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August

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

GAYA DIN (DEFENDANT) *v.* RAJ BANSI KUAR AND ANOTHER (PLAINTIFFS)*

Hindu Law—Mitakshara—Mortgage of Joint ancestral Property by Father—Sale of property in execution of a decree against Father—Son's Right.

The ancestral estate of a joint Hindu family, consisting of a father and his minor son, was mortgaged by the father, as the head of the family and manager of the estate, as security for the repayment of moneys borrowed for the use and benefit of the family. The lender of these moneys sued the father to recover them by the sale of the estate, and obtained a decree against him directing its sale, and sought to bring the estate to sale in the execution of such decree. *Held*, in a suit by the minor son to protect his share in the estate from sale in the execution of such decree, that, the suit in which such decree was made, and such decree, being regarded as a suit against the father, and as a decree made against him as representing the family, such decree might be executed against the estate, notwithstanding the minor son had not formally been joined as a defendant in such suit. *Bissessur Lal Sahoo* v *Luchmessur Singh* (1) followed: *Deendyal Lal* v. *Jugdeep Narain Singh* (2) distinguished (3).

THIS was a suit in which the plaintiff Raj Bansi Kuar claimed for herself a declaration of proprietary right to a two-anna share of a village called Dakhangaon, and for her minor son a similar declaration to a fourteen-anna share of that village, "by reason of such property being advertized for sale in satisfaction of an illegal demand." It appeared that Ramphal Lal, the husband of the female plaintiff, and father of the minor plaintiff, who at the time this suit was brought was alive, had on the 7th December, 1867, given Gaya Din and Mata Din, defendants in this suit, a bond for the payment of Rs. 2,800, with interest, on the 3rd June, 1871, hypothecating mauza Dakhangaon, described as belonging to him exclusively, as collateral security for the payment of such moneys. The obligees sued Ramphal Lal on this bond, and, on the 20th September, 1877, obtained a decree against him for the amount claimed thereunder, "by enforcement of the hypothecation and auction-sale of the hypothecated property." In the execution of this decree Dakhangaon was attached, and advertized for sale on the 20th December, 1878. The plaintiff Raj

* First Appeal, No. 46 of 1879, from a decree of Rai Bhagwan Prasad, Subordinate Judge of Azamgarh, dated the 28th February, 1879.

(1) L. R., 1 Ind. Ap., 233; 5 Calc. L. R., 477.

(2) I. L. R., 3 Calc., 198.

(3) See also *Deva Singh* v. *Ram Manohar*, I. L. R., 2 All., 746.

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Bansi Kuar objected to the sale, claiming the property as belonging to herself and the minor plaintiff under a partition made in 1866. The objection having been disallowed, the present suit was instituted by the plaintiffs against the obligees of the bond, the decree-holders, and Ramphal Lal, the judgment-debtor. The plaintiffs stated in their written statement as follows:—"According to the doctrines of the Hindu law, and the reliable authority of the Mitakshara, which is current in these Provinces, the father, the son, and the grandson have equal rights as heirs in the ancestral estate. No co-parcener in the ancestral family estate has a right to transfer, waste, or pledge an ancestral property so as to put it in jeopardy, without any necessity recognized by the Hindu law, or without the consent of the members of the family. In spite of all these considerations, the judgment-debtor, during the lifetime of his father (who was manager of the ancestral estate and responsible for the maintenance of the family, and for the discharge of the necessary obligations), hypothecated the entire mauza Dakhangaon, one of the ancestral properties, the subject of the suit, as security for an illegal debt personally contracted by him with the creditors without any legal necessity, without the consent, knowledge, and participation of the other members of the family, and without having any right or power to do so. Twelve years ago, before the debt due to the defendants, creditors, had come into existence, a partition of the ancestral property took place among the members of the family, during the lifetime of the grandfather of the minor, by reason of the misconduct and extravagance of the judgment-debtor; and a two-anna share of mauza Dakhangaon and a one-anna share of mauza Tikuria was assigned to the female plaintiff, and the remaining three annas of Tikuria aforesaid and fourteen annas of Dakhangaon to the minor, the rent-free land in Khas Mahál being awarded to the judgment-debtor for his own personal maintenance. According to that partition, the parties are up to this time in possession. The defendants, creditors, brought a suit on their bond for the aforesaid debt, which had not been contracted in good faith, against the judgment-debtor and the hypothecated property, and having obtained a decree wished to bring to sale, as the judgment-debtor's property, the entire ancestral estate. Thereupon, the plaintiff brought forward her objections, which eventually were allowed in respect of mauza Tikuria, by admitting the

