APPELLATE CIVIL

Before Mr. Justice Darwood.

1928

May 4.

U SHWE BWA

v.

MAUNG THAUK KYA AND OTHERS.*

Voluntary payment—Charge on land how created—Payment by one heir to set aside Court-sale of property of a deceased person—Payment of Government revenue by one co-sharer—Transfer of Property Act (IV of 1882), s. 100.

Held, that an heir of a deceased person who voluntarily pays into Court money under the provisions of O. 21, r. 89, of the Civil Procedure Code in order to get the Court sale of the deceased's property set aside, does not acquire any charge thereby on the shares of the co-heirs in such property, by operation of law or otherwise, if such payment, which they are under no liability to make, is made without their knowledge and consent.

A majority of the High Courts in India have held that even where a co-sharer pays Government revenue which all the co-sharers are bound to pay, and thereby saves the estate, he does not acquire a charge on the shares of his defaulting co-sharers.

Kinu Ram v. *Mozaffer*, 14 Cal. 809 ; *Seth Chitor Mal* v. *Shib Lal*, 14 All. 273 ; *Shivrao* v. *Pandlik*, 26 Bom. 437—*referred to.*

P. Amman Pariyayi v. *M. P. Pakran*, 36 Mad. 493 ; *Rajah of Vizianagram* v. *Rajah Setrucherla*, 26 Mad. 686—*distinguished.*

Thein Maung for the appellant.

DARWOOD, J.—So far as this appeal is concerned, the facts of the case may be stated as follows :—

A money decree was passed against the first four respondents as legal representatives of their mother, the late Ma Shan Ma. In execution of that decree the property in suit, *viz.*, certain paddy lands, were auctioned by the Court and purchased by the appellant. The 1st respondent, however, exercising the powers conferred by Order XXI, rule 89, of the Civil Procedure Code, deposited Rs. 870-2-0 in

*Civil Second Appeal No. 21 of 1928 against the judgment of the District Court of Prome in Civil Appeal No. 113P of 1927.

Court and thus saved the property. The four respondents subsequently mortgaged the property to one U Shwe Kha on the 17th August, 1924, for Rs. 590, and later, under Exhibit B, appellant purchased the rights of the 2nd, 3rd and 4th respondents in the property subject to U Shwe Kha's mortgage which, appellant says, he has paid off.

The 1st respondent has also sold his interest in the property to the 5th and 6th respondents ; but there appears to be a separate dispute going on between these parties as to the validity of the sale. The 5th respondent states that the 1st respondent is in possession as his tenant. The 1st respondent shows himself to be a very unrealiable witness. He says that he has not sold all the land to the 5th and 6th respondents, and that he has returned them the sale price—Rs. 2,000. The 5th and 6th respondents deny this allegation. It is not clear why the lower Courts did not go into the question of these respondents' title. They were either necessary parties to the suit, or they were not. If they were, then the appellants were, on the findings of the lower Courts, entitled to a decree for possession of 11/16ths of the land against them.

It is true that the Courts below have given a decree against them, but, if they have purchased the 1st respondent's interest in the property, then it appears to me that the one point which has been argued in both the lower Courts, *viz.*, the question of a charge on the land for a proportionate share of the sum which the 1st respondent paid to have the Court sale cancelled, loses its importance.

It is admitted that the shares of the 2nd, 3rd and 4th respondents in the land in suit amount to 11-16ths of the whole, and the main point of dispute in the lower appellate Court and this Court was whether

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the appellant was entitled to this share free of any charge.

If the 1st respondent alone had to be considered, the question would be of paramount importance in this case, but, inasmuch as it has been alleged, with some show of truth, that the 5th and 6th respondents are his representatives in title, it can hardly be urged that any equitable charge which the 1st respondent might possibly have been entitled to against his co-heirs for their proportionate share of the sum of Rs. 870-2-0, which he paid to recover the land, has been passed on to his assignees.

There are certainly no equities in their favour with reference to the payment made by the 1st respondent. If they have acquired his interest in the land, they would certainly not be entitled to a sort of rebate on the price paid by them for his share merely because he chose to pay his mother's debt, more especially as the rebate would have to be paid by the appellant.

Both the lower Courts have held that the appellant has acquired the interest of his vendors in the property subject to a charge in favour of the 1st respondent to the extent of Rs. 596-12-0.

Appellant urges that the lower Courts were wrong in law in allowing this charge.

On the assumption that the 1st respondent is still the owner of his own share, it certainly does seem equitable that his co-heirs should contribute towards the cost of the recovery of the land after the Court sale. But it is very questionable whether any right of contribution in such a case could be made a charge upon their share in the land.

