
(1875) 03 CAL CK 0005

Calcutta High Court

Case No: Regular Appeal No. 11 of 1873

Mussamut Gowrun
Butty and Others

APPELLANT

Vs

Muddun Gopal Lall

RESPONDENT

Date of Decision: March 13, 1875

Judgement

Phear, J.

The principal question which is now before us is, whether or not the evidence taken at the original hearing, together with that taken on remand, serves to establish, as against the plaintiffs, the encumbrances which the appellants, Gridhari Lall Sahoo, Poosun Lall Sahoo, and Muddun Gopal Lall, respectively claim to have upon the property the subject of this partition suit. It appears to be admitted that Shib Narain Singh, the first defendant, and his elder son, the second defendant, and his younger sons the minors, plaintiffs, together constitute a joint family living in commensality under the Mitakshara law, and in the joint enjoyment of the property which is the subject of suit.

2. The way in which Gridhari Lall places his claim is shortly as follows:--He says that Duryao Singh, the father of Shib Narain, and therefore the grandfather of the plaintiffs, during his life incurred great pecuniary liabilities, and that on his death the duty of discharging his debts fell upon Shib Narain. In addition to this, Shib Narain himself wasted money to carry on the zamindari and domestic business and to perform certain marriage and obsequial ceremonies, and so from time to time borrowed money from various bankers, among others the appellant's firm; that Shib Narain and his son Amur Persad were in possession of the disputed property in their own absolute right; and the banking transactions just referred to had been carried on with the appellant's firm continuously since the days even of Daryao; and that relying on these circumstances, the appellants, when Shib Narain and Amur Persad were pressed by zamindari and domestic needs, lent them money, and they secured repayment of the same by the execution of two registered bonds, one after the other, in favor of the appellant. Gridhari Lall adds that having sued on these bonds, he obtained two decrees dated respectively 4th May and 14th June 1370, and when in execution of these decrees he had seised and was about to

sell the property of Shib Narain and Amur Persad, they, with the- view to preserve the property from sale, executed in good faith a bond, dated 9th July 1870, hypothecating 8 annas share of Mauza Beer for the sum remaining due, namely, Rs. 6,794.

3. The evidence in support of this case is extremely slight. The bond itself of the 9th July 1870 is proved, though perhaps proof of it was not needed in view of the plaint. Also the decrees of 4th May and 14th June 1870 may be considered to be proved. But although Gridhari himself and several witnesses have been examined on the remand order, they speak very imperfectly indeed to the other material facts of this story. Gridhari does however explain the reason why only 8 annas of the property was pledged to him by stating that the other 8 annas had in his presence been sold by Shib Narain and Amur Persad to Sitaram, one of the defendants, in the preceding; month of May, namely on 8th May 1870, for R. 86,000.

4. The case of Poosun Lall is precisely the same as that of Gridhari Lall, and is stated in almost exactly the same words: the only difference between the two cases is that Poosun Lall's final bond of hypothecation was for Rs. 5,874 instead of Rs. 6,794.

5. The evidence which has been given on behalf of this defendant even after remand, if taken alone, altogether fails to establish this case; the bond itself is not proved. It may however be taken (although against minors) as admitted by the plaint: and the facts established in Gridhari Lall's case can be made use of by this defendant.

6. Muddan Gopal reiterates the story of the other two appellants as regards the debts left by Duryao Singh and the expenditure of Shib Narain, and that Shib Narain Singh and Amur Persad were in possession of the disputed property in their own absolute right; and then he says that, confiding in these circumstances, he advanced to Shib Narain and Amur Persad the sum of Rs. 3,000 on interest by hypothecation of 8 annas share of Mauza Beer, asli with dakhili, under a registered bond dated the 26th Kartik 1278 F.S. (4th November 1870).

7. This bond is sufficiently proved, as also the advance of the money thereunder, and it may also be taken as made out that the money was wanted, or at least that Muddun Gopal bona fide believed it was wanted, for the performance of a family ceremony.

8. With regard to all three appellants, it may be reckoned as certain from their written statements and from the evidence that they knew the joint family consisted of more members than Shib Narain and Amur Persad, but they advanced money to and dealt with Shib Narain and Amur Persad as being the only adult members of the family; and they were ultimately content to take such security for repayment of the money as Shib Narain and Amur Persad alone could give them in the shape of a mortgage or charge upon the family property.

