ORIGINAL CIVIL.

Before Mr. Justice Chitty.

BHOLANATH KHETTRY

v.

KARTICK KISSEN DAS KHETTRY AND OTHERS.*

1907

Feb. 6, 7, 12.

Hindu Law—Mitakshara—Alienation—Right of son to contest validity of alienations of ancestral property made by father or grandfather prior to son's birth—Mortgage of ancestral property—Son's right of redemption.

Under the Mitakshara school of Hindu Law, a member of a joint family can contest the validity of the alienation by his father or grandfather only of such an interest in the ancestral property as existed at his birth and vested in him by his birth.

Where there is a complete transfer of property by mortgage by the father or grandfather prior to the birth of such member, the only interest that may vest on birth is the equity of redemption.

THIS suit was instituted by the plaintiffs Bholanath Khettry and Puran Chand Khettry *inter alia* for a declaration that they were jointly entitled to a third share in the premises No. 6 Mullick Street in Calcutta, which they claimed to be ancestral property, for setting aside the decree in a mortgage suit being suit No. 214 of 1905, and for stay of the sale of the above premises, directed by that decree.

The plaintiffs are the sons of one Kartick Kissen Das Khettry by his wife Panna Bibee, and the grandsons of one Radha Kissen Das Khettry, and the parties are governed by the Mitakshara school of Hindu Law.

Radha Kissen married one Goomti Bibee in the year 1868, and Kartick Kissen was born in 1876. Bholanath and Purna Chand were born on the 11th October 1904 and the 10th March 1906 respectively.

By an indenture dated the 2nd October 1880, Radha Kissen purported to mortgage the entirety of the premises No. 6 Mullick Street to one Dino Nath Mitter, without the consent of Kartick

* Original Civil Suit No. 654 of 1906.

Kissen, who was then an infant. Dino Nath Mitter died in 1883 leaving a widow and six sons. Two of his sons obtained Letters of Administration to his estate and instituted a suit against Radha Kissen upon the mortgage, being suit No. 332 of 1884, and on the 11th September 1884, they obtained the usual mortgage decree containing a direction for the sale of the property in case of non-payment. In 1885 a suit was instituted for the partition of the estate of Dino Nath Mitter, being suit No. 450 of 1885, and a Receiver was appointed of some of the shares.

In 1887 Radha Kissen filed his petition in insolvency and by a vesting order dated the 20th December 1887 all his estate vested in the Official Assignee.

On the 19th March 1894 Kartick Kissen mortgaged his half share in the premises No. 6 Mullick Street to one Mukund Lal Pal Chowdhry, and from this date to September 1895 five other mortgages were executed by Kartick Kissen in respect of a moiety of the same premises in favour of other mortgagees.

By an order dated the 7th March 1895, the Receiver appointed in suit No. 450 of 1885, was directed to take steps to realise the money due on the mortgage of the 2nd October 1880. On the 3rd September 1896, the Receiver, with the consent of Kartick Kissen, applied for and obtained an order, in suit No. 332 of 1884, for the sale of the whole of the premises in suit. The Official Assignee as representing the estate of Radha Kissen made no objection to this order, by which after providing for the payment of certain costs, it was directed that the remainder of the sale-proceeds should be divided in two parts, to satisfy the mortgage decree obtained against Radha Kissen in suit No. 332 of 1884, and the claims of the mortgagees of Kartick Kissen respectively.

The Receiver did not proceed to carry out the order of the 3rd September 1896 in consequence of the institution of a suit by Goomti Bibee claiming a third share in the premises. This suit abated on her death on the 1st January 1901. Further delay was caused by the institution of a suit by Panna Bibee, claiming a share in the premises. This suit was dismissed on the 18th December 1903.

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In 1905, Debendro Lal Pal Chowdhury and Jogendro Lal Pal Chowdhry as executors of Mukund Lal Pal Chowdhry, instituted a suit, being suit No. 214 of 1905, and by a decree dated the 2nd August 1905, it was ordered that this suit should be treated as supplemental to the suit No. 332 of 1884, and that the order of the 3rd September 1896 should be carried out. The 4th August 1906 was the date fixed for the sale of the premises. Radha Kissen had died on the 30th July 1905.

