

Jetharam and ors. Vs. Hazarimal

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Court : Rajasthan

Decided On : Aug-28-1951

Reported in : AIR1952Raj28

Judge : Wanchoo, C.J. and; Bapna, J.

Acts : Hindu Law; [Registration Act, 1908](#) - Sections 35 and 35(3); Specific Relief Act, 1877 - Sections 12

Appeal No. : Appeal No. 9 of 1950

Appellant : Jetharam and ors.

Respondent : Hazarimal

Advocate for Def. : Sohan Nath and; Sardar Nath, Adv.

Advocate for Pet/Ap. : Indernath and; Utsavlal, Adv.

Disposition : Appeal dismissed

Judgement :

Bapna, J.

1. This is an appeal against the judgment and decree of the High Court of the former covenanting State of Jodhpur, and, was filed before the Ijlas-i-khas and. transferred to this Court by virtue of the provisions of Ordinance No. XL of 1949

read with Ordinance No. XII of 1950.

2. The respondent Hazarimal sued the appellant Jetharam for specific performance of a contract of sale of a house situated at Jodhpur and more particularly described in the plaint, on the basis of an agreement of sale Ex. P-1, dated the 29th January 1941. Rugnath Das and his three sons were impleaded as defendants Nos. 2 to 5 as mortgagees of the property. Laduram and Jaitulal, sons of Jetharam defendant, and their minor sons were impleaded as defendants Nos. 6 to 12 on, their own application. Defendant No. 1 and defendants Nos. 6 to 12 filed separate written statements but have taken identical pleas. They contested the suit on the following grounds;

(1) that Jetharam was a person of weak intellect and his signatures had been secured on Ex. P-1 under a misrepresentation and he did not fully understand the nature of the transaction at the time; (2) that the completion of the sale had been made dependant upon the consent and willingness of the sons and grandsons of Jetharam & as the same had not been secured, the agreement was not enforceable; (3) that the house in dispute had been built by Dalla father of Jetharam, and was the joint family property of Jetharam, and his sons and grandsons, and Jetharam alone had no authority to enter into an agreement for sale which was thus unenforceable.

The mortgagees denied any knowledge of the agreement of sale and expressed that they had no interest except under the mortgage which, they said, had been executed by Jetharam and his sons. The trial Court accepted the defence on all the three points and dismissed the suit. On appeal, the learned Judges of the High Court of the former covenanted State of Jodhpur reversed those findings and held on a discussion of the evidence and circumstances of the case that it had not been established that the house had been built by Dalla and was ancestral property in the hands of Jetharam. It was held that the land had been acquired and built upon by Jetharam himself. The contention that Jetharam had since the acquisition of the property thrown it into the common stock and made it joint family property belonging to his sons and grandsons was negatived. It was also held that even on the assumption that the house was joint family property, the agreement to sell had

been made for payment of his antecedent debts and was binding on his sons and grandsons. It was further held that it had not been proved that Jeharam was a person of weak intellect but on the other hand it had been fully proved that he had executed Ex. P-1 of his own free will after understanding its implications and no misrepresentation had been made to him, and further that there was no stipulation for obtaining the consent of the sons of Jeharam before the agreement of sale was to become complete. The suit was accordingly decreed for specific performance of the contract of sale against Jetharam, with directions that he should execute a sale-deed and have it duly registered and also deliver possession to the plaintiff, and for possession against the mortgagees on receipt of their mortgage amount, and for possession against defendants Nos. 6 to 12 as well, as they stated that they had got into possession by redeeming the mortgage. A further direction was made that if any amount was left over after payment of the mortgage debt, it was to be paid to Jetharam.

