Jugal Kishore and another Vs Dr. Pirbhu Dayal and another

Court: High Court Of Punjab And Haryana At Chandigarh

Date of Decision: Aug. 1, 1980

Acts Referred: Court Fees Act, 1870 â€" Section 7(iv)(c)

Hon'ble Judges: D.S. Tewatia, J

Bench: Single Bench

Advocate: M.S. Jain, for the Appellant; S.C. Goyal and Mr. Satya Pal Jain, for the Respondent

Final Decision: Dismissed

Judgement

D.S. Tewatia, J.
These four revision petitions (No. 1445 to 1448 of 1974) involve identical question of fact and law and, therefore, a

common order is proposed. These are directed against a common interim order dated 11th October, 1974, deciding that the suit, filed by the

Plaintiffs for the purpose of voiding the mortgage effected by Defendant No. 2, in regard to payment of Court fee fell within the purview of

Sections 7 (iv) (c) of the Court fees Act, which envisages payment of ad valorem Court fee. The suits having been filed on fixed Court fee, a

direction was given to pay ad valorem Court fee and make up the deficiency within the stipulated period by 11th November, 1974. The Plaintiffs

instead of complying with the said direction have sought to approach this Court.

2. Mr. M.S. Jain, counsel for the Petitioners has canvassed that the Plaintiffs were entitled to seek a declaration of mortgage deed effected by

Defendant No. 2 in favour of mortgagee Defendant No. 1 for two reasons ; (1) that the mortgage effected by the Defendant No. 2 was not binding

upon the Plaintiffs as he had effected the mortgage as a sole proprietor of the property in dispute and secondly for the reason that part of the

property was owned by Plaintiff minor Bhagwan Dass, whose property could not have been alienated without first seeking the permission of the

District Judge u/s 8(2) of the Hindu Minority and Guardianship Act, 1956 (hereinafter referred to as the Act).

3. Before considering the submission advanced on behalf of the Petitioners, a few relevant facts deserve notice. In the plaint the case set up by the

Plaintiffs is that property In dispute was a joint Hindu Family property of which Defendant No. 2 was the Manager. The Plaintiffs are his sons and

and coparceners in the said coparcenaries property ; that the defence mortgages of the four properties were effected by Defendant No. 2 without

any legal necessity. In the circumstances at best he could mortgage only his own share in those properties and further, in any case, he should not

have mortgaged the share of the minor without first obtaining the permission of District Judge u/s 8(2) of the Act.

4. It would be seen from the above facts as alleged in the plaint that it was not the case of the Plaintiffs that Defendant No. 2 had effected the

mortgage of the property in dispute representing himself to be the sole proprietor thereof. Hence, the nature of the suit and the relief that they are

entitled to or what in law they must be deemed to have claimed would have to be judged on the basis of the case set up in the plaint which is that

Defendant No. 2 in his capacity as a Karta, had effected mortgage of the property in dispute which he could not have done. Firstly because there

was no legal necessity and secondly that one of the coparceners being minor, there could be no alienation of his property without obtaining the

permission of District Judge u/s 8(2) of the Act.

5. The trial Court for its finding that in substance the Plaintiffs should be deemed to be claiming not only the deliration but also the relief of

cancellation of the mortgage deed and hence on the plaint court fee payable would be ad valorem, based itself on the Supreme Court decision

reported in Shamsher Singh Vs. Rajinder Prashad and Others, , and a Full Bench decision of the Lahore High Court reported in AIR 1941 97

(Lahore) which it is not necessary to notice in detail. Suffice to say that these cases are almost on all fours with the facts of the present case. The

only distinction that has been pointed out by Mr. M. S. Jain is that in the present case, one of the coparceners is a minor, whose property could

not have been alienated by the Karta with out the requisite permission already mentioned and therefore, mortgage of his property not being

binding, it was not necessary for him to claim either expressly or by implication the cancellation of the mortgage deed. Where, such is the position,

maintains the learned Counsel, cancellation of the mortgage cannot be envisaged by implication as it has been done in cases where till such time the

mortgage deed was cancelled the mortgage created by a Karta in law is binding npon the coparceners as held in the two decisions on which the

reliance has been placed by the trial Court.

6. In my opinion, the fact that one of the coparceners happened to be a minor would not make any difference whatsoever to the binding nature of

the mortgage effected by the Karta. It is only when the guardian whether father or any one case in his capacity as guardian effects alienation of the

property of the minor that the requisite permission u/s 8(2) of the Act has to be obtained but not where Karta of the coparcener property, in his

capacity as a Karta alienates coparcenaries property including the share of the minor coparcener.

7. For the reasons aforementioned, there is no merit in these petitions and the same are dismissed with no order as to costs. The Petitioners are

directed to make up the deficiency in Court fee by or before 1st October, 1980.