APPELLATE CIVIL.

Before Tek Chand and Abdul Rashid JJ.

1934

Dec. 10.

IMPERIAL BANK OF INDIA, JULLUNDUR (DEFENDANT) Appellant

versus

MST. MAYA DEVI (PLAINTIFF)
AMAR SINGH (DEFENDANT) } Respondents.

Civil Appeal No. 329 of 1934.

Hindu Law — Joint Hindu family property — Gift of — by Manager — whether void or voidable — and whether can be challenged by a stranger to the family.

Held, that under the *Mitakshara* Law the Manager of a Joint Hindu family, even though he be the father of the other co-parceners, cannot alienate joint family property except for family necessity, or with the consent of the co-parceners if they are adults.

But, an alienation by him, which cannot be supported on these grounds, is not unlawful or void *ab initio*, but is voidable at the option of the other co-parceners, who alone are affected by his unauthorised act, and this applies equally to 'gifts' of joint family property, as to sales and mortgages.

Hanuman Kamat v. *Hanuman Mandur* (1), relied upon.

Held also, that no person who is a stranger to the family and does not possess a right to have the transaction defeated on other grounds (*e.g.* under section 53 of the Transfer of Property Act) has a *locus standi* to intervene and impugn an alienation by the Manager, merely because it is in excess of his authority to deal with the property for family purposes, and on this point there is no distinction between sales and mortgages on the one hand and gifts on the other.

Banke Rai v. *Madho Ram* (2), and other cases, relied on.

Sohan Lal v. *Peare Lal* (3), distinguished.

First Appeal from the decree of K. S. Chaudhri *Niamat Khan, Senior Subordinate Judge, Jullundur,*

(1) (1891) I. L. R. 19 Cal. 123, 126 (P.C.). (2) 153 P. R. 1883.
(3) (1929) 117 I. C. 826.

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dated 16th December, 1933, decreeing the plaintiff's suit.

M. A. MAJID and K. ZAMAN, for Appellant.

ACHHRU RAM, BALWANT RAI and I. K. KAUL, for (Plaintiff) Respondent.

TEK CHAND J.—The Imperial Bank of India (defendant No.1), having obtained a money-decree against Amar Singh (defendant No.2) attached the house in dispute, alleging it to be the property of the judgment-debtor. The plaintiff, who is the wife of the judgment-debtor, objected on the ground that the house was her exclusive property, having been gifted to her by her husband Amar Singh in January, 1924. She alleged that the gift had been made orally, but was followed by mutation, which was sanctioned by the Revenue Officer on the 22nd February, 1924, since when she had been in possession through tenants. The executing Court overruled the objection, whereupon the plaintiff instituted a suit under Order XXI, rule 63, for a declaration that the house was her property and was not liable to attachment and sale in execution of the decree obtained by defendant No.1 against defendant No.2.

The suit was resisted by the Bank, on whose behalf the factum as well as the validity of the gift were denied. It may be stated here that it is not the case of the contesting defendant that the gift had been made to defeat or delay the creditors of defendant No.2. It was admitted before us by both counsel that in 1924 Amar Singh was in affluent circumstances and that the loan, for the payment of which the Bank had obtained the decree was raised in 1926, *i.e.* about two years after the gift.

The learned Subordinate Judge, after a careful examination of the voluminous evidence produced by

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the parties, found that the gift in favour of the plaintiff was genuine and had been made *bonâ fide*, at a time when the donor was suffering from slow fever (which was then believed to be tuberculosis), and that since 1924, she had been in possession as exclusive owner. He also found that the house, though acquired by Amar Singh himself, had been purchased with the proceeds of "ancestral" property and, therefore, was the property of a joint Hindu family consisting of himself and his minor son and consequently could not be gifted by Amar Singh. He held, however, that the Bank, being a stranger to the family, had no *locus standi* to object to the validity of the gift. He accordingly passed a decree in favour of the plaintiff granting her the declaration prayed for. The Bank appeals.

