

Ajodhya Roy Vs. Hardwar Roy and ors.

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Court : Kolkata

Decided On : Feb-18-1909

Reported in : 1Ind.Cas.213

Judge : Mookerjee and ;Carnduff, JJ.

Appellant : Ajodhya Roy

Respondent : Hardwar Roy and ors.

Judgement :

1. The substantial question of law, which calls for decision in this appeal, is one of some nicety and novelty. In 1899, Baburam Sahu, now represented by the respondents, obtained a mortgage decree against one Raja Roy and his three sons Ram Logan Roy, Ramtohal Roy and Deodhary Roy, members of a joint Mitakshara family. All the original judgment-debtors except Deodhari Roy had died before the present execution was taken out. The decree-holder brought on the record all the members of the joint family, amongst whom was the appellant, an infant son of Deodhari. It was objected on behalf of the infant represented by his mother and guardian, Rambati Koer, that he could not be made a party to the execution proceedings, and further that the application as against him was barred by limitation. The learned Munsiff found on the evidence that the appellant was born subsequent to the mortgage-decree and held that as his father Deodhari was still alive, he could not be made a party to the execution proceedings. The Court of First Instance also held that, as the appellant had been born more than three

years before the 23rd July 1906, the application, so far as he is concerned, must be taken to have been barred by limitation. Upon appeal, the learned District Judge reversed this order. He held that no particular person was the judgment-debtor, that the real judgment-debtor was the joint-family, which can never die, and that at any time the members of the family, then in existence, might be called into Court. In this view of the matter, he concluded that Ajodhya Roy was a proper party to the execution proceedings. The infant has now appealed to this Court, and on his behalf it has been contended that the only persons against whom the decree-holder could proceed in execution are either the parties to the suit or their representatives, and that, as the father of the appellant, one of the original judgment-debtors, was still alive, the appellant could not in any sense be treated as the representative of any party to the suit. In answer to this argument, it has been contended on behalf of the decree-holders that, as soon as the appellant was born, he acquired by birth an interest in the mortgaged property, which up to that time had been owned and possessed by the other members of the family in which he was born, that he is consequently bound by the decree in the mortgage suit and is the representative of his father for the purposes of the execution proceedings, although his father may still be alive. No attempt has been made in the arguments addressed to us to support the view taken by the learned District Judge that the real judgment-debtor was the joint family, which could never die, and in our opinion that theory cannot be supported. But after a careful examination of the arguments addressed to us and of the principles of law applicable to cases of this description, we are of opinion that the conclusion at which the Court of appeal below arrived is correct and must be affirmed.

2. It has been found by the Courts below, and for the purposes of this decision that finding cannot be challenged by any of the parties, that the appellant was born after the mortgage-decree had been made. Before his birth the entire interest, in the mortgaged properties was vested in the original judgment-debtors who were parties to the mortgage suit. The immediate effect of his birth was that the aggregate of rights then vested in his grand-father, his father and his two uncles, became vested in him conjointly with them. In other words, the interest which was originally vested in A and his sons X.Y. and Z. became, upon the birth of P., as the son of X, vested in A.X.Y.Z. and P. The question, therefore, arises whether by

reason of this devolution of interest P. became a representative of any of the parties to the suit. Now, the term representative', as used in Section 244 of the Code of Civil Procedure of 1882, means, not merely the legal representative in the sense of the heir, executor or administrator, but includes any representative in interest, that is, any transferee of the interest of the decree-holder or judgment-debtor, who so far as such interest is concerned, is bound by the decree, *Ishan Chunder v. Beni Madhub* 24 C. 62, *Gulzari Lal v. Madho Ram* 26 A. 447. To determine, therefore, whether a particular person is a representative of a party to the suit, the two tests to be applied are, first, whether any portion of the interest of the decree holder or of the judgment-debtor which was originally vested in one of the parties to the suit, has by act of parties or by operation of law, vested in the person who is sought to be treated as representative, and secondly, if there has been a devolution of interest, whether, so far as such interest is concerned, that person is bound by the decree. Let us consider for a moment the effect of the application of each of these two tests to the case before us.

