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APPELLATE CIVIL.

Before Mr. Justice Markby and Mr. Justice Prinsep.

ADURMONI DEYI (DEFENDANT) *v.* CHOWDHRY SIB NARAIN KUR (PLAINTIFF).* 1877 *Sept. 5*

Hindu Law—Mitakshara—Son's Interest in Ancestral Estate—Burden of Proof.

In a suit by a son to set aside an alienation of property made by his father during the son's minority, it was shown that the property in suit originally belonged to the plaintiff's grandfather, who came to a partition of his property with his brother: and that, on the death of the plaintiff's grandfather, his two sons, the father and uncle of the plaintiff, divided the estate between them, the property in suit falling to the share of the plaintiff's father. It was sought to set aside the alienation on the ground that there was no legal necessity for effecting it. The suit was brought seven or eight years after the plaintiff attained his majority.

Held that, notwithstanding the partition by the plaintiff's father, the property was ancestral property in which the plaintiff at his birth acquired an interest.

Held also, reversing the decision of the Courts below, that the question to be tried in the suit was, according to the decision of the Privy Council in *Girdharee Lall v. Kunhoo Lall* (1), not whether there was any legal necessity for the alienation, but whether the debt of the father, in satisfaction of which

* Special Appeal, No. 832 of 1876, against a judgment of W. Macpherson, Esq., Officiating Judge of Cuttack, upholding a decision of Baboo Chunder Prosonno Dutt, Munsif of Balasore.

(1) 14 B. L. R., 187.

1877

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the alienation was made, was incurred for an immoral purpose, and that, under the circumstances, the onus was on the plaintiff to show that it was.

Quære.—Is a son bound to discharge debts of the father which are illegal, though not immoral?

THIS was a suit for the recovery of Mouza Similia and half of Mouza Gentia, on the allegation that the plaintiff's father, during the minority of the plaintiff, improperly sold the said properties without the consent of the plaintiff, the family being governed by Mitakshara law. There was a further allegation that no necessity or occasion had existed for the sale. The sale of the second mouza took place on the 16th of May, 1862, to the defendant, for a consideration of Rs. 1,750, and the defendant thereupon entered into possession. The property in dispute originally formed part of the estate of one Chowdhry Huri Narain Kur Mahapater, the grandfather of the present plaintiff, who, during his lifetime, divided his ancestral and self-acquired property between himself and his brother, under a registered deed of partition dated the 5th Assar, 1237 (27th September, 1830). On the death of the grandfather, his two sons, the father and uncle of the present plaintiff, by a deed of partition dated the 7th Cheyt, 1242 (18th of March, 1836), divided the estate of their father between them, the father of the plaintiff receiving the property in dispute as part of his share. The present suit was instituted on the 4th of May, 1874. The lower Appellate Court held, that the share of the property obtained by the father of the plaintiff was ancestral property. The Court also held that the burden lay on the defendant to show that the sale to him by the father of the plaintiff was founded on legal necessity, and gave the plaintiff a decree. The defendant preferred a special appeal to the High Court.

Baboo *Komolakant Sen* for the appellant.—The incidents attached to ancestral property under Mitakshara law were destroyed by the partition made by the grandfather of the respondent. The property, the subject of the suit, belonged absolutely to the father of the plaintiff. Under Mithila law, ancestral property which descends to a father is not exempted from liability for his debts because a son is born; see *Girdharee*

Lall v. *Kantoo Lall* (1). The burden of proof that the made by the father of the plaintiff was not legally necessary should have been on the plaintiff.

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Mr. *Twidale* for the respondent.—The property of the father of the respondent was ancestral property—*Muddun Gopal Thakoor* v. *Ram Buksh Pandey* (2). The onus was properly cast on the defendant. Alienations by a member of a joint Hindu family cannot be made except for the benefit of the family—*Sadabart Prasad Sahu* v. *Foolbash Koer* (3). It lies, therefore, on the alienee to show the circumstances under which the alienation was made.

The following judgment was delivered by

MARKBY, J. (PRINSEP, J., concurring).—The plaintiff in this case sued to recover possession of a mouza which he alleged to be his ancestral property. He stated that the property had been sold to the defendant by his father in May, 1862, that is twelve years, all but a very few days before this suit was brought; but that, as there was no necessity for the sale, it was void, and not binding on him, the plaintiff.

The plaintiff claimed to belong to a family governed by the Mitakshara law. There was some dispute about this, but this point has been finally settled in favour of the plaintiff.

It has also been argued that this property is not to be considered as ancestral, because, though it belonged to the grandfather of the plaintiff, the father of the plaintiff made a partition of the family property with his own brother, and the mouza in suit, when it fell to the share of the plaintiff's father, belonged to him absolutely as his separate property, and his son did not on his birth acquire any interest therein. Upon this point we think the decision of the Courts below that the son acquired an interest in this property at his birth is correct. There is no authority for the contrary.

The remaining question for consideration in the suit now before us is, whether the sale was, under the circumstances,

(1) 14 B. L. R., 187. (2) 6 W. R., 71. (3) 3 B. L. R., F. B., 31.