In the memorandum of appeal presented in this Court, the finding of the Subordinate Judge as to the genuineness of the gift was impugned, but at the time of the arguments Mr. Abdul Majid very fairly and properly stated before us that in view of the overwhelming evidence on the record he was unable to sustain this plea. The only contention which has been raised before us is that the house in question having been found to be ancestral in the hands of the donor, its gift by him to the plaintiff was absolutely void, and not merely voidable at the instance of the minor son of the donor. He contended that the alienation was a nullity in the eye of the law, under which title did not pass to the plaintiff and, therefore, the Bank could treat it as the property of Amar Singh and attach it in execution of the decree obtained by it against him. In my opinion this contention is without force, and I have no hesitation in rejecting it. It is no doubt true that under the Mitakshara Law the

manager of a joint Hindu family, even though he be the father of the other coparceners, cannot alienate joint family property except for family necessity, or with the consent of the coparceners if they are adults. But it is equally well-settled that an alienation by him, which cannot be supported on these grounds, is not unlawful or void *ab initio*, but is merely voidable at the option of the other coparceners, who alone are affected by his unauthorised act. This proposition is too well established to require elaborate discussion. It will be sufficient to refer to the dictum of their Lordships of the Privy Council in *Hanuman Kamat* v. *Hanuman Mandur* (1), that "the alienation by a manager was not necessarily void, but was only voidable if objection were taken to it by the other members of the joint Hindu family."

Mr. Abdul Majid conceded that the proposition stated above, is sound so far as the manager's alienations by way of sale or mortgage are concerned, but he urged that *gifts* by the manager stand on an entirely different footing and are void. He based this contention on the well-known rule of Hindu Law that the *karta* of the family may make gifts of small portions of joint family property for religious purposes. From this it cannot be inferred, however, that all other gifts by the *karta*, not answering the description given above, are null and void. All that this means is that the *karta* is authorized to make a gift of a small portion of the joint family property for religious purposes, without the consent of the other coparceners and, under certain circumstances, even despite their objection. In such a case the gift is binding, because of the pious object of the donation and its validity is not dependent upon the consent of the other co-

(1) (1891) I. L. R. 19 Cal. 123, 126 (P.C.).

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parceners or any benefit that they or the family as a whole might derive from it.

Where, however, the gift is not for religious purposes, or consists of the whole or a large portion of the joint family property, the transaction is voidable, but only at the instance of the other coparceners. No person who is a stranger to the family, and does not possess a right to have the transaction defeated on other grounds (*e.g.* under section 53 of the Transfer of Property Act) has a *locus standi* to intervene and impugn it, merely because it was in excess of the authority which the *karta* possessed to deal with it for family purposes.

That on this point there is no distinction between sales and mortgages on the one hand and gifts on the other is clear from a number of decided cases in which gifts, not made for religious purposes, have been held to be voidable at the option of the coparceners only, and not void *ab initio* as contended for by the learned counsel. Reference may in this connection be made to *Banke Rai* v. *Madho Ram* (1), where it was held by Elsmie and Rattigan JJ., after a reference to several original texts of Hindu Law, " that according to the Hindu Law, as interpreted in the Punjab, no member of a joint Hindu family can, in the absence of a custom to the contrary, alienate even his own share in the undivided estate without the consent of his coparceners, but such an alienation is an act which is not necessarily and *ipso facto* void, but is merely voidable by the cosharers if they choose to repudiate it." See also *Mussammat Piari* v. *Kishori Rawanji Maharaj* (2), *Jagesar Pande* v. *Deo Dat Pande* (3) and *Mussam-*

(1) 153 P. R. 1883. (2) 1930 A. I. R. (Lah.) 223.
(3) (1923) I. L. R. 45 All. 654.

mat Saraswati Kaur v. *Mahabir Prasad* (1), all of which are cases of gifts.

Mr. Abdul Majid has not been able to distinguish any of these cases from the one before us. He has, however, relied principally upon a Single Bench decision of Dalal J. of the Allahabad High Court, reported as *Sohan Lal* v. *Peare Lal* (2). The facts of that case were entirely different. There a Hindu father had made a gift of a portion of his property to a *Brahman*, who was a legal practitioner by profession and was found to be much richer than the donor. The gift was not perfected by delivery of possession to the *Brahman* donee, and a few years later the donor, who had been in possession all along, sold the same property to a third party. The donee sued the vendee for possession, alleging that the gift had been made for religious purposes and was therefore valid. This contention did not find favour with the learned Judge. The real ground of decision appears to be that the gift to such a person could not confer any spiritual benefit on the donor, or his ancestors, or other members of the family. Moreover, the gift in that case had not been accompanied with possession and for this reason also it could not be given effect to against a subsequent transferee, for valuable consideration, and without notice. It is clear, therefore, that on these grounds the then plaintiff's suit merited dismissal. In the course of his judgment, however, the learned Judge observed that " the gift of joint family property made by a Hindu father in excess of his powers is entirely void and the donee cannot claim possession on the basis of such a gift from a subsequent purchaser even though it has not been avoided by the son." With all deference, to the learned Judge, I venture to

