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APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

JUMOONA PERSAD SINGH AND OTHERS (DEFENDANTS) *v.* DIG NARAIN SINGH AND ANOTHER (PLAINTIFFS).* 18 *Apr*

Hindu law—Joint family—Execution of Decree—Liability of Family for debts contracted by co-sharer—Debts binding on joint family.

When one member of a Mitakshara family contracts a debt which is binding not only on the persons executing the contract, but on the other members of the joint family to which he belongs, the creditor has two courses open to him: (*a*), he may elect to treat the debt as a personal debt, and confine his suit to the person who actually contracted it. In such a suit he obtains a mere personal decree not binding on the family, and in execution thereof he merely sells the right, title and interest of the person who actually contracted the debt; that was the case of *Deendyal Lal* v. *Jugdeep Narain Singh* (1); or (*b*), he may treat the borrower as acting for the family, sue him as representing the joint family, and when he has obtained a decree against the borrower in that capacity, proceed to sell the right, title and interest of his judgment-debtors (*i.e.*, all the members of the joint family) or any of them. That was the case of *Bissessur Lal Sahoo* v. *Maharajah Luchmessur Singh* (2).

THIS was an appeal from a decree passed by the Subordinate Judge of Bhagulpore in a suit instituted by the plaintiffs on the

* Appeal from Original Decree No. 276 of 1881, against the decree of Moulvi Hafiz Abdul Karim, Subordinate Judge of Bhaugulpore, dated the 18th July 1881.

(1) I. L. R., 3 Calc., 198: L. R. 4 I. A. 247. (2) L. R., 6 I. A., 233.

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3rd of December 1880. The judgment of the Subordinate Judge, so far as material, is as follows:

"These are two cases which are so far analogous that the pleaders on both sides have agreed that they may be tried together, and for this reason the parties have examined their witnesses in case No. 250. The facts of these two cases are as follows: The plaintiff No. 1 is the son, and the plaintiff No. 2 is the wife of Gobind Dyal Singh, who is the defendant third party in case No. 250, and defendant second party in case No. 251. It is an admitted fact that the plaintiff and Gobind Dyal Singh were members of a joint family. The plaintiffs state that Sheo Pershad, father of the defendants Nos. 1 to 5, amongst the defendants, first party in case No. 250, had a money decree dated the 30th October 1865, and one Luchmandas Marwari had a mortgage decree of the said date against Baboo Gobind Dyal Singh, and the plaintiffs were not parties in these suits; that in satisfaction of the said money decree, the right and interest of Baboo Gobind Dyal Singh in the property Nos. 1 to 5 were sold by auction in the Court on the 7th of March 1866, and in property No. 6 on the 14th of August 1867, and were purchased by the said Sheo Pershad, and in satisfaction of the said mortgage decree the right and interest of Baboo Gobind Dyal Singh aforesaid in the property No. 7, which was secured under the said decree, were sold by auction in the Court on the 6th of March 1866, and purchased by Janki Pershad, full brother of Sheo Pershad aforesaid. This Janki Pershad is the defendant No. 6, one of the defendants first party in case No. 250. One Jugmohun Pershad also is made one of the defendant first party, No. 7, in that case, and it is alleged that all the defendants first party are members of a joint family, and they all have a right in the purchase of those shares.

"The properties Nos. 1 to 7 mentioned above are mentioned in the schedule of the plaint of the case No. 250, and those properties are the subject-matter of that suit. In case No. 251 only one property, that is 1 anna 5 gundah, together with half of the julkur out of 16 annas of Mouzah Mansoreporé is in dispute. The plaintiffs allege that this property was not secured under the abovementioned mortgage decree; but in that decree the right and interest of Baboo Gobind Dyal in the said property were sold by auction on the 6th of March 1866, and were purchased by one Bhikari Roy, who has sold the same to the defendants first party in case No. 251. In case No. 250, the defendants second party are made defendants for this reason, that of the said defendants the defendant No. 8 is ticcadar and possessor of the properties Nos. 1, 2, 3, 4 and 6, and the defendant No. 9 is the ticcadar and possessor of the property No. 5, on behalf of the defendants first party in the said case.

"The plaintiffs allege that the plaintiff No. 1 was born on the 30th Magh 1265 Fusli; that during his minority the plaintiff No. 2, having obtained a certificate under Act XL of 1858, was his guardian, and as the 30th Magh 1265 Fusli corresponds with the 29th of January 1858, the plaintiff No. 1

completed his twenty-first year on the 28th of January 1879, and consequently under Act IX of 1875 the plaintiff No. 1 attained his majority on the 28th of January 1879. The plaintiffs state that the Mitakshara law governs the family of the plaintiffs; that out of the property in dispute in case No. 250 some are ancestral and some have been purchased during the joint tenancy out of the joint fund, that is, out of the collection money of the ancestral property. The ancestral property and the purchased property are specified below the plaint in the said case.

