

Basanta Kumar Das Vs Kusum Kumari Dasi

Court: Calcutta High Court

Date of Decision: April 17, 1916

Acts Referred: Civil Procedure Code, 1908 (CPC) â€” Order 47 Rule 1, 152

Citation: 38 Ind. Cas. 584

Hon'ble Judges: Greaves, J

Bench: Single Bench

Judgement

Greaves, J.

This is an application made in a partition suit by the mortgagees of the plaintiffs' shares asking (i) to be added as parties and to

be allowed to appear in all proceedings in this Court and before the Commissioner of partition and the Receiver at their own costs, such costs to

be added to their claim as mortgagees, (ii) for revocation of an order of the 9th August 1915, directing (inter alia) a sale of the one-fourth share of

the premises Nos. 4 and 5, Jackson Ghat Street, which is one of the properties to be partitioned in the suit for the purpose of defraying the costs

of the suit. Other relief is also sought. The suit was instituted on the 17th May 1910. The mortgages were respectively executed on the 5th August

1910, the 26th July 1911, the 29th May 19 > 2 and the 30th August 1913, and purported to charge the plaintiffs' undivided half share in the estate

of one Dinabandhu Das, which estate is the subject-matter of the partition suit.

2. A decree was made in the suit on the 4th January 1912, from which it appears that the plaintiffs were entitled to a one-third and not a one-half

share in the estate of Dinabandhu Das, and the mortgagees charge their mortgagors", the plaintiffs and their attorneys with fraudulently representing

that they were entitled to a one-half share, whereas they, in fact, knew that they were only entitled to a one-third share. On the 9th August 19=15,

an order was made by Mr. Justice Chaudhuri giving liberty to sell the moveables and the one-fourth undivided share of 4and 5y Jackson Ghat

Street, free from encumbrances-for the purpose of paying the costs already incurred in the suit and the expenses of the partition.

3. The parties to the suit agreed among themselves that the one-fourth share in 4 and 5, Jackson Ghat Street, should be offered to the co-sharer

for Rs. 35,000. A contract at this price was eventually entered into, not with the co-sharer but with another person whose name was disclosed: at

a late stage The conveyance has been approved, the earnest money has been paid, and the 20th March last was fixed for completion.

4. I should say here that upon the materials: before me the applicant has not satisfied me that the sale was not fair and aboveboard and that the

price was not a fair one,"" and I see no grounds for believing, upon the materials before me, that the sale was collusive or fraudulent. So far as the-

applicant asks to be added as a party and to attend the proceedings at his own expense, I should have been disposed to accede to his application

having regard to the conduct of the mortgagors, but I understand that he does not now desire this unless I am prepared to set aside the sale on the

ground that Mr. Justice Chaudhuri's order was made without jurisdiction. This is the substantial question which has been argued before me: It is

said that Mr. Justice Chaudhuri had no jurisdiction to make such an order as he did, as the one-fourth share of Nos. .4 and 5, Jackson Ghat

Street, cannot be"" partitioned" in this suit in the absence of the other co-sharers therein.

5. It is said that this is a suit for partition by metes and bounds, and there can be no partition by metes and bound"s of a one-fourth undivided

share, that there is no power to direct a sale, as such power only arises under the Partition Act, and a case like this does not fall within the

provisions of the Act empowering a sale; and, lastly, it is said that there can be allotment of the share in the suit to one of the parties thereof as

there could be no separate and exclusive user of an undivided one-fourth share.

6. For these reasons, it is said that Mr. Justice Chaudhuri's order was wrong and made without jurisdiction, and I am asked to so hold. I express

no opinion as to the correctness or otherwise of the order of Mr. Justice Chaudhuri. I think it would be quite wrong for me to do so, and I know of

no provision of the CPC which empowers me to sit in appeal, as I am asked to do, upon Mr. Justice Chaudhuri's order. Section 15""2 of the CPC

provides for the correction of clerical or arithmetical mistakes in order, and this application certainly does not fall within the provisions of that

section.

7. Order XLVII, Rule 1 (the review order) provides for a review if there is some mistake or error on the face of the record, or if it is shown that

the decision of the Court has proceeded upon a mistaken view of the law, and decided a case contrary to a decision which is binding upon the

Court to which the application for review is made: see In the matter of the Petition of Sharup Chand Mala, Sharup Chand Mala v. Pat Dassee 14

C. 627 : 7 Ind. Dec. (N.S.) 416, Jatra Mohun Sen v. Aukhil Chandra Chowdhry 24 C. 334 : 12 Ind. Dec. (N.S) 890.

8. In the present case, I can find no mistake or error on the face of the record, nor have I been referred to any authority which has decided that an

undivided share cannot be partitioned in a suit constituted like the present suit. Accordingly, in my opinion, the provisions of Order XLVII, Rule 1,

are not applicable to this case. Lastly, I was asked to say that the Court has inherent jurisdiction to review its own orders and that this is a case for

the exercise of such jurisdiction. This may be so in a case of fraud or under special circumstances, but, in my opinion, the principle does not apply

here.

9. I think, therefore, that this application is misconceived and that the Rule must be discharged with costs. But I direct the Taxing Officer in taxing

the costs to disallow the entire costs of the affidavit of Shamermull Parruck filed on the 4th April 1916.

10. That affidavit sets out in full an enormous number of letters, most of which are quite immaterial, and the affidavit seems to me to be drawn

entirely for the purpose of making costs.

11. I also direct the Taxing Officer to look carefully into the affidavit of Soshee Bhusan Dutt, filed on the 6th April 1916, to ascertain if, as was

stated to me, it is practically in identical terms with other affidavits filed on this application, and if this so appears- I direct him to disallow the costs

of this affidavit.