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partition and possession, but disallowed summarily as regards Dakhangaon, notwithstanding the partition having taken place before the debt due to the creditors had come into existence. At the time of execution of the bond, the judgment-debtor was neither an absolute proprietor nor manager of the property, nor was he responsible for maintenance of the members of the family and household or for the discharge of the necessary obligations connected therewith. Under these circumstances, he was not authorized to pledge the estate of Dakhangaon as security for his own illegal personal debt. His act was unwarranted and contrary to the principles of the Hindu law. Neither the plaintiff nor other legal heirs are debtors under the decree, nor have they benefited by the debt. The debt was not contracted for any legitimate necessity with the consent of the members of the family, nor was the judgment-debtor, at the time they came into existence, a manager or superintendent of the ancestral property or responsible for the maintenance of the family and for the discharge of legal obligations connected with it. Under these circumstances, the property in suit, which is an undivided ancestral estate, partly in possession of the plaintiffs and partly in that of the judgment-debtor, as a life tenure, is not, according to Hindu or statutory law, liable to be sold in satisfaction of the demand of the creditors." The defendants Mata Din and Gaya Din stated in answer to the suit as follows:—"No partition of shares took place between the plaintiffs and the judgment-debtor; and, according to the *shasters*, Raj Bansi Kuar, the wife of the judgment-debtor, has no right in the disputed estate, which is the ancestral property of the judgment-debtor. Therefore this false claim, which is brought on the allegation of partition and separate possession, should not at all be entertained. The plaintiff (Raj Bansi Kuar) personally has no right to bring the claim. The disputed property is the ancestral estate of Ramphal Lal, judgment-debtor, who has all along been in possession thereof; the plaintiffs are his wife and son who live jointly with him and are maintained by him. These facts will be fully established on investigation. The judgment-debtor aforesaid borrowed money on 7th December, 1867, from the defendant's firm, in a lawful manner, for the benefit of the family and meeting certain emergencies, executing a bond in the name of the plaintiffs; and it was after a good deal of litiga-

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tion, which was carried on up to the High Court, that a decree was obtained against the judgment-debtor. At the time the loan transaction took place and the bond was executed, the judgment-debtor's son had not been born; and therefore he has no right to question the judgment-debtor's acts. Before the taking of the property it is incumbent on a son to discharge the debts of his father; it is a pious duty. A claim in respect of the property cannot be regarded as valid without payment of such debts. The accusation of irregularity and drunkenness made against the judgment-debtor by his wife and son is totally wrong and groundless. The defendant does not think it necessary to make any further defence; he hopes that the Court will do justice in the matter. Such an undutiful wife and son cannot obtain any relief from the Court. The judgment-debtor having caused the mutation of names to be effected fraudulently in favor of his widow and son, after the hypothecation of the property in favor of the defendant, has caused this suit to be brought." The third and fourth issues framed by the Subordinate Judge for trial were as follows:—"(iii) Whether twelve years ago, during the lifetime of Sital Prasad, the father of Ramphal Lal, defendant, a partition took place, according to which the plaintiff is in possession of a two-anna share, and Gur Saran Partap, her son, of a fourteen-anna share of mauza Dakhangaon, which is an ancestral zamindari estate; or whether no partition took place between the plaintiffs and Ramphal Lal and the latter is in possession? (iv) Whether Ramphal Lal, being a man of extravagant habits and bad character, mortgaged mauza Dakhangaon during the lifetime of his father, Sital Prasad, as security for the payment of debts contracted without any legal necessity, contrary to his powers and without the knowledge of the plaintiffs, who possessed a right under the Hindu law, and held possession; and therefore the property is not liable to be sold in satisfaction of the decree-holders' claims; or whether Ramphal Lal is not a man of loose and bad character, and he, having borrowed the money for the benefit of the family and meeting legitimate necessities, mortgaged the property at a time when Gur Saran Partap was not born, his wife having no right under the Hindu law? Has Ramphal Lal fraudulently caused the names of the plaintiffs to be recorded after hypothecation"? Upon these issues

