

## APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

COWASJI TEMULJI AND OTHERS, EXECUTORS OF HIRJIBHAI, DECEASED  
(ORIGINAL PLAINTIFFS), APPELLANTS, v. KISANDAS TICUMDAS AND  
ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.\*

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March 8.

*Mortgage—Consent decrees between mortgagors and mortgagee—Joint management—Equal division of rent and produce—Prohibition against partition—Mortgagee competent to grant mirasi lease—Mortgagors to get one-fourth of the nazarana (present)—Rights of the mortgagors conveyed to the mortgagee—Equitable mortgage by mortgagee—Settlement by mortgagee in favour of his relations—Suit by equitable mortgagee—Decree—Execution—Auction purchaser put in possession—Suit by donees under the settlement—Donees entitled to possession—Rights of the parties to be worked out by amicable settlement or by a suit—Suit by representatives of auction purchaser to recover one-fourth share by partition—Plaintiffs entitled to possession of the share as tenants in common—Mirasi lease by mortgagee's assignee without mortgagor's consent—Lease not to enure for the benefit of the assignee.*

The owners of certain land mortgaged it to S. In the year 1866 consent decrees, Exhibits 57 and 58, were passed between the mortgagors and the mortgagee S. The consent decrees provided that both parties should jointly carry on the management of the land, each being entitled to half of the produce and rent; that the land itself should not be partitioned, that S. was competent to grant a *mirasi* lease, provided the *nazarana* (present) accepted was not less than Rs. 500 and that the said *nazarana* should be divided between the mortgagors and S. in the proportion of  $\frac{1}{4}$  and  $\frac{3}{4}$  respectively. The said rights of the mortgagors were subsequently conveyed by them to S. for consideration, Exhibit 64. Afterwards S., in April 1891, deposited Exhibit 64 by way of equitable mortgage with two persons. In October 1891 S. settled the property which was subject to the equitable mortgage on his relatives J. and M. In 1892 the two equitable mortgagees sued S. to recover their equitable mortgage debt and got a decree against the property equitably mortgaged and against S. personally. The property was put up for sale in execution and purchased by H. for Rs. 5,425 which covered the claim of the equitable mortgagees. J. and M. obstructed the auction purchaser H. in his attempts to obtain possession, and their obstruction having failed, they brought a suit against H. The final decree in the suit made a declaration that as against H., J. and M. were entitled to the properties and their possession subject to H.'s right conveyed to the mortgagee S. under Exhibit 64 and subsequently purchased by H., and that "the rights of the parties as thus declared must be worked out by amicable settlement between them or by means of a separate suit."

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The plaintiffs as executors under the will of H., deceased, who was deprived of possession under the aforesaid decree, having brought a suit against the assignees of J. and M. to recover by partition  $\frac{1}{2}$  share of the land, the lower Courts dismissed the suit for the recovery of  $\frac{1}{2}$  share by partition on the ground that the clause in the consent decrees, Exhibits 57 and 58, affected to prohibit partition.

On second appeal by the plaintiffs,

*Held*, reversing the decree, that though the plaintiffs as tenants in common would be entitled to partition, yet by virtue of the consent decrees they were estopped from exercising such right.

*Held*, further, that though the consent decrees did empower the mortgagee S. to grant a *mirasi* lease without the mortgagor's consent, yet this power did not enure for the benefit of his assignee.

SECOND appeal from the decision of R. D. Nagarkar, First Class Subordinate Judge of Poona with appellate powers, reversing the decree passed by D. G. Medhekar, Joint Subordinate Judge of Haveli.

The facts were as follows :—

The land in dispute originally belonged to Shekh Sadudin, Mohamad Latiff and Nurunisabi. They had mortgaged it to W. Spiers. In the year 1864 disputes having arisen between the mortgagors and the mortgagee, the mortgagors filed suits, Nos. 37 and 38 of 1866, against mortgagee and, on the 10th March 1866, they got consent decrees which provided that both the parties should carry on the *vahivat* of the land, each being entitled to half of the produce; that the rent should be divided equally between them, that the land itself should not be partitioned, that the mortgagee W. Spiers was to be competent to grant a *mirasi* lease, provided the *nazarana* (present) accepted was not less than Rs. 500, and that the *nazarana* should be divided between the mortgagors and the mortgagee in the proportion of  $\frac{1}{4}$  and  $\frac{3}{4}$  respectively, Exhibits 57 and 58.

