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**(1872) 09 CAL CK 0003**

**Calcutta High Court**

**Case No:** Regular Appeal Nos. 62 of 1871 and 41 and 42 of 1872

Baboo Nund Coomar  
Lall and Another

APPELLANT

Vs

Moulvie Razeeooddeen  
Hossein, Syud  
Razaooddeen Hossein,  
Moulvie Abdool Lutf  
and Others

RESPONDENT

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**Date of Decision:** Sept. 16, 1872

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### **Judgement**

Sir Richard Couch, Kt., C.J.

The plaintiffs in this suit are the sons of Laekram Lall, and the case in the plaint was that Laekram Lall held a share in the recently settled Mehal Jehangeerpore Munkurpaul as ancestral property, two-thirds of which share was the share: of the plaintiffs, and one-third the share of their father; that in a suit brought by the plaintiffs against Laekram and others, the Zillah Judge of Patna decreed the disputed two-thirds to them, and on the 7th of May 1869, the writ for delivery of possession was issued by that Court; that subsequently on the application of the principal defendants who had purchased the right and interest of Laekram, the Judge passed an order giving possession to the principal defendants; and the plaint prayed for possession of the two-thirds and mesne profits. The case of the principal defendants, Hurrukh Lall and others, was that the property in suit was brought to Bale under a lien of a good and just debt of Mohes Doss, and the share of the plaintiffs was sold; and, further, that the property in suit had not descended from ancestors. The suit was heard by the Subordinate Judge of Patna, with two others of the same nature, and he found that the property in this suit was purchased by Laekram as manager for himself and his sons, and was to be viewed in the light of ancestral property; but holding that the sale, which was under a decree of the Court of Shahabad, was valid, he dismissed the suit with costs. In his judgment he refers to the judgment in the suit which is the subject of the appeal No. 41 of 1872, and we take that as part of the judgment in this suit. In that it appeared that of the share of 2 annas Id. 6 ■c., held by Laekram, he directly inherited from his father or grandfather 12 ■d., and the remainder he

inherited collaterally from the widows of two of his brothers and of a nephew.

2. Two questions were raised in the appeal: first, whether the sale of the plaintiffs' share was justified and was binding on them; secondly, whether, if it was not, the plaintiffs were entitled to a decree in respect of the property which Laekram inherited collaterally.

3. The plaintiffs were not parties to the suit by Mohes Doss under the decree in which the property was sold, and are not bound by it. It is therefore necessary for the defendants to show in this suit that the shares of the plaintiffs were liable to be sold under it. The money was lent by Mohes Doss on three bonds, dated the 1st December 1862, the 23rd of May 1868, and the 2nd of October 1864, and the only witness examined in this suit was the writer of two of them, who said that Laekram told Mohes Doss that, in order to meet expenses attending on his journey to Gya, where he was going to perform some religious ceremony, he was obliged to borrow. The first bond recites that the amount of Rs. 1,200 was borrowed on account of his personal necessity. The second and third contain similar statements. As the Subordinate Judge in his judgment in this suit appears to have introduced facts proved in the other suits, we will see what they were. The evidence is in the suit which is the subject of the appeal No. 42. The first witness for the defendant only proved that he had lent Rs. 600 to Laekram in Aughran 1276 (November and December 1869). The second, a servant of Laekram, said that Mukhun Coomar lent Laekram money under several bonds; he had borrowed money with the view to pay Government dues, liquidate Gooroopersaud's debt, Shuffee Khan's debt, and for meeting expenses of law suits. A third witness, No. 5, said that Laekram borrowed money from Khool Deep Sahoy; why, he could not tell: Laekram met legal expenses for conducting and defending law suits from his own funds and from funds borrowed; that he expended Rs. 8,000 or 9,000 on the occasion of his daughter's marriage, a daughter by his first wife; that the expenditure on the occasion of the plaintiff's marriage was small. No. 8 said Laekram borrowed several sums of money from Mukhun Coomar, in order to meet expenses attending the prosecution and defence of law-suits and to pay Government dues; that he paid off Gooroopersaud's debt (which had been decreed), and also Shuffee Khan's, from the sums borrowed; that he borrowed Rs. 3,000 from Issur Sahoy, which debt he paid off by borrowing money from Moulvie Abdool Lutf, or Chowdhry Wahed Ally. This witness, who was mooktear of Laekram, said, on cross-examination, he did not remember what Laekram did actually with the specific sums that he borrowed from Mukhun. There was no evidence how or for what purpose the debts which were said to have been paid off with the borrowed money were contracted. The evidence is altogether insufficient to establish a case in which a mortgage by a father of ancestral property would be binding on his sons. The judgment of the Subordinate Judge is mainly founded upon the assumption of facts of which there was no proof.