It was this decree in suit No. 214 of 1905 that the plaintiffs prayed to have set aside in the present suit, instituted by them by their mother and next friend Sreemutty Panno Bibee against their father Kartick Kissen, the executors of Mukund Lal Pal Chowdhury, various other parties claiming an interest under the various mortgagees, and the Official Assignee, alleging that upon their birth they became entitled jointly to a one-third share of the premises under the Mitakshara school of Hindu Law, that at the date of the institution of suit No. 214 of 1905, Bholanath had been born and not having been made a party, was not bound by the decree, and lastly that all the mortgages were for immoral purposes and did not in any way affect their right, title and interest in the premises.

Mr. S. R. Das (with him *Mr. P. K. Sen*) for the plaintiffs. Under the Mitakshara school of Hindu Law, a son on birth has a vested interest in ancestral property and a coparcener cannot sell or mortgage his undivided share in ancestral property for his own purposes, unless for necessity in respect of an antecedent debt or in execution. He cannot alienate his share except on partition. See *Suraj Bunsi Koer* v. *Sheo Persad Singh*(1), *Sadabart Prasad Sahu* v. *Foolbash Koer*(2), and *Venkataramanaya Pantulu* v. *Venkataramana Dass Pantulu*(3), also see Mayne's Hindu Law, 7th edition, sections 353, 356. Hence the mortgage of Radha Kissen, executed without the consent of his son Kartick Kissen and for immoral purposes was invalid. The mortgage would only bind Radha Kissen's share; such share to be ascertained not on the date of the mortgage, but at the time of realisation. See

(1) (1878) I. L. R. 5 Calc. 148; L. R. 6 I.A. 88.
(2) (1869) 3 B. L. R. (F.B.) 31. (3) (1905) I. L. R. 29 Mad. 200.

Rangasami v. *Krishnayan*(1) and *Mahabeer Persad* v. *Ramyad Singh*(2). Also see Mayne's Hindu Law, 7th edition, sections 362, 363. The same arguments apply to the mortgages by Kartick Kissen. Before partition, the purchaser or mortgagee, like his alienor, is liable to have his share diminished by the birth of other co-parceners. The remedy of the purchaser or mortgagee is to insist on an immediate partition: see *Madho Parshad* v. *Mehrban Singh*(3), *Gurlingapa Satwirapa Gidwir* v. *Nandapa Chanbasapa Solapuri*(4). *Ponambala Pillai* v. *Sundarappayyar*(5), was also referred to.

Mr. C. R. Das (with him *Mr. B. C. Mitter*) for the defendants mortgagees. A co-parcener has a vested interest in the ancestral property. Under the Transfer of Property Act a vested interest can be transferred, and the transferee will be invested with the whole interest that lay in the transferor: see *Aiyyayari Venkataramayya* v. *Aiyyayari Ramayya*(6). All the authorities quoted by the other side are cases of contract-debts, and so are to be distinguished from this suit, in which there is a transfer of property. Radha Kissen became insolvent before the execution of the mortgages by Kartick Kissen. His half share in the property vested in the Official Assignee for the benefit of his creditors. It cannot be argued that the Official Assignee became a member of the co-parcenary, of which Radha and Kartick were joint members. The vesting order put an end to the unity of the family and amounted to a partition. If however, the Official Assignee be held to represent Radha Kissen, it may be pointed out that the consent order was made in the presence of both parties.

A Mitakshara son cannot object to alienations validly made by his father before he was born or begotten, because he could only by birth obtain an interest in the property. On birth, a son gets an interest in *what is left* of the ancestral property, and not in what has gone out: see Mayne's Hindu Law 7th edition, section 342; *Madho Singh* v. *Hurmut Ally*(7), *Jogul*

(1) (1890) I. L. R. 14 Mad. 408.
(2) (1873) 12 B. L. R. 90.
(3) (1890) I. L. R. 18 Calc. 157; L. R. 17 I.A. 194.
(4) (1896) I. L. R. 21 Bom. 797.
(5) (1897) I. L. R. 20 Mad. 354.
(6) (1902) I. L. R. 25 Mad. 690.
(7) (1868) 3 All. H. C. 432.

