(1877) 05 CAL CK 0006

Calcutta High Court

Case No: None

Januk Singh		APPELLANT
	Vs	
Bheknarain Singh and Another		RESPONDENT

Date of Decision: May 22, 1877

Citation: (1877) ILR (Cal) 439

Hon'ble Judges: White, J; L.S. Jackson, J

Bench: Division Bench

Judgement

White, J.

It is to be observed that the present suit is not one in which a son is seeking to set aside a sale of ancestral property made by his father or to recover from a purchaser ancestral property which has been sold in execution of a decree against the father; but a suit in which a creditor, in whose favour a father has created a charge upon the ancestral Immovable estate, is endeavouring to enforce that charge against the share or interest of the sons in that ancestral estate, where the latter were no parties to the charge, and were also minors at the time of its creation. Such being the nature of the present suit, the proposition of law laid down by the officiating Judge amounts to this, that when a creditor brings such a suit, he is entitled to a decree against the sons upon simply proving the loan and the instrument of charge, and that his right to a decree can only be defeated, in the event of the sons showing that the money was advanced for an immoral purpose. In other words, any charge which the father may create upon the ancestral Immovable property during the minority of his sons is a valid charge, and must he satisfied out of that property, unless the sons, on whom the Judge throws the burden of proof, can show that the charge was created to secure money borrowed by the father for immoral purposes. If this be good law, it follows that the interests in the ancestral Immovable property, which, under the Mitakshara law, are vested in sons by their birth, are entirely unprotected from the selfish or wasteful or capricious acts of the father except in the single instance of money borrowed by him upon the estate for immoral

purposes.

2. The decisions on which the Officiating Judge relies in support of a proposition fraught with such serious consequences, are Girdharee lall v. Kantoo Lall 14 B.L.R. 187 : S.C.L.B. 1 I.A. 321 and 22 W.R. 56 and Muddun Gopal Lall v. Mussamat Gourunbutty 15 B.L.R. 264 : S.C. 23 W.R. 365. But neither of these cases, when examined with reference to the facts involved in them, can, in my opinion, he considered as authorities for any such doctrine.

3. In Girdharee lall v. Kantoo Lall 14 B.L.R. 187 : S.C.L.R. 1 IndAp 321 and 22 W.R. 56 the suit was brought by sons for the purpose of setting aside a deed of sale of ancestral property executed by their father, and also of recovering from the purchaser the whole of the property which purported to pass by the deed. In giving the judgment of their Lordships, Sir Barnes Peacock, after referring to a certain ride laid down by Lord Justice Knight Bruce, in the case of Hunooman Pursad v. Mussamat Babooee 6 Moore''s I.A. 393 proceeds thus: "It is necessary, therefore, to see what was the nature of the debt for the payment of which it was necessary to raise money by the sale of the property in question." The facts regarding the nature of the debt, which their Lordships considered to be established, were that, previous to the sale which was sought to he set aside, a bond had been executed by the father, upon which a decree had passed and execution issued against the father. " The bond," as their Lordships observe, "had been substantiated in a Court of justice," and the purpose for which the bond was given had not been impugned. The words used by their Lordships in observing upon this latter circumstance are as follow; There was nothing to show that it, viz., the bond, was given for an immoral purpose; and the holder recovered a decree upon it. There is no suggestion that either the bond or the decree was obtained benamee for the benefit of the father, or merely for the purpose of enabling the father to sell the family property and raise money for his own purpose. There is nothing of the sort suggested and nothing proved." Their Lordships further considered it established by the evidence that it was necessary for the father to raise money to get rid of the execution which had issued upon the decree obtained upon this unimpeached bond; that acting under that necessity the father executed the deed of sale in question; and that the purchase-money arising from the sale "had been paid into the bankers of the father, and been applied partly to pay off the decree, and partly to pay off a balance due from the father to the bankers, and partly to pay Government revenue." Upon this state of facts, the Judicial Committee decided that it was "not because there was a small portion which was not accounted for, that the son, probably at the instigation of the father, has a right to turn out the bona fide purchaser who gave value for the estate," adding, that "even if there was no necessity to raise the whole purchase-money the sale would not be wholly void."

