APPELLATE CIVIL.

Before Mullick and Bucknill, J.J.

SHYAM SUNDER RAI

v.

JAGARNATH MISRA.*

1923.

July, 11.

Hindu Law—Joint family—alienation of entire property by coparcener, without legal necessity—suit by one coparcener for recovery of his share, maintainablity of.

A coparcener in a joint Hindu family governed by the *Mitakshara* is not competent to sue for the recovery of his share of the property from transferees who have purchased the property from a coparcener claiming to act on behalf of the joint family and who have failed to prove that the sale was made for legal necessity.

Held, also, that in such a case, if the plaintiff does not sue for recovery of the whole property, and implead the other coparceners he is not entitled to any equitable relief.

Bunwari Lal v. *Daya Sunkar Misser*(1) and *Mahanth Ram Sunder Das* v. *Barhamdeo Narayan Thakur*(2), distinguished.

Appeal by the defendants.

The plaintiff and his father Bulan represented one branch of a joint Hindu family governed by the *Mitakshara*, while Makut and Babujan represented the other branch of the joint family and on the 15th November, 1907, the property in suit was sold by Babujan and Makut to the defendants for a sum of Rs. 3,350; the plaintiff alleged that in 1902 his father separated from Babujan and Makut and began to hold his half share in the property separate from them. The present suit was brought against the transferees only on the 5th July, 1918, for a declaration that the

* Appeal from Appellate Decree No. 1098 of 1921, from a decision of M. Ihtisham Ali Khan, Subordinate Judge of Bhagalpur, dated the 9th May, 1921, confirming a decision of Maulavi Najabat Husain, Munsif of Bhagalpur, dated the 28th June, 1920.

(1) (1908-09) 13 Cal. W. N. 815. (2) (1909-10) 14 Cal. W. N. 552.

1923.

SHYAM SUNDER RAI v. JAGARNATH MISRA.

plaintiff's half-share could not be affected by the sale and for recovery of possession of that share from the defendants.

The defendants filed a written statement pleading that the family was joint and that there had not been any separation as alleged by the plaintiff. The issue upon this was :

"Did Bulan separate from Makut Lal and Babujan in *Pus* 1309?".

As the defendants pleaded jointness an additional issue was framed and ran as follows :

"Was there any legal necessity and is the *kabala*, dated 15-11-1907 binding on the plaintiff?"

The Munsif found that the plaintiff was not separate at the time of the sale. He found that the family was still joint, that there was no legal necessity for the alienation and that, therefore, the sale was invalid. He, however, gave the plaintiff a decree for his half-share and that decree was affirmed by the lower Appellate Court.

Nirsu Narayan Sinha, for the appellants.

Susil Madhab Mullick, for the respondent.

MULLICK, J. (after stating the facts of the case, as set out above, proceeded as follows) :—

The present second appeal is preferred by the defendants on the ground that in view of the finding that the plaintiff was not separate at the time of the sale his claim to recover a half-share cannot be entertained.

Now, upon the authorities, this contention is undoubtedly correct. A coparcener in a joint family who establishes that a member of the family has alienated family property without legal necessity, can sue to recover the whole property. He cannot be allowed to sue for his own share or any specific portion thereof for the simple reason that in a *Mitakshara* joint family no particular share can be predicated as belonging to any individual member. In the present case the plaintiff has not only omitted to

ask for the recovery of the whole property but he has failed to implead his co-sharers. Therefore, in my opinion, the suit ought not to have been entertained.

The only concession, which the Courts have so far made in the direction of allowing the share of the transferor to be affected, is where the share of the transferor has been attached in execution of a money decree. In such a case the Courts have held that a co-sharer, who sues for the recovery of the whole property, will be allowed to recover, but that it will be declared that the purchaser of the interest of the transferor is entitled to partition and to recover thereafter that portion of the property which represents the transferor's interest therein. There is no justification for the contention that as the plaintiff was entitled to sue for the whole he is entitled also to relinquish his claim to half and to ask for a decree for the remainder. The Courts have never countenanced a suit of this kind.

The question as to other equitable relief does not arise in this case. In *Bunwari Lal* v. *Daya Sunker Misser* (1) a coparcener sued the transferees as well as the coparceners who had transferred the property. There a decree was made for the recovery of the whole property but it was provided that the plaintiff should refund to the transferees the purchase money paid by them and in the event of his failing to do so, the transferees would be entitled to retain possession of that share, which on partition would represent the interest of the transferors. A somewhat similar course was followed in *Mahanth Ram Sunder Das* v. *Barhamdeo Narayan Thakur* (2). There a coparcener sued for a declaration that a mortgage, in respect of the joint family property by his coparceners, was invalid. The mortgagees having brought a suit for the enforcement of their mortgage and advertised the joint family property for sale, the declaration given to the plaintiff in his suit was that the whole property

(1) (1908-09) 13 Cal. W. N. 815. (2) (1909-10) 14 Cal. W. N. 532.

1925.

SHYAM SUNDER RAI v. JAGARNATH MISRA.

MULLICK, J.

was liable to be sold in execution of the mortgage decree, it being notified at the sale that the plaintiff and his coparceners were in possession in proportion to their respective interests and that the shares of the mortgagor coparceners were held subject to the lien of the transferees. No such equity arises in the present case in view of the form in which the suit has been laid.

The result might have been otherwise if the plaintiff had put his claim in the alternative and joined his coparceners as defendants, but he has not chosen to do so; and I think it is not possible to allow him any equitable relief.

It is suggested by the learned Vakil, for the appellants, that we should allow the plaint to be amended. But having regard to the fact that the case has now reached the second appeal stage and that it was open to him in the trial Court as soon as the evidence on the issue as to separation was taken to ask for the amendment, I do not think we should now allow him to alter the whole aspect of the litigation by including an additional prayer for relief and by bringing new parties on the record

The result, therefore, is that the decree of the lower Appellate Court will be set aside and the suit will be dismissed with costs throughout.

BUCKNILL, J.—I agree.

Decree set aside.