1935

BAKHSHISH SINGH v. MAKHAN SINGH.

We, therefore, accept this application for review to this extent that the dismissal of the plaintiffs' suit by the Court below against Fauja Singh and Karam Singh shall be upheld, and the plaintiffs' appeal against that portion of the decree shall stand dismissed. The rest of the decree passed by us will remain intact.

As the petitioners have succeeded only partially and were guilty of grave negligence in not raising this objection at the proper time, we will not allow them any costs of these proceedings.

P. S.

Review accepted in part.

APPELLATE CIVIL.

Before Tek Chand and Abdul Rashid JJ.

1934

Oct. 30.

RATTAN LAL AND ANOTHER (PLAINTIFFS) Appellants

versus

ALLAHABAD BANK, LIMITED, LAHORE, AND OTHERS (DEFENDANTS) Respondents.

Civil Appeal No. 1114 of 1934.

Court Fees Act, VII of 1870, section 7 (iv) (c), Art. 17 (iii) : Suit by son for declaration that joint Hindu family property mortgaged by father without necessity was not liable to sale in execution of the mortgage-decree against the father — proper court-fee.

Held, that a suit by the son of a Hindu governed by the *Mitakshara*, for a declaration that a mortgage of joint family property by the father had not been effected for legal necessity or for the benefit of the family and that the property was not liable to sale in execution of the decree obtained on foot of the mortgage against the father (*the son not having been made a party to the mortgage suit*) is governed by Art. 17 (*iii*), Schedule II of the Court Fees Act, and a

1934

RATTAN LAL
v.
ALLAHABAD BANK, LTD.

court-fee of Rs.10 is sufficient, and that section 7 (*iv*) (*c*) of the Act is not applicable to such a suit.

Sukh Dial v. *Durga Das* (1), followed.

Harbhagwan v. *Amar Singh* (2), *Sham Das* v. *Charan Das* (3) and other cases referred to.

First Appeal from the order of Lala *Shankar Lal, Senior Subordinate Judge, Ferozepore, dated 23rd May, 1934, rejecting the plaint.*

J. L. KAPUR and S. C. MANCHANDA, for Appellants.

PARTAP SINGH and P. M. LAUL, for Respondents.

TEK CHAND J.

TEK CHAND J.—The plaintiffs, Rattan Lal and Inderjit, minors, sons of Hans Raj and Sohan Lal (defendants 2 and 3), brought a suit for a declaration that the property described in the plaint was not liable to sale in execution of a decree which had been obtained by the Allahabad Bank (defendant 1) against defendants 2 and 3, on foot of a mortgage, executed in 1930 by defendant 2 on his own behalf and as the agent of defendant 3, on the ground that the property in dispute was ancestral of a joint Hindu family, of which the plaintiffs and defendants 2 and 3 were members, and that the mortgage had not been effected for legal necessity or for the benefit of the family. A court-fee of Rs.10 only was paid on the plaint, while the suit was valued for purposes of jurisdiction at Rs.3,17,863.

The suit was resisted by the first defendant, the Allahabad Bank on numerous grounds, one of them being that the plaint was insufficiently stamped. The Senior Subordinate Judge upheld this objection and directed the plaintiffs to pay *ad valorem* court-fee on

(1) (1928) 113 I. C. 908. (2) (1924) I. L. R. 5 Lah. 137.
(3) (1925) A. I. R. (Lah.) 90.

1934

RATTAN LAL
v.
ALLAHABAD BANK, LTD.

TEK CHAND J.

Rs.3,17,863. The plaintiffs having failed to make up the court-fee within the time fixed, the learned Judge rejected the plaint under Order VII, rule 11 (*c*), Civil Procedure Code.

The plaintiffs have appealed and the only question for determination is the proper amount of court-fee payable on the plaint. The learned Subordinate Judge has held that the suit is governed by section 7 (*iv*) (*c*) of the Court Fees Act, and that the value for purposes of court-fee is the same as that fixed by the plaintiffs for purposes of jurisdiction. In the plaint, however, no consequential relief of any kind had been asked for, and it is difficult to see how sub-clause (*iv*) is applicable. It is conceded by the learned counsel for the defendant Bank, that if the Bank had not obtained a decree on foot of the mortgage and the sons of the mortgagors had sued for a declaration that the mortgage had been effected without family necessity, a court-fee of Rs.10 only would have been payable on the plaint, under Article 17 (*iii*) of Schedule II of the Act. It is urged, however, that the position is different when the mortgagee had obtained a decree against the mortgagor on foot of the mortgage and had taken, or was about to take, steps to bring the property to sale, when the sons of the mortgagors sued for a declaration that the mortgage was without necessity and the family property was not liable to sale in execution of the decree. In my opinion this contention is without force. It is no doubt true that if a person, *against whom a decree has been passed*, brings a suit to have the decree set aside on the ground of fraud or for any other valid cause, it has been held that the suit falls within section 7 (*iv*) (*c*). But the position is different where the plaintiff was not a party to the suit in which the decree was passed.

