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**Dropdi Devi and ors. Vs. Jagdish Chandra and ors.**

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**SooperKanoon Citation** : sooperkanoon.com/751240

**Court** : Rajasthan

**Decided On :** Jul-04-1988

**Reported in** : AIR1989Raj110; 1988(2)WLN413

**Judge** : S.S. Byas, J.

**Acts** : Hindu Law; Mitakshara Law; Partition Act, 1893 - Sections 4

**Appeal No.** : Civil Second Appeal No. 471 of 1974

**Appellant** : Dropdi Devi and ors.

**Respondent** : Jagdish Chandra and ors.

**Advocate for Def.** : L.R. Mehta, Adv.

**Advocate for Pet/Ap.** : H.M. Pareekh, Adv.

**Disposition** : Appeal partly allowed

**Judgement** :

**S.S. Byas, J.**

1. This civil second appeal was filed by defendant Kanhaiya Lal, against whom the plaintiff-respondents' suit for cancellation of documents and recovery of possession over the immovable properties and mesne profit was decreed by the two courts below. Kanhaiya Lal passed away during the pendency of the appeal.

As such, his legal representatives were brought on record and substituted in his place. The appeal is now being continued and prosecuted by legal representatives.

2. In this appeal, an interesting question of Hindu Law, relating to the right of a purchaser of an interest of a coparcener in the joint family property, is involved. There is no judicial pronouncement of our High Court on the point involved.

3. The respondents are the heirs and descendants of one Bhagwati Lal Kayastha, as set out in the pedigree mentioned in para '1' of the plaint. Plaintiff Smt. Phool Kanwar is the widow of Bhagwati Lal. Bhagwati Lal had one son Heeralal. Plaintiff Smt. Pam Kanwar is wife of Heeralal while the other respondents are his sons and daughters. Smt. Phool Kanwar, Smt. Pam Kanwar, Jagdish Chandra and Ashok Kumar instituted a suit against defendant Kanhaiya Lal, impleading the other sons and daughters of Heeralal as pro forma defendants for cancellation of certain documents and recovery of possession over immovable property in the Court of the Civil Judge, Udaipur on August 23, 1969. The case set up in the plaint was that Bhagwati Lal passed-away in 1952 A. D. Heeralal left the house and his where about could not be ascertained or known for last more than eleven years, the house described in para 5 of the plaint, situate in the city of Udaipur, is the ancestral property left by Bhagwati Lal, No partition took place between the sons and daughters of Heeralal, his wife and mother. The house in dispute, thus, remained the joint family property of them all. Defendant Madanmonan Lal, who is the eldest son of Heeralal, mortgaged a room of the said house to defendant Kanhaiya Lal for a sum of Rs. l,000/- on October 30, 1964 by a registered deed without the consent of the plaintiffs and other heirs of Heeralal. Defendant Kanhaiya Lal, in pursuance to the said mortgage, obtained possession over the mortgaged room. Defendant Kanhaiya Lal also filed a suit for the recovery of money against defendant Madanmohan Lal and obtained decree against him. In execution of that money decree, the mortgaged room was got attached. Later on the equity of redemption of the mortgage of the aforesaid room was put to auction by the Court and the equity of redemption was purchased by defendant Kanhaiya Lal on August 23, 1967 for a sum of Rs. 520/-. It was alleged that neither the original mortgage nor the auction conducted by the Court was valid and legal

because the mortgage was made and the debt was incurred by defendant Madanmohan Lal without the consent of the plaintiffs and other heirs of Heeralal. It was prayed that the mortgage-deed as well as the sale certificate issued by the Court be declared null and void as against the plaintiffs and possession of the room in dispute be delivered to them from defendant Kanhaiya Lal. The plaintiffs also claimed mesne profit at the rate of Rs. 15/-. past pendente lite and future.

4. The suit was contested only by defendant Kanhaiya Lal. The other pro forma defendants, as is natural in such cases, joined hands with the plaintiffs and admitted the suit. Defendant Kanhaiya Lal admitted the mortgage and his purchasing the equity of redemption in the auction by the Court, It was. however, denied that defendant Madanmohan Lal had no authority or powers to mortgage the room. It was pleaded that defendant Madanmohan Lal was the sole and exclusive owner of the room in dispute, Alternatively, it was pleaded that defendant Madanmohan Lal was the manager of the joint Hindu family and he had full authority to mortgage the room. The room was put to auction in execution of the decretal debt. It was also pleaded that Heeralal is still alive. Questions relating to limitation, improper valuation of the suit and estoppel etc. were also raised. The learned Civil Judge raised the necessary issues and recorded the evidence of the parties. On the conclusion of the trial, the learned Civil Judge recorded his findings as under : --

(1) the house, described in para 5 of the plaint, of which the room in dispute is a part, is the joint Hindu family property of the heirs of Bhagwati Lal, that is, the plaintiffs and the pro forma defendants;

(2) no partition took place between the joint Hindu family property and the house remained joint Hindu family at all relevant times:

(3) Heeralal was not heard of last eleven years and it should be presumed that he was no more alive;

(4) defendant Madanmohan Lal, who is a son of Heeralal, had no authority or powers to mortgage the room in dispute. As such, the mortgage made by him was invalid and unenforceable:

(5) the sale of the room in execution of the money decree passed against defendant Madanmohan Lal is also invalid as the debt was not incurred by Madanmohan Lal for legal necessity of the joint Hindu family; and

(6) the suit was perfectly maintainable.