"With reference to the disputed property in case No. 251 it is alleged to be ancestral, and it is stated that, according to the Mitakshara law, the plaintiff No. 1 had an equal right with his father Baboo Gobind Dyal Singh in those properties from the date of his birth, and according to the said law, the plaintiff No. 2 also is entitled to an equal share at the time of partition. It is alleged that in the abovementioned auction sales, with the exception of the partition right of Baboo Gobind Dyal Singh aforesaid, nothing else is sold, and the purchasers ought to have, by making partition, held possession of only the share of Baboo Gobind Dyal Singh; but they have taken possession of the entire share. Consequently, in both the cases, the plaintiffs pray that, with the exception of the share which will be found according to partition to be the share of Baboo Gobind Dyal Singh in respect of the disputed properties in both the cases, the plaintiffs may be put in possession of the remaining share of the joint family, and if the order cannot be passed in that way, then the entire share may be decreed, and that mesne profits from the date of the suit up to date of possession may be awarded.

"In both the cases, the defendants first party aver in answer that the plaintiff No. 1 was born in Kartick 1263, and consequently he is barred by limitation; that limitation applies to the right of the plaintiff No. 2 also, because the disputed property was sold by auction, and possessed by the purchasers more than twelve years ago; that the family of the plaintiffs is governed by the law of the Mithila school, and their house is also in the Mithila country; that the plaintiff No. 2 has secured so much *stridhan* that she is not entitled to get a share.

"The defendants first party in case No. 250 make this particular statement, that out of the disputed property, the properties Nos. 3, 4, 5, 6, are the self-acquired property of Baboo Gobind Dyal Singh, and the defendants first party, in case No. 251, make this particular statement, that according to the value of the disputed property in the said case, the said case is cognizable by the Court of the Munsiff, and that it cannot be instituted in this Court; and that the disputed property in the said case is the self-acquired property of Baboo Gobind Dyal Singh. Amongst the defendants second party in case No. 250, the defendant No. 9, admitting his ticca tenure and possession, states that he is made defendant without any ground.

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"The plaintiffs and the defendants first party have in their plaint and written statement made some observations with reference to the nature of the debt of those decrees on account of which the auction sales were held; but I have omitted those statements, for this reason that, according to the ruling of the Privy Council in the case of *Deendyal Lal* v. *Jugdeep Narain Singh* (1), there is no need in a case like this to determine the nature of the debt.

"The following are the issues which are common to both the cases: (1), whether the claim of the plaintiffs is barred by limitation or not; (2), whether the plaintiff No. 1 was born on the 30th of Magh 1265 or in 1263 Fusli Kartie; (3), whether the family of the plaintiffs is governed by the Mitakshara law or by the law of the Mithila school, and what is the share of the father according to the law of the Mithila school; (4), how much stridhan has the plaintiff No. 2 received, and owing to her having received that stridhan, is the said plaintiff, who is entitled to one share at the time of partition, deprived of that share or not?

"Issues which belong to case No. 250 alone: (1), whether the properties Nos. 3, 4, 5, and 6 have been purchased by Baboo Gobind Dyal Singh from his own fund, or have they been purchased out of the joint money; (2), whether the defendants second party are made defendants on sufficient grounds, or without any ground?

"Issues which belong to case No. 251 alone: (1), what is the value of the disputed share; (2), whether the disputed property is the self-acquired property of Baboo Gobind Dyal Singh, or is it ancestral property?

"In both the cases one issue is framed with reference to the right of mesne profits also."

The Subordinate Judge found that plaintiff No. 2 was entitled to a share on partition—Shama Churn Sircar's *Vyvastha Chandrika*, vol. II, p. 211; *Sheodyal Tewaree* v. *Judonath Tewaree* (2); West and Bühler, 2nd edition, pp. 294—306, and was therefore entitled to sue jointly with plaintiff No. 2; that plaintiff No. 2 was born at the end of Magh 1265 Fusli; that the plaintiff's family were governed by the Mitakshara law; and that the *stridhan* received by the plaintiff No. 2 was not sufficient to deprive her of the right to share on partition. The Judge also found that the property in dispute was joint family property, and that the ticcadars were properly made defendants. He also found in plaintiffs' favour on the question of jurisdiction, and that the property in dispute in case No 251 was also ancestral property. He thereupon decreed the plaintiff's claim for partition and possession with costs, and mesne profits from the date of suit.

