(1867) 06 CAL CK 0001

Calcutta High Court

Case No: Regular Appeals Nos. 228, 240, 241, 249, 252 and 255 of 1865

Luchmun Persad and Another		APPELLANT
	Vs	
Raja Ram Tewary and Others		RESPONDENT

Date of Decision: June 1, 1867

Judgement

Sir Barnes Peacock, Kt., C.J.

This is a suit brought by Luchmun Persad, the son of Jeetun Lall, on account of himself, and as guardian of his minor brother Radhamohun Persad. The appeal is from a decision of the Principal Sudder Ameen of Sarun. The suit was brought on the 5th October 1863, and is to recover possession of certain lands by reversal of certain deeds, some of those deeds being deeds of absolute sale, and some of conditional sale. I wish to remark, before I enter into the merits of the case, that it is very inconvenient that a suit of this nature should be brought against a number of defendants whose interests are altogether distinct from each other. S. 8, Act VIII of 1859, allows causes of action to be joined in the same suit by and against the same parties. But there is no clause which authorises different causes of action to be joined in one suit against different parties where each of those parties has a distinct and separate interest. In this case the validity of the different deeds depends each upon its own merits. It would be just as reasonable to sue four different defendants on bonds given by each of them, or even to join them with a few other defendants for trespassing on the plaintiff''s lands, as it was to join all the defendants in the present suit. Such a joinder in one suit of distinct causes of action against different defendants, each of whom is unconnected with the cause of action against the other, complicates the case before the Judge, and renders it exceedingly difficult for him in dealing with the case of each defendant to exclude from his consideration those portions of the evidence which may not be admissible against him, though admissible against one or more of the others. Moreover, it is vexatious and harassing to the different defendants. Such a procedure renders it almost compulsory on all the defendants to be present, either in person or by their pleaders, whilst the case is going on against the others in respect of matters in

which they are not interested; and, moreover, it is harassing and inconvenient as regards the attendance of the witnesses of the several defendants, as it renders it necessary for the witnesses of each to be present and to be detained whilst the case of the others is being heard and determined. Again in appeal each case must be argued as a separate and distinct case. I think, therefore, that the Judges below ought to be more careful, and to reject plaints when brought against several defendants for causes of action which have accrued against each of them separately, and in respect of which they are not jointly concerned.

2. In a case of this nature, which was brought before the Court in the exercise of original jurisdiction, Norman, J., rejected the plaint. An appeal was preferred to a Division Bench, and the decision of Norman, J., was upheld. I observe that, in this very case, one ground of objection was that the suit was informal, because some persona in whose favor deeds had been executed and their heirs were not made co-defendants, and a, distinct issue was raised upon the subject.

3. Having made these remarks, I now proceed with the case with reference to the defendant in Appeal No. 241, which is a separate appeal, although the case is mixed up with others, and forms part of only one action in the Court below. The suit against this defendant is to set aside an absolute deed of sale of ancestral immoveable property executed by the plaintiff''s father Jeetun Lall in 1848. Possession was taken by the purchaser at that date, so that more than twelve years from the date of the deed, and the taking of possession under it, had expired when the suit was commenced on the 5th October 1863. Luchmun Persad was born about 1837, and, consequently, more than three years had expired since he became of full age. The Principal Sudder Ameen decided upon the issue of limitation that the suit was not barred, upon the ground that limitation ran from the death of Jeetun Lall, the father, and not from the time of the execution of the deed of sale, or from the time when the defendant entered into possession under it. He puts the case simply on the ground that the statute of limitation commenced to run from the date of Jeetun Lall''s death on the 3rd Bhadro 1264, Fuslee, corresponding with 8th August 1857. The case came before the first Division Bench, and the point being one of considerable importance with reference to which there were conflicting decisions, the Division Bench referred it for the decision of a Full Bench. The question has now been very ably and fully argued on both sides.

