APPELLATE CIVIL

Before Sir Syed Wazir Hasan, Knight, Chief Judge, and Mr. Justice Bisheshwar Nath Srivastava

1932
February, 4.

BAIJNATH AND ANOTHER (PLAINTIFFS-APPELLANTS) *v.* MAHARAJ BAHADUR AND OTHERS (DEFENDANTS-RESPONDENTS) *

Hindu Law—"Ancestral property" meaning of—Self-acquired property of father, if ancestral in the hands of sons—Mortgage—Right of son to mortgage his share in such property—Property, if becomes ancestral in relation to grandson—Mitakshara coparcenary land joint tenancy estate, distinction between.

In Hindu Law the term "ancestral" in its technical sense can apply only to property belonging to the grandfather and his ascendants in the male line and in such property the sons, grandsons and great-grandsons of the person who inherits it, are entitled to an interest by birth. Self-acquired property of a Hindu father, therefore, cannot be regarded as "ancestral" in the hands of his sons. The sons have no interest therein by birth. It devolves on the sons according to the ordinary rules of succession and not by right of survivorship. Each son inherits a definite share in the property and there is nothing to prevent one of the sons making mortgage of his share. Such property, however, becomes ancestral as regards the rights of their sons if they had any.

Atar Singh v. *Thakur Singh* (1), *Mst. Lakhpati* v. *Permeshwar Misra* (2), *Raja Chelikani Venkayyamma Garu* v. *Raja Chelikani Venkatarama Nayyamma* (3), *Katama Natchier* v. *Srimut Raja Moottoo Vijaya Ragandha Bodha Goorroo Swamy Periya Odaya Taver* (4), and *Raja Jogendra Bhupati Hurri Chundan Mahaptra* v. *Nityanund Man Singh* (5), referred to.

Though in some respects there is a resemblance between a Mitakshara coparcenary and an estate in joint tenancy, yet they materially differ in many respects. To say that the

*Second Civil Appeal No. 114 of 1931, against the decree of Thaku Rachhpal Singh, District Judge of Gonda, dated the 13th of December, 1930, upholding the decree of M. Ziauddin Ahmad, Additional Subordinate Judge of Gonda, dated the 30th of April, 1929.

(1) (1908) L.R., 35 I.A., 206. (2) (1929) I.L.R., 5 Luck., 631.
(3) (1902) L.R., 29 I.A., 156. (4) (1883) 9 M.I.A., 539.
(5) (1890) L.R., 17 I.A., 128.

sons held as joint tenants subject to the incident of survivorship is very different from saying that they held it as coparcenary property without the right of alienating their share.

Messrs. *Ali Zaheer* and *Ghulam Imam*, for the appellants.

Messrs. *Radha Krishna* and *Mohammad Husain*, for the respondents.

SRIVASTAVA, J. :—This is a plaintiffs' appeal against the decree, dated the 13th of December, 1930, of the learned District Judge of Gonda affirming the decree, dated the 30th of April, 1929, of the Additional Subordinate Judge of that place. It arises out of a suit for sale on foot of a mortgage deed, dated the 8th of October, 1918. The mortgage deed was executed by one Shiam Behari, who is now dead, and related to a one-anna share in village Katha Mafi in the Gonda District. Shiam Behari was one of the four sons of Munshi Baijnath, who was at one time in Government service in the Gonda District. The names of the other three brothers of Shiam Behari, are Lal Behari, Fateh Behari, and Kishen Behari. Lal Behari is also dead and has left a son, Maharaj Bahadur. Maharaj Bahadur, Fateh Behari, and Kishen Behari, defendants Nos. 1 to 3, respectively, were impleaded as representatives of the deceased mortgagor, Shiam Behari. These defendants resisted the suit, amongst others, on the ground that the property in suit was the joint ancestral property of all the four sons of Munshi Baijnath and that the mortgage by Shiam Behari alone was incompetent.

Both the lower courts have found that Munshi Baijnath in 1891, when he was employed as a Tahsildar in the Gonda District, purchased a four annas share in village Katha Mafi in the name of his three sons, Lal Behari, Fateh Behari and Kishen Behari. Shiam Behari was born subsequent to this purchase. After his birth his name was also recorded as

1932

BAIJNATH v. MAHARAJ BAHADUR.

