(1936) 02 AHC CK 0054

Allahabad High Court

Case No: None

Dhara Singh		APPELLANT
	Vs	
Bharat Singh		RESPONDENT

Date of Decision: Feb. 5, 1936

Citation: AIR 1936 All 613

Final Decision: Disposed Off

Judgement

1. This is an appeal by Dhara Singh, defendant 1 in the suit, against a decree passed by the learned Subordinate Judge of Meerut, dated 2nd September 1931. The plaintiff''s claim against defendants 1 and 2 was for a declaration that certain property specified in the plaint could not be sold in satisfaction of a mortgage decree No. 103 of 1929 in a case to which he was not a party. The facts of the case can be shortly stated as follows: The plaintiff Bharat Singh by name is the son of Har Narain, defendant 2 in the case. On 14th August 1917, defendant 2 executed a simple mortgage of certain property in favour of appellant-defendant 1 in the suit. The property which was mortgaged consisted of zamindari property and one house in the city of Meerut. The zamindari property comprised the entire khewat No. 1-2, mahal Gulab Singh, in the village of Kori Kamalpur, District Meerut. The consideration for the said mortgage was a sum of Rs. 4,000. In due course defendant 1 obtained a decree upon this mortgage against defendant 2 only and proceeded to sale of the mortgaged property; hence this suit.

2. It was the plaintiff''s case that defendant 2 and the plaintiff being father and son constituted a joint Hindu family, and, as such, were owners of ancestral property, namely 2/3rds of khewat No. 1-2, mahal Gulab Singh, Mouza Kori Kamalpur, and 1/3rd of the house already mentioned, situate in the city of Meerut. According1 to the plaintiff his father defendant 2 had mortgaged the property in question in order to raise the sum of Rs. 4,000, to pay what was due upon the latter, pre-empting certain property. It appears that the remaining 1/3rd of the zamindari property, namely, khewat No. 1-2, mahal Gulab Singh, Mauza Kori amalpur, belonged to Ram

Saran Das, the brother of defendant 2, who sold it to Mt. Nabi Begam. Defendant 2 preempted the property in order to acquire the whole mahal and had to pay Rs. 5,100 for it. He actually paid Rs. 1,100 in cash and raised the remaining Rs. 4,000 by executing the mortgage of 14th August 1917, to which we have previously referred. The security given, as we have stated, consisted not only of the preempted property but also the property already owned by defendant 2 alone or jointly with his son.

3. The plaintiff contended in this suit that as the major portion of the property mortgaged was ancestral property, the mortgage was not valid and binding on the property and that the property in dispute could not be sold by the mortgagee in execution of his mortgage-decree. In short, he contended that as the mortgage was executed to raise money to pay off a pre-emption decree, it was not executed for legal necessity and was therefore void. Defendant 1, the present appellant, denied that the property in question was ancestral property and that being so he contended that the mortgage was a valid one and that the property could in due course be sold. In the alternative he contended that even if the property was ancestral yet such could be sold by reason of the fact that the mortgage was executed for legal necessity and for the benefit of the family and the remaining property of the family or in short, for the benefit of the estate. The learned Subordinate Judge came to the conclusion that defendant 2 could not bind the ancestral property and he, therefore, declared that only the property other than ancestral property was liable to sale in execution of decree No. 103 of 1929 which had been obtained by defendant 1 against defendant 3. Against this decree defendant 1 has preferred a first appeal to this Court, and before us to day his counsel on his behalf has taken two main points. We shall deal shortly with these contentions.

4. In the first place it is argued by the appellant that the present decree cannot stand by reason of the fact that there was no evidence whatsoever before the Court upon which it could find that any portion of the property mortgaged by the mortgage of 14th August 1917 was ancestral property. Both counsel agree that no evidence was called in the Court of the Subordinate Judge with a view to establishing whether or not any part of the property in dispute was or was not ancestral. From a perusal of the judgment of the learned Subordinate Judge it is clear that he, at least, assumed that a substantial portion of the property, namely, 2/3rds in khewat No. 1-2 of mahal Gulab Singh in Mauza Kori Kamalpur, was ancestral, but how he came to make this assumption we are unable to say. According to the plaint the plaintiff also alleged that l/3rd of the house situate in Meerut City was also ancestral, but there is no reference to this property at all throughout the whole judgment.

