

(1881) 02 CAL CK 0016

Calcutta High Court

Case No: None

Upooroop Tewary and
Others

APPELLANT

Vs

Lalla Bandhjee Suhay

RESPONDENT

Date of Decision: Feb. 15, 1881

Citation: (1881) ILR (Cal) 749

Hon'ble Judges: Mitter, J; Maclean, J

Bench: Division Bench

Judgement

Mitter, J.

Various objections have been taken by the defendants against the plaintiff in this suit, and the lower Courts have overruled them all. Some of them have been also taken before us in this appeal, but it would be convenient to take up first the 8th and 9th grounds mentioned in the petition of appeal. These two grounds raise the question, which is in issue between the parties, as regards the title to the property. It is contended before us, that the decision of the lower Courts, that what was sold was only the interest of Dabee Pershad, is erroneous. The proceedings resulting in the execution-sale taken together with the bond of the year 1864, it is contended, show that what was sold was the entire family property. The District Judge decides this point as follows:—"Now the words which I have just quoted apply exactly to the present case. It appears from the bond of the 24th August 1864, that the mortgage was of Dabee Pershad's right, title, and interest without any specification of share. It appears again from the decree of the 7th June 1865 on that bond that there was no mention of any specific share, but only of the right, title, and interest. Finally, the proceeding of the 19th March 1866, confirming the sale, shows clearly that it was only Dabee Pershad's right, title, and interest that passed at the sale to the auction-purchaser." Now it appears to us that the District Judge is not right in the construction which he has put upon the bond of the 24th of August 1864. No doubt, the words used in the bond, by which the hypothecation was effected, were "my proprietary share," but the share specified therein was the share of the family as

contradistinguished from the shares of other coparceners, according to the true principle which governs the relations of members constituting a joint Hindu family under the Mitakshara law. Dabee Pershad, the father, could not predicate of his interest in the joint property as constituting his share. The plaintiff's case is, that at the time of the mortgage the family property was joint. Under these circumstances, it seems to us that the bond, rightly construed, hypothecated the whole share in the disputed mouza which was held by the joint family. In this view of the bond, it would follow that the decree and the sale also referred to the mortgaged property-namely, the share held and owned by the joint family; and if the plaintiff in this case had been a minor at the time of the mortgage, the suit against the father would, in accordance with numerous decisions, have been held as brought against him in his representative character representing the joint family. But in this case the plaintiff had attained majority before the mortgage of the 24th August 1864 was executed, and therefore, the answer to the question, whether or not the plaintiff is bound by the mortgage and the subsequent decree, would depend upon the enquiry into certain questions of fact which I shall indicate hereafter, but upon which questions of fact there has been no decision by the lower Appellate Court. The law upon this subject is contained in paras. 28 and 29, Chap. I, Section 1 of the Mitakshara. The author of the Mitakshara, treating of the power of alienation of a single member of a joint family, says in para. 28: "An exception to it follows. Even a single individual may conclude a donation, mortgage or sale of Immovable property during a season of distress for the sake of the family, and especially for pious purposes"; and in para. 29 he goes on to say: "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 by hypothecation or sale of Immovable 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." From these two paragraphs it is clear, that where the coparceners are all adults, the sale by one of them would not be valid unless made with the consent of the rest; but if some of them are minors, the members who are adults may make a valid alienation of the family property under the conditions mentioned in para. 29. It has been held by the Judicial Committee of the Privy Council, that it is a pious duty for a son under the Mitakshara law to pay such debts of his father as were not contracted for immoral purposes; and according to the Hindu Law, it is also a pious duty for a person to pay off his own debts. It has been held by their Lordships of the Judicial Committee, that from these two propositions it follows, that an alienation by a father living jointly with his sons under the Mitakshara law to pay off his antecedent debts, which debts are not proved to have been incurred for immoral purposes, is an alienation for the performance of indispensable duties within the meaning of para. 29, Chap. I, Section I of the Mitakshara. In this case, therefore, if the alienation-namely, the mortgage of the 24th August 1864-had been made for the purpose of paying off an antecedent debt,

and if the plaintiff had been then a minor, the mortgage would have been binding upon him; but it appears that the plaintiff at that time was of age, and therefore, as already pointed out, the mere circumstance of the existence of an antecedent debt would not be sufficient to bind him. But it must be proved that he was a consenting party to that transaction. His consent might have been express or implied. If he stood by, and thereby allowed the creditor with whom his father was dealing to believe that he was a consenting party, the transaction would be binding upon him. This question was raised in the following issue "whether or not the bond, the decree, and the auction-sale were executed, passed, and held with the knowledge of the plaintiff; if so, would that operate as an at(sic)oppel against the plaintiff?" If all these proceedings were held with the knowledge of the plaintiff, it seems to us that it would be a fair inference from that circumstance that the plaintiff was a consenting party to the original transaction. The circumstance that, under the purchase in the year 1866, the defendants obtained possession of the whole family property, and remained in possession of it for about twelve years, has also a material bearing upon this question. As it is a question of fact, we cannot, in this second appeal, deal with it. We must, therefore, remit the record to the lower Court in order that it may, with reference to the observations made above and the evidence upon the record, come to a finding upon it.

2. We reserve at present our opinion upon the other questions raised in this appeal, and the appeal will be finally disposed of as soon as the record and the finding of the lower Court come up.

3. We reserve the question of the costs of this hearing.