Srivastava, J.

a co-owner in respect of the four annas share along with his three brothers. It has been found that Munshi Baijnath had no other means of income except his salary, that at the time of the purchase his three sons were minors and that the property was purchased by Munshi Baijnath *benami* in the name of his sons. It has further been found that Shiam Behari and his three brothers were joint in estate and no separation ever took place amongst the brothers. As a result of these findings of fact, the courts below arrived at the conclusion that the four annas share in village Katha Mafi was the self-acquired property of the father, and on the latter's death it became the joint ancestral property in the hands of his sons. It was, therefore, held that Shiam Behari was incompetent to transfer by mortgage any portion of the property.

The learned counsel for the plaintiffs-appellants has not disputed the correctness of the findings of fact stated above which are conclusive in second appeal. He has, however, challenged the correctness of the conclusion drawn by the learned District Judge about the property in the hands of Shiam Behari and his brothers being joint ancestral property and about Shiam Behari's incompetence to mortgage his one-fourth share.

The rule that the individual interest of a coparcener in a joint family is not alienable is a corollary from the principle that, according to the true character of a Mitakshara joint family, no individual member of that family can predicate that he has a certain definite share in the joint and undivided property of the family. It, therefore, becomes necessary to find out whether the self-acquired property of the father when it devolves on his sons who form members of a joint Hindu family can, in their hands, be regarded as joint family property. According to the well-recognized classification

of joint family property, it may be divided into three broad heads :—

(1) Ancestral property.

(2) Property acquired with joint exertion or with the aid of joint funds.

(3) Self-acquired property thrown into the common stock. Admittedly the share in question does not fall under any of the last two heads. The question, therefore, arises whether it can be regarded as ancestral property.

In Sastri's Hindu Law, 6th edition, page 310, the learned author observes as follows :—

"The Sanskrit word for ancestral is पैतामह (*Paitamaha*) meaning, belonging to पितामह (*Pitamaha*). This word पितामह (*pitamaha*) though it is ordinarily applied to the father's father, means in the plural number, all the paternal male ancestors of the father in the male line, how high soever."

Thus, in Hindu Law the term "ancestral" in its technical sense can apply only to property belonging to the grandfather and his ascendants in the male line. In *Atar Singh* v. *Thakur Singh* (1), their Lordships of the Privy Council also have held that unless lands come to a person by descent from a lineal male ancestor, they cannot be deemed ancestral in Hindu Law.

It is also important to note that in the case of ancestral property under the Mitakshara law, the sons, grandsons and great-grandsons of the person who inherits it, are entitled to an interest in such property by birth. According to the Mitakshara पैत्रिके पैतामहे च द्रव्ये जन्मनैव स्वत्वम् । "property in the paternal or grand-paternal estate is by birth"—Mitakshara, Chapter I, section 1, paragraph 27. Colebrooke's translation of the word पैतामहे in this passage as ancestral, is not accurate. Its literal and more correct translation is grand-paternal. Admittedly, the property in question in the present case was the self-acquired property of Munshi

(1) (1908) L.R., 35 I.A. 206.

1932

BAIJNATH v. MAHARAJ BAHADUR.

Srivastava, J.

Baijnath. His sons had no interest therein by birth. It cannot, therefore, be regarded as their ancestral property. Shiam Behari had no son. If he had a son born to him, the property, as regards the rights of the sons, could be described as ancestral property. But it would be quite incorrect to describe it as ancestral property in the hands of Shiam Behari.

The learned counsel for the defendants-respondents has placed strong reliance on our decision in *Musammat Lakhpati* v. *Parmeshwar Misra* (1) and on the decision of their Lordships of the Privy Council in *Raja Chelikani Venkayyamma Garu* v. *Raja Chelikani Venkatarama Nayyamma* (2), in support of his contention that the property in suit in the hands of the sons of Munshi Baijnath must be held to be ancestral. These cases can be regarded as authority only for what they actually decide. In *Lakhpati* v. *Parmeshwar Misra* (1), the self-acquired property of the father had devolved on his sons who were members of a joint Hindu family. On the death of one of these sons, competition arose between his widow and his surviving brothers and it was decided that the property was held by the brothers jointly with benefit of survivorship and that the interest of the deceased son would go to his surviving brothers and not to the widow. We have been unable to discover one word in our judgment in this case to justify the contention that the property in the hands of the sons was held to be joint family property. We had referred to the decisions of their Lordships of the Privy Council in *Katama Natchier* v. *Srimut Raja Moottoo Vijaya Ragandha Bodha Gooroo Swamy Periya Odaya Taver* (3), *Raja Jogendra Bhupati Hurri Chundan Mahapatra* v. *Nityanund Mansingh* (4), and *Raja Chelikani Venkayyamma Garu* v. *Raja Chelikani Venkatarama Nayyamma* (2), and on the authority of these decisions, all that we actually decided was that