3. The present appeal has been filed by Jetharam and defendants Nos. 6 to 12 who are his sons and grandsons, and it appears that the mortgagees having been paid off were not made parties to this appeal. The finding that Ex. P-1, the contract of sale, was not vitiated by any misrepresentation or lack of understanding by the executant or by absence of consent of the sons of Jetharam is one of fact and cannot be raised in this appeal and the learned counsel for the appellants very rightly did not address any arguments on these points. It was, however, contended for the appellants that it was the case of both parties that Jetharam and his sons were members of a joint Hindu family and, therefore, there was an initial presumption that the house property which was in possession of the members of the family was joint family property. The law is, however, well settled that there is no presumption that a family, because it is joint, possesses joint property or any property. The burden of proving that any particular property is joint family property is in the first instance upon the person who claims it as coparcenary property '*Shadilal v. Lal Bahadur*', AIR (20) 1933 PC 85. The mortgagee in that case brought a suit to enforce the mortgage by sale of the property mortgaged by the father, and the sons pleaded that the mortgaged property was ancestral and that there was no necessity for the loan. It was held by their Lordships of the Privy Council that there was no presumption that a family, because it is joint, possesses

joint property, and it was for the sons of the mortgagee to allege and prove that those properties were joint family properties. 'Shadilal's case', (AIR (20) 1933 PC 85), was referred to by the Madras High Court in 'Jankiamma v. Venkata Rajagopala Chinnarao', ILR (1945) Mad 378 at p. 384. It was there contended by the respondent that if any member of a Hindu joint family claimed any property in his possession to be his separate property, the onus was on him to prove that it was acquired by him out of his own funds and without the aid of the family estate. Their Lordships observed that before the appellant could be called upon to assume such burden, it was incumbent on the respondent to show that the family was possessed of some property with the aid of which the property in dispute could have been acquired.

4. In an Oudh case: 'Mt. Brij Kunwar v. Sankata Prasad', AIR (17) 1930 Oudh 39, a suit was brought by the mortgagee after the death of the mortgagor against his sons and grandsons. It was pleaded that the property was ancestral and the mortgage was not binding as it was not for legal necessity or antecedent debt. It was held that there was no presumption in Hindu Law about any property being ancestral and it was for the persons alleging that it was so to prove their contention. In 'Kamlakant Gopalji v. Madhavji Vaghji', AIR (22) 1935 Bom 343, it was held that merely from the fact that the father and the sons are joint in food and worship, there is no presumption that they hold joint family property. It is for the plaintiff to show that the family possessed some joint or ancestral property from which the presumption could be drawn that all the property possessed by the family was joint family property.

5. The principles which have now been well established are that to render the property joint, the person claiming such interest in the property must prove that the family was possessed of some property with the income of which the property could have been acquired or from which the presumption could be drawn that all the property possessed by the family is joint family property or that it was purchased with joint family funds or acquired by joint labour. None of these alternatives is a matter of legal presumption. It can only be brought to the cognisance of the Court in the same way as any other fact, namely, by evidence.

6. It was contended that the 'patta' of the property was in the name of Jetharam and his sons. It may be pointed out that the defence in the trial Court was that the plot had been purchased and built upon by Dalla, father of Jetharam, but that fact was held not proved. The patta itself was not produced by the defendants. It was argued that the plaintiff in his statement admitted having seen the patta and did not deny Laduram's name being in it. What the plaintiff stated was that he had seen the patta but did not remember in whose name it was. The statement of the plaintiff need not be considered incorrect since it is possible that he may not have remembered in whose name the patta was. The Patta was in possession of the defendants themselves and they could have very easily produced it if they wanted to rely upon it. It is, however, conceded that the patta of this property was obtained in Section 1969 when Laduram, the eldest son of Jetharam, was not more than 12 years old. The mere fact that Jetharam thought it proper to add his minor's son's name does not prove that the property was acquired jointly by Jetharam and his son. Some proof should have been adduced as to the source from which the money was forthcoming not only for the purchase of the land but for the construction of the property thereafter. There is no evidence on the record in this respect. The doctrine of advancement is not followed in India and the fact that a minor's name is included in the document of title does not confer any title in him unless of course it is proved that the minor had any independent source of income and the minor's money was utilized in the acquisition of the property. Reference may be made to 'Naginbhai v. Abdulla', 6 Bom 717, 'Gopal Trimbak Bhate v. Kesheosa Vishnoosa', AIR, (23) 1936 Nag 185, and 'Nga Tin Cyi v. Nga Twe Aung', 35 Ind Gas 12(UB).

