Honooman Sahay and Others Vs Pursid Narain Sing and Others

Court: Calcutta High Court

Date of Decision: Jan. 28, 1880

Citation: (1880) ILR (Cal) 845

Hon'ble Judges: Pontifex, J; McDonell, J

Bench: Division Bench

Judgement

Pontifex, J.
This case is one more instance of the plentiful crop of litigation which has sprung out of the decisions in the reported cases of

Gridharee Lall (L.R. 1 IndAp 321: S.C. 14 B.L.R. 187) and Deendyall Lall (L.R. 4 IndAp 247: S.C. ILR 3 Cal. 198).

2. The circumstances of the case are as follows:Radhay Kishen, the father of plaintiff"s Nos. 1 and 2, and husband of plaintiff No. 3, by two

bonds, purported to mortgage that which was in fact ancestral estate. The family was governed by the Mitakshara, and at the dates of the

mortgages both the sons were alive; and it has been stated that one at least of them was of age. From the judgment of the Munsif it would appear

that the earlier of the two bonds recited, as a necessity for raising the loan secured by it, the performance of the koruj ceremony of Kulu Ram, a

deceased member of the family. And from the same judgment it would appear that, on the face of it, the later of the two bonds purported to be

executed as security for the balance of account upon former bonds.

3. The mortgagee subsequently instituted suits on the bonds, in which suits, Radhay Kishen, the father, alone was made a defendant; and in

execution of the decrees in those suits, four portions of ancestral property were attached and sold by the Court, and purchased by the mortgagee

himself, who is represented by the present appellants. The sale-certificates were in the usual form, under the old Code, of the right, title, and

interest"" of the judgment-debtor.

4. It is doubtful from the materials before us whether any one of the four properties now sued for was included in either of the mortgage-bonds; but

it is admitted on behalf of the appellants that only one of the properties sued for was so included. The sales took place, and possession was taken

under them of the whole 16 annas of the four properties more than eleven, and less than twelve years before suit. The plaintiffs sued to recover

possession of the whole 16 annas of the properties.

5. The Munsif dismissed the plaintiffs'' suit altogether, holding that sufficient necessity had been shown to exist to authorize Radhay Kishen, as

managing member of the family, to make the mortgages. The Munsif does not seem to have noticed that at least three of the properties were not

included in the mortgages, but he did find that Radhay Kishen did not employ the moneys borrowed for immoral purposes.

6. The Subordinate Judge considered it unnecessary to find whether the money was borrowed for necessary purposes or applied to immoral

purposes; but upon the grounds that the father alone was a defendant to the suits, and that the sale-certificates related only to the right, title, and

interest of the judgment-debtor, held, 1st, that only Radhay Kishen''s interest passed by the sales; 2nd that the widow was not entitled to any

share; and 3rd, that the two sons were entitled to recover two-thirds of the properties sued for.

7. Against the whole decree a special appeal has been preferred to us by the defendants; and against the second finding of the Subordinate Judge a

cross-appeal has been preferred by the plaintiffs.

8. Now the principles of law which apply to this case, and which are partly to be gathered from the text-books and the cases, seem to us to be the

following:

9. That, under the law of the Mitakshara, each son, upon his birth, takes a share (interest) equal to that of his father in ancestral Immovable estate,

is indisputable.--Suraj Bunsi Koer v. Sheo Pershad Singh (L.R. 6 IndAp 88 : S.C. ante, p. 148, at p. 164).

10. The father, as managing member of a Mitakshara family, when the other members of the family are all minors (same case, p. 101) may have

authority to convey or charge the whole 16 annas of the ancestral property for the purposes of family necessity. But if a stranger deals with the

father alone as managing member, he is, in our opinion, bound to see that a necessity exists.

11. If no necessity exists, then no power of dealing with the rights of the other members in specific ancestral property exists, and a sale by the

father, though purporting to affect the whole 16 annas, can only pass his own right, title, and interest, to affect which alone, under circumstances,

his power--or in Bengal having regard to Sadabart Prosad Sahu v. Foolbash Koer (3 B.L.R. F.B. 31), his creditor''s rights-could extend.

Whether, even in cases of necessity, a father, as managing member, has authority to affect the interest of the adult members of the family, without

their consent, seems still undecided. The Judicial Committee, in Suraj Bunsi Koer v. Sheo Pershad Singh (L.R. 6 IA 88; S.C. ante, p. 148, at p.

