

APPELLATE CIVIL

Before Mr. Justice Muhammad Raza and Mr. Justice
E. M. Nanavutty

1933
February, 27

RAJA BAKHSH SINGH AND OTHERS (OBJECTORS-APPELLANTS v. RAJA RAM (OPPOSITE PARTY-RESPONDENT)*

Hindu law—Joint Hindu family—Mortgage of joint ancestral property by some out of several co-parceners—Mortgage not for ancestral debt or for family necessity—Simple money decree against the living mortgagor personally and against the estate of the deceased mortgagor in the hands of his sons—Suit dismissed against the other co-parceners—Undivided interest of other co-parceners in the mortgaged property, if saleable in execution of decree—Civil Procedure Code (Act V of 1908), section 53—Section 53 of the Code of Civil Procedure, if can help the decree-holders.

Where a deed of mortgage of joint ancestral property is executed by two out of several co-parceners, the mortgage not being for any antecedent debt or family necessity, and after the death of one of the executants a simple money decree is passed as against the estate of the deceased mortgagor in the hands of his sons and against the other executant personally and the suit is dismissed against the other co-parceners, the latter's interest in the property mortgaged cannot be attached and sold in execution of the decree.

According to the Mitakshara Law, as applied in all the Provinces, the undivided interest of a co-parcener may be attached and sold in execution of a decree against him.

Section 53 of the Code of Civil Procedure cannot help the decree-holder where the decree has been passed against some defendants alone as the legal representatives of the deceased judgment-debtor and it is for payment of money out of the property of the deceased in their hands and no decree has been passed against the remaining co-parceners but the suit has been entirely dismissed as against them. *Brij Narain v. Raja Mangal Prasad* (1), *Sripat Singh v. Sir P. K. Tagore* (2), and *Masit Ullah v. Damodar Prasad* (3), referred to.

*Execution of Decree Appeal no. 7 of 1932, against the order of S. Shaukat Husain, Subordinate Judge of Hardoi, dated the 27th of October, 1931.

(1) (1923) I. L. R., 46 All., 95.

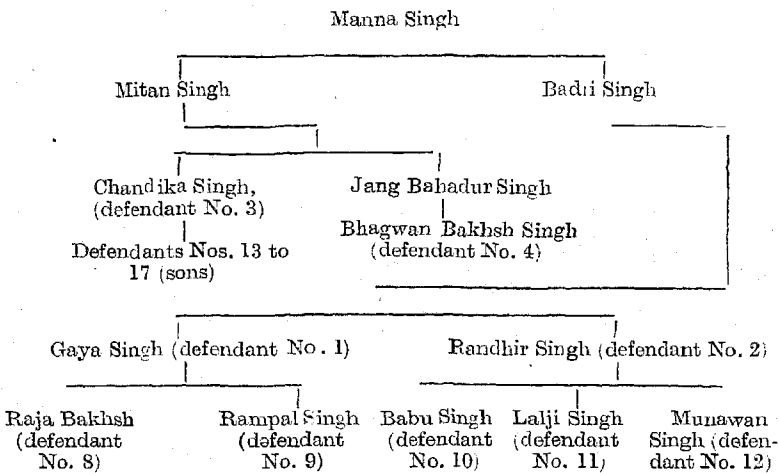
(2) (1916) L. R., 44 I. A., 1.

(3) (1926) L. R., 53 I. A., 204.

Mr. *Radha Krishna Srivastava*, for the appellants.
Messrs. *Hyder Husain, Har Govind Dayal and Raghubar Dayal Bajpai*, for the respondents.

RAZA and NANAVUTTY, JJ. :—This is an execution first appeal and arises in the following circumstances.

Raja Ram of Mahmudpur, brought a suit against Gaya Singh and others to recover Rs.19,500 by sale of a 10 biswas share in Mahmudpur, comprised in a registered mortgage, executed by Badri Singh (since deceased) and Chandika Singh for Rs.10,000 bearing interest at 11 annas per cent. per mensem (with six monthly rests) on the 15th of November, 1920. The following pedigree will be useful for reference :



The mortgage in suit was executed by Badri Singh and Chandika Singh alone for Rs.10,000, advanced in cash. Thus there was no antecedent debt. The learned Subordinate Judge found that the mortgage was not executed for any family necessity. He found also that the property in suit was the joint ancestral property of the mortgagors. The result was that only a simple money decree was passed on the 13th of May, 1931, on the basis of the deed in suit, as against the estate of Badri Singh deceased in the hands of the defendants Nos. 1 and 2, and against

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Chandika Singh, defendant No. 3 (personally). The decretal order is in the following terms :

“I therefore decree the sum of Rs.19,500 with costs, interest at the contract rate on Rs.10,000 during the pendency of the suit and future interest at 6 per cent. per annum on the entire decretal amount, as against the defendant No. 3 personally and against the estate of Badri Singh in the hands of defendants Nos. 1 and 2, under rule 1, order XX and rule 6, order IX, schedule I, of the Code of Civil Procedure. *The suit is dismissed as against the other defendants.* The defendants Nos. 4, 7 and 8 to 17 will get their respective costs from the plaintiffs.

