(1909) 03 CAL CK 0012

Calcutta High Court

Case No: Appeal from Appellate Decree No. 573 of 1907

Bunwari Lal and Others		APPELLANT
	Vs	
Daya Sunker Misser		RESPONDENT

Date of Decision: March 26, 1909

Judgement

1. On the 18th March 1905, the Plaintiffs-Respondents commenced the action out of which the present appeal arises for a declaration that they formed with the Defendant second party a joint Mitakahara family, that the subject-matter in dispute formed part of the joint family property, that the deed of sale executed by the Defendant second party on the 19th March 1893 is null and void, and that the Plaintiffs are consequently entitled to recover possession and mesne profits from the date of dispossession to the date of suit as well as future mesne profits from the date of suit till the date of recovery of possession. The Plaintiffs valued the property in dispute at Rs. 400, and approximately stated the mesne profits antecedent to suit at Rs. 1,082-9-15. They paid court-fees on the plaint upon Rs. 1,086-5-15, namely, upon ten times the Government Revenue payable for the disputed property under sec. 7, sub-sec. 5, cl. (a), of the Court Fees Act, as also upon the amount of mesne profits. The Defendants first party, now Appellants before this Court, resisted the claim on the ground of limitation, as also on the allegations that the property did not belong to the joint family but was the exclusive property of the second party Defendant, that the alienation had been made with the consent of all the members and for legal necessity, and that in any event the Plaintiffs were not entitled to recover possession till they offered to refund the purchase-money. The Court of first instance found that the Plaintiffs and the second party Defendants were members of a joint Hindu family governed by the Mitakshara law, that the disputed property which had been purchased on the 8th September and 7th October 1890 in the name of the Defendants second party was joint family property, that the second party Defendant had no right to alienate the same without the consent of his coparceners, that part of the consideration was applied in the discharge of a prior mortgage created on the 27th July 1892 for family necessities and that the remainder had been

appropriated in payment of another family debt and for necessary family purposes. The Subordinate Judge also held that the first Plaintiff who is the father of Plaintiffs Nos. 2 to 7 and grandfather of Plaintiffs Nos. 9 to 14 assented to the transfer- He dismissed the suit, however, on the ground that it was barred by limitation under Art. 91 of the Second Schedule to the Limitation Act. Upon appeal the learned District Judge held that the suit was not barred by limitation inasmuch as it must be treated in substance as a suit for recovery of possession from persons who had not acquired any valid title under their purchase, and, that in any view as some of the Plaintiffs were infants, who did not and could not consent to the alienation at the time it was no question of limitation could arise. Upon the question of the mode in which the consideration for the conveyance had been applied, the District Judge apparently doubted whether it was spent for family benefit, but he did not arrive at any conclusive finding upon this point. He held however that the second party Defendant, as one of the numbers of a joint Hindu Mitakshara family, was not competent to alienate the property without the assent of the co-parceners, and that therefore all the Plaintiffs were entitled to recover the disputed property. In this view of the matter, he reversed the decision of the Court of first instance, decreed the suit and directed the mesne profits to which the Plaintiffs might be entitled, to be ascertained in execution. The first party Defendants who represent the transferees from the second party Defendant under the conveyance of the 19th March 1893, have now appealed to this Court. The appeal is directed against every part of the judgment of the District Judge, which is attacked substantially on two grounds, namely, first, that the Plaintiffs are not entitled to recover possession without repayment of the consideration for the conveyance, and, secondly, that, in any view of the matter, the Plaintiffs are not entitled to claim mesne profits for more than three years antecedent to the suit.