4. The question turns upon the Mitakshara law, that being the law of the district in which the lands are situate. We are of opinion that Luchmun Persad''s cause of action accrued at the time when possession was taken under the deed of sale, notwithstanding the father of Luchmun Persad was then living.

5. It appears clear that, according to the Mitakshara law of inheritance, a son acquires a right in ancestral property during the life of his father; see ch. I, s. 1: "The term heritage signifies that wealth which becomes the property of another solely by reason of relation to the owner;" v. 2. "It is of two sorts,--unobstructed

(apratibandha), or liable to obstruction (sapratibandha). The wealth of the father or of the paternal grandfather becomes the property of his sons or of his grandsons 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. The same holds good in respect of their sons and other descendants;" v. 3. The property in this case was ancestral, and not the self-acquired, property of Jeetun Lall. The plaintiff, upon his birth, therefore, as the son of Jeetun Lall, acquired a right in the property, even during his father''s lifetime; for the case was one of unobstructed heritage. The author of the Mitakshara goes on to speak of partition, and shows that rights acquired by unobstructed heritage exist before partition. He says in v. 4:-- "Partition is the adjustment of divers rights regarding the whole by distributing them on particular portions of the aggregate." V. 5:-- "Entertaining the Same opinion Narada says: ''where a division of the paternal estate is instituted by sons, that becomes a topic of litigation called by the wise partition of heritage.'" In v. 7 he discusses the question whether property arises from partition, or whether the partition is of pre-existent property. He says: "Does property arise from partition? or does partition of pre-existent property take place? Under this head of discussion, proprietary right is itself necessarily explained; and the question is, whether property is deduced from the sacred institutes alone, or from other and temporal proof." The author then examines the arguments as to whether property is temporal or not. In the course of the discussion, he states that "an owner is by inheritance," and that "unobstructed heritage) is here denominated ''inheritance;'" vv. 12 and 13; and after discussing the arguments on both sides, he comes to the conclusion that property is temporal. He explains in v. 16 the object of the disquisition, and he proceeds in v. 17: "Next, it is doubted whether property arise from partition, or the division be of an existent right." In vv. 18 to 22 he states the arguments urged by his adversaries against his position that property exists before partition; and in vv. 23 to 26 he answers those objections; and then, in v. 27, comes to the conclusion that property in the paternal or ancestral estate is acquired by birth, although the father, during the minority of his sons, has power to dispose of it for indispensable acts of duty and for other purposes prescribed by law. He says:-- "Therefore it is a settled point that property in the paternal or ancestral estate is by birth, although the father have independent power in the disposal of effects other than immoveables, for indispensable acts of duty and for purposes prescribed by text of law, as gifts through affection, support of the family, relief from distress, and so forth: but he is subject to the control of his sons, and the rest, in regard to the immoveable estate, whether acquired by himself or inherited from his father or other predecessor; since it is ordained, ''though immoveables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without