Raja Ram (decree-holder) took out execution against Gaya Singh, Randhir Singh and Chandika Singh on the 18th of May, 1931 and applied for attachment and sale of several properties including 7 biswas 10 biswas share of village Mahmudpur out of the 10 biswas share comprised in the mortgage mentioned above. Raja Bakhsh Singh (defendant No. 8) and Rampal Singh (defendant No. 9), sons of Gaya Singh defendant No. 1 and Babu Singh (defendant No. 10), Lalji Singh (defendant No. 11) and Munawan Singh (defendant No. 12), sons of Randhir Singh defendant No. 2, filed objections contending that the plaintiff's suit was dismissed as against them, that the property in dispute was the joint family property and that it could not be sold in execution of the decree, as the debt on the basis of which the decree was passed did not benefit the family and had been contracted for immoral purposes. The learned Subordinate Judge framed three issues and found as follows :

1. The property in dispute was the ancestral joint family property, as alleged by the objectors.
2. The debt in question was not contracted for immoral purposes.

3. The plea that the debt was contracted for immoral purposes could be taken by the objectors and was not barred by the rule of *res judicata*.

Having found that the debt in question was not contracted for immoral purposes, the learned Subordinate Judge dismissed the objections, relying on the ruling of their Lordships of the Privy Council in the case of *Brij Narain v. Raja Mangal Prasad* (1). He also overruled the objector's contention that if the executing court decided that the property in dispute should be sold in execution of the decree, the share of their father (defendants Nos. 1 and 2), should be sold first and then that of the sons (defendants Nos. 8 to 12, objectors).

The defendants Nos. 8 to 12 who are the minor sons of Gaya Singh and Randhir Singh, defendants Nos. 1 and 2, have filed this appeal, challenging the order of dismissal passed by the learned Subordinate Judge on their objections.

This appeal has been pressed before us on two grounds :

1. The suit having been dismissed against the appellants (defendants Nos. 8 to 12), and the property in dispute being joint ancestral property, no execution can proceed against that property.

2. The decree-holder's application is for attachment of a definite share and not of the undivided interest of the judgment-debtors, (defendants Nos. 1 to 3), and hence it is bad in law.

We think that the learned Subordinate Judge has not approached the case in the right way.

It is true that by the Mitakshara law a judgment against the father of the family can be executed against the whole of the Mitakshara property in every event but one, viz. that the debt, in respect of which the

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judgment has been obtained was a debt incurred for illegal or immoral purposes. (See *Sripat Singh v. Sir P. K. Tagore* (1). It is also true that if the managing coparcener of a joint Hindu estate is the father, and the reversionaries are the sons, he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt. See *Brij Narain v. Mangla Prasad* (2). The rule as to the son's liability to pay his father's debts, as expressly laid down in *Brij Narain's* case, extends equally to grandsons and great-grandsons. Under the law of the Mitakshara, the rights of descendants are co-extensive with their obligations. The great-grandson is as much a member of the joint family as a son or grandson. Thus a Hindu governed by the Mitakshara, who has received ancestral assets is liable for the debts of his great-grandfather in addition to the debts of his father or grandfather. See *Masit Ullah v. Damodar Prasad* (3).

In the case of a joint family the sons, grandsons and great-grandsons are liable to pay the debts of their father, grandfather or great-grandfather, even if the debts were contracted by him for his own benefit provided they were not incurred for an unlawful or immoral purpose. The liability to pay debts contracted by the father, grandfather or great-grandfather, though for his own benefit, arises from a religious and pious obligation which is placed upon the sons, grandsons and great-grandsons, under the Mitakshara law, to discharge the debts of their father, grandfather or great-grandfather, provided the debts were not contracted for an unlawful or immoral purpose. The liability, however, is not a personal one, that is to say, the creditor of the father, grandfather or great-grandfather is not entitled to proceed against the person or

(1) (1916) L. R., 44 I. A., 7.

(2) (1923) I. L. R., 46 All., 95.