165), say: ""It is not so clearly settled whether, in order to bind adult coparceners, their express consent is not required: but this is a question that

does not arise in the present case."" So in the case before us, as it has not been found whether either of Radhay Kishen"s sons was of age at the

respective dates of the mortgages, the question may not arise, and we do not at present feel bound to give a positive opinion upon it. But we may

refer to the Mitakshara, Chap. I, Section i, vv. 27, 28, and 29 as dealing with the question, and may say that, as at present advised, we see no

reason why a mortgagee or purchaser should be excused from exercising ordinary caution and obtaining such consent. The case of Gridharee Lall

v. Kantoo Lall (L.R. 1 IndAp 321: s., C, 14 B.L.R. 187), which is always so much relied upon, decided a question of Mithila law; and moreover,

in that case, a necessity affecting the whole family was proved to have existed, for there were execution-proceedings affecting the family dwelling-

house, or at least the father"s rights therein, a sale of which had been advertised, and which sale, if carried into effect, must have been detrimental

to the family. Even if that case had not been explained in more recent decisions of the Privy Council, we think that the general language of the

judgment, applying as it did to the particular facts found in the case, cannot be taken as an authority for the proposition that a Mitakshara father

may, when no necessity exists, convey or charge the rights in specific ancestral property of the other members of the family.

12. Under the Mitakshara law sons are bound to pay the debts of their father which have not been incurred for immoral purposes. But this is a

liability either attaching to them personally, or to be satisfied in a due course of administration; and we find no authority for saying that a judgment-

creditor of the father in respect of the father"s own separate debt, can, either in the father"s lifetime, or afterwards, attach or take any specific

portion of the ancestral property beyond the father"s own proportionate right in it, without having made the other members of the family parties to

his suit. The case of Deendyal Lall v. Jugdeep Narain Singh (L.R. 4 IndAp 247; S.C.I.L.R. 3 Cal. 198) is an authority of the Privy Council for

holding, in a case where no necessity is shown to have existed, that execution proceedings by a judgment-creditor on a bond given by a

Mitakshara father, against property not hypothecated by the bond, and when the father alone had been made a defendant to the suit, cannot affect

the interests of the other co-sharers of the family. Indeed, if it were otherwise, there would be an end virtually of the Mitakshara family, for a father

would only have to borrow for purposes not immoral and submit to a decree, and the family might, in execution of that decree, be deprived of the

most cherished portion of the ancestral property without any opportunity of redeeming it.

13. A mortgagee, dealing with a Hindu governed by Mitakshara law, is, in our opinion, bound to enquire into the state of the family; and if he finds

there are other members of it besides the father with whom he is dealing, he is further bound to enquire into the necessity of the transaction; and if

there are adult members of the family it is at least doubtful whether he ought not to obtain their consent.

14. A mortgagee can only take such a charge on specific ancestral property as the mortgagor can give; and if the mortgagor is acting as managing

member, he can affect the 16 annas of the property only in cases of necessity, and if there are adult members of the family, perhaps only with their

consent. And it is difficult for us to see how the purchasers under a mortgage-decree can obtain any better or more extensive title than the

mortgagee and mortgagor could conjointly give. There is no magic in a Court or Judge which enables them to deal with or affect property in any

higher or more extensive degree than the parties to the suit conjointly could do.

15. The sale by the Court does not give what is called in England a Parliamentary title, but is only a link in the chain of title and a purchaser is, or in

our opinion ought to be, as much bound to see that all proper parties are represented in a suit, as he would be to see that all persons interested

were parties to a conveyance. We can see no difference between the effect of a decree of our Courts and the effect of a decree of the Court of

Chancery in England; but if there is any difference, it would seem to be to the disadvantage of the Indian decree, which by express enactment deals

only with the ""right, title, and interest"" of the defendant to the suit by name.

16. It has been decided that if the managing member of a family, the other members of which are at the time minors, having authority (the

touchstone of which is necessity) mortgages the whole 16 annas of the ancestral property, then in a suit by the mortgagee the sale under the decree

would pass the whole 16 annas of the mortgaged property, although the mortgagor alone was made defendant; and the reason for such decision

probably is, that the 16 annas having been validly mortgaged to the mortgagee, and his remedy being foreclosure or sale, the decree of the Court

would affect what was in the parties before it,--namely, the mortgagee''s right, validly acquired, to have the whole 16 annas sold; though even in

that case (where necessity would have to be proved by the mortgagee and purchaser) it seems to us that the Courts would exercise a wise

discretion in enquiring into the state of the mortgagor''s family and directing that the adult members of such family (if any at the date of the suit)

should be made co-defendants, so as to give them an opportunity of redeeming, and also in order to secure the due application of any surplus sale

moneys, in the same way as the Court of Chancery in England acted in analogous cases; see Goldsmid v. Stonehewer (9 Hare Appx. 88), Young

v. Ward (10 Hare Appx. 58), and Siffken v. Davis (Kay, Appx., 21). For it must be remembered that, in a large proportion of mortgage-suits in

India, the mortgagee himself, as in the case before us, becomes the purchaser, and thus virtually obtains all the benefits of foreclosure without

sacrificing his other remedies as a mortgagee.

