

(1880) 07 CAL CK 0013

Calcutta High Court

Case No: None

Laljee Sahoy

APPELLANT

Vs

Fakeer Chand and
Others

RESPONDENT

Date of Decision: July 21, 1880

Citation: (1881) ILR (Cal) 135

Hon'ble Judges: Pontifex, J; McDonell, J

Bench: Division Bench

Judgement

Pontifex, J.

This appears to us to be one of those fraudulent cases on the part of a Mitakshara father and son, which have led to the late fluctuating developments of Mitakshara law. The case stood over in consequence of a similar point, at the time it came on, being before a Pull Bench, -Luchmun Dass v. Giridhur Ghowdhry (I. L. R. 5 Cal. 855), and the argument was delayed till the decision of the Full Bench had been given. Now, I was a member of the Pull Bench on that occasion, and as I understand it, the decision given by the Full Bench in that case does not interfere with the opinions expressed in the judgment of myself and Mr. Justice McDonell in the case of Pursid Narain Singh v. Honooman Sahay (I. L. R. 5 Cal. 845) (which was one of the cases mentioned in the Reference to the Pull Bench), except that would seem, in consequence of the rulings of the Privy Council, we are bound to hold that the payment, even in the father's lifetime, of an antecedent debt due by him is a pious duty on the part of the son; and its discharge is, therefore, such a necessary purpose as to give validity to a sale or mortgage by the father as against his minor sons (but not against his adult sons), whether such antecedent debt does or does not come within the words-"If a calamity affecting the whole family requires it, or the support of the family renders it necessary, or indispensable duties, such as the obsequies of a father or the like make it unavoidable;" always provided that the antecedent debt is not incurred for immoral purposes. It was however, the opinion of the Full Bench, that the antecedent debt spoken of by the Privy Council means a

debt antecedent to the transaction, viz., the sale or mortgage purporting to deal with the property.

2. But if the property is dealt with by a decree in a suit upon a mortgage by the father alone, to which suit the father and sons are parties, it follows, from the Privy Council decisions, that, as against the sons, even though they may have been adult when the debt (assuming it was not for immoral purposes) was incurred, and notwithstanding verse 29, Chap. I, Section i, and verse 10, Chap. I, Section vi, of the Mitakshara, the property would be bound; not indeed by virtue of the mortgage, but by virtue of the father's debt antecedent to the suit being enforceable against the joint ancestral estate, and therefore against the mortgaged property as put of it. Strictly speaking, perhaps the suit should be in the form of a suit upon the mortgage as against the father, and upon the debt as an antecedent debt as against the interests of the sons in the joint ancestral estate. But this would be merely matter of form; and the neglect to frame the suit accurately would, probably, not prevent the Court making a decree which would give the sons an opportunity of redemption. The result in fact seems to be, that qua ancestral property, the son is as equally liable for the father's debts, if not incurred for-immoral purposes, as for his own debts. But if the interests of an adult son were affected by a decree against the father alone, which, in our opinion, is not the law, the unreasonable consequence might be, that the son's interest would be more liable for the payment of the father's debt than for the debt, and perhaps the prior debts, of the son, for no creditors of the son could touch his interest without suing him.

3. No doubt, previously to the Privy Council judgment, it was considered that the pious duty of paying the father's debts did not arise until after his decease. This resulted from what appears to have been considered by the Privy Council a too literal interpretation of the texts which applied to the subject, and which, for convenience" sake, may be referred to as to a great extent collected in Chap. V, Section iv, of the Mayukha. But by the decisions of the Privy Council it has now been established, that it is a pious duty of the son to pay his father's debts out of the ancestral estate even in the father's lifetime.

4. Now, in the present case, a Mitakshara father mortgaged certain ancestral mehals for the purpose of securing the sum of Rs. 9,000. That sum of Rs. 9,000 was made up of three sums due to the mortgagee on antecedent decrees,-viz., a sum of Rs. 2,598-3-8, due on a decree of 19th December 1864; a sum of Rs. 822-6-6, due on another decree of the same date; and the sum of Es.5,183-9-4, due on a decree of 29th November 1864. These three decrees made up the sum of Rs. 8,604-3-6. The mortgagee agreed to give up Rs. 204-3-6, but at the same time advanced an additional sum of Rs. 600, thereby making up the whole sum of Rs. 9,000. Now, the first two antecedent decrees which I have mentioned were against the father alone; but they were decrees which have not been impeached, and which show that there were antecedent debts due from the father at the time of the execution of the