2. On behalf of the Plaintiffs-Respondents, an objection has been taken that the appeal is incompetent, inasmuch as the memorandum of appeal to this Court is insufficiently stamped. The Appellants have paid Court-fees upon ten times the Government Revenue payable for the disputed property; and they have paid an additional Court-fee of Rs. 10, on account of mesne profits which according to them are still unascertained and the decree in respect of which must be treated as a declaratory decree. On the 22nd February last when the appeal was first called on for Rearing, this preliminary objection was taken, and as the contention of the Respondents was not seriously resisted by the learned Vakil for the Appellants, the objection was allowed and the Appellants were directed to pay within three weeks from the date of our order Court-fees upon the whole amount of mesne profits claimed in the plaint. On the 8th March last, however, it was represented to us by the learned Vakil for the Appellants that our previous order was contrary to the established practice of this Court and he asked for leave to argue the point at length. As the question involved was one of considerable importance, we give the Appellants as well as the Respondents fresh opportunity to argue the matter fully

before us. It was contended on behalf of the Appellants that although the Plaintiffs might have approximately stated the amount of mesne profits in their plaint as required by sec. 50 of the Code of 1882, the decree of the District Judge does not imply that they are actually entitled to recover that sum, that consequently the subject-matter of the present appeal must be treated as unascertained, and that in this view, a Court-fee of Rs. 10 is adequate under Sch. II, Art. 17 and cl. (b) of the Court Fees Act. It was further suggested that the decree might be treated as a declaratory decree, and might therefore be covered by cl. (3) of the same article. It was contended, on the other hand, by the learned Vakil for the Respondent, that neither of these articles was applicable, and that the case was covered by sec. 7, sub-sec. (1), of the Court Fees Act. In our opinion, the contention of the Appellants is obviously erroneous and cannot be sustained. Art. 17, cl. (6), of the Second Schedule to the Court Fees Act provides that the plaint or memorandum of appeal in every suit where it is not possible to estimate at a money-value the subject-matter in dispute and which is not otherwise provided for by the Act is to bear a Court-foe of Rs. 10. The test to be applied is therefore two-fold: first, is this a suit in which it is not possible to estimate at a money-value the subject-matter in dispute, and, secondly, is this a suit which is not otherwise provided for in the Act? Both these questions must, in our opinion, be answered in the negative. As regards the first question, it is worthy of note that the word " estimate " involves an idea of approximation. To estimate as defined in the Oxford Dictionary, Vol. IV, p. 303, is " to form an approximate notion of the amount, number, magnitude of position of anything without, actual enumeration or measurement." In other words, to bring a case within the scope of this clause, it must be established that it is not possible even to state approximately a money-value for the subject-matter in dispute. Sec. 50 of the Code of 1882 makes it obvious that a claim for mesne profits does not fall within this description and the very fact that Plaintiffs in the present case have found it possible to state the value of the mesne profits claimed, shows that the subject-matter in dispute can be estimated at a money-value. But there is a further test to be applied to bring the case within the scope of the sixth clause. The suit must be one which is not otherwise provided for by the Act. Sec. 7, sub-sec. (1), however, shows that the suit is provided for in the body of the Act itself, because, in so far as mesne profits are concerned, it is a suit for damages or compensation and consequently the amount of fee payable has to be computed on the amount claimed. It is fairly clear, therefore, that Sch. II, Art. 17, cl. (6), is of no assistance to the Appellants. The suggestion that cl. (3) might possibly cover the case is equally groundless, as this is not a memorandum of appeal in a suit to obtain a declaratory decree where no consequential relief is prayed. Upon examination, therefore, of the provisions of the Court Fees Act, it seems to us to be reasonably plain that the Court-fees on the memorandum of appeal must be paid on the amount claimed as mesne profits. The learned Vakil for the Appellants, however, strenuously contended that this implied considerable hardships upon an unfortunate Defendant. It was suggested that an unscrupulous Plaintiff might capriciously put a fictitious value upon the mesne

