

P. C.\*  
1889  
Nov. 14<sup>th</sup>  
20.

MAHABIR PERSHAD (PURCHASER FROM ONE OF THE DEFENDANTS) v.  
MOHESWAR NATH SAHAI (DEFENDANT) AND ANOTHER  
(ONE OF THE PLAINTIFFS).

[On appeal from the High Court at Calcutta.]

*Sale in execution of decree—Sale of joint family estate in execution of a decree against the father upon debts contracted by him—Liability of son's share—Hindu law—Alienation.*

It is only on condition of the son's showing that the father's debt has been contracted for an illegal or immoral purpose that the son, upon a decree against the father alone being executed by the attachment and sale of the family estate, can claim to have the liability limited to the father's own share under the Mitakshara.

In the absence of such proof, whether the entirety of the family estate has been transferred at the sale in execution, or not, is a question of fact, in each case dependent on what was understood to be brought, and has been brought, to sale.

*Nanomi Babuasin v. Modhan Mohun* (1) and *Bhagbut Pershad Singh v. Girja Koer* (2) referred to and followed.

The description of the property, in the certificate of sale, as the right, title and interest of the judgment-debtor was consistent with every interest, which he might have caused to be sold, passing at the sale.

APPEAL from a decree (16th July 1885) of the High Court affirming a decree (10th June 1884) of the Second Subordinate Judge of Sarun.

The suit related to a 5-anna 4-pie share in mouzah Maharajgunge, in the Sarun district, being the ancestral estate of a family consisting of a father, Rai Moheswar Nath Sahai, Massumat Murat Koer his wife, and their minor son, Markanda Nath. The latter sued by his mother as his guardian, and he was a respondent in this appeal. The father was joined as one of the defendants in the suit, but was a respondent in this appeal. He had, on 11th September 1869, mortgaged a fractional part of the above share to Seogolam, father of the principal defendant Chowaram, to secure Rs. 4,381. Again, on 5th November 1869, Moheswar Nath had mortgaged a 2-anna share of the family estate to Sant Lal to secure Rs. 500. And, on 30th August 1871, he mortgaged a 6-pie share to Chowaram to secure Rs. 1,050. These sums were debts;

\* Present: LORD HOBHOUSE, SIR B. PRACOCK, and SIR R. COUCH.

(1) L. R., 13 I. A., 1; I. L. R., 13 Cal., 21.

(2) L. R., 16 I. A., 99; I. L. R., 16 Cal., 717.

Moheswar's father having begun to contract them, and he himself having increased them.

Sheo Golam, Sant Lal, and Chowaram obtained decrees against Moheswar in respect of principal and interest due on their bonds. Their decrees were dated 11th September 1873, 7th April 1874, and 10th March 1874. One Sobh Narain also held a decree against him for at least Rs. 2,166.

Chowaram proceeded to execute his decree, and the whole 5 annas 4 pie share of Maharajgunge was advertised to be sold on the 15th January 1875. But Moheswar's son and wife, on the day before the sale, brought a suit against him and Chowaram, claiming that the family estate might be protected by a declaratory decree from the impending sale. Also on the 5th January a petition was presented for the sale to be postponed on the ground that the ancestral lands ought not to be sold for a personal debt of the judgment-debtor, and while a suit was pending to exempt that estate from sale. The sale, however, took place.

Chowaram subsequently, on the 21st February 1875, obtained possession of the whole 5 annas 4 pie share from the Court, having paid the purchase-money, Rs. 10,000. This money was appropriated to the payment of various decree-holders against Moheswar, as appears by a proceeding of the Court, dated 10th May 1875. The appellant purchased the rights of Chowaram.

Meantime, the plaintiff proceeded with the declaratory suit. This, however, was dismissed on 12th May 1875, the Court being of opinion that after possession of the whole estate, in pursuance of the sale, had been given to the auction-purchaser a declaratory suit would not lie, and that it must be a suit for possession. A suit which Moheswar Nath, on the other hand, brought to have the sale set aside on the ground of fraud was dismissed on 25th June 1878 by the High Court (having been decreed in the first instance), so that the purchaser remained in possession. Upon this the objection was raised, under section 332 of Act X of 1877, amended by section 43 of Act XII of 1879, then in force, that the co-sharers were entitled to joint possession with the purchaser. This was disallowed.

The plaintiff, accordingly, brought the present suit on 15th December 1880, in which issues were settled raising the questions

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whether the shares, other than Moheswar Nath's in the family estate, were bound by the debt, and whether possession of the whole, or any part, could be recovered by the son as his share.

The Subordinate Judge found it not proved that Moheswar Nath had applied to immoral purposes the proceeds of the loan in respect of which Chowaram had obtained a decree against him. He, however, made a decree for possession of the third share by the minor plaintiff, declaring that the purchaser at the sale was entitled only to the share of Moheswar Nath. This was supported, in the main (with a reversal as to mesne profits which had been decreed), on an appeal to the High Court; the Judges (CUNNINGHAM and MACPHERSON, JJ.) being of opinion that only the father's share had been sold.