Subsequently, on the 25th October 1890, the mortgagors conveyed their rights under the said consent decrees to the mortgagee W. Spiers for Rs. 4,000 by Exhibit 64. On the 11th April 1891 W. Spiers deposited Exhibit 64 by way of equitable mortgage with two persons Manekji and Mancherji. Some months after the equitable mortgage, that is, on the 18th

October 1891, W. Spiers, who was then in involved circumstances, settled the property comprised in Exhibit 64 on James and Mary Spiers, his son and daughter-in-law respectively.

In the year 1892 the equitable mortgagees, Manekji and Mancherji, brought a suit, No. 143 of 1892, against W. Spiers to recover their mortgage debt by sale of the property equitably mortgaged and from the defendant personally. A decree was accordingly passed against the defendant, and in execution the property being sold, it was purchased by one Hirjibhai Dhanjisha, since deceased, for Rs. 5,425 and the claim of the equitable mortgagees was thereby satisfied.

James and Mary Spiers, the donees under the settlement made by W. Spiers, offered resistance to the delivery of possession to the auction-purchaser Hirjibhai and their resistance having failed, they filed a suit, No. 95 of 1895, against Hirjibhai praying that they should be given possession of the property, or that they should be allowed to redeem, or that it should be declared that the auction purchaser Hirjibhai was entitled only to the interests conveyed to W. Spiers by Exhibit 64. The proceedings went up to the High Court in second appeal No. 65 of 1897 and the concluding portion of the High Court's decree ran thus :—

The result is that the plaintiffs (James and Mary Spiers) are entitled to a declaration that they are entitled to as against the defendant (Hirjibhai) the properties described in the plaint and to the possession thereof subject to the defendant's right to the interest conveyed to W. Spiers by the deed of the 25th October 1890 and subsequently purchased by the defendant. The rights of the parties thus declared must be worked out by amicable settlement between them or by means of a separate suit. In this suit brought on a ten rupees stamp we can only make a declaration of rights.

Hirjibhai being deprived of possession under the High Court's decree, the plaintiffs, claiming as executors under his will, brought the present suit against defendant 1, who was the assignee of James and Mary Spiers, the donees under the settlement of W. Spiers, and against defendant 2, who was a lessee under a *miraspatra* from defendant 1, to recover by partition one-fourth share of the land described in the plaint, alleging that it was purchased by the deceased Hirjibhai at a court sale and was in.

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his possession, that thereafter the son and daughter-in-law of W. Spiers brought a suit against Hirjibhai and in consequence of the suit and final decree passed therein by the High Court in the second appeal the property went into the possession of defendant 1; that, according to the decree of the High Court, Hirjibhai acquired one-fourth of the land in suit, that defendant 1 had fraudulently executed a sale-deed in respect of the land to defendant 2, that defendant 1 had no right to sell plaintiffs' share to defendant 2 without plaintiffs' consent, and that the cause of action arose on the 14th December 1897 when the deceased Hirjibhai was deprived of the possession under the High Court's decree.

Defendant 1, Kisandas Ticumdas, answered *inter alia* that the plaintiffs had no right to claim one-fourth of the land in suit, that the deceased Hirjibhai had acquired some rights from W. Spiers under the sale-deed of the 25th October 1890, but that right entitled Hirjibhai to receive only one-fourth of the price of the land and the assessment in case the land was transferred under a *miraspatra* and this right had never been interfered with, that the defendant sold the property in suit together with another property under a *bond fide* sale, that the deceased Hirjibhai was called upon by a notice to execute a *miraspatra* and other papers, but the notice was not complied with and thus the defendant alone had to execute a *miraspatra* in favour of defendant 2 and that the plaintiffs could not claim anything beyond what was given by the consent decrees in suits Nos. 37 and 38 of 1866.

Defendant 2, Sorabji Dadabhai Dubash, replied that the auction sale on which the plaintiffs claimed conferred on them no higher rights than those acquired by W. Spiers under his sale-deed of the 25th October 1890, that those rights only were held under the decree of the High Court to have passed to Hirjibhai, that the plaintiffs were not entitled to actual partition of the land, that the defendant had not purchased the land but had taken it in *miras*, that he was, therefore, not liable to the suit in the form in which it was framed and that the claim was barred under section 13 of the Civil Procedure Code (Act XIV of 1882).

