserting that the said mortgages in favour of the plaintiffs as also the proceedings in the said suit and the mortgage decree referred to in paragraph 5 hereof are illegal and not binding upon her. The defendant Jashwati is also making assertions to the same effect and is interested in denying the rights of your petitioners as mortgagees and the validity of the said mortgages and the proceedings and decree above referred to and are assisting and colluding with the said Chunilal Johury and Motilal in defeating the claims of the plaintiffs. The plaintiffs state that such mortgages and the said proceedings and decree in suit No. 1010 of 1931 are binding upon all the defendants and in particular the defendants Dhanabati and Jashwati."

The reliefs claimed were as follows :—

> " (i) A declaration that the said mortgages referred to in paragraph 4 hereof are binding upon the defendants and in particular upon the defendants Dhanabati and Jashwati.
>
> " (ii) That it be declared that the proceedings and the decree dated 8th July, 1931, in Suit No. 1010 of 1931, are binding upon all the defendants and in particular upon the defendants Dhanabati and Jashwati.
>
> " (iii) That this suit be treated as supplementary to the said Suit No. 1010 of 1931 and it be declared that the decree and proceedings in such suit are binding on the defendants and that if necessary the time for redemption be extended.
>
> " (iv) In the alternative a decree in form No. 5 (*a*) or form No. 5 of the Appendix D of the Code of Civil Procedure with such variations as may be found necessary.
>
> " (v) Receiver."

The following issues at the trial before Buckland J. were submitted on behalf of the defendant Dhanabati, who alone filed a written statement.

> " 1. Is the suit maintainable having regard to :—
>
> " (*a*) The consent decree,
>
> " (*b*) Section 47 of the Civil Procedure Code, and
>
> " (*c*) Section 42 of the Specific Relief Act ?

"2. Was there any joint family after the institution of the partition suit?

"3. Had the plaintiffs knowledge that Dhanabati was a party to the partition suit?"

It is to be noted that in her written statement Dhanabati denied that the alleged loans or mortgages were for legal necessity or for benefit as alleged, or that the plaintiffs had any interest in the properties in question, or that the alleged mortgages or loans were in any way binding on her. Dhanabati, however, at the trial, did not raise any issue upon this matter, or give any evidence in respect thereof.

The learned Judge did not give any decision in respect of issue 1 (*a*), as apparently the plaintiffs at the trial were content with a declaratory decree, and the first issue was directed to the fourth claim for relief, viz., the alternative prayer for a mortgage decree.

The issue No. 1 (*b*) as to section 47 of the Civil Procedure Code was decided in favour of the plaintiffs: it was not raised on the appeal in the High Court and no question now arises in respect thereof.

As regards the issue 1 (*c*) the learned Judge held that the plaintiffs were entitled to institute the suit in order to establish their rights as against the defendant Dhanabati, who was denying them.

As regards the second and third issues the learned Judge held that when the mortgage suit was instituted Dhanabati had no rights except a right to maintenance, and that being so, the question whether the institution by Motilal of the partition suit amounted to a severance affecting the status of the joint family did not arise, and that all the persons who had any actual interest at the time in the mortgaged property were in fact parties to the mortgage suit. Consequently, the learned Judge held that the plaintiffs were entitled to succeed and he made a declaration in the form of prayers 1 and 2 of the amended plaint.

Dhanabati appealed to the High Court, in its civil appellate jurisdiction against the judgment and decree of Buckland J.—the appeal was heard by Costello and Lort-Williams JJ.—who stated that of the issues raised at the trial only the following need be considered, viz. :—

"1. Is the suit maintainable having regard to—
Section 42 of the Specific Relief Act?

"2. Was there any joint family after the institution of the partition suit?

"3. Had the plaintiffs' knowledge that Dhanabati was a party to the partition suit?"

The learned Judges were of opinion that the first issue was of minor importance. They held that the declaration made by Buckland J. was not in a proper form, but that the Court could make a proper decree if satisfied that the plaintiffs were entitled to it.

