Before Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

RAM SAHAI AND OTHERS (DEFENDANTS) *v.* PARBHU DAYAL (PLAINTIFF).*

1921
May, 12.

Hindu law—Mitakshara—Joint ancestral property—Sale by father without legal necessity—Suit by son to set aside sale—Purchaser not entitled to a lien on the father's share for return of the purchase money.

The father in a joint Hindu family, consisting of himself and one son, sold some of the joint ancestral property. The son sued to have the sale set aside. It was found that there existed legal necessity to support the sale only in respect of Rs. 350 out of a total consideration of Rs. 1,500, and the plaintiff was given a decree for possession of the property subject to the payment of that sum.

Held that, whatever relief the defendants vendees might be entitled to against the father, they were not entitled to any charge against the undivided share of the father in the joint family property in respect of the balance of the purchase money. *Kali Shankar* v. *Nawab Singh* (1), *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (2), *Balgobind Das* v. *Narain Lal* (3), *Anant Ram* v. *Collector of Etah* (4), *Madho Parshad* v. *Mehrban Singh* (5), and *Lachhman Prasad* v. *Sarnam Singh* (6), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *A. P. Dube*, for the appellants.

Mr. *N. C. Vaish*, for the respondent.

LINDSAY and KANHAIYA LAL, JJ.:—The plaintiff is the son of Ajudhia Prasad and seeks to impeach the sale of certain property, effected by the latter in favour of Ram Sahai, Musammat Mathura, the wife of Ram Sahai, and Nathu Ram, a minor relative of theirs, on the 22nd of April, 1913. The sale was effected in lieu of Rs. 1,500, out of which Rs. 238 were to be credited towards certain prior oral debts, Rs. 312 were to be credited towards a prior unregistered bond of the 25th of February, 1913, and Rs. 950 were paid before the sub-registrar.

The property sold was the ancestral property of the family to which the plaintiff and his father, Ajudhia Prasad, belong. The allegation of the plaintiff was that the sale in question was made without any legal necessity, and that it was fictitious and without consideration. The court of first instance found that

* Second Appeal No. 283 of 1919 from a decree of H. J. Bell, District Judge of Jhansi, dated the 9th of November, 1918, modifying a decree of Ladli Prasad, Subordinate Judge of Jhansi, dated the 10th of June, 1918.

(1) (1909) I. L. R., 31 All., 507.
(2) (1879) I. L. R., 5 Calc., 148.
(3) (1893) I. L. R., 15 All., 339.
(4) (1917) I. L. R., 40 All., 171.
(5) (1890) I. L. R., 18 Calc., 157.
(6) (1917) I. L. R., 39 All., 500.

1921

RAM SAHAI v. PARBHU DAYAL.

out of the sum of Rs. 950 paid before the sub-registrar, Rs. 272 had been taken for legal necessity, that the previous debts specified in the sale-deed were fictitious, and that the balance of the sale consideration was not taken for any family purposes. The lower appellate court, however, held that Rs. 350 had been taken for legal necessity. A decree in favour of the plaintiff for possession of the property subject to the payment of the said amount followed.

The main point urged on behalf of the defendants appellants is that in view of the fact that Rs. 950 had actually been paid to Ajudhia Prasad, the father of the plaintiff respondent, the sale ought not to have been set aside without protecting the rights of the defendants vendees.in regard to that portion of the consideration which was found not to have been taken for legal necessity, by making it a charge on the share of Ajudhia Prasad in the family property comprised in the sale. On their behalf reliance is placed on the decisions in *Mahabeer Prasad* v. *Ramyad Singh* (1) and *Jamna Parshad* v. *Ganga Pershad* (2), but in each of those cases the sale in question had been effected in execution of a decree, to which, as held by their Lordships of the Privy Council in *Deendyal Lal* v. *Jugdeep Narain Singh* (3), different considerations were applicable. The rules governing an auction sale in execution of a decree are not necessarily identical with those applicable to a voluntary sale. The decision in *Bunwari Lal* v. *Daya Shankar Misser* (4) has also been relied on, but in that case the disputed property had been purchased in the name of the person who had afterwards made the transfer, and it was held that he was bound to make good to the purchaser the representation he made that he had a power to charge the same.

In *Kali Shankar* v. *Nawab Singh* (5) the view taken by this Court was that a member of a joint Hindu family governed by the Mitakshara could not validly mortgage his undivided share in ancestral property held in co-parcenary on his own private account without the consent of his co-sharers. Where a

(1) (1873) 12 B. L. R., 90.
(2) (1892) I. L. R., 19 Calc., 401.
(3) (1877) I. L. R., 3 Calc., 198.
(4) (1909) 13 C. W. N., 815.
(5) (1909) I. L. R., 31 All., 507.

father in such a family mortgaged the ancestral property, neither for a lawful family necessity nor for an antecedent debt, it was held that such a mortgage could not be enforced even against the share of the father.