5. Counsel for the appellant has strongly urged before us that the learned Subordinate Judge had no right whatsoever to assume that any part of this property was ancestral. It appears to us that the whole trouble has arisen by reason of the

manner in which issue 2 in this case was framed. This issue is concerned with the question whether any part of the property was or was not ancestral. The issue is framed in these terms: "What portion of property is not ancestral?" Framing the issue in this way suggests that the onus lay upon the defendant to establish that the mortgaged property or a part of it was not ancestral. In other words it was for the defendant to show that the property was other than ancestral. If that was the correct view of the law, then of course the learned Subordinate Judge would be entitled to assume that the property was ancestral unless the defendant adduced evidence to the con-tray, and no such evidence was adduced by the defendant. However, we are abundantly satisfied that the onus of establishing that the property or any part of it was ancestral lay upon the plaintiff. It was his duty to prove affirmatively by evidence that the property in question or at least some part of it was ancestral.

6. Given a joint Hindu family owning property, there is no presumption that such property is ancestral. Such is the view expressed in Mulla''s Hindu Law, Edn. 6, p. 248, and that is the view which has been adopted by their Lordships of the Privy Council in Shadi Lal v. Lal Bahadur 1933 ALJ 339. At p. 342 of the judgment Sir Dinshaw Mulla observes:

There is no presumption that a family because it is joint, possesses joint property, and it was for the sons of the mortgagor to allege and prove that those properties were joint family properties. This, their Lordships think, they failed to do.

7. This decision amply supports the appellant''s contention in the present appeal that the onus of establishing that the mortgaged property was ancestral property lay upon the plaintiff who was claiming that the property in question could not be sold in satisfaction of the mortgage decree. As no evidence was called by the plaintiff to establish that the property in dispute or any part of it was ancestral, his suit was bound to fail, and for that reason the decree passed by the learned Subordinate Judge cannot stand. We have been in considerable doubt as to what course we should pursue, but after giving the matter our fullest consideration we are of opinion that the proper course to follow in this case is to frame an issue upon this point and have such issue decided by the lower Court. As we have stated previously, the issue was wrongly framed, and, as framed, it threw the onus upon the wrong party. There is nothing on the record to suggest that the defendants objected in any way to the issue as framed or on the other hand that the plaintiff approved of it as framed. There is nothing to show that there was any argument before the framing of issues or whether the parties were even consulted as to the form this issue should take. It is idle to speculate how the issue came to be framed in the manner in which it was. It may have been the fault of one or either of the parties or it may have been entirely due to a wrong view of the law held by the learned Subordinate Judge. Whatever the cause of the issue being framed in this manner, one thing is clear, that as a result of the framing of the issue in the manner

in which it was, the case was never properly fought out. From the judgment also it would appear as if there was no real argument upon the question whether the property was ancestral or not, because, as we have pointed out previously, the judgment proceeds upon the assumption that 2/3rds of the zamindari property was ancestral.

8. The defendant did in his written statement make it clear that he did not admit that any portion of the property was ancestral, but in our view he should have made his point more clear than he did when the matter eventually came up for hearing before the learned Subordinate Judge. He was somewhat to blame in allowing the Subordinate Judge to proceed in the manner in which he did. The question, whether this property or any part of it was ancestral, has never been decided, and in our view this point must be decided before justice can be done in the case. Further, when the lower Court comes to decide the question, it must remember that the burden of establishing that the property or any part of it was ancestral rests not upon the defendant but upon the plaintiff. The second point taken by the appellant is that he was prevented by the learned Subordinate Judge from adducing evidence to establish that the mortgage in question was executed by defendant 2 for the benefit of the family and the remaining family property and therefore that it was binding upon the property and upon the plaintiff. It is clear from an application made by the defendant, on 2nd September 1931, that he desired to call the patwari to give evidence. The patwari would, of course, have been intimately acquainted with the circumstances existing in this village and would have been able to give valuable evidence one way or another upon the question whether this mortgage was for the benefit of the family and the remaining property of the family. There appears also on the record a list of witnesses filed by the defendant on 2nd September 1931, but it is clear that not a single one of these witnesses was called and examined.