(1) I. L. R., 3 Calc., 198; L. R. 4 I. A., 247. (2) 9 W. R. 261.

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The defendant appealed to the High Court.

Mr. *Gasper* (Mr. *Twidale* with him) for the appellant.—The suit is barred by limitation—*Nobin Chunder Chuckerbutty* v. *Guru Persad Doss* (1); *Brinda Dabee Chowdhrain* v. *Pearee Lall Chawdhry* (2); see Limitation Act, 1877, sch. II, cls. 126, 127, 144; *Mahomed Arsad Chowdhry* v. *Yakoob Ally* (3). Partition of the whole estate must be asked for—*Parbati Churn Deb* v. *Ain-ud-deen* (4). Under Mitakshara law the wife gets a share on partition in lieu of maintenance. But here the wife is being maintained. There is no allegation that she is not being maintained, and there is no partition of the joint estate. Nor does she ask that she be put in separate possession of her share. As to the right of the purchasers, see *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (5); *Doollee Chand* v. *Wooma Sunker Proshad* (6); *Lalji Sahoy* v. *Fakir Chand* (7); *Bhagwat Dassee* v. *Gouri Kunwar* (8); *Ambica Pershad Tewaree* v. *Ram Sahai Lal* (9); *Doorga Persad* v. *Kesho Persad Singh* (10); *Muttayan Chetliar* v. *Sangili Vira Pandia Chinnatambiar* (11).

Mr. *Evans* (Baboo *Mohesh Chunder Chowdhry* and Baboo *Taruck Nath Sen* with him) for the respondent cited *Girdharee Lall* v. *Kantoo Lall* (12); *Munnoo Lall* v. *Lalla Choonee Lall* (13); *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (5).

Mr. *Gasper* in reply.

The following judgments were delivered by the Court (PRINSEP and O'KINEALY, JJ.):—

O'KINEALY, J.—In this case plaintiff sues for possession of his share in certain properties sold in execution of a decree against his father and purchased by the defendant, or, if that cannot be done, he wishes that possession of the entire property may be

(1) B. L. R. Sup. Vol., 1008; 9 W. R., 505.
(2) 9 W. R., 460.
(3) 15 B. L. R., 357.
(4) I. L. R., 7 Calc., 577.
(5) L. R. 6 I. A., 88; I. L. R. 6 Calc., 148.
(6) I. L. R., 6 Calc., 135.
(7) 7 C. L. R., 97.
(8) 7 C. L. R., 218.
(9) 10 C. L. R., 505.
(10) L. R., 9 I. A., 27.
(11) L. R., 9 I. A., 128, 144; I. L. R., 6 Mad., 1.
(12) L. R., 1 I. A., 321; 12 B. L. R., 187.
(13) L. R., 1 I. A., 144.

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given up to him, and that a decree, somewhat in the form of the decree given in the case of *Deendyal Lal* v. *Jugdeep Narain Singh* (1), should be passed in his favor. His mother is also a party to the suit on the ground that, according to Hindu law, when a partition of joint property is made, she is entitled to a share of the property in lieu of maintenance. The lands in dispute may be divided into two classes. In the first class fall parcels 1 to 6, which were purchased by the defendant in execution of his own decree; in the second class parcel No. 7, which the defendant purchased in execution of the decree of a third party. For the defence it was contended that the debts were debts due by the family; that their entire interest in the property was sold; and that the plaintiffs could not succeed.

In regard to the lady it was also contended that, having been out of possession for more than twelve years, she could have no right to any share even if the partition were allowed.

The Subordinate Judge, relying on the case of *Deendyal Lal* v. *Jugdeep Narain Singh* (1) declined to allow the defendant to go into the question of necessity, and gave the plaintiffs a decree for possession of their shares in all the plots 1 to 7. He made no distinction whatever between plots 1 to 6 on the one hand and plot 7 on the other, but treated them alike. He seems not to have taken into consideration that in the one case the decree-holder purchased, and in the other case he did not. The defendant first party, purchaser of those properties, appealed against that decision, and he has urged before us the same argument that he raised in the lower Court; and *first*, he contends that the suit is not governed by *Deendyal's case* at all, and that the son of the person against whom the decree was executed has no right to obtain any part of the property.

Before the decision of *Deendyal's case* it had been decided in this Court that, where a father mortgaged property and the mortgage was not binding upon his son, yet, although the son could recover the property, still the purchaser at a sale under a mortgage decree, in such a case was entitled in equity to a lien on the share of the father for the amount of his debt. The leading case on this point is that of *Mohabeer Pershad* v. *Ramyad Singh* (2).

