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EMPRESS v. JYADULLA

The *Advocate General*, offg. (Mr. *Paul*) for the Crown.

The following was the opinion of the Full Bench:—

GARTH, C. J.—We are of opinion that an appeal from an order of acquittal is within time if presented within six months from the date of the order of acquittal. The sixty days rule does not apply (1).

APPELLATE CIVIL.

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

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May 22.

BHEKNARAIN SINGH AND ANOTHER (DEFENDANTS) *v.* JANUK SINGH (PLAINTIFF).*

Hindu Law—Mitakshara—Son's Interest in Ancestral Property—Mortgage by Father during minority of Sons.

A Hindu, subject to the Mitakshara law, and forming with his sons a joint Hindu family, mortgaged certain ancestral immoveable property during the minority of his sons. In a suit by the mortgagee against the father and sons to recover the mortgage debt "by sale of the mortgaged property, and out of other properties, as well as from the person" of the father,—*held*, that it was incumbent upon the plaintiff to show for what purpose the loan was contracted, and that that purpose was one which justified the father in charging, or which the plaintiff had at least good grounds for believing did justify the father in charging, the sons' interests in the ancestral immoveable property.

THE special appellants, who were two of the defendants in the Court below, sought relief against a decree passed by the Officiating Judge of Patna, under which their shares of the ancestral property were declared liable to be sold in satisfaction of a bond executed by their father, the first defendant, in favour of the respondent, who was the plaintiff in the Court below.

(1) *Ed. Note.* In "*Reg.* v. *Dorabji Balabhai*" (11 Bom. Rep., p. 117) it was held, that s. 272 of Act X of 1872 must be read by itself.

* Special Appeal, No. 836 of 1876, against a decree of E. Grey, Esq., Officiating Judge of Zillah Patna, dated the 17th of February, 1876, reversing a decree of Baboo Ram Persad, Second Subordinate Judge of that district, dated the 15th of January, 1875.

It appeared that the father of the special appellants, on the 12th of January, 1871, borrowed Rs. 1,100 from the respondent, at 1 rupee per cent. per mensem; and as a security for the loan, executed a bond to the respondent, by which he hypothecated, or mortgaged, to the respondent a 12-anna share in a certain mouza, with a stipulation that the money should be repaid in two years from the date of the bond.

It further appeared that the 12 annas share of the mouza was the ancestral property of the special appellants and their father; that the bond was executed whilst the special appellants were minors; and that they and their father formed a joint Hindu family governed by the Mitakshara law. On failure of the father to repay the money at the expiration of the appointed time, the respondent, on the 31st of August, 1874, brought the present suit, in which he sought to recover the amount due on the bond "by sale of the hypothecated property, and out of the other properties, as well as from the person" of the father. The suit in the first instance was brought against the father alone, but, subsequently, on the 7th of October, 1874, the plaintiff petitioned the Court to be allowed to add the special appellants as defendants, alleging that the loan to the father was applied to answer the joint necessities of the father as well as of his sons, and for the support and the education of the latter. The special appellants were, accordingly, by leave of the Court, made defendants in the suit, the mother of the younger of them, who is still a minor, appearing on the record as his guardian. The Court of first instance considered the loan and the bond to be proved, but gave a decree to the plaintiff against the father alone, and in respect only of 4 annas out of the 12 annas share hypothecated by the bond. As against the special appellants, that Court dismissed the suit, on the ground that there was a failure of proof that there was any legal necessity for the loan, and that, consequently, the interest of the special appellants in the ancestral immoveable property was not properly and validly charged with the repayment of the loan.

On appeal by the respondent, the Officiating Judge, considering that he was acting in accordance with the decisions in *Gir-*

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dharee Lall v. *Kantoo Lall* (1) and *Muddun Gopal Lall* v. *Mussamut Gowrunbutty* (2), remanded the cause for a finding on the following issue, *viz.* :—" Whether the money borrowed by the father (defendant No. 1), was borrowed for an immoral purpose?" The Judge at the same time ruled that the burden of proof on the above issue rested on the defendants. He further added that the decision of the case turned on the finding upon that issue, and that if the money was borrowed for an immoral purpose, the appeal must be dismissed; but if not borrowed for such a purpose, the plaintiff was entitled to have the whole 12 annas of the mouza sold in satisfaction of his bond.

Under the order of remand, the Court of first instance returned to the Officiating Judge a finding in favour of the defendants. But the Officiating Judge, when the appeal came before him for final decision, considered that the evidence adduced by the defendants was insufficient. He, accordingly, held, "that the issue was not proved in the affirmative," and acting on the view of the law which he had stated in his order of remand, reversed the decree of the Court of first instance, and made a decree in favour of the plaintiff in respect of the whole of his claim.

From this judgment the two sons now appealed.

Baboos *Chunder Madhub Ghose* and *Abinash Chunder Banerjee* for the appellants.

Baboo *Mohesh Chunder Chowdhry* for the respondent.

