

Dan Kuer Vs. Sarla Devi

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Court : Mumbai

Decided On : Jul-24-1946

Reported in : (1947)49BOMLR123

Judge : Simonds, M.R. Jayakar and John Beaumont, JJ.

Appellant : Dan Kuer

Respondent : Sarla Devi

Disposition : Appeal dismissed

Judgement :

M.R. Jayakar, J.

1. This is an appeal from a judgment and decree of the High Court of Judicature at Allahabad dated March 12, 1942, which reversed a judgment and decree of the Court of the Additional Subordinate Judge of Etah dated July 31, 1935.

2. The main questions to be determined in this appeal are:-

(1) Whether a registered partition award dated January 8, 1921, created a valid charge in favour of the respondent, Sarla Devi, on the property (the two villages of Quazipur and Mai) allotted to her husband Nidhan Singh; and

(2) whether Drigpal Singh, the predecessor in title of the appellant, Dan. Koer, had notice (actual or constructive) of the said award and charge, when he took a usufructuary mortgage of the said two villages on the following day, January 9, 1921, wherein a reference was made to the said award.

3. The pedigree of the family, so far as it is material to the case, is as follows.

4. The family was subject to the Mitakshara law of the Benares school. It had considerable property. After the death in 1911 of Kanhaiya, Nidhan Singh and his three brothers effected about 1912 a partition of their joint family property and separated. After the partition, Nidhan Singh, without any lawful family necessity, improperly contracted debts. He became a spendthrift. His wife the respondent, who is a purdanashin lady, objected, on behalf of herself and her two minor sons, to this extravagant behaviour of her husband. She therefore consulted Drigpal Singh (who was related to the family and was a well-wisher), and also her brothers-in-law, about securing a partition between her husband and two sons. The object was to save some of the joint family property from liability to satisfy the debts of Nidhan Singh and to safeguard the interests of her sons and of herself. Drigpal Singh, she affirms, advised a partition and told her he would get her a maintenance allowance of Rs. 75 per month set apart for her in the partition deed. Five arbitrators, including the three brothers of Nidhan Singh, made a partition award dated January 8, 1921. By it, Nidhan Singh was allotted the two villages mentioned above, and the shares of the two minor sons were separated from the share of Nidhan Singh. The relevant part of the award, the construction and the legal effect of which are involved in this appeal, is in the following terms:-

We allot the property mentioned in List A specified below, to Kunwar Nidhan Singh, which shall remain in his possession subject to a charge for the maintenance of Mst. Sarla Devi (the respondent); and if she ever falls out with Kunwar Nidhan Singh and they cease to live together, the charge for maintenance thereon will be at the rate of Rs. 75 a month, the amount fixed by us.

5. On the following day, January 9, 1921, Nidhan Singh borrowed Rs. 40,000 from Drigpal Singh, on the security of the said two villages, and executed a usufructuary mortgage deed, in which the property was expressed to be free from all liabilities,

and the arbitration award was expressly mentioned. On August 5, 1921, Nidhan Singh sold the mortgaged villages to Drigpal Singh for Rs. 30,000. In or about 1923, the Court appointed the respondent the guardian of her minor sons. About 1925, Drigpal Singh died, leaving him surviving his third wife, the appellant. About 1928, Nidhan Singh died, leaving him surviving a widow, the respondent, and two sons.

6. On January 9, 1933, the respondent filed the present suit in the Court of the Additional Subordinate Judge of Etah against the appellant. In her plaint, after setting out the facts stated above, she alleged that the property was given to Nidhan Singh charged with her maintenance, and, that after the award Nidhan Singh had mortgaged the property to Drigpal Singh and then sold it to him. Drigpal Singh took the property subject to the maintenance charge, and on his death the appellant succeeded to the property subject to the same charge, but, in spite of repeated demands, the appellant had refused to pay the maintenance, with the result that a suit had to be brought for the recovery of Rs. 10,800, the amount of maintenance for twelve years from January 8, 1921 (the date of the award), to the date of the suit. She prayed that a decree might be passed in her favour.

