

1911
May 12.

Before the Hon'ble Mr. H. G. Richards, Chief Justice, and Mr. Justice Banerji.

TULSHI RAM (PLAINTIFF) v. BABU AND ANOTHER (DEPENDANTS).^a

Hindu law—Mitakshara—Joint Hindu family—Alienation by one member without the consent of a co-parcener—Legal necessity—Right of subsequently born co-parcener to impugn the transaction.

Where an alienation of ancestral property is invalid as having been made without legal necessity by one member of the coparcenary without the consent of the rest, it is open to co-parceners to object to such alienation notwithstanding that they were born subsequently thereto. *Kali Shankar v. Nawab Singh* (1) referred to, *Chuttan Lal v. Kallu* (2) distinguished.

THE facts of this case were as follows.

A mortgage-deed was executed by one Ram Sahai, who had two sons, Boli and Sundar, who were at the time joint with him. Boli attested the deed, and died subsequently, leaving two sons. The mortgagee sued after the death of Ram Sahai and Boli, and asked for a decree for sale against the mortgagors' son and grandsons. The latter pleaded absence of legal necessity for the alienation, which was also alleged to have been made without their consent. The court of first instance found that the transfer was made without legal necessity and without the consent of Sundar, but, as the grandsons had not been born at the time of the mortgage, the court decreed the claim against them. Upon appeal by the grandsons the lower appellate court upheld the finding regarding absence of necessity; held that Boli was not estopped by reason of having attested the deed, and exempted the share of the appellants.

Upon second appeal by the plaintiff, the decree below was affirmed. The following judgement was delivered by KNOX, J.

"This appeal is another ingenious attempt to get behind findings of fact based on evidence. The learned vakil for the appellant ignores the fact that the findings are dead against him and tries to get rid of the decree by attacking points which in the face of the findings are against him. The appeal is dismissed with cost."

The plaintiff appealed under section 10 of the Letters Patent. The appeal was originally heard by STANLEY, C. J., and GRIFFIN, J., who remitted an issue. The appeal then came on for hearing before RICHARDS, C. J., and BANERJI, J.

Babu Girdhari Lal Agarwala, for the appellant, relied on *Chuttan Lal v. Kallu* (2) and argued that upon the finding

^a Appeal No. 90 of 1910 under section 10 of the Letters Patent.

(1) (1909) I. L. R., 81 ALL, 507. (2) (1910) I. L. R., 88 ALL, 293.

that the grandsons were not in existence when the mortgage was made, the plaintiff was entitled to a decree against them and their share in the property.

Dr. *Satish Chandra Banerji*, for the respondents, submitted that the mortgagor not having made the transfer with the assent of his co-parceners who were then in existence, and there being no necessity for it, the mortgage was invalid and created no charge upon any portion of the property. He cited *Kali Shankar v. Nawab Singh* (1) and *Mayne's Hindu Law*, 7th Ed., section 342, p. 449.

Babu Girdhari Lal Agarwala was heard in reply.

RICHARDS, C. J., and BANERJI, J. :—This appeal arises out of a suit to enforce a mortgage. The mortgage was made in the year 1891 by one Ram Sahai. Ram Sahai had two sons, Boli and Sundar Lal. Boli left surviving him two sons, Babu Lal and Munshi Lal. The suit was instituted in the year 1909 against Sundar Lal, Babu Lal and Munshi Lal. The defence was that there was no legal necessity and that therefore Ram Sahai had no power to mortgage the ancestral property. The court of first instance found that there was no legal necessity for the loan. It, however, gave a decree for the sale of two-thirds of the property, exempting one-third as being the share of Sundar Lal, who had not consented to the mortgage. This was not very accurate, because on partition the share of Sundar Lal in the property after the death of his father would have been one-half and not one-third. On appeal by Babu Lal and Munshi Lal, the lower appellate court affirmed the finding on the question of legal necessity and dismissed the plaintiff's suit to the extent of a further one-third. Why it gave a decree for sale of one-third we do not know. However, the question does not arise, inasmuch as neither Babu Lal nor Munshi Lal appealed. The plaintiff then preferred an appeal to the High Court. The case coming before our learned brother, he dismissed the appeal, whereupon the present appeal was preferred under the Letters Patent. A Bench of this Court remitted issues to the court below as to whether Babu Lal and Munshi Lal were born in the year 1891 when the mortgage was made. The finding on this issue is that neither was born until some

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time subsequently. It is now contended on behalf of the appellant that inasmuch as neither Babu Lal nor Munshi Lal was alive at the date of the mortgage they cannot question the validity of the mortgage.

A passage to be found at page 449 of the 7th edition of Mayne's Hindu Law was referred to. It is as follows:—"A son cannot object to alienation validly made by his father before he was born or begotten, because he could only by birth obtain an interest in property which was then existing in his ancestor." It seems to us that in order that the alienation should bind sons who are afterwards begotten, it must be a valid and effectual alienation. On the very same page Mr. Mayne says:—"On the other hand, if the alienation was made by a father without necessity and without the consent of sons then living, it would not only be invalid against them but also against any son born before they had ratified the transaction; and no consent given by them after his birth would render it binding upon him." In the present case the family at the time of the alienation consisted of Ram Sahai and his two sons, Boli and Sundar Lal. It is clear on the finding of the court that Sundar Lal gave no consent. The attempted alienation was therefore invalid and ineffectual.

There is abundant authority, if it was wanted, that where there is no legal necessity, one of the co-parcenary body cannot alienate the ancestral property without the consent of all the other members; see *Kali Shankar v. Nawab Singh* (1). The case of *Chuttan Lal v. Kallu* (2) was also relied upon on behalf of the appellant. In that case it would appear that there had been a valid alienation before the birth of the member who afterwards sought to impugn its validity.

In our opinion the decision of our learned brother was correct and we therefore dismiss the appeal with costs.

Appeal dismissed.

(1) (1909) I. L. R., 31 All., 507.

(2) (1910) I. L. R., 33 All., 233.