PRIVY COUNCIL.

P. C.*
1917
April, 17, 24.

33 M 2/42

KAWAL NAIN AND OTHERS (PLAINTIFFS) *v.* BUDH SINGH AND OTHERS (DEFENDANTS).

[On appeal from the High Court of Judicature at Allahabad.]

Hindu law—Partition—Evidence of separation—Institution of suit for partition by members of joint family—Unequivocal expression of intention to separate—Dismissal of suit for partition on technical ground.

Held that the institution of a suit for partition by one of the members of a Hindu joint family governed by the Mitakshara law amounted to an unequivocal desire of the plaintiff for separation, and effected his separation from the joint family. It was immaterial in such a case whether the co-sharers assented. *Girja Bai* v. *Sadashiv Dhundhiraj* (1) followed.

Their Lordships said :—"A decree may be necessary for working out the result of the severance, and for allotting definite shares, but the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate, whether he obtains a consequential judgement or not."

APPEAL No. 140 of 1915, from a judgement and decree (10th of April, 1913) of the High Court at Allahabad, which reversed a judgement and decree (31st of August, 1911) of the Subordinate Judge of Saharanpur.

The suit out of which this appeal arose was instituted by the appellants to enforce a mortgage, dated the 28th of August, 1890, executed by the respondent Prabhu Lal in favour of the predecessor in title of the appellants. The defendants were members of a joint Hindu family governed by the Mitakshara law, of which Budh Singh was the head. Prabhu Lal, however, the eldest son, separated from his father, and in 1890 brought a suit against his father for partition of the property belonging to the joint family, and lived and carried on his business separately. The suit was dismissed on the 19th of July, 1890, on a technical point, and to prevent an appeal by Prabhu Lal the elders of the community to which they belonged intervened and settled the dispute between Prabhu Lal and his father, the settlement being that the $\frac{1}{5}$th share to which Prabhu Lal was entitled was allotted to him separately, and the father's name was allowed to remain recorded for revenue purposes.

* *Present* :—Viscount HALDANE, Lord ATKINSON, Sir JOHN EDGE, Mr. AMEER ALI, and Sir WALTER PHILLIMORE, BART.

(1) (1916) I. L. R., 43 Calc., 1031 : L. R., 43 I. A., 151.

The mortgage in suit was executed by Prabhu Lal as above stated, and he thereby mortgaged the $\frac{1}{5}$th share assigned to him for Rs. 1,500, on the terms therein specified.

The present suit was brought on the 22nd of August, 1910, against Prabhu Lal to recover Rs. 10,000 with interest and costs by sale of the mortgaged properties in default of payment, and the other members of the mortgagor's family were added as defendants. In defence they denied the plaintiffs' claim; their main plea being that Prabhu Lal was a member of a joint and undivided family and was therefore incompetent to alienate his share of the family properties.

The principal issue now material was whether Prabhu Lal was joint with or separate from his father and brothers.

The Subordinate Judge on the evidence decided that issue in the plaintiffs' favour and made a decree in accordance with that conclusion.

On appeal (by Budh Singh alone) the High Court (Sir H. G. RICHARDS, C. J., and P.C. BANERJI, J.) reversed the decree of the Subordinate Judge, mainly on the ground that, if a partition had been effected between Prabhu Lal and his father, a document would have been executed to evidence it, and the fact of the partition would have been expressly stated in the mortgage-deed. They made a decree accordingly dismissing the suit with costs.

On this appeal, which was heard *ex parte*—

De Gruyther, *K. C.*, and *B. Dube* for the appellants contended that Prabhu Lal must be considered to have separated from his father and brothers when by filing a suit he claimed partition of the share to which he was entitled and thereby expressed a declaration of his intention to separate from the joint family. Reference was made to *Girja Bai* v. *Sadashiv Dhundiraj* (1) as governing the present case. The fact that the Court had then wrongly decided that he had no cause of action and therefore dismissed his suit, was immaterial. The High Court regarded the question as being whether actual physical partition had been proved, and held that it had not. The case above cited, which made such proof unnecessary, was not before the High Court, having been decided subsequently to the judgement now under appeal.

(1) (1916) I. L. R., 43 Calc., 1031; L. R., 43 I. A., 151.

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1917, April 24 :—The judgement of their Lordships was delivered by Viscount HALDANE :—

This is an appeal from a judgement of the High Court at Allahabad which reversed a judgement of the Subordinate Judge of Saharanpur. The question which arose was whether a mortgage of certain interests in land was valid, as contended by the appellants, who were the successors in the title of the original mortgagee. The land had been the property of a joint family subject to Mitakshara law, and the controversy turned on whether the respondent Prabhu Lal, the mortgagor, had separated from the joint family before executing the deed, and so rendered himself competent to make a valid hypothecation of the interest which had come to him as a member of the joint family.