7. On March 20, 1933, the appellant filed a written statement stating, among other things, that no charge had been created as alleged in the plaint, that at the time of the mortgage and sale Drigpal Singh had no notice of the partition or arbitration award; that he had taken the property on the understanding that it was free from all liabilities; that the charge for the maintenance allowance was mentioned in the award deed as the result of a conspiracy and fraud committed against Drigpal Singh, in which the respondent, the members of the family and their servants had joined, and that the respondent was not entitled to any maintenance either during the period when her husband was alive or thereafter.

8. The learned Additional Subordinate Judge raised certain issues, including the two questions mentioned above, and, after recording oral and documentary evidence, he held on the first of the said two questions that the award was valid in other respects but the portion thereof relating to the maintenance of the respondent was invalid and unenforceable; the respondent was not a party to the

reference to arbitration, and the arbitrators had no power to adjudicate on her right of maintenance and make it a charge on the property; a trick had been played on Drigpal Singh by making the said provision in the award out of the property mortgaged to him. He further held that the charge was a conditional one, that such a charge could be conditionally created, the condition being that she should fall out with her husband and they should cease to live together. On the second of the said questions he held that Drigpal Singh was not aware of the maintenance charge on the mortgaged property, that it had not been brought to his notice, it was entered surreptitiously in the award behind his back with some ulterior motive, there was an active concealment of the charge from him and he, having purchased the property for a good consideration without notice of the charge, took the property free from it. On these grounds he dismissed the suit with costs. A decree dated July 31, 1935, was accordingly drawn up.

9. From this decree the respondent appealed to the High Court of Judicature at Allahabad. On March 12, 1942, the High Court (Allsop and Verma JJ.) delivered judgment. They held that upon a proper construction of the award a charge had been created by it from the time of partition, that the charge was not conditional and there was no question of any condition having to be satisfied. They further held that the award definitely mentioned the charge and was also mentioned in the mortgage deed, and Drigpal Singh had been conversant with the whole arrangement, that he had not been deceived about the conditions of the partition, and that the appellant, as the representative in interest of Drigpal Singh, could not avoid the consequences of the charge on the allegation that Drigpal Singh was a transferee without notice of the charge, and that he was in no better position when he later bought the property. They therefore allowed the appeal and decreed the suit with costs in both Courts. A decree dated May 12, 1942, was accordingly drawn up.

10. From this decree the appellant has appealed to His Majesty in Council.

11. On the two main questions set out above, their Lordships feel no difficulty in agreeing with the conclusions which the High Court has arrived at. On the first of the said two questions, viz. whether the award created a valid charge in favour of

the respondent on the property (the two villages of Quazipur and Mai) allotted to Nidhan Singh, the terms of the award clearly charged the property allotted to Nidhan Singh. Nothing could be clearer than the words in the award: 'We allot the property mentioned in List A specified below to Kunwar Nidhan Singh, which shall remain in his possession subject to a charge for maintenance of Musammat Sarla Devi'.

12. On the second question, whether Drigpal Singh, the predecessor in title of the appellant, had notice of the said award and charge when he took the mortgage on the following day, the circumstances which led to the award are mentioned in it. From them and the other evidence in the case, it clearly appears, as the High Court judgment points out, that after the partition, Nidhan Singh led a life of great extravagance and got involved in debt. The result was that the respondent sought the assistance of his brothers and other well-wishers of the family (including Drigpal Singh) and obtained the partition between him and her two sons, who were minors at the time. The arbitration award was drawn up, signed and registered on January 8, 1921. The arbiters who made the award were no strangers but were the three brothers of Nidhan Singh and two other gentlemen apparently well known to the family, the last of whom was a Deputy Collector. The arbitrators say in the award that they had been approached by the respondent to effect the partition because of her husband's extravagance and that they thought it proper to accede to her request in spite of her husband's objection, because the latter had admitted that he could not act cautiously in spending money and because they knew from personal knowledge and enquiries that he had been extremely extravagant. The result was that they allotted the property to Nidhan Singh and other property to the minor sons and they charged the property allotted to the husband with the maintenance of the respondent. On the next day, January 9, Nidhan Singh executed a deed of usufructuary mortgage of the whole property allotted to him in favour of Drigpal Singh and the deed was registered on January 10, and on August 3, 1921, he sold the equity of redemption to Drigpal Singh. This is the substance of the story evidenced by the award and other evidence.

