[APPELLATE CIVIL.]

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

1871
Aug, 24.

MAHABIR KOWER AND OTHERS (DEFENDANTS) *v.* JUBHA SING AND ANOTHER (PLAINTIFFS.)*

Hindu Law—Mitakshara—Ancestral Property—Self-acquired Property—Legal Necessity—Purchaser how far bound to enquire into Legal Necessity.

A., a Hindu, sued B., the widow of C., claiming to be entitled with others as heirs of C. under the Mitakshara law to certain property. The suit was compromised on the terms, as to one portion of the property, that it was to be retained by B. for life, and after her death to be divided according to specified shares between A. and the other claimants. After B.'s death, A. obtained possession of his share under the deed of compromise. A. alienated the property, and during his life-time his sons sued to set aside the alienation on the ground that it was ancestral property. *Held*, A. took the property absolutely, and not as ancestral property.

Ugra Sing was the great grandfather of Khiju Sing, the father of the plaintiffs. He had a brother named Ajit Sing, who was separate in food and estate. Ajit Sing died leaving his widow, Munga Kunwar. Khiju Sing brought a suit against Munga Kunwar and other heirs of Ajit Sing for possession of his share of the property left by Ajit Sing, but a compromise was entered into by the parties to the effect (as regards the property the subject of the present suit) that Munga Kunwar was to retain possession for life. After her death it was to be divided between Khiju Sing and other claimants according to specified shares. The property in question had been purchased by Ajit Sing in the name of his son Bhikdhari, who afterwards predeceased him.

After the death of Munga Kunwar, according to the terms of the solehnama, or deed of compromise, Khiju obtained possession of an 8 pie share of this property, called Patti Khurd in Mauza Syudpur, *alias* Manna. On the 10th

* Special Appeal, No. 135 of 1871, from a decree of the Judge of Sarun, dated the 31st December 1870, reversing the decree of the Subordinate Judge of that district, dated the 31st March 1870.

April 1863, Khiju executed a deed of zuripeshgi in favor of Mohabir Kunwar and Jai Gopal Kunwar who were put in possession. On the 3rd April 1866 the property was sold in execution of a decree against Khiju and purchased by Tilakdhari Sing. Subsequent to the execution of the zuripeshgi, and the sale held in the execution, suits had been brought by the guardians of the plaintiffs during their minority, but without success.

The present suit was brought by the plaintiffs to set aside the zuripeshgi lease executed by their father, and also to reverse the sale of 3rd April 1866, on the ground that as the property was the ancestral property of the plaintiffs, their father had no power to alienate it, nor was it liable to be sold in execution of a decree passed against him, and that the purchase by Tilakdhari was merely *benami* for the benefit of Mohabir and Jai Gopal. They asked for immediate possession of one moiety, and a declaration of their right to the remainder on their father's death.

The defence was (*inter alia*) that the property was not the ancestral property of the plaintiffs, as it had ben acquired in the first instance by Bhikdhari Sing, who was not an ancestor of Khiju ; that it had come to Khiju under the solehmana, and not by inheritance ; and that the debt was incurred for legal necessities.

The Subordinate Judge held that the property was not the ancestral property of the plaintiffs, on the ground that their father had acquired under the compromise, and that the person to whom the property had originally belonged (either Bhikdhari or Ajit) was not the ancestor of the plaintiffs. He considered that the property was self-acquired property, and as such Khiju had full power to alienate it, and that as the present debt was incurred to pay off past debts and to save the property from being sold, it was in curred for purposes which were valid under the Hindu law.

On appeal, the Judge held that it was immaterial whether the property was originally acquired by Ajit Sing or his son Bhikhdari, as the property in either case was ancestral as far as Khiju was concerned. Although the property was acquired

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under a compromise, yet the claim which had been set up by Khiju was on the ground that the property was ancestral, and that he was one of the heirs. The property was not acquired from a stranger, Khiju got it in his character of an heir, and therefore he had no right to alienate it except for legal necessity. In a case of this nature where joint family property was concerned, it was necessary for the defendants to show that there was such necessity to raise money on the zuripeshgi as well as to borrow under the bond, as to justify the sale. As to the sale, the Judge remarked that the Subordinate Judge treated the debt as commencing from the date of the bond in favor of Bunwari Lal, but that was not correct; he should have gone further back to see to the original cause of the debt. He found that the original debt did not go towards payment of the necessity for which it was incurred; that there was no enquiry as to the cause of the embarrassment for which the loan was raised; that the money had been appropriated by Khiju to his own use, and that there was no evidence to show that the money borrowed was ever applied for the benefit of the minors. He further found that the purchase in the name of Bhikdhari was *benami* for the use of Mohabir and Jai Gopal. He accordingly passed a decree in favor of the plaintiffs.

The defendants appealed to the High Court.

Baboos *Annada Prasad Banerjee* and *Chandra Madhab Ghose* for the appellants.

