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KARIM-UD-DIN v. GOVIND KRISHNA NARAIN.

High Court discharged with costs, and the decrees of the Subordinate Judge in the five original suits restored.

The respondents must pay the costs of the appeals.

Appeals allowed.

Solicitors for the appellants:—*Ranken Ford, Ford, and Chester.*

Solicitors for the respondents:—*T. L. Wilson & Co.*

J. V. W.

APPELLATE CIVIL.

1909
April, 13.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.

KALI SHANKAR (PLAINTIFF) *v.* NAWAB SINGH AND OTHERS (DEFENDANTS.)*

Hindu Law—Mitakshara—Mortgage of ancestral property by one member—No decree can be passed against his share.

A member of a joint Hindu family governed by the *Mitakshara* cannot validly mortgage his undivided share in ancestral property held in co-parcenary on his own private account without the consent of his co-sharers.

Hence, where a father in such a family purports to mortgage the ancestral property neither for a lawful necessity nor for an antecedent debt, *held* that a decree for sale cannot be passed even in respect of the share of the father alone. *Chandra Deo* v. *Mata Prasad* (1), and *Balgobind* v. *Narain* (2) followed.

The material facts will appear from the judgment.

Hon'ble Pandit *Sundar Lal*, for the appellant.

Babu *Jogindra Nath Chaudri* and Pandit *Moti Lal Nehru*, for the respondents.

The following judgments were delivered:—

BANERJI, J.—This appeal arises out of a suit for sale brought upon three mortgages. The first of these is dated the 25th of June 1894, and is for Rs. 6,200, the second dated the 30th of March 1895, is for Rs. 3,000 and the 3rd is dated the 8th of July 1895, and is for Rs. 2,000. The suit was brought not only against the mortgagor but also against his sons and grandsons. The latter contested the claim and urged that their interests in the mortgaged property could not be affected by the mortgages.

* First Appeal No. 143 of 1907 from a decree of Ishri Prasad, Subordinate Judge of Mainpuri, dated the 13th of February 1907.

(1) (1909) I. L. R., 31 All., 176. (2) (1893) I. L. R., 15 All., 339, P. C.

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The court below found in respect of the first mortgage of the 8th of July 1895, that necessity for incurring the loan for the benefit of the joint family had been established and made a decree for the amount of that mortgage to be realised by sale of the mortgaged property. As regards this part of the decree there is no controversy in this appeal.

As regards the second mortgage, namely, that of the 30th of March 1895, the court below was of opinion that although the debt was not tainted with immorality, it had not been proved that it was incurred for family necessity. The claim in respect of that mortgage was accordingly dismissed. In view of the recent Full Bench ruling in *Chandra Deo Singh* v. *Mata Prasad* (1), and the opinion of the majority of the Judges constituting the Full Bench, it must be held that the court below has rightly decided that the burden of proof was upon the plaintiff. As the plaintiff failed to prove that the mortgage was made for the benefit of the family his claim wasr ightly dismissed. Mr. *Sundar Lal,* the learned advocate for the appellant, does not contest the correctness of the lower court's finding as to the non-existence of necessity for the loan. He, however, raises the question whether in respect of this debt a decree should not be passed for sale of the father's interests in the mortgaged property, the debt not being tainted with immorality. This question I will consider later.

It is conceded that having regard to the fact that the period of limitation for a personal decree against the father expired before the suit was instituted, a decree for the recovery of the amount of this bond personally from the father and generally from the family property cannot be passed, the claim for such a decree being time-barred.

There remains the mortgage of the 25th of June, 1894, the amount secured by which was Rs. 6,200. This amount consists of a sum of Rs. 3,116-4-3 due under previous mortgages, dated the 4th of February 1893, and the 24th of March 1893, and a sum of Rs. 3,083-11-9 paid in cash on the date of the mortgage. The lower court held that out of the sum of Rs 3,083-11-9 mentioned above, necessity for incurring the loan had been proved to the extent of Rs. 1,500 only. On this point no argument

(1) (1909) I. L. R., 31 All., 176.

