

(1880) 06 CAL CK 0014

Calcutta High Court

Case No: None

Giridhur Chowdhry by
his Guardian Kamini
Chowdhrani

APPELLANT

Vs

Luchmun Dass

RESPONDENT

Date of Decision: June 2, 1880

Citation: (1880) ILR (Cal) 855

Hon'ble Judges: Richard Garth, J; Pontifex, J; Morris, J; Mitter, J; Jackson, J

Bench: Full Bench

Judgement

Pontifex, J.

Those questions may be answered in the affirmative]. The second question referred is answered by the arguments as to the first. The third question may be answered by Kanto Lall's case (L.R. 11. IA. 321; S.C. 4 B.L.R. 187), which is distinguishable only from the fact that in that case a stranger was the purchaser. The difference between the first and third questions is only a question of the form of the decree. As to the fourth question, Sections 28 and 29 of Chap. I of the Mitakshara may be cited against us. Yet these sections must be read with the qualification that a son is bound to pay his father's debts, and there are texts which go so far as saying, that, even during the lifetime of the father, a son is bound to pay his father's debts. [Garth, C.J.--The hardship is, that the father might sell any portion of the property without consulting the son]. The cases of Buddree Lall v. Kanto Lall (23 W.R. 260) and Anoorajee Koer v. Bhugobutty Koer (25 W.R. 148), both decide that a creditor is not bound to go behind the decree for the sale of the mortgaged property, unless clear proof were given that the loan was contracted for immoral purposes. Muddun Gopal Lall v. Gowrunbatty (15 B.L.R. 264; S.C. 23 W.R. 365), as also the two cases last cited, show, that there is an obligation attaching on the son to pay his father's debts, and that a sale under a mortgage made by the father would bind the son, unless the debts were illegally or immorally contracted. As to the fifth question, the answer to it falls within the principle which has been laid down by the Privy Council; the question

has arisen from the words used in page 106 of Suraj Bansi Koer's case as reported in L.R. 6 I.A. The Privy Council were then contemplating a sale that had taken place for an antecedent debt: they say that, having laid down that the debt was binding on the family, a sale made by the father would be binding on the family. [Pontifex, J.--Your argument goes as far as this, that all sales are binding unless the debt for which the decree is obtained can be shown to have been contracted for some forbidden purpose]. Yes. The answer to the seventh question may be found in the arguments that I have laid before the Court already.

2. Mr. Branson for the appellant in case No. 289.--Gunga Pershad v. Sheodyal Singh (5 C.L.R. 224) decides that a son is liable for debts of his father, unless he can establish that the debts were illegally or immorally contracted; see also Ruder Perakash Misser v. Hurdai Narain Sahu (5 C.L.R. 112).

3. Mr. H. Bell for the respondent.--The questions resolve themselves into two points, viz.: (i) The extent of a son's liability to pay debts contracted by the father; (ii) Assuming the liability, can the son be bound by any decree against the father unless he is made party to the suit? According to Hindu law, no Hindu son is liable for the debts of his father during the father's lifetime. It is argued that, where joint property has passed out of the family in payment of a father's debt, the sons cannot recover the property unless they can prove that the debts were contracted for immoral or illegal purposes. If that is correct, it is totally opposed to the texts of the Mitakshara in Section 27, Chap. I. If, under the Mitakshara, the father is subject to his sons, how can he alienate without the consent of the sons? Are we to take the case of Suraj Bansi Koer v. Sheo Pershad Singh (L.R. 6 IndAp 88; S.C., ante, p. 148) as overruling the Mitakshara? In that case it does not appear from the High Court's judgment that the debts were contracted for an immoral purpose. What the Privy Council say in that case with regard to a purchaser, not being a purchaser without notice, would be good if applied to a mortgagee; but the remarks do not apply to a purchaser. They do not say that any other property, except the father's own property, would have been liable for the debt. Sadabart Prasad Singh v. Foolbash Koer (3 B.L.R. F.B. 31) is an authority for showing that a member of an undivided Mitakshara family has no authority, without the consent of his co-sharers, to mortgage family property in order to raise money on his own account. The case of Suraj Bansi Koer v. Sheo Pershad Singh (L.R. 6 IndAp 88; S.C. ante, p. 148), instead of extending Kanto Lall's case (L.R. 1 IndAp 321; S.C. 14 B.L.R. 187), cuts it down; and it does not seem to have been the intention of the Privy Council to go beyond Kanto Lall's case (L.R. 1 IndAp 321; S.C. 14 B.L.R. 187). From the case of Girdhari Lall v. Kanto Lall (L.R. 1 IndAp 321 ; S.C. 14 B.L.R. 187), it is clear that in that case there was necessity. Moreover, the case was argued ex parte, and no suggestion was made that the father's share alone was liable. These decisions of the Privy Council were considered in the case of Bheknarain Singh v. Januk Singh (I.L.R. 2 Cal. 438). In the case of Suraj Bansi Koer (L.R. 6 IndAp 88; S.C. ante, p. 148) the father was dead, so there was no question as to the liability of the sons to pay during the father's

