

APPELLATE CIVIL.

Before Mr. Justice Ainslie and Mr. Justice Kennedy.

1877
Dec. 21.

SHAM NARAIN SINGH (DEFENDANT) v. RUGHOOBURDYAL
(PLAINTIFF).*

Mitakshara Law—Ancestral Property—Foreclosure—Alienation.

Until foreclosure, the vendee, under a bond of conditional sale, holds the lands, the subject of the bond, only as security for the money lent.

Semble.—The effect of foreclosure is to put an end to the original conditional sale and to make the property *ab initio* the immovable property of the person who advanced the money.

Query.—Whether ancestral property which was moveable when it descended, but has been converted into immovable property, is not immovable ancestral property for the purposes of the Mitakshara law.

SUIT to recover possession of certain lands acquired by one Brij Lall Sahu, the grandfather of the plaintiff, under a deed of conditional mortgage dated the 20th February 1847. Brij Lall Sahu afterwards foreclosed the mortgage, and on his death his son, Ram Buksh Sahu, the father of the plaintiff, instituted proceedings for and obtained possession of the lands and afterwards alienated them to the defendant. The plaintiff contended that such alienation was invalid as against himself, on the ground that the land was immovable ancestral property, and therefore inalienable under Mitakshara law, and further that no legal necessity existed for the sale.

The defendant, in the third paragraph of his written statement, stated “that though the deed of conditional sale, dated 20th February 1847, was executed in favour of Brij Lall Sahu, father of Ram Buksh Sahu, yet the property in suit had not become the right and interest of the plaintiff’s grandfather during his lifetime. Eventually Ram Buksh Sahu, father of the plaintiff, instituted a suit, and with great labor, expense and exertion, acquired the property in suit.”

The Court of first instance dismissed the plaintiff’s claim.

* Special Appeal, No. 708 of 1877, against the decree of E. Grey, Esq., Officiating Judge of Zilla Patna, dated the 15th of January 1877, reversing the decree of Baboo Matadin Roy Bahadur, Subordinate Judge of that District, dated the 29th of May 1876.

The lower Appellate Court held that the property in suit was ancestral property, and that, inasmuch as the defendant had failed to give proof of legal necessity for the alienation, the appeal must be allowed. The learned Judge was also of opinion that *Girdharee Lall v. Kantoo Lall* (1) did not apply.

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The defendant now preferred a special appeal to the High Court.

Baboo *Chunder Madhub Ghose* and Baboo *Rajendra Nath Bose* for the appellant.

Mr. *R. E. Twidale* and Moonshee *Mahomed Yoosuf* for the respondent.

The judgment of the Court was delivered by

KENNEDY, J.—In this case there is an appeal from the judgment of the Judge of Patna reversing the decision of the Subordinate Judge. As I understand, three points have been argued on behalf of the special appellant. The first question which he raises, is with respect to the nature of the property which is claimed by the plaintiff. The special appellant contends that, in truth, this is not ancestral immoveable property. We are, however, of opinion that it must be treated as being ancestral immoveable property.

The ancestor, Brij Lall, acquired this property by a deed of conditional sale. Now it has been held, and I have no hesitation in saying with perfect correctness, that up to the time of the foreclosure becoming absolute, the interest of the vendee by the conditional sale amounts only to securing his money. He has the land, he has it simply as security. One must remember, however, that from the beginning it was not so. Originally it was really a conditional sale, which became absolute on the expiry of the limited term. Legislation intervened, and by the Regulation, that which was by itself ripening into an absolute estate in land became converted into

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

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something which remained conditional until foreclosure proceedings were adopted; but if it were necessary for me to decide this point, I should strongly be inclined to think that the effect of the foreclosure would be to put an end to the original conditional sale and to make the property the immoveable property of the person who advanced the money from the commencement. However, I do not think it necessary here to decide that, for we find a most careful abstention by the defendants in their written statement from alleging that the proceedings which converted the interest in the property into an absolute interest were taken by Ram Buksh. Paragraph 3 of the defendant's written statement says—(*Reads.*) Evidently only referring to the proceedings for possession which invariably follow upon the foreclosure which converts a conditional into an absolute sale. And, therefore, I think that the property having been in the hands of Brij Lall, whether subject to the right of redemption or not, the defendant, appellant, would be bound to show that when it came into the hands of Ram Buksh it was not immoveable property; that he has certainly failed to do on the face of these proceedings. And I am now informed that on the face of the proceedings it appears that the foreclosure proceedings were in fact taken by Brij Lall. I do not at all see that even if moveable property came into the hands of a descendant and was converted into immoveable property, that that would not be an immoveable ancestral estate. I do not know of any authority which shows that the meaning of an immoveable ancestral estate is an ancestral estate which has descended in immoveable form. I am inclined to think that it includes an ancestral estate, no matter whether it descends in moveable or immoveable form.

The next point which has been raised is, that this money was applied for the purpose of carrying on a business which was for the benefit of the joint family. Now if that had been an ancestral business, I should have had little difficulty in holding, as it has been determined at least on the Original Side of this Court, that it is a part of the ancestral property which the descendant is bound to keep up, and to the

support of which he may apply all the ancestral assets (1). But it appears quite clear that this was not an ancestral business, but the separate business of Ram Buksh, which he transacted during the lifetime of his father. And therefore, though it may have been for the benefit of Ram Buksh, who was a member and kurta of the joint family, it is quite clear that it was not for the benefit of the joint family.

Again it has been suggested that as this was a case in which there had been a suit for recovery of property, that which is recovered becomes the separate property of the recovering member of the family. In the first place, the principal passage from the Mitakshara read by the pleader for the appellant only speaks of recovery had with the consent of the other members of the family. In the next place, it only refers to a partition amongst brothers. And I do not think it has derogated from the ancestral character of the property, although it may be enjoyed separately. In the third place, this is not such a recovery as is meant in the Mitakshara. The property was left in the hands of the mortgagor according to the ordinary meaning of the contract, and a suit after foreclosure proceedings is little more than a matter of form.

There was another point raised by the appellant, namely, that the Judge was wrong in making a distinction between the purchase in this case and the case of sale for discharge of debts. In our opinion, the Judge was perfectly right. The decision of the Privy Council referred to by him—*Girdharee Lall v. Kantoo Lall* (2)—clearly applies to cases of debts, and its reasoning applies to no other.

The appeal must be dismissed with costs.

Appeal dismissed.

(1) See *Johurra Bibee v. Sreegopal* p. 71; *Petumdoss v. Ramdhone Doss*, *Misser*, I. L. R., 1 Calc., 470, See Tay., 279.
also *Ramlal Thakursidas v. Lakmi-* (2) 14 B. L. R., 187; S. C., 22 W.
chand, 1 Bonab. H. C., App., 51, at R., 56.