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BASANT RAM v. KOLAHAL.

We set aside the decrees of both the lower Courts, and remand the case under s. 351 of Act VIII of 1859, for trial of the suit on its merits against the two defendants, Kolahal Ram and Gobind Ram, for the whole amount claimed under the hundi. The costs of this appeal to abide the result.

Decree reversed and case remanded

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May 9,

APPELLATE CIVIL.

Before Mr. Justice Spankie and Mr. Justice Oldfield.

SITAL AND ANOTHER (DEFENDANTS) *v.* MADHO (PLAINTIFF).*

Acts done not void—Exclusive gift—Father's powers—Hindu law—Mitakshara—Implied prohibition—Self-acquired immoveable property—Son's rights—Smriti Chandrika—Spiritual responsibility.

A Hindu son, subject to the Mitakshara law of inheritance, sued to obtain a declaratory decree for a moiety of a house which the father had conveyed by deed of gift to plaintiff's brother, being the self-acquired immoveable property of his father, on the ground that under the Hindu law, a father is not permitted to make a gift of immoveable property to one son, to the injury of the other.—*Held*, (reviewing all the authorities and precedents on the subject,) that although prohibition of such a gift, on moral or spiritual grounds, may be implied by the texts of Hindu law, yet, where it is not declared that there is absolutely no power to do such acts, those acts, if done, are not necessarily void, and that, therefore, an exclusive gift to one son by the father, of self-acquired immoveable property, is not illegal.

Pandit *Ajudhia Nath* and Babu *Barodha Prasad* for appellants.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Munshi *Hanuman Prasad* for respondent.

THE facts of the case out of which the present appeal arose, and was decreed by the High Court, will be found fully set forth in the Court's judgment which was delivered by:—

SPANKIE, J:—The plaintiff, and defendant Sadho, in this suit, are the sons of one Sital, also a defendant.

The property in dispute is a dwelling-house, purchased by Sital in 1861, and transferred by gift on the 13th September 1875, by him to Sadho.

* Special Appeal, No. 308 of 1877, from a decree of H. Lushington, Esq., Judge of Allahabad, dated the 10th December, 1876, affirming a decree of Babu Mritonjoy Mukerji, Munsif of Allahabad, dated the 4th July, 1876.

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The plaintiff sues to avoid the deed of gift in favor of Sadho, and claims a declaratory decree for a moiety of the house, on the ground that his father was not permitted by the Hindu law, to make a gift of immoveable property to one son, to the injury of the other.

The defendant Sadho contends that the plaint discloses no ground of action, and that the property in suit having been acquired by Sital, he was at liberty to dispose of it as he pleased.

The Munsif held that, if the Hindu law did not allow the gift, the plaintiff had good cause of action. On the point of law it was not necessary to express an opinion, as the High Court determined it, laying down that the exclusive gift of self-acquired property to one son, when there were other sons, is illegal, Mahasukh v. Budri (1).

In appeal the Judge affirmed the decree, holding himself bound by the precedent cited by the Munsif (1), and believing that it represented the commonly received doctrine in these provinces, though the Calcutta Court had taken a diametrically opposite view of the law (2).

The defendant in special appeal urges, as in the first Court, that the property having been self-acquired by Sital, he was quite competent to make a gift of it in favor of one son, to the exclusion of the other.

The case cited as having been determined by this Court, refers to no authority expressly. The learned Judges observe that, the texts of the law support the doctrine that a man's immoveable property, although self-acquired, is not within his power of disposal so absolutely, by gift in his lifetime, as to enable him to give it all to one son, or grandson, in exclusion of the rest. The Court also remarked that they had not to deal with the case of an unequal division of immoveable property, for the gift was an exclusive gift; as the learned Judges do not cite their authorities, we do not consider ourselves bound by the decision.

(1) H. C. R., N.-W. P., 1869, 57.
(2) 10, W. R., 247. Bawa Misr. v. Raja Bishen Prokash Singh.

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The learned pleader for the appellant, Pandit Ajudhia Nath, referred to various authorities and precedents of this, and the presidency Court. Some of the cases cited (1), are not absolutely conclusive on the point before us. The judgment of the judicial committee of the Privy Council in Rungama, appellant, *v.* Atchama, respondent (2), determined a question relative to a second adoption of a son, the first adopted son being still alive. It appears, however, to recognise the competency of a father to dispose of property that was not ancestral, by an act "*inter vivos*" without the consent of all his sons, and so far the principle would extend to the case before us, the other case cited Nana Narain Rao, appellant, *v.* Huree Punth Bhao, Sree Newas Rao, and Balwant Rao, respondents (3) does not touch the matter now in dispute. It establishes a will which disposed of the testator's self-acquired property, unequally amongst his sons, but it does not go beyond this. The case decided by the Agra Sudder Dewany Adawlat in 1861, is of no authority (4). It refers to no texts, and does not enter into the point, or any argument.