13. It is clear to their Lordships from these circumstances, and also the evidence of Todar Singh, the general attorney of Drigpal Singh, and the main evidence

produced on behalf of the appellant, that Drigpal Singh figured in the transaction from the beginning, being regarded as one of the well-wishers of the family, and that he knew full well what was happening. Todar Singh had to admit, in spite of his strong leaning in the appellant's favour, that the respondent requested Drigpal Singh to agree to advance a loan to Nidhan Singh as the latter was heavily indebted. Drigpal Singh's wife supported her request. Nidhan Singh's wife then pressed him, adding that her children were going to be ruined. Thereupon Drigpal Singh said he would look into the papers and then give a definite reply. Drigpal Singh came out and had a talk with Nidhan Singh and others on the proposal of advancing a loan. Nidhan Singh and others requested him to take a usufructuary mortgage of the property, and Drigpal Singh agreed. Gopi Chand, the general attorney of Nidhan Singh, showed papers to Drigpal Singh then and there. Nidhan Singh and all those who were present there had informed Drigpal Singh that a partition between Nidhan Singh and his sons had already taken place and that the villages sought to be mortgaged were allotted to the share of Nidhan Singh. This is a clear statement of what happened, drawn-out of the mouth of a partisan witness in favour of the appellant. This is apart from the circumstance that the effect of the partition and the charge are expressly mentioned in clear terms in the award and in the deed of mortgage which Drigpal Singh took on the very next day after the award. Similarly, the sale deed, which followed a few days later, also states that the property which was the subject matter of the sale was allotted to the share of the mortgagor under the arbitration award dated and registered on January 8, 1921. It is further to be noted that the mortgage amount of Rs. 40,000 was not paid into the hands of Nidhan Singh but was, under covenant 1 of the mortgage deed, to remain with the mortgagee for payment to the creditors and for meeting other necessities, which fact clearly supports the conclusion that Drigpal Singh was on terms of trust and confidence with the family, including the respondent, who was a purdanashin lady. It is true that in covenant 3 of the mortgage deed the property was conveyed free from all liabilities. That clause appears to be a distant imitation of the covenants usually found in an English mortgage, but it is clear that the formal and general nature of this clause cannot override the conclusion suggested by the other terms of the mortgage and the facts in evidence in this case. Their Lordships have therefore no difficulty in coming to the conclusion, as

the High Court has done, that Drigpal Singh was conversant with the whole arrangement leading to the partition award and the charge on the property. In this view of the case it would seem unnecessary to go into the question argued before their Lordships about constructive notice or the effect of registration arising under the provisions of Section 3 of the Transfer of Property Act.

14. An argument was addressed to their Lordships based upon the fact that Section 39 of the Transfer of Property Act which was in operation in 1921, the year of the award, mortgage and sale, was different in terms from the present section introduced by the Amending Act of 1929. Under the unamended section, it is argued, the transferee must be proved to have had notice of the intention of defeating the right to receive maintenance and mere notice of the right to receive maintenance would not be enough. But in this connection two circumstances have to be noted: (1) that the amended section under which notice of the right to receive maintenance would be enough was in operation at the date of the suit, January 9, 1933; and (2) assuming that the present case is governed by the unamended section, it has been held by the High Courts in India, in cases arising under that section, that if the property left by the husband was limited or the transfer to the purchaser was of all the property which was available for the payment of the maintenance, and if the purchaser was proved to be aware of the circumstances of the family, the transfer would be subject to the widow's right of maintenance. (See *Bhagat Ram v. Mst. Sahib Devi* I.L.R.(1921) Lah. 55 and *Syed Abu Mahomed v. Saraswati Dasi* (1925) 43 C.L.J. 604. In the later case, the intention to defeat the widow's right of maintenance, which the unamended Section 39 of the Transfer of Property Act requires to be proved, was gathered from the fact that all the property available for satisfying the maintenance claim of the widow (excepting a small hut) had been transferred to the purchaser.

