(1879) 07 CAL CK 0005

Calcutta High Court

Case No: None

The Collector of Monghyr, on behalf of Ruder Prokash Misser		APPELLANT
	Vs	
Hurdai Narain Shahai and Another		RESPONDENT

Date of Decision: July 14, 1879

Citation: (1880) ILR (Cal) 425

Hon'ble Judges: Tottenham, J; Mitter, J

Bench: Division Bench

Judgement

Mitter, J.

In appeal it has been contended before us that the decision of the District Judge is wrong on both the points which he has decided. But before we enter upon the question thus raised before us on behalf of the plaintiff, it may be as well to notice here several objections of law to the maintenance of the suit taken before us on behalf of the respondent.

2. The first contention is, that the order of the District Judge, directing the Collector, u/s 12 of Act XL of 1858, to take charge of the property of the minor, is wrong; and that, therefore, the present suit having been brought by a manager, on behalf of the minor, appointed by the Collector, has not been properly framed. The objection is based upon the ground that the interest of a minor in a joint family estate under the Mitakshara law is not such property as can be taken charge of by a manager appointed under the provisions of Act XL of 1858. This proposition is correct, as is shown by authorities which have been cited before us.

3. But, nevertheless, we do not think that this objection to the suit can prevail. In the first place, conceding that the order of the District Judge u/s 12 of Act XL of 1858 was erroneous in law, it has become final, there having been no appeal against it. In the next place, we are of opinion that the ground upon which it has been assailed does

not exist here. The property which was ordered to be administered by the Collector was not an interest of a member of a joint family governed by the Mitakshara law. Whatever interest Sib Prokash had in the joint estate, had passed to the minor by the deed of gift executed in his (the minor''s) favor, supposing that to have been a valid deed.

4. It has been said that the deed of gift in question is invalid, because the circumstances attending its execution clearly show that it has been set up to defraud creditors. But we think that it cannot be said to be a mere paper-transaction transferring no title. Possession of the estate conveyed by it has been taken by the Collector on behalf of the minor under the direction of the District Judge. The circumstances surrounding the execution of this instrument lead to the inference that its object was to save the family estate from being ruined by the extravagance of the father, and not to defeat the just rights of the father''s creditors, but rather to protect them, for the deed in fact provides for the payment of the father''s just debts.

5. But, conceding that that gift is void against the father''s creditors, it is binding and operative between the parties to the instrument. Therefore, from the moment of its execution, Sib Prokash ceased to have any joint interest in the family estate, and, consequently, the ground upon which the present contention rests does not exist in this case.

6. The next objection that has been raised on behalf of the respondent is, that the gift having been accepted on behalf of the minor Ruder Prokash, he is not competent to question the auction-sale as a son under the Mitakshara law, and that his claim must stand or fall by the deed of gift. If Ruder Prokash had been of age, and had accepted the gift, we do not think even then he would have thereby forfeited or relinquished his rights of a Mitakshara son. He being a minor, there cannot be any doubt there is no force in this contention.

7. The last contention which has been put forward against the suit being decided on its merits, is, that the plaintiff is precluded from questioning the validity and the effect of the respondent''s auction-purchase, because he is bound by the final order passed in the proceedings taken by the father, u/s 256 of Act VIII of 1859, for its reversal. It has been said that, after the aforesaid proceedings were remanded from this Court, the conduct of the suit was taken up by the Collector on behalf of the minor, and that, therefore, although the name of Ruder Prokash was not substituted on the record in place of his father, yet, to all practical intents and purposes, he was fully represented in it.

8. The present suit has been brought upon the ground that the property in dispute, being part of a joint family estate governed by the Mitakshara law, could not be sold for the satisfaction of such debts of the father as were not binding upon the son. This question is wholly foreign to the matter which was the subject of enquiry in the

proceedings instituted u/s 256 of Act VIII of 1859. Therefore supposing that, for all practical purposes, Ruder Prokash was a party to that proceeding, he could not have raised this point in it; consequently he is not precluded from maintaining this suit by the decision passed in that proceeding upholding the respondent''s auction-purchase.

9. With reference to this proceeding, another contention has been raised before us. It is to the effect, that the finding arrived at then, as to the adequacy of the price paid by the respondent for the auction-purchase of the property in suit, must be treated as final now. We shall deal with this question in its proper place.