(1) (1929) I.L.R., 5 Luck., 631.
(2) (1902) L.R., 29 I.A., 156.
(3) (1883) 9 M.I.A., 539.
(4) (1890) L.R., 17 I.A., 128.

the property was held by the sons as joint tenants subject to the rule of survivorship. Referring to the last mentioned case, we took care to say that it was not necessary for us to enter into a discussion as regards the true import of the word "ancestral" as used by their Lordships in a passage quoted by us from their judgment. It is hardly necessary to point out that though in some respects there is a resemblance between a Mitakshara coparcenery and an estate in joint tenancy, yet they materially differ in many respects. To say that the sons held as joint tenants subject to the incident of survivorship is very different from saying that they held it as coparcenary property without the right of alienating their share.

In *Raja Chelikani Venkayyamma Gaur* v. *Raja Chelikani Venkatarama Nayyamma* (1), the question was as regards property inherited by the grandsons from their maternal grandfather. It was held that "in the hands of the grandsons, it was ancestral property which had devolved on them under the ordinary law of inheritance," and that they held it jointly with the benefit of survivorship. But in view of the meaning given to the word "ancestral" by their Lordships of the Judicial Committee in the latter case of *Atar Singh* v. *Thakur Singh* (2), referred to above, it is difficult to say that their Lordships intended to use the word "ancestral" in relation to the maternal grandfather's estate in its technical sense. It is not necessary for us to enter into an elaborate discussion of this decision as the case before us does not involve any question regarding the estate of a maternal grandfather and has, therefore, no direct bearing on the present case.

Lastly, it is admitted that on the death of Munshi Baijnath the property in question devolved on his sons according to the ordinary rules of succession and not

(1) (1902) L.R., 29 I.A., 156. (2) (1908) L.R., 35 I.A., 206.

1932

BALNATH v. MAHARAJ BAHADUR.

by right of survivorship. Each son, therefore, inherited a definite share in the property. This would clearly distinguish it from a case of joint family property in respect of which it is impossible for a coparcener to say that he has any definite share. Therefore, the reason underlying the rule that the individual interest of a coparcener cannot be transferred, does not exist in the case.

Srivastava, J.

For the above reasons we are of opinion that the share in suit was not held by Shiam Behari as joint family property and that there was nothing to prevent his making a mortgage of it.

We would accordingly allow the appeal, set aside the decision of the lower court and decree the plaintiffs' claim for Rs.2,363-10-0 together with interest at annas 12 per cent. per mensem from the date of suit till six months from today and future interest till the date of realization at annas 8 per cent. per mensem together with costs in all the courts. If the money is not paid by the date fixed, the mortgaged property shall be sold. A decree for sale in the prescribed form will be prepared, but the provision as regards the personal decree will be scored out.

HASAN, C. J. :—I agree.

Appeal allowed.

APPELLATE CIVIL

Before Sir Syed Wazir Hasan, Knight, Chief Judge and Mr. Justice Muhammad Raza

1932 February 1.

BRIJNATH SHARGHA, PANDIT AND OTHERS (DEFENDANTS-APPELLANTS) v. LAKSHMI NARAIN KAUL, PANDIT (PLAINTIFF-RESPONDENT).*

Breach of trust—Brother depositing articles for safe custody with another brother—Some of the articles deposited not returned—Suit for recovery of the missing articles—Court whether can give a decree for the value of the missing articles—Liability of brother for breach of trust—Hindu Law—Debt and liability for missing goods, if Avyavaharika*—Death of defendant—Legal representatives, whether liable for the articles misappropriated—Maxim* actio personalis moritur cum persona, *applicability of—Interest, if can be awarded on the value of missing articles decreed by way of damages.*

One brother handed over to the other brother a box containing jewellery and gold coins for safe custody, but when the box was returned it did not contain a number of articles kept in it and a suit was brought for the recovery of the missing articles. The defendant died during the course of trial and his legal representatives were substituted in his place.

Held, that the position in which the two brothers stood with regard to the box in question was one of trust which the giver of the box reposed in the taker of it and the subsequent disappearance of a large number of articles from the box was clearly a breach of trust on the part of the taker and any loss that resulted to the depositer must be made good by the taker.

Held further, that the maxim *actio personalis moritur cum persona* does not apply to the case which falls within one of the several exceptions to it.