lifetime. *Gunga Pershad v. Sheodyal Singh* (5 C.L.R. 224) follows the case of *Bheknarain Singh* (I.L.R. 2 Cal. 438), The obligation of sons to pay their father's debts is a religious obligation to secure the father's salvation. This is laid down in Menu, Chap. III, Section 2. See, as to the payment of debts, Colebrooke's Digests, Chap. V., pp. 263, 268, and 273. A son may be compelled to pay his father's debt, but only so far as there are assets. The son is only bound to pay the share of the father in the debt, p. 286. A minor is not liable to pay them, p. 291. See also the chapter on debts in Mayne's Hindu Law, p. 249. As to debts which a son is bound to pay, see West and Buhler, Bk. II, introd., Section 64; chapter on Liabilities, p. 340; also 2 Strange's Hindu Law, p. 274. The Privy Council have not discussed or laid down any rule as to the extent of the liability of the son, What is the meaning of the word "sons" in page 101 of *Suraj Bansi Koer's* case as reported in L.R. 6 IndAp If the position therein mentioned is deduced from *Kanto Lall's* case (L.R. 1 IndAp 321: S.C. 14 B.L.R. 187), the meaning of the word is "minor sons." No opinion is given as to grown-up co-parceners. The onus is thrown on minor sons to show that the property was parted with for immoral purposes. *Deendyal's* case (L.R. 4 IndAp 247; S.C.I.L.R. 3 Cal. 198) further lays down that the sons cannot be bound unless they are made parties to the suit, and they were not so made parties in the mortgage suit; and Section 445 of CPC provides that a father of a defendant cannot be the guardian of his son. *Bissessur Lall Sahoo v. Luchmesur Singh* (L.R. 6 IndAp 233) does not conflict with *Deendyal's* case (L.R. 4 IndAp 247; S.C., ILR 3 Cal. 198). The question there was, whether the property could be attached without making a younger son a party. *Sadabart Pershad's* case (3 B.L.R. F.B. 31) lays down that, assuming sons are liable to pay a father's debts, they must be made parties to the Suit. The answers I would propose to the questions of the Full Bench, so far as they affect my case, are as follows:

4. (i) That a purchaser can only enforce his decree against the father's share. If he has attached the father's share before the father's death, he can sell it; if not, the share passes by survivorship to his sons, and he cannot therefore sell. (ii) On the authority of *Suraj Bansi Koer's* case (L.R. 6 IndAp 99; S.C., ante, p. 148), the mortgagee could enforce by suit against father and son the payment of his money by sale during the father's lifetime. (iii) Where the son is of age at the time the debt was contracted, the case would be different, because the consent of such son is a condition precedent to the contraction of the debt, and it is clear that the Privy Council in *Suraj Bansi Koer's* case (L.R. 6 IndAp 88; S.C. ante, p. 148), have expressly reserved the case of adult sons.

5. The opinion of the Full Bench was as follows:

6. Having regard to the law as laid down by the Privy Council in the cases mentioned in the reference, we think that the questions referred to us should be answered as follows:

1. The mortgage itself upon which the money was raised could not be enforced, but the debt so contracted by the father being itself an antecedent debt within the rulings of the Privy Council, and the son being a party to the suit, the mortgagee, notwithstanding the form of the proceedings, would be entitled to a decree directing the debt to be raised out of the whole ancestral estate, inclusive of the mortgaged property.
2. Assuming the minor to be the only son, the mortgagee would be entitled to a similar decree against him after the father's death.
3. We think that, under such circumstances, the mortgagee could not be considered as a bona fide purchaser for value, and would not be entitled to the property, except to the extent of the father's interest, as against the infant son.
4. Assuming the adult son to be a party to the suit, the mortgagee would be entitled to a decree similar to that mentioned in the answer to the first question, directing the debt to be raised out of the whole ancestral estate.
5. In the view which we take of the case, the whole of the money borrowed would be an antecedent debt.
6. We consider it unnecessary to answer this question.
7. The sons not being made parties to the suit, they would be entitled to recover their shares as against the purchaser. If they had been made parties, they would have had apparently a good defence to the suit upon the merits.