has been addressed to us impugning the finding of the court below. The learned Subordinate Judge however has overlooked the fact that Rs. 3,116-4-3, part of the consideration for this mortgage, consisted of antecedent debts for which the mortgagor was competent to mortgage the whole of the family property, the debt not being tainted with immorality. Mr. *Chaudri* for the respondents concedes that the court below ought to have passed a decree for this sum of Rs. 3,116-4-3 and interest thereon from the date of the mortgage, in addition to the amount for which a decree has been made on account of this mortgage. The appeal therefore should succeed so far as the item of Rs. 3,116-4-3 mentioned above, and interest thereon is concerned. It is urged on behalf of the appellant that in respect of all the three mortgages a decree should be passed for sale of the interests of the mortgagor in the mortgaged property. In the view which I held in the Full Bench case referred to above this contention would be sound, but I feel myself bound by the decision of the majority of the Full Bench. The Calcutta High Court has no doubt held that in a case like this a decree may be made for the sale of the father's interest in the mortgaged property, but according to the view of the majority of the learned Judges who constituted the Full Bench of this Court it would be inconsistent to hold that the interest of the father can be sold and that the father was competent to make a mortgage of his own interest only. The learned Chief Justice said in his judgment (at page 208 of the report): "It follows from this that if the mortgage in suit is not binding *in toto* it is not binding as to the mortgagor's share in the mortgaged property," and the opinions of the other learned Judges seem to be to the same effect. In their opinion this conclusion is in consonance with the decision of their Lordships of the Privy Council in *Balgobind Das* v. *Narain Lal* (1). The plaintiff is not therefore entitled to a decree for sale of the interests of the father in their mortgaged property. As regards the mortgage of the 25th of June 1894 the claim for a personal decree was time-barred having been instituted after the expiry of six years from the date, on which the debt became due. Therefore the only decree which the plaintiff can get as regards that mortgage is a decree for

(1) (1893) I. L. R., 15 All., 339.

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Rs. 3,116-4-3, and interest thereon in addition to the amount for which the court below has made a decree in respect of that mortgage.

The result is that the appeal will be allowed so far that to the amount decreed by the court below in respect of the first mortgage dated the 25th June 1894, should be added the sum of Rs. 3,116-4-3 mentioned above and the decree will be for the principal sum of Rs. 4,616-4-3 together with interest thereon at the stipulated rate from the date of the mortgage, namely the 25th of June 1894, to the date fixed for payment and thereafter at the rate of 6 per cent. per annum. In other respects the decree of the court below in regard to this mortgage will be upheld. As regards the mortgage of the 30th of March 1895, the claim will stand dismissed. As regards the whole mortgage of the 8th of July 1895, the plaintiff will be entitled to the amount secured by that mortgage together with interest from the 8th of July 1895, to the date hereafter fixed for payment at the rate stipulated in the mortgage and thereafter at 6 per cent. per annum. The costs in this Court and the court below will be paid by the parties in proportion to the failure and success, including in this court, fees on the higher scale. We fix the first of October 1909, as the date for payment of the mortgage money. The decree of this Court will be drawn up in the form prescribed by Order 34 of the Code of Civil Procedure and should separately specify the amount due upon each of the mortgages in respect of which the claim is decreed and the property to be sold for realisation of that amount.

STANLEY, C. J.—I agree in the proposed order. As to the contention that the father's share at least in the mortgaged property is liable to be sold, it seems to me that this question is concluded by the decision of the Privy Council in *Balgobind Das* v. *Narain Lal* (1). It was in that case held that according to the law as administered by the courts of this Province a member of a joint family cannot validly mortgage his undivided share in ancestral property held in coparcenary on his own private account without the consent of his cosharers. In view of this decision we are bound to hold that the mortgage by the father which was

(1) (1893) I. L. R., 15 All., 339.

not made to satisfy an antecedent debt or for a legal necessity of the family is not binding even as to his share in the ancestral property comprised in it.

Decree modified.

MISCELLANEOUS CIVIL.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Richards, and Mr. Justice Griffin. *

WILLIAM ARTHUR FORSHAW (PETITIONER) *v.* EUNICE GERALDINE FORSHAW (OPPOSITE PARTY).

Act No. IV of 1860 (*Indian Divorce Act,*) *sections* 12,17—*Decree nisi—Duty of the Court passing that decree—Confirmation.*

The High Court should not make a decree *nisi* for dissolution of marriage absolute without a motion being made to it for that purpose. When after the passing of the decree *nisi* for dissolution of marriage, no one represented either the petitioner or the respondent and co-respondent in the High Court, *held*, no order could be made on the reference for confirmation of such decree unless a motion was made to the Court for that purpose. *Held* further that under section 12 of the Act the duties of a court in the investigation of a suit for a divorce are that upon any petition for a dissolution of marriage being presented, the court shall satisfy itself, so far as it reasonably can, not only as to the facts alleged but also whether or not petitioner has been in any manner accessory to or conniving at the adultery, or has condoned the same; and shall enquire into any counter-charge which may be made against the petitioner. *Culley* v. *Culley* (1) followed.

THIS was a reference under section 17 of the Indian Divorce Act.

The facts of the case are set forth in the judgments.

The parties were not represented.

The reference was first laid before the Court for hearing on the 12th December 1908, when the following order was passed:

STANLEY, C. J., RICHARDS AND GRIFFIN, JJ.—This matter comes before us upon a reference under section 17 of the Indian Divorce Act for the purpose of having a decree for the dissolution of the marriage of the petitioner with his wife Eunice Geraldine Forshaw on the ground of her adultery with the co-respondent Innes confirmed. The learned District Judge informs us by letter, dated the 3rd of December 1908, that the pleader for the

* Matrimonial Reference No. 2 of 1908 made by J. H. Cuming, District Judge of Cawnpore.

(1) I. L. R., 10 All., 559.