From this decree an appeal by Mahabir Pershad, the purchaser of Chowaram's decree, was admitted to Her Majesty in Council. Thereafter the respondent, Massumat Murat Koor, died; and by an order in Council, the appeal was revived against her husband, Moheswar Nath, on a certificate of the High Court that such revivor should be made; and on a like certificate, Massumat Bubbuh Bibi was appointed guardian *ad litem* to the infant respondent.

Mr. J. D. Mayo and Mr. H. Corwell for the appellant.—The sale was intended by the Court executing the decree, with the knowledge of all concerned, to transfer the whole joint family estate. The Subordinate Judge was right in holding that Moheswar was not proved to have applied the proceeds of the loan, upon which Chowaram's decree was obtained, to any immoral purpose. The minor respondent, by reason of the son's liability for his father's debts, not incurred for immoral purposes, cannot impeach the sale or limit the application of the execution to the father's share. The decree also was based upon a debt incurred by the successive heads of the family, and therefore bound the entirety of the estate, including the son's interest. Where the father of a family under the Mitakshara law has contracted a debt—on the one hand, neither necessary nor beneficial to the family—but still, on the other, not for an immoral or illegal purpose, then, in execution of a decree upon that debt, the whole family estate may be sold, and not merely the father's share. This being the general rule, the exceptional case is where the creditor issues execution against the

interest of the father alone. In every one of the cases it is enough to see whether the facts bring it within the general rule as given in *Nanomi Babuasin v. Modhun Mohun* (1), or within the exception as found in *Deendyal v. Jugdeep Narain Singh* (2). The claim is not under the mortgage, but under the sale upon the decree. They also referred to—*Girdhara Lall v. Kantoo Lall* (3); *Suraj Bansi Koer v. Sheopersad Singh* (4); *Simbhunath Pande v. Golap Singh* (5); *Bhagbut Persad v. Girja Koer* (6); *Minakshi Nayudu v. Innudi Kanaka Ramaya Goundan* (7).

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The respondents did not appear.

Afterwards, on 20th November, their Lordships' judgment was delivered by—

LORD HOBHOUSE.—The sole question in this appeal is whether the purchaser, whom the defendant represents, acquired the entirety of the 5 annas 4 pie which were put up to sale in execution, or only such share as the judgment-debtor, Moheswar Nath, would take on a partition. Other questions have been raised in the Courts below which are not relevant to this appeal. It has been considered whether the sale was necessary for the benefit of the family estate; but the question is whether the plaintiff, who is the son of the judgment-debtor, can set up his right as a co-sharer to impeach a sale decreed against his father for the purpose of defraying the debts of his father and grandfather. He can only do so on condition that he shows the debts to have been contracted for immoral purposes, and that issue has been found against him in this suit. Again, the First Court then examined the circumstances at considerable length to show that the purchaser bought the property subject to encumbrances, and that his purchase-money ought not to have been applied, as the Court in fact applied it, to the payment of those encumbrances. But if the plaintiff could have raised any such case as that, he must have done so in a suit differently framed in point of parties, of allegations, of prayer, of

- (1) L. R., 13 I. A., 1; I. L. R., 13 Calc., 21.
- (2) L. R., 4 I. A., 217; I. L. R., 3 Calc., 198.
- (3) L. R., 1 I. A., 321; 14 B. L. R., 187.
- (4) L. R., 6 I. A., 88; I. L. R., 5 Calc., 148.
- (5) L. R., 14 I. A., 77; I. L. R., 14 Calc., 572.
- (6) L. R., 15 I. A., 90; I. L. R., 15 Calc., 717.
- (7) L. R., 16 I. A., 1; I. L. R., 12 Mad., 142.

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issue, and of proofs. Except for the issue raised as to immorality, this suit is solely for the purpose of treating the defendant as nothing more than a co-sharer in the estate, and the decree which the plaintiff has obtained does so treat him.

There have been of late years a great number of suits of this kind, and some difficulties have been felt as to the proper mode of treating them. It is to be hoped that recent decisions by this Committee have lessened those difficulties. At all events, their Lordships feel none in this case, treating it on the principles laid down in the cases of *Nunomi Babuasin v. Modhun Mohun* (1) and *Bhagbut Persad Singh v. Girju Koer* (2); and addressing themselves to the question of fact whether the thing meant to be sold and bought was the entirety of the estate or only a share in it.

