PRIVY COUNCIL.

J.C.*
June, 22.
1926

MASIT ULLAH AND OTHERS (DEFENDANTS) *v.* DAMODAR PRASAD (PLAINTIFF).

[On Appeal from the High Court at Allahabad.]

Hindu law—Joint family property—Alienation by father—Suit to set aside alienation—Liability for debt of great-grandfather.

A Hindu governed by the Mitakshara is liable for the debt of his great-grandfather in the same manner as he is liable for the debt of his father or grandfather.

The son of a Hindu governed by the Mitakshara sued to set aside a sale for Rs. 18,400, of joint family property by his father, who was made a defendant. It appeared that the whole of the consideration, except about Rs. 2,000, had been applied by the father to discharge mortgages made by his grandfather. There was no evidence that the balance had been used by the father for immoral or unauthorized purposes.

Held that the suit should be dismissed, as the plaintiff was liable for his great-grandfather's debt, and the father, who was in collusion with his son, had deliberately withheld his evidence which would have shown how the rest of the consideration had been applied.

APPEAL (No. 28 of 1925) from a decree of the High Court (June 20, 1922) varying a decree of the Subordinate Judge of Moradabad. The suit was instituted by the respondent to set aside a sale made by his father, Janki Prasad, in 1906 of joint family property for Rs. 18,400. The purchasers, from whom the property was claimed, and Janki Prasad were made defendants. The appellants, the purchasers, pleaded, among other pleas, that the sale was for necessity, and in satisfaction of antecedent debts.

Jawahir Lal, the grandfather of Janki Prasad, had mortgaged the property in 1895 for Rs. 11,000 to Abid Ali Khan; and in 1903 had executed further

* *Present*: Lord BLANESBURGH, Lord DARLING, Mr. AMEER ALI and Lord SALVESEN.

mortgages in favour of Sri Ram and Ganeshi Lal. It was concurrently found by both Courts in India that out of the consideration money Rs. 12,900 was applied to discharge the first of the above mortgages, and Rs. 3,122 to discharge the two mortgages last mentioned, which both Courts found were made for legal necessity.

The decrees made by the Subordinate Judge and by the High Court on appeal appear from the judgement of the Judicial Committee in which the facts are more fully stated. The learned Judges on appeal (MEARS, C. J. and PIGGOTT, J.) were of opinion that the payment of Rs. 12,900 to discharge the mortgage by Jawahir Lal could not be treated as for necessity, as although Janki Prasad was under an obligation to discharge the debt of his grandfather, the plaintiff was not under an obligation to discharge the debt of his great-grandfather.

1926. March, 23. *De Gruyther, K. C.* and *Abdul Majid* for the appellants.

[The respondent did not appear.]

June, 22. The judgement of their Lordships was delivered by Mr. AMEER ALI) :—

This appeal arises out of a suit brought by the plaintiff Damodar Prasad on the 19th of September, 1918, to set aside an alienation effected by his father Janki Prasad on the 17th of September, 1906. Damodar Prasad the plaintiff is a member of a Hindu family subject to the Mitakshara law, and the allegations on which he seeks to have the sale by his father set aside are, in the common form, alleged immorality of the father, jointness of the family, and the absence of necessity for the sale which is sought to be set aside. The plaintiff made his father Janki Prasad a defendant in the suit. Originally he was defendant No. 6,

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but, after the addition of the representatives of some of the vendees who had died in the meantime, Janki Prasad was made defendant No. 11.

In his plaint the plaintiff prayed to be put in proprietary possession of the property in suit and for mesne profits. In their answer to the plaintiff's claim the defendants denied that the property was ancestral and they alleged that it was sold to them for Rs. 18,400, which was applied for family purposes, and that the alienation was valid in law and binding on the plaintiff.

The suit came for trial before the Subordinate Judge of Moradabad who, on the 25th of February, 1920, held *inter alia* that the plaintiff had failed to prove absolutely the allegations made by him against his father of immorality; he held also that it had been established that out of the Rs. 18,400 over Rs. 16,000 had been applied to the discharge of ancestral debts, the payment of which was binding on the joint family of which the plaintiff was a member. He held further that Janki Prasad, the grandson of Jawahir Lal who had contracted the debts that had been discharged out of the sale proceeds, was "competent to transfer the family property to discharge his deceased grandfather's debts which were not proved in the case to have been taken for any immoral purposes." He also held that Damodar Prasad, the great-grandson of Jawahir Lal, was burdened with the same obligation that lay upon Janki Prasad. But the Subordinate Judge found that out of the consideration of Rs. 18,400 a sum of Rs. 2,000 odd was not properly accounted for, and that in respect of that amount the plaintiff was under no obligation. He found also that Janki Prasad, on the 9th of July, 1907, transferred his half share in the family property to the plaintiff