The judgment of the Court was delivered by

WHITE, J. (who, after stating the facts as above, continued) :—It is to be observed that the present suit is not one in which a son is seeking to set aside a sale of ancestral property made by his father or to recover from a purchaser ancestral property which has been sold in execution of a decree against the father; but a suit in which a creditor, in whose favour a father has created a charge upon the ancestral immoveable estate, is endeavouring to

(1) 14 B. L. R., 187; S. C., L. R., 1 I. A. 321; and 22 W. R., 56.

(2) 15 B. L. R., 264; S. C., 23 W. R., 365.

enforce that charge against the share or interest of the sons in that ancestral estate, where the latter were no parties to the charge, and were also minors at the time of its creation. Such being the nature of the present suit, the proposition of law laid down by the Officiating Judge amounts to this, that when a creditor brings such a suit, he is entitled to a decree against the sons upon simply proving the loan and the instrument of charge, and that his right to a decree can only be defeated, in the event of the sons showing that the money was advanced for an immoral purpose. In other words, any charge which the father may create upon the ancestral immoveable property during the minority of his sons is a valid charge, and must be satisfied out of that property, unless the sons, on whom the Judge throws the burden of proof, can show that the charge was created to secure money borrowed by the father for immoral purposes. If this be good law, it follows that the interests in the ancestral immoveable property, which, under the Mitakshara law, are vested in sons by their birth, are entirely unprotected from the selfish or wasteful or capricious acts of the father except in the single instance of money borrowed by him upon the estate for immoral purposes.

The decisions on which the Officiating Judge relies in support of a proposition fraught with such serious consequences, are *Girdharee Lall* v. *Kantoo Lall* (1) and *Muddun Gopal Lall* v. *Mussamat Gourunbutty* (2). But neither of these cases, when examined with reference to the facts involved in them, can, in my opinion, be considered as authorities for any such doctrine.

In *Girdharee Lall* v. *Kantoo Lall* (1), the suit was brought by sons for the purpose of setting aside a deed of sale of ancestral property executed by their father, and also of recovering from the purchaser the whole of the property which purported to pass by the deed. In giving the judgment of their Lordships, Sir Barnes Peacock, after referring to a certain rule laid down by Lord Justice Knight Bruce, in the case of *Hunooman Pursad* v. *Mussamat Babooee* (3), proceeds thus:—"It is necessary, therefore, to see what was the nature of the debt for

(1) 14 B. L. R., 187; S. C., L. R., 1 I. A. 321; and 22 W. R., 56.

(2) 15 B. L. R., 264; S. C., 23; W. R., 365.

(3) 6 Moore's I. A., 393.

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the payment of which it was necessary to raise money by the sale of the property in question." The facts regarding the nature of the debt, which their Lordships considered to be established, were that, previous to the sale which was sought to be set aside, a bond had been executed by the father, upon which a decree had passed and execution issued against the father. "The bond," as their Lorsdhips observe, "had been substantiated in a Court of justice," and the purpose for which the bond was given had not been impugned. The words used by their Lordships in observing upon this latter circumstance are as follow:—"There was nothing to show that it, *viz.*, the bond, was given for an immoral purpose; and the holder recovered a decree upon it. There is no suggestion that either the bond or the decree was obtained *benamee* for the benefit of the father, or merely for the purpose of enabling the father to sell the family property and raise money for his own purpose. There is nothing of the sort suggested and nothing proved." Their Lordships further considered it established by the evidence that it was necessary for the father to raise money to get rid of the execution which had issued upon the decree obtained upon this unimpeached bond; that acting under that necessity the father executed the deed of sale in question; and that the purchase-money arising from the sale "had been paid into the bankers of the father, and been applied partly to pay off the decree, and partly to pay off a balance due from the father to the bankers, and partly to pay Government revenue." Upon this state of facts, the Judicial Committee decided that it was "not because there was a small portion which was not accounted for, that the son, probably at the instigation of the father, has a right to turn out the *bonâ fide* purchaser who gave value for the estate," adding, that "even if there was no necessity to raise the whole purchase-money the sale would not be wholly void."

Their Lordships' decision, as I understood it, proceeds on the ground that a *primâ facie* case of necessity for the sale had been shown, against which no rebutting evidence had been offered, and that as, moreover, a considerable portion of the purchase-money had been proved to be applied for purposes which would

make the sale binding on the sons, their suit to set aside the sale could not be maintained.

In *Muddun Gopal Lall* v. *Mussamat Gourunbutty* (1), sons were again the plaintiffs, and brought a suit against their father and elder brother, and certain persons who claimed interests in the ancestral estate under bonds, or as purchasers in execution of decrees obtained on bonds, praying for a partition of the ancestral estate and for possession of their shares free from encumbrances by cancelment of the bonds. Phear, J., in delivering the Court's judgment, which was given in those appeals at the same time, states, as the facts found "that in Muddun Gopal's case the plaintiffs' father and elder brother had mortgaged 8 annas of the joint property to Muddun Gopal in consideration of a loan of money which was wanted for a family purpose; and that in the cases of Girdharee Lall and Pooran Lall, the plaintiffs' father and elder brother had mortgaged 8 annas of the joint property in order to prevent the sale of that property at the instance of Girdharee Lall and Pooran Lall, in execution of decrees which these persons had respectively obtained against the father and eldest son personally."—And the Court then held that, under these circumstances, the plaintiffs, the minor sons, were not entitled to obtain their share of the joint property free from these mortgages.

