(1877) 07 PRI CK 0005

Privy Council

Case No: None

Jugdeep Narain Singh		APPELLANT
	Vs	
Deendyal Lal		RESPONDENT

Date of Decision: July 25, 1877

Citation: (1877) 4 IndApp 247

Hon'ble Judges: James W. Colvile, Barnes Peacock, Montague E. Smith, Robert P. Collier, JJ.

Judgement

James W. Colvile, J.

1. The Respondent in this case is the only son of one Too/am Singh, and, the family being governed by the law of the Mitakshara, is joint in estate, in the strict sense of the term, with his father. On the 28th of January, 1863, the father being indebted to the Appellant to the amount of Rs. 5000, executed to him a Bengali mortgage bond for securing the repayment of that sum with interest at the rate of 12 per cent, per annum. The Appellant afterwards put this bond in suit, and on the 30th of May, 1S(J4, obtained a decree against Toofani Singh for the sum of Rs. 6328 13a. 8p. He took no proceedings to enforce this decree, which was in the form of" an ordinary decree for money, against the property especially hypothecated; but in September, 1870, caused "the rights and proprietary and mokuriuri title and share of Toofani Singh, the judgment debtor " in the joint family property which is the subject of this suit, to be put up for sale in two lots for the realisation of the sum of Rs. 11,144 6a. 4p., the amount alleged to be then due on the decree; and himself became the purchaser of those lots for the sums of Rs. 900 and Rs. 10,100. Objections were taken to this sale by the judgment debtor, which., after going through, all the Courts, were finally overruled, and the Appellant obtained the asual certificate title, and in January, 1871, succeeded in taking possession thereunder of the whole of the property now in dispute. Thereupon, in February, 1871, the Respondent brought the suit out of which this appeal arises for the recovery of the whole property on the ground that being according to the law of the Mitakshara the joint estate of himself and his father, it could not be taken or sold in execution for the debt of the latter,

which, had been incurred without any necessity recognised by the Shastras or the law. The father was joined as a Defendant.

2. The issues on the merits settled in the cause were:

1. Did Toofani Singh borrow money from the Defendant (the Appellant) under a legal necessity or without a legal necessity? and are the auction sales and other proceedings taken in satisfaction of the debt all illegal, and ought they to be set aside or not?

2. Under the Mitakshara law, is the Plaintiff entitled to the entire property sold in satisfaction of his father''s debts, or to how much?

3. Was some portion of mouzah Domawun personally acquired by the Plaintiffs father, or was it acquired by the ancestral funds and property?

3. A good deal of evidence was given in the Court of first instanco as to the nature of the debt incurred by Toofani Singh, and upon the issue whether it was borrowed under a legal necessity. Upon the face of the bond the debt is ostensibly that of the father alone; there is no statement that the money was borrowed for the purposes of the joint family, or so as to bind co-sharers in the estate. The oral evidence adduced by the Plaintiff was directed to shew that his father, who had passed five years in jail on a conviction for forgery, had both before and since his imprisonment lived an immoral and disreputable life, not residing with and rarely visiting his family; and that the money was borrowed on his sole credit, and spent by him in riotous living. On the other hand, the Defendant (the Appellant) brought witnesses to prove that part at least of the money, viz., Rs. 1500, was expressly borrowed in order to provide for the marriage expenses of one of the daughters of the family; and, generally, that the Plaintiff was cognisant of his father''s transactions, and the whole debt one which bound both co-sharers.

4. The subordinate Judge does not appear to have thought it necessary to come to any definite conclusion upon this issue. In one passage of his judgment he says, "The sale being held by the Court, it is unnecessary to see whether it was held under a legal necessity or not." In another passage he says, " The sale held by the Court, according to the laws in force, of the ancestral estate, as the rights and interests of the judgment debtor, cannot be regarded as including the right of the son of the judgment debtor which he derived under the Shastras; and so far as the Plaintiff''s share is concerned, the sale cannot be confirmed." This seems to be the ground on which he proceeded; for he gave the Plaintiff a decree for one moiety of all the property claimed, except a small portion which he held was the separate acquisition of the father.

5. On appeal tills decree was reversed by the Zillah jndge of Gyah, who dismissed the suit on the ground (amongst others) that a legal necessity to borrow the money had been established, and consequently that not merely the particular share of the

property that may have belonged to Tonfani Singh, but the whole undivided estate was liable for the debt.

6. The Respondent then brought his case before the High Court by special appeal, which, by its decree of the 14th of June, 1873, reversed the decree of the Lower Appellate Court, and ordered that the Plaintiff should obtain possession from the Defendants of the property which was the subject of suit for the benefit of the joint family. The present appeal, which has been heard ex parte, is against that decree.