his son for a consideration of Rs. 40,000 and that, although the plaintiff was a minor at the time of this transfer, on attaining majority he ratified the transaction. The Subordinate Judge considered that this transfer had the effect of "disrupting" the joint family and that, after this transfer of 1907, the plaintiff and Janki Prasad could not be taken to be "members of a joint Hindu family owning joint property in the true sense of the word in Hindu law." He accordingly held that the sale deed impugned in the case could not be set aside as the major portion of the consideration was used in the discharge of legal debts. The only relief the plaintiff was entitled to was to have "a proportionate property released from the sale deed and only to the extent of his share." He dismissed the claim for mesne profits considering that the claim was unduly delayed. He accordingly made a decree in the following terms:—"The plaintiff's claim is decreed for recovery of certain specified share in the property in suit."

The plaintiff appealed to the High Court of Allahabad. The learned Judges considered that the decree the Subordinate Judge had made was unworkable, and in this view their Lordships agree; but the High Court took a totally different view regarding the liability of the plaintiff in respect of the ancestral debts for which the property had been alienated by his father Janki Prasad, and principally, in this view of the case, the learned Judges came to the conclusion that Damodar Prasad was not liable for anything more than Rs. 3,077, which was actually left in the hands of the vendees for payment to certain creditors of Jawahir Lal, and which had been proved to have been paid to these men by the vendees. The High Court agreed with the Subordinate Judge in the conclusion that Janki Prasad's transfer of 1907 to his

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son effected a partition between them and they accordingly made the following order in the case :—

"The result is that the plaintiff is entitled to a decree directing that he may recover possession of one-half of the property specified at the foot of the plaint, subject to payment into court for the benefit of the defendant's vendees of a sum of Rs. 1,561-2-6. We allow him two months from the date of this decree to pay that money into court. If he fails to do so, his suit will stand dismissed with costs throughout. If payment is made as directed the plaintiff will be entitled to recover possession. In the view which we take regarding the nature of the suit as a whole, and its conduct in the court below, with reference more particularly to the non-appearance of Janki Prasad in the witness box and the numerous indications on the record that the plaintiff and his father are really hand and glove in this matter, we do not think that we ought to allow the parties any costs. The parties will, therefore, bear their own costs in this Court and in the court below. This decree will be substituted for the decree of the trial court which is hereby set aside."

The defendants have appealed from the decree of the High Court to His Majesty in Council.

It is to be regretted that the respondent does not appear on this appeal. Their Lordships, however, have given their best consideration to the case and minutely examined the authorities.

The principal point for determination relates to the position of the great-grandson with regard to the obligation resting in a Mitakshara family on descendants to liquidate the debts of the ancestor.

It is beyond question that under the law of the Mitakshara the great-grandson is as much a member of the joint family as a son or grandson.

It is also clear that the right in ancestral property extends to four generations beginning with the father, and that this right springs from "birth" [the Mitakshara, Chapter I, verse 27; the *Viramitrodaya*

(Shastri's Translation), pp. 16 and 72]. Professor Sarvadhikari in his Lectures on Hindu Law, p. 563, points out that there is absolute consensus among the commentators on the subject of the great-grandson's interest in ancestral property.

Under the law of the Mitakshara the rights of descendants are co-extensive with their obligations. Sons and grandsons are expressly declared to have controlling rights in respect of ancestral estate. Vijnaneswara in Chapter I, Section I, verse 27, declares as follows :—

"Therefore it is a settled point that property in the paternal or ancestral estate is by birth, although the father has independent power in the disposal of effects other than immovables, for indispensable acts of duty and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress and so forth; but he is subject to the control of his sons and the rest in regard to the immovable estate, whether acquired by himself or inherited from his father or other predecessor."

In Section V, verse 9, the grandson is declared to have the same right as the son :

"So likewise the grandson has a right of prohibition, if his unseparated father is making a donation, or a sale of effects inherited from the grandfather; but he has no right of interference if the effects were acquired by the father. On the contrary, he must acquiesce, because he is dependant."

Their Lordships will consider presently whether there is any difference in principle between the rights and obligations of grandsons and of great-grandsons.

