Privy Council Appeals No. 115 of 1917.
Bengal Appeal No. 65 of 1915.

Sunitabala Debi - - - - - - - - *Appellant*

v.

Dhara Sundari Debi Chowdhurani and another - - - *Respondents.*

Dhara Sundari Debi Chowdhurani - - - - - *Appellant*

v.

Sunitabala Debi and another - - - - - *Respondents.*

(*Consolidated Appeals.*)

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 30TH MAY, 1919.

Present at the Hearing:

VISCOUNT HALDANE.
LORD BUCKMASTER.
LORD DUNEDIN.

[*Delivered by* LORD BUCKMASTER.]

The history of this case is the history of a family dispute between the appellant — a *pardanashin* lady, the daughter of one Sarut Chandra Roy Chowdhury, and the respondents, who are his two widows. After the death of Sarut Chowdhury, the respondents applied for a grant of letters of administration of his estate with a will annexed, the will being dated the 22nd November, 1903, the date of his death. The appellant, as the daughter of the deceased and devisee under an earlier will, opposed this application. The District Judge refused the grant, holding that the alleged will was not genuine, and the respondents appealed to the High Court. While this appeal was pending,

the Administrator-General of Bengal as executor applied for probate of an earlier will dated the 21st September, 1892. By the terms of this will the appellant would take the whole property of the testator, subject to certain small provisions for maintenance in favour of the first respondent and of another wife. A caveat was entered by the respondents to this grant, and there was thus opened a prospect of litigation inviting indeed to all who enjoy quarrels themselves or profit by the quarrels of others, but of small service to those interested either by family or pecuniary considerations in the estate.

In these circumstances a compromise of the whole proceedings was an obviously sensible course to take, for apart altogether from strict rights under disputed documents, the parties in controversy were associated by close relationship to the deceased—the one as his daughter and the others as his widows. A compromise was, in fact, reached, and it might have been hoped the disputes were ended, but it is rash to entertain such an expectation, for it is out of that compromise that these proceedings have arisen.

The effect of the compromise was simple. The respondents' appeal against the judgment which declared against the alleged will of 22nd November, 1903, and the caveat against the grant of the earlier will were both to be withdrawn, and the probate of the earlier will was to be granted to the Administrator-General. As a consideration for this, and as a release of all claims against the estate, the appellant agreed to pay each of the widows an absolute sum of Rs.80,000 with interest at 6 per cent. until payment, and to secure these sums by executing in their behalf a mortgage of the testator's estate, the value of which was stated to be Rs.295,000.

Three documents were executed in pursuance of this arrangement—the one, an agreement of the 16th January, 1907, between the respondents and the appellant, being the agreement of compromise; the second, a mortgage of the 5th March, 1907, mortgaging the real and personal estate in payment of the two sums of Rs.80,000; and the third, a release by the widows of their claims.

On the 25th March, 1909, the first respondent instituted proceedings under the mortgage deed against the appellant, the other respondent and a prior mortgagee of the real estate asking for payment of the Rs.80,00 and interest, and sale of half of the mortgaged property.

This action was defended on two grounds—the one of substance and the other of form. The first that the compromise was not binding upon the appellant owing to the disabilities attaching to a *pardanashin* lady, and the other that the proceedings were wrong in form: since by section 67 of the Transfer of Property Act of 1882 it is impossible to seek for sale of part only of mortgaged property.

The learned Subordinate Judge decided against the appellant on both contentions, and granted the relief claimed. On appeal to the High Court of Calcutta this decree was reversed so far as it depended upon the question of form; but confirmed

on the question of substance, the High Court holding that it was not possible to obtain partial relief upon such a mortgage, and granting permission to the plaintiff to make the necessary amendments in the plaint, and sending the matter back for re-hearing when these amendments had been made.

In their Lordships' opinion, the High Court were quite right in the conclusion at which they arrived. It would, of course, be possible—though inconvenient—to execute in one document a mortgage of one-half of an entire property in favour of each of two mortgagees. By this means two independent mortgages would be combined in one deed, and in such a case independent relief might be granted to each mortgagee; but the present mortgage does not take that form. It contains no covenant for payment of the mortgage debt, but consists of a conveyance of the whole property to the two mortgagees as tenants in common and not as joint tenants, with separate provisoes for redemption as to the real and personal estate in the same terms, viz., that upon payment "by sums of equal amounts to each of the two mortgagees and their representatives of Rs.80,000 with interest." and on payment of costs and incidental expenses "the said mortgagees, their respective heirs or assigns, will separately at the cost of the mortgagor" re-convey and re-assign the mortgaged property. This mortgage clearly effects the conveyance of the real estate to the mortgagees as tenants in common, and no redemption could be effected of part of the property by paying to one of the mortgagees her separate debt. It is not a mortgage to each of a divided half, but a conveyance to them of the whole property.

Where a mortgage is made by one mortgagor to two tenants in common, the right of either mortgagee who desires to realise the mortgaged property and obtain payment of the debt, if the consent of the co-mortgagee cannot be obtained, is to add the co-mortgagee as a defendant to the suit and to ask for the proper mortgage decree, which would provide for all the necessary accounts and payments, excepting that there could be no judgment for a sum of money entered as between the mortgagee defendant and the mortgagor. So far, therefore, as this appeal depends on maintaining the correctness of the form of the proceedings, it must fail. The proceedings were wrong in form, but were capable of being amended so as to constitute a properly framed suit. It was within the competence of the Court to make such an amendment, and indeed it was their clear duty to do it if thereby delay and expense would be avoided. In their Lordships' opinion, the amendment of the plaint as directed by the High Court is not appropriately worded and they consider that the trial judge should on the rehearing of the suit make such amendments as may be necessary and proper.

The remaining ground upon which this appeal depends is that the mortgage was in fact executed by a Hindu *pardanashin* lady, and it is, therefore, incumbent upon the plaintiff to show that she had independent and disinterested advice.

It is not necessary—indeed, it is undesirable—to insist in such cases upon a test which depends upon a clear understanding of each detail of a matter which may be greatly involved in legal technicalities. It is sufficient that the general result of the compromise should be understood, and that people disinterested and competent to give advice should, with a fair understanding of the whole matter, advise the lady that the deed should be executed. The learned Subordinate Judge has applied the proper and necessary test for the purpose of examining the evidence. He has found that the lady had sufficient intelligence to understand the relevant and important matters, that she did understand them as they were explained to her, that nothing was concealed, and that there was no undue influence or misrepresentation. As apparently it was only her husband who was blamed in the matter, it is satisfactory to find by the judgment of the learned Subordinate Judge that in his opinion he did his best to serve his wife. The High Court of Bengal confirmed this judgment, and, after examining the evidence, stated that the deed was executed with the full knowledge of the nature and effect of the transaction, and that the lady had independent and disinterested advice in the matter.

It is not in accordance with the practice of this Board to interfere with two concurrent findings of fact so clearly and definitely expressed, and they, therefore, think that the second ground of appeal fails equally with the first, and that this appeal should be dismissed with costs.

The cross-appeal, as to whether the suit as originally framed was maintainable, raises no independent question and was not opened. It should also be dismissed but without costs. The costs of obtaining special leave to cross-appeal will, of course, be borne by the cross-appellant, and these will be set off against the costs of the main appeal.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

SUNITABALA DEBI

v.

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DELIVERED BY LORD BUCKMASTER.

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