(1) 1928 A. I. R. (All.) 476. (2) (1929) 117 I. C. 826.

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think that this observation is expressed in much too wide terms, and if it was intended to lay down a general rule of Hindu Law, without reference to the peculiar facts of that particular case, I most respectfully dissent from it. It appears that the attention of the learned Judge was not drawn to an earlier decision of a Division Bench of the Allahabad High Court in *Jagesar Pande* v. *Deo Dat Pande* (1), where it was held "that a gift of family property made by a manager of a joint Hindu family is not absolutely void, but was only voidable at the instance of the person whose interests were affected by it, namely, the coparceners of the property."

For the foregoing reasons I hold, that even if the finding of the lower Court be accepted as correct that the house in question was the property of a joint family consisting of defendant No.2 and his son, the gift by the former in favour of the plaintiff was only voidable at the option of the other coparcener, and as this option has not been exercised, it is not open to the appellant Bank who is a stranger to the family to urge that the gift, which has otherwise been found to be genuine and proper, did not convey any title to the plaintiff.

Before concluding this part of the case it may be mentioned that the only other alleged member of the joint family at the time of the gift was a minor son of the donor, who is stated to have died during the pendency of the present litigation.

The learned counsel for the plaintiff-respondent has challenged the finding of the learned Subordinate Judge that the property in dispute was ancestral, and I think it necessary to record my finding on it, though

(1) (1923) I. L. R. 45 All. 654.

in the view of the law, which I have taken above, it is not very necessary to do so. It is common ground between the parties that the site of the house in question was purchased by Amar Singh by a deed, registered on the 29th May, 1905, from one *Rai Sahib* Bishan Das, and that the house was constructed by him subsequently. The contention on behalf of the Bank is that the money required for the purchase of the house, as well as that spent on the superstructure came from ancestral funds, and, therefore, the house must be treated as "ancestral" property. As stated already, this contention has been accepted by the learned Judge of the Court below. The case for the plaintiff, however, is that Amar Singh did not spend money belonging to the joint family on the purchase of the site, but that he raised the requisite amount by loan from *Lala* Salig Ram and *Bawa* Sâlamat Rai. *Bawa* Salamat Rai (P.W.12) has deposed that Amar Singh had borrowed Rs.7,000 or Rs.8,000 from him for the purchase of the house from *Rai Sahib* Bishan Das, and *Lala* Dev Raj, who is the son of *Lala* Salig Ram, since deceased, has produced the account book of his father which contains entries that a sum of Rs.3,952-5-0 was advanced as a loan on the 7th February, 1905, to Amar Singh. This date is particularly important, as we find from the sale-deed in question that a part of the sale-price was paid by Amar Singh to Bishan Das on the 10th February, 1905. We have no reason to doubt the veracity of *Bawa* Salamat Rai or the correctness of the account produced by *Lala* Dev Raj, both of whom are disinterested and respectable witnesses. After the purchase Amar Singh sold the main house for Rs.12,500 to a third party and kept a portion of the vacant site with him, on which he subsequently constructed the

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present house. This house does not appear to be a very substantial structure; according to Amar Singh it cost him about Rs.2,500 only. Amar Singh has stated, and this is corroborated by his clerk Moti Ram (P.W.16), that this amount was spent by him out of his earnings from the legal profession. It is true that there is no documentary evidence in support of this assertion, but at the same time there is no evidence to the contrary. Considering the small amount spent on the construction, I do not think that Amar Singh's version is improbable.