(1) I. L. R., 3 Calc., 198; L. R. 2 I. A., 247. (2) 12 B L. R., 90.

Now in *Deendyal's case* the purchase was not a purchase of the mortgaged property, and when the case came to be argued before the Honorable Judges of this Court, they declined to extend the equitable relief which had been allowed to purchasers at sales in execution of mortgaged property to the case of purchasers under an ordinary money decree, and indeed that had never been done.

The case went to the Privy Council, and their Lordships said: "It is difficult to see upon what principle the hypothecation of property in question can be taken to improve the position of the creditor." Then, acting on that principle, namely, that a hypothecation could have no important bearing on the decision of the case, they did more than extend the equitable relief, that had been given in the *case of Mahabeer Pershad*, to a purchaser under an ordinary personal money decree, for they declared, as had previously been the law in Madras, that the purchaser had a legal right to the share of his vendor. This is the construction that their Lordships themselves have put upon their decision.

In the case of *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (1), their Lordships, referring to the *case of Deendyal*, said: "That question must now be taken to have been set at rest by the recent decision of this tribunal in *Deendyal Lal* v. *Judgeep Narain Singh* (2) by which the law has so far been assimilated to that prevailing in Madras and Bombay, that it has been ruled that the purchaser of undivided property at an execution sale *during the life of the debtor, for his separate debt*, does acquire his share in such property with the power of ascertaining and realizing it by a partition."

In a subsequent appeal from the decision of the High Court at Madras, *Muttayan Chettiar* v. *Sangili Vira Pandia Chinnatambiar* (3), the members of the Judicial Committee referred to what they had stated in *Suraj Bunsi's case* and adhered to it.

When one member of a Mitakshara family contracts a debt which is binding not only on the person executing the contract, but on the other members of the joint family to which he belongs, the creditor may deal with them in either of two

(1) L. R. 6 I. A., 88 at p. 102.
(2) I. L. R. 3 Calc., 198; L. R. 4 I. A., 247.
(3) L. R. 9 I. A., 144; I. L. R. 6 Mad., 1.

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ways. He may elect to treat the debt as a personal debt, and confine his suit to the person who actually contracted it. In such a suit he obtains, and only obtains, a mere personal decree not binding on the family, and in execution of the decree he merely sells the right, title and interest of the debtor, which in this case is the person who actually borrowed the money. Or he may treat the borrower as acting for the family, sue him as representing the joint family, and when he has obtained a decree against the borrower in that capacity, proceed to sell the right, title and interest of his judgment-debtors, *i.e.*, all the members of the joint family or of any of them. *Deendyal's case* is an example of the one kind of case, and *Bissessur Lall Sahoo* v. *Maharaja Luchmessur Singh* (1), is an example of the other. In this last case, as in the case of *Deva Singh* v. *Ram Manohar* (2), one member of the family was treated as representing the whole family. The decree was not against the man personally. The family property was joint, and it was held that the sale in execution of the decree carried with it the whole property. But in the *case of Deendyal*, as was pointed out, during the argument, by Sir Barnes Peacock, the suit and decree were against the man himself. There was nothing to show that he was sued in his representative capacity; the decree was a personal decree, and the sale proceeding did not carry the matter any further.

Looking at the case from this point of view, it it not difficult to understand why their Lordships treated the question of necessity as immaterial. Being of opinion that the plaintiff in the orginal proceedings had elected to treat the defendant as the sole and only debtor, and had purchased his right, title and interest under the personal decree, they declined to allow him to turn round and obtain the benefit of a suit which he had never instituted (and could not institute after the first decree), and enlarge his decree at the expense of persons who were not on the record either in name or by representation. In such a case evidence of necessity would be irrelevant, for the purchaser had, by the form of his first action, deprived himself of all power to sue new parties who may be called by analogy the principals in the transaction.

(1) L. R., 6 I. A. 233. (2) I. L. R. 2 All. 746.

I asked Mr. Gasper more than once what was the distinction between this case and the *case of Deendyal.* So far as I can see the facts of the two cases are exactly similar. Mr. Gasper has not attempted to draw any distinction. He has confined himself to shewing that different views of *Deendyal's case* have been taken by different Divisional Benches of this Court. I certainly know of no case in this Court in which it has been stated that, if the facts are the same as those in the *case of Deendyal,* that decision should not be followed.

In this case the facts, so far as plots 1 to 6 are concerned, are the same, and I think we are bound by that decision in regard to them.