(3) (1926) L. R. 53 I. A., 204.

the separate property of the sons, grandsons or great-grandsons; it is limited to the joint family property. The liability exists whether the father, grandfather or great-grandfather be alive or dead. Where a father, grandfather or great-grandfather has contracted a debt for his own personal benefit, the creditor may obtain a personal decree against him alone, and may enforce the decree by attachment and sale of the entire coparcenary property, including the interests of the sons, grandsons and great-grandsons therein. They, though not parties to the suit, are bound by the sale by reason of their pious duty to pay the debts of their father, grandfather or great-grandfather; and they cannot recover the property, unless they prove that there was no debt at all, or that the debt was contracted for immoral purposes; and that the purchaser at the sale had notice that it was so contracted. The mere circumstance of a pious obligation of a Hindu son, grandson or great-grandson, to pay the debt of his father, grandfather or great-grandfather, does not validate a mortgage which is invalid for want of legal necessity or of the necessity for the payment of an antecedent debt; but the mortgagee may obtain a simple money decree if the debt was not incurred for immoral purposes; and it does not follow that the mortgagee cannot get at all at the interests of sons, grandsons or great-grandsons in the mortgaged property. It is the mortgage alone that does not bind the sons, grandsons or great-grandsons, with the result that the mortgagee is not entitled to a mortgage decree against them. But this does not relieve the sons, grandsons or great-grandsons from the pious obligation to pay the debt of their father, grandfather or great-grandfather to the mortgagee provided the debt was not incurred for immoral purposes. To the extent to which the mortgagee does not bind the property, the mortgagee is entitled to treat the mortgage-debt as a "simple" as distinguished from a "secured" debt; and he may obtain a money decree

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against the father and the sons; and may have the whole of the mortgaged property attached and sold in execution of the decree. See Mulla's Hindu law, 5th edition, pages 295—298 and 302, 306.

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All this is true, but we have to see what orders should be passed in the case before us. The difficulties in this case have all arisen from the fact that the suit was entirely dismissed against defendants Nos. 8 to 12, though they had not pleaded that the debt had been contracted by their grandfather for any unlawful or immoral purpose; and the decree (simple money decree) was passed against the estate of Badri Singh, in the hands of the defendants Nos. 1 and 2, alone. There is no personal decree against Badri Singh. The decree under execution, though open to objection, has unfortunately become final and now we must take it as it is. The result is, that the plaintiff is not now entitled to any relief against the defendants Nos. 8 to 12; and they are not in any case liable for the debt for which the decree in question was passed against the estate of Badri Singh, in the hands of the defendants Nos. 1 and 2, alone. In the peculiar circumstances of the case execution cannot proceed against the family property, so far as the interest of the defendants, Nos. 8 to 12, is concerned. The decree has been passed against the defendants, Nos. 1 and 2, alone as the legal representatives of Badri Singh, deceased, and execution may proceed against their undivided interest in the property in dispute. According to the Mitakshara law, as applied in all the provinces, the undivided interest of a coparcener may be attached and sold in execution of a decree against him. But as the suit has been entirely dismissed against the defendants Nos. 8 to 12 their interest (undivided) in the property in dispute cannot be attached and sold in execution of the decree. In our opinion, section 53 of the Code of Civil Procedure, cannot help the plaintiff (decree-holder) in this case. The decree

has been passed against the defendants Nos. 1 and 2 alone as the legal representatives of Badri Singh, and it is for payment of money out of the property of the deceased in *their* hands alone. No decree has been passed against the defendants remaining coparceners but Nos. 8 to 12 and the suit has been entirely dismissed as against them.

Hence we allow the appeal and setting aside the order of the lower court, direct that the interest of the objectors (defendants Nos. 8 to 12), in the property in dispute, be released from attachment. Having regard to all the facts and circumstances of the case, we order that the parties should bear their own costs in these proceedings, in this court and also in the court below.

Appeal allowed.

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*Before Mr. Justice Bisheshwar Nath Srivastava and
Mr. Justice H. G. Smith*

MUNSHI LAL AND OTHERS (PLAINTIFFS-APPELLANTS) *v.* RAJA BAKHSH SINGH *v.* RAJA RAM
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Transfer of Property Act (IV of 1882), section 31—Condition subsequent by way of defeasance—Court if bound to enforce in every case—Penalty, essential elements of—Contract—Non-performance of condition subsequent—Compensation for non-performances—Damages whether sufficient compensation.

Held, that section 31 of the Transfer of Property Act shows that a condition subsequent by way of defeasance that any interest created shall cease to exist in case a specified uncertain event shall not happen, can be valid, but it does not follow that because the law allows such a condition being imposed, the court is bound to enforce it in every case. *Alexander Popham v. Bamfeild* (1), referred to.

*First Civil Appeal No. 68 of 1931, against the decree of Babu Gauri Shankar Varma, Subordinate Judge of Sitapur, dated the 11th of May, 1931.

(1) (1682) 23 E. R., 325 (326).