7. A good deal of the argument at their Lordships'' bar was addressed to the question of the nature of the judgment debt, and whether or not there was " legal necessity " for the loans of which it was composed. Whatever may be their Lordships'' opinion of the finding of the Zillah Judge upon this point, they must, for the purposes of this appeal, treat it as conclusive. The appeal is only from the order on special appeal; and on that special appeal the High Court could not have disturbed the finding of the Lower Appellate Court on this question of fact, unless there was no evidence at all to support it. And this, whatever was the character and weight of the evidence, cannot be affirmed.

8. This issue, however, 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 hud 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 Nugenderchunder Ghose v. Srimutty Kaminee Dossee 11 Moore''s Ind. App. Ca. 241. and Baijun Dodbey v. Brij Bhoohwu Lull Awasti Law Rep. 2 Ind. App. 275.

9. The first and principal question, however, that arises on this appeal is, whether the Appellant acquired a good title even to the right, title, and interest of the father; whether under the law of the Mitakshara the share of one co-sharer in a joint family estate can be taken and sold in execution of a decree against him alone. In lower Bengal, where this question can arise only between brothers or other collaterals (sons not having as against their father in his lifetime, under the law of the Dayabhaga, the rights which they have under the law of the Mitakshara), it is settled law that the right, title, and interest of one co-sharer in a joint estate may be attached and sold in execution to satisfy his personal debt; and that the purchaser under such an execution stands in the shoes of the judgment debtor, and acquires the right as against the other co-sharers to compel a partition.

10. That a similar rule prevails in the south of India, though the law there administered is founded on the Mitakshara, is shewn by two cases decided by the

High Court of Madras: Virdsvdmi Gra-mini v. Ayyasvami Gramini 1 Madras H.C.R. 171, and Palani Velappa, Kaundan v. Mannaru Naickan 2 Madras H.C.R. 416. The latter case was one in which, as here, the co-parceners were father and son. And that the law is to the same effect in the Presidency of Bombay was ruled in the two cases which are reported at pp. 32 and 182 of the first volume of the Bombay High Court Roports.

11. All these cases, however, affirm not merely the right of a judgment creditor to seize and soll the interest of his debtor in a joint estate, but also the general right of one member of a joint family to dispose of his share in a joint estate by voluntary conveyance without the concurrence of his co-parceners. This latter proposition is certainly opposed to several decisions of the Courts of Bengal.

12. In 1869 the question was carefully considered by the High Court of Calcutta. A Division Bench of that Court referred it to a Full Bench in the case of Sadabart Persad Sahu v. Phoolbash Koer.

13. The decision of the Full Bench is reported in the third volume of the Bengal Law Reports, Full Bench Rulings, p. 31. The Chief Justice, after reviewing all the authorities, came, with the concurrence of his colleagues, to the conclusion that under the law of the Mitakshara, as administered in the Presidency of Fort William., " Bhagwan Lall" whose act was in question, " had no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint family property, in order to raise money on his own account, and not for the benefit of the family." The Full Bench so reported to the Division Bench, and the latter then made its final decree in the cause, which involved many other questions. From that decree there was an appeal to Her Majesty in Council, which was heard em parte. This Committee, for the reasons stated in their judgment, which is reported in the Law Rep. 3 Ind. App. p. 7, did not think it necessary or expedient either to affirm or disaffirm the ruling of the Full Bench on this point. Their Lordships (p. 30) said they " abstained from pronouncing any opinion upon the grave question of Hindu law involved in the answer of the Full Bench to the second point referred to them, a question which, the appeal coming on ex parte, could not he fully or properly argued. That question must continue to stand, as it now stands, upon the authorities, unaffected by the judgment on this appeal."

14. It is, however, to be observed that even the Full Bench in the case under consideration recognised a possible distinction between the sale of a share in a joint estate under an execution, and an alienation by the voluntary act of a co-sharer, and thought that the former might be valid, though the latter was invalid. In dealing with the first question referred to the Full Bench, the Chief Justice, at p. 37 of the .Report, says:

It is unnecessary for us to decide whether, under a decree against Bhagwan in his lifetime, his share of the property might have been seized, for that case has not

arisen. According to a decision in Stokes .Reports, it might have been seized, but the case as against Bhagwan and that against the survivors are very different. So long as Bhagwan lived, he had an interest in this property which entitled him, if he had pleased, to demand a partition, and to have his share of the joint estate converted into a separate estate.