The suit must be taken to be in substance an action to recover the specific articles which were found to be missing when the box was returned. But as a decree for the delivery

*Second Civil Appeal No. 64 of 1931, against the decree of Khan Bahadur Mahmud Hasan, Additional District Judge Lucknow, dated the 20th of October, 1930, affirming the decree of Syed Yaqub Ali Rizvi, Subordinate Judge, Malihabad, Lucknow, dated the 10th of January, 1930.

1932

BRIJ NATH SHARGHA, PANDIT, v. LAKSHMI NARAIN KAUL,

of those articles would be infructuous as they no longer exist, the court having jurisdiction to do so, could decree in favour of the plaintiff the value of these articles. It cannot be held in such a case that it was a claim for an unliquidated and uncertain sum of money. On the other hand, the claim and the decree represent the ascertained and market value of the missing articles. *Phillips* v. *Homfray* (1), referred to.

The essence of the transaction between the two brothers was that one stood in the position of a trustee to the other and if any loss is incurred by one, by reason of the breach of trust on the part of the other, the duty to make good the loss is highly moral and lawful and the debt to which he rendered himself liable by the fact of the articles being missing was not *avyavaharika* but was *vyavaharika*. *Chhakuri Mahton* v. *Ganga Prasad* (2), relied on.

In the case of a decree for the value of articles lost by breach of trust interest should not be allowed as the decree in its very nature is one for damages and allowing interest will be tantamount to awarding damages upon damages.

Mr. *Hyder Husain*, for the appellants.

Mr. *Makund Behari Lal*, for the respondent.

HASAN, C.J., and RAZA, J. :—This is the defendants' appeal from the decree of the Additional District Judge of Lucknow, dated the 20th of October, 1930, affirming the decree of the Subordinate Judge of Malihabad, dated the 10th of February, 1930, except in the matter of a small sum of money for interest which the court of first instance had refused to award to the plaintiff but which the learned Additional District Judge has allowed.

The facts of this case are very simple. There were four brothers, two of whom were Sri Krishen Kaul and Bishnath Shargha. The difference in the caste name was due to the adoption of one of them. Some time ago Pandit Sri Krishen Kaul handed over a box for safe custody to his brother Pandit Bishnath Shargha. The box contained jewellery and gold coins. But the box, when opened after it was returned by Pandit Bishnath Shargha to Pandit Sri Krishen, did not con-

(1) (1883) L.R., 24 Ch., D., 439. (2) (1911) I.L.R., 39 Calc., 862.

1932

BRIJ NATH SHARGHA, PANDIT v. LAKSHMI NARAIN KAUL,

Hasan, C. J. and Raza, J.

tain a number of the articles which it had originally contained when it was delivered to the former by the latter. There is no dispute in this case now as to what the missing articles were nor as to their value. Pandit Sri Krishen Kaul died in January, 1928 and the suit out of which this appeal arises was instituted by his legal representative against Pandit Bishnath Shargha. During the pendency of the suit, Pandit Bishnath Shargha also died and in the array of defendants were then impleaded his representatives.

The courts below have given a decree to the plaintiffs against the defendants for a sum of Rs.2,264 as representing the value of the missing articles.

In support of the appeal before us, three points were argued by the learned counsel for the appellants:

(1) That the finding of the lower appellate court that there existed a contract between the two brothers for the re-payment of the value of the missing articles is not based on evidence,

(2) That the suit abated on the death of Pandit Bishnath Shargha, and

(3) That no decree could be passed against the defendants because Pandit Bishnath Shargha must be deemed to have been guilty of criminal breach of trust, it being admitted that he and the present defendants formed a joint Hindu family governed by the Mitakshara law.

As to the first point, very little need be said. The learned Additional District Judge on the question of contract refers both to oral and documentary evidence and at the hearing of the appeal we were taken through that evidence. We are unable to hold that there is no evidence in support of the finding, though it may be reasonably urged that there is no sufficient evidence. The finding is, therefore, conclusive in second appeal. Be that as it may, it seems to us that on the facts admitted and found by the lower appellate court, the

1932

BRIJ NATH SHARGHA, PANDIT v. LAKSHMI NARAIN KAUL,

position in which the two brothers stood with regard to the box in question, was one of trust which the giver of the box reposed in the taker of it. The subsequent disappearance of a large number of articles from the box was clearly a breach of trust on the part of Pandit Bishnath Shargha and any loss that resulted to Pandit Sri Krishen must be made good by Pandit Bishnath Shargha. We, therefore, reject the first point urged in support of the appeal.

Hasan, C. J. and Raza, J.

