

Deg Narain Singh and anr. Vs. Ramphul Singh and ors.

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Court : Kolkata

Decided On : Aug-01-1881

Reported in : (1882)ILR8Cal517

Judge : Prinsep and ;Field, JJ.

Appellant : Deg Narain Singh and anr.

Respondent : Ramphul Singh and ors.

Judgement :

Field, J.

1. Four points have been taken before us in this appeal. The first is concerned with the question of limitation.

2. On this point we agree with the judgment of the Court below. We think that, having regard to the provisions of Section 31 of the Indian Majority Act, IX of 1875, the plaintiff No. 1, Deg Narain Singh, attained his majority upon completing his age of twenty-one years; and as this suit was instituted within three years after he so came of age, it is within time. We may observe that there is now no contention before us that this plaintiff was born on a date prior to that set forth in the plaint.

3. The second point is concerned with the la. 2g. 21/2k. share, which the plaintiffs allege, though not very distinctly, to have been acquired out of the joint funds

belonging to the family. The defendants, on the other hand, contended, that this was their self-acquired property. The Subordinate Judge has, in a very hesitating manner, disposed of the question thus raised. He does not believe the evidence on either side, but he comes to the conclusion that, as the burden lay upon the defendants to prove that this share of the property was purchased out of their funds exclusively, and as they have failed to discharge this burden, it must be held that the property was acquired from the joint funds of the family. There can be no doubt that the presumption is, that all acquisitions made while the family is joint are made from the joint funds; and that the burden is upon the person who alleges that any property is self-acquired to prove this allegation. In this case we think that the defendants have not discharged the burden which thus lay upon them; and we think, moreover, that the balance of evidence is in favour of the plaintiffs. We are, therefore, of opinion that this la. 2g. 2 1/2k. share must be regarded as joint property.

4. The third point raises rather a difficult question concerned with Mitakshara law. It is contended that the son, who is the plaintiff No. 1, cannot succeed in this suit, unless he can prove that the debt, upon which the decree was passed, was a debt incurred for immoral purposes; and the fourth contention is, that if we hold that the plaintiff No. 1 can succeed in the present suit without proving that the debt was incurred for immoral purposes, because he was not a party to the suit in which the decree for that debt was passed, then there ought to be an inquiry into the question, whether or not that debt was incurred for necessary purposes.

5. These last two points are, to a certain extent, intermixed, and will have, therefore, to be considered together. The argument upon both of them assumes that the share of the son was made liable to satisfy the debt, and passed by the execution-sale to the purchaser. If this were so, there would be much force in the argument addressed to us. If, on the contrary, the share of the son was not made liable and did not pass, the case becomes altogether different. It will be important to examine the cases bearing on the question. In the case of *Deen Dyal Lal v. Jugdeep Narain Singh* I.L.R. 3 Cal. 198; s.c. L.R. 4 I.A. 247 the son sued to recover back the whole of the estate. The Subordinate Judge, gave him a decree for one moiety, -i.e., his own share; the father and the son being the only persons

entitled to share upon a partition. The District Judge dismissed the suit altogether, holding that legal necessity for the alienation had been proved. The High Court reversed the decree of the District Judge, and, on appeal to the Privy Council, their Lordships were of opinion, that legal necessity had been proved, but that this point was immaterial, as the case ought to be decided upon another ground,-the ground namely, that the father's right, title, and interest only had been sold in execution of the decree; and the purchaser at the execution-sale was entitled to nothing more. Their Lordships of the Privy Council say: 'This issue,' that is the issue of legal necessity, 'seems to their Lordships to be immaterial in the present suit, because whatever may have been the nature of the debt, the appellant cannot be taken to have acquired by the execution-sale more than the right, title, and interest of the judgment-debtor. If he had sought to go further, and to enforce his debt against the whole property and the co-sharers therein who were not parties to the bond, he ought to have framed his suit accordingly and have made those co-sharers parties to it. By the proceedings which he took, he could not get more than what was seized and sold in execution, viz., the right, title, and interest of the father. If any authority be required for this proposition, it is sufficient to refer to the cases of *Nugendur Chunder Ghose v. Sreemutty Kaminee Dossee* 11 Moore's I.A. 241 and *Baijun Doobey v. Brij Bhookun Lall Awusti* L.R. 2 I.A. 275.' See the report of *Deen Dyal Lal v. Jugdeep Narain Singh* in the I.L.R. 3 Cal. at pp. 204 205. Now, in the case before us, there can be no doubt that what was sold at the execution-sale was, not the whole property, but the right, title, and interest of the father Gobind Dyal Singh alone, and, therefore, so far as this point is concerned, the present case is on all fours with the case in the Privy Council just quoted. But it is contended by Mr. Twidale, that, although the decree was obtained only as against the father, we ought to presume that it was obtained against the father not only in his personal capacity, but also in his representative capacity as guardian of his minor son and manager of the family-property; and that, in this way, the decree binds all the members of the family and the whole of their interest in the property sold. It is sought, moreover, to distinguish this case from that of *Deen Dyal Lal v. Jugdeep Narain Singh* I.L.R. 3 Cal. 198; s.c. L.R. 4 I.A. 247 on the ground that, in that case, Jugdeep Narain Singh was a major when the suit on the bond was brought, while in the present case the plaintiff Deg Narain Singh was a minor when