the Subordinate Judge decided as follows:—"The Court holds that the plaintiffs have not produced any partition-deed or any other document, of the time of partition, to support the evidence of witnesses produced by them to prove that they acquired the property in suit by partition more than twelve years ago, in the lifetime of Sital Prasad, the father of Ramphal Lal. The mere oral evidence of the witnesses does not satisfy the Court as to the partition having taken place at that period. From an extract of the pattidari for 1279 fasli (1871-1872), filed with the records of the execution of the decree held by the decree-holders against Ramphal Lal, defendant, No. 419 of this Court, it is proved that, in respect of the entire mauza Dakhangaon, the names of Raj Bansi Kuar and Gur Sarau Partap, her son, were entered in the papers, under an order dated 15th June, 1872, in this way, that two annas were recorded in the name of the Musammat and fourteen annas in the name of the minor. As to the fourth issue, the Court holds that the evidence of witnesses, copy of the application for execution made by Sital Prasad and Thakur Prasad, decree-holders, dated the 4th January, 1867, copy of the proceedings of the Sadr Amin's Court, dated the 12th March, 1869, filed by the plaintiffs, it is proved that the zamindari estate in question is the ancestral property of Ramphal Lal, defendant; that the plaintiffs have held possession of it as members of a joint family; that at the time of the execution of the mortgage-bond, on which the decree-holders have obtained the decree, Sital Prasad, the father of Ramphal Lal, was alive; and that the names of the plaintiffs were recorded in respect of the zamindari estate in question in 1279 fasli. The decree-holders not having impleaded the plaintiffs along with Ramphal Lal, debtor, and not having obtained a decree against them (plaintiffs), by proving that the debt was contracted for the necessary purposes specified in the Hindu law, for the benefit of the plaintiffs, and that the plaintiffs' property was liable for it, they have no right to bring to sale the property in dispute to satisfy the decree they have obtained against Ramphal Lal, defendant, alone. The nature of the debt due to the decree-holders is not very material in this case. The Privy Council ruling in the case of *Deendyal Lal* v. *Jugdeep Narain Singh* (1) and the Madras Court

(1) I. L. R., 3 Calc., 198.

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ruling in *Venkatasami Naik* v. *Kuppaiyan* (1) and *Venkataramayyan* v. *Venkatasubramania Dikshatar* (2) also support the view taken by the Court. In the cases cited, the son had instituted his suit (which was decreed) after the sale in execution of a decree which was against his father alone, while in the present instance, the suit is instituted by the son and wife before the auction-sale, but the principle applicable to both cases is one and the same. As the right of the son was held there not to have passed by the auction sale, because the suit, the decree, and the execution-proceedings therein referred to were not against the father; so in this case, the property in suit, being recorded in the names of the plaintiffs exclusively, cannot be sold, as in this instance too the suit was instituted, the decree passed, and the execution-proceedings taken against Ramphal Lal alone. The contention of the defendants that Gur Saran Partap was not born when Ramphal Lal mortgaged the property in suit in the bond; that according to Hindu law a wife has no right; that Ramphal Lal has fraudulently caused the names of the plaintiffs to be recorded after the mortgage, and the plaintiffs are not competent to take objections to the mortgage and the decree, is not sufficient. According to the principles of Hindu law (Macnaghten's Hindu law), "sons who are born, or begotten, or those who are yet to be born, have a right to the ancestral property." It was for this reason that the objections of the transferee as to the incompetency of the heir of the transferor of the ancestral property (who was born after the transfer) to question the transferor's acts, was held to be immaterial in *Ram Swaruth Pandey* v. *Baboo Basdeo Singh* (3). In the present suit, from the evidence of Rachpal Das, Mahabir, Sri Nath, and Janki Prasad, witnesses for the plaintiffs, who state that Gur Saran Partap is fifteen or sixteen years old, it is proved that he (Gur Saran Partap) was born before the execution of the bond, dated the 7th December, 1867, and from the maxim of the Hindu law, noted at p. 50, vol. I of the aforesaid work, and the concluding sentence of the Privy Council ruling noted above, it is proved that a wife *has* a right. As notwithstanding the entry of the plaintiffs' name in the revenue papers, in respect of the estate in dispute, in June,

(1) I L. R., 1 Mad., 354. (2) I. L. R., 1 Mad., 358.
(3) H. C. R., N.-W. P., 1867, p. 168.

