

(1871) 08 CAL CK 0005

Calcutta High Court

Case No: Special Appeal No. 135 of 1871

Jubha Sing and
Another

APPELLANT

Vs

Mahabir Kower and
OthersRESPONDENT

Date of Decision: Aug. 24, 1871

Judgement

L.S. Jackson, J.

This is one of those suits so common in the districts of Behar, and which, I must say, form a very unfavorable feature in the litigation of those districts. It was a suit by Hindu sons, in the life-time of their father, to set aside alienations made by the father in consequence of obligations incurred by him, and, to recover immediate possession of a portion of the property with a declaration of their right to the remainder of it on the death of their father. The transactions are of extremely recent date,--namely of April 1863, and April 1866; and the present suit was commenced in 1869. But it appears that this suit was not the first of the proceedings taken with the view of asserting the rights of these plaintiffs, but that during their minority suits had been previously commenced on their behalf by their guardians; so that the ink was scarcely dry on the sales which conveyed the property to the defendants on the part of the father, before the plaintiffs came into Court to undo that which had been done.

2. The property in dispute was an 8-pie share of Pati Khurd in Mauza Sydpur, alias, Manna. The suit was dismissed by the Subordinate Judge, but on appeal the Zilla Judge reversed that judgment, and gave the plaintiffs a decree.

3. The principal questions raised before us in special appeal have been whether the property in question came under the category of ancestral or family property, so that the plaintiff's father being under the Mitakshara law was incapable of disposing of it; and, secondly, whether the defendants had sufficiently made out the existence of legal necessity, supposing that the father was not the absolute owner.

4. The Judge upon the question of ancestral property merely says this. "I do not think, it very much matters for the purposes of this suit, whether the property was purchased by Ajit Sing or his son Bhikdhari Sing; the property would in either case be ancestral as far as Khiju Sing was concerned." He then goes on to show that Khiju, the father of the plaintiffs, had got into possession of this property as an heir either of Bhikdhari or Ajit Sing.

5. Now the decision of the Judge upon this point involves a question of some nicety under the Hindu law. The Judge seems to consider that any property that came into the hands of a man by way of inheritance is ancestral property, such as to give to the son of that man on his birth a joint right and interest in such property. I confess that after reading though several verses in the 1st and 5th Sections of Chapter I of the Mitakshara, I have considerable doubt whether that is a correct view.

6. The property in question seems to have been purchased at a revenue sale by one Bhikdhari who was the son of Ajit. Khiju, the father of the plaintiffs, was second in descent from Ugra, the brother of Ajit, and was, therefore, the son of Bhikdhari's first cousin. Bhikdhari, it appears pre-deceased his father Ajit; and upon the death of Ajit some dispute appears to have arisen in regard to the succession to this and other property, and proceedings were commenced in the Civil Court, but they terminated in a compromise under which an ultimate division of the whole of the property was agreed upon in these terms, that the branch of Jiwun Sing, who was another brother of Ajit, should take half of the property, and that the other half should be divided in equal thirds between this Khiju and the son and the grandson of another son of Ugra. In respect of a portion of the property in dispute the division was to take effect immediately, but as to the property now in question it was to remain for her life-time in possession of Khiju's widow, and after her death to be divided in like manner.

7. Now, without expressing any very decided opinion as to what, under the section and verses quoted, constitutes ancestral property, although my own mind inclines to the opinion that the kind of property in respect of which a man's son by birth obtains an equal right with himself, is property which has come to that man from his father and grandfather, but without expressing any final opinion upon that point, it seems to me sufficient for the purposes of this case to hold, that by the operation of that agreement between the different members of this family, Khiju Sing took this property not as ancestral property, but as a definite share which became his in pursuance of an agreement previously come to by the members of the family, and which therefore became his own absolute property.

8. In this point of view, I do not consider the plaintiffs were entitled to call in question the alienations by Khiju Sing. But even if they had been so entitled, it seems to me that the Judge has gone too far in allowing the exercise of that right. The Judge says--"In a case of this nature when joint family property is concerned," I have already stated that this was not joint family property, but that the several parties took and enjoyed separate and distinct shares, "it was necessary for the defendant to show that there was such necessity

to raise money on the zuripeshgi, as well as to borrow under the bond, as to justify the sale. First, as to the sale, the Subordinate Judge in his judgment makes the debt to commence from the date of the bond in favour of Bunwari Lal; but that is not correct, I think he should have gone further back to see the original cause of the debt."

9. So that according to the Judge if family embarrassment exists such as is about to cause the sale of valuable landed property, it is not sufficient to entitle the purchaser to relief that he should show the existence of such embarrassment, but he must enquire into the circumstance connected with that debt, must go into the history of the matter in which the embarrassment originated, and trace back the whole chain of transactions from the beginning. I think that is going too far, and is not borne out by the decisions of the Privy Council upon this point. Upon all these considerations it appears to me that the Judge had not sufficient ground for reversing the decision of the Court below, and that decision ought to stand, and the decision of the Judge be reversed with costs.