17. Applying the principles to which we have referred, and which seem to us correct, to the case before us, we should be of opinion, even if this

was not a special case, that, as the father alone executed the mortgages and was made a defendant to the suit, the sale in execution could as

against those members of the family who were minors at the dates of the respective mortgages, pass the entire 16 annas of the mortgaged ancestral

property, only in the event of the defendants proving that sufficient necessity existed for incurring the debt; and if no necessity was proved, could

pass to the defendants only the right, title, and interest of the father, Radhay Kishen although the loans might not have been applied by him to

immoral purposes, and the sons might, if properly proceeded against, have been bound to pay their father''s debt; and if any members of the family

were adult at the dates of the respective mortgages, it is still an open question whether, even if necessity were proved, their interests could be

affected without their consent. But this is a special case, for here the mortgagee and purchaser was the same person, and therefore, in this case at

all events, only the right, title, and interest would pass unless necessity was shown to exist. With respect to the properties not included in the

mortgages, we are of opinion, that the execution sales could only pass the right, title, and interest of the father Radhay Kishen; and therefore, with

respect to such last mentioned properties, the decree of the Subordinate Judge will, subject to the observations we shall presently make in the

cross-appeal, be approved, and the appeal will be dismissed with costs. In the words of the Privy Council in Deendyal Lall v. Jugdeep Narain Sing

(L.R. 4 IndAp 247; S.C.I.L.R. 3 Cal. 198), if the defendants had sought ""to go further, and to enforce their debt against the whole [16 annas of

the] property and the co-sharers therein, who were not parties to the bond, they ought to have framed their suit accordingly, and have made those

co-sharers parties to it."" With respect to such parts of the properties sued for (if any) as were included in the mortgage-bonds or either of them, as

there has been no finding in the lower Appellate Court with respect to the existence of sufficient necessity for the loans, or as to the ages of the

sons at the dates of the respective mortgages, the case must go back there for a decision on the following points: 1st, whether any and what part of

the property sued for was included, in the mortgage-bonds respectively; and if any part was so included, then, 2ndly, whether sufficient necessity

existed for incurring the debt secured by each bond so as to bind the 16 annas of the property mortgaged by it; and 3rdly, whether either and

which of the sons was of age at the dates of the mortgages respectively. If either was of age, whether he consented to the mortgage; and if he did

not consent, whether he was bound by the mortgage; and the Subordinate Judge must reconsider his judgment and decide the case, so far as it

relates to property comprised in either of the mortgages, in accordance with findings he may arrive at on those points; and the costs of the appeal

in relation thereto will abide the result.

18. With respect to the cross-appeal no distinct authority has been quoted, or appears to exist. We must, therefore, deal with it as a new case.

The question is indeed mooted in the last words of the Privy Council judgment in Deendyal"s case (L.R. 4 IndAp 247 : S.C., ILR 3 Cal. 198), but

does not appear to have been raised in the subsequent case of Suraj Bunsi Koer v. Sheo Pershad Sing (L.R. 6 IndAp 88; S.C., ante, p. 148),

where the infants sued by their mother as guardian. Possibly the reason for their not raising it, was because the mother was not strictly a party to

the suit, or because, in the previous execution proceedings (see p. 96), an order had been made rejecting her claim, to which she had submitted.

By vv. 1 and 2 of Section vii, Chap. I of the Mitakshara, it is declared that, upon a distribution made either during the life of a father or after his

decease, the wife is to take an equal share; but in the latter event she will be only entitled to half a share, if any separate property has been given to

her.

19. Now we are of opinion that the mortgages of the father, and the sales in execution against him, which occurred during his lifetime, must, as

against the defendants, be taken to be a distribution within the meaning of those verses, and as possession was taken by the defendants during the

father"s lifetime, we must consider it a distribution made within that period; and therefore that the widow is entitled to an equal share with her

husband and sons.

20. If, however, a necessity shall be found to have existed for incurring the loan for which any portion of the properties sued for was mortgaged,

the widow will be entitled to no share in the property included in such mortgages; with respect to the properties not included in the mortgages, she

is entitled to a one-fourth share, as also to the same share in the mortgaged properties if no sufficient necessity shall be found to have existed. The

decree of the lower Appellate Court will be modified accordingly, all such parts of the properties sued for as were not mortgaged for purposes of

necessity being for this purpose divisible into fourths, and the cross-appeal is allowed with full costs, or apportioned costs according to the findings

which the lower Appellate Court shall arrive at.

21. By their plaint the plaintiff''s prayed that mesne profits for the period of pendency of suit up to the day of recovery of possession to such

amount as may be determined in execution of decree, may be awarded to them. Such mesne profits will, of course, be governed by the ultimate

decision in the case.