APPELLATE CIVIL.

Before Broadway and Coldstream JJ.

1932

June 7.

HEM RAJ AND OTHERS (PLAINTIFFS) Appellants

versus

BASHESHAR DAS AND OTHERS (DEFENDANTS) AND DEVI DAS (PLAINTIFF) Respondents.

Civil Appeal No. 2073 of 1926.

Hindu Law—Mortgage by father of joint family property—Subsequent partition between him and his sons—by which the father's share in the mortgaged property became one-sixth—whether auction purchaser of the mortgaged property under the mortgage decree can claim possession of the whole property as against the sons.

Where the father has created a charge on joint family property and subsequent to the creation of that charge a partition has been effected and the family has been disrupted (the partition although specifying the shares of the father and sons, not being a partition by metes and bounds) and subsequent to this partition a suit has been brought on the mortgage and finally decreed and the property mortgaged has been brought to sale and when the auction purchaser sought to get possession of the property, he was obstructed by the sons of the mortgagor who claimed that their shares had not passed to the auction purchaser.

Held that in the absence of proof that their father had effected the mortgage for some immoral or illegal purpose the sons' claim must be rejected.

Trimbak Balkrishna v. *Narayan Damodar Dabholkar* (1), followed.

Mulla's Hindu Law, sections 294 (2) and 296, referred to.

First Appeal from the decree of Pandit *Devi Dayal Joshi, Senior Subordinate Judge, Lahore, dated the 26th May, 1926, dismissing the plaintiffs' suit.*

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M. C. MAHAJAN, TIRATH RAM and MANOHAR LAL SACHDEV, for Appellants.

KISHEN DAYAL, RAMA NAND and BHAGWAT DAYAL, for (Defendant No. 1) Respondent.

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BROADWAY J.—On the 18th of June 1907 one Narpat Rai, son of *Lala* Surjan Mal, a Khatri of Lahore, executed a mortgage in favour of Mool Chand and Company of Lahore by which he mortgaged a certain house in lieu of a sum of Rs. 8,000. In this deed of mortgage Narpat Rai alleged that he was the owner of the property mortgaged. As a matter of fact Narpat Rai had five sons with four of whom he was having considerable difficulty. They (the four sons) were claiming that they were members of a joint Hindu family along with their father Narpat Rai and their brother Daulat Ram, and joint owners of all the property including this particular house, while Narpat Rai was asserting that the said four sons were not joint with him and that the property of which they were in possession including the house mortgaged, was his sole property and that they were in possession of it as his servants. On the 5th of August 1907 Narpat Rai instituted a suit against his four sons claiming possession of all the properties, including the house mortgaged, on the ground that he was the sole owner of the same. The four sons contested the suit on the ground that they were members of a joint Hindu family and that the property was joint family property. Ultimately the parties referred their case to arbitration with the result that an award was given on the 16th of November 1909 partitioning the entire family property, including this house, between the father and his five sons, each one being given a 1/6th share in the entire property. So far as the house mortgaged was

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concerned, although it was in possession of the four brothers, the father was declared to be a co-sharer with them to the extent of 1/6th, their brother Daulat Ram being also allotted a similar share. Objection was taken to this award, but it was finally decided in 1910 and a decree apparently was passed, giving effect to the award. It appears that Narpat Rai took no further steps to get the joint property divided by metes and bounds and to take possession of his divided share. Subsequent to this Mul Chand and Company brought a suit on the basis of their mortgage, obtained the usual decree and in due course brought the mortgaged house to sale. At the auction sale the highest bidder was one Nikka Mal who finally purchased the property on the 27th of May 1917 for Rs. 6,500. When he sought to obtain possession of the said house, however, he was obstructed by the four brothers who claimed that they were the sole owners of the said house and that their father had no right, title or interest in it and was not for that reason empowered to create any charge on the house. It was held by the executing Court that Narpat Rai and his five sons were co-sharers in this house, each having a one-sixth share. The objections were, therefore, allowed to the extent of the shares of the four brothers, namely, 2/3rd of the house, but dismissed *qua* the remaining 1/3rd. This was on the 30th August 1918 and resulted in the institution of two suits, one by Nikka Mal for immediate possession of the house purchased by him, and the other by the four brothers, who claimed that they were the owners of the entire house and that therefore were entitled to the 1/3rd, possession of which had been allowed to Nikka Mal. These two suits were tried and disposed of on the 21st of July 1919 and the 27th of January 1921. When the appeals came up before a