profits, and thus drive an unsuccessful Defendant to pay heavy Court-fees in appeal, upon a claim which upon investigation would prove to be groundless and exaggerated to a considerable extent. In answer to this contention, we need only point out that a similar difficulty might arise in the case of suits for accounts, as to which there can be no doubt that under sec. 7, sub-sec. (4), cl. (f), of the Court Fees Act, the Court-fees have to be paid according to the amount at which the relief sought is valued in the plaint or memorandum of appeal. We are not concerned with the policy of the Legislature in these matters; nor is it within our province to consider whether the law may or may not require an amendment. In our opinion, it is plain that the suit is governed by sec. 7, sub-sec. (1), and not by cl. (3) or cl. (6) of Art. 17 of Sch. II to the Court Fees Act. It may further be observed that Court-fees have to be paid only upon the mesne profits claimed antecedent to the suit, and, as pointed out in the cases of Ram Krishna Bhikaji v. Bhima Bai I. L. R. 15 Bom. 416 (1890) and Maiden v. Janakiramayya I. L. R. 21 Mad. 371 (1898), a plaint or memorandum of appeal is not liable to stamp duty in respect of mesne profits subsequent to the suit. This circumstance strengthens the view we take because there is, as indicated in the cases just mentioned, a substantial difference between mesne profits antecedent to the suit which may be always approximately valued as they have already accrued due during a definite period, and mesne profits subsequent to the suit which at the date of the plaint must be treated as unascertainable because depended upon an uncertain element, namely, the period of time which would intervene between the date of institution of the suit and the date of recovery of possession under the decree.

3. The learned Vakil for the Appellants further pressed us with the argument that the practice of the Court has been in favour of his contention. We may point out that what is described as the practice of the Court appears to have grown up in the office without the knowledge of the Judges, and cannot therefore be treated as binding upon us. We are not unmindful that as observed by Sir Richard Garth, C. J., in Kishori Lal Boy v. Sharut Chunder Mazumdar I. L. R. 8 Cal. 593 (1882), where a law which imposes a heavy tax upon litigation has received a particular interpretation in favour of the suitor and a course of practice has prevailed for many years in accordance with that interpretation, any Court of Justice ought to be very slow to change that interpretation or course of practice to the prejudice of the suitor, unless it sees clear and weighty reasons for so doing. [See also Ijjatulla Bhuiyan v. Chandra Mohan Banerji 11 C. W. N. 1133; s. c. 6 C. L. J. 255 (1907), Bidhata Roy v. Ram Charitra Roy 12 C. W. N. 37: s. c. 6 C. L. J. 651 (1907), Dowlat Ram v. Vitho I. L. R. 5 Bom. 188 at p. 193 (1880), in the last of which cases Westropp, C. J., observed that the reluctance of Courts of Justice to break through an established practice on such a point to the disadvantage of the subject and to the advantage of the Crown, is illustrated by the decision of Lord Mansfield in a well-known case on stamps (Anonymous, Lofft 155).] As pointed out however by Sir Richard Garth himself this principle is applicable only whore the language of the statute is of doubtful import, because, in the words of Sir

John Edge, Bal Koran v. Gobind I. L. R. 12 All. 129 at p. 135 (1890), a practice which is in contravention of the law, even if such practice be the practice of a High Court, cannot make lawful that which is unlawful, nor ran a practice of a Court justify a Court in putting upon an Act of the Legislature a construction which is contrary to the plain wording of the Act [see to the same effect, the observations of Maclean, C. J., in Khedu v. Budhan I. L. R. 27 Cal. 508 (1900)]. In the case before us, the language of the Court Fees Act is reasonably plain, and in our opinion it would not be right, out of deference to so-called practice, to put upon it an interpretation which it can not possibly bear. We adhere, there fore, to the view which we expressed en the 22nd February last that the Court-fees must be paid upon the amount stated in the plaint. We understand that our order on that date has been carried out. We shall therefore now proceed to consider the appeal on the merits.