9. The application to which we have previously referred not only asked that a date be fixed for the examination of the patwari but also prayed that the statements of witnesses present in Court should be taken, but the learned Subordinate Judge appears to have thought that no evidence was necessary. Upon the defendant''s application he passed an order in these terms:

I do not see any ground to postpone the case. The patwari''s evidence is not at all material. The decision of the case hinges on a point of law which is governed by various rulings.

10. This order makes no reference to the application that the statements of the witnesses present in Court should be taken and in terms refers only to an application for fixing a date for taking the patwari''s evidence. However, it is clear from the terms of this order that the learned Subordinate Judge regarded the questions at issue to be purely questions of law and that no evidence was really necessary upon the points. The order certainly prevented the defendant from calling the patwari and it doubtless had the effect of preventing him from tendering the

witnesses present on 2nd September 1931. Upon the question whether the mortgage was for the benefit of the family or the remaining family property the view of the learned Subordinate Judge is clear. He thought that the question was determined by authorities of this Court and that no evidence tending to show that this mortgage was for the benefit of the family or for the benefit of the remaining property could assist the defendant in any way. As we have stated previously, the money was borrowed upon this mortgage in order to pay what was due under the pre-emption, decree. The learned Subordinate Judge in his judgment observes:

It has been held in series of cases that where the pre-emption decree merely gave one the option of acquiring certain property at a certain price, he is under no obligation to obtain the property and, therefore, cannot jeopardize the ancestral family property in order to purchase fresh property. In view of these decisions, therefore, defendant 2 could not encumber joint ancestral family property to acquire necessary funds to pre-empt other property. The case is fully governed by the rulings in Shanker Sahai v. Becho Ram 1925 23 ALJ 204 and Chatur Bhuj v Gobind Ram 1923 21 ALJ 348, and, therefore, needs no comment. The ancestral property must, therefore, be free from the obligation of the mortgage, but there is no bar to prevent defendant 1 from realizing the amount of his debt due under the mortgage from the property acquired by defendant 2 in the village.

11. In short, the learned Subordinate Judge was of opinion that a mortgage entered into in circumstances similar to those existing in the present case could never bind the ancestral property and he thought that such view was supported by the case of this Court to which he refers. The view of the law which the learned Subordinate Judge expressed is supported'' by the case in Shanker Sahai v. Becho Ram 1925 23 ALJ 204. That case lays down that where a Hindu father, who was under no obligation to raise any money for the protection of his estate, mortgaged the joint ancestral property in order to acquire other property by preemption, such mortgage was not binding. It is pointed out in that case that any act for which the character of '' legal necessity" or "benefit to the estate" can be claimed must be a defensive act, something undertaken for the protection of the estate already in possession, not an act done with the purpose of bringing fresh property in possession and which may or may not be successful under the chances attending upon litigation. The learned Subordinate Judge did not refer to the case in Inspector Singh v. Kharak Singh 1928 50 All 776, but it must be observed that this case also supports the view expressed by the learned Subordinate Judge. In this latter case it is laid down that it is not competent to the manager of a joint Hindu family comprising minor members to raise money on the security of the family property in order to start a new business even if such business may reasonably be supposed likely to be a profitable one.

12. The "benefit to the estate" contemplated by their Lordships of the Privy Council in Hunooman Persaud Panday v. Babooee Munraj Koonweree (1872) 6 MIA 393, must, it is stated, be a benefit of a "defensive nature," calculated to protect the

estate from possible danger or destruction. Had the case remained there, we would have been bound to hold that this was a pure question of law and that no evidence was necessary to decide whether the mortgage of 14th August 1917 was for the benefit of the family and of the remaining property. However, within a few months of the decision in Inspector Singh v. Kharak Singh 1928 50 All 776, already referred to, a Full Bench of this Court came to a conclusion contrary to that expressed in the former case. In this latter case, Jagat Narain v. Mathura Das 1928 50 All 969, the following proposition is laid down:

In order to sustain an alienation of joint family property made by the managing member of the family the transaction must be one which is for the benefit of the estate and such as a prudent owner would have carried out with the knowledge available to him at the time. Transactions justifiable on the principle of ''benefit to the estate'' are not limited to those transactions which are of a ''defensive nature.