It would be more convenient if the record contained the whole of the proceedings in the execution and sale, because they must always be important evidence, often the best, as to the nature of the thing sold. In this case the application for attachment and sale, and the orders made thereon, and the notification of sale, are not to be found, and their Lordships are left to infer their tenor from an adverse petition presented on behalf of the plaintiff, and from the sale certificate. The difficulty is increased by the circumstance that there were three, or probably four, decrees then standing against Moheswar; whereas the sale proceeded on one of them, founded on a mortgage to one Chowaram of only a fraction of the estate. From the pleadings and judgments, their Lordships conclude that in some way not explained the various creditors combined to have the estate sold for the common benefit. At all events, no difficulty on this score has been felt in the Courts below.

Chowaram's decree, dated 7th March 1874, is for the realisation of a sum of money out of the property mortgaged to him by Moheswar, viz., "my rights and interest in 6 pie out of 5 annas 4 pie of the entire 16 annas" of the estate in question.

The day fixed for the sale was the 5th January 1875. On the 4th January 1875 the plaintiff filed a plaint against Chowaram and Moheswar, in which, after alleging fraud and immorality, he

(1) L. R., 13 I. A., 1; I. L. R., 13 Calc., 21.

(2) L. R., 15 I.A., 99; I. L. R., 15 Calc., 717.

claimed that "the ancestral property of the plaintiff, which he has inherited from his grandfather, ought not to be sold in satisfaction of such illegal and personal debts;" and he prayed for a declaration protecting his estate. On the next day the plaintiff's pleader presented a petition in the execution proceeding, stating that the 5 annas 4 pie share of mouzah Udoypore, &c., "which is the ancestral property of my client, is to be sold to-day in this Court." The petition then states the suit commenced the day before, and prays postponement of the sale till the suit should be disposed of. That petition was rejected, not on the ground that the thing to be sold was only the share of Moheswar, which could not prejudice the plaintiff, but on this ground, that "the plaintiff is at liberty, in case of the sale taking place, to make the purchaser a defendant in his suit, so that he (the purchaser) may defend the right purchased by him."

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It is hardly possible to make it clearer that all parties, judgment-creditors, judgment-debtor, the plaintiff and his advisers, and the Court itself, considered that the thing put up to sale was the entirety of the estate.

The sale certificate was issued on the 6th February 1875 to the vakil of Chowaram, the decree-holder. After stating that all the "right, interest and connection which the judgment-debtor had in the property" had been purchased "from the decree-holder," and "that in future the certificate shall be considered as a good evidence of transfer of the right and interest of the judgment-debtor," it describes the property thus—"Five annas four pie of mouzah Udoypore *alias* Maharajunge, pergunnah Cherand, which belonged to the judgment-debtor, Rai Moheswar Nath, is sold (for) Rs. 10,000."

The Procedure Code at that time required that property sold in execution should be described as the right, title and interest of the judgment-debtor, and it has been held in many cases that the presence of these words in the sale certificate is consistent with the sale of every interest which the judgment-debtor might have sold, and does not necessarily import that when the father of a joint family is the judgment-debtor nothing is sold but his interest as a co-sharer. It is a question of fact in each case; and in this case their Lordships think that the transactions of the 4th

1889 and 5th January 1875, and the description of the property in the sale certificate, are conclusive to show that the entire corpus of the estate was sold.

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They are of opinion that the High Court should have reversed the decree of the Subordinate Judge and have dismissed the suit with costs, and that a decree to that effect should now be made in reversal of the decree of the High Court. The appellant should have his costs in the High Court and also his costs of this appeal. Their Lordships will humbly advise Her Majesty accordingly.

*Appeal allowed.*

Solicitors for the appellant: Messrs. Sanderson, Holland, and Allen.

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*July 14*  
*31,*  
*Nov. 30.*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT)  
*v.* FATHAMIDANNISSA BEGUM AND OTHERS (PLAINTIFFS).

[On appeal from the High Court at Calcutta.]

*Act IX of 1847—Assessment to revenue, finality of, upon land within an estate permanently settled—Non-liability to assessment of alluvial land re-formed within such an estate, no abatement having been made on account of previous diluvion—Act IX of 1847, construction of—Jurisdiction of the Civil Courts in regard to orders of revenue authorities.*

A review of the legislation anterior to Act IX of 1847 shows that whilst it was intended to bring under assessment lands not included in the permanent settlement, whether waste or gained by alluvion or dereliction from sea or rivers, yet all such lands as were comprised in permanently-settled estates were to be rigorously excluded from further assessment.

Lands included in the permanent settlement having afterwards been covered by water, and having then been formed again on the same site, held not to be lands "gained" from the river by alluvion or dereliction within the meaning of Regulation II of 1819, that expression being confined to meaning lands gained since the period of the settlement.

The effect of Act IX of 1847 was merely to change the mode of assessment in the case of land already liable to be assessed under legislation

\* *Present at first hearing*: LORD HOBHOUSE, LORD MACNAGHTEN, and SIR R. COUCH.

\* *At the second*: LORD WATSON, LORD HOBHOUSE, LORD HERSHELL, LORD MACNAGHTEN, SIR H. PEACOCK, and SIR R. COUCH.