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ning upon the plaintiff. Both the lower Courts have held that it is not, but it is argued in special appeal that, in deciding this question, the Courts below have not adopted the correct principles of Hindu law. The Munsif says,—"The Mitakshara law rules that a son, as soon as he is born, has equal right with his father in his ancestral property, consequently, a father cannot, without the consent of his son, and in the absence of any legal necessity, sell his ancestral property. This being so, the burden of proving that the sale sought to be set aside was made under a legal necessity, as adverted to, is wholly on the defendant." Subsequently he says—"As, therefore, the defendant has failed to prove the existence of a legal necessity which alone could render her purchase valid, plaintiff is not bound by the sale under consideration." And the District Judge says—"It is for the defendant to show that the sale was effected for at least reasonable, if not pressing, necessity. He has failed, however, to produce any proof which can be regarded as in the slightest degree satisfactory. There is no proof of the existence of any debts or pressure of any kind such as would justify the sale; on the other hand, there is certainly far better evidence to show that there was no real necessity, but that the sale took place simply to provide means for the gratification of loose and extravagant tastes."

Whatever may have been once thought in this Court I do not think that, after the decision of the Privy Council in *Girdharee Lall* v. *Kantoo Lall* (1), it can be said that this is the right way of dealing with such a case.

There was certainly at one time a disposition in this Court to treat the father as having no power whatever to bind his son by his disposition of the ancestral property of the family except in cases where the son was a minor, and there was a legal necessity to dispose of the property; putting, therefore, the father, as regards his minor son's interests in the property, in the same position as a guardian. The effect of this view of the position of the father under the Mitakshara law, coupled with the deci-

(1) 14 B. L. R., 187.

sion of the Full Bench in the case of *Sadabart Prasad Sahu* v. *Foolbash Koer* (1), that no member of a Mitakshara family can dispose even of his own share, was practically to enable the son to set aside *in toto* all alienations of the family property made during his minority, unless the alienee could show that the alienation was one which was really necessary for the preservation of the interests of the family.

But the Privy Council in the case *Girdharee Lall* v. *Kantoo Lall* (2) have taken an entirely different view of the position of the son under the Mitakshara law. Proceeding upon a decision of the Sudder Dewany Adawlut, they have practically put the son in the same position with respect to debts contracted by his father, as if he had succeeded to the ancestral estate as heir upon the death of his father. They say—"It would be a pious duty to pay his father's debts, and it being the pious duty of the son to pay his father's debts, the ancestral property, in which the son, as the son of his father, acquires an interest by birth, is liable to the father's debts." And they infer from this that an alienation made to satisfy such debt of the father is binding on the son.

Applying these principles to the present case, it appears to me that the true question for consideration is, not whether there was any legal necessity for the sale of this property, but whether the sale was to satisfy a debt which, if contracted by the father and left unpaid by him, the son would, under the Hindu law, be under an obligation to discharge. If it was to satisfy such a debt that the property was sold, then I think, according to the Privy Council decision, the sale is valid. And I think that decision also clearly shows that it is only in respect of debts contracted for an immoral purpose that the son can say that, under the Hindu law, he is not liable. That seems to be the view taken in the passage printed at page 197 of the report.

I do not mean it to be inferred from what I have said above that a son is bound to discharge debts that are illegal although not immoral: that is an altogether different question, and not now under consideration.

(1) 3 B. L. R., F. B., 31. (2) 14 B. L. R., 187.

I think, therefore, that the question which the Court below should have proposed for consideration was, whether the debt which this property was sold to satisfy was incurred for an immoral purpose.

CHOWDHRY SIB NARAIN KUR.

Upon the question of onus I have had more doubt. One would be inclined to think that the party alleging immorality was bound to prove it. Probably, however, the question of onus is one which must be determined according to the circumstances of each particular case. But I have no doubt whatever that, under the circumstances of this case, the onus ought to be placed upon the plaintiff. The transaction took place a very long time ago, and the plaintiff attained his majority seven or eight years before he took any steps to set this purchase aside. I think it would be a grievous injustice to allow him now to do this, unless he can show affirmatively that the transaction is one which the law renders void.

Appeal allowed.

Before Mr. Justice Markby and Mr. Justice Mitter.

1877
March 12.

WATSON & CO. (DEFENDANTS) *v.* DHONENDRA CHUNDER MOOKERJEE (PLAINTIFF).*

Res judicata—Limitation—Beng. Act VIII of 1869, *s.* 29—*Tenancy in abeyance—Obligation to payment.*

A, the zemindar, granted a patni lease of certain talooks to *B*, who assigned it to *C* and *D*. On *B's* death, *C* and *D* applied to the Collector for registration of the patni talook in their names as assignees of *B*. *A* objected to the registration on the ground that the lease enured only for the life of *B*. *A's* objection being overruled, he instituted a regular suit to eject *C* and *D*, the present defendants, which was decided against *A* finally by the Privy Council in 1874. During the pendency of this litigation, the zemindar sued to recover the rent for the year 1868, not upon the basis of the patni lease, but for use and occupation, treating the tenants as mere trespassers. This suit was dismissed on the ground that the plaintiff ought to have sued on the lease. In 1875, the plaintiff brought the present suit for the rent of 1868 on the patni lease. The defendants pleaded *res judicata* and limitation. The plaintiff contended that the suit was within time on the ground that the right to

* Regular Appeal, No. 270 of 1875, against a decree of Baboo Jadu Nath Mullick, Subordinate Judge of Zilla Midnapore, dated the 4th of September, 1875.