In neither of the decisions which are relied on by the Officiating Judge was the suit brought by a bond-holder or mortgagee against the father and sons to enforce a charge upon the ancestral estate created by the father, and in both of the decisions it is clear that the transaction of the father, whether it consisted of a sale or a loan, was inquired into by the Court with a view to see if there was any legal necessity for the transaction, or if it had reference to family purposes, and that the result of that inquiry formed the main ingredient of the decisions arrived at.

The liability of a son for the debts of his deceased father under Hindu law appears to me to be a distinct question from the right of a father in his lifetime to charge the interest of his infant sons in the joint ancestral immoveable estate with the

(1) 15 B. L. R., 264; S. C., 23 W. R., 365.

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payment of a debt. It is the latter question which is before the Court in the present suit; and to arrive at a correct decision, I think that the principles to be applied are those which are laid down in the leading case of *Hunooman Persad* v. *Mussamat Babooee* (1). The authority of that case has been often recognized in the Privy Council, and notably in *Lalla Bunseedhur* v. *Koonwar Bundesuree*(2), and also in *Giridharee Lall* v. *Kantoo Lall* (3). In *Hunooman Persad's case*, the mortgage was made by a mother and widow, as guardian of her infant son and manager of his estate, but so far as relates to the interests in the ancestral estate which sons get by birth under the Mitakshara law, and the right of the father to alienate the same, there seems to be no essential difference between the position of the father when dealing with those interests during the minority of his sons, and the position of a mother when dealing as guardian and manager of her infant son's estate. Lord Justice Knight Bruce says in *Hunooman Persad's case*: "The power of the manager for an infant heir to charge an estate not his own is, under the Hindu law, a limited and qualified power; it can only be exercised rightly in a case of need or for the benefit of the estate;" and with respect to the question on whom the onus of proof lies, his Lordship, after stating that the onus will vary with the circumstances, proceeds to say: "When the mortgagee himself with whom the transaction took place is setting up a charge in his favour made by one whose title to alienate he necessarily knows to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir,—namely, those facts which embody the representations made to him of the alleged need of the estate and the motives influencing his immediate loan."

Taking these to be the principles of law applicable to the decision of this suit, I am of opinion, that the Officiating Judge was wrong in holding that it lay upon the special respondents to prove that the loan was contracted by the father for immoral purposes, and that on their failing to do so, the respondent was

(1) 6 Moore's I. A., 393.

(2) 10 Moore's I. A., 454, at p. 461.

(3) 14 B. L. R., 187; S. C., L. R., 1 I. A., 321; and 22 W. R., 56.

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entitled to a decree for a sale of the special appellants' interests in the ancestral property. Before he was entitled to such a decree, I think it was incumbent upon the respondent to show for what purpose the loan was contracted, and that that purpose was one which justified the father in charging, or which the respondent had at least good grounds for believing did justify the father in charging, the interests which the special appellants have in the ancestral immoveable property. As the respondent has failed to show this either in the Court of first instance or in the lower Appellate Court, I think the order of remand, and the subsequent decree of the Officiating Judge, must be reversed, and that of the Court of first instance restored. The appeal is allowed with costs.

Decree reversed.

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Macpherson.

1877
July 12 & 19.

KELLIE (DEFENDANT) *v.* FRASER (PLAINTIFF).

Jurisdiction—Cause of Action—Suit for land—Letters Patent, 1865, *cl.* 12—*Application to file award—Act VIII of* 1859, *s.* 327—*Revocation of authority of Arbitrators.*

The plaintiff and defendant entered into partnership for the purpose of carrying on the cultivation and manufacture of tea, on a tea estate at Darjeeling, of which they were the owners in certain shares. The deed was executed and registered in Calcutta, but both the parties resided out of the jurisdiction. The deed contained provisions for a reference to arbitration in case of difference or dispute in any matters relating to the partnership. Differences having arisen, arbitrators were appointed in accordance with the clause in the deed. In the course of the arbitration proceedings one of the arbitrators received two telegrams purporting to be sent by the plaintiff and defendant to the arbitrators, the terms of which were "stay further proceedings, arrange matters here." The arbitrators subsequently made their award in Calcutta to the following effect: that the defendant's share in the partnership property should stand charged with the payment of a certain sum found to be due by him to the plaintiff, and that the defendant should execute a mortgage of his share to the plaintiff as security for such payment; that the partnership should be dissolved on certain terms, and that the tea garden at