There has been a conflict of decision amongst the High Courts of India on the analogous case of payment of revenue by one co-heir. In 1887 in the

case of *Kinu Ram Das* v. *Mozaffer* (1), a Full Bench of the High Court of Calcutta held that there is no general rule of equity to the effect that whoever, having an interest in an estate, makes a payment in order to save the estate, obtains a charge on the estate, and, therefore, in the absence of a statutory enactment, a co-sharer who has paid the whole revenue and thus saved the estate does not by reason of such payment acquire a charge on the share of his defaulting co-sharer.

Wilson, J., with whom the majority agreed, said :—

"The contention before us has been in favour of the broad proposition that a payment of Government revenue or any other payment necessary to save the estate if made by one having an interest which would be sacrificed by the loss of the estate gives a charge on the estate for the money paid. We have to say whether such a rule of equity is in force in this country."

The answer of the majority of Judges to the above question was in the negative.

In *Seth Chitor Mal* v. *Shib Lal* (2), a Full Bench of the Allahabad High Court agreed with the decision in *Kinu Ram Das's* case. Section 100 of the Transfer of Property Act was referred to and held not to operate as creating a charge in the above circumstances.

The decision of these two High Courts on this important question was followed by the High Courts of Bombay in *Shivrao Narayan* v. *Pandlik Bhaire* (3).

Jenkins, C.J., states there :—

" The mere fact that the plaintiff had to make the payment for the purpose of saving his own property does not in our opinion make any difference, for though this fact may, under the circumstances, have given a right to claim contribution, a charge would not be an incident to that right, for it is plain that the right to contribution is a personal right and the remedy is a personal remedy and that there is no lien in respect of which the right to contribution arises."

(1) (1887) 14 Cal. 809. (2) (1892) 14 All. 273. (3) (1902) 26 Bom. 437.

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In *Rajah of Vizianagram* v. *Rajah Setrucherla Somasekhararaz* (1), a Full Bench of the Madras High Court held that where one of two or more co-sharers owning an estate subject to the payment of Government revenue pay the whole revenue in order to save the estate from liability to be sold for arrears of revenue, he is entitled to a charge upon the share of each of his co-sharers for the realization of the latter's share of the revenue as between co-sharers.

Subramania Aiyer, J., based this right on justice, equity and good conscience, while Benson, J., was of opinion that a charge was created by operation of law.

In *P. Amman Pariyayi* v. *M. P. Pakran Haji* (2), a Bench of the Madras High Court followed the decision in the *Rajah of Vizianagram's* case.

The different opinions held by the High Courts of Calcutta, Bombay and Allahabad on the one side and that of Madras on the other render the question in this case more difficult to answer. But the facts may easily be differentiated from those contained in the above authorities. In each of those cases the co-sharers were all liable to pay the Government revenue, and in default of such payment their lands were liable to be sold. Payment of revenue by one co-sharer, therefore, was payment of a debt for which all the co-sharers were jointly liable. In the present case the property of Ma Shan Ma had already been sold in order to satisfy the decree passed against her estate. Her heirs were, therefore, no longer liable to pay any debt, since none existed. The 1st respondent, however, then took it upon himself to save the property by having the Court sale set aside under the provisions of Order XXI, rule 89, of the Civil Procedure Code. At that period neither he nor his co-owners were under any liability to make any

(1) (1902) 26 Mad. 686. (2) (1912) 36 Mad. 493.

payment whatever in respect of the property. His action, therefore, in saving the property was a purely voluntary one, and it does not appear to be suggested that he was acting with the knowledge or consent of his co-owners in doing so.

Since a charge can only be created by act of parties, or by operation of law, it is difficult to see how one has been created in this case. There was no act of the parties creating one, and the voluntary payment made by the 1st respondent, even though it benefited the other respondents, does not create a charge "by operation of law" in his favour. No doubt from the point of view of equity, justice and good conscience, it is right and proper that the co-owners who benefited by his act should recompense him, and that their share in the property should be held liable for the amount which each of them has to contribute; but, in view of the rulings quoted above, I think it must be held, so far as this case is concerned, that the 1st respondent has no charge upon the shares of his co-owners. I arrive at this conclusion with considerable hesitation, though it is supported by the views of the High Courts of Calcutta, Bombay and Allahabad, as it appears to me that the opposite view held by the Madras High Court is supported by cogent and convincing arguments.

The judgment and decree of the lower appellate Court is, therefore, reversed and that of the Subdivisional Court modified to the extent that the decree for possession of the 11-16ths share in the property will be unconditional.

Respondents will pay appellant's costs.