13. There can be no question whatsoever that the decision in this Full Bench case is flatly at variance with the earlier decision of this Court previously referred to. Some years after this Full Bench case, the case in Benares Bank, Limited v. Hari Narain 1932 ALJ 714, was decided by their Lordships of the Privy Council. In this case it is laid down that money borrowed by the father as manager of a joint Hindu family governed by the Mitakshara for the purpose of a business which is not ancestral, is not borrowed for legal necessity and a mortgage granted as security for such a loan is not binding on the minor members of the joint family, and the mortgage being wholly invalid does not pass the shares even of the alienating co-parceners. In this case there was no question of borrowing money to pay off a pre-emption decree and therefore the facts are somewhat different from the case which we are considering at present, but it is open to argument that this case has thrown considerable doubt upon the validity of the Full Bench case to which we have referred, namely the case in Jagat Narain v. Mathura Das 1928 50 All 969. We are however relieved from considering the precise effect of this Privy Council case upon the case Jagat Narain v. Mathura Das 1928 50 All 969 because in the Full Bench case in Amraj Singh v. Shambhu Singh 1932 ALJ 895, the precise effect of the Privy Council case previously referred to has been discussed by the three learned. Judges who were members of that Full Bench. The learned Sir Muhammad Sulaiman, C.J., and King, J., were of opinion that the authority of the Full Bench ruling in Jagat Narain v. Mathura Das 1928 50 All 969 has not been shaken by the decision of their Lordships of the Privy Council in Benares Bank, Limited v. Hari Narain 1932 ALJ 714 though on the other hand we must observe that Mukerji, J. was of opinion that the authority of the Full Bench case in Jagat Narain v. Mathura Das 1928 50 All 969 had been entirely destroyed by reason of the decision in Benares Bank, Limited v. Hari Narain 1932 ALJ 714. As a Division Bench we are bound by the opinion expressed by the majority of this Full Bench and follow the law as laid down by such majority.

14. This case in Amraj Singh v. Shambhu Singh 1932 ALJ 895 is directly in point in the present case, for it lays down that a mortgage executed in order to raise money to pay off a preemption decree may be a mortgage executed for the benefit of the family and for the benefit of the property and consequently binding upon the property and the family. The head-note of the case is somewhat misleading because it was in fact held in the case that a loan for the purpose of satisfying a pre-emption decree in the circumstances of that case was not within the authority of the executants and was therefore unenforceable against the property mortgaged. However, the judgments of the learned Chief Justice and King, J., make it clear that a mortgage such as the present one may well in certain circumstances be a mortgage binding upon the property and upon the other members of the family. At p. 896 the learned Chief Justice observes:

On the one hand, it cannot be said that money required by the manager of a joint Hindu family in order to pay the pre-emption money and costs for the acquisition of fresh property is in all cases without legal necessity or benefit to the family estate, and is therefore always outside the authority of the father.... Where a pre-emption claim is in reality in the nature of a speculation or is not in the best interests of the family, the action of the manager would be without justification. But there may, for instance, be a case where a rival proprietor, wishing to become a co-sharer in the village, and thereby causing considerable interference in the management of the family estate, purchases property when it is highly beneficial to the family and the estate, if not actually necessary to exclude him from the village so as to avoid all future trouble; or there may be a case where a substantial share in the ancestral village has been sold very cheap and its acquisition will bring about a considerable improvement in the comfort and support of the family owning a small share in the village and a better enjoyment of the ancestral share. When satisfied that the acquisition was not speculative but in the best interests of the family and for its benefit as well as for the benefit of the family estate, which an ordinary prudent manager would make, it would be open to a Court to hold that the transaction is binding on the other members of the family, even though it is nothing but the raising of a loan on a mortgage of family property for the sake of satisfying the pre-emption decree.