convening all the sons. They who are born, and they who are yet unbegotten, and they who are still in the womb, require the means of support no gift or sale should therefore be made.'' "An exception to it follows: ''Even a single individual may conclude a donation, mortgage, or sale of immoveable property, during a season of distress, for the sake of the family, and especially for pious purposes.'" He proceeds:-- "The meaning of that text is this,--while the sons and grandsons are minors and incapable of giving their consent to a gift, and the like; or while brothers are so and continue unseparated, even one person, who is capable, may conclude a gift, hypothecation, or sale, of immoveable property, if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father, or the like, make it unavoidable;" see vv. 27, 28 and 29. In v. 30 he points out that separated kinsmen should join, not because it is necessary, but because it is convenient that they should do so in order to avoid future doubts. The paragraph is as follows: "The following passage separated kinsmen, as those who are unseparated, are equal in respect of immoveables; for one has not power over the whole, to make a gift, sale or mortgage, must be thus interpreted: among unseparated kinsmen the consent of all is indispensably requisite, because no one is fully empowered to make an alienation, since the estate is in common, but among separated kinsmen the consent of all tends to the facility of the transaction, by obviating any future doubt whether they be separate or united: it is not required on account of any want of sufficient power in the single owner, and the transaction is consequently valid even without the consent of the separated kinsmen." Then in v. 33 he says:-- "In respect of the right by birth to the estate, paternal or ancestral, we shall mention a distinction under a separate text," referring to s. 5, v. 3. In s. 5 the commentator points out in vv. 1 and 2 that "among grandsons by different fathers, the allotment of shares is according to the fathers." He says:-- "The distribution of the paternal estate among sons has been shown. The author next propounds a special rule concerning the division of the grandfather''s effects by grandsons.-- ''Among grandsons by different fathers, the allotment of shares is according to the fathers.'' Although grandsons have by birth a right in the grandfather''s estate equally with sons, still the distribution of the grandfather''s property must be adjusted through their fathers, and not with reference to themselves. The meaning here expressed is this: if unseparated brothers die leaving male issue, and the number of sons be unequal, one having two sons, and another three, and a third four, the two receive a single share in right of their father, the other three take one share appertaining to their father, and the remaining four similarly obtain one share due to their father. So if some of the sons be living and some have died leaving male issue, the same method should be observed: the surviving sons take their own allotments, and the sons of their deceased brothers receive the shares of their own fathers respectively. Such is the adjustment prescribed by the test;" see v. 2. "If the father be alive, and separate from the grandfather, or if he have no brothers, a partition of the grandfather''s estate with the grandson would not take place; since it has been

directed that shares shall be allotted in right of the father, if he be deceased; or admitting partition to take place, it would be made according to the pleasure of the father, like a distribution of his own acquisitions. To obviate this doubt the author says: ''For the ownership of father and son is the same in land which was acquired by the grandfather or in a corrody, or in chattels which belonged to him.'" The author then proceeds to point out a distinction between ancestral estate and that which was self-acquired by the father. He says:-- "In such property, which was acquired by the paternal grandfather through acceptance of gifts, or by conquest, or other means, as commerce, agriculture, or service, the ownership of father and son is notorious, and therefore partition does take place. For, or because, the right is equal or alike, therefore partition is not restricted to be made by the father''s choice, nor has he a double share;" v. 5. In v. 6 he goes on:-- "Hence also it is ordained by the preceding text that ''the allotment of shares shall be according to the fathers,'' although the right be equal." In v. 7 he says:-- "The first text, ''when the father makes a partition, &c.,'' (s. 2, v. 1), relates to property acquired by the father himself. So does that which ordains a double share: ''Let the father making a partition reserve two shares for himself.'' The dependence of sons, as affirmed in the following passage, ''while both parents live, the control remains even though they have arrived at old age,'' must relate to effects acquired by the father or mother. This other passage, ''They have not power over it (the paternal estate) while their parents live,'' must also be referred to the same subject." In v. 8 he says:-- "Thus, while the mother is capable of bearing more sons, and the father retains his worldly affections and does not desire partition, a distribution of the grandfather''s estate does nevertheless take place by the will of the son," that is, the son of the father, or the grandson. Sir William Macnaghten, in his Principles of Hindu Law, says, that when the mother is incapable of bearing more sons, distribution of the grandfather''s estate takes place by the will of the son, from which it was contended that it is to be inferred that, in his opinion, it would not take place whilst the mother was capable of bearing children. But Macnaghten does not refer to v. 8, but only to a former paragraph which relates to self-acquired property See Ch. IV, pp. 43, 44. In 9 the commentator of the Mitakshara goes on to say:-- "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 a dependant." The words "the grandson has a right of prohibition" do not mean merely that the son can prevent his father from making a gift or sale of the property by injunction. If he has power to prohibit, he must have a right in the property, and a right to set aside the sale if made. In v. 10 the author proceeds:-- "Consequently the difference is this: Although he," that is, the son, "have a right by birth in his father''s and his grandfather''s properly, still, since he is dependant 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: but 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." Here, then, is a clear expression of the grandson''s right to prevent his father from alienating ancestral property. V. 11 was cited to show that the father was not bound to divide ancestral estate. But it does not establish that point. In that paragraph the commentator refers to Menu as an authority that the father, however reluctant, must divide the grandfather''s property, and he points out a distinction as regards ancestral wealth recovered by the father, which is put upon the same fooling as self-acquired property, and he holds that Menu, by the declaration, shows that the father was bound to divide other ancestral property.

