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 SURY DABEE
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 PANDAY.

As the decree stands, the plaintiff can realize the instalments by execution by sale and attachment of any property of the defendant's. But if he wishes to sell and attach the properties rule; charged he must bring a suit.

The appeal must be allowed; no order need be made in the we make no order as to costs.

F. K. D.

Appeal allowed.

Before Mr. Justice Prinsep and Mr. Justice Ghose.

1895
 June 25.

ABILAKH BHAGAT AND OTHERS (PLAINTIFFS) v. BHEKHI MAHTO AND ANOTHER (DEFENDANTS) AND OTHERS (PLAINTIFFS).^{*}

Hindu Law—Mitakshara—Insanity subsequent to inheriting of property—Committee in Lunacy under Act XXXV of 1858, Mortgage of joint family property by.

Under the Mitakshara law, a person who has succeeded to the inheritance of property does not lose his right on his becoming insane at a subsequent time.

Ram Sahye Bhukkut v. Lalla Laljee Sahye (1), and Ram Soonder Roy v. Ram Sahye Bhugut (2) distinguished.

Balgobinda v. Lal Bahadur (3), Deokishen v. Budhyprakash (4), Sanku v. Pattamma (5), and Moniram Koluta v. Kery Kolutani (6) referred to.

The father and head of a joint family under the Mitakshara law having become insane, two of his grandsons, acting as committee appointed under Act XXXV of 1858, mortgaged the joint family property on behalf of the lunatic, with the sanction of the Judge. The mortgagee sued upon the mortgage, and obtained a decree against them both in their own capacity and as guardians of their grandfather. *Held*, that the act of the committee might well be regarded as the act of the father and head of the family, and the debt having been contracted for the benefit of the family the whole family was bound by the mortgage, and decree, and that the sale in execution thereof passed the entire property.

THE facts of this case, which are sufficiently set forth in the judgment of the High Court, are shortly these: One Ram Sahye

^{*} Appeal from Appellate Decree No. 1070 of 1894, against the decree of H. W. Gordon, Esq., District Judge of Sarun, dated the 7th of March 1894, affirming the decree of Babu Anant Ram Ghose, Subordinate Judge of Sarun, dated the 28th of December 1892.

(1) I. L. R., 8 Calc., 149.

(2) I. L. R., 8 Calc., 919.

(3) S. D. A., 1854, p. 244.

(4) I. L. R., 5 All., 509.

(5) I. L. R., 14 Mad., 289.

(6) I. L. R., 5 Calc., 776; I. R., 7 I. A., 115.

Bhagat, a Hindu governed by the Mitakshara law, after having succeeded to, and for some time separately held his share in, property left by his father, became insane. Two of his grandsons Jugdeo Bhagat and Agam Bhagat, appointed under Act XXXV of 1858 as committee for the lunatic, mortgaged the share on behalf of the lunatic Ram Sahye with the sanction of the District Judge. The mortgagee obtained a decree upon the mortgage against Jugdeo and Agam, both in their own capacity and as guardians of their grandfather. The share was brought to sale and purchased by the mortgagee. The sons of the lunatic and all his grandsons (including Jugdeo and Agam), together with their wives, now bring this suit against the mortgagee, praying among others for a declaration that the share did not pass under the sale; and it was contended on their behalf, (1) that the lunatic had lost his right in the property by reason of his insanity; (2) that there was a partition among his sons, whereby his right, if any, had come to an end; and (3) that the alienation of joint family property by the committee did not bind the whole family. Both the Courts below dealing with the facts found that there was no partition, and that the mortgage was for the benefit of the family, and dismissed the suit.

The plaintiffs appealed to the High Court.

Babu *Nalini Ranjan Chatterjee* for the appellants.—Ram Sahye on becoming insane lost his right as a coparcener. *Ram Sahye Bhukkut v. Lalla Laljee Sahye* (1), *Ram Soonder Roy v. Ram Sahye Bhugut* (2). The Mitakshara, chapter II, section 10, verse 6, lays down that a disqualified person would not get a share if his disqualification arises before a partition. Ram Sahye not being separate from his co-sharers, the rule that property once vested cannot be divested does not apply. *Mayne's Hindu Law* (5th edition, p. 686), para. 580. Assuming that the lunatic had his right of a coparcener the mortgage executed by the committee was not binding on the family. The right of the father to bind the family by his acts is a special right built on considerations which cannot exist in a committee appointed to manage his affairs. They had not the power of alienation which was a personal right of the father and not an incident of the right of management.

