1935

SYED SAJJAD HUSAIN, RAJA v. KHAN BAHADUR ALI HASAN KHAN

constitutes an adjudication in his favour about his right to a personal decree and entitles him to a personal decree in respect of the balance remaining unrealised under either of the two decrees. The argument proceeded that the result of the setting aside of the order, dated the 23rd of August, 1932, would be to deprive the decree-holder of the right to make any application for a personal decree in respect of the balance remaining due on the second decree because of any application for that purpose being now barred by time. The contention is in our opinion perfectly correct. We are therefore satisfied that any modification or alteration of the order dated the 23rd of August, 1932, more than three years after the order was passed far from furthering the ends of justice would work serious injustice to the interest of the decree-holder. We can therefore see no sufficient ground to interfere with the order of the lower appellate Court.

Srivastava and Ziaul Hasan, JJ.

The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice Ziaul Hasan

1935
September

BIJAI RAJ SINGH alias BHAN SINGH AND OTHERS (OBJECTORS-APPELLANTS) *v.* RAM PADARATH AND ANOTHER (OPPOSITE-PARTY RESPONDENTS).*

Civil Procedure, Code (Act V of 1908), sections 11 and 53 and order II, rule 2—Hindu Law—Mortgage by Hindu—Suit against a Hindu mortgagor impleading his sons and grandsons —Suit dismissed against sons and grandsons—Decree allowed to become final—Decree not enforceable against interest of sons and grandsons in family property—Money decree against a Hindu, whether can be enforced in his lifetime against his sons and grandsons.

*Execution of Decree Appeal No. 76 of 1934, against the order of Babu Gauri Shankar Varma, Additional Subordinate Judge of Gonda, dated the 29th of August, 1934, upholding the order of Babu Mahesh Chandra, Munsif of Gonda, dated the 22nd of December, 1933.

1935

BIJAI RAJ SINGH v. RAM PADARATH

Where a suit is brought on the basis of a mortgage deed executed by a Hindu, and his sons and grandsons are also impleaded but a money decree only is passed against the father and the suit is dismissed against the sons and grandsons and the decree is allowed to become final, *held*, that the decree-holder is barred from enforcing the decree against the interest of the sons and grandsons by the rule of constructive *res judicata* as well as by the provisions of order II, rule 2 of the Code of Civil Procedure.

Section 53 of the Code of Civil Procedure deals with the liability of ancestral property in the hands of a son or other descendant for the payment of the debts of a deceased ancestor in respect of which a decree has been passed. Where, therefore, the ancestor against whom the decree had been passed is still alive there is no question of enforcement of the decree against his legal representatives or against ancestral property in the hands of such legal representatives. *Ramasami Nadan* v. *Ulaganath Goundan* (1), and *Raja Bakhsh Singh* v. *Raja Ram* (2), relied on.

Messrs. *Radha Krishna Srivastava* and *Suraj Narain*, for the appellants.

Messrs. *Hyder Husain* and *P. N. Chaudhri*, for the respondents.

SRIVASTAVA and ZIAUL HASAN, JJ.:—This is an execution of decree appeal against the order, dated the 29th of August, 1934, of the Additional Subordinate Judge of Gonda affirming the order, dated the 22nd of December, 1933, of the Munsif of that place.

The facts of the case are that Bhaiya Bhagwat Singh, respondent No. 2, had executed a deed of mortgage in favour of Ram Padarath, respondent No. 1. The latter brought a suit on the basis of this mortgage deed and impleaded therein besides the mortgagor his sons and grandsons also, who are the appellants before us. The relief claimed in the suit was that a decree for sale be passed against the mortgaged property, and in case the mortgaged property could not be sold, a money decree be given against all the defendants. The appellants pleaded that the mortgage had been executed without

(1) (1898) I.L.R., 22 Mad., 49. (2) (1933) I.L.R., 8 Luck., 700.

any family necessity and therefore the mortgaged property which was ancestral property of the family could not be sold. They further denied the plaintiff's right to a money decree on the ground that the debt in question had been taken for gambling. The learned Munsif held that the debt in suit had not been borrowed for payment of any antecedent debt or for legal necessity and that the mortgaged property which was found to be ancestral could not therefore be made liable for it. He further held that the defendants had failed to prove that the money was spent on gambling, but dismissed the claim against the appellants and gave the plaintiff a money decree only against Bhaiya Bhagwat Singh the mortgagor. None of the parties appealed against this decree and it has become final between the parties. In execution of the abovementioned money decree, the decree-holder sought to attach and sell the joint family property. The appellants objected that their interests in the property were not liable to attachment and sale. Both the lower Courts have disallowed the objection. The learned Additional Subordinate Judge has also held that the entire family property is liable to attachment and sale under section 53 of the Code of Civil Procedure.

Srivastava and Ziaul Hasan, JJ.

