

Natesa Pathar Vs. Ganapathi Subbu Pathar and ors.

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Court : Chennai

Decided On : Oct-08-1925

Reported in : 94Ind.Cas.68

Judge : Charles Gordon Spencer, J.

Appellant : Natesa Pathar

Respondent : Ganapathi Subbu Pathar and ors.

Judgement :

Charles Gordon Spencer, J.

1. The plaintiffs brought this suit for partition of their 4/5th shares in the plaint properties which form the ancestral properties of themselves and their father, the 4th defendant. The 1st defendant brought a money suit against the 4th defendant in S.C.S. No. 1165 of 1908 on the file of the Kumbakonam Sub-Court and attached the defendants' properties and purchased them in Court-auction subject to a usufructuary mortgage in favour of Swaminadha Pathar upon which Rs. 1,000 were due. The only question for decision in this case is whether the 1st defendant in the suit, purchased the interest of the 4th defendant only or that of all his sons also. Both the lower Courts have decided in favour of the former alternative and have given the plaintiffs a decree for partition of their 4/5th share. Whether what the purchaser got at the Court sale was the entire family property or only the 4th defendant's share therein is a mixed question of law and fact. It has been so held

by this Court in *Gnanammal v. Muthusami* 13 M. 47 : 4 Ind. Dec. 743 and by the Privy Council in *Abdul Aziz Khan v. Appayasami Naicker* 27 M. 131 : 8 C.W.N. 186 : 6 Bom. L.R. 7 : 31 I.A. 1 : 8 Sar.P.C.J. 568 and in *Somasundam Avalappa Nicker v. Murugappa, Chetiyar* 18 Ind. Cas. 49 : 36 M. 325 : (1913) M.W.N. 86 : 12 M.L.T. 571 : 1913 23 M.L.J. 653. The statement in *Mahabir Pershad v. Moheswar Nath Sahai* 17 C. 584 : 17 I.A. 11 : 5 Sar.P.C.J. 489 : 8 Ind. Dec. 929 and in *Abdul Aziz Khan v. Appayasami Naicker* 22 M. 110 : 8 Ind. Dec. 77 that it is only a question of fact in each case may be disregarded in the light of later pronouncements. As a Court of Second Appeal I have only to see that the Courts below have rightly applied the law to the facts found by them. A number of cases have been cited in which a similar question had to be decided as to the nature of the interest which passed in a sale or family property.' I will not refer to them as Mayne in his *Hindu Law*, 9th Edition, page 433, has summed up the effect of all these decisions. He says: 'The mere fact that the father might have transferred his son's interest affords no presumption that he has done so, and those who assert that he has done so must make out, not only that the words in the conveyance are capable of passing the larger interest, but that they are such words as a purchaser might be reasonably expected to require.' Then in Rule 4 he says,: 'The fact that the sons have not been made parties to the proceedings in execution is a material element in considering whether the creditor aimed at the larger or was willing to limit himself to the minor remedy.'

2. Both the District Munsif and the Subordinate Judge appear from their judgments to have been quite alive to the effect of the rulings on the subject of the sons' liability to discharge debts of their father which are not tainted by illegality or immorality from their shares of the family property. They have considered the frame of the suit, the terms of the decree, and the sale certificate as well as the conduct of the parties and the character of the debt. The debt was a personal debt of the father due upon a promissory-note as it appears from the judgment (Ex. A) in S.C.S. No. 1165 of 1908. In other proceedings between the parties, it was found that the debt was not incurred for immoral purposes [See Ex. VIII (a)]. The District Munsif came to the conclusion in this suit, 'There can be no doubt about the creditor's right to proceed against the family property to recover the debt.' But in the present case there are the following significant facts : At the trial of the suit the

defendants were exonerated as no guardian was appointed to represent them. The decree directed payment of Rs. 110 by the 1st defendant alone. In the petition for transmitting the decree for execution, it was noted that the defendants Nos. 2 to 5 had been exonerated and that no relief was asked against them. In the execution petition this fact was repeated and the prayer was for attachment of the immoveable property belonging to and enjoyed by the 1st defendant. In the sale proclamation the interest of the judgment-debtor was described as certain survey numbers inherited and enjoyed by the 1st defendant. The sale certificate also contained a note that the defendants Nos. 2 to 5 had been exonerated and the Subordinate Judge also relied on the fact that the property was bought for Rs. 75 which is much below its value even after allowing for the encumbrance. The price at which the auction-purchaser 'managed to secure the property is not, in my opinion, so important as the low upset price, viz., Rs. 50 at which the sale commenced. If there is no competition, a successful bidder naturally will not give more than is sufficient to secure the sale being knocked down in his favour. As against this there is nothing but the mere fact that the sale certificate mentions the survey numbers to be sold without stating that only the interest of the 4th defendant was made the subject of the sale. Under these circumstances, I am of opinion that the lower Courts were entitled to come to the conclusion that only the father's share in the suit properties was sold and I cannot say that their findings are wrong. I, therefore, dismiss the second appeal with costs of respondents Nos. 1 to 3.

3. After the sale had been concluded, one of the sons, Doraiswami, died. The Subordinate Judge found that his share must go to the plaintiffs and the 4th defendant. Although the 4th defendant was not originally a party to the suit and did not claim 1/20th share on account of the death of his son. I think that the Appellate Court had power, under Order XLI, Rule 33, to make this award in his favour. Appellant will pay the 4th respondent's Vakil's fee and vakalat upon this item.