4A. In the result, the learned Civil Judge decreed the suit in terms prayed for by the plaintiffs. Defendant Kanhaiya Lal went in appeal, which was heard and decided by the learned District Judge, Udaipur. He concurred with all the findings of the trial Court and dismissed the appeal. Hence this second appeal.

5. I have heard Mr. H. M. Pareekh--learned counsel for the appellants and Mr. L. R. Mehta-- learned counsel for the respondents. I have also gone through the case file carefully.

5A. In assailing the judgment anddecrees of the Courts below, it was strenuously contended by Mr. Pareekh that the whole approach of the two courts to the crucial question involved is wholly erroneous and unsustainable. It was argued that the mortgage made by the defendant Madanmohan Lal in favour of Kanhaiya Lal no more existed after the mortgaged property was put to sale by the Court in execution of the money decree obtained by Kanhaiya Lal against Madanmohan Lal, Kanhaiya Lal had Lal, Kanhaiya Lal had purchased the equity of redemption, that is, with the encumbrance of the mortgage existing in the room in dispute. The mortgage, thus, got merged into the sale. It was argued that though a coparcener, who is not a manager of the Joint Hindu Family, has no right to alienate even for value his undivided interest without the consent of the other coparceners, this principle does not apply where the alienee purchased the Joint Hindu Family property at an execution sale. It was urged that the sale in favour of defendant Kanhaiya Lal was, thus, valid and could not be challenged by the other coparceners. It was also argued that in any case the Courts below should have given a direction to the effect that the execution of the decree in so far as it directs the purchaser to deliver possession of the property to the plaintiff be stayed for a fixed period and if before the expiry of that period the purchaser brings a suit for general partition against the plaintiff, then the stay should continue until the disposal of the suit but if no such suit is brought within that period, then the stay of

execution will stand cancelled, as has been the practice of the courts in such cases, Reliance in support of the contention was placed on Kandaswami Udayan v. Velayutha Udayan, AIR 1926 Mad 774, Sidheshwar Mukherjee v. Bhubneshwar Prasad, AIR 1953 SC 487, Ram Dayal v. Manak Lal, AIR 1973 Madh Pra 222 (FB) and Nelli Narasimha Reddy v. Vadla Krishnaiah, AIR 1975 Andh Pra 250.

6. It was. on the other hand, contended by Mr. Mehta-- learned counsel for the plaintiff respondents that neither the mortgage nor the sale in execution of the decree made by the Court, was valid and enforceable. It was argued that when a coparcener cannot alienate his undivided interest without the consent of the other coparceners, the alienation made by him is void and inoperative. I have taken the respective submissions into consideration.

7. The contention raised by Mr. Pareekh has considerable force and may be examined at some length According to Mitakshara law, as administered in the Bombay, Madras and Madhya Pradesh States, a coprarcener may alienate for value his undivided interest in the coparcenary property without the consent of the other coparceners.

8. However, in other parts of the country, this type of alienation has not been recognised. According to Mitakshara law, as administered in other parts of the country, no coparcener can alienate even for value, his undivided interest without the consent of the other coparceners, vide Articles 259 and 260, of Mulla's Hindu Law (1982 Edition).

9. This rigour that no coparcener can alienate his undivided interest, has been relaxed in favour of purchasers at an execution sale throughout the country. Article 289 of Mulla's Hindu Law speaks that according to Mitakshara Law, as applied in all the States, the undivided interest of a coparcener may be attached in his lifetime in execution of a decree against him for his personal debt. Such an attachment and consequent sale are perfectly legal with no taint or infirmity.

10. In Sidheshwar Mukherjee's case (AIR 1953 SC 487) (supra), their Lordships of the Supreme Court observed, in para 9, as under : --

'It is true that under the Mitakshara law, as it is administered in the State of Bihar, no coparcener can alienate, even for valuable consideration, his undivided interest in the joint property without the consent of his coparcener; but although a coparcener is incompetent to alienate voluntarily his undivided coparcenary interest, it is open to the creditor, who has obtained a decree against him personally, to attach and put up to sale this undivided interest and after purchase to have the interest separated by a suit for partition.'

