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SURAJ DIN v. MAHABIR PRASAD.

it was held by the learned Chief Justice, Sir LAWRENCE JENKINS and CROWE, J., that a judgement-debtor who has been arrested and imprisoned in execution of a decree and has obtained an interim protection order under section 13 of the Indian Insolvency Act, is liable to be re-arrested in execution of the same decree. In this case there was an appeal from a decision of STARLING, J., and the appeal came before JENKINS, C. J., and CROWE, J. In his judgement the learned Chief Justice reviewed the authorities and criticised at length the judgement of PETHERAM, C. J., to which we have referred. The learned Chief Justice observed:—"I confess I do not follow the train of reasoning which led Sir COMER PETHERAM to the conclusion that the Code only contemplates one arrest, if by that is meant that there is anything in the Code, which forbids a second arrest apart from the express prohibition it contains. If the Chief Justice's proposition is correct, then it is difficult to see why a special prohibition was inserted in section 341. The mere fact that a general power of retaking the person is not expressly given by the Code cannot be a prohibition, for were it so, then a retaking of property in attachment would equally and by parity of reasoning be illegal; but that no one suggests." We entirely agree in the view thus expressed and in the conclusion arrived at by our learned brother against whose decision this appeal has been preferred. We therefore dismiss the appeal with costs.

Appeal dismissed.

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November 26.

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

CHUTTAN LAL (PLAINTIFF) *v.* KALLU AND OTHERS (DEFENDANTS).*

Hindu law—Joint Hindu family—Alienation of family property—Right of subsequently born member of family to object to alienation.

Held that a member of a joint Hindu family who was born after the alienation of the family property by another member of that family cannot question the validity of that alienation. *Chattarpal Singh* v. *Natha* (1) followed. *Hurodoot Narain Singh* v. *Beer Narain Singh* (2) and *Bunwari Lal* v. *Daya Shunker* (3) distinguished.

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*Appeal No. 54 of 1910 under section 10 of the Letters Patent.

(1) Weekly Notes, 1906, p. 26. (2) (1869) 11 W. R., 480.
(3) (1900) 13 C. W. N., 815 (822).

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CHUTTAN LAL v. KALLU.

THIS was an appeal under section 10 of the Letters Patent from a judgement of GRIFFIN, J. The facts of the case are stated in the judgement under appeal, which was as follows :—

"A certain property was mortgaged to one Bhawani Das, ancestor of the plaintiff, in 1873. After his death his son, Nain Sukh Das, acquired proprietary rights in the property in his own name and that of his son, Madho Ram. Subsequently Gulzari Lal, brother of Nain Sukh Das, brought a suit for recovery of a ¼ share in the property, and on the 7th of June 1888, obtained a decree. On the 10th of October 1891, Madho Ram conveyed the remaining ¾ share to defendant No. 1. After that date Naurang Mal, son of another brother of Nain Sukh Das, brought a suit for the recovery of a 1/12 share in the property and obtained a decree. The present suit has been brought by Chuttan Lal, brother of Naurang Mal, claiming a 1/12 share in the property. The suit was dismissed by the courts below on the ground that he was not born on the date of the alienation by Madho Ram, and that therefore he had no right in the property in suit. In second appeal it is contended that a member of a joint Hindu family born after alienation of the family property has taken place is entitled to have the alienation set aside if it is illegal for any reason. A passage from the Mitakshara is quoted in support of this contention :—'Those who are born, and those who are yet unbegotten, and those who are still in the womb, require means of support. No gift or sale should therefore be made.' Mitakshara, chapter I, section 1, clause 27. Further a passage from the ruling in *Bunwari Lal* v. *Daya Shunker* (1) is cited :—'It is well-settled that any co-parcener who was born at the time of the completion of an alienation would be entitled to sue to set aside the invalid alienation, and such alienation if invalid because made without the consent of all co-parceners then in existence can be set aside even at the instance of another co-parcener who was born subsequent to the alienation.' In the case of *Hurodoot Narain Singh* v. *Beer Narain Singh* (2) it was found that the father had made a family arrangement which was not a legal one, and therefore the after-born son was entitled to share in the family property as if no such arrangement had taken place. There is, however, authority for an opposite view in Mayne's Hindu Law, 7th edition, paragraph 342, that "a son cannot object to an alienation validly made by his father before he was born or begotten, because he could only by birth retain an interest in property which was then existing in his ancestor." The right to sue to have an alienation set aside can scarcely be called a right to ancestral property. In the present case the alienation was made not by the father but by a cousin of the plaintiff. The plaintiff's father took no steps whatever to have alienation set aside. The plaintiff, as it seems to me, must be content with his share in the family property as it actually stood at the time of his birth. In my opinion the court below was right in dismissing the plaintiff's suit. I dismiss his appeal with costs."

Pandit *Mohan Lal Sandal*, for the appellant :—

The sole question in the appeal is whether a subsequently born co-parcener can impugn the alienation made before his

(1) (1909) C. W. N., 815 (822). (2) (1869) 11 W. R., 480.

birth. I rely on the following authorities:—Mitakshara Chap. I., Sec. I, Cl., 27. *Bunwari Lal* v. *Daya Shunker*, (1) *Hurodoot* v. *Beer Narain* (2). The case of *Chattarpal Singh* v. *Natha* (3) is distinguishable, inasmuch as the mortgage was made by the father, and it was for the benefit of the family; in the present case, the alienation was made by a co-parcener who had no right to do so.