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Kishore v. *Shib Sahai*(1), *Girdharee Lall* v. *Kantoo Lall*(2), *Yekeyamian* v. *Agniswarian*(3). In the present case the son would have an interest in the equity of redemption only. If there had been a conveyance by sale, there is no question, that the plaintiffs would have no cause of action. There is no difference in principle between sale and mortgage in respect of the transfer of the property. On the question of antecedent debts, *Khalilul Rahman* v. *Gobind Pershad*(4), *Moheshwar Dutt Tewari* v. *Kishun Singh*(5), *Gunga Prosad* v. *Ajudhia Persad Singh*(6) were referred to.

Mr. S. R. Das, in reply.

Cur. adv. vult.

CHITTY J. This is a suit by Bhola Nath Khettry and Poran Chand Khettry, infants, by their mother and next friend against their father Kartick Kissen Das Khettry and some fifteen other defendants to contest the validity of certain mortgages made by their grandfather Radha Kissen Khettry and their father Kartick Kissen Das Khettry before the plaintiffs were born.

The plaint sets out in full detail the circumstances which have occurred since the date of the mortgages.

The facts are somewhat complicated, but I do not propose to discuss them at length, because it is admitted that the statements in the plaint are substantially correct. Two dates, however, should be added to those there given, viz., the dates of the births of the plaintiffs. Bhola Nath was born on the 11th October 1904 and Poran Chand on the 10th March 1906. The prayer of the plaint is, firstly, for a declaration that the plaintiffs are entitled jointly to a third share in the premises No. 6 Mullick Street. Secondly, for partition of the said premises. Thirdly, to set aside the decree made in suit No. 214 of 1905 and stay of

(1) (1883) I. L. R. 5 All. 430.
(2) (1874) L. R. 1 I. A. 321.
(3) (1869) 4 Mad. H. C. 307.
(4) (1892) I. L. R. 20 Calc. 328.
(5) (1907) 11 C. W. N. 294.
(6) (1881) I. L. R. 8 Calc. 131.

the sale directed by that decree. A number of issues were raised in the case, but so far as we are at present concerned the suit may be dealt with on what is really a preliminary question, whether the plaintiffs have any right to contest the mortgages or to go behind the decree, which has been passed in respect of them.

The parties are governed by the Mitakshara school of Hindu Law and the case must be considered on that basis.

It must be assumed for purposes of this decision that the mortgages both of Radha Kissen and Kartick Kissen were improperly made or that the money was raised by them for immoral purposes; for it is obvious, if the mortgages had been properly made, they would be good against the plaintiffs, even if they had been alive at those dates.

The cases, which were cited by Mr. S. R. Das for the plaintiffs, do not seem to me to bear upon the real point at issue in this case. The propositions of law, which he asserted, and which were based on the decisions in the following cases, viz., *Suraj Bunsi Koer* v. *Sheo Prosad Singh*(1), *Sadabart Prosad Sahu* v. *Foolbash Koer*(2) and *Madho Parshad* v. *Mehrban Singh*(3), are well established, but really do not meet the point here. There is no dispute that a son on his birth becomes entitled to an interest in the joint family property existing at that date.

The real question here is what was the ancestral property, which was in existence at the date of the birth of the first plaintiff.

The law is definitely stated by Mr. Mayne in section 342 of his work, which runs as follows:—

"Dispositions of property by a father can, of course, only be objected to by those who have a joint interest with him in the property either by joint acquisition, or by birth. Where the objection is based on the latter ground, it is necessary to show that such an interest vested in the objector at his birth or by his birth. Therefore, a son cannot object to alienations validly made by his father before he was born or begotten, because he could only by birth obtain an interest in property, which was then

(1) (1878) L. R. 6 I. A. 88. (2) (1869) 3 B. L. R. (F. B.) 31.
(3) (1890) I. L. R. 18 Calc. 157; L. R. 17 I. A. 194.