As regards the second point, we are of opinion that there is no substance in it either. It was argued that the *maxim actio personalis moritur cum persona* applied to the present case. But to this maxim there are several exceptions and we think that the present case falls within one of such exceptions. If we may respectfully say so, the judgment of BOWEN, L.J., in the case of *Phillips* v. *Homfray* (1), is most illuminating. His Lordship said:

> "The only cases in which, apart from questions of breach of contract, expressed or implied a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appeared to us to be those in which property or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys. In such cases, whatever the original form of action, it is in substance brought to recover property or its proceeds or value, and by amendment could be made such in form as well as in substances. In such cases the action, though arising out of a wrongful act, does not die with the person. The property or the proceeds or value which, in the lifetime of the wrongdoer, could have been recovered from him, can be traced after his death to his assets and re-captured by the rightful owner there.

(1) (1883) L.R., 24 Ch., Div., 439.

1932

BEJI NATH SHARGHA, PANDIT v. LAKSHMI NARAIN KAUL,

Hasan, C. J. and Raza, J

> But it is not every wrongful act by which a wrongdoer indirectly benefits that falls under this head, if the benefit does not consist in the acquisition of property, or its proceeds or value. Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damage which have been done to him are unliquidated and uncertain, the executor of a wrongdoer cannot be sued merely because it was worth the wrongdoer's while to commit the act which is complained of, and an indirect benefit may have been reaped thereby."

The present action must be taken to be in substance an action to recover the specific articles which were found to be missing when the box was returned. But as a decree for the delivery of these articles would be infructuous as they no longer exist, the court having jurisdiction to do so, has decreed in favour of the plaintiff the value of these articles. It cannot be said of the present case that this was a claim for an unliquidated and uncertain sum of money. On the other hand, the claim and the decree represent the ascertained and market value of the missing articles.

Under the third point it was argued that the debt to which Pandit Bishnath Shargha rendered himself liable by the fact of the article being missing, was not "*Vyavaharika*" but that, on the other hand, it was "*avyavaharika*", having been incurred by an act of criminal misappropriation. We are unable to accept this argument. The essence of the transaction between the two brothers was that one stood in the position of a trustee to the other and it seems to us that if any loss is incurred by one, by reason of the breach of trust on the part of the other, the duty to make good the loss is highly moral and lawful. This subject is discussed at length in the judgment of the late Sir ASHUTOSH MUKERJI in the case of *Chhakuri Mahton*

1932

BRIJ NATH SHARGHA, PANDIT, v. LAKSHMI NARAIN KAUL,

v. *Ganga Prasad* (1), and it will serve no useful purpose to repeat that discussion in this judgment.

The lower appellate court has allowed interest in favour of the plaintiffs on the value of the articles of which they have been deprived by reason of the act of the late Pandit Bishnath Shargha. We are of opinion that there is no ground for allowing interest. The decree in its very nature is one for damages and allowing interest will be tantamount to awarding damages upon damages. We, therefore, modify the decree of the lower appellate court in the matter of interest and direct that the plaintiffs shall not be allowed any interest. The rest of the appeal is dismissed with costs.

Hasan, C. J. and Raza, J.

Appeal partly allowed.

APPELLATE CIVIL.

Before Syed Wazir Hasan, Chief Judge, and Mr. Justice Bisheshwar Nath Srivastava.

1931 *December, 23*

SAEED AHMAD KHAN, SAIYED, AND OTHERS (PLAINTIFFS-APPELLANTS) *v.* RAJA BARKHANDI MAHESH PRATAB NARAIN SINGH (DEFENDANT-RESPONDENT).*

Transfer of Property Act (IV of 1882), sections 74 and 76 (g)—Mortgage—Subrogation—Money left with mortgagee for payment to prior mortgagee—Intention to extinguish prior mortgage—Larger amount paid to prior mortgagee than the amount left—Redemption Suit—Excess amount paid by subsequent mortgagee, if it can be claimed as prior charge—Mortgagee obtaining possession over certain plots not included in mortgage deed—Mortgagee obtaining rent assessed on such plots against mortgagor and obtaining decrees for rent—Mortgagee's liability to account for profits of those plots in the redemption suit—Lambardar—Mortgagee's right to claim accounting from lambardar for rent realized by him from mortgaged property—Mortgagor happening to be lambardar—Profits realized by lambardar, if they can be gone into in redemption suit—Accounts—Mort-

*First Civil Appeal No. 15 of 1931, against the decree of Pandit Baij Kishen Topa, Additional Subordinate Judge of Bara Banki, dated the 10th of October, 1930.

(1) (1911) I.L.R., 39 Calc., 862.