

(1886) 12 AHC CK 0005
In the Allahabad High Court

Balbir Singh

APPELLANT

Vs

Ajudhia Prasad and Others
Jagraj Singh Vs Ajudhia
Prasad and Others

RESPONDENT

Date of Decision : 07-12-1886

Acts Referred:

Citation : (1887) ILR (All) 142

Hon'ble Judges : Tyrrell, J; John Edge, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

John Edge, Kt., C.J.—These are two appeals against the judgments of the Subordinate Judge of Mainpuri, passed on the 18th May 1885, dismissing the respective claims of the plaintiffs, who respectively prayed for decrees that their respective proprietary rights in certain ancestral property be declared, and their interests in such property, which were about to be sold in execution of two decrees against their father, Harbans Singh, protected and exempted from such sale.

2. The sale of the ancestral property was advertised to take place on the 20th September 1881, in satisfaction of two decrees—one being in respect of a sum of Rs. 7,080 in favour of the third defendant, and the other of Rs. 1,724-5 3 in favour of the first and second defendants. The two plaintiffs, the sons of the judgment-debtor, separately brought suits against the decree-holders and their father, with the object of protecting their rights in the attached property.

3. With regard to the question as to whether the execution-creditor, in respect of the decree for Rs. 7,080, was entitled to realize by sale of the property, that is a question which may be very shortly dealt with, in that case the father had hypothecated the property in suit. It was attempted to be shown by his sons, the plaintiffs, that the debt was not one for which he could hypothecate any property except his own. It was, however, candidly admitted by Mr. Conlan, who appeared

for the appellant in one case, and by Pandit Ajudhia, Nath, who appeared for the appellant in each case, that although the plaintiffs' father was a person of immoral character, the creditor had no means of knowing that the monies advanced by him were likely to be applied to any other purpose than that for which they were professedly borrowed, namely, for the purpose of an indigo factory in which the family had an interest. It appears to me therefore that the plaintiffs' claims in respect of this part of the case were rightly dismissed in the lower Court, and that they are not entitled to any declaration in respect of the execution proceedings under the decree for Rs. 7,080.

4. The next question is, whether they can maintain these suits in respect of the execution proceedings under the decree for Rs. 1,724-5-3.

5. The father borrowed Rs. 1,100 originally on a hundi from the defendants 1 and 2, who sued for the principal and interest due to them, and obtained a simple money decree. There was no hypothecation of property as security for their debt.

6. It was said by these two defendants that this money was borrowed for family purposes to pay a debt due by the plaintiff, Balbir Singh, and to build certain shops at Cawnpore. It matters little, in our opinion, for what purpose the money borrowed was obtained. If borrowed by Harbans Singh for family purposes, it was open to these two defendants to have sued the members of the family they wished to bind, or to have sued the father Harbans Singh, as representative of the family. In either of these events they would have obtained a decree enforceable against the whole of the ancestral family property. They sued the father alone, and treated this as his separate debt. It is quite true the father alone borrowed the money, but that did not prevent these defendants from suing the other members of the family, or suing the father in his capacity of head of the family, if the debt was one incurred on account of the family. It is therefore a question of law whether the decree obtained by these defendants affects the family interest, and can be executed against the family property.

7. I am of opinion that it cannot. The cases to which the counsel for the respondents have referred us, are all, except the last, cases in which the Courts had to decide a somewhat similar point arising after a sale had taken place. So far as those cases are concerned, it is sufficient, for the purpose of the present case, to say that this is not a case in which the question arises after a sale has taken place.

8. Now the last case referred to and cited by Pandit Nand Lal, as in his favour is, in my opinion, nothing of the kind. I refer to the case of Muttayan Chettiar v. Sangili Virapandia Chinnatambiar, L. R., 9 Ind. App, 128: I.L.R., Mad., 1. In that case the property proceeded against was property inherited by the son from his father, which, in the son's hands, was liable to be sold in satisfaction of the father's debts.