4. As regards the merits, there can be no question that the decisions of both the Courts below are erroneous. The Subordinate Judge dismissed the suit on the ground that it was barred by limitation inasmuch as it had not been brought, within three years from the date of the execution of the conveyance, to cancel or set aside the instrument. Now, whatever the position might have been if the second party Defendant, the executant of the conveyance, had sought to recover the property, Janki Kunwar v. Ajit Singh L. R. 14 I. A. 148; I. L. R. 15 Cal. 58 (1887), his co-parceners who were not parties to the deed would be entitled to maintain a suit for recovery of possession within twelve years from the time when the alienee took possession of the property [Rajaram Tewary v. Luchmun Pershad 8 W. R. 15 (1867)]. Besides, as some of the co-parceners were infants who were in existence at the date of the alienation, no question of limitation could properly arise. It is well settled that any co-parcener who was born at the time of the completion of the alienation [Girdhareelal v. Kantoolal L. R. 1 I. A. 32; 14 B. L. R. 187 (1874), Bhola Nath v. Kartick Kissen I. L. R. 34 Cal. 372 (1907)] would be entitled to sue to Bet aside the invalid alienation, and such alienation, if invalid because made without the consent of all the co-parceners then in existence, can be set aside even at the instance of another co-parcener who was born subsequent to the alienation [Hurodat Narain Singh v. Beer Narain Singh 11 W. R. 480 (1869)]. The ground, therefore, upon which the Subordinate Judge dismissed the suit cannot possibly be supported. The view taken by the District Judge is equally open to objection. He has hold, so far as we can gather from his judgment, that the alienation was made without necessity and without the assent of all the co-parceners and on this ground alone he has made a decree in favour of the Plaintiffs under which they are entitled to recover possession of the entire property unconditionally. This position is clearly opposed to the principle approved by this Court in a series of cases. No doubt as laid down by this Court in the cases of Sadabart Prasad v. Foolbash Koer 3 B. L. R. 31 F. B.: 12 W. R. 1 F. B. (1869) and Haunman Dutt Roy v. Baboo Kishen Kishor Narayan Singh 8 B. L. R. 353: 15 W. R. 6 (F. B.) (1870), an alienation made of joint family property by one co-parcener without the assent of the others is not binding upon the latter and may

be set aside at their instance. But as ruled by this Court in Mahabir Persad v. Ramyad Singh 12 B. L. R. 90: 20 W. R. 192 (1873) and Jamuna Parshad v. Ganga Parshad I. L. R. 10 Cal. 401 (1892), the Court will grant relief subject to the equities of the purchaser. This rule is based on the broad principle of justice, equity, and good conscience, that the co-parcener who has received the money and effected the alienation ought not to be afforded an opportunity and to retain the money and also to enjoy the property which must of necessity return to his possession as a member of the Mitakshara family as soon as the alienation is set aside. He is, therefore, at least bound to make good to the purchaser the representation he made, namely, that he had a power to charge the joint family property, and he can be compelled to do so by the exercise of such proprietary right over the same property as he individually possessed. When, therefore, an alienation made by a co-parcener is set aside at the instance of another member of the family, the Court orders that the property should be possessed in defined shares and the shares of the transferor should be subject to the lien of the transferee for the return of the purchase-money, on the ground that the co-parcener must make his share available for payment of his just dues and in fulfilment of his obligation. In this view, the learned District Judge was clearly in error when he made an unconditional decree in favour of the Plaintiffs for recovery of the entire property.

5. It has been argued, however, by the learned Vakil for the Respondents that this Court is no longer in a position to work out the equities between the parties. He invites our attention to the circumstance that the second party Defendant as also the first Plaintiff, who was his father, have died during the pendency of this litigation, and that consequently the other Plaintiffs have acquired the entire property by survivorship freed from any possible equitable claim of the purchaser. Now it appears that the suit was commenced on the 18th March 1905, and was dismissed by the Subordinate Judge on the 7th July 1906. This decision was reversed by the District Judge and a decree was made in favour of the Plaintiffs on the 4th January 1907. Ghiranjib Misser, the first Plaintiff, died on the 24th February 1907. The present appeal was preferred on the 27th March 1907; and Deo Sankar Misser, the second party Defendant, died in February 1908. It follows, therefore, that the co-parcener who executed the conveyance as also his father who assented to the alienation and participated in the sale-proceeds-both died after the decree of the District Judge had been made. Under these circumstances, the question arises, whether it can be successfully contended upon any intelligible principle that the other Plaintiffs have during the pendency of the suit acquired the property by survivorship BO as to make it impossible for this Court to work out the equities between the parties. In support of the contention that the Court is powerless to grant any relief to the parties under such circumstances, reliance has been placed upon the cases of Umanund v. Sree Kishen 7 W. R. 248 (1867), Ram Baton Sahu v. Mohant Sahu 11 C. W. N. 732: S. C. 6 C. L. J. 74 (1907), Udit Chobey v. Radhika Prasad Upadhya 6 C. L. J. 662 (1907) and Ramyad Sahu v. Bindeswar Kumar Upadhya. 6 C. L.