11. Article 289 of Mulla's Hindu Law, occurring in the Chapter of 'Debts', runs as under :--

'289-- Undivided coparcenary interest, when liable for coparcener's debt.-- (1) According to the Mitakshara law as applied in all the States, the undivided interest of a coparcener may be attached in his lifetime in execution of a decree against him for his personal debt.'

12. The same view has been expressed in Article 3 on page 589 of Hindu Law (AIR Publication-- 1981 Edition). The said Article 3(1) reads as under : --

'Article 3-- (1) A debt contracted by a coparcener for his own benefit or purpose may be enforced during his lifetime against his undivided interest in the joint family property.'

13. The position is, thus, well-settled that the undivided interest of a coparcener may be attached and sold in his lifetime in execution of a decree against him for his personal debts. The view of the courts below that the sale certificate Ex.A1, issued in favour of the defendant Kanhaiya Lal is not valid, is not correct and is unsustainable. Mr. Mehta, learned counsel for the plaintiff-respondents could not controvert this settled position in law nor could he cite any authority before me taking view contrary to that mentioned above. The sale made in favour of defendant Kanhaiya Lal through Court auction and the sale certificate Ex.A1, issued in his favour in consequence of it, are valid and quite enforceable.

14. The next question which arises for consideration is as to the rights of the purchaser of the coparcenary interest. The matter has been dealt with at length

and exhaustively in Article 261 of Mulla's Hindu Law. The learned author has discussed both the positions, namely, (1) where the possession has not been transferred to the purchaser; and (2) where the purchaser has obtained the possession. In the instant case in my hand, admittedly, defendant Kanhaiya Lal had obtained possession over the property purchased by him at the execution sale under sale certificate Ex.A1. I will, therefore, confine myself as to the rights of the purchaser who had obtained possession. On page 348 under Article 261, the view expressed by Mulla is as under : --

'If the purchaser has obtained possession, the non-alienating coparceners are entitled to sue for and recover possession of the whole of the property for the benefit of the joint family including the vendor. The purchaser is not entitled in such suit to an order for partition either of the specific property sold to him or of the joint family properties in general; he must, if he wants to realize his vendor's interest, bring a suit of his own for a general partition. Where a suit therefore is brought by the non alienating coparceners for possession, the proper decree to be passed would be an order directing the purchaser to deliver possession, to the plaintiffs of the whole property, and declaring that the purchaser is entitled to a declaration that he has acquired the undivided interest of his vendor in the property and that he is entitled to take proceedings to have that interest ascertained by partition, but to protect the purchaser a further direction is added that the execution of the decree, so far as it directs the purchaser to deliver possession to the plaintiffs, be stayed for a specified period, and if before the expiry of that period the purchaser brings a suit for a general partition against the plaintiffs then the stay should continue until the disposal of that suit, but if no such suit is brought within that period, then the stay of execution will stand cancelled.'

15. The aforesaid view is based on the cases cited above. Recently in Ramdayal's case (AIR 1973 Madh Pra222) (supra), a Full Bench of the Madhya Pradesh High Court expressed the following view (paras 5 and 6) :--Where the property in possession of the purchaser from a coparcener is not in excess of the share of the coparcener the Court can, in a decree for possession passed in a suit filed by another coparcener, direct that 'the execution of the decree, so far as it directs the purchaser to deliver possession to the plaintiffs, be stayed for a specified period

and if before the expiry of that period the purchaser files a suit for general partition against the plaintiff, of the suit but if no such suit is brought within that period then the stay of execution will stand cancelled'.'

16. It need not be stressed that every purchaser of the whole or any portion of the joint family property-- by a sale in execution of a decree-- has a right to claim a partition of the joint family property. A person, who is entitled to demand partition, may sue to enforce partition. Defendant Kanhaiya Lal, therefore, had a right to claim partition and on his death, the same right can be effectively asserted, claimed or exercised by his heirs and descendants. Whether the alienee is entitled to the specific share purchased by him in the sale conducted by a Court in execution of a money decree, is a question to be decided in that partition suit. So long that suit for partition has not been filed, the purchaser is entitled to retain possession over that specific portion purchased by him in the Court auction.

17. The property in dispute is only a room, which is a portion of a big Haweli. It does not appear that the share of defendant Madanmohan Lal could be less than this room on partition.

18. Under these circumstances, the appeal should be allowed partly and the judgment and decree of the courts below should be suitably modified.

19. The appeal is, therefore, partly allowed only to this extent that a further direction be added to the decree passed by the courts below to the effect that the execution of the decree in so far as it directs the purchaser to deliver possession of the property to the plaintiffs be stayed for a period of six months and if before the expiry of that period the purchaser brings a suit for general partition, then the stay should continue until the disposal of the suit but if no such suit is brought within that period, then the stay of execution will stand cancelled.

20. Parties are left to bear their own costs.

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