9. In my opinion, the creditor's remedy in the present case was to have brought

his suit, if he desired to obtain a decree which he could execute against the family property, and not against the father's interest only, if he could maintain it, either against those members of the family against whom he desired to execute his decree, or against the father as head of the family, expressly or impliedly suing him in that capacity. In the case of *Nanomi Babuasin v. Madan Mohan I. L. R. Cal.*, 21 lately decided in the Privy Council, their Lordships, referring to the rights of the father-debtor and the creditor in that case, say: "if his (the father's) debt was of a nature to support a sale of the entirety, he (the father) might legally have sold it (the property) without suit, or the creditor might legally procure a sale of it by suit." The creditor here has brought no such suit

. 10. For these reasons we are of opinion that the decree for the sum of Rs. 1,724-5-3 is not enforceable against the rights and interests which these plaintiffs, the sons of Harbans Singh, have in the ancestral property sought to be sold by defendants Nos. 1 and 2.

11. The case of the defendants Nos. 1 and 2 put forward before us by Pandit Nand Lal is strangely inconsistent. At first he contended that the appeal ought to be dismissed as against his clients on the ground that they had not, and did not, claim to sell anything except the father's interest in the property. In support of this contention, he pointed to the sixth paragraph of their defence. On our asking him to explain why, in that view of the case, the allegations in the eighth paragraph of the defence were made, he volunteered no explanation, but proceeded to argue that his clients were entitled to bring to sale the interests, not only of the father, but of the respective appellants in the family property. It appears to me that the statement of defence of defendants Nos. 1 and 2 is a tricky one, and was framed so that they might raise whichever of the above contentions they might find most convenient in the Court below or on appeal. They wanted apparently to sail between wind and water, and having these contradictory pleadings to go upon, they were able to adopt the one or the other, as circumstances might arise.

12. I wish, in conclusion, to say, as to *Basa Mal v. Maharaj Singh I. L. R.*, 8 All, 205, that I agree with what is stated in the last paragraph but one of that judgment, which was passed on the 6th March last by the learned late Chief Justice Sir Comer Petheram and by Mr. Justice Straight. That part of the judgment to which I refer is as follows

It seems to us that two broad rules are deducible from the foregoing authorities, and they are these: First, that when a decree has been made against the father and manager of a joint Hindu family in reference to a transaction by which he has professed to charge or sell the joint ancestral property, and a sale has taken place in execution of such decree of the joint ancestral property, without any limitation as to the rights and interests sold, the rights and interests of all the coparceners is to be assumed to have passed to the purchaser, and they are bound by the sale, unless and until they establish that the debt incurred by the father, and in respect of which the decree was obtained against him, was a debt

incurred for immoral purposes of the kind mentioned by Yajnavalkya, chapter xi, Section 48, and Manu, chapter viii, sloka 159, and one which it would not be their pious duty as sons to discharge. Next, that if, however, the decree, from the form of the suit, the character of the debt recovered by it, and its terms, is to be interpreted as a decree against the father alone, and personal to himself, and all that is put up and sold thereunder in execution is his right and interest in the joint ancestral estate, then the auction-purchaser acquires no more than that right and interest, that is, the right to demand partition to the extent of the father's share. In this last mentioned case, the co-parceners can successfully resist any attempt on the part of the auction-purchaser to obtain possession of the whole of the joint ancestral estate, or, if he obtains possession, may maintain a suit for ejectment to the extent of their shares, upon the basis of the terms of the decree obtained against the father, and the limited nature of the rights passed by the sale thereunder.

13. Our order in these two appeals, therefore, is that, so far as the plaintiffs claim to exempt their rights and interests in the attached property under the decree of the third defendant, Bhataile Harbans Rai, the appeals must be dismissed.

14. The remainder of the plaintiffs' claim to exemption must be decreed. The decrees of the Subordinate Judge will therefore be varied in both cases, so as to exempt the rights and interests of the plaintiffs from execution proceedings under the decree of defendants Nos. 1 and 2 for Rs. 1,724-5-3.

15. The costs, both in this and the lower Court, will be in proportion to the claim decreed and dismissed in both suits.

Tyrrell, J.

16. I concur.