the suit was instituted and the decree obtained. It has been argued that, although it does not so appear from the published report, Jugdeep Narain Singh was a major at the time referred to; but the judgment of the Privy Council does not in any way turn on this. It will, however, be useful to examine the authorities which Mr. Twidale has quoted in support of that argument. The first case is that of *Girdharee Loll v. Kantoo Lall* L.R. 1 I.A. 321; s.c 14 B.L.R. 187. There, in what is called 'the first appeal' (page 328 of the report in L.R., 1 I.A.), the father had sold the property by private sale, and it was not a case of a purchase at an execution-sale. The father had sold not merely his own interest, but the property itself. Their Lordships of the Privy Council were of opinion, that this sale was justified by the necessity of discharging the father's debt, which had not been shown to have been incurred for an immoral purpose, and which was, therefore, properly discharged from the ancestral property. In the second appeal (page 333 of the report in L.R., 1 I.A.), the purchaser was a purchaser at an execution-sale. The property purchased had been mortgaged by the father (see the report of this case at pages 188-189 of 14 B.L.R.), a decree had been made upon this mortgage-bond, and the Court had given an order for this particular property to be put up for sale under the execution. The property itself, and not merely the father's interest therein, had been sold, and in this respect that case differs from the case of *Deen Dyal Lal v. Jugdeep Narain Singh* I.L.R. 3 Cal. 198; S.C. L.R. 4 I.A. 247 and from the case now before us. The father had in fact exercised the power of a managing member of a Hindu family to bind the family property by the mortgage-bond. A decree was subsequently obtained upon this bond: and, as the Lords of the Judicial Committee observed, if this decree was a proper one (and that it was an improper one was not shown), the interest of the sons, as well as the interests of the father, in the property, although it was ancestral, were liable for the payment of the father's debt. The question, whether a decree against the father in a suit to which the son was not a party would bind the son and his interest in the property, was not raised in those cases, and therefore nothing was decided on this point by the Privy Council.

6. The next case relied on is that of *Luchmi Dai Koori v. Asman Singh* I.L.R. 2 Cal. 213; S.C. 25 W.R. 421. Here the exact point which we have now to decide was not raised or determined.