Further, I find myself unable to agree with the lower Court that the other property, which Amar Singh possessed at the time of the purchase of the site and construction of this house, was ancestral, and I think, therefore, that even if the income of that property was utilised for the acquisition and construction of the house in question, it cannot be said that the house is joint family property. It appears from the evidence on the record that the only " ancestral " property that Amar Singh possessed at the time was a residential house which did not yield any income, and that the rest of the property, which was in his possession, had been inherited by him from his separated granduncles, *Rai Bahadur* Kanhaya Lal and Harbilas. Thus it was " obstructed heritage " and, therefore, not " ancestral " in his hands.

It was, however, contended by the learned counsel for the appellant that it had not been satisfactorily established that Amar Singh's grandfather Sada Nand and his two brothers *Rai Bahadur* Kanhaya Lal and Harbilas had separated. But on this point the evidence of *Lala* Dev Raj, who is a neighbour of the family and knows a good deal about its affairs, stands unrebutted. He has deposed that the three brothers

had separated many years ago and did not hold property in coparcenary. This evidence is supported by the will of Kanhaya Lal, dated the 2nd September, 1897 (Ex. P. 20), in which it is stated that the three brothers had separated in 1888 and all the property had been divided among themselves. The learned Judge of the lower Court has excluded Ex. P. 20 from consideration on the ground that it was a copy of the will of Kanhaya Lal, and was not admissible in evidence, as the loss of the original will had not been proved. The will, however, was registered after the death of Kanhaya Lal by the Registrar, Jullundur, on the 24th January, 1899, and Amar Singh stated on oath that the original never came into his possession, nor did he know where it was. In these circumstances there seems to be no reason why the certified copy of the will should not have been admitted in evidence. The document is more than thirty years old, and formal proof of its execution was not necessary.

In my opinion the evidence on the record establishes beyond doubt that Kanhaya Lal, Sada Nand and Harbilas had separated many years ago and that the property, which Amar Singh got under the will of Kanhaya Lal or by inheritance from Harbilas, both of whom had died childless, was " obstructed heritage " and was not ancestral. There was, therefore, no substantial nucleus of " ancestral " property, the income of which could be held to be " joint " of Amar Singh and his son. Even, therefore, if it be assumed that the house in question was acquired, and the superstructure constructed, not with borrowed money or with the professional earnings of Amar Singh, but with the income of his other property, the house cannot be held to be ancestral. For this reason, the gift by Amar Singh in favour of the plaintiff is valid, even if

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the proposition of law put forward by the learned counsel for the appellant were accepted as correct.

I hold, therefore, that the plaintiff was entitled to the decree, which has been passed in her favour by the learned Subordinate Judge. I would accordingly dismiss the appeal with costs.

TEK CHAND J.

ABDUL RASHID J.—I agree.

A. N. C.

Appeal dismissed.

LETTERS PATENT APPEAL.

Before Addison and Din Mohammad JJ.

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Dec. 12.

AMAR NATH AND OTHERS (PLAINTIFFS) Appellants

versus

DUNI AND OTHERS (DEFENDANTS) Respondents.

Letters Patent Appeal No. 22 of 1932.

Adverse possession—Tenant of mortgagee of mortgaged land—whether holds adversely to mortgagor—during the subsistence of the mortgage.

Held, that though a tenant put in possession of land by a mortgagee may claim adversely against the mortgagee, his possession cannot become adverse against the mortgagor until the mortgage is redeemed and the mortgagor becomes entitled to immediate possession.

Muhammad Husain v. *Mul Chand* (1), *Zinda* v. *Mst. Roshnai* (2), *Gitabai* v. *Krishna Malhari* (3), and *Muhammad Mumtaz Ali Khan* v. *Mohan Singh* (4), relied upon.

Letters Patent Appeal from the decree passed by Jai Lal J. on 23rd February, 1932, reversing that of R. S. Lala *Shibbu Mal, Additional District Judge, Sialkot, at Gurdaspur, dated 18th December, 1930, and restoring that of* Chaudhri *Sheo Parshad, Subordinate Judge, 4th Class, Sialkot, dated 24th February, 1930, dismissing the plaintiffs' suit.*

(1) (1905) I.L.R. 27 All. 395.
(2) 1928 A.I.R. (Lah.) 250.
(3) (1921) I.L.R. 45 Bom. 661.
(4) (1923) I.L.R. 45 All. 419, 424 (P.C.).