The Subordinate Judge found that the deceased Hirjibhai purchased at the court sale relied upon by the plaintiffs only the interest conveyed to W. Spiers by Sadudin and Mohamad Latiff, plaintiffs in suits Nos. 37 and 38 of 1866, under their sale-deed of the 25th October 1890 and that this interest consisted of the right to enjoy the land in common with W. Spiers and to divide its profits equally without dividing the land, the right to receive one-fourth share of the *nazarana* in case of the transfer of the land by *miras* and to receive Rs. 5 per *bigha* per year as assessment from the transferee, that the claim was time-barred, that the frame of the suit was bad, that the plaintiffs were not entitled to have by partition one-fourth of the land in suit, that the plaintiffs' claim was barred under section 13 of the Civil Procedure Code (Act XIV of 1882) by reason of the consent decrees in suits Nos. 37 and 38 of 1866, which prohibited partition of the land, and that the suit was not bad for misjoinder of parties and causes of action. On the said findings, the Subordinate Judge dismissed the suit.

The plaintiffs appealed and the defendants preferred cross-objections. The appellate Court found that the plaintiffs' claim for partition was barred by decrees in suits Nos. 37 and 38 of 1866, that the judgment of the High Court in the second appeal gave to deceased Hirjibhai no higher rights in the plaint property than the right to the interest conveyed to W. Spiers by Exhibit 64 and purchased by Hirjibhai at the auction sale, that defendant 1 was entitled to transfer the land to defendant 2 by way of *miras* without the consent of deceased Hirjibhai and that the amount of *nazarana* realized by defendant 1 was Rs. 2,500. The appellate Court, therefore, reversed the decree and allowed to the plaintiff Rs. 625, that is, one-fourth of the money realized by defendant 1 from defendant 2 by way of *nazarana*.

Plaintiffs preferred a second appeal.

*Raike* with *S. V. Bhandarkar* for the appellants (plaintiffs).

*N. V. Gokhale* for respondent 1 (defendant 1).

*Weldon* with *P. P. Khare* for respondent 2 (defendant 2).

BACHELOR, J.:—The plaintiffs, who are the appellants here, brought this suit as executors of the will of Hirjibhai Dhanjisha,

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and the prayer in the plaint was to recover by partition the plaintiffs' one-fourth share in the land described. The defendants denied that the plaintiffs had acquired any share or partible interest in the land. The first question which arises is, therefore, what interest the plaintiffs have in the land, and whether that interest entitles them to partition. The plaintiffs stand in the shoes of the original owners Shekh Sadudin and two other persons, who had mortgaged the land to one W. Spiers.

The nature of the plaintiffs' interest has to be ascertained from certain prior decrees which have been passed on the subject of the property. These decrees are Exhibits 57 and 58 and were recorded by consent in 1866 in order to terminate a dispute which had arisen in 1864 between the original owners and the mortgagee, W. Spiers. In substance these decrees provide that both parties should jointly carry on the *vahivat* of the land, each being entitled to one-half of the produce; that the rent received should be divided equally between them; that the land itself should not be partitioned; that W. Spiers was to be competent to grant a *mirasi* lease, provided the *nazarana* (present) accepted was not less than Rs. 500; and that the *nazarana* should be divided between Shekh Sadudin's party and W. Spiers in the proportion of one-fourth and three-fourths respectively.

Such, then, were the rights which Shekh Sadudin and his co-owners were awarded. These rights were, on 25th October 1890, by means of Exhibit 64 in suit, conveyed by Shekh Sadudin and the others to W. Spiers for a consideration of Rs. 4,000: the conveyance particularly recites the right to take half the produce of the land, and the right to one-quarter of the *nazarana*.

Next, on 11th April 1891, this deed, Exhibit 64, was deposited by W. Spiers by way of equitable mortgage with two persons Manekji and Mancherji, who thus became equitable mortgagees of the interests conveyed to W. Spiers by Exhibit 64.

On 18th October 1891, W. Spiers, being then indebted in various quarters, settled the property on his relatives James and Mary Spiers. The property was then subject to Manekji and Mancherji's equitable mortgage.

In 1892 Manekji and Mancherji brought Suit No. 143 against W. Spiers to recover their mortgage-money by sale, and they obtained a decree against the property equitably mortgaged and against the defendant W. Spiers personally. In pursuance of that decree the property equitably mortgaged was put to sale, and was purchased by the deceased Hirjibhai for Rs. 5,425, which covered the claim of the equitable mortgagees.