15. From the perusal of the material documents, it is clear that in the present case the two properties which were made the subject matter of the charge by the award were the identical properties which were the subject matter of the mortgage and the later sale deed. This will appear clearly on a comparison of the details of the property mentioned in List A to the award and the details of property annexed to the mortgage deed, and mentioned in the body of the sale deed. The mortgage

and the sale therefore related to all the property which was available for the payment of maintenance, and if the purchaser was aware of this fact and of the circumstances of the family, it would be fair to hold that the transfer would be subject to the widow's right of maintenance.

16. Their Lordships' attention was invited to the case of *Lakshman Ramchandra Joshi v. Satyabhamabai* (1877) I.L.R. 2 Bom. 494 and on the authority of that ruling it was argued that the debts which were paid out of the mortgage amount and the proceeds of the said sale, being the debts of the family legally recoverable from the father's share, the purchaser for value would not be bound by the widow's claim for maintenance. In this connection it is to be noted, however, that, as pointed out by Westropp C.J. (p. 497), the decree for maintenance in the case before him was a personal decree against the person liable for the maintenance, and not against the ancestral estate, nor was any charge created on the family property. Another circumstance was that the money paid by the purchaser in that case was utilised for satisfying the claim of the widow under the maintenance decree and the costs of the suit payable to her. The case is therefore distinguishable from the present one. But, apart from this circumstance, the judgment of West J. whose dissertations on Hindu law must always command great esteem, contains an exposition of the law on this point, and the case is therefore rightly regarded as a leading authority on the question. In the course of his judgment (pp. 506, 517) that learned Judge quotes with approval the remarks of Phear J. in the case of *Srimati Bhagabati v. Kanailal Mitter* (1872) 8 Beng. L.R. 225 that

As against one who has taken the property as heir, the widow has a right to have a proper sum for her maintenance ascertained, and made a charge on the property in his hands. She may also, doubtless, follow the property for this purpose into the hands of anyone who takes it as a volunteer, or with notice of her having set up a claim for maintenance against the heir' and that 'when the property passes into the hands of a bona fide purchaser without notice it cannot be affected by anything short of an already existing proprietary right; it cannot be subject to that which is not already a specific charge or which does not contain all the elements necessary for its ripening into a specific charge'...(p. 495) what was purchased with

knowledge of a right which would thus be prejudiced is liable to her claim from the first....

To explain the necessity of the widow making her maintenance a charge on the family property, it was stated that (p. 494)

In the case of a widow of an ordinary co-parcener, as against the surviving members of the joint family, her claim being strictly limited to maintenance only, regulated by the circumstances of the joint family, it appears that, although she may have her maintenance made a charge on the property, yet, if she should refrain from that course, she leaves to the co-parceners an unlimited estate to deal with at their discretion...

The principle of this rule was stated in the following words (p. 495) :-

The knowledge of collateral rights created by agreement, in equity frequently qualifies: those acquired by a purchaser. The widow's right to maintenance is a right maintainable against the holders of the ancestral estate in virtue of their holding no less through the operation of the law than if it had been created by agreement, and so when the sale prevents its being otherwise satisfied, it accompanies the property as a burden annexed to it in the hands of a vendee with notice that it subsists...

Their Lordships are in complete agreement with this view of the law.

17. The other case of *Soorja Koer v. Nath Buksh Singh*, I.L.R. (1884) Cal. 102 to which their Lordships' attention was invited, was likewise a case where a decree for maintenance was a mere personal decree, no charge was created on the property (p. 103) and further the purchaser purchased the property at an auction sale in execution of the widow's decree for maintenance and the purchase money was utilised for providing maintenance to her.

18. The true rule of Hindu law in such matters would appear to be as follows:-

19. Two obligations confront a joint Hindu family. (1) The obligation to pay the debts (for instance, of the father) binding on the family; and (2) the moral

obligation to provide maintenance to the widows of the family. The latter obligation would, under certain circumstances, ripen into a legal obligation, as, for instance, when a charge is created on specific property of the family either by agreement or a decree of the Court; that, so long as neither of these two obligations has taken the form of a charge on the family property, the obligation to pay the binding debts will have precedence (as, for instance, in the course of the administration of the estate) over mere claims of a female member's maintenance; but, if either of these two obligations assumes the shape of a charge, it would take precedence over the other. This rule of Hindu law is thus in accord with the principle underlying Section 39 of the Transfer of Property Act. (See *Somasundaram Chetty v. Unnamalai Ammal* I.L.R(1920) Mad. 800.