(1) I. L. R., 8 Calc., 149.

(2) I. L. R., 8 Calc., 919.

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Babu *Saligram Singh* for the respondents.—There was a separation in the family after the death of Ram Sahye's father, and the property is not ancestral joint family property. The property vested in Ram Sahye alone and cannot be divested—Mayne's Hindu Law, para. 554 (4th edition). *Moniram Kolita v. Kery Kolitani* (1), *Balgobinda v. Lal Bahadur* (2), *Deokishen v. Budhprakash* (3). The Court having found that the debt was for the benefit of the family it was binding on the family. The present case cannot be called a suit for partition. The cases of *Ram Sahye Bhukkut v. Lalla Laljee Sahye* (4) and *Ram Soonder Roy v. Ram Sahye Bhugut* (5) do not apply.

Babu *Nalini Ranjan Chatterjee* in reply.—It should not be assumed that the whole property has already passed to the mortgagees. The question yet to be tried is whether the whole or the portion of the property of the lunatic only passed under the sale. The bond was in fact executed by two of the junior members of the family and did not bind the family under the law.

The following judgments were delivered by the High Court (PRINSEP and GHOSE, JJ.) :—

GHOSE J.—The facts out of which this appeal arise are shortly these: One Chnturoo Bhagat died, leaving two sons, Ram Sahye and Sheo Sahye, who succeeded to his estate; and there is no question in this case that they held separately the properties inherited by them. Subsequently, in or about the year 1833, Ram Sahye became insane. He left three sons, Abilakh, Dukhit and Dilchand. The last died without any issue, and the surviving sons had each two sons, Jugdeo and Dononath (sons of Abilakh), Agam and Brijbehari (sons of Dukhit).

In the year 1871, Jugdeo and Agam were appointed to be Ram Sahye's committee in lunacy under the provisions of Act XXXV of 1858; and these two persons, with the sanction of the Judge previously obtained, mortgaged the property in suit in favour of the defendant. This mortgage does not appear to have been executed in their own behalf, but on behalf of the lunatic

(1) I. L. R., 5 Calc., 776; L. R., 7 I. A., 115. (2) S. D. A., 1854, p. 244.

(3) I. L. R., 5 All., 509.

(4) I. L. R., 8 Calc., 149.

(5) I. L. R., 8 Calc., 919.

only ; but however that may be, the mortgagee sued them on the mortgage, and a decree was obtained in 1882 against them both in their own capacity and as guardians of their grandfather. And in execution of this decree, the mortgaged property was brought to sale and purchased by the defendant in July 1885.

The present suit was instituted in 1891 by the sons and grandsons of Ram Sahye, and their respective wives ; and the object of their suit was to have it declared that Ram Sahye, by reason of insanity, had no right in the property, and that the sale in July 1885 passed no title to the defendants. And among other matters it was alleged in the plaint that Abilakh and Dukhit, the two sons of Ram Sahye, divided between themselves the whole of the paternal estate of Ram Sahye and entered into possession of their respective shares.

It has been found by both the Courts below that at the time when the succession opened out to Ram Sahye, he was not insane, and that the insanity occurred after the estate had vested in him ; that there was no partition of the estate between the two sons of Ram Sahye, and that the debt contracted under the mortgage was for the benefit of the joint family. And the lower Courts have held that the estate having once legally vested in Ram Sahye, he could not be divested of it by reason of subsequent insanity ; that the sale in question rightfully passed the property in suit to the defendants ; and that neither the sons nor the grandsons of Ram Sahye, nor their respective wives, were in a position to question this sale.

On second appeal to this Court, it has been broadly contended on behalf of the plaintiffs that, upon the happening of insanity, Ram Sahye became disentitled to the property, and that therefore the sale in question passed no title to the defendants. It has been further argued that the loan having been contracted on behalf of Ram Sahye only, and not on behalf of the family, the decree could not bind the joint family property, and that, therefore, the sale was ineffectual ; and further, that, though the father Ram Sahye could bind the sons and grandsons by any debt contracted by him, not being of an immoral character, that right was personal to himself and not in his committee in lunacy.

