

## APPELLATE CIVIL.

1914  
December, 19,

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

DEO NARAIN SINGH (PLAINTIFF) v. GANGA SINGH AND ANOTHER  
(DEFENDANTS)\*

*Hindu law—Joint Hindu family—Son's right to dispute alienation made by father—Son conceived but not born at the date of alienation.*

Held that a Hindu son is competent to contest an alienation made by the father at a time when the son was in his mother's womb. *Sabapathi v. Somasundaram* (1) followed. *Mussamut Goura Chowdhraïn v. Chummun Chowdry* (2) not followed. *Kalidas v. Krishan Das Chandra Das* (3) *Hanmant Ramchandra v. Bhimacharya* (4) *Minakshi v. Virap*: a (5) referred to.

THIS was a suit to set aside an alienation made by the father of the plaintiff on the ground that the father had no right to make it. The defence among others was that the plaintiff was not born at the date of the alienation and could not challenge it. The court of first instance found that the plaintiff was in his mother's womb at the date of the alienation and relying upon *Goura Chaudhraïn v. Chummun*, and the opinion of Golap Chandra Sarkar, (*Hindu Law*, page 210, 4th edition) held that the plaintiff could not question the alienation and dismissed the suit. The lower appellate court confirmed the decree. The plaintiff appealed.

Dr. S. M. Suleman for the appellant:—

A son is allowed to participate in the ancestral property by the mere fact of his birth. It is submitted that "birth" means conception. A son comes into existence as soon as he is conceived, and from that moment he becomes a member of the family. Conception, therefore, gives him a sufficient right to maintain an action to set aside the father's alienation; *Yekeyamian v. Agniswarian* (6); *Strange's Hindu Law*, 182. The case on which the court of first instance relied (*W. R.* 1864, page 340) does not lay down correct

\*Second Appeal No. 1578 of 1913 from a decree of V. N. Mehta, Subordinate Judge of Jaunpur, dated the 25th of June, 1913, confirming a decree of Kesri Narain Chand, city Munsif of Jaunpur, dated the 31st of March, 1913.

(1) (1882) I. L. R., 16 Mad., 76.

(4) (1887) I. L. R., 12 Bom., 105.

(2) (1864) W. R., Gap No. 340.

(5) (1884) I. L. R., 8 Mad., 89.

(3) (1869) 2 B. L. R., 103, F. B.

(6) (1869) 4 Mad. H. C., Rep., 307.

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law ; and it has never been followed. The correct law is laid down in *Ramanna v. Venkata* (1), *Sabapathi v. Somasundaram* (2) *Madho Singh v. Hurmut Ally*, (3) *Jado Singh v. Mussumat Ranee* (4) and *Tulshi Ram v. Babu* (5). Reference was also made to Mayne, 449, Trevelyan, 291. The passage in Sarkar's Hindu Law does not help the defendants. If it is read in the light of cases cited, it means that a son cannot question an alienation unless he is born alive. If he is born alive he has the same right to question an alienation as a son in existence ; *Hanmant Ramchandra v. Bhimacharya* (6).

Babu *Durga Charan Banerji*, for the respondents.

The whole question is whether a child in the womb is a child born. The only reason why he is allowed to question an alienation is that he is a co-owner and an alienation cannot be made except with his consent. Is a child in the womb a co-owner on the date of alienation if subsequently born. There is no doubt that in certain cases, e.g., in cases of succession, partition etcetra his rights will date back to the conception if he is born alive. The cases of alienations should be governed by the principles upon which cases of *bona fide* purchasers are governed.

Dr. *S. M Suleman*, was heard in reply.

RICHARDS, C. J., and BANERJI, J.—The suit which has given rise to this appeal was brought by the plaintiff appellant for a declaration that a sale-deed, dated the 17th of August, 1909, executed by his father Hansraj Singh in favour of Naurang Singh, the predecessor in title of the defendants, is null and void as against the plaintiff. The validity of the sale is questioned on various grounds. The lower court has dismissed the suit on the finding that the plaintiff was born after the date of the sale and is not, therefore, entitled to question its validity. It has further been found that the plaintiff was in his mother's womb when the sale was made, and it is not disputed for the purposes of this appeal that the property sold is ancestral property. The question to be determined in this appeal is whether a son who was in his mother's womb at the date of an alienation by the father, of

(1) (1887) I. L. R., 11 Mad., 246.

(2) (1882) I. L. R., 16 Mad., 76.

(3) N.-W. P., H. C. Rep., 432.