With regard to the second and third issues the learned Judges were of opinion that the judgment of Mitter J. in the case on which Buckland J. had relied, viz. : *Sheo Dyal Tewaree* v. *Jadoonath Tewaree* (1868) 9 W.R. 61 was contrary to the earlier view expressed in *Vato Koer* v. *Rowshun Singh* 8 W.R. 52 and the Privy Council decision in *Appovier* v. *Rama Subba Aiyan* (1866) 11 M.I.A. 90. and was definitely overruled by the Privy Council in *Balkishen Das* v. *Ram Narain Sahu* 30 I.A. 139.

The passage in the judgment of Mitter J. to which the learned Judges referred. as stated by them, was as follows :—

> " division by metes and bounds was necessary to constitute partition under the Mitakshara and that under the Hindu Law two things at least are necessary to constitute partition: the shares must be defined and there must be distinct and independent enjoyment of those shares ".

With respect to the learned Judges their Lordships are of opinion that the above-mentioned judgment of Mitter J. has not been rightly appreciated. Mitter J. was considering the effect of the death of one Golaba, the mother of one Shibdyal, and grandmother of the appellant, upon the alleged share of Golaba.

He referred to the text of the Mitakshara, viz. :—

> " ' of heirs dividing after the death of the father, let the mother also take a share,' " and proceeded as follows " or in other words, the mother or grandmother, as the case might be, is entitled to a share *when* sons or grandsons divided the family estate between themselves. But the mother or the grandmother can never be recognised as the owner of such a share, until the division has been *actually* made. She has no pre-existing vested right in the estate except a right of maintenance. She may acquire property by partition, for partition is one of the recognised modes of acquiring property under the Hindu Law. But partition, in her case, is the *sole* cause of her right to the property."

Mitter J. proceeded to say :—

> " The learned Counsel for Doolaro has contended that in the case before us, partition must be *held to have actually taken place*, and he cited a ruling of Her Majesty in Council to the effect, that division by *metes* and *bounds* is not at all necessary to constitute partition under the Mitakshara. We do not for a moment, in fact we cannot, question the correctness of this ruling."

In this passage Mitter J. probably was referring to the decision of the Privy Council in *Appovier* v. *Rama Subba Aiyan* (*supra*) which was in 1866, about two years before Mitter J.'s decision.

In that case it was held that the deed in question being a division of rights operated as a conversion of the tenancy and a change of " *status* " in the family *quoad* the property specified, changing, as it were, the joint tenancy thereof into a tenancy in common and by operation of law making the members of the previously undivided family a divided family in respect of such property. The effect of the decision in *Appovier* v. *Rama Subba Aiyan* (*supra*) was stated

by Lord Davey in giving the judgment of the Judicial Committee in *Balkishen Das* v. *Ram Narain Sahu* (*supra*) at p. 148. The question there was not whether " there was a separation by metes and bounds, but a separation in estate and interest : for that would have been the same legal effect so far as altering the status of the family was concerned, as a partition of metes and bounds ".

In neither of these Privy Councils decisions was the right of a mother or wife of one of the members of the joint family to have a share in the joint family property under consideration, nor can their Lordships find that in *Balkishen Das* v. *Ram Narain Sahu* (*supra*) the judgment of Mitter J. on this question was " definitely overruled " as the learned Judges of the High Court stated.

The learned Judges referred also to Sir Dinshah Mulla's " Principles of Hindu Law " 7th Edition, paragraph 322, page 390, which deals with the question how partition is effected; the paragraph is part of chapter 16, which relates to the Mitakshara law.

That paragraph obviously relates to the effect of partition on the tenure of the property : and it concludes with the statement, " the property ceases to be joint immediately the shares are defined and thenceforth the parties hold the property as tenants in common ". It is also pointed out that after the shares are defined the parties may divide the property by metes and bounds or they may continue to live together and enjoy the property in common as before.

The contention on behalf of the appellants in the present case was that this passage relates only to the status of the members of the joint family after partition and does not touch the right of the wife of one of the members : for it was urged that even after a partition, which altered the status of the members of the joint family, the wife of one of the members would be entitled to no more than maintenance as long as the members of the joint family continued to live together and enjoy the property in common as before.