The only authorities for the broad contention of the appellants

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that the learned Vakil on his behalf relied upon in the course of his argument are two decisions of a Divisional Bench of this Court—*Ram Sahye Bhukut v. Lalla Laljee Sahye* (1) and *Ram Soonder Roy v. Ram Sahye Bhugut* (2), and the Mitakshara, chapter XII, section 10, vv. 1 to 6.

Both the cases quoted related to this family. In the first mentioned case, Ram Sahye, or rather his committee, sued to recover possession of certain property which had passed to the defendants under a sale in execution of a decree for mesne profits passed against the sons of Ram Sahye and Sheo Sahye consequent upon a mortgage executed by them. This Court on a consideration of the Mitakshara, chapter II, section 10, vv. 1, 3 and 6 held that an insane person loses his right to a share on partition of the family property, and that no decree for recovery of the property could be passed in favour of Ram Sahye which would contemplate a partition between himself and the purchasers of the interest of his coparceners (*i. e.*, his sons); and they accordingly dismissed the suit. At the same time, they expressed the opinion that the position assumed in the mortgage executed by the sons that by reason of insanity Ram Sahye was disqualified from claiming the property, could not “probably” be maintained and “that he was still the owner of the property.”

In the other case, the committee of Ram Sahye similarly sued for recovery of a certain share in a property which had been alienated by one of his sons. This Court followed the earlier case, and, upon a consideration of the Mitakshara, held that, inasmuch as on a partition between the plaintiff and his sons he would not get any share, and his sons would receive the whole property, and inasmuch as the rights of the sons had been extinguished under the law of limitation, Ram Sahye could not maintain the suit for the purpose of restoring it to the joint family.

It seems to us that these two cases do not support the broad contention of the appellant that upon the happening of insanity Ram Sahye became disentitled to the property. They do not go any further than to hold that upon the event of a partition taking place, the insane father would not get any share, but that the

(1) I. L. R., 8 Calc., 149.

(2) I. L. R., 8 Calc., 919.

whole property would be received by the sons. On the other hand, it will be observed that this Court in the first mentioned case practically affirmed the principle laid down in the case of *Balgobinda v. Lal Bahadur* (1) which was to the effect that, under the Hindu law, though an insane person cannot succeed to the inheritance of property, a person who has once succeeded to property cannot be dispossessed of it if he subsequently becomes insane. The same view was adopted by a Full Bench of the Allahabad High Court in *Deokishen v. Budhprakash* (2), and it was held that when property has once vested by succession in a person, his subsequent insanity will not be a ground for its resumption. To the same effect is the case of *Sanku v. Puttamma* (3) decided by the Madras High Court. The principle which underlies these cases is practically the same which was expounded by the Judicial Committee in the well known case of *Moniram Kolita v. Kery Kolitani* (4).

As to the argument based upon the *Mitakshara* itself, we think it is equally untenable. We do not think that the rules laid down in it go any further than the two decisions of this Court already referred to, nor do we consider that the fact of section 10, chapter II of the *Mitakshara*, being headed "on exclusion from inheritance" in any way indicates, as it was argued before us, that the author meant to lay it down that if a person *after* he has inherited a property becomes insane, he should be excluded from, or deprived of it. On the contrary, the last portion of verse 6 shows that it could not be so. It says, "but one already separated from his co-heirs is not deprived of his allotment." To the same effect is a text of *Viramitrodaya*, chapter VIII, verse 4, which runs as follows: "The exclusion again of these takes place if their disqualification occur previously to partition (or succession); but not also if subsequently to partition (or succession), for there is no authority for the resumption of allotted shares." (Babu Golap Chandra Sarkar's Translation).

We may take it, therefore, that the property having once vested in Ram Sahye under the law of inheritance, it remained with him

(1) S. D. A., 1854, p. 244.

(2) I. L. R., 5 All., 509.

(3) I. L. R., 14 Mad., 289.

(4) I. L. R., 5 Calc., 776 : L. R., 7 I. A., 115.