But in regard to plot 7 the case is different. There the person who purchased the property was not the decree-holder. He had not the carriage of the suit. The form in which it was instituted could not have been determined by him. Neither had he carriage of the execution proceedings. All that he is required to do is to point to the decree and say, "this decree shows that the property in dispute was liable to be sold for the debt of the father. I have bought on the faith of that decree, and I am entitled to hold the property." This, I understand, is the decision in *Kantoo Lall's case;* therefore in regard to plot No. 7 I think the appeal should be dismissed.

Sudaburt's case (1) is to the effect that one member of the joint family could not sue for a share, but to get back the whole property. This was thought to be a great hardship in *Mahabeer Pershad's case,* and the Judges, on the ground of equitable relief, decided that the share of the purchaser should be subject to the mortgage lien. In *Deendyal's case* the decree was not that the joint family should hold the property subject to a lien; but that the members should obtain possession of the property subject to a declaration that the purchaser was entitled to his vendors' share. This declaration runs as follows: "Their Lordships think that the decree should be varied by adding a declaration that the appellant, as purchaser at the execution sale, has acquired the share and interest of Toofan Singh in that property, and is entitled to take such proceedings as he shall

(1) 3 B. L. R., F. B., 31.

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be advised to have that share and interest ascertained by partition." Similarly, in the present case, all I understand the purchaser of these plots 1 to 6 is entitled to is, the share of the father. Until partition, and until the widow's share is taken into account, no member of the family can predicate his share of the family property. I, therefore, think the plaintiff is entitled to the whole property, except the share of the husband of the lady (the father of the minor), and that the defendant purchaser is only entitled to the excepted share, which must be determined on taking the share of the lady into consideration.

PRINSEP, J.—I am of the same opinion. I concur in the distinction drawn by my learned colleague between the cases which follow the rule laid down in *Deendyal's case*, and in the other cases in which the question arose, whether the father was not proceeded against in a representative capacity, that is to say, that he acted on behalf of himself and all the members of the family, and was so treated in proceedings taken against him to enforce the particular debt.

The case of *Deendyal* seems to be, as has already been pointed out, one in which the creditor elected to proceed against the father alone, and to sell what would properly be regarded as his sole share in the ancestral family property. The present case is on all fours with the facts in *Deendyal's case*, and therefore, in my opinion, we are bound to act in accordance with the rule therein laid down.

There is, however, a distinction between the properties 1 to 6 and property No. 7. In the former the decree-holder was himself the purchaser; in the latter, that is to say in property No. 7, a third party was the purchaser. As regards this latter property, under the authority of the judgment of the Privy Council in the case of *Girdharee Lall* v. *Kantoo Lall* (1) the purchaser would be entitled to retain the entire property sold. As regards the other properties the rule laid down in *Deendyal's case* must be followed, that is to say, that the plaintiffs must receive possession of the entire property subject to the right which the defendants first party can enforce to obtain partition of the particular share of the judgment-debtor, Gobind Dyal Singh.

(1) 14 B. L. R., 187.; L. R. 1 I. A., 321.

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That share would be one-third under the Mitakshara law, which has been rightly found by the lower Court to apply to the present case.

As the rights of the parties are ascertained in this case, it is unnecessary to require the defendants first party to bring another suit for partition, and accordingly the decree will be drawn up thus: that the plaintiffs do recover two-thirds of the properties Nos. 1 to 6, their claim as regards property No. 7 being dismissed.

Mesne profits will be given on the same principle.

Costs will be given in proportion to the amounts decreed, and dismissed both in this and the lower Court.

Decree modified.

Before Mr. Justice Mitter and Mr. Justice Tottenham.

BIJADHUR BHUGUT (PLAINTIFF) *v.* MONOHUR BHUGUT (DEFENDANT).*

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June 1.

Appeal—Application to file award—Order rejecting Appeal, Matters to be decided upon—Application to file an award—Court-fee on such application.

No appeal lies from an order upon an application to file an award under s. 525 of the Civil Procedure Code. Upon an application to file an award under s. 525 of the Civil Procedure Code, the Court to which the application is made has no jurisdiction to enquire whether the defendant has agreed to the terms of the instrument referring the matter to arbitration, or whether the terms were obtained by fraud. When such objections are made, it is the duty of the Court to reject the application under s. 525, and refer the parties to a regular suit.

The proper Court-fee upon an application to file an award under s. 525 is the Court-fee prescribed for applications, and not the Court-fee upon a plaint.

IN this case the plaintiff sought to enforce the filing of an award, said to have been made by an arbitrator appointed by himself and the defendant, as well as for possession of the properties included in the award. The defendant denied that he had entered into any agreement to refer the matters to which the

* Appeal from Original Decree No. 6 of 1882, against the decree of Baboo Kali Prosunno Mookerjee, Sub-Judge of Sarun, dated the 1st November 1881.