7. It was next contended that even if the property was the self-acquired property of Jetharam, it had been blended with the joint family property and was thrown in the common stock of the family and Jetharam and his two sons Laduram and Jaitulal dealt with the property as if it belonged to them jointly. For the last contention reliance was placed on Exs. P-10, P-11, P-12, and D-1. Ex. P-10 is a mortgage-deed purporting to have been executed by Jetharam and his two sons Ladu and Jaitulal for a sum of Rs. 22,000/- on 9th of October, 1929 in favour of Ragunath. P-11 is another mortgage deed, dated 7-5-1935 executed by the aforesaid three persons in favour of Ragunath for a sum of Rs. 1,999/-. This was a second

mortgage and the amount of consideration was the interest which had fallen due on the first mortgage. Ex. P-12 is dated 17-5-1939 and is a third mortgage in lieu of Rs. 1,999/- due on account of interest Ex. P-10 and purports to have been executed by Jetharam and his two sons Ladu and Jaithu in favour of the same mortgagee Ragunath. Ex. D-1 is the last mortgage deed executed by Jetha, Ladu and Jaitulal for Rs. 25,998/- in supersession of Exs. P-10 & P-11 and Ex. P-12, the earlier mortgages. All these mortgages are in favour of the same mortgagee Ragunath.

8. Learned counsel for the appellant argued that the Division Bench of the High Court had committed an error in so far as it observed that these were mortgages executed by jetharam or by Jetharam and his two sons. As a matter of fact, all the four mortgages were executed by Jetharam and his two sons Ladu and Jaitulal but the observation of the learned Judges of the Division Bench was made while discussing whether the property had been acquired by Dalla. He was alive when two of the mortgages had been executed, and the fact that he was not a party to the transactions was held to be inconsistent with the case set up by the defendants. The present argument is that the owners were Jetharam, Laduram and Jaitulal. In the first place, it is rather curious that while the documents were purported to be executed by Jetharam and his two sons Laduram and Jaitulal, the sons never appeared in the course of the registration proceedings in respect of the three deeds Exs. P-10, P-11 and P-12. The person who appeared before the Registrar was only one and he was Jetha. Only in the last deed of mortgage Ex. D-1 did all the three executants appear in registration proceedings and admit the mortgage. This Ex. D-1 is dated 14-2-1941 and was executed not only after the agreement to sell had been executed by Jetharam on 29-1-1941 but after the plaintiff had given him notice on 10-2-1941 to execute the deed of sale and convey the property. By this time, obviously, the defendants had made up their mind to make out a case that Jetharam alone had no authority to alienate the property. It was at one stage argued by the learned counsel for the appellant that if only one of several executants appeared to admit the mortgage before the Registrar and the deed was registered, it was invalid even as against the person on whose admission the deed was registered. The argument, however, was not supported by any authority. On the other hand, the case of 'Md. Ewaz v. Brijlal', 4 Ind App

166, is an authority to the contrary. It was held in that case that where the document was executed by two or more persons, and some of them admitted execution while others denied it the document should be registered as to the persons admitting the execution and it would be effective against the persons on whose instance the document was registered. This decision was given by their Lordships of the Privy Council in 1877 and Sub-section (3) of Section 35, Registration Act was amended to bring it in accordance with that decision. The law of registration in Marwar on the point was not different. The mortgages Exs. P-10, P-11 and P-12 were thus operative only against Jetharam, The inclusion of the name of his sons Laduram and Jaitulal has, therefore, no significance beyond giving some sort of satisfaction to the mortgagee that the sons of the mortgagor will not perhaps question the mortgage later on. Ex. D-I which was executed by Jetha, Ladu and Jaitu, and got registered by all the three of them, does not carry the matter further as the consideration was entirely composed of the mortgage money of Ex. P-12 and interest thereon.

9. There is no proof also as to any express act by Jetha Ram which may show that he had given up his sole ownership of this property. The fact that his sons and grandsons lived with him in the same house is not sufficient for any presumption or finding that Jetha had voluntarily thrown the property in the common stock with the intention of abandoning all separate claims upon it. It has been held that a clear intention to waive the separate rights of the person who acquired the property must be established and that it will not be so inferred from the mere fact of his allowing the other members of his family to use it conjointly with himself. Reference may be made to 'Rajkishore v. Madangopal, AIR (19) 1932 Lah 636; 'Govind Prasad v. Shanti Swarup', AIR (22) 1935 All 778; 'Gopal Trimbak Bhate v. Kesheosa Vishnoosa', AIR (23) 1936 Nag 185; and 'Periakaruppan Chetty v. Arunachelam Chetty', 50 Mad 582.