7. The case of *Gonesh Panday v. Dabi Doyal Singh* 5 C.L.R. 36 was a case of a mortgage-bond and of a purchaser in execution of a decree upon this mortgage-bond, and is, therefore, not in point, as it is on all fours with the case of *Girdhari Lall v. Kantoo Lall* L.R. 11. A. 321; s.c 14 B.L.R. 187. It may be convenient to notice that this case decided a point which is also material in the case now before us-viz., that a decree-holder, who purchases in execution of his own decree, cannot be considered to be in the favourable position of a purchaser for valuable consideration without notice. This is also in accordance with the decision of the Full Bench in *Luchmun Dass v. Giridhur Chowdhry* I.L.R. 5 Cal. 855. We may here observe that the decree, in execution of which the property was sold in the case now before us, was a simple money-decree, and was apparently obtained upon a simple money-bond. We think that there is a distinction between a simple money-decree upon a money-bond and a decree upon a mortgage-bond. In the case of a mortgage it would perhaps make no difference whether the decree obtained upon the mortgage-bond were a simple money-decree or a decree to enforce the lien against the mortgaged property; as in either case the mortgagee's lien would (so far as the present question is concerned) be satisfied and extinguished by the sale of the mortgaged property. See the Full Bench case of *Syud Emam Momtazooddeen Mahomed v. Raj Coomar Dass* 14 B.L.R. 408; also *Narsidas Jitram v. Joglekar* I.L.R. 4 Bom. 57 and *Munbasi Kooer v. Nowrutton Kooer* 8 C.L.R. 428. In the present case it has not been proved that the decree was a decree made upon a mortgage-bond. The property of a joint family governed by Mitakshara law may be bound in two ways. It may be bound by the father if he sells or mortgages it for the liquidation of a debt due by him and not incurred for immoral purposes. If the father does not, in the exercise of the power which he has as manager, himself sell or mortgage, then the only other way in which the family property can be made liable is by a decree of Court; and according to the decision of the Privy Council in the case of *Deen Dyal Lal v. Jugdeep Narain Singh* I.L.R. 3 Cal. 198; s.c L.R. 4 I.A. 247 the decree will bind only those persons who are parties to the suit in which it was made. In the present case the father was the only person sued, and we are not prepared to assent to the argument addressed to us, that, although the minor was not expressly made a party to the suit through his natural guardian or a guardian ad litem appointed by the Court in the suit, still we

ought to assume that the father was a defendant, not only for himself and his own interest, but also as representing his minor son and the interest of such son in the family property. The next case is that of *Gunga Pershad v. Sheo Dyal Singh* 5 C.L.R. 224. This was a case of an alienation by the father, and not a case of a purchaser at an execution-sale, and with reference to what has been already said, it was not in point, as the father was competent to alienate the property for a debt not incurred for immoral purposes. The case of *Bissessur Lall Sahoo v. Luchmessur Singh* L.R. 6 I.A. 233; S.C. 5 C.L.R. 477 is also not in point. It was there expressly found that the decrees were substantially in respect of the joint debt of the family, and that they were passed against the representative of the family, in other words, it was found that the person sued represented all the members of the family. The next case is that of *Upooroop Tewary v. Lall Bandjee Sahay* I.L.R. 6 Cal. 749; S.C. 8 C.L.R. 192. This also was a case in which the father had mortgaged, and there was also this additional ground for the decision that the son, being an adult, stood by and allowed the creditors, with whom his father was dealing, to believe that he was a consenting party. Then we have the case of *Goburdhon Lall v. Singessur Dutt Kooer* I.L.R. 7 Cal. 52; S.C. 8 C.L.R. 227. Here a decree was made against the father, the family property was attached, and after the attachment the father died. No sale took place in pursuance of the attachment, and therefore this case also is not in point. The case of *Munbasi Kooer v. Nowrutton Kooer* 8 C.L.R. 428 was a case of a sale in execution of a decree obtained upon a mortgage-bond, and, for the reasons already given, is not in point. The last case relied upon by Mr. Twidale is that of *Narayana Charya v. Narso Krishna* I.L.R. 1 Bom. 262 and this case is in support of his contention, but it is not a decision of this Court.

8. We now turn to examine the cases quoted on the other side, and we think that the following four cases are against Mr. Twidale's argument, and support the contention of the respondents *Roodur Prokash Misser v. Hirday Narain Sahoo* 5 C.L.R. 112; *Pursidh Narain Singh v. Hanooman Sahay* I.L.R. 5 Cal. 845; s.c. 5 C.L.R. 576; *Bhagwat Dassa v. Gouri Koonwar* 7 C.L.R. 218 and *Hanooman Sahay v. Pursidh Narain Singh* 7 C.L.R. 465. We may observe that the last case is the case of a mortgage, and therefore conflicts with some of the decisions already referred to. We may further refer to the case of *Laljee Sahoy v. Fakeer Chand*

I.L.R. 6 Cal. 135 where it was held, that the interests of an adult son could not be affected by a decree against the father alone. The decision of that case turned, however, upon another point.

9. We think that the following propositions will be found to be established as the result of all the cases:

1st.-The father may alienate the family property to discharge debts incurred by him for purposes not illegal or immoral.

