

had been possible so to arrange matters regarding the light, the special respondent would still have been shut out from his ancient supply of air.

We think that the Principal Sudder Ameen's order was both legal and proper, and we accordingly dismiss the special appeal with costs.

The 17th May 1865.

Present •'

The Hon'ble H. V. Bayley and J. B. Phear,

Judges.

Fraud of father—Son when bound by.

Case No. 311 of 1864.

Regular Appeal from a decision passed by the Judge of Jessore, dated the 11th May 1864.

Bhuggobutty Dossee and others (Defendants).

Appellants,

versus

Kishen Nath Roy (Plaintiff), *Respondent.*

Baboos Gopal Lai Mitter and Onoocool

Chunder Mookerjee for Appellants.

Baboo Kishen Kishore Ghose for

Respondent.

Suit laid at Rupees 2,990 9 as. 16 gds.

A son cannot obtain a decree when suing as heir to regain property, alleging his father's fraud as the cause of the action.

IN this case plaintiff, as manager for the minor sons of Soorjnath Doss, deceased, sued for a declaration of title to certain landed property. It is alleged in the plaint that Sootjnath, in his life-time, and in order to avoid the claim of creditors, executed two hibbanamahs, or deeds of gift, on the 12th Bhadro 1255: one in the name of his wife Mobessuree, the mother of the minor, and the other in the name of his *second* wife Bhuggobutty; that Soorjnath remained in possession after that act till he died on the 6th Assin 1256, having appointed his nephew, Kasheenath Ghose, and his old servant, Fukeer Chand Mitter, defendants, as managers of the estate *J or the minor*. It is also alleged by plaintiff that Kasheenath fabricated a mourosee pottah, dated 11th Bhadro 1259, purporting to have been given by Bhuggobutty, and in the benamee of one Kala Chand Holdar; also that Kasheenath then caused a case under Act IV. of 1840 to be brought, and, under cover of it, ousted the minor from some lands, and did

so also from other property by selling the minor's property in execution of decrees for the debts of the widows.

Defendant Kasheenath pleads that the two deeds of gift are valid and not in fraud of creditors; that the widows held possession under them, and duly granted the mourosee pottah and other leases under that title. The defendants Bhuggobutty and Fukeer Chand support the answer of the defendant Kasheenath.

The lower Court has held that the hibbanamahs are fictitious and fraudulent documents, and that the leases and sales under them are invalid.

It was pleaded in the lower Court that, if this were so, the fraud was that of plaintiff's father to defeat creditors; and that plaintiff, though a minor, could not sue to obtain this property on the ground of his father's fraud.

The lower Court, however, decided that, as the minor did not accept nor join in his father's fraud, and the widows were only unconscious instruments in the hands of the defendant Kasheenath, the minor was not to be bound in such a case.

The case was decreed in plaintiff's favour accordingly, and the costs of Mohes Chunder Chuckerbutty were charged against plaintiff, on the ground that the former had been unnecessarily made a defendant by the latter.

The defendant appeals, urging amongst other grounds this, as the plaintiff comes into Court on his right as heir from his father, whose acts have all been held by the lower Court to have been fraudulent, he cannot recover on the ground of his father's acts being fraudulent, but must be bound by his father's fraud.

We think that this "objection is valid. The case of Obhoy Churn Ghuttuck, December 1859, page 1639, is quite in point, and must be followed. We quite concur in the concluding words of the judgment in it:—

" A deed may be avoided on the ground
" of fraud, but then the objection must come
" from a person neither party nor privy
" to it, for no man can allege his own fraud
" in order to invalidate his own deed.
" This rule is, we think, a very wholesome
" one in this country. It is well that the
" natives of this presidency should under-
" stand that, when they execute fictitious
" deeds for the purpose of defeating their
" creditors, avoiding an attachment, or effect-
" ing any other fraudulent purpose, they
" place themselves completely at the mercy

" of the person in whose name the fictitious conveyance is made out, and that the plea of the transaction being a benamed one will not be listened to."

The pleader for the opposite party cites the Sooboodra Bebee, pages 543-544 of the Decisions of the Sudder Dewanny Adawlut for 1858. But there was more than one peculiarity distinguishing it from the case of Obhoy Churn Ghuttuck. It was held in Sooboodra's case that a purchase, made in the name of another with a view of preventing the real purchaser's creditors laying hold of the property, is not such a *legal fraud* as will *estop* the original purchaser, or those who represent him, from *bringing an action* for the enforcement of the transaction *against the party* in whose name the property was purchased; and that a plaintiff cannot sue to render void an act done by him in fraud, or to be relieved from the effect of his own fraudulent act, but may, however, sue to have a *legal act*, that is, an act legal in itself, such a benamed purchase, enforced, even though made, as in the present instance, with a motive of keeping the property out of the reach of his creditor.

• But that was not a case like this where the plaintiff, as heir, comes in to regain property alleging his own father's fraud as the cause of action. Further, the case of Obhoy Churn is, moreover, the later ruling.

We, therefore, consider the decision of the Court below wrong, and we decree this appeal, and dismiss plaintiff's suit with all costs.

The 17th May 1865.

Present :

The Hon'ble K. Jackson and H. A. Glover,
Judges,

Hindoo family—Presumption of being joint—
Allegation of separation—Onus probandi.

Case No. 3664 of 1864.

Special Appeal from a decision passed by the Judge of Ilooghly, dated the 9th September 1864, modifying a decision passed by the Principal Sudder Ameen of that District, dated the 2ph January 1864.

Mun Mohinee Dabee and others (Defendants),
Appellants,

Sooda Monee Dabee and others (Plaintiffs),
Respondents,

Baboo Prosunno Coomar Sein for Appellants.

Baboos Mohindro Lai I Shome and Bhowanee Churn Datt for Respondents.

In a Hindoo family the presumption of law is that they are joint, and the *onus* proving that the family is separate lies on the party making such assertion. The mere fact of property standing in the name of one brother does not prove that it is his separate and self-acquired property.

THIS was a suit by a Hindoo widow for recovery of a share in what is alleged to be the ancestral family property. The defendants (who are special appellants before us) are the widows of another of the brothers, and claim on the ground that the property was self-acquired.

The accompanying genealogical table will explain the position of the parties :—

[Jankeenath.

I

Ramdhun, Modhun Mohun. Kaslu-enath, Kalipuddo, Kadernath

Plaintiff is the widow of Modhun Mohun, and defendant of Kaleepuddo.

Of the five sons of Jankeenath, two, Kasheenath and Kadernath, died before their father.

Special respondent, who sues in *formd pauperis*, alleges that her husband Ramdhun and Kalipuddo lived together as a joint undivided Hindoo family; that Ramdhun died childless before her husband, and that after Modhun Mohun's death, she, as his widow, became entitled to one-half of the family property, and had, indeed, retained it, living in commensality with the widows of Kalipuddo, until the latter, by obtaining a certificate to administer to all the properties left by their husband, dispossessed I plaintiff of her share.

Special appellants urge that the special respondent's husband died before his elder brother Ramdhun, and that, after the latter's death Kalipuddo, their husband, succeeded to all the property, having already purchased Modhun Mohun's share during his lifetime. They add that the family property consisted of 2 beegahs of land only, and all the rest of which Kalipuddo died possessed* was his own self acquired estate.

Both lower Courts held that the property was joint, the Judge giving the plaintiff a one-third share of all the property claimed, whereas the Principal Sudder Ameen had excluded from it certain property which he held to have been acquired by the special appellant's husband after the death of special respondent's husband,