(4) (1873) N.-W. P., H. C. Rep., 113.

(5) (1911) I. L. J., 33 All., 654.

(6) (1878) I. L. R., 12 Bom., 105.

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ancestral property can contest the alienation. The decision of this question depends on the further question whether a son in the mother's womb can be deemed to be a co-owner of joint ancestral property.

Under the *Mitakshara* a son acquires an interest in ancestral property by birth, the reason for the rule being, as pointed out by Mr. Golap Chandra Sarkar in his Work on Hindu Law, page 210, 4th edition, that the father and other ancestors are reproduced in the son. The question is whether birth relates back to the period when the child was in its mother's womb. Under other systems of law, such as the Civil Law and the English Law, a child is deemed for some purposes to be born when it is in its mother's womb. This rule is in several instances recognized by the Hindu law. In the case of succession by a posthumous son he takes a share in his father's property from the date of his father's death, and he is regarded as being in existence though he is only in his mother's womb and not actually born until afterwards. Again, in the case of partition, a son *in utero* at the time of partition is deemed to be in existence and the partition may either be postponed or a share should be set apart for him. (See Strange's Hindu law, page 182, Jolly's Tagore Law Lectures, page 132, *Kalidas Das v. Krishan Chandra Das* (1); Mayne's Hindu Law, section 472, 7th edition). It has also been held that the "rights of a son in the womb could not be defeated by a will made by the father." *Hanmant Ramchandra v. Bhimacharya* (2) and *Minakshi v. Virappa* (3). So that, in the cases of succession, partition and will, a son in the womb has been regarded as one *in esse*. There is nothing to show that in the case of an alienation by sale a different rule obtains. Our attention has not been called to any text of Hindu Law in which an alienation has been excluded from what is deemed to be the general rule. The courts below have relied on a passage in Mr. Golap Chandra Sarkar's Hindu Law, page 210, 4th edition, which is as follows:—"A child in the womb is not entitled to all the rights of a child *in esse*. A son's right of prohibiting an unauthorized alienation by the father, of ancestral property cannot be exercised in favour of an

(1) (1869) 2 B. L. R., 103, F. B.

(2) (1887) 1 L. R., 12 Bom., 105.

(3) (1884) 1 L. R., 8 Mad., 89.

unborn son." The learned author has referred to the case of *Mussamat Goura Chowdhraïn v. Chummun Chowdry* (1) as an authority for the proposition laid down by him. That case no doubt supports his view, but it was dissented from by the Madras High Court in *Sabapathi v. Somasundram* (2). The learned Judges held that "an alienation by a Hindu to a *bona fide* purchaser for value is liable to be set aside by a son who was in his mother's womb at the time of the alienation." In the recent case of *Sri Datla Venkata Subba Raju Garu v. Gatham Venkatrayudu* (3), the same court assumed that a son could contest an alienation made by his father at a time when the son was in his mother's womb. The same view appears to have been adopted by the Bombay High Court. (See West and Buhler's Hindu Law, page 803). We agree with this view. Both on authority and on principle we are of opinion that a son subsequently born alive is competent to contest an alienation made by the father when the son was in the womb. The court below was, therefore, wrong in dismissing the suit on the ground on which it dismissed it. We allow the appeal, set aside the decree of the court below and remand the case to that court with directions to re-admit it under its original number in the register and dispose of the other questions which arise in the case. Costs here and hitherto will be costs in the cause.

*Appeal decreed and cause remanded.*

### FULL BENCH.

*Before Sir Henry Richards, Knight, Chief Justice, Justice Sir Pramada Charan Banerji and Mr. Justice Tudlall.*

LAL BAHADUR SINGH (DEFENDANT) v. ABHARAN SINGH AND OTHERS  
(PLAINTIFFS)\*.

*Act No. IV of 1882 (Transfer of Property Act), section 99—Sale of mortgaged property in contravention of terms of section—Right of representatives of mortgagor to redeem.*

If a mortgagee brings the mortgaged property to sale in contravention of the provisions of section 99 of the Transfer of Property Act, 1882, such sale is not

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\*Second Appeal No. 1530 of 1913, from a decree of B. J. Dalal, District Judge of Benares, dated the 30th of May, 1913, confirming a decree of Partab Singh, Subordinate Judge of Jaunpur, dated the 9th of October, 1912.

(1) [1864] W. B., Gap No. 340. (2) (1892) I. L. R., 16 Mad., 76.

(1914) 27 M. L. J., 560.

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