3. With reference to the first test, we observe that as soon as the appellant, whom we have called P, was born, the aggregate of rights previously vested in A.X.Y. and Z. became vested in P along with A.X.Y. and Z. If, before the birth of P, there had been a definition of the interests of the parties, each of the persons A.X.Y. and Z. would have been entitled to one fourth of the estate. If after the birth of P., there had been a similar definition of the interests of the parties, the result would have been that each of the persons A.Y. and Z. would have been entitled to one-fourth of the estate but the one-fourth share which would otherwise have been taken by X. would now have to be distributed between X. and P; in other words, the effect of the birth, of P. was that, if a partition was called for, X. would be entitled to only one-eighth and P. to another one-eighth (*Mitakshara*) Chap. I Section 5, *Debi Parshad v. Thakur Dial*, 1 A. 105 followed in *Bhimul Doss v. Choonee Lall* 2 C. 379 (F.B.). It is manifest, therefore, that by reason of the birth of P. there has been a transference of interest in the eye of the law. To the extent of this interest, P. is a representative of one of the parties to the suit, namely his father. The case is on principle strictly analogous to that of the transfer of the equity of redemption of the judgment-debtor, in whole or in part, after the mortgage decree has been made. It cannot be disputed that the purchaser of a fragment of the equity of redemption

after the decree is a representative of the judgment-debtor, whether he acquired his interest under a private alienation, as in *Madho Das v. Ranji Patak* 16 A. 286 at P. 291 or by a judicial sale as in *Gulzari Lal v. Madho Ram* 26 A. 447. and *Radha Kissen v. Hem Chandra* 11 C.W.N. 495. On principle, therefore, it is impossible to say that the appellant, who has by his birth, acquired an interest in the equity of redemption, is not a representative of his father who was one of the original parties to the suit, within the meaning of Section 244 of the Code.

4. As regards the second test, it is manifest that the appellant is, to the extent of the interest acquired by him by birth, bound by the mortgage-decree made before his birth. It is well settled that a son cannot object to alienations validly made by his father before he was born or begotten, because he could only by birth obtain an interest in property which was then existing in his ancestors. In support of this proposition it is sufficient to refer to the decision of a Full Bench of this Court in *Raja Ram Tewary v. Luchmun Pershad* 8 W.R. 15, to the decision of their Lordships of the Judicial Committee in *Girdharee Lal v. Kantoo Lal* L.R. 1 I.A. 321; 22 W.R. 56; 14 B.L.R. 187 and to the decisions of the High Courts at Agra and Allahabad in *Madho Singh v. Hurmut Ally* 3 Agra H.C.R. 432 and *Jado Singh v. Musammat Rane* 5 N.W.P.H.C.R. 113, in which it was ruled that an alienation of immoveable property by a member of a joint Mitakshara family cannot be contested by his son who, at the time of the alienation, was neither born nor begotten. It is not necessary to show that this proposition is supported by the principles laid down in the Mitakshara, as the more important texts applicable to the matter are set out in the judgment of Sir Barnes Peacock in the Full Bench case to which we have just referred. We take it, therefore, that the appellant has by his birth acquired an interest in the mortgaged property directed to be sold by the decree and that so far as such interest is concerned he is bound by the decree. He must consequently be treated as a representative of one of the parties to the suit within the meaning of Section 244 of the Code, and as such he is a proper party to the execution proceedings.

5. It may be doubted, however, whether it was necessary for the decree-holder to bring the appellant before the Court in these execution proceedings, for as in the case of a mortgage suit the lis continues after the decree nisi and the doctrine of

lis pendens is applicable to proceedings to realise the mortgage after the decree for sale, *Surjiram Marwari v. Barhamdeo Persad* 2 C.L.J. 288. The appellant who by reason of his birth subsequent to the mortgage decree, acquired an interest in the mortgaged properties would be bound by the proceedings in execution though not brought before the Court. But even though he may be so bound, the mortgagee decree-holder is entitled to treat him as a representative of one of the parties to the suit and to bring him before the Court with a view to avoid possible disputes and complications in future.

6. Under Article 179 Clause 4 of the Limitation Act, no question of limitation arises. The contrary view suggested in the first Court was apparently based upon Article 178 which has obviously no bearing.

7. The result, therefore, is that the conclusion at which the learned District Judge arrived cannot be successfully challenged and this appeal must be dismissed with costs. We assess the hearing fee at one gold mohur.

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