There is a long course of decisions in which such suits have been held to be governed by Art. 17 (*iii*) and a court-fee of Rs.10 only held payable. And the rule is the same where the son of a person governed by the *Mitakshara* sues to have it declared that an alienation of joint family property by his father is not binding on him, it not having been effected for legal necessity or the benefit of the family. See, *inter alia*, *Harbhagwan* v. *Amar Singh* (1), *Sham Dass* v. *Charan Das* (2), *Karm Chand* v. *Uma Datt* (3) and *Sukh Dial* v. *Durga Das* (4). The case last mentioned is on all fours with the case before us, for there, as here, the suit was by the son of a Hindu against whom a mortgage-decree had been passed, and the decree-holder had applied for the sale of the mortgaged property, and the son had sued for a declaration that the property being ancestral could not be sold as the mortgage-debt had been advanced for immoral and illegal purposes. It was held that the suit was not for a declaration with consequential relief, but was one for a mere declaration and that a court-fee of Rs.10 only was payable, the value of the suit for purposes of jurisdiction being the value of the property.

The learned Senior Subordinate Judge has referred to a number of rulings, but on examination we find that none of them has any bearing on the case before us. *Lingangowda Dod-Basangowda Patil* v. *Basangowda Bistangowda Patil* (5), was a suit for partition of joint family properties, and it was held that a previous suit to which the fathers of the plaintiffs were parties, operated as *res judicata*, because, for the purpose of partition of the family

(1) (1924) I. L. R. 5 Lah. 137.
(2) 1925 A. I. R. (Lah.) 90.
(3) 1930 A. I. R. (Lah.) 755.
(4) (1928) 113 I. C. 908.
(5) 1927 A. I. R. (P. C.) 56: I. L. R. 51 Bom. 450.

1934

RATTAN LAL
v.
ALLAHABAD BANK, LTD.

TEK CHAND J.

estate into the various branches of the family, the head of each branch must be considered to represent his sons. It was also found that in the former litigation the father had acted on behalf of his minor sons and in their interests. This case is, therefore, clearly distinguishable. *Nathuni Sahu* v. *Bhagwan Gir* (1), was not a case in which the sons were suing for setting aside an alienation made by their father and the points involved were quite different. In *V. N. Alagar Aivangar* v. *Srinivasa Aivangar* (2), the plaintiffs, in addition to a claim for a declaration that certain alienations were not valid and binding as against their interests in the family property, prayed for partition and possession of their shares. It will be seen that in that case consequential relief was expressly asked for and, therefore, a court-fee of Rs.10 was obviously insufficient. Further it appears that in that case the alienations had been made by the alienor in his capacity as guardian of his minor sons, and the sons on attaining majority sought to repudiate the alienations and the decree which had been passed thereon.

Mr. Partap Singh for the respondent referred us to *Hakim Rai* v. *Ishar Das-Gorkle Rai* (3), but there the decree had been obtained against the plaintiff himself and he wanted to avoid it on the ground of fraud.

I have no doubt that the plaint in this case had been properly stamped and the order of the lower Court to the contrary was erroneous.

I would accordingly accept this appeal, set aside the judgment of the lower Court rejecting the

(1) 1928 A. I. R. (Pat.) 43. (2) (1926) 50 Mad. L. J. 406.
(3) (1927) I. L. R. 8 Lah. 531.

plaint, and remand the case to it for decision in accordance with law. Court-fee on this appeal shall be refunded : other costs shall be costs in the cause.

ABDUL RASHID J.—I agree.

A. N. C.

Appeal accepted,
Case remanded.

APPELLATE CIVIL.

Before Addison and Din Mohammad JJ.

BHARAT NATIONAL BANK, LTD., DELHI, AND ANOTHER (DEFENDANTS) Appellants

1934
Dec. 14.

versus

THAKAR DAS (PLAINTIFF)
SAWAN MAL (DEFENDANT) } Respondents.

Civil Appeal No. 1316 of 1931.

Indian Contract Act, IX of 1872, sections 128, 134, 139 : Surety — onus probandi — *that his liability is not co-extensive with that of the principal debtor — Omission by creditor to sue principal within time — whether discharges surety — Foreign judgment — not decided on merits — Civil Procedure Code, Act V of 1908, section 13 (h) : Banker's lien.*

The plaintiff T. D. sued for recovery of money he had advanced to the Bank (Defendant-Appellant). The Bank claimed as a set-off the amount due on a loan made by it to one N. M., a contractor of Bhatinda in Patiala State, for which plaintiff was a surety and which had not been repaid by N. M. The Bank sued both N. M. and plaintiff in the Patiala Courts for recovery of the money lent to N. M., but the suit was dismissed for default and an application for its restoration was rejected as barred by time. The Bank appealed up to the highest Court in the State but its appeals were rejected and so was a subsequent application for revision.