The precedent of the Calcutta Court, "Muddun Gopal Thakur and others" (5), refers to a case in which the plaintiff's grandfather originally acquired the lands in dispute. He had several wives and several sons. By a deed of gift he gave the property in dispute to the plaintiff's father, and provided for all his sons by other deeds of gift. The plaintiff's father made a deed of sale of the property in favor of the defendant. It was held that, according to the Mitakshara, a father is not incompetent to sell immoveable property acquired by himself; also that landed property acquired by a grandfather, and distributed by him amongst his sons, does not by such gift, become the self-acquired property of the sons, so as to enable them to dispose of it by gift, or sale, without the consent, and to the prejudice of the grandsons. In this decision the texts and authorities are directly referred to, and the question is exhaustively treated. The other case cited from the Weekly Reporter,

(1) Mitakshara, Chap. I., p. 27, sec. 1. Chap. I., secs. 5, 10, 11. Moore's Indian Appeals, Vol. IV., p. 103. Vol. IX., p. 96. 6, W. R., p. 71. 10, W. R., p. 287. Agra S. D.A., 1861, 223

H. C., N.-W. P., R.A., No. 150 of 1874, dated 11th May, 1875.

(2) 4, Moo. I. A., p. 1.

(3) 9, Moo. I. A., 96.

(4) S. D. A., Agra, 1861, 223.

(5) 6, W. R., 71.

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ter, (1) "Bawa Misr," follows this judgment:—The question, however, was, whether the father could, by will, make an unequal distribution of his self-acquired estate amongst his heirs. But the principle of the Court's ruling would apply to the suit before us, and both the decisions put the same interpretation on the texts in the Mitakshara, that we are disposed to do. Para. 27, chapter 1, s. 1, declares that it is a settled point, that property in the paternal or ancestral estate is by birth. The father is declared to be subject to the control of his sons in regard to the immoveable estate, whether acquired by himself, or inherited from his father or other predecessor, since it is ordained that though immoveables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons, they who are born, and they who are yet unbegotten, and they who are still in the womb require the means of support, and no gift or sale should therefore be made. The respondent's pleader relies on this passage, as being an absolute declaration, that any such gifts, or sale, of self-acquired property is illegal. But the words do not go quite so far as this. Such a sale or gift *should* not be made, without convening all the sons. It would be wrong, and contrary perhaps, to the spirit of the Hindu law, to make such a sale, or gift, that might prejudice the rights of the sons, or tend to limit their means of support, but there is no declaration that the transaction would be absolutely void. The father, it is true, is to be subject to the control of his sons in regard to the immoveable estate, whether acquired by himself, or inherited from his father, or other predecessor. But even this control appears to be limited. In s. 5 of the Mitakshara, in which the equal rights of father and son in ancestral property are discussed, Para. 9, declares the grandson's right of prohibition, if his unseparated father is making a donation, or a sale of effects inherited from his grandfather. But he has no right of interference if the effects were acquired by the father; on the contrary, he must acquiesce because he was dependant. Para. 10 goes on to explain the difference. Although the son has a right of birth in his father's, and his grandfather's property, still, as he is dependant on his father in regard to the paternal estate, and since the father has a predominant interest, as it was acquired by himself, the son must

(1) 10, W. R., 287.

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acquiesce in the father's disposal of his own acquired property, but since both have indiscriminately a right in the grandfather's estate, the son has a power of interdiction, but then only, if the father be dissipating the estate.

In noticing the apparent contradiction between para. 27, s. 1, chap. I, and paras. 9 and 10, s. 5, chap. I, the learned Judges who decided the case of Muden Gopal (1) remark that the apparent conflict is reconciled if the right of the sons in the self-acquired property of the father, is treated as an imperfect right, incapable of being enforced at law. The words "should not" and "shall not" imply a prohibition, but not an absence of power to do the prohibited act. The learned Judges add that a colour is further given to this construction, by a passage in the Mitakshara on the administration of justice, chap. IV, s. 1, para. 10. Macnaghten's Hindu Law, vol. 1, p. 227, where the author, in stating who are capable of maintaining actions, says: "In case of land acquired by the grandfather, the ownership of father and son is equal, and therefore if the father make away with the immoveable property so acquired by the grandfather, and if the son have recourse to a Court of justice, a judicial proceeding will be entertained between the father and the son." But the right of suit is not mentioned as extending to the case where a father alienates his own self-acquired immoveable property.