10. It was contended that the consideration of the first mortgage was utilized as mentioned in the deed to pay off a debt of Rs. 14,000/- incurred in connection with the motor business and Rs. 8,000/- were payable to the Jodhpur State in connection with certain contracts. No evidence has been produced to show as to who were carrying on this motor business or this contract business and there can

be no presumption that this was the business of the family. In any case, if Jetharam had become indebted along with his sons, he was jointly and severally liable and he might have thought it prudent to raise a loan on his property in order to wipe off his liability which would incidentally wipe off the liability of his sons as well.

11. An important feature in this case is that Jetharam himself has not come in the witness-box and the defendants have, therefore, kept back the circumstances with respect to the acquisition or enjoyment of the property which could throw considerable light on the fact whether it was the property of Jetharam alone or was that of the joint family consisting of himself and his sons and grandsons. It was argued that the creditor Ragunath had stated that the debts were of Jetha and his sons in lieu whereof he had mortgaged the property. He appears on the scene when taking the first mortgage on 9-10-1929. He has no knowledge of the debts for payment whereof the mortgage had been executed. His statement can only be of the fact in corroboration of the mortgage deed itself that the three persons Jetha, Ladu and Jaitu had executed the mortgage and they were his debtors. Beyond that fact, the statement of Ragunathdas is of no value.

12. It was next contended that the lower Court was not right in holding that the sale was valid even on the assumption that the property was joint family property. It has been observed by the High Court that the sale had been made in order to pay off the mortgage-money and its interest which was an antecedent debt and was, therefore, binding on the sons and grandsons. It was contended that if the property was joint family property and the debts evidenced by Exs. P-10, P-11 and P-12 were the debts outstanding against the family as a whole, the debts were not, the antecedent debts of Jetharam alone. The debts were of the family, the payment thereof was not due to legal necessity as it had not been shown that there was any pressure on the family for repayment. The distinction is sought to be made on the ground that when the alienation is for family necessity, it must be proved that there was pressure for repayment of the debt '*Bandhram v. Ram Kishun Sonar*', AIR (10) 1923 All 535, '*Chiranjilal v. Bankeylal*', AIR (20) 1933 All 273. There is no doubt that if an alienation is made by manager other than the father, it is not enough to show merely that the debt is a preexisting debt but it

must be proved that there was pressure on the family and that there were no other means to repay the debt. In the present case, Jetharam was not only the manager but the father of the sons and the debt was such that he was one of the debtors assuming that the loan had been obtained jointly by the father and the sons. While a debt contracted by the father alone which is not for illegal or immoral purpose becomes an antecedent debt, it is not the less antecedent because his sons are joint debtors with him. According to the doctrine of pious obligation, the male issues of a Hindu are under a pious obligation or duty to pay the debts-- even the personal debts-- of the ancestor provided the debt is untainted, i.e., not of an illegal or immoral nature. The emphasis is on the fact that in such cases, the debt may be one contracted for his own benefit by the debtor. It does not mean that if the debt contracted by the father is such that his sons are co-debtors with him, such debt will not become an antecedent debt, of course, when it is antecedent in fact as well as in time. There is no force in this contention either.

13. It was finally argued that specific performance of the contract may not be granted as it was a discretionary relief. It was contended that property was of a much higher value than the amount of consideration viz., Rs. 31,000/-, and Jetharam may have agreed to sell in an unguarded moment and there is something to show that he was a person of weak intellect. The contention that Jetharam was a person of weak intellect is not borne out on the record. He himself did not come into the witness-box and there is no medical evidence on the subject. The explanation to Section 12 of the Specific Relief Act is, however, clear that unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money. A contract to sell immovable property is, thus, one where grant of pecuniary compensation is not an adequate relief. It may be pointed out also that there is no evidence as to the value of property in 1941 when the contract was made. In any case, the inadequacy of the consideration is no ground for refusing enforcement of the contract unless that fact taken with other circumstances make out a case for holding that the bargain was an unconscionable, one. There is no proof in this case for any such finding specially when the finding of the lower Court as to Jetharam being of weak intellect has been given against the defendants.

14. The appeal has, therefore, no force, and is,dismissed with costs.

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