Head of his department, but there is no express provision that he shall not do so. We think that it is impossible to argue that this rule by itself is sufficient to make the transfer to the kanungo's wife null and void. Nor do we think, for the reasons stated in our judgement in the connected case, that the transfer can be considered void on the ground of public policy. We, therefore, allow the appeal, set aside the decrees of both the courts below and remand the case to the lower appellate court with directions to re-admit the appeal upon its original number in the file and to proceed to hear and determine the same according to law, having regard to what we have said above. Each side will bear their own costs of this appeal. The other costs will be costs in the cause.

Appeal decreed and cause remanded.

APPELLATE CIVIL.

Before Mr. Justice Walsh and Mr. Justice Sundar Lal.

BHIRGU NATH CHAUBE AND ANOTHER (PLAINTIFFS) v. NARSINGH TIWARI AND ANOTHER (DEFENDANTS),*

1916 *July* 3.

Hindu Law—Sale by father of joint family property without legal necessity—Suit by sons to repudiate the sale—Mesne profits payable by purchaser from date of such repudiation.

Where the father, as manager, alienates joint Hindu family property without legal necessity, and the sons repudiate the sale, a purchaser who had no notice that the father was incompetent to sell the property is in equity only liable to pay mesne profits from the date of such repudiation. *Mugun Chunder Chuttoraj* v. *Surbessur Chuckerbutty* (1), *Dakhina Mohan Roy* v. *Saroda Mohan Roy* (2) and *Grish Chunder Lahiri* v. *Shoshi Shikhareswar Roy* (3) referred to.

THE facts of this case were as follows :—

Certain property belonging to a joint Hindu family consisting of a father and his minor sons was sold in 1900 by the father. The sons, on attaining their majority, brought a suit, in December, 1912, impugning the sale on the ground that it was not justified by any legal necessity and praying for recovery of possession and mesne profits. The father had died before the suit. The claim

*Second Appeal No. 1151 of 1915, from a decree of Muhammad Husain, Subordinate Judge of Ghazipur, dated the 22nd of April, 1915, reversing a decree of Aijaz Husain, Munsif of Muhammadabad, dated the 31st of August, 1914.

(1) (1867) 8 W. R., 479. (2) (1893) I. L. R., 21 Calc., 142.

(3) (1900 I L. R., 27 Calc., 951 ; L. R., 27 I. A., 110.

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for mesne profits was withdrawn with leave to file a fresh suit therefor, and possession was decreed in April, 1913, on the finding that there was no legal necessity for the sale. It did not appear that any portion of the sale price was ordered to be refunded to the vendee. In August, 1914, the sons instituted a suit for the recovery of mesne profits. The court of first instance decreed the suit. The lower appellate court reversed that decree. The plaintiffs appealed to the High Court.

Pandit *Narmadeswar Prasad Upadhia* (for Dr. *Surendra Nath Sen*), for the appellants:—

A purchaser from the managing member of a joint Hindu family knows as a matter of law that the sale is voidable at the instance of the other members if it is made without legal necessity. Here, it has been found that there was no legal necessity. The purchaser ought to have known that his title was defeasible at the will of the sons of the vendor. The question of his *bonâ fides* is immaterial. As was observed in the case of *Mugun Chunder Chuttoraj* v. *Surbessur Chuckerbutty* (1), mesne profits must always be recoverable from the person who has enjoyed them, no matter how ignorant he may have been of the defect in his title. His possession was found to have been without title; he is, therefore, bound to account for the mesne profits received by him from the date of his possession. As to the mode of accounting, some difference is no doubt made between a *bonâ fide* trespasser and a wanton trespasser, as was pointed out in the case of *Dungar Mal* v. *Jai Ram* (2), but as to the liability to account and the time from which the liability begins there is no difference. The avoidance of the sale under which the defendants were in possession made the possession wrongful from the very outset and not merely from the date of the avoidance. During the whole period of the defendants' possession the appellants have been deprived of at least their share of the profits.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the respondents:—

A purchaser in good faith for value from the father and manager of a joint Hindu family is not a person in wrongful possession. The sale by the father was presumably for the benefit

(1) (1867) 8 W. R., 479. (2) (1902) I L. R., 24 All., 376.

of the minor sons. The status of the vendees was very different from that of a trespasser without a shadow of title. This difference between a rank trespasser and one who comes in under colour of a title in good faith was recognized in the matter of the accountability for mesne profits in the Privy Council case of *Dakhina Mohan Roy* v. *Saroda Mohan Roy* (1). The point raised in the case in 8 W. R., 479, was that a *bonâ fide* vendee had his remedy for refund of his sale price with interest against his vendor, and it would be inequitable if he were allowed to retain the profits at the same time. But in the present case no such consideration arises, for the vendor is dead and the vendee cannot under the Hindu Law realize the sale price from the sons.

Pandit *Narmadeswar Prasad Upadhia*, in reply :—

The decision in the case of *Dakhina Mohan Roy* v. *Saroda Mohan Roy* (1), relied upon by the respondents, distinctly lays down that even a *bonâ fide* trespasser is liable to account for the mesne profits received by him ; *vide* page 148 of the report. The only allowance made in his favour was that he could deduct from his collections the Government revenue and other expenses met out of his pocket during the period of his possession.

WALSH, J.—This case is one of some importance and raises in a pronounced form a question of principle which appears never to have been decided by the courts in this country, namely, where a sale has been made by a father and manager of a joint Hindu family, without legal necessity, and the sons afterwards repudiate it and set the transaction aside ; from what date ought the purchaser to be held accountable for mesne profits ?