20. The present case is in the line of cases of which *Kuloda Prosad Chatterjee v. Jageshar Koer* I.L.R(1899) . Cal. 194 is a good illustration, the only difference being that in that case the charge was created by a compromise decree in favour of the widow. It was also a case under the unamended Section 39 of the Transfer of Property Act. The properties were later transferred by mortgage by the party affected by the charge. The widow proceeded in execution of the maintenance decree for maintenance money due subsequently to the transfer. It was argued that, having regard to the provisions of Section 39 of the Transfer of Property Act as it stood then, the charge created in favour of the widow under the previous compromise decree could not affect the interest of the purchasers because they were persons who took the property without notice of the right of maintenance in the widow.. It was held that, apart from Section 39, the decree created a charge on the property for the maintenance of the widow; the purchaser subsequently took a mortgage of the property from the party against whom the decree was passed. He is, therefore, bound in the same manner as the mortgagor was bound by it. The decision was also rested on another ground that the plaintiffs could hardly be said to be transferees without notice of the right of maintenance in the widow because it did not appear that before they took the mortgage they made any enquiry as to the right of the widow or whether any charge existed upon the property in question.

21. It was further argued that the widow, being a stranger to the contract embodied in the award, cannot sue to enforce it; but it is too late, in their Lordships' opinion, to doubt the rule which has prevailed in India that where a contract is intended to secure a benefit to a third party as a beneficiary under a family arrangement, he may sue in his own right to enforce it. This seems to be the principle underlying the decision of this Board in *Khwaja Muhammad Khan v. Husaini Begam* 12 Bom. L.R. 638. In that case, their Lordships declined to apply the common law doctrine laid down in *Tweddle v. Atkinson* (1861) 1 B. & S. 393 to agreements and arrangements entered into in connection with marriages amongst communities in India like Muslims. This ruling has since been followed in India in many cases, where provision is made for the maintenance of the female members of a Hindu family on a partition of the joint family property between the male members.

22. Their Lordships agree with the decision of the High Court that on a proper interpretation of the terms of the award the charge was created from the date of the award. The reference to the exact rate of maintenance, viz. Rs. 75 per month, being of no importance while the widow lived with her husband, would come into operation only after the husband and wife had ceased to live together. This part of the clause, therefore, would be operative only after that event had happened, though the charge itself would commence to operate from the date of the award. The charge was not, therefore, conditional upon the widow living apart from her husband.

23. Their Lordships likewise agree with the conclusion of the High Court that there is no reliable evidence to support the contention that there was a conspiracy to defraud Drigpal Singh, and that the evidence produced is of very little value. Three of the arbitrators, as is stated above, were the brothers of the husband, and another arbitrator was a person occupying the responsible position of a Deputy Collector.

24. As regards the period for which the maintenance allowance was due, both Courts agree in finding that the respondent lived with her husband till the time of his death in 1928 and that she received her maintenance till that period, though it is not clear, as the High Court judgment points out, whether such maintenance

was not paid from the property of the minor sons. Having regard to the fact, however, that she received her maintenance up to that date and that she brought the suit long after the death of the husband, their Lordships think it would be inequitable to decree maintenance to her for the entire period beginning with the date of the award. The plaintiff did not prove her case that she lived apart from her husband. On the contrary, the evidence shows that she lived with her husband and was not without receiving her maintenance. The decision of the High Court does not decide this point. It will, therefore, be necessary to send the case back to the High Court for the purpose of determining from what date after her husband's death she is entitled to maintenance, and at what rate. In considering this question the Court may have regard to the fact that the arbitrators, who apparently knew the circumstances of the family, its needs and requirements and also the value of its assets, fixed Rs. 75 per month as proper maintenance.

25. Subject to what is stated above, their Lordships are of opinion that the decision of the High Court is correct, and they will humbly advise His Majesty that this appeal be dismissed. The appellant must pay two-thirds of the respondent's costs of this appeal.