4. Their Lordships'' decision, as I understood it, proceeds on the ground that a prima facie case of necessity for the sale had been shown, against which no rebutting

evidence had been offered, and that as, moreover, a considerable portion of the purchase-money had been proved to be applied for purposes which would make the sale binding on the sons, their suit to set aside the sale could not be maintained.

5. In Muddan Gopal Lall v. Mussamut Gourunbutty 15 B.L.R. 264 : S.C. 23 W.R. 365 sons were again the plaintiffs, and brought a suit against their father and elder brother, and certain persons who claimed interests in the ancestral estate under bonds, or as purchasers in execution of decrees obtained on bonds, praying for a partition of the ancestral estate and for possession of their shares free from encumbrances by cancelment of the bonds. Phear, J. in delivering the Court''s judgment, which was given in those appeals at the same time, states, as the facts found "that in Muddun Gopal''s case the plaintiffs'' father and elder brother bad mortgaged 8 annas of the joint property to Muddun Gopal in consideration of a loan of money which was wanted for a family purpose; and that in the cases of Girdharee Lall and Pooran Lall, the plaintiffs'' father and elder brother bad mortgaged 8 annas of the joint property in order to prevent the sale of that property at the instance of Girdharee Lall and Pooran Lall, in execution of decrees which these persons had respectively obtained against the father and eldest son personally."--And the Court then held that, under these circumstances, the plaintiffs, the minor sons, were not entitled to obtain their share of the joint property free from these mortgages.

6. In neither of the decisions which are relied on by the Officiating Judge was the suit brought by a bond-holder or mortgagee against the father and sons to enforce a charge upon the ancestral estate created by the father, and in both of the decisions it is clear that the transaction of the father, whether it consisted of a sale or a loan, was inquired into by the Court with a view to see if there was any legal necessity for the transaction, or if it had reference to family purposes, and that the result of that inquiry formed the main ingredient of the decisions arrived at.

7. The liability of a son for the debts of his deceased father under Hindu law appears to me to be a distinct question from the right of a father in his lifetime to charge the interest of his infant sons in the joint ancestral Immovable estate with the payment of a debt. It is the latter question which is before the Court in the present suit; and to arrive at a correct decision, I think that the principles to be applied are those which are laid down in the leading case of Hunooman Persad v. Mussamat Babooee 6 Moore''s I.A. 393. The authority of that case has been often recognized in the Privy Council, and notably in Lalla Bunseedhur v. Koonwar Bundesuree 10 Moore''s I.A. 454 at 461, and also in Giridharee Lall v. Kantoo Lall 14 B.L.R. 187 : S.C.L.R. 1 IndAp 32 and 22 W.R. 56. In Hunooman Persad''s case, the mortgage was made by a mother and widow, as guardian of her infant son and manager of his estate, but so far as relates to the interests in the ancestral estate which sons get by birth under the Mitakshara law, and the right of the father to alienate the same, there seems to be no essential difference between the position of the father when dealing with those interests during the minority of his sons, and the position of a mother when

dealing as guardian and manager of her infant son''s estate. Lord Justice Knight Bruce says in Hunooman Persad''s case: "The power of the manager for an infant heir to charge an estate not his own is, under the Hindu law, a limited and qualified power; it can only be exercised rightly in a case of need or for the benefit of the estate;" and with respect to the question on whom the onus of proof lies, his Lordship, after stating that the onus will vary with the circumstances, proceeds to say: "When the mortgagee himself with whom the transaction took place is setting up a charge in his favour made by one whose title to alienate he necessarily knows to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir,--namely, those facts which embody the representations made to him of the alleged need of the estate and the motives influencing his immediate loan."

8. Taking these to be the principles of law applicable to the decision of this suit, I am of opinion, that the Officiating Judge was wrong in holding that it lay upon the special respondents to prove that the loan was contracted by the father for immoral purposes, and that on their failing to do so, the respondent was entitled to a decree for a sale of the special appellant''s interests in the ancestral property. Before ho was entitled to such a decree, I think it was incumbent upon the respondent to show for what purpose the loan was contracted, and that that purpose was one which justified the father in charging, or which the respondent had at least good grounds for believing did justify the father in charging, the interests which the special appellants have in the ancestral Immovable property. As the respondent has failed to show this either in the Court of first instance or in the lower Appellate Court, I think the order of remand, and the subsequent decree of the Officiating Judge, must be reversed, and that of the Court of first instance restored. The appeal is allowed with costs.