J. 102 (1907), with a view to show that the Court of Appeal is bound to take notice of events which have happened since the order under appeal was made. The cases upon which reliance has been placed, however, do not support any such broad contention. In the case of Ram Raton Sahu v. Mohant Sahu 11 C. W. N. 732: S. C. 6 C. L. J. 74 (1907), it was pointed out that, as a general rule, a Court of Appeal in considering the correctness of the judgment of the Court below will confine itself to the state of the case at the time such judgment was rendered and will not take notice of any facts which may have arisen subsequently; but the Court will in exceptional cases depart from this rule, and take notice of subsequent events on the principle that it is the duty of the Court which still retains control over the judgment, to take such action as will shorten litigation, preserve the rights of both parties, and best subserve the ends of justice. We adhere to the principle thus formulated, and upon that principle it is manifest that the purchaser is entitled to equitable relief in the case before us. If the opposite view put forward by the Respondents were adopted, the consequence would be startling. The rights of the parties would depend, not upon the merits of the controversy between them but upon the length of time over which the litigation might be protracted and upon the accidental circumstance whether a subordinate Court has or has not taken an erroneous view of the rights and obligations of the parties. In this very case, if the District Judge had correctly appreciated the principle deducible from the rulings to which we have referred, there is no question that he would have made the recovery of the property by the Plaintiffs conditional upon the refund of the purchase-money, to be realised out of the shares of the transferor and his father who assented to the transaction. On what principle, can it be seriously suggested that, because the District Judge happened to commit an error of law, this Court is powerless to grant relief to the parties ? The function which this Court discharges as a Court of Appeal, is to make the order which might and ought to have been passed by the subordinate Court. Reliance, however, was placed by the learned Vakil for the Respondents upon the decision of their Lordships of the Judicial Committee in Madho Parshad v. Mehrban Singh L. R. 17 I. A. 194: s. c. I. L. R. 18 Cal. 157 (1890), in which it was held that the equity of the purchaser can be enforced only where the coparcener who made the alienation is not dead, because, immediately on this event his share passes by survivorship to persons who are not liable for the debts and obligations of the deceased. This decision, however, has no application to the facts of this case, and is clearly distinguishable. In the case before the Judicial Committee, the death of the alienor took place before the litigation commenced, and, therefore, at the time when the suit was instituted, the entire property had vested in persons who had taken it by survivorship free from all possible equity of the purchasers. Nor can the case before us be regarded as analogous in any way to the class of cases in which it has been held that when one coparcener of a joint Mitakshara family sues for partition, a severance is not effected till the shares have been defined. The cases of Joy Narain Giri v. Girish Chunder Myti 25 W. R. 355: s. c. I. L. R. 4 Cal, 437; L. R. 5 I. A. 228 (1878) and Chidambaram Chettiar v. Gouri Nachiar I. L. R. 2 Mad. 83: s. c. L. R. 6

I. A. 177 (1879) may be taken as types of this class of cases which are distinguishable on the ground that till a severance has been effected, there is no separation in estate and no interest which could pass by inheritance. On the same ground, may be distinguished the decision of the learned Judges of the Allahabad High Court in Padar Nath Singh v. Raja Ram I. L. R. 4 All. 235 (1882), that, in a family governed by the Mitakshara law, a suit to set aside an alienation cannot, on the death of the Plaintiff, be continued by his heirs, as his right lapses. In the case before us, the Plaintiffs came into Court for recovery of property alienated by one of their co-parceners with the consent of another. So far as they themselves are concerned, they are entitled to recover the property and to hold what would represent their shares upon partition unconditionally. But so far as the shares of the persons who effected or assented to the alienation are concerned, they are not entitled to retain them without a refund of the purchase-money of which they had the benefit. The Court has been of the subject-matter of the litigation, and to do full justice the Court can grant relief only on equitable terms. We are not prepared to hold that in circumstances like these, the co-parceners can claim to take the property during the pendency of this appeal, by survivorship so as to defeat the rights of the purchaser. The decree of the District Judge in so far as it allows the Plaintiffs to recover the entire property unconditionally must therefore be set aside. The Plaintiffs will be entitled to recover three-fourths of the property unconditionally and the remaining one-fourth, which represents the shares of Chiranjib Misser, will be charged with the lien of the purchaser to the extent of Rs. 300. The Plaintiffs will be entitled to recover this one-fourth share upon payment of Rs. 300 to the purchaser within six months from the date of the decree of this Court. Upon failure to do so their claim in respect of this one-fourth share must stand dismissed.