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Division Bench of this Court, it was found that the procedure adopted by the Court below had been in disregard of certain decisions of this Court and of the Civil Procedure Code and a remand was, therefore, ordered in both of them for the proper trial of the cases. They were finally disposed of in one judgment by *Lala* Devi Dayal Joshi on the 26th May 1926, the decision being in favour of the auction purchaser Nikka Mal, who, however, had died and was represented by his son Basheshar Das. Separate appeals have been filed by the four brothers in the two cases and this judgment will dispose of both these appeals.

Appeal No. 2073 of 1926 relates to the suit brought by the four brothers *qua* the 1/3rd of the house and No. 2074 of 1926 arises out of the suit brought by the auction purchaser relating to the 2/3rds of which he had been deprived. Appeal No. 2073 need not detain us long, as, in my judgment, the decision of the trial Court is manifestly correct. Admittedly, the only question for decision is whether the four brothers, the plaintiffs in the case, had established the fact that they had acquired the prescriptive title to the share of their father and brother. Now, there can be no doubt that whatever the state of affairs may have been prior to 1910, this particular property was held to be joint family property and, as such, was partitioned by the arbitrator whose award was given effect to in the decree passed in that suit. No overt act has either been alleged or proved from which it can be said that the four brothers, plaintiffs in the suit, set up a title adverse to the title of their father and brother after the passing of the decree. It was urged that inasmuch as Narpat Rai had alleged in 1905 that he was the sole owner of this property, their possession must

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be held to have been adverse since 1905 and that the passing of the decree did not break the continuance of the period of adverse possession. As a matter of fact, in 1905, whatever Narpat Rai's attitude may have been, the attitude of the four brothers was that their possession was not adverse to Narpat Rai's interests but that they were in possession, as members of a joint family, of joint family property of which they held a share and of which admittedly Narpat Rai also was a co-sharer. In these circumstances there can be no doubt that this suit has been rightly decided and I would, therefore, dismiss this appeal with costs.

Turning now to appeal No. 2074 of 1926 it has been urged on behalf of the appellants (the four brothers) that as a matter of fact there had been a separation in status as far back as 1905, and that therefore the mortgage executed by their father in 1907 was not binding and created no valid charge so far as their shares in the property were concerned. They based their claim as to separation of status on an alleged agreement to refer certain disputes to arbitration which was entered into between them and their father and Daulat Ram on the 27th and 28th January 1905. While it has been admitted that a reference to arbitration was made, the terms of the reference have not been proved, and it is clear that the dispute then existing between Narpat Rai and the four appellants was mainly on the question of whether the property was joint family property or belonged exclusively to Narpat Rai. This reference to arbitration admittedly proved abortive, and it is not known what actually happened. While the reference was pending, however, the four appellants published a notice to the general public, Exhibit P-1, on the 5th

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of April 1905 which was replied to by Narpat Rai by another notice, dated the 10th of April, 1905. It has been urged that the contents of these two notices clearly show a clear and unequivocal intention on the part of the four appellants to hold their property separately, and, therefore, it has been urged, that the family from that moment became disrupted and separate in status. To this Mr. Kishen Dayal for the respondents replied that he placed his reliance on *Tulsi Ram* v. *Shib Das* (1) and *Hari Kishen* v. *Chandu Lal* (2), and urged that inasmuch as in the Punjab the Mitakshara Law was not binding on Hindus in the same way as it is binding in other provinces in India and inasmuch as in the Punjab a son cannot claim partition of the joint family property during the lifetime of his father without his father's consent, the mere assertion of an intention to hold the property separately did not by itself affect the disruption of the joint family. I do not think it necessary to deal with this question, however, as in my judgment, the evidence on the record is not sufficient to establish that there was any clear and unequivocal expression of intention on the part of any of the members of this joint family to hold their property separately. The reference to arbitration is clearly inconclusive and an examination of the two notices, Exhibits D-1 and D-2, does not support the claim advanced by the appellants in this respect and in my opinion this question has been rightly decided by the trial Court.