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1872 (which entry was tantamount to a transfer), the decree-holders failed to implead them in their suit, impeaching the entry as fraudulent, they cannot sell the zamindari estate in dispute in satisfaction of the mortgage and the decree, according to the Calcutta High Court ruling in the case of *Nund Coomar Lall* v. *Razeeooddeen Hossein* (1) and the Allahabad High Court ruling in the case of *Jhingur Sahu* v. *Dabi Charan Singh* (2)."

The defendant Gaya Din, the defendant Mata Din having died, appealed, for himself, and as the legal representative of his brother Mata Din, to the High Court.

The *Senior Government Pleader* (Lala *Juala Prasad*) and Munshi *Hanuman Prasad*, for the appellant.

Babus *Baroda Prasad Ghose* and *Jogindro Nath Chaudhri*, for the respondents.

The judgment of the Court (STUART, C. J., and OLDFIELD, J.) was as follows:—

JUDGMENT.—One of the plaintiffs is the wife of one Ramphal Lal, now living, and the other is his minor son, on whose behalf his mother sues as guardian. It is averred that mauza Dakhangaon was one of the ancestral estates and was partitioned twelve years ago, and came into the possession of plaintiffs; and the other property in suit, eleven bighas in Khas Mahál, was assigned to Ramphal Lal for his maintenance. Ramphal Lal executed a bond in favor of defendant hypothecating the said mauza, and the latter obtained a decree against Ramphal Lal, and in its execution advertized the mauza and the land above mentioned for sale. Plaintiffs objected to the sale, but their objections were disallowed, and this suit has been brought. The relief sought has not been very distinctly stated in the plaint, but it is substantially to have the mauza declared to be the property of the plaintiffs, and the properties declared not liable to sale in satisfaction of the defendants' decree against Ramphal. The grounds on which the claim is based are that the mauza was, under the partition, the separate property of the plaintiffs, and the debt, being a personal debt of Ramphal and

(1) 10 B. L. R., 183.

(2) Unreported; S. A. No. 892 of 1876, decided the 8th December, 1876.

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not on behalf of the joint family or for any purposes which the law authorizes, is not a debt for which any of the property can be held liable, and the suit and the decree against Ramphal being personal against himself, to which plaintiffs were no parties, it is only his personal interest that can be liable. The defendant traversed these pleas, and the issues material to this appeal, which the Subordinate Judge laid down, had reference to the alleged partition and the character of the debt contracted by Ramphal, and the liability of the property to be sold in satisfaction of it under the decree obtained by the defendant against Ramphal Lal. The Subordinate Judge has decided that there has been no partition, and that the mauza Dakhangaon is the joint ancestral property of Ramphal Lal and the plaintiffs; and, without going into the question of the character of the debt or the circumstances under which it was contracted, he finds that, as the defendants, decree-holders, did not implead the plaintiffs along with Ramphal Lal in their suit against the latter, and did not obtain a decree against them, they cannot bring to sale under that decree the plaintiffs' property; and the Subordinate Judge cites the case of *Deendyal Lal* v. *Jugdeep Narain Singh* (1); and he has decreed the claim for a declaration of the plaintiffs' proprietary right in mauza Dakhangaon, and dismissed the claim in respect of the land. The defendants, decree-holders, have appealed to this Court. This appeal only has reference to the decree in respect of mauza Dakhangaon.