6. The second point taken on behalf of the Appellants raises the question of mesne profits. In the plaint, mesne profits were claimed antecedent to the suit for a period of nearly twelve years from the 30th April 1893 to the 18th March 1905. The District Judge has not stated expressly the period for which mesne profits are recoverable. But the learned Vakil for the Respondents has contended that the judgment of the Court below intended to allow mesne profits for the entire period in claim. It has been argued by the learned Vakil for the Appellants that this is erroneous and that upon the authority of the decision of their Lordships of the Judicial Committee in Kishnanand, v. Kunwar Partab Naraian I. L. R. 10 Cal. 785 (1884), the Plaintiffs are entitled to mesne profits during the three years immediately preceding the institution of the suit under Art. 109 of the Limitation Act. In answer, it has been argued by the learned Vakil for the Respondents that as some of the Plaintiffs were infants at the time when the claim for mesne profits occurred as also at the time of the commencement of this suit, no portion of the claim is barred by limitation. Now sec. 8 of the Limitation Act provides that, when one of several joint claimants is under a disability and when a discharge can be given without the concurrence of such persons, time will run against them all; but where no such discharge can be

given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others. There can be no question that in the case of a joint Mitakshara family like the one before us, a discharge could have been given on behalf of all the co-parceners by the head of the family. Reference has been made by the learned Vakil for the Respondents to the case of Anando Kishore Dass Bakshi v. Anando Kishore Bose I. L. R. 14 Cal. 50 (1886) in support of the contrary view; that however was a case of persons governed by the Dayabhaga law. Reference has also been made to the decision of their Lordships of the Judicial Committee in Annamalai v. Murugasa L. R. 30 I. A. 220 (1903) to show that the relation between the manager of a joint family and his co-parceners is not that of principal and agent or of partners, but more like that of trustee and cestui que trust. If so, the head of the family would be entitled in a case like the present to give a discharge for the claim on behalf of himself and his co-parceners, adults as well as infants. The view we take is supported by the decision in Surju Prasad Singh v. Khawahish Ali I. L. R. 4 All. 512: s. c. 2 All. W. N. 114 (1882), Vigneswara v. Bapayya I. L. R. 16 Mad. 436 (1893) and Sadullah Khan v. Bhanamal (1882) Punj-Rec. No. 58 which were recently approved by this Court in Han Har Pershad v. Bholi Pershad 6 C. L. J. 383 at p. 393 (1907) as authorities for the proposition that in the case of a joint Mitakshara family, where a right is vested in all the members jointly, the managing member may, within the meaning of sec. 8 of the Limitation Act, give a discharge without the concurrence of the minor members of the family, and that time may consequently run against all the members of the individual family including the minor members thereof. We must therefore modify the decree of the District Judge so far as mesne profits are concerned and allow the claim to be assessed in the execution department for Only three years antecedent to the suit. It is necessary to add that the Plaintiff will be entitled to mesne profits only in respect of a three-fourths share of the property; the profits derived by the purchaser from the remaining one-fourth share of the property will be set off against the interest on the purchase-money to which he would otherwise be legitimately entitled.

7. The result, therefore, is that the decrees made by the Courts below will be discharged and in lieu thereof a decree will be drawn up in this Court entitling the Plaintiffs to recover possession of a three-fourths share of the property together with mesne profits in respect of such share for three years antecedent to the suit and for the period which may intervene between the institution of the suit and the recovery of possession under this decree. The Plaintiffs will also be entitled to recover the remaining one-fourth share of the property if they pay to the purchaser or deposit in Court for payment to him the sum of Rs. 300 within six months from this date. Upon their failure to do so, their claim in respect of this one-fourth share will stand dismissed. Under the circumstances of the case each party will pay his own costs throughout the litigation.