1909

JAMNA DAS v. RAMAUTAR PANDE.

mortgaged property but also, in certain events, for decree under section 90. The plaint itself contained a prayer for such relief. We think we cannot go behind the decision of the High Court. We accordingly disallow the objections filed on behalf of the representative of Musammat Lakhpati Kuar with costs. There only remains the question of the costs of the respondent Pandit Ramautar Pande. In the court below the costs of this respondent were thrown on the decree-holder. We think that Pandit Ramautar Pande should bear his own costs in the court below and in this Court. We do not desire to express any strong opinion on the conduct of Ramautar Pande in not keeping his bargain with his vendor, particularly as it is suggested by the learned advocate that he may have some equity against his vendor. The fact, however, remains that he became transferee of the equity of redemption in the mortgaged property stipulating that he would pay the amount of the mortgage to Jamna Das. He did not do so, and in the events which have happened he is holding a substantial portion of the mortgaged property without even discharging the debts due thereon. We dismiss the appeal and direct that the appellant and Pandit Ramautar Pande do bear their own costs in this Court and in the court below. The other respondent on whose behalf the objections were filed must pay the decree-holder's costs.

Appeal dismissed.

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

1909 *March* 26

NAND RAM (DEFENDANT) v. MANGAL SEN AND ANOTHER (PLAINTIFFS).*

Hindu Law—Partition—Property gifted away to one son to the detriment of another—Share in the property gifted.

When a Hindu father governed by the *Mitakshara* makes a gift of his moveable property to one son to the detriment of the other, not on account of affection for that son, but to punish and disinherit the other son, *held* that the alienation is bad and that in a suit for partition the son can claim a share in the property gifted to the other son.

THIS was a suit for partition of joint family property, which included both moveable and immoveable property. One of the defences set up was that the movable property had been given

*Second Appeal No. 154 of 1908, from a decree of H. J. Bell, District Judge of Aligarh, dated the 26th of November 1907, modifying a decree of Muhammad Shafi, Subordinate Judge of Aligarh, dated the 2nd of April 1907.

1909

NAND RAM v. MANGAL SEN.

away by the father of the plaintiff, Mangal Sen, to Nand Ram, a younger brother of Mangal Sen and that the father having full power of disposition over moveables, the gift could not be questioned by the plaintiffs and the moveables given away could not be included in the partition. Both the courts below decreed the plaintiffs' suit in respect of the moveable as well as of the immoveable property. The finding of the lower appellate court in regard to the gift of the moveables was that the gift was "not so much out of affection to one son as based on the motive of dealing retribution to another son." The defendant Nand Ram appealed to the High Court.

Munshi *Gulzari Lal* (with him Babu *Durgacharan Banerjee*) for the appellant, submitted that the father had the power to give away his moveable property to any one of his sons and the other son could not question the alienation. He cited Mayne, *Hindu Law*, pages 435 and 436. *Mitakshara*, Ch. I, section I, paras. 27 and 28. *Lakshman Dada Naik* v. *Ram Chandra Dada Naik* (1). *Rayadur Nallatambi Chetti* v. *Rayadur Mukunda Chetti* (2).

Dr. *Satis Chandra Banerji*, for the respondents, cited *Yagnavalkya* Ch. II, verse 121. भूर्या पितामहोपात्ता निबन्धो द्रव्यमेव वा। तत्र स्यात् सदृशं स्वाम्यं पितुः पुत्रस्य चोभयोः

["Inasmuch as the ownership of father and son is co-equal in the acquisitions of the grandfather, whether they be land, any settled income, or moveables, in them the ownership of the father and son is equal."]

He submitted that the original text made no distinction between moveable and immoveable property in respect of the father's power of alienation. The *Mitakshara* did make a distinction but it was open to question if the passage in the *Mitakshara* laid down a mandatory rule of law or was only advisory. The earlier cases on the point, no doubt, were in favour of the appellant but the later cases made no distinction between moveable and immoveable property. Besides, even if the text in the *Mitakshara* might be taken to be mandatory in its nature, the present case did not come within the exceptions to the general rule formulated by *Vijnaneswara*, in which cases alone the father could alienate moveable property. The

(1) (1876) I. L. R., 1 Bom., 561. (2) (1868) 3 Mad., H. C. Rep., 455.

finding of the lower court being that the gift was not made out of affection, the gift was illegal and the respondents were entitled to their share in the property given away.