This contention is said to be supported by the passage in the above-mentioned paragraph numbered (2) (iii) at page 391, which runs as follows :—

> " (iii) Partition between male coparceners entitles the wife, mother, and grandmother to a share in the joint property [ss. 315-317] ; they are not entitled to any such share until partition."

It was argued on behalf of the appellants that the word " partition " in the last sentence must mean " division ", as until the property was divided by metes and bounds the wife would be entitled to maintenance only.

Mitter J. dealt with this matter at page 63 of 9 W.R. in the following passage :—

> " Or suppose that Golaba, instead of appearing as an intervenor in the Lower Court, as she did, under section 73 of the Procedure

> Code, had brought an action against them both for the arrears of her maintenance which would have accrued subsequent to the decree of the Lower Court down to the present day? What answer could they have given to such a claim? Surely they could not have pleaded, she was not entitled to be maintained out of the estate, because they were *going to make over to her* a share of it. Such a plea would be absurd on the very face of it. She is not to starve until the assignment is *actually* made.

The decision of Mitter J. in the above-mentioned case, 9 W.R. 62, which is material to the matter now under consideration, was that according to the Mitakshara law, the mother or the grandmother is entitled to a share when sons or grandsons divide the family estate between themselves, but that she cannot be recognised as the owner of such share until the division is actually made as she has no pre-existing right in the estate except a right of maintenance.

In 1910 the High Court of Allahabad came to the same conclusion in *Beti Kunwar* v. *Janki Kunwar* I.L.R. 33 All. 118, Stanley C.J. and Banerji J. held, at page 121, that :—

> "It is only when the sons actually divide the property and effect a complete partition that the mother can get a share. There is nothing in the Mitakshara from which we may infer that upon a mere severance of the joint status of a Hindu family a mother can claim a share."

The abovementioned decisions of Mitter J. and Stanley C.J. and Banerji J. were followed by the High Court of Bombay in 1918 in the case of *Raoji Bhikaji Kondkar* v. *Anant Laxman Kondkar* I.L.R. 42 Bom. 535.

In their Lordships opinion the abovementioned decisions correctly represent the Mitakshara law on the matter now under consideration, for it is not suggested that there is any difference in this respect between the rights of a wife and those of a mother or grandmother.

The result of the abovementioned conclusion is that inasmuch as the preliminary decree in the partition suit was not carried out and no actual division of the joint family property was made, Dhanabati did not become the owner of the share mentioned therein.

Consequently Buckland J. was right in holding that as Chunilal, Motilal and his two sons, Narendra and Basant, were parties to the mortgage suit (No. 1010 of 1931) all persons who at the time of the decree had any interest in the joint property were parties to the suit and the decree was a valid decree.

Dhanabati at that time was not the owner of any share in the joint property and had no right of redemption.

The decision therefore of Buckland J. that the suit was maintainable under section 42 of the Specific Relief Act was correct. Their Lordships, however, are in agreement with the learned Judges of the Appeal Court that the de-

claration, which was made by Buckland J. was not in the proper form. This however is merely a matter of form and their Lordships are of opinion that it should be declared as follows :—

> " I. That the mortgages in question are valid and the decree dated the 8th July, 1931, and made in Suit (No. 1010 of 1931) is valid and enforceable.
>
> " II. That the female defendants had not at the date of the said decree any right or title in or to the mortgaged property or any interest therein entitling them to redeem."

Their Lordships therefore are of opinion that this appeal should be allowed, the decree of the High Court dated the 5th of June, 1934, should be set aside and the decree made by Buckland J. dated the 21st of November, 1933, should be restored, except that the declarations hereinbefore stated should be substituted for the declarations contained in the said decree made by Buckland J.

The respondent Dhanabati Bibi must pay the costs of the plaintiffs in the Appeal Court in India and of this appeal.

Their Lordships will humbly advise His Majesty accordingly.

(32237—3A) Wt. 8034—41 170 11/35 P. St G. 338

In the Privy Council.

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