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notwithstanding his subsequent insanity, there being no partition between himself and his sons and grandsons. The question we have then to consider is whether the defendant acquired a good title to the property under the sale held in execution of the mortgage decree, to which we have already referred.

The mortgage does not purport to be expressly on behalf of the whole family, but it was given on behalf of the father and head of the family under the sanction of the District Judge previously obtained under the provisions of Act XXXV of 1858 ; and it has been found that this was for the benefit of the whole family. The decree that was obtained by the mortgagee was, as has already been mentioned, against Jugdeo and Agam, both in their capacity of committee to the lunatic and in their personal capacity. The decree was passed upon confession of judgment, and this indicates that Jugdeo and Agam meant to execute the mortgage, not simply as committee of the lunatic, but as members of the family. And the debt having been contracted for the benefit of the whole family, we are of opinion that the whole family was bound by the mortgage and the decree obtained thereupon, and that at the sale which took place the entire property passed to the defendant. We do not feel pressed by the argument that the committee of the lunatic could not bind the whole family, for the act of the committee, with the sanction of the Judge, may well be regarded as the act of the father and head of the family ; and the debt having been contracted for the benefit of the family, it seems to be clear enough that it is binding upon all.

Upon all these grounds we are of opinion that this appeal should be dismissed with costs.

PRINSEP, J.—I agree in the judgment delivered by my learned colleague that the plaintiffs are bound by the mortgage which has been found to be on account of debts contracted by the father and grandfather of the male plaintiffs, accepted by the manager of the family and sanctioned by the District Judge on behalf of the former, while the female plaintiffs have no right to contest the matter ; but I desire to add that I have doubts as to the correctness of the law laid down in the cases cited (I. L. R., 8 Calc., 149, and again in p. 919), for I am inclined to doubt

whether, as there held, an estate having once vested in Ram Sahye as a member of a joint Hindu family, he can be deprived of his rights in it, because at the time of the determination of his specific right, title and interest by partition he happened to be a lunatic.

It is, however, unnecessary for the purposes of this appeal to determine this point, because the decision of this suit can be properly arrived at otherwise.

The two appeals are dismissed with costs.

s. c. c.

Appeal dismissed.

Before Mr. Justice Prinsep and Mr. Justice Ghose.

JAGERNATH SAHAI AND ANOTHER (JUDGMENT-DEBTORS) v. DIP RANI KOER (DECREE-HOLDER) AND OTHERS (AUCTION-PURCHASERS.)*

1895

June 4.

Jurisdiction—Bengal, N. W. P. and Assam Civil Courts' Act (XII of 1887), section 13, clause (3)—Civil Procedure Code (XIV of 1882), section 25—Sale in execution of decree for sale.

A suit on a mortgage bond, praying for a decree for sale, was transferred under section 25 of the Civil Procedure Code from the Court of the Second Subordinate Judge to that of the Third Subordinate Judge in the district for trial in that Court. The suit was decreed, and an order for sale was passed by the Third Subordinate Judge. After the sale, an application was made to set it aside on the ground, *inter alia*, that the Court of the Third Subordinate Judge had no jurisdiction to sell the property, it being within the local jurisdiction of the Second Subordinate Judge's Court. The jurisdiction of the Third Subordinate Judge to try the *suit* was not questioned.

Held, that section 13, clause (3) of the Bengal, North-Western Provinces and Assam Civil Courts' Act (XII of 1887) dealt with matters of this description, and the Court which passed the decree and the order for sale had jurisdiction to hold the sale.

Frem Chandi Dey v. Mohkoda Debi (1) distinguished; *Gopi Mohan Roy v. Doybaki Nundun Sen* (2) and *Tinocuri Delia v. Shih Chunder Pal* (3) referred to.

THIS was an appeal relating to an application to set aside a sale in execution of decree. The suit, which was one for sale under section 88 of the Transfer of Property Act, was originally instituted in the Court of the Subordinate Judge, Second

*Appeal from Order No. 198 of 1894, against the order of Babu Amrita Lal Chatterjee, Subordinate Judge of Tihoot, dated the 9th of March 1894.

(1) I. L. R., 17 Calc., 699.

(2) I. L. R., 19 Calc., 13.

(3) I. L. R., 21 Calc., 639.

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