4. It is therefore necessary to decide the second question, whether the plaintiffs are entitled to a decree in respect of the property which Laekram inherited collaterally. In the Mitakshara, Ch. i, s. 1, v. 3, heritage is said to be "of two sorts, unobstructed, or liable to obstruction. The wealth of the father or paternal grandfather becomes the property of his

sons or of his grand sons in right of their being his sons or grandsons, and that is an inheritance not liable to obstruction. But property devolves on parents (or uncles), brothers, and the rest upon the demise of the owner, if there be no male issue; and thus the actual existence of a son and the survival of the owner are impediments to the succession; and, on their ceasing, the property devolves on the successor in right of his being uncle or brother. This is an inheritance subject to obstruction." V. 27 of the same section which was much relied upon in the argument for the appellant, where it says:-- "Therefore, it is a settled point that property in the paternal or ancestral estate is by birth" must be considered to refer to inheritance not liable to obstruction; what is described in v. 3, as becoming the property of sons or grandsons in right of there being sons or grandsons. They do not by birth acquire a right in property to the succession to which by their father there is an impediment, and which he may never succeed to V. 32 says:-- "In respect of the right by birth to the estate, paternal or ancestral, we shall mention a distinction under a subsequent text." In s. 5, v. 9, it is said:-- "So likewise the grandson has a right of prohibition if his unseparated father is making a donation, or a sale of effects inherited from the grandfather; but he has no right of interference if the effects were acquired by the father. On the contrary, he must acquiesce because he is dependant." And v. 10 is:-- "Consequently the difference is this: although he may have a right by birth in his father"s and in his grandfather"s property still, since he is dependent on his father in regard to, the paternal estate, and since the father has a predominant interest as it was acquired by himself, the son must acquiesce in the father"s disposal of his own acquired property; bat since both have indiscriminately a right in the grandfather"s estate, the son has a power of interdiction if the father be dissipating the property." According to these texts the restriction upon the father"s power of alienation only applies to the grandfather"s property Vv. 8 and 11 of the same section confirm this, and so also does v. 5 of s. 5.

5. Doubts hare been raised on this question by commentators, and the arguments on each side are stated in Colebrooke"s Dig., Vol. II, Madras ed., p. 274, where the author is of opinion that the rule of equal dominion vested in father and son only applies where the property has regularly descended. The state of the question in very well stated in West and Buhler, Bk. 2, Intro. p. 19:-- "Ancestral property, as amongst descendants, comprises property transmitted in the direct male line from a common ancestor, and accretions to such property made with the aid of the inherited ancestral estate. Thus, in the case of a father, head of a family, property inherited from his father or grandfather, is ancestral property, however acquired by its previous possessors. On the other hand, property inherited by him from females, brothers, or collaterals, or directly from a great-great-grandfather, appears to be subject to the same rules as if self acquired. Ancestral property, in fact, may be said to be co extensive with the objects of the apratibandha daya, or unobstructed inheritance. The view, here stated, agrees with that arrived at by Jagannatha, after a discussion of the contrary doctrines held by other lawyers. This discussion itself shows, however, that there is much to be said on both sides, and the question must be regarded as one still in controversy."

6. What appears to be the result of the text of the Mitakshara and the better opinion among commentators is supported by two decisions. In *Rayadur Nallatambi Chetti v. Rayadur Mukunda Chetti* 3 Mad. H.C. Rep., 455 it was held that a suit by a son against his father to compel a division of immoveable property inherited by the latter from his paternal cousin could not be maintained. And in *Jawahir Singh v. Gayan Singh* 4 Agra H.C. Rep., 78 it was held that a son cannot control his father's act in respect of a property, the succession to which is liable to obstruction; and it is only in respect of property not liable to obstruction that the wealth of the father and grandfather becomes the property of his sons or grandsons by virtue of birth.

7. We concur in these decisions. The decree of the Court below must be reversed as to two-thirds of 12 ■d. of the property in suit, and it must be decreed that the plaintiffs do recover two-thirds of 12 ■d. of the property claimed in the plaint, with mesne profits and costs of suit in proportion.

8. A similar decree will be made in the appeal No. 41 of 1872 between the same parties, where the property in suit is the mehal under the old settlement; and in appeal No. 42 of 1872 where the suit was against another purchaser. Costs of the appeals to be borne by the parties in proportion.