James and Mary Spiers obstructed Hirjibhai in his attempts to obtain possession after his purchase, and, as they were unsuccessful in the proceedings taken on their obstruction, they brought against Hirjibhai Suit No. 95 of 1895 in which they prayed that they might be given possession of the entire property, or that they should be allowed to redeem, or that it should be declared that Hirjibhai was entitled only to the interests conveyed to W. Spiers by Exhibit 64. In that suit the final decree was made by this Court which gave to James and Mary a declaration that as against Hirjibhai, they were entitled to the properties and to the possession of them subject to Hirjibhai's right to the interest conveyed to W. Spiers by Exhibit 64 and subsequently purchased by Hirjibhai; and the Court added that "the rights of the parties as thus declared must be worked out by amicable settlement between them or by means of a separate suit." The plaintiffs now bring this suit in order, as they claim, to work out the rights accrued to them.

The defendant 1 is the purchaser of the interests of James and Mary Spiers under a deed dated 16th December 1896.

From what we have already said it follows that the plaintiffs, as executors, of Hirjibhai, are entitled only to those rights which by Exhibit 64 were conveyed to W. Spiers: those rights are recited in the consent decrees, Exhibits 57 and 58, and have been described by us above. This was the view of the lower appellate Court, and we cannot doubt that it was so far right. But then that Court refused the plaintiffs' prayer for partition, being of opinion that that claim could only be "based upon the allegation that the judgment of the High Court gave the plaintiffs higher rights than were reserved to Shekh Sadudin and the two others under the decrees Exhibits 57 and 58." It is

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here that we are unable to follow the learned Subordinate Judge. Apart from that clause in the consent decrees which affects to prohibit partition, we think it clear that, as tenants in common, the plaintiffs would be entitled to partition.

But the question is whether in this suit the plaintiffs are entitled to give the go-by to a particular clause in an existing decree on the ground that that clause, if resting on no higher authority than the agreement between the parties, would be bad in law. We think that this question must be answered in the negative. It may be—though we express no opinion as to this—that in a suit properly framed for that purpose the plaintiffs might have been able to get the decree set aside. But no such suit has been brought, and the decree is a subsisting decree; nor does it, we think, make any difference that it was taken by consent of the parties who were all *sui juris*. The decree stands, and, while it stands, it operates as an estoppel between the then parties and their present representatives. Authority for this view may be found in *Huddersfield Banking Company, Limited, v. Henry Lister & Son, Limited*<sup>(1)</sup>. That was an action brought by the Banking Company for the specific purpose of setting aside a consent order as having been obtained under a mistake as to material facts, and the Court of Appeal, affirming Vaughan Williams J., set aside the order. The decision might assist the plaintiffs if they were suing to set aside the consent decree, but, as we have said, that is not their suit, and the consent decree is still outstanding against them. That being so, their case upon this point is exposed to the observations of Lindley, L. J., where he says: "A consent order, I agree, is an order; and so long as it stands it must be treated as such, and so long as it stands I think it is as good an estoppel as any other order. I have not the slightest doubt on that." In our opinion, therefore, it is not competent to the Court in this suit to override one particular clause in a subsisting decree. It follows that the plaintiffs are not entitled to partition.

Then it was urged that the decrees did not empower Spiers to grant a *mirasi* lease without the plaintiffs' consent, but upon a

(1) [1895] 2 Ch. 273.

fair reading of the material passages in the decrees we agree with the lower Court that that is unmistakably their effect and meaning. We do not, however, think that this condition enures for the benefit of the present defendant 1, who is merely an assignee from Spiers. The agreement embodied in the decrees points, we think, to the view that the individual Spiers was a person in whom the parties had confidence and that for this reason he was entrusted with the special power in question. Such a contract, importing the consideration of personal skill or confidence, would not be assignable; it would not be open to the contractor to substitute the skill or credit of an assignee. (Leake on Contract, 4th edition, p. 826, and the cases there cited.)

On the whole, therefore, we think that the plaintiffs are so far right that the defendant 1 was not entitled, without their consent, to grant the *mirasi* lease to the defendant 2, and it must be declared that the lease does not bind the plaintiffs' share in the land nor does it affect the plaintiffs' right to joint possession.

The plaintiffs' claim to interest must be disallowed.

For these reasons we must reverse the decree under appeal and make a decree awarding joint possession to the plaintiffs. Appellants to have their costs of the appeal; the other costs to be borne by each party.

*Decree reversed.*

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