The first two pleas in appeal fail. There was clearly a cause of action for this suit, and the suit being substantially for a declaration of the plaintiffs' right, and that the property is not liable to sale in execution of defendants' decree, is certainly maintainable; and the plaintiffs' failure to establish their separate title under the alleged partition will not deprive them of any right they may have to a declaration in their favor that the property is not liable to be sold in satisfaction of defendants' decree, which, as already stated, is the substantial object of their suit and the real relief they ask on the other ground that the joint ancestral property is not liable to be sold in execution of a decree against Ramphal Lal. The other pleas in appeal are in effect directed against this last contention of

(1) I. L. R., 3 Calc., 198.

plaintiffs and are that the plaintiff Raj Bansi Kuar has no right or title in the mauza, and that Ramphal Lal was competent to execute the bond and hypothecate the property; that the minor plaintiff was not born at the time the bond was executed; and that the decree against Ramphal Lal is good against the entire mauza, the cases cited by the Subordinate Judge being irrelevant. No objection has been taken to the finding of the lower Court that there has been no partition as alleged, and in its absence it is quite clear that Raj Bansi Kuar has no *locus standi*, personally having no interest in the property in suit. The only question which we are therefore concerned with in this appeal is the right of Gur Saran Partap, the minor son of Ramphal Lal, to have the mauza Dakhangaon declared not liable to sale in execution of the decree against his father Ramphal Lal. The evidence establishes that Gur Saran Partap was born before Ramphal Lal executed the bond in favor of the defendants, although he could not have been more than two or three years old at the time, and his father Ramphal Lal was the manager for the family; and it also is established by the evidence that the debt was a joint debt contracted for the benefit of the family and expended for its benefit. These facts sufficiently appear from the statements of the defendants' witnesses, and there is nothing reliable in the evidence of the plaintiffs' witnesses to the contrary or credible in their statements imputing profligacy to Ramphal Lal.

Looking at the bond, we find it hypothecated the entire mauza. We have therefore a bond executed in favor of defendants by the father of the minor as the head of the family for a family debt hypothecating the entire mauza the joint ancestral property, and the whole property including the son's interest is liable for a debt of the character of the one in this suit. But the Subordinate Judge has held the property not liable to sale in execution of the decree against Ramphal Lal with reference to the frame of the suit and the decree; we have therefore to examine those proceedings. The suit though brought only against Ramphal Lal was brought to recover a joint debt, and the relief sought was to enforce the hypothecation and to bring to sale the entire mauza, that is, the entire joint ancestral estate, and the decree ordered the recovery of the

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debt by enforcement of the hypothecation and sale of the entire mauza. It appears to us that the suit was brought against Ramphal Lal and the decree made against him as the representative of the family for recovery of a joint debt by sale of the joint ancestral property, and the decree may be executed against the whole of the joint ancestral property, notwithstanding that the minor plaintiff was not formally included among the defendants. At the time of the institution of the suit the minor plaintiff was the only other member of the family who had any interest in the property, and Ramphal Lal then as now was his natural guardian.

In a Hindu family "the father is in all cases naturally and in cases of infant sons necessarily the manager of the joint estate,"—*Suraj Bunsi Koer* v. *Sheo Persad Singh* (1); and when a suit is brought against the father, the assumption that the father is sued as representing the minor son is thus consistent with the constitution of the Hindu family and the father's position. The principle laid down in *Bissessur Lal Sahoo* v. *Luchmessur Singh* (2) appears to apply to this case. There two decrees had been obtained against one member of a Hindu family in suits brought against him alone: the question was whether the entire family property was liable to be sold in execution of the decrees. Their Lordships held that, the family being joint, it must be assumed that the member is sued as a representative of the family, and "when looking to the substance of the case and the decrees, they are substantially decrees in respect of a joint debt of the family and against the representative of the family, they may be executed against the joint family property." The case of *Deendyal Lal* v. *Jugdeep Narain Singh* (3) is in some points different from the case before us. There a sale had taken place in execution of a decree against the father, and the decree-holder himself was the purchaser: it was held he could only be said to have bought what was seized and sold in execution which was the father's interest. We decree the appeal and dismiss the suit with all costs.

Appeal allowed.

(1) I. L. R., 5 Calc., 148.

(2) L. R., 6 Ind. Ap., 233; 5 Calc. L. R., 477.

(3) I. L. R., 3 Calc., 198.