2nd.-If the son seeks to set aside such alienation as to his own interest, he will have to show that the purposes of the alienation were illegal or immoral.

3rd.-If the son, being adult, has joined in the conveyance or led the alienee by his conduct to suppose that he assented to the alienation, he will be estopped from disputing its validity.

4th.-The above three propositions apply to a mortgage so as to place the purchaser at an execution-sale under a decree upon the mortgage-bond in the position of an alienee by private sale.

5th.--If the son has been a party to the suit in which the decree upon the mortgage-bond was obtained, he is of course concluded.

6th.-If the son has not been a party to the suit, he is not concluded, but must show that the original debt was contracted for illegal or immoral purposes, in order to recover his share of the property from the purchaser.

7th.-Where the father has neither aliened nor mortgaged the family-property, but it is sought by suit to make that property liable to satisfy a debt incurred by the father, the son, as well as the father, must be made a party to the suit.

8th.-When the creditor sues the father alone for a debt contracted by him alone, and in execution sells the right, title, and interest of the father only, the purchaser at this sale does not take the son's interest.

10. The case of *Laljee Sahoy v. Fakeer Chand* I.L.R. 6 Cal. 135 was the case of an adult son. The present case is that of a minor son. Does this difference make any difference in the application of the eighth and last proposition? It has always been well understood in this country that where it is sought to affect the interests of a minor by a suit, such minor must be made a party to such suit by his natural guardian or a guardian appointed by the Court. The present Code of Civil Procedure lays down more precise rules than were contained in the former Code for making minors parties to suits, and having them properly represented by guardians ad litem. But there is no pretence for saying that, before the passing of the present Code, minors were not made parties to suits affecting their interests, or that, when they were not made parties, they could be affected by the decrees passed in such suits.

11. We are, therefore, of opinion that the plaintiff No. 1 in this case cannot be affected by the decree or by the sale in execution of that decree, seeing that, being a minor when the suit was instituted in which that decree was obtained, he was not made a party in the manner usual under the procedure then in force. In conclusion, we may notice one more case which has been referred to in the course of the argument, and that is the case of *Suraj Bunsii Kooer v. Sheo Prosad Singh* L.R. 6 I.A. 88; S.C. I.L.R. 6 Cal. 148. In that case the father executed a mortgage-bond. There was then a decree against the father upon this bond; and the father, the judgment-debtor, died while the execution-proceedings were pending. The minors then came in before the sale, and objected that the father had incurred the debt without justifying necessity, the money having been applied to debauchery and sensuality. They were referred to a separate suit, and, having instituted such separate suit, it was held therein that, as they had raised objections before the sale, the purchaser at that sale must be held, to have had constructive notice of those objections. The decision, as regards the actual merits proceeded on the ground that the debt in respect of which the father had executed the bond, was found to have been incurred without justifying necessity; and the allegation of the sons in this respect being proved, they succeeded in recovering their shares from the purchaser at the sale. It will be observed that this case also was a case in which the father had bound the family-property in the exercise of that power, which is a good power when exercised within the limits and for the purposes allowed by

law.

12. The conclusion then at which we arrive is, that it was unnecessary for the plaintiff No. 1 to prove that his father's debt was incurred for an immoral purpose, and it was equally unnecessary to enter into the question of justifying necessity, because the father did not alienate or bind the family-property, and the proceedings in the former suit and the execution were not directed to make the son's interest liable for the father's debt. The creditor in fact dealt with the father alone, and sought to enforce his claim by suit against the father and the father's interest only, and the purchaser under the decree passed in that suit cannot give to his purchase an operation wider than the scope of the suit, the decree, and the execution of the decree.

13. For these reasons we are of opinion that the decree of the lower Court is correct, and that this appeal must be dismissed with costs.

Prinsep, J.

14. I am also of opinion that this appeal should be dismissed, because, under the decree under which the defendants acquired their title, only the right, title, and interest of plaintiff's father was sold, the plaintiff being no party to the suit either personally or as represented by his father.

1[Section 3: Subject as aforesaid, every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards, shall, notwithstanding anything contained in the Indian Succession Act (No. X of 1865) or in any other enactment, be deemed to have attained his majority when he shall have completed his age of twenty-one years and not before:

Subject as aforesaid, every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before.]