9. Consequently, the three cases may be summarised thus:--In that of Muddan Gopal, the plaintiff's father and elder brother mortgaged 8 annas of the joint property to Muddan

Gopal in consideration of a loan of money which was wanted for a family purpose.

10. In those of Gridhari Lall and Poosun Lall, patting them at their highest, the plaintiff's father and elder brother mortgaged 8 annas of the joint property in order to prevent the sale of that property at the instance of Gridhari Lall and Poosun Lall in execution of decrees which those persons had respectively obtained against the father and eldest son personally.

11. The plaintiff's case then is reduced to this, namely, are the minor sons, the plaintiffs, entitled to insist on partition of the joint property, and to obtain their share of the joint property free of these mortgages.

12. In the case of Laljeet Singh v. Rajcoomar Singh 12 B.L.R., 373, we had occasion to discuss the first part of this question at considerable length. The result at which we arrived was that the sons could at any time during their father's life, call upon him to partition the ancestral property. And as to the second part of the question, it was also made clear in the course of the discussion that under the Mitakshara law the occurrence of the birth of a son had the effect of limiting the father's power of disposition over ancestral property: while he could before the birth of a son deal with it as sole owner, after that event he becomes in a certain sense subject to the control of his son, who by birth becomes co-owner with him; with this farther condition however that, during the minority of his son, he has an absolute discretion within certain limits.

13. Those limits are prescribed in paras. 28 and 29 of s. 1, Ch. i, Mitakshara. They are expressed no doubt in these paragraphs in somewhat general terms, and this Court is constantly called upon to decide whether a given case comes within them or not. The judgment of the Privy Council in 6 M.I.A. 393 (Privy Council) has been applied by analogy and considered to furnish a guiding principle upon this point. Since however the present appeal first came before this Court, a decision has been passed by the Privy Council in the case of Girdharee Lall v. Kantoo Lall 14 B.L.R., 187, which is even more immediately relevant.

14. According to that decision, as we understand it, the interest which, under the Mitakshara law, a son acquires in the ancestral property of his father, by and in the event of being born, is of the nature of an inheritance; and remains liable to the payment of the personal debts of the father, even though subsequently contracted, in the same way as the entire property would have been liable had the son not been born, except only in the case where those debts are illegal, or were contracted for an immoral purpose. The judgment says expressly "the interest of the SONS as well as the interest of the fathers in the property, although it is ancestral, is liable for the payment of the fathers' debts."

15. It would therefore seem to follow that any disposition of the property, which is reasonably made by the father for the purpose of discharging a debt of this kind, i.e., a debt of the father's which does not fall within the exception, is one of those spoken of and

authorised as "unavoidable"" by paras, 28 and 29, s. 1, Ch. i, Mitakshara.

16. The debt being of such a nature that the property is ultimately liable to discharge it, the alienation of that property, Whether by mortgage or sale by the father upon reasonable terms for the purpose of discharging the debt, must be substantially an unavoidable transaction.

17. In the present case as the evidence stands, meagre though it is, the father's debts for which this property has been hypothecated in favor of the defendants do not appear to have been illegal or of an immoral character.

18. In the case of Muddun Gopal, the debt was incurred for a family purpose; and in the other two cases, they were debts the reality of which has, so to speak, been guaranteed by a decree. It must be taken as long as those decrees or unimpeached that there really was a debt from the father and his eldest son to Poosun Lall and Gridhari Lall respectively. The debts then being apparently real debts, and not of an immoral character, and one of them being incurred for a family purpose, it follows that they were of such a nature that the joint property of the family was liable to meet them; and that, therefore, the mortgages which the father has made for the purpose of securing these debts to the defendants, appear upon the authorities which have been quoted to be good encumbrances upon the joint estate and valid against the claims of the minors, the plaintiffs.

19. We thus think that, while the plaintiffs are no doubt entitled to have a partition of the property, the partition must be subject to the mortgages of the three appellants to the extent of 8 annas of the entire property. The appellants are entitled to their costs: but, as we cannot give a decree making the minors pay the costs, these costs will be declared a charge upon the property.