He cited Mayne, *Hindu Law*, para. 335, *Jugmohan Das Mangal Das* v. *Sir Mangal Das Nathubhoy* (1), Ghose, *Hindu Law*, 423, *Raja Ram Tewari* v. *Luchmun Pershad* (2), *Laljeet Singh* v. *Rajcoomar Singh* (3), *Kali Parshad* v. *Ram Charan*, (4).

STANLEY, C. J. and BANERJI, J.—In the suit out of which this appeal has arisen the plaintiff Mangal Sen sued his father Kewal Ram and his minor brother Nand Ram for partition of the joint family property including both moveable and immoveable property. The lower appellate court, as also the court of first instance, decreed the plaintiff's claim. An appeal has been preferred and the only question which has been pressed in argument before us in the appeal is in respect of the order for partition of the moveable property. In the defence, which was filed to the suit the defendants alleged that Kewal Ram gave away the whole of the moveable property of the family to his son Nand Ram and that therefore the plaintiff could not have partition of the moveable property. It has been found by the court below that the moveable property sought to be partitioned was part of the joint family property and that the gift which was made by Kewal Ram to his son Nand Ram was made not from affection but from vindictive motives, namely, to punish the plaintiff on account of alleged misconduct on his part. The lower appellate court finds that the gift was not made out of affection but on the motive of dealing retribution to the plaintiff. We have to see, therefore, whether the father was entitled under the circumstances to make a gift of the moveable property of the family to one son to the exclusion of the other.

The question of the right of a father in a family governed by the *Mitakshara* law, by which the parties here are governed, to dispose of moveable property in favour of one son to the exclusion of other sons, has been considered in a number of cases.

(1) (1886) I. L. R., 10 Bom., 528 at pp., 547, 548 and 514.
(2) (1867) 8 W. R. 15.
(3) (1873) 12 B. L. R., 373.
(4) (1876) I L. R., 1 All., 159.

1909

NAND RAM v. MANGAL SEN.

We need only refer to a few of the leading authorities on the subject. In the case of *Raja Ram Tewary* v. *Luchmun Pershad* (1), this question was considered and it was decided that according to the *Mitakshara* law a son acquires by birth a right in ancestral property and has a right during his father's lifetime to compel the partition of such property; that the father cannot without the consent of his son alienate such property, except for sufficient cause, and that the son may not only prohibit the father from so doing but may sue to set aside the alienation if made. In delivering the judgment of the Court in that case Sir BARNES PEACOCK, C.J., at p. 20 observes: "It is clear then that the son by birth alone acquires a right in ancestral property and that he has a right during his father's lifetime to compel a partition of such property; that the father cannot without the consent of the son alienate such property except for sufficient cause; and that the son may prohibit the father from so doing. It has been held that the son has not merely the right to prohibit but that he may sue to set aside the alienation if made." No distinction, it will be observed, is here drawn between moveable and immoveable property.

The same question came before the Bombay High Court in the case of *Laksham Dada Naik* v. *Ram Chandra Naik* (2). There, after a review of the authorites, it was held that a Hindu governed by the *Mitakshara* law, who has two sons undivided from him cannot whether or not his act be regarded as a gift or a partition, bequeath the whole, or almost the whole of the ancestral moveable property to one son to the exclusion of the other. In delivering the judgment of the Court in that case, MELVILL, J., observes: "From the above authorities we come to the conclusion that it was not within the power of Dada Naik (*i.e.*, the father) (whether his act be regarded in the light of a gift or of a partition) to bequeath the whole, or almost the whole of the ancestral moveable property to one son and virtually to disinherit the other." This case came before their Lordships of the Privy Council on appeal, * and at the hearing it was conceded by the counsel for the parties that

(1) (1867) 8 W. R., 15. (2) (1876) I. L. R., 1 Bom., 561.
*See (1880) 7 I. A., 181: I. L. R., 5 Bom., 48, P. C.—ED.