Mr. Mayne, in his valuable treatise on Hindu Law, has summarized the rules of the Mitakshara relating to the rights of sons and other descendants as follows :—" The question in each case will be 'Who are the persons who have taken an interest in the property by birth?' The answer will be that they are

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the persons who offer the funeral cake to the owner of the property. That is to say, the three generations next to the owner in unbroken male descent. Therefore, if a man has living sons, grandsons and great-grandsons, all of these constitute a single co-parcenership with himself. Every one of these descendants is entitled to offer the funeral cake to him and therefore every one of them obtains by birth an interest in his property." And the author then proceeds to add, "the sons of the great-grandsons would not offer the cake and therefore are out of the co-parcenership so long as the common ancestor is alive."

In the case of *Lachman Das* v. *Khunnu Lal* (1) a Full Bench of the Allahabad High Court have held that on a mortgage by a Hindu, subject to the Mitakshara, of joint ancestral property the sons and grandsons of the mortgagor were equally liable for the interest secured by the mortgage in addition to the principal amount. The learned Judges in that case considered that, although the law of the Mitakshara made a certain distinction in the liability of the son and grandson with regard to ancestral debts, such distinction was not recognized by the British Indian Courts out of the Bombay Presidency. The question of the great-grandson's liability did not form the subject of discussion in that case; the enunciation was, therefore, confined to the obligation of a grandson.

The High Court of Allahabad, in the present case, seems to have thought that the Hindu law did not extend the liability for the payment of ancestral debts beyond the grandson. That conclusion seems to be wrong. The law of the Mitakshara proceeds on a logical basis; rights are created by birth up to the third generation, viz., son, grandson and great-grandson; the son of a grandson is entitled equally with

(1) (1896) I.L.R., 19 All., 26.

his father to question the validity of debts contracted by the ancestor after his birth. His obligation to discharge the valid debts of that ancestor is therefore, co-extensive with the rights. This view is supported, not only by the principle on which the liability of the descendants is based, but by express rules. Mitra Misra (the author of the *Viramitrodaya*) states the rule thus :—" The term 'sonless' used in the text (on succession)—such as 'The wife and the daughters also etc.'—indicated the default of the grandson and the great-grandson also. The succession of the wife is proper only in default of male issue down to the great-grandson. For the duty of the grandsons, too, to pay off the debts is declared in the text. 'The debts ought to be liquidated by the sons and grandsons (*putra-pautrais*); but if any one else were to take the estate in spite of the grandson, then the declaration of the grandson's liability to discharge the debts would be unreasonable, since by reason of the text—'The heir to the estate of a person shall be compelled to liquidate his debts,'—he alone who takes the estate is declared liable to discharge the debts. If it be argued that the grandson is included under the term 'gentiles' and as such may take the estate, then in that case there would be no use for the special provision regarding the grandson's liability to discharge the debts; since it would follow from the text alone, viz. : 'The heir to the estate of a person shall be compelled to liquidate his debts.'—If it be said that the grandsons are liable in the same way as sons to liquidate the debts, although they do not get the grandfather's estate, then *a fortiori* it follows that when property is left by the grandfather, the right of any others than the grandson ought not to take place. The same reason applies to the great-grandson also.'

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Then after discussing the meaning of the words *putra-pautrais*, he proceeds thus :—" Accordingly, the different sorts of provisions for the liquidation of the debts by the great-grandsons as distinguished from the same by the grandsons, and by the grandsons as distinguished from the same by the sons, become consistent with reason. Otherwise there would arise the objection of assuming a peculiar provision so far as regards the great-grandsons."

Again Vijnaneswara, commenting on the following enunciation of Yajnavalkya [II, 50 (*a*)]—" The father being gone to a foreign country or deceased (naturally or civilly) or afflicted with an incurable disease, the sons or their sons must pay his debt, but, if disputed, it must be proved by witnesses,"—states that " Brihaspati says : ' The sons must pay the debts of their father when proved as if it were their own (*i.e.*, with interest); the grandson has to pay only the principal, while the great-grandson shall not be compelled to pay anything unless he have assets.' " (1).

The Hindu lawyers appear to have made a difference in the obligations resting upon sons, grandsons and great-grandsons. The son was bound to discharge the ancestral debt as his own, principal and interest, whether he received any assets or not from the ancestor. The grandsons had to discharge the debt without interest and the great grandson's liability arose only if he received any assets from the ancestor.

The British Indian Courts have held that the son and grandson are not liable for any debt unless they receive assets and that the obligations of each of them, sons and grandsons, are co-extensive. In the case of *Brij Narain* v. *Mangal Prasad* (2) the son's liability is expressly laid down, and their Lordships think that

(1) West and Bühler's Hindu Law (3rd Edn.), Vol. II, pp. 1241-1242.
(2) (1923) I.L.R., 46 All., 95: L.R., 51 I.A., 129

that rule extends equally to grandsons and great-grandsons.