In the regular appeal (2) cited by the appellant's pleader as having been determined in 1875, by this Court, the learned Judges have also remarked on these apparent contradictions, and they observed that the only rational mode which has been suggested of reconciling the apparently contradictory doctrines is to suppose that para. 27, s. 1, refers to acquisitions of immoveable property made by the father with the use and by the aid of ancestral funds. The community of interest which the son has with the father, in the grandfather's property, is the foundation of the restriction of the father's power in respect thereof. But the son has no community of interest with the father in property acquired by him independently of ancestral funds, and consequently, there can be no restric

(1) 6, W. R., 71.

(2) Unreported Regular Appeal, No. 150 of 1874, decided on 11th May 1875.

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tion on the latter's freedom in dealing with it. But with due respect to the learned Judges who made these remarks, the true reason appears to be this, that as long as the father lives, the control remains with him. The sons, as we have seen, are dependent on the father. In chapter I, s. 5, para. 7, which declares "the dependence of sons," as affirmed in the following passage, "while both parents live, the control remains, even though they have arrived at old age," must relate to the effects acquired by the father or mother. This other passage "they have not power over it" (the paternal estate), "while their parents live," must be referred to the same subject, (self-acquired property). In. ss. 9 and 10, which we have already quoted above, the dependency on the father, and the predominant interest of the father in self-acquired property, is what restricts the son from exercising any interference with its disposal. This view of the question is borne out by a passge in chap. VIII. of the Smriti Chandrika, a work of special authority of the Madras school, where the interest of the son in the father and grandfather's property is treated of. In para. 21, it is asked how could there exist such inequality while the son possesses a right, by birth, in both his grandfather's and father's property. The reply is, that in the case of the grandfather's property, the ownership, and also the independent power, are both equal in the father and son, whereas in the case of the father's property, while he is alive, and free from defect, he alone possesses independent power, and not the son.

We, however, are prepared to rest the reconciliation of the apparent contradiction, on the ground that there is nothing more than a prohibition implied in para. 27, s. 1, chap. I. There is no express declaration that a gift or sale so made is *ipso facto* void, because the donor or vendor has no power to make it, and we also consider that the rulings of this Court on other points of Hindu law, have recognized the principle that, though prohibition of certain acts may be implied, yet, where it is not declared that there is absolutely no power to do them, those acts, if done, are not necessarily void. This recognition is partially supported by Sir Thomas Strange, who admits a certain discretion on the part of the father, to deal with self-acquired property, and also by a passage in Macnaghten's principles of Hindu la , chap. I., where he lays down, as the resu t f

Vide chap. IX. on partition.

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all authorities, "that with respect to personal property of every description, whether ancestral or acquired, and with respect to real property acquired or recovered by the occupant, he (the father) is at liberty to make any alienation which he may think fit, subject only to spiritual responsibility."

Entertaining this view of the point in dispute, and finding as we believe, that authority and precedent are with us, we have no hesitation in holding that the decision of the Judge is wrong, and that this exclusive gift by Sital the father, to his son Sadho, of the house in dispute, was not illegal under the Hindu law, and the facts not being disputed, the claim should have been dismissed. We accordingly decree this appeal and dismiss the claim, by reversing the judgments of the Courts below, with costs.

Decree reversed.

APPELLATE CIVIL.

1877.
May 28.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Pearson.

MAJOR-GENERAL SHOWERS (DEFENDANT) *v.* SETH GOBIND DASS (PLAINTIFF).*

Act VIII of 1859, *ss.* 240, 248—*Act XIX of* 1873, *s.* 3 *cl.* 1—*Irregularity in publication of Court sale of Khalisa Mahal.*

In the case of a sale by the Civil Court of forest land, which formed a grant from Government under a deed describing the property as a "Khalisa Mahal," subject to the payment of revenue after a term of years, the sale not having been proclaimed at the site of the grant. *Held*, that the sale was invalid by reason of irregularity in the publication, and because it was not competent to the Civil Court to sell land chargeable with, although not actually paying revenue at the time of sale, such Khalisa Mahals being revenue paying lands within the meaning of s. 248 of Act VIII of 1859, and s. 3, cl. 1, Act XIX of 1873, and that therefore the sale should have been held by the Collector.

The decree-holder, respondent in this case, attached through the Court of the Judge of Small Causes exercising the powers of a Subordinate Judge in Dehra Dún, a grant of forest-land comprising 2,080 acres conferred by Government upon the judgment-debtor, General Showers, on terms embodied in a deed. By the said deed

* Miscellaneous Regular Appeal, No 5 of 1877, from an order of R. Alexander, Esq., Judge, Small Cause Court, Dehra Dún, with special jurisdiction, dated the 11th December 1876.