Prior to the mortgage, which was dated the 28th of August, 1890, the respondent Prabhu Lal had, on the 6th of April, 1889, commenced a suit for partition. By his plaint he had claimed a fifth share of the family property, and their Lordships entertain no doubt that the claim amounted to an intimation to the defendants, his co-sharers, of the unequivocal desire of the plaintiff for separation from the joint family. If this be so, the judgement of the Judicial Committee in the recent case of *Girja Bai* v. *Sadashiv Dhundhiraj* (1) renders it beyond question that the commencement of this suit for partition effected a separation from the joint family. It is immaterial, in such a case, whether the co-sharers assent. A decree may be necessary for working out the result of the severance and for allotting definite shares, but the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate, whether he obtains a consequential judgement or not.

These considerations are sufficient to dispose of the only serious question raised by the present appeal. Had their Lordships' judgement in the case just referred to been delivered before and not after the judgements now under review, that of the High Court would probably have been different. The Subordinate Judge thought himself bound to examine a number of transactions from which he drew the inference that the members of the joint family had assented to the severance contended for, although a

(1) (1916) I. L. R., 43 Calc., 1031 : L. R., 43 I.A., 151.

complete partition had not been carried out. It was not necessary for him to find so much in order to establish the severance, but the result at which he arrived was right. The High Court, in reversing his decision, proceeded on the footing that no agreement for severance had been established, and that it was necessary that the existence of such an agreement should be shown. This is plainly contrary to the principle as subsequently laid down by this Board in the other case. It has been argued that the suit for partition, commenced by the plaint of 1890, was dismissed and that the plaint was therefore of no effect. Their Lordships cannot assent to this argument. It is true that, in the suit of 1890, the Subordinate Judge dismissed the claim, disbelieving the case put forward in support of it, namely, that the father, who was head of the joint family, had refused to supply his son Prabhu Lal with the funds required to maintain him, and had otherwise ill-treated him. The High Court says that, while this belief was no valid ground for dismissing the claim for partition, it still shows that on the date when the suit was dismissed the family remained joint. It will, however, be observed that the judgement in that suit proceeded on the ground that owing to the age of the father he might have other children and that in consequence the property could not be divided or the plaintiff's share fixed. But, while this was obviously wrong, the judgement on its face concedes that the plaintiff had a right to partition, although no cause of action for an actual partition was regarded as having accrued. It cannot be said that the plaint did not amount to such an expression of intention as to satisfy the conditions of the law as now settled.

Their Lordships have thought it necessary to examine the argument for the appellants in the present appeal with the more care because the respondents have not been represented at the Bar. But they are satisfied that the High Court has given a decision which cannot stand. They will therefore humbly advise His Majesty that this appeal should be allowed and the decree of the Subordinate Judge restored. The respondents must pay the costs here and below. But their Lordships desire to point out that as the personal remedy under the mortgage is probably barred by limitation, the liberty to apply for a personal decree,

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which is given by the decree in accordance with order XXXIV of the Code of Civil Procedure and section 90 of the Transfer of Property Act in the event of the proceeds of a sale proving insufficient, must be subject to the right of the respondents to raise any defence to the personal claim, such as one based on limitation which may prove open to them.

Appeal allowed.

Solicitors for the appellants: *Barrow, Rogers and Nevill.*

J. V. W.

LACHHMAN PRASAD AND OTHERS (PLAINTIFFS) *v.* SARNAM SINGH AND OTHERS (DEFENDANTS).

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33 ML/39

[On appeal from the High Court of Judicature at Allahabad.]

Hindu law—Joint Hindu family—Alienation of joint property of family governed by Mitakshara law—Mortgage not for family necessity or to pay antecedent debt—Suit on mortgage—Non-liability of sons and grandsons of mortgagors.

Where a mortgage had been made by some of the members of a Hindu joint family governed by the Mitakshara law who joined in borrowing Rs. 1,200 on the security of the property of the joint family of which they were the heads without the consent of their co-parceners, and it was found that the mortgage was *primâ facie* invalid as against the family property as being neither for an antecedent debt, nor for any proved necessity of the joint family.

Held that the mortgage could not be upheld on the doctrine laid down in the case of *Mahabeer Prasad* v *Ramyad Singh* (1), which was distinguishable on the ground that there were special circumstances in that case which did not exist in the present case, and it therefore did not lay down the general law.

The general law was laid down in *Madho Parshad* v. *Mehrban Singh* (2), which governed this and all other cases of the kind, and according to those principles the mortgage in suit was invalid as against the sons and grandsons of the mortgagors.

APPEAL No. 19 of 1915, from a judgement and decree (11th of December, 1912) of the High Court at Allahabad, which affirmed a judgement and decree (8th of August, 1911) of the court of the Subordinate Judge of Bareilly.

The main question for determination in this appeal was whether, in a suit brought against a Hindu mortgagor and his

* *Present*:—Viscount HALDANE, Lord ATKINSON, Sir JOHN EDGE, and Mr. AMEER ALI.

(1) (1873) 1 B. L. R., 190: 20 W. R., 192.

(2) (1890) I. L. R., 18 Calc., 157 (163): L.R., 17 I. A., 194 (196.)