according to the *Mitakshara* law a father cannot by will make an unequal distribution of ancestral property, whether moveable or immoveable, between his sons. The question was also considered in the case of *Jugmohan Das Mangal Das* v. *Sir Mangal Das Nathubhoy* (1), in an appeal from a decision of SCOTT, J., who held that whether the law of the *Mayukha* applies, or the *Mitakshara*, a son is entitled to demand partition of moveable as well as immoveable property in his father's lifetime. The learned Judges who heard the appeal upheld the decision of SCOTT, J, and held that there was no distinction between moveable and immoveable property as regards the right of a son in an undivided family governed by the *Mitakshara* law to partition in the lifetime of the father.

We think that in view of these authorities it is clear that unless a case be brought within the exceptions mentioned in the *Mitakshara* there is no distinction as regards the right to partition between moveable and immoveable property. We therefore must turn to the *Mitakshara* to see whether or not in this case the father was justified in making a gift of the moveable ancestral property to one son so as to exclude from participation therein the other son. We find from a reference to it that property, whether moveable or immoveable, in the paternal or ancestral estate is by birth, but that a father has independent power in the disposal of effects, other than immoveable, for indispensible acts of duty and for the purposes prescribed by texts of law (see chapter I, section I, paragraph 27). The purposes prescribed by texts of law are gift through affection, support of the family, relief from distress, and so forth. If the gift of the moveable property in this case had been made to the defendant Nand Ram through affection, different considerations would arise from those which we have to consider. It is clear from the finding of the lower appellate court that the gift of the moveable property was not made to Nand Ram out of affection but for the purpose of punishing the other son and from vindictive feelings. That is the finding of the lower appellate court which we must accept in second appeal. In view of this finding we cannot say that the gift was one which comes within the purposes mentioned

(1) (1886) I. L. R., 10 Bom., 528

1909

NAND RAM v. MANGAL SEN.

in the paragraph of the *Mitakshara* which we have quoted for which a father may dispose of moveable property, and in this view it seems to us that the court below rightly decreed the plaintiff's claim for partition of the moveable property.

We therefore dismiss the appeal with costs.

Appeal dismissed.

1909. *April* 6.

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

GIRDHARI LAL AND ANOTHER (PLAINTIFFS) *v.* KHUSHALI RAM AND ANOTHER (DEFENDANTS).*

Code of Civil Procedure (Act XIV of 1882), sections 244,583—Decree ex parte—Sale under—Decree set aside—Second decree satisfied—Suit for possession by judgment-debtor not barred.

K, obtained an *ex parte* decree for sale on a mortgage and in execution thereof caused the mortgaged property to be sold and purchased it himself. The *ex parte* decree was subsequently set aside and another decree was obtained after contest. That decree was satisfied before the property could be sold a second time. As *K* continued in possession a suit was brought against him to recover possession. *Held* that the suit was not barred by the provisions of section 244 or section 583 of the Code of Civil Procedure 1882.

THE facts of the case are as follows:—

In 1883, the widow and the brother's widow of one Tori Singh, purporting to act for themselves and for Chait Singh, the minor son of Tori Singh, mortgaged the property in suit to Khushali Ram. On the basis of this mortgage Khushali Ram obtained an *ex parte* decree for sale on the 23rd July 1895, and in execution of that decree caused the property to be sold, purchased it himself on the 20th December 1897, and obtained possession. The *ex parte* decree was set aside on the 19th December 1899. On the 10th August 1904, however, after contest another decree for sale was obtained but before the sale was carried out a puisne incumbrancer paid off the amount of the decree. Notwithstanding this, Khushali Ram continued in possession of the property. On the 7th February 1905, the mortgagors sold the property to the plaintiffs Girdhari Lal and Musammat Lado Bibi. The suit out of which this appeal arose was brought by Girdhari Lal and Lado Bibi as transferees from the mortgagors to recover possession of the property. The court below holding

* First Appeal No. 283 of 1907, from a decree of Muhammad Shafi, Subordinate Judge of Aligarh, dated the 22nd July 1907.