The guiding principle applicable to cases of that kind has been laid down by the Privy Council in *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (1), where Sir JAMES COLVILE, who delivered the judgment of their Lordships, stated that all were agreed that the alienation of any portion of the joint estate, without an express or implied authority of the co-parceners, might be impeached by the latter, and that such an authority would be implied, at least in the case of minors, if it was shown that the alienation was made by the managing member of the family for legitimate family purposes. In *Balgobind Das* v. *Narain Lal* (2) their Lordships of the Privy Council similarly laid down that an undivided share in an ancestral estate held by a member of a joint family could not be mortgaged by him on his own private account without the consent of those who shared the joint estate.

The present plaintiff was a minor at the time of the sale, and as the sale in question was not made for lawful family purposes, except to the extent of a small portion of the consideration, no question of implied authority arises. He is not bound by the sale effected by his father on his private account, and any equities which may be available to the vendees against the father are not enforceable as against him.

It is urged on behalf of the defendants appellants that the effect of setting aside the sale in its entirety without creating a charge in respect of the balance of the consideration money on the share of the father would be that the son and the father would get the benefit of the entire joint property, as if no money had been obtained on its security by the latter. But if that argument be accepted, the result would be that a charge, which a member of a joint Hindu family is not competent to create, except for certain purposes, will have to be recognized as partially valid and enforceable; and the protection which the law intended to afford against an alienation of joint family property by one

(1) (1879) I. L. R., 5 Calc., 148 (165). (2) (1893) I. L. R., 15 All., 339.

1921

RAM SAHAI v. PARBHU DAYAL.

member without the consent of the other members would be frustrated.

In *Anant Ram* v. *Collector of Etah* (1) it was held that where family necessity could not be established by direct evidence it might be assumed, if it could be shown that reasonable care had been taken to ascertain the existence of circumstances which justified the transfer and the transferee had acted in good faith, and that in any other event the transfer would not be enforceable even against the share of the transferor. The reason is obvious. Till a separation or partition is effected, it is not open to any member of a joint Hindu family to predicate in respect of the joint family property that he owns a definite share or specified interest therein; and if he does not own any definite share or specified interest therein, he is not competent to transfer what he might be entitled to at the time of separation or partition, if he survived. No decree can, therefore, be granted to a person who purchases the rights of such a member, permitting him either to sue for partition, as if the transfer had not been invalid, or to claim a charge on the property so transferred to him.

In *Madho Parshad* v. *Mehrban Singh* (2) their Lordships of the Privy Council referred to the decision in *Mahabeer Parsad* v. *Ramyad Singh* (3), but did not consider it necessary to decide whether if the transferor had been still alive, and so entitled to resume his undivided share on the cancellation of the sale, it would have been possible to allow the vendee a charge on his share for the amount paid by him on account of the consideration of the sale. But in *Lachhman Prasad* v. *Sarnam Singh* (4) their Lordships made certain observations pointing out the limits beyond which the decision in that case could in no circumstances be carried. They observed:—"Whether that particular case was rightly decided or not it is not necessary to consider here, because the learned Judges proceeded upon the footing that there had been the representation referred to. On looking at the facts, their Lordships agree with the observation of Mr. *Parikh* that there was very little, if any, evidence of such a representation, but that there was such a representation

(1) (1917) I. L. R., 40 All., 171. (3) (1878) 12 B. L. R., 90.

(2) (1890) I. L. R., 18 Calc., 157. (4) (1917) I. L. R., 39 All., 500.

was the basis of the judgment, and, unless the learned Judges had held that an equity arose out of it, their judgment would have amounted to this, that for every mortgage by the head of a joint family the property of the joint family could be made available to the extent of the interest of the mortgagor. Now, whatever may happen when there are special circumstances such as there were in the case referred to, that is not the genera law." Then they proceeded to describe the general law which, they said, was quite plainly laid down by Lord WATSON in *Madho Parshad* v. *Mehrban Singh* (1) as follows :—" Any one of several members of a joint family is entitled to require partition of ancestral property, and his demand to that effect, if it be not complied with, can be enforced by legal process. So long as his interest is indefinite, he is not in a position to dispose of it at his own hand and for his own purposes ; but as soon as partition is made, he becomes the sole owner of his share and has the same powers of disposal as if it had been his acquired property."

Applying those principles, they came to the conclusion that there could be no doubt that the mortgage in question was wholly void. Section 38 of the Transfer of Property Act (IV of 1882) now codifies the law under which representations made in certain circumstances can bind persons other than those who made them.

In the present case there is no proof that any such representation had been made by the transferor. There was no other member in the family except the plaintiff and his father; and the plaintiff was then and is still a minor. There are no circumstances alleged which can justify an enforcement of the equity claimed on behalf of the defendants appellants. The defendants might be entitled to some remedy against the transferor, but they are not entitled to enforce it in this suit.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(1) (1890) I. L. R., 18 Calc., 157.