After a careful examination of such evidence as there is on the record and after giving due weight to the arguments advanced at the bar, I am of opinion that the disruption of this family took place in 1910

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after the award in the suit instituted by Narpat Rai on the 5th of August 1907. It is immaterial whether the date of the disruption is the date of the decree or is the date of the institution of the suit, for admittedly the mortgage in favour of Mool Chand and Company was effected shortly before the 5th of August 1907.

It was next urged on behalf of the four brothers that inasmuch as admittedly, and as found by the trial Court, they were not bound by the decree in the suit brought by Mool Chand and Company on the mortgage bond, the sale of this particular house in execution of that decree did not in any way affect their 2/3rd share in the said house. It was pointed out that in any event there was no joint family at the date when Mool Chand and Company instituted their suit and that there was no joint family property when the decree in favour of Mool Chand and Company was executed and this particular house brought to sale. It was urged therefore, that all that the auction purchaser could have bought was the interest or share of the mortgagor Narpat Rai, that is to say, 1/6th of the property sold at the auction. On the other hand, it was contended that the partition which intervened between the date of the mortgage, when the charge was created on this property, and the date of the sale, did not affect the situation in any way, and it was urged that the four appellants could only avoid the effect of the sale by proving that the mortgage had been effected by their father for some immoral or illegal purpose. As a matter of fact the appellants have never set up such a case. There is good authority for the proposition that had the house in question been joint at the time of the sale, the four appellants, although not parties to the suit and therefore not bound by the decree, could not

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have recovered their shares of the mortgaged property unless they could prove that the mortgage had been effected for some immoral or illegal purpose (See Mulla's Hindu Law, section 294 (2) and section 296). It was urged, however, that the authorities in support of that proposition did not meet the present situation; for in those cases, at the time of the sale, the property sold was joint, whereas in the present case admittely at the time of the sale there was no joint family property in existence. It seems to me, however, that the question is set at rest by the decision of a Division Bench of the Bombay High Court in *Trimbak Balkrishna* v. *Narayan Damodar Dabholkar* (1). There the facts were practically on all fours with the present case. A father had created a charge on joint family property. Subsequent to the creation of that charge a partition had been effected and the family had been disrupted. The partition although specifying the shares of the various members was not a partition by metes and bounds. Subsequently to this partition a suit was brought on the mortgage and finally decreed. The property mortgaged was brought to sale and when the auction purchaser sought to get possession of the property bought by him at this sale, he was obstructed by the son of the mortgagor who claimed that his share had not passed to the auction purchaser. The son's claim was rejected.

It seems to me clear that when in this case the property was partitioned, so far as this particular house was concerned, all that remained to the joint family was the equity of redemption, and that it was in this equity of redemption that Narpat Rai and his five sons were given equal shares, *i.e.* 1/6th each. The property being part of the joint property at the date

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of the mortgage, the mortgagee's rights were not affected in any way by the partition itself, and no doubt the four appellants would have been entitled to claim redemption of their shares from the mortgagee if the terms of the mortgage permitted of a part redemption of the property. Failing such condition it seems to me clear that the redemption would have had to have been of the whole of the property. In the present case, as already pointed out, the appellants have never alleged that this debt had been raised by their father for any immoral or illegal purpose, nor have they ever offered or expressed a desire to redeem either wholly or in part and in these circumstances I consider that the view taken by the trial Court is correct and that the auction-purchaser was entitled to immediate possession of the property bought by him, and I would, therefore, dismiss this appeal with costs.

COLDSTREAM J.

COLDSTREAM J.—I agree.

A. N. C.

Appeal dismissed.