10. Then, as regards the grounds upon which the lower Court has dismissed the suit, it seems to us that the District Judge is clearly wrong in holding that, under the Mitakshara law, the plaintiff during his father''s lifetime, is not competent to maintain this suit for the whole of the share of the property in dispute which belonged to the joint family. On the other hand, the suit would have been open to objection if he had brought it for an undivided share of the family--Rajaram Tewaree v. Luchmun Pershad (12 W.R., 478).

11. It is not absolutely necessary in this case to determine whether the debts for the satisfaction of which Sib Prokash''s property was sold, were of such a nature as would be binding upon the sons. It seems to us that what was sold in execution of the decree against Sib Prokash was simply his right and interest in the disputed property; and that present case is governed by the ruling of the Judicial Committee in Deendyal v. Jugdeep Narain (I.L.R., 3 Cal. 198; S.C., L.R., 4 IndAp 247). In that case, Deendyal, a creditor of Toofani Singh, father of the plaintiff Jugdeep Narain, obtained a money-decree under a bond executed by the father, in which a particular family property was hypothecated as security for the loan. Deendyal, instead of proceeding against the mortgaged property caused "the rights and proprietary and mokurrari title and share of Toofani, the judgment-debtor," in another joint family property to be put up for sale, and himself became the purchaser. The plaintiff Jugdeep Narain sought to recover the property from the hands of Deendyal, who had taken possession of it under his purchase. The District Judge of Gya, who heard the case on appeal from the judgment of the Subordinate Judge of that District, found, as a fact, that the debt, for the satisfaction of which the property in dispute in that case was sold, were contracted by the father for necessary family purposes. He, accordingly, reversing the judgment of the first Court, dismissed the suit. On special appeal this Court (Phear and Morris JJ.) held) that what was sold was simply the interest of the father in the joint property and not the joint property itself, and that, as such interest under the Mitakshara law is not saleable, nothing passed to Deendyal by the auction-sale. The plaintiff''s calim was accordingly decreed. On appeal by Deendyal, the Judicial Committee held that such interest, whether alienable or not in the Bengal Presidency, by voluntary alienation, is seizable and saleable in execution of a decree. The Judicial Committee accordingly varied the

decree of the High Court, with the declaration that Deendyal by auction-purchase had acquired the interest of the father, Toofani Singh, in the particular joint family property, which was the subject of the suit in that case, and that, by virtue of that right, he was entitled to enforce a partition so as to recover possession of the father''s defined share.

12. Referring to the question of "legal necessity" for the loans, the Judicial Committee observe (p. 251): "Whatever may be their Lordships'' opinion of the finding of the Zilla 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."

13. 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 had 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 Nugender Chunder Ghose v. Sreemutty Kaminee Dossee (11 I.A., 241) and Baijun Doobey v. Brij Bhookun Lall Awusti (L.R., 2 IndAp, 273).

14. We think that the above observations clearly apply to the present case, and on the strength of the authority of this case, we are warranted in holding that the respondent before us acquired by the execution-sale in this case only the interest of the father Sib Prokash in the disputed property.

15. Mr. Woodroffe very strongly urged on behalf of the respondent that the ruling of the Judicial Committee in Muddun Thakoor v. Kantoo Lall (L.R., 1 IndAp, 333) should govern this case, and contended that the decision of the Judicial Committee in Deendyal v. Jugdeep Narain (4 I.A., 247) would not have been what it was, if the ruling in Muddun Thakoor v. Kantoo Lall (L.R., 1 IndAp, 333) had been brought to the notice of their Lordships of the Judicial Committee. That whatever may be the difficulties in reconciling the decisions in these two cases, and however slightly the authority of the case of Muddun Thakoor might have been weakened by the later decision in Deendyal v. Jugdeep Narain (I.L.R., 3 Cal., 198; S.C. L.R., 4 IndAp 247), that authority has been fully set up again in the still later decision of the Judicial Committee in Suraj Bunsi Koer v. Sheo Persad Singh (I.L.R., 5 Cal 148; S.C., nom. Ram Sahai v. Sheo Prosad Singh (4 Cal., 226).