Baboo *Mahesh Chandra Chowdhry* for the respondents.

The judgment of the Court was delivered by

JACKSON, J.—This is one of those suits so common in the districts of Behar, and which, I must say, form a very unfavorable feature in the litigation of those districts. It was a suit by Hindu sons, in the life-time of their father, to set aside alienations made by the father in consequence of obligations incurred by him, and to recover immediate possession of a portion

of the property with a declaration of their right to the remainder of it on the death of their father.

The transactions are of extremely recent date,—namely of April 1863 and April 1866; and the present suit was commenced in 1869. But it appears that this suit was not the first of the proceedings taken with the view of asserting the rights of these plaintiffs, but that during their minority suits had been previously commenced on their behalf by their guardians; so that the ink was scarcely dry on the sales which conveyed the property to the defendants on the part of the father, before the plaintiffs came into Court to undo that which had been done.

The property in dispute was an 8-pie share of Pati Khurd in Mauza Sydpur, *alias* Manna. The suit was dismissed by the Subordinate Judge, but on appeal the Zilla Judge reversed that judgment, and gave the plaintiffs a decree.

The principal questions raised before us in special appeal have been, whether the property in question came under the category of ancestral or family property, so that the plaintiff's father being under the Mitakshara law was incapable of disposing of it; and, secondly, whether the defendants had sufficiently made out the existence of legal necessity, supposing that the father was not the absolute owner.

The Judge upon the question of ancestral property merely says this. "I do not think, it very much matters for the purposes of "this suit, whether the property was purchased by Ajit Sing or "his son Bhikdhari Sing; the property would in either case "be ancestral as far as Khiju Sing was concerned." He then goes on to show that Khiju, the father of the plaintiffs, had got into possession of this property as an heir either of Bhikdhari or Ajit Sing.

Now the decision of the Judge upon this point involves a question of some nicety under the Hindu law. The Judge seems to consider that any property that came into the hands of a man by way of inheritance is ancestral property, such as to give to the son of that man on his birth a joint right and interest in such property. I confess that after reading through seve-

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verses in the 1st and 5th Sections of Chapter I of the Mitakshara, I have considerable doubt whether that is a correct view.

The property in question seems to have been purchased at a revenue sale by one Bhikdhari who was the son of Ajit. Khiju, the father of the plaintiffs, was second in descent from Ugra, the brother of Ajit, and was, therefore, the son of Bhikdhari's first cousin. Bhikdhari, it appears pre-deceased his father Ajit; and upon the death of Ajit some dispute appears to have arisen in regard to the succession to this and other property, and proceedings were commenced in the Civil Court, but they terminated in a compromise under which an ultimate division of the whole of the property was agreed upon in these terms, that the branch of Jiwun Sing, who was another brother of Ajit, should take half of the property, and that the other half should be divided in equal thirds between this Khiju and the son and the grandson of another son of Ugra. In respect of a portion of the property in dispute the division was to take effect immediately, but as to the property now in question it was to remain for her life-time in possession of Khiju's widow, and after her death to be divided in like manner.

Now, without expressing any very decided opinion as to what, under the section and verses quoted, constitutes ancestral property, although my own mind inclines to the opinion that the kind of property in respect of which a man's son by birth obtains an equal right with himself, is property which has come to that man from his father and grandfather, but without expressing any final opinion upon that point, it seems to me sufficient for the purposes of this case to hold, that by the operation of that agreement between the different members of this family, Khiju Sing took this property not as ancestral property, but as a definite share which became his in pursuance of an agreement previously come to by the members of the family, and which therefore became his own absolute property.

In this point of view, I do not consider the plaintiffs were entitled to call in question the alienations by Khiju Sing. But even if they had been so entitled, it seems to me that the Judge has gone too far in allowing the exercise of that right.

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The Judge says—"In a case of this nature when joint family "property is concerned," I have already stated that this was not joint family property, but the several parties took and enjoyed separate and distinct shares, "it was necessary for the "defendant to show that there was such necessity to raise money "on the zuripeshgi, as well as to borrow under the bond, as "to justify the sale. First as to the sale, the Subordinate Judge "in his judgment makes the debt to commence from the date of "the bond in favour of Bunwari Lal; but that is not correct, "I think he should have gone further back to see the original "cause of the debt."

So that according to the Judge if family embarrassment exists such as is about to cause the sale of valuable landed property, it is not sufficient to entitle the purchaser to relief that he should show the existence of such embarrassment, but he must enquire into the circumstance connected with that debt, must go into the history of the matter in which the embarrassment originated, and trace back the whole chain of transactions from the beginning, I think that is going too far, and is not borne out by the decisions of the Privy Council upon this point.

Upon all these considerations it appears to me that the Judge had not sufficient ground for reversing the decision of the Court below, and that decision ought to stand, and the decision of the Judge be reversed with costs.

Appeal allowed.