In the present case it is amply proved that in 1901 Jawahir Lal borrowed on a mortgage Rs. 11,000 from one Abid Ali Khan and that in 1903 he similarly borrowed over Rs. 3,000 from certain people of the name of Sri Ram and Ganeshi Lal. Jawahir Lal appears to have died after 1903, and Janki Prasad, his grandson, became manager of the ancestral estate. In 1906 he sold the property now in suit to the defendants for Rs. 18,400. It is established to the satisfaction of both the Courts in India that out of the consideration for the sale Rs. 3,000 odd went to the discharge of the debts due to Sri Ram and Ganeshi Lal. The Subordinate Judge has found on the evidence that a large portion of the said consideration amounting to Rs. 12,700 was applied by Janki Prasad to the discharge of the debt due to Abid Ali Khan. A certain balance was left outstanding and the mortgagee brought a suit against Janki Prasad and Damodar Prasad, the plaintiff, for the balance. The plaint in that suit is Exhibit E. It states that "Rs. 3,072-13-0, principal and Rs. 935-3-0, interest, in all Rs. 4,008 was still due to the plaintiffs from the defendants and the property mortgaged, after deducting Rs. 12,700 which the plaintiff had received." It goes on to state further that "about six years ago, Lala Jawahir Lal, the principal mortgagor, died. Defendant No. 1 is his grandson, and defendant No. 2 his great-grandson; and the family of all the above-mentioned three men was a joint Hindu family, and debt was contracted for family necessity. Now the defendants are in possession of the hypothecated property and liable for payment of the debt."

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On this claim a decree was made against Janki Prasad and Damodar Prasad for the sum of Rs. 4,614, and, on the 14th of July, 1914, Janki Prasad put in an application depositing that amount.

Counsel for the appellants was quite justified in laying stress on this application as showing that Janki Prasad and Damodar Prasad never questioned in that suit the legality of the mortgage to Abid Ali Khan and accepted the full benefit of the discharge of Abid Ali Khan's mortgage.

Their Lordships are of opinion that the view taken by the High Court regarding the obligation of the great-grandson to pay the debt of the ancestor is not well-founded in law. In this case the recognized obligation resting on the grandson was accepted by Janki Prasad. He had discharged the debt, which he was bound to do, and, in their Lordships' opinion, his son could not turn round to say that it had been invalidly discharged. Their Lordships are of opinion that it has been amply proved in this case that the sum of Rs. 12,700 was applied to the payment of Abid Ali Khan's mortgage.

The only sum that was left unaccounted for was Rs. 2,000 odd, as found by the Subordinate Judge. Janki Prasad, the plaintiff's father, admittedly received the whole consideration, and he was the man who used the largest part of the money for the discharge of the ancestral debts. He could have told in his evidence how the sum of Rs. 2,000 was applied. There is no evidence that it was used for immoral or unauthorized purposes. His testimony was therefore most material in the case. Efforts were made to get him into the witness box, but he studiously avoided appearing in court. The Subordinate Judge says father and son were living together at the time, and he

surmised that he was in collusion with his son. In this view the learned Judges of the High Court appear to agree. Their Lordships have no doubt on the facts that the present action is a collusive one, that the testimony of Janki Prasad as to the application of the balance of Rs. 2,000 was deliberately withheld, and that the transfer in 1907 by the father to the son was equally collusive.

In their Lordships' judgement, the ruling in *Vadivelam Pillai* v. *Natesam Pillai* (1) does not apply to the facts of this case.

On the whole case, their Lordships are of opinion that the judgement and decree of the High Court should be set aside and the plaintiff's suit dismissed with costs in all the Courts, and they will humbly advise His Majesty accordingly. The respondents will pay the costs of this appeal.

Solicitor for appellants: *H. S. L. Polak.*

NIRMAN SINGH AND OTHERS (PLAINTIFFS) *v.* LAL RUDRA PARTAB NARAIN SINGH AND OTHERS (DEFENDANTS).*

J.C.*
July, 1.
1926

[On Appeal from the Court of the Judicial Commissioner of Oudh.]

Act No. IX of 1908 (Indian Limitation Act) schedule I, article 127—Suit for partition—Exclusion from joint family property—Mutation proceedings—Absence of judicial determination of title—Receipt of maintenance.

In 1882, on the death of a Hindu leaving three sons, mutation proceedings took place in which the eldest son contended that he was entitled to be recorded as sole owner. An order was made that he be recorded as lambardar, and on appeal an entry of his younger brothers as co-sharers was

* *Present*: Viscount DUNEDIN, Lord ATKINSON, and Mr. AMEER ALI.

(1) (1912) I.L.R., 37 Mad., 435.