6. It is clear, then, that a son by birth alone acquires a right in ancestral property, and that he has a right during his father''s lifetime to compel a partition of such property; that the father cannot, without the consent of the son, alienate such property except for sufficient cause, and that the son may prohibit the father from so doing. It has been held that the son has not merely the right to prohibit, but that he may sue to set aside the alienation if made. In Mussamut Roopna v. Ray Reotee Rumeen S.D.A., 1853, 344 it was held that the sale of joint undivided property in a Mithila family without necessity was void, unless made with the assent of all the joint sharers, and that it was not valid even for the seller''s own share; and it was stated by the Judges to have been repeatedly so held. In Virasvami Gramini v. Ayyasvami Gramini 1 Mad. Rep., 471 it was held that a member of an undivided Hindu family may alienate the share to which, if a partition took place, he would individually be entitled. It is not necessary for us to determine which of the two doctrines is correct. All that we have to do, is to determine when the cause of action accrued. If the sale was valid as to the father''s share, it must have operated as a severance of the joint interest in the property included in the conveyance. If so, Luchmun, the only son then living, might have sued the purchaser for a partition of the property, or to recover his own share of it. The father''s death in that case would not alter his rights. If the sale was invalid as regards the father''s share, the son might have sued in the father''s lifetime for a partition to recover the whole estate to be held as joint family estate. It can scarcely be supposed that the father could join as a co-plaintiff to set aside his own alienation for a valuable consideration, or that he would be entitled to share the profits of the estate when received by the son to be held as joint family estate See Raja Ram Ternary v. Luchmun Persad, 4 B.L.R., A.C., 118; Mahabeer Persad v. Ramyud Singh, 12 B.L.R., 90; and Jugdeep Narain Sing v. Deendial, ib., 100. It is not necessary to determine these points, or to consider whether the father, if living, would have had to he made a co-defendant, if he could not be made a co-plaintiff in such a suit; or whether the purchaser, if not entitled to hold the father''s share of the property conveyed, or to compel a partition of the property, might not be equitably entitled to the father''s share of the profits when collected. The determination of these points does not appear to affect the question of limitation. Even if the son would, upon the father''s death, become entitled to the father''s share by survivorship, and consequently entitled to a greater interest in the

estate than he had in his father''s lifetime, that would not necessarily affect the question of limitation. If the son might have sued in the father''s lifetime, either with or without joining the father as a co-plaintiff, and have recovered in that suit all that he was entitled to, the death of the father could not create a new cause of action. If the son might have joined the father as a co-plaintiff, and the suit would not have abated by the father''s death but would have survived to the son, it seems that the cause of action must have been complete in the father''s lifetime. If three joint tenants are dispossessed of an estate, they may join in an action to recover it back from the wrong-doer. When recovered, the estate belongs to the three jointly. If one of them dies, the two survivors may sue for it, and, when recovered, the estate would belong to the two jointly. Yet no one would contend that, if all the three lived for twenty years, a new cause of action would accrue to the survivors upon the death of the one, because they had a greater interest after his death than they had in his lifetime. The cause of action is the same, notwithstanding that the two, by survivorship, have a greater interest in it than they had before. The cause of action in such, a case would accrue at the time of wrongful dispossession. This is merely put as an illustration. It is not intended to say that a joint Hindoo family are the same as joint tenants under the English law. So in a case under the Mitakshara law, if a father and a son of full age should be dispossessed in the father''s lifetime of ancestral property, the son could not, upon the father''s death, twenty years afterwards, sue to recover the estate upon the ground that limitation did not begin to run in the father''s lifetime. The inconvenience which would result from holding that, in cases like the present, limitation does not commence until the death of the father, would be very great. The death might happen twenty or thirty years after the sale, and after the property has been sold by the first purchaser, and passed successively into the hands of several subsequent bona fide purchasers for valuable consideration, and when the last purchaser in possession might be wholly unable to prove whether the circumstances of the joint family, at the time of the sale, were such as to justify the sale by the father. Inconvenience could not be allowed to affect our decision if the law were clear, but it is a matter to be taken into consideration in determining what the law is.