16. We do not think that there is any conflict between the cases of Muddan Thakoor and Deendyal. In a recent case, the decision of which has not yet been reported (Appeal from Appellate Decree, No. 1582 of 1878, decided on the 26th June 1879), another Division Bench of this Court (AINSLIE and Broughton, JJ.) has pointed out the distinction between these two cases. In the case of Muddun Thakoor, the father had mortgaged a certain joint property to a creditor, who obtained a decree under the mortgage-bond, and caused the mortgaged property to be sold in execution. These facts appear from the printed Privy Council Record to which we have referred. Similarly in the case of Ram Sahai the mortgaged property was put up to sale. In the first mentioned case the Judicial Committee held that the whole property passed to the purchaser, because he had no notice of the nature of the debts, supposing that they were such as would not be binding upon the sons. In the latter case, the purchaser being fixed with a constructive notice as to the nature of the debts, for the satisfaction of which the property was sold, and it haying been found concurrently by all the tribunals, including the Judicial Committee, that the nature of the debts were such as would not be binding upon sons, it was held that what passed by the sale was simply the interest of the father in the joint property.

17. There is no distinction between this case and that of Deendyal. There is nothing in the decree which the respondent Hurdai Narain obtained against the father Sib Prokash, or in the proceedings taken in execution, which would to show that anything more than the interest of the latter was liable, or actually sought, to be sold.

18. The price paid by the respondent Hurdai Narain also tends to show that nothing more than the interest of the father was put up for sale. It is proved in this case that Rs. 1,816 is the gross rental of eight annas of Mouza Singhole. Allowing a deduction of ten per cent, (the highest rate) as collection charges and the amount of Government revenue, viz., Rs. 328-7, the nett profits in round numbers amount to Rs. 1,307. Accepting that such estates as this are sold in this district at twenty years'' purchase, as admitted by the respondent Hurdai Narain, the value would still amount to Rs. 26,140 The respondent has purchased the property for Rs. 6,800.

19. It has been said that it has been sold subject to prior charges. These charges are--(1), that the disputed property, along with another mouza, was hypothecated in a bond, dated the 27th Joist 1279 (8th June 1872), for Rs. 14,000; and (2), that it, along with eleven other mouzas, was similarly hypothecated in a bond, dated the 2nd April 1873, for Rs. 26,000.

20. Now, as far as the evidence adduced in this case goes, it appears that the hypothecation in the second of the abovementioned bonds is invalid as against Hurdai Narain, because it was executed after the property had been attached in the execution of his decree. No doubt a portion of the amount, secured by the first mentioned bond, would be a burden upon the property in dispute; but still the price paid is inadequate for the whole eight annas of Mouza Singhole.

21. In the proceeding u/s 256 of Act VIII of 1859 it was held, that the price paid was not inadequate, and it has been contended before us that this finding is binding upon the plaintiff in this case. But we do not think that this contention has any force, because the plaintiff in this case rests his claim upon title quite independent of that of the father.

22. Upon all these grounds we are of opinion, that what was purchased by the respondent Hurdai Narain was simply the interest of the father Sib Prokash in the disputed property, and that, in this view of the case, it is not necessary to decide the question, whether the debts for which the respondent Hurdai Narain obtained the decree, dated the 4th March 1873, against the father Sib Prokash, were binding upon the son Ruder Prokash.

23. We do not think that, for the purpose of determining what the interest of Sib Prokash is in the disputed property, the respondent Hurdai Narain should be referred to a separate suit. Following the decision of this Court in special Appeal, No. 1728 of 1877, decided on the 11th April 1878 (an unreported case), we think the matter may be inquired into and finally determined in this suit. In that inquiry, the mother of the minor is a necessary party, and in her absence, we refrain from expressing any opinion as to the contention raised before us, that the family being governed by the Mithila law, the father is entitled to a double share. In the lower Court, the respondent Hurdai Narain alleged that the family is governed by the Mithila law, and there is nothing in the record which would go to show that he gave up that contention. There is no difference between the Mitakshara and the Mithila law so far as the questions disposed of by our present judgment are concerned. Therefore, we have treated the case with reference to those questions, as if it was governed by the Mitakshara law. There may be some difference between the two schools of Hindu law as regards the question of the father''s share in a partition of ancestral property; but upon that point, as we have already said, we express no opinion now. For the purpose of disposing of that question we remit the following issues for the determination of the lower Court:
(1) Is the family of the plaintiff governed by the Mithila or the Mitakshara law?

(2) If governed by the former law, whether Sib Prokash was the eldest born son of his father, and what is his share in Mouza Singhole?

24. In the trial of these issues the mother of the plaintiff is a necessary party, and, accordingly, we directed her to be made a party to the suit.

25. We reserve the costs of this hearing.