Mr. *G. W. Dillon*, for the respondents:—

The alienation was made so long ago as 1891; the father of the plaintiff did not object to it. The presumption is that the alienation had been made with the consent of all the co-parceners then living and that it was for their benefit. If such alienations made before the birth of a co-parcener in a joint Hindu family are to be impugned subsequently by such co-parcener, then it is very unsafe to get a sale-deed from the father of a Hindu family.

Pandit *Mohan Lal Sandal*, replied.

STANLEY C. J. and BANERJI, J.—The question raised in this appeal is whether a member of a joint Hindu family, who was born after the alienation of the family property by another member of that family can question the validity of that alienation. The facts are these:—One Bhagwan Das acquired certain property under a mortgage in 1873. He had four sons, Nainsukh Das, Gulzari Mal, Hazari Lal and Kishan Lal. Nainsukh Das, after the death of his father, purchased from the mortgagor his equity of redemption jointly with his son, Madho Ram. So that the absolute ownership of the property was acquired by Nainsukh Das and Madho Ram. Gulzari Mal, the brother of Nainsukh Das, brought a suit and obtained a decree for a fourth share of the property. After this, on the 10th of October, 1891, Madho Ram sold the remaining three-fourths share to the defendant No. 1. The plaintiff, who is one of the sons of Kishan Lal, brought the suit which has given rise to this appeal for a twelfth share of the property on the ground that the sale by Madho Ram was not binding on him.

(1) (1909) 13 C. W. N., 815 (822). (2) (1869) 11 W. R. 480,
(3) Weekley Notes, (1906) p. 26.

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The court of first instance dismissed the suit, holding that at the date of the sale impugned by the plaintiff he had no interest in the family property, he not having been born at that date, and that therefore he had no right of suit. This judgement was affirmed by the lower appellate court and on appeal to this Court the decree of the lower appellate court was affirmed.

The plaintiff has preferred this appeal under the Letters Patent. The learned vakil for the appellant in support of the contention that the plaintiff is entitled to maintain the suit, relies upon a passage in the Mitakshara to which reference is made in the judgement of our learned colleague. That passage in our opinion does not support the plaintiff's contention. He further relies upon a decision of the Calcutta High Court in *Hurodoot Narain Singh* v. *Beer Narain Singh* (1). That case in our opinion has no bearing upon the question before us. There it was held that a Hindu father had no power to settle ancestral property by conveyance in his lifetime or by a will to take effect after his death without the consent of all his sons living at the time; and where such a settlement was not assented to by the sons living at the time and another son was afterwards born, no subsequent assent of the former would be binding on the latter. That is not the case here. The learned vakil also relies upon a *dictum* of the learned Judges who decided the case of *Bunwari Lal* v. *Daya Shunker* (2). The *dictum* is to the effect that an alienation, if invalid, because made without the consent of all the co-parceners then in existence, can be set aside even at the instance of another co-parcener who was born subsequent to the alienation. The authority cited for this view is the case of *Hurodoot Narain Singh* v. *Beer Narain Singh*, to which we have referred. That case, as we have pointed out above, did not decide the question whether an alienation validly made at a time when a co-parcener was not in existence could be questioned by such a co-parcener. It seems to us to be clear that a plaintiff can question the validity of an alienation of such property only in which he had an interest at the date of the alienation. If his interest came into existence subsequently to the alienation, he cannot question the validity thereof. As Mr. Mayne observes in

(1) (1869) 11 W. R., 480. (2) (1909) 13 C. W. N., 815.

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is well-known work on Hindu Law, 7th edition, p. 449, "a son cannot object to alienations 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." Hence, if at the time of the alienation there had been no one in existence whose assent was necessary, or if those who were then in existence had consented, he could not afterwards object on the ground that there was no necessity for the transaction. The same view was held by this court in *Chattarpal Singh* v. *Natha* (1). In that case BLAIR and BURKITT, JJ., held that the plaintiffs, not being in existence at the date of the mortgage which was impugned in that case, had no right or interest in the property and were not therefore entitled to possession of it. As the alienation now in question was made so far back as 1891, the presumption would be, in the absence of any evidence to the contrary, that it was made with the assent of the other co-parceners then alive. This presumption is strengthened by the fact that the plaintiff's father, who is still alive, never questioned the validity of the transaction. Under these circumstances we are of opinion that the view taken by our learned colleague in this case is perfectly correct and is in accordance with Hindu Law. We accordingly dismiss the appeal with costs.

Appeal dismissed.

1910

November

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

RAM CHANDRA (DEFENDANT) v. JOTI PRASAD AND OTHERS, (PLAINTIFFS).*

Tort—Public nuisance—Closure of public road—Right of suit—Special damage.

Held that stopping a highway, and thereby rendering it necessary for a person to make a detour is such a special damage as would justify him in instituting a suit for removal of the obstruction. *Hart* v. *Bassett* (2) and *Blagrave* v. *The Bristol Waterworks Company* (3) referred to.

THE plaintiffs respondents were owners of the temple of Raghunathji at Rihbi Kesh. Beyond the grounds of the temple was a plot of land, marked R. S., on the survey maps of 1884. Round this plot ran a public road. Across the plot R. S., which belonged to the defendant, was a track which was used as

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* Appeal No. 52 of 1910 under section 10 of the Letters Patent.

(1) Weekly Notes, 1906, p. 26. (2) 13 Jones' Reports, 156.
(3) 1 H. and N., 369.