7. The next question to be decided is, did a new cause of action accrue upon the birth of Radhamohun, the younger brother, either to him alone, or to him and his brother jointly?

8. Luchmun Persad was born in 1837. Radhamohun was not born until the end of 1856 or the beginning of 1857, only about nine years after the sale in 1848, and not twelve years before the commencement of the suit. It seems clear that no new cause of action accrued upon his birth.

9. It is clear that, before his birth, his father and his brother might have made a partition of the estate, and if they bud done so, he would have had no interest in the share allotted to his brother (Mitakshara, ch. i, s. 6); and, before his birth, his father

might have sold the share allotted to him. So, the father and his elder brother, or the father with the assent of the elder brother, might, before his birth, have sold the estate, and the sale would have been binding upon him. It is contended that, although Radhamohun would have been bound by a sale made by the father jointly with Luchmun Persad, still he is not bound by a sale by the father alone without the consent of Luchmun.

10. If the father and Luchmun had been turned out of possession by a wrong-doer, the cause of action would have accrued at the time of dispossession, and a new cause of action would not have accrued upon the birth of Radhamohun. Radhamohun succeeded to the estate as it was when he was born. He had no right to dissent from the sale, for he was not born at the time. The sale might have been invalid as against Luchmun, but the cause of action accrued to Luchmun immediately the purchaser took possession. If Radhamohun had been born at the time when the estate was sold, the father would have been entitled to only one-third of the estate upon partition; but as it was, the father and Luchmun would each have been entitled to one-half, if partition had been made at that time. If the case of Virasvami Gramini v. Ayyasvami Gramini 1 Mad. H.C. Rep., 471 is correct, the father might have lawfully sold one-half at that time, but if Radhamohun on his birth acquired a new right against the purchaser, it was a right which, if partition had been made at that time, would have entitled him to one-third. Now if Luchmun had sued and recovered one-half before Radhamohun was born, could Radhamohun upon his birth have sued for one-third? If so, the purchaser, instead of acquiring half, would in fact be able to retain only half minus one-third of the property conveyed, or in other words one-sixth instead of half.

11. Whatever interest in the property Radhamohun became entitled to on his birth, he derived it by unobstructed heritage, or inheritance from his father. He could not inherit any thing which his father has lawfully conveyed away. If the father parted with his own share, he could not inherit any part of it. If the conveyance caused a severance of the joint interest of him and Luchmun, and passed his own half to the purchaser, Radhamohun, as heir of the father, could not inherit any part of the share which passed to the purchaser, neither could he inherit from his father any part of Luchmun''s share. At most he inherited only a cause of action, and it is difficult to see how he could even inherit that from his father, unless his father had a right to set aside his own sale. Even if he took by inheritance from his father an interest in Luchmun''s right of action against the purchaser, he must have inherited it subject to the operation of the Statute of limitation upon it. At all events Radhamohun''s birth could not create a fresh interest or a new right of action in Luchmun, either alone or jointly with himself. Luchmun is now suing upon a joint cause of action. Luchmun''s interest in it is clearly barred by limitation. If there is any cause of action which is not barred, it must be a separate cause of action in Radhamohun. I do not think that a separate cause of action in Radhamohun was caused by his birth: but it is not necessary to determine that question, as the cause