The defendants in this case purchased certain property from the plaintiffs' father, who was manager of the family property on the 18th of October, 1900. It was property of a joint Hindu family, and the sale was made without legal necessity. The plaintiffs, who are two sons of the vendor, the vendor having died before the institution of the proceeding, brought a suit to set aside the sale shortly after attaining their majority. The transaction was, of course, voidable, and on the 30th of April,

(1) (1893) I. L. R., 21 Calc., 142.

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1913, it was set aside and the plaintiffs obtained a decree for possession. On the 10th of August, 1914, the present suit was instituted for mesne profits. I will deal in a moment with the question of bringing two suits in such a case. The lower appellate court has decreed mesne profits from the date when possession was obtained by the plaintiffs. This is clearly wrong. But it does not follow from that, that the plaintiffs are right. They have brought this appeal in assertion of the principle that mesne profits are payable from the date of the defendants' original purchase. Ordinarily speaking this would be so. It has been found by the court below that the defendants purchased in good faith, if that is the correct expression to use when they take the risk, as they did here, of the sale being subsequently challenged. But it is clear law that the good faith of the defendant is no answer to a claim for mesne profits by a man who has been kept out of his lawful property and has lost the proceeds of it. The purchaser, who has acquired no title against the true owner, has his remedy against his vendor. That was the ground of the decision in an old case reported in *Mugun Chunder Chuttoraj* v. *Surbessur Chuckerbutty* (1), where the purchaser had been deceived by the vendor, and had to pay mesne profits from the date of his purchase. But in my opinion the class of case with which we are now dealing must be treated as an exception to the general rule. The sale need never be avoided unless it is repudiated by a member of the family. The defendants had a title, though a defeasible one. It might be years before the children repudiated, and in any case the sale did not dispossess them of property to which at the time they were entitled in their own right. I think it is the position of the plaintiff, and the existence of their option to avoid the sale, which makes the difference and creates an exception to the general rule. The *bonâ fides* of the defendants is material in the sense that it enables them to avail themselves of the exception, but it does not create it. I think the fair and equitable conclusion is that the possession of the defendants becomes wrongful, and they are therefore answerable to the plaintiffs as from the date of the repudiation by the plaintiffs by the institution of the suit, namely, on the 11th of December, 1912. From that moment

(1) (1867) 8 W. R., 479.

the defendants continue in possession and dispute the claim at their peril. The question appears to be *res integra*. The respondents relied upon what was said by the Privy Council in *Dakhina Mohan Roy* v. *Saroda Mohan Roy* (1). Although the point in that case was quite different and the defendant who had been in possession under a binding order of a competent court was made answerable for what he had actually received with a credit for salvage and expenses, still the principle is recognized that the court is entitled to deal with a question of this kind with a free hand, and to do what seems most in accordance with equity and justice. I would further refer to a *dictum* of the Privy Council in *Grish Chunder Lahiri* v. *Shoshi Shikhareswar Roy* (2) in which Lord HOBHOUSE says:—"Mesne profits are in the nature of damages which the court may mould according to the justice of the case." I am fortified, if not altogether persuaded, in adopting the view I do in this particular matter by the concurrence of Mr. Justice Sundar Lal who has the advantage of his intimate knowledge and experience of what one may call the equitable considerations which arise when persons who deal in joint Hindu family property have to surrender it with a valueless remedy against their vendor or his estate.

I am at a loss to understand why the plaintiffs were allowed in their original suit for cancellation of the deed to drop this claim and bring a second action against the defendants. They were allowed to do so by the court, otherwise the second suit would have been altogether barred, so there is nothing to be said on the question of right. But presumably they did it for their own purposes. I think such procedure should be severely discountenanced. And although I would allow the appeal to the extent of modifying the decree of the court below by giving the plaintiffs mesne profits from the 11th of December, 1912, I think they ought to have no costs either of the suit or of the appeal.

SUNDAR LAL, J.—I am of the same opinion. The sale by the father and manager of a joint Hindu family is not necessarily void, though it may be avoided on certain grounds by other members of the family. It may be a sale advantageous to the family,

(1) (1893) I. L. R., 21 Calc., 142. (2) (1900) I. L. R., 27 Calc., 951; L. R., 27 I. A., 110.

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though not for a legal necessity, which the minor members of the family may decide to adhere to. Sales like this are frequently made in good faith by the head of the family. Until avoided I think the sale holds good. The plaintiffs avoided the sale-deed by their suit filed on the 11th of December, 1912. They obtained a decree for possession. The claim for mesne profits is subject to equities in favour of the purchaser, and in many cases the courts in this country have made the price paid by the purchaser a charge on the vendor's share of the property and given to the plaintiffs a decree for possession of their share of the property as separate property. In this case I think the plaintiffs were entitled to avoid the sale-deed and to obtain mesne profits from the date on which they gave notice of their option to avoid it to the purchaser. That date in this case is the 11th of December, 1912, and I think that it is from that date the plaintiffs are entitled to mesne profits. In an ordinary Hindu family no member of a joint family is entitled to an account from the head of the family and the plaintiffs would not have been entitled to obtain an account of their share of the profits from the father, nor are mesne profits awarded in a partition suit except under very exceptional circumstances. I think where the purchaser from the head of a family has purchased in good faith the property, he is entitled to treat the sale as binding until one of the members of the family exercises his option to avoid it, and on that ground I agree entirely in the judgement just pronounced by my brother Mr. Justice WALSH.

BY THE COURT.—We allow the appeal, reverse the decree of the lower appellate court, and the give the plaintiffs a decree for mesne profits from the 11th of December, 1912, until possession was given up to the plaintiffs, *viz.*, the 23rd of December, 1913. Each party will pay his own costs of the suit in all courts, and of this appeal. We remand the case under order XLI, rule 23, to the lower appellate court to ascertain the correct sum of mesne profits on the basis of this decree. The term mesne profits is to exclude any sum for interest.

Appeal allowed and cause remanded.