15. Again King, J. observes at p. 907:

In certain circumstances it might be held that the acquisition of new property by preemption was a beneficial and prudent act such as would justify a mortgage of joint family property by the manager. But the facts showing that the transaction was beneficial and prudent must be proved. I cannot accede to the contention that the acquisition of new zamindari property, with money raised upon a mortgage, must necessarily benefit the estate. It might be prudent and beneficial to acquire certain property for Rs. 1,000, but neither prudent nor beneficial to acquire the same property for Rs. 3,000. Then again the property in question might be a special value

to the family owing to its position. Its acquisition by the family might promote the profitable enjoyment of their ancestral estate, and its acquisition by an outsider, especially by a hostile outsider, might be harmful to the interests of the family.

16. From the dicta of the learned Chief Justice and King, J., it is clear that both of them dissented from the view expressed in the earlier cases decided in this Court and were of opinion that in certain circumstances a mortgage executed in order to obtain money to pay off a pre-emption decree might well bind the family property and the other members of the family. Mukerji, J. however did not agree with the view expressed by the majority of the Court though he also was of opinion that in very special circumstances a mortgage to obtain money to pay off a pre-emption decree might bind the ancestral property. At p. 900 he observes:

In an ordinary case of pre-emption, the purpose is neither the avoidance of a calamity nor support of the family nor performance of an indispensable duty like a sradh. It has been argued that it may be that the person who has purchased the property is a very bad man with tyrannical habits, and it might be feared that, if he was allowed to purchase the property, he might, in course of time, swallow up the whole family property. If a case like that can be made out, it is possible to say that the preemption would be an act to avoid a calamity which affects the whole family. The calamity must be one which affects the whole family. This cannot be forgotten.

17. As we have pointed out previously the view expressed by the majority in the Full Bench case in Amraj Singh v. Shambhu Singh 1932 ALJ 895 is binding on us and we must follow it. Consequently we must hold that the learned Subordinate Judge was wrong in coming to the conclusion that a mortgage such as the one in the present case could not prossibly in law bind the property and the other members of the family. This Full Bench case in Amraj Singh v. Shambhu Singh 1932 ALJ 895 overrules the cases relied upon by the learned Subordinate Judge and that being so he ought to have heard evidence and to have found whether or not the acquisition of the property by means of the money raised by this mortgage was for the benefit of the family and of the remaining property. The defendant obviously desired to call evidence upon this point and as we have pointed out earlier had made a written application requesting the learned Subordinate Judge to hear the witnesses who were actually in Court and to fix a day for hearing the evidence of the patwari of the village. The learned Subordinate Judge, holding the view which he did, thought that no evidence could be of assistance and decided the case without any evidence whatsoever. In order to do justice in this case it is necessary to have a finding whether the acquisition of the property by defendant 2 was for the benefit of the family and the remaining property. In certain circumstances the acquisition might be for the benefit of the estate, whereas in others it might not. The learned Subordinate Judge must, of course, in arriving at his conclusion, consider the price paid, the amount of the property already held by the family and similar questions. No decision can be arrived at without hearing the evidence of the parties and

consequently it is necessary also to frame an issue and have a finding upon this point.

18. For the reasons which we have given we remit the following issues under Order 41, Rule 25, Civil P.C., for the findings of the Court below: (1) Was the property the subject-matter of the mortgage or any portion of it ancestral property? If a portion of the mortgaged property only was ancestral, how much? (2) In the event of the Court finding that the whole or any portion of the mortgaged property was ancestral, was the acquisition of the pre-empted property by means of money obtained under the mortgage justified on the ground of legal necessity or benefit to the estate? The parties are at liberty to adduce such evidence as they deem proper upon these issues and the Court is requested to return its findings upon them to this Court within a period of three months. On receipt of the findings the usual ten days is granted for objections, if any, to such findings. In considering the evidence the Court must not overlook the fact that the mortgaged property consisted not only of zamindari property but also a house in Meerut, of which according to the plaintiff a l/3rd share was ancestral property.