of action now sued upon is a joint cause of action in Luchmun and Radhamohun. Limitation is pleaded to a joint cause of action. If that issue is found against Luchmun, I should think he could not, as guardian of Radhamohun, be allowed, under the allegations in this suit, to recover upon a separate cause of action, if any accrued to Radhamohun on his birth. That would be a wholly different cause of action from that sued upon. It is clear that Radhamohun did not upon his birth inherit from his father a joint cause of action with Luchmun, and that Luchmun''s cause of action did not accrue upon the birth of Radhamohun.

12. Therefore, we are of opinion that limitation did bar the suit so far as it related to the cause of action out of which Appeal No. 241 arises, consequently the decision of the Principal Sudder Ameen as to that cause of action must be reversed with costs, and in respect of it a decree given for the defendant.

13. This decision applies also to the defendants who are interested in the lands to which the Appeal No. 255 relates. The deed of sale in that case was executed, and possession taken under it, in 1845, and consequently the suit was barred in 1863.

14. As to Appeal No. 249, the deed was dated in 1838, and possession followed immediately. Consequently the suit is barred.

15. We now come to consider Appeal No. 228. In that case the deed was dated 18th August 1847. There was a decree for foreclosure in 1849, and a decree for possession on the 9th January 1852. If the cause of action accrued upon the execution of the bill of conditional sale in 1847, it was barred. If it dates from foreclosure in 1849, it would also be barred. Neither Luchmun nor Radhamohun were parties to the foreclosure. If it dates from the time when possession was taken under the decree of 1852, then it is not barred.

16. We are of opinion that limitation began to run from the time when possession was taken, and not from the date of the mortgage deed under which possession was not taken, nor from the date of the foreclosure. Prior to 1852, when possession was taken, all was on paper. The plaintiffs were no parties to the foreclosure suit, and are not bound by it. We are of opinion, that the cause of action, if any, accrued when possession of the land was taken by the purchaser. Suppose a person not having any title to the land were to mortgage it, the owner of the land would not be bound to bring an action directly the mortgage deed was executed. Or suppose the mortgagee were to go on to foreclose the land, and not to make the owner of the land a party, he would not be bound to come in, nor would he be affected by the decree in that suit. He might very reasonably say:-- "Why should I be obliged to incur the costs and harassment of a suit, when the property remains in my possession? It will be time enough for me to interfere when my possession is interfered with." That appears to be the time when his cause of action accrued, so far as the right to recover possession is concerned. The parties were not bound to bring a suit to set aside the deed. They might have possibly brought such a suit, if they had pleased, so

that they might have the validity of it tried at once, when witnesses were forthcoming to prove that there was no sufficient cause for the mortgage. The right to set aside the deed is a distinct right from the right to recover possession.

17. There is one case in which it was held by the late Sudder Court that the plaintiff''s case was out of time under the Statute of Limitation, and his cause of action accrued at the date of mortgage. It was however admitted in that case that the defendant''s father, who was the original mortgagee, obtained possession at the time at which the deed was executed. The case is not in point, and we think that as regards the Appeal No. 228, the case was not barred.

18. The same reasons apply to Appeal No. 252, in which case the decree for foreclosure was in 1854, and possession was not taken until afterwards.

19. The necessity of separating all these different cases in delivering judgment in appeal, shows the difficulty and annoyance to which defendants must be put, by being joined in one action in respect of different causes of action to set aside the various deeds executed under different circumstances, and in respect of which they have no common interest.

20. It having been decided in the cases out of which Appeals Nos. 228 and 252 arise, that the Statute of Limitation did not apply, the appeals will go back to the Division Bench which referred them to this Court, to determine the appeals so far as the other issues are concerned. It appears that in Appeal No. 240, no question of limitation arises. That appeal will therefore go back to the Division Bench to be determined on the merits.