We are clearly of opinion that section 53 has no application to the case. This section deals with the liability of ancestral property in the hands of a son or other descendant for the payment of the debts of a deceased ancestor in respect of which a decree has been passed. In the present case Bhaiya Bhagwan Singh, the ancestor against whom the decree had been passed, is still alive and there is no question of enforcement of the decree against his legal representatives or against ancestral property in the hands of such legal representatives. The decision of the learned Subordinate Judge cannot therefore be supported on the ground based on section 53 of the Code of Civil Procedure.

1935

BIJAI RAJ SINGH v. RAM PADARATH

Srivastava and Ziaul Hasan, JJ.

The main contention urged on behalf of the appellants is that the plaintiff's suit having been dismissed against the appellants, he is barred by the rule of *res judicata* from seeking to enforce the decree against the appellants' interest in the joint family property. It is no doubt true that a creditor may sue the father alone and obtain a decree against him which might be executed by attachment and sale of the entire interest of the father as well as of the sons in the joint family property in cases where the debt was not contracted for any immoral purpose and the sons are under a pious obligation to pay the debt, but this is not the position in the present case. Here the creditor chose to implead the sons and grandsons which it was open to him to do. Obviously the object of impleading them was to enable him to enforce payment of the debt against the entire joint family property. For this purpose he not only sought a decree for sale of the mortgaged property but also in the alternative claimed a relief for a money decree against all the defendants, namely the father as well as the sons and grandsons. It is obvious that he was not entitled to any personal decree against the sons and grandsons, but what he was entitled to was a money decree against the father coupled with a declaration that it was enforceable against the entire joint family property. The prayer for the personal relief against all the defendants was evidently understood in that sense by all concerned. As stated before the defendants tried to resist the claim by setting up a plea of the debt having been incurred for an immoral purpose. When this plea was disallowed and it was held that the plaintiff was entitled to a personal decree against the father, the legal result which followed was that the money decree against the father would be enforceable against the entire joint family property. But somehow the Munsif dismissed the claim against the sons and did not give the plaintiff any declaration making their interest in the joint family property liable for the decree. The deci-

sion has become final between the parties and operates as *res judicata* between them. In *Ramasami Nadan* v. *Ulaganath Goundan* (1), a creditor of a Hindu brought a suit against him and his sons whom it was sought to make liable on the ground that the debts were incurred for the benefit of the family, but he did not obtain a decree against the sons. It was held by a Full Bench of the Madras High Court that the plaintiff could have prosecuted his claim against the sons in that suit and have obtained a decree making their shares in the family property liable for the father's debt. Similarly in *Raja Bakhsh Singh* v. *Raja Ram* (2), a Bench of our Court held that where a suit brought after the death of the mortgagor against his sons and grandsons was decreed against the estate of the deceased mortgagor in the hands of his sons, but dismissed against the grandsons, the latter's undivided interest in the mortgaged property could not afterwards be attached and sold in execution of the decree. We are therefore of opinion that the decree-holder having allowed the decree dismissing his claim against the appellant to become final, he cannot enforce the decree obtained by him against the interest of the appellants in the joint family property.

Stress was laid by the learned counsel for the decree-holder on the fact that the prayer for relief in the plaint did not in terms ask for any relief making the appellants' interest in the family property liable for the debt. We have already observed that in the light of the pleadings of the parties and the circumstances of the case the interpretation to be placed upon the aforesaid prayer in our opinion is that it was intended to make the interest of the sons and grandsons in the joint family property liable for the plaintiff's claim. But even if it were conceded that the relief in question sought for nothing more than a personal decree against the sons and grandsons, still we are of opinion that the plaintiff must be held to be barred from enforcing the

(1) (1898) I.L.R., 22 Mad., 49. (2) (1933) I.L.R., 8 Luck., 700.

1935

BIJAI RAJ SINGH v. RAM PADARATH

Srivastava and Ziaul Hasan, JJ.

decree against the interest of the appellants by the rule of constructive *res judicata* as well as by the provisions of order II, rule 2 of the Code of Civil Procedure. It is not denied that the object of impleading the appellants in the suit was to make the appellants' interest in the joint family property liable for the plaintiff's claim. It is also not denied that it was open to the plaintiff to claim for a relief making the defendants' interest in the joint family property liable for the plaintiff's claim. It has, however, been argued that though the plaintiff might have made that a ground of attack in that suit yet it is not a matter which they ought to have made or were bound to make a ground of attack. We think that it was not only desirable but proper and necessary that the appellants being impleaded in the suit and a decree for money having been sought against them all questions between them and the plaintiff and about their liability for the plaintiff's claim should have been raised and determined in that suit. Moreover the plaintiff having chosen to implead the defendants on the basis of the cause of action which arose in his favour in respect of the debt which had been incurred by Bhaiya Bhagwat Singh, was bound to claim against the appellants all the reliefs to which he was entitled in respect of that cause of action. If he omitted to sue for any such relief without the leave of the Court, he could not sue for such relief in a subsequent suit, much less be allowed to enforce it in the execution proceedings.

The result therefore is that we allow the appeal with costs. set aside the order of the lower Court and dismiss the application for execution against the appellants' undivided share in the joint family property. The plaintiff will, of course, be entitled to proceed with the execution against the interest of the father in the joint family property.

Appeal alllowed.