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existing in his ancestor. Hence, if at the time of the alienation there had been no one in existence whose assent was necessary, or if those, who were then in existence, had consented, he could not afterwards object on the ground that there was no necessity for the transaction."

Turning to the facts of this case we find that the first mortgage was made on the 2nd October 1880. On that mortgage a suit was filed (being suit No. 332 of 1884) and in it a consent decree was passed on the 11th September 1884. That decree was the usual mortgage decree and contained a direction for sale of the property in case of non-payment. In 1887 Radha Kissen became insolvent and his estate vested in the Official Assignee. Between March 1894 and September 1895 no less than seven mortgages of this property were made by the first defendant Kartick Kissen Das Khettry.

It may be stated that Radha Kissen's mortgage purported to be of the whole property and Kartick Kissen's mortgages of a moiety.

On the 3rd September 1896, an order was obtained by the Receiver appointed in another suit for sale of the whole property in suit No. 332 of 1884. To that order Kartick was a consenting party and the Official Assignee, as representing Radha Kissen's interest in the estate, made no objection and must also be taken to have been a consenting party. At that date the Official Assignee and Kartick Kissen Das Khettry were the only two persons in existence, who had any right in this particular property and it appears to me that that consent order had the effect of a ratification, if it can be so called, of the mortgage of Radha Kissen by Kartick Kissen and of the mortgages of Kartick Kissen by Radha Kissen or his representative the Official Assignee. That order still stands good and it is in pursuance of that order that the sale is now being asked for. It is true that in suit No. 214 of 1905, which was filed after the first plaintiff was born, a decree also by consent was taken on the 2nd August, 1905. It may be noticed that Radha Kissen had died some three days before that decree was passed. By that decree it was ordered that that suit should be regarded as supplemental to the suit of 1884 and that the sale ordered in the suit of 1884 should proceed.

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It is this last decree, which the plaintiffs now seek to have set aside as against them. But it appears to me that it is immaterial whether this decree be set aside or not, for the order of the 3rd September 1896 is still standing and there can be no objection to the revival of that order (if indeed it need reviving) by an order made expressly in the 1884 suit. But in my opinion it is clear that there were complete transfers of this property both by Radha Kissen and Kartick Kissen, transfers it is true by way of mortgage and not by sale and therefore transfers of a qualified nature, but none the less complete transfers. Whether such transfers would have been good as against Radha Kissen or as against Kartick Kissen of the moiety dealt with by each other it is not necessary to discuss, for in my opinion, as I have stated, the consent decree of 1896 amounted to a consent by either party to the transfers of the other. The result is that at the dates of the plaintiffs' births the ancestral property consisted not of an absolute estate in the premises No. 6 Mullick Street, but in the equity of redemption to that property. To a share in that equity of redemption it may be that the plaintiffs became entitled on their respective births and as such they may be entitled to redeem the properties. That there was some such idea on the plaintiffs' part is shewn by the application made to me by their counsel at the commencement of the hearing for leave to amend the plaint by the insertion of a prayer for redemption. That I refused, because it by no means follows that there would be any necessity for a suit for redemption, and also because it would be a prayer inconsistent with the present claim of the plaintiffs that the mortgages are invalid as against them. But so far as the setting aside of the mortgages or of the decree of this Court, which has been passed upon them, is concerned, I am of opinion that the plaintiffs have no case and I think that on this ground alone their suit must necessarily fail.

I do not consider it necessary to deal with the authorities quoted at great length, because the law on this point at least seems clear and, if this be correct, those cases have really no bearing upon the point.

This is a case of a complete transfer before the plaintiffs' birth, and not, as it was in most of the cases cited, a case of a

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debt or of a contingent contract. I hold, therefore, that they have no right in the suit to the relief which they claim and the suit must therefore be dismissed with costs.

Suit dismissed.

Attorney for the plaintiffs: *O. G. Gangooly.*

Attorneys for the defendants: *Dutt & Guha.*

J. C.