mortgage bond. The 3rd decree, of the 29th November 1864, was a decree on a bond given by the father and his son, the present plaintiff, which decree had been obtained against the father and the present plaintiff. It is not attempted in this case to show that that decree was a fraudulent or improper decree; no steps were even taken to set it aside; and we must assume, therefore, that the debt was a valid debt against the father and the son; and that being the case, the whole sum of Rs. 9,000, alleged to be secured to the defendant by the father's bond, was at the date of such bond, an antecedent debt due by the father, with the exception of Rs. 600 advanced at the time. Now, that is so insignificant a proportion to the whole sum that, probably, it might be left out of account altogether. But as a matter of fact there is a recital in the bond that it was taken for the karuj ceremony of the grandfather of the present plaintiff; and we find by a statement in the plaint that the grandfather died just one month before the execution of the bond in, question. We think, therefore, that we may safely assume that the Rs. 600 was advanced to the father for a purpose which would be binding on the ancestral estate. Now, upon this mortgage bond the defendant, mortgagee, sued the father alone. He obtained a decree, the property was put up for sale, and the mortgagee purchased it. It is true that the decree was in the form in which decrees were then drawn, declaring that the right, title, and interest of the defendant should be sold. But there can be no doubt whatever upon the evidence in this case, that it was the belief of the mortgagee, at the time when he executed the decree, that he was selling and purchasing the whole 16 annas of the property hypothecated. Still, if there were no other circumstances in the case, we should have been bound, on the principles to which I have referred at the commencement of this judgment to hold, that the son's interest would not be affected by that decree, he not having been a party to the suit. But in reality we find that in this case there are very special circumstances. Not only was the bond given, as to the larger proportion of the amount secured, for a debt actually due by the son, but we find, upon the evidence, that the son was present at the time of the execution of the bond; and that he was a consenting party to his father mortgaging this mehal. We also find, upon the evidence, that after the suit had been commenced by the mortgagee, and a decree obtained, the son went to the mortgagee and asked him to postpone the execution of the decree. Moreover we find, that the son allowed the mortgagee to purchase, and to enter into possession, and to hold possession of the 16 annas for nearly twelve years, because the purchase was made in December 1866, and this suit was not commenced until November 1878; and it is a noticeable circumstance that the plaintiff has carefully abstained from presenting himself as a witness.

5. But the case does not rest there alone, for there is evidence to show, and we have been assured, that, after his purchase, the mortgagee paid off money-4 incumbrances upon this estate. In consequence of the son standing by and allowing the mortgage to be made, allowing the mortgagee to believe that the mortgage would affect that whole 16 annas of the property, and afterwards allowing him to

take possession under his purchase, to continue such possession for a period of eleven years and upwards, and to discharge incumbrances on the estate, we think it would be manifestly unfair and improper, under the circumstances, to allow the son in this suit to treat the purchase by the mortgagee under his decree as if it did not affect the son's interest at all. If these circumstances did not exist, we should have said, as we have stated before, that the son being adult, and being no party to the mortgage or to the suit upon it, would not be bound by the decree; and even under existing circumstances, we think that, properly, he ought to have been made a party to the suit. But the question now is, ought he to succeed in this suit? He has allowed nearly twelve years to expire before bringing the present suit; and when he brings the suit, he makes no offer whatever to pay off the sum that was secured by the mortgage-bond, or the sums paid by the defendant in discharge of incumbrances on the estate. Now, we have shown that the son is liable, at all events, so far as ancestral estate goes, which would include this mortgaged property, to pay the antecedent debt of the father; and the mortgagee would be entitled to enforce, in execution against this property, any decree he might get against the son for that antecedent debt. We think it would be wholly unfair in this suit to give the plaintiff a decree when he has not offered in any way to pay off that debt; and inasmuch as he stood by when the mortgage, purporting to affect the whole 16 annas, was made, and allowed the defendant to take and hold unquestioned possession of the estate for more than eleven years, to deal as owner with the other incumbrances on this property by paying them off, and to be put to a very considerable expense in that way, we think that he ought not now to have even an opportunity of redeeming the property. What we shall do, therefore, will be to affirm the decree of the Court below and dismiss the plaintiff's suit. The appeal must, therefore, be dismissed with costs.