15. The decision in Sadabart''s Case has been followed by, amongst others, that of Mahabeer Persad v. Ramyad Singh 12 Beng. L.R. 90., being the case referred to in the judgment under appeal as No. 209 of 1872.

16. That was a decision by the two learned Judges who passed. the decree now under appeal, and the circumstances of the one case are nearly the same as those of the other. In that of 1872, the father had borrowed the money ostensibly on his sole credit, and given a Bengali mortgage bond to secure it. The bondholder had sued on his bond, obtained a decree, taken out execution against joint property, and become the purchaser of it at the execution sale. The distinction between that case and the present is that the property seized and sold was that which was specially hypothecated by the bond. The sons sued to recover the property. There was a clear finding against the alleged " necessity " for the loan. The Court laid down in the strongest terms (see p. 94) the law as established by the Full Bench ruling in .Sadabart''s Case, and other decisions, and appears to have assumed that a title acquired by means of an execution sale stood on no higher ground than one founded on a voluntary alienation.

17. It asserted, however, the power of imposing equitable terms upon the son, whom they held entitled to recover; and these terms were, in effect, that the property, when recovered, should be held and enjoyed by the family in defined shares; and that the share of the father, the judgment debtor, should be subject to the lien of the judgment creditor for the money advanced, with interest. In the present case the same Judges have refused to recognise any such equity, proceeding on the ground'' that the execution was taken out not against the property specially hypothecated, but against the general estate.

18. It is difficult to see upon what principle the hypothecation of the property in question can be taken to improve the position of the creditor; since the very act of hypothecation implies a violation of the rule laid down in Sadabart''s Case. It is further to be observed that in one respect the equity of the creditor is stronger in the present case than it was in that of 1872; since here it has been found by the Lower Appellate Court that "legal necessity to borrow the money existed; " whereas, in the case of 1872, there was a clear finding the other way. Their Lordships, therefore, are of opinion that the reasons which the learned Judges have given do not justify their refusal to give to the Defendant in this case the benefit of the equity which they enforced in the other.

19. But what is the effect of the decision of 1872? It is a clear authority for the proposition that, although by the law as settled in that part of the presidency of Fort William which is governed by the Mitakshara, a member of a joint family cannot incumber his share in joint property without the consent, express or implied, of his co-partners, the purchaser of it at an execution sale nevertheless acquires a lien upon it to the extent of his debtor''s share and interest.

20. There appears to be little substantial distinction between the law thus enunciated and that which has been established at Madras and Bombay; except that the application of the former may depend upon the view the Judges may take of the equities of the particular case; whereas the latter establishes a-broad and general rule defining the right of the creditor.

21. Their Lordships, finding that the question of the rights of an execution creditor, and of a purchaser at an execution sale, was expressly left open by the decision in Sadabart''s Case, and has not since been concluded by any subsequent decision which is satisfactory to their minds, have come to the conclusion that the law, in respect at least of those rights, should be declared to be the same in Bengal as that which exists in Madras, They do not think it necessary or right in this case to express any dissent from the ruling of the High Court in Sadabart''s Case as to voluntary alienations. But however nice the distinction between the rights of a purchaser under a voluntary conveyance and those of a purchaser under an execution sale may be, it is clear that a distinction may, and in some cases does, exist between them. It is sufficient to instance the seizure and sale of a share in a trading partnership at the suit of a separate creditor of one of the partners. The partner could not himself have sold his share so as to introduce a stranger into the firm without the consent of his co-partners, but the purchaser at the execution sale acquires the interest sold, with the right to have the partnership accounts taken in order to ascertain and realise its value.

22. It seems to their Lordships that the same principle may and ought to be applied to shares in a joint and undivided Hindu estate; and that it may be so applied without unduly interfering with the peculiar status and rights of the co-parceners in such an estate, if the right of the purchaser at the execution sale be limited to that of compelling the partition, which his debtor might have compelled, had he been so minded, before the alienation of his share took place.

23. In the present case their Lordships are of opinion that they ought not to interfere with the decree under appeal so far as it directs the possession of the property, all of which appears to have been finally and properly found to be joint family property, to be restored to the Respondent. But they think that the decree should be varied by adding a declaration that the Appellant, as purchaser at the execution sale, has acquired the share and interest of Toofani Singh in that property, and is entitled to take such proceedings as he shall be advised to have that share and interest ascertained by partition. And they will humbly advise Her Majesty

accordingly. They desire to add that they cannot make any more precise declaration as to Toofani Singh''s share, since, if a partition, takes place, his wife may be entitled to a share; and, further, that there will be no order as to the costs of this appeal.