
(1961) 03 MP CK 0013

In the Madhya Pradesh High Court

Case No : Civil Revision No. 440 of 1959

Gopalachandra and Others

APPELLANT

Vs

Bhagwatinand Brahmanchari and Others

RESPONDENT

Date of Decision : 18-03-1961

Acts Referred:

Court fees Act, 1870 — Article 17, 7

Citation : AIR 1962 MP 279

Hon'ble Judges : S.B. Sen, J

Bench : Single Bench

Advocate : S.R. Joshi, for the Appellant; G.M. Chafekar, for the Respondent

Final Decision : Allowed

Judgement

S.B. Sen, J.—The suit under revision has been brought by Gopalchandra and his brothers against their father Ramchandra and another brother Shankarlal for a declaration that the mortgage of their ancestral house by their father and brother in favour of defendant No. 1 Bhagwatinand is not binding on them. The plaintiff-applicants alleged that the mortgage was without consideration, it was not for the benefit of the joint family; that there was no antecedent debt; that the transaction was immoral and that the mortgage was not binding on them as they were not parties to the same. The trial Court framed a preliminary issue regarding payment of court-fee, decided it against the plaintiffs and passed an order calling upon the plaintiffs to pay ad valorem Court-fee on the valuation of the decree which they wanted the Court to set aside. The plaintiffs have preferred this revision against the said order.

2. The trial Court has relied on a case reported in AIR 1943 70 (Nagpur) . In that case the sons brought a suit for declaration that a decree passed against his father was not binding on them as they were not parties to the suit. Mr. Justice Bose (as he then was) observed:-

"Ordinarily a decree only binds parties and privies but if for one reason or

another he is bound then there is implicit in the declaration a prayer that a former decree be modified so as to exonerate his interests. In such a case it is necessary for the plaintiff to have the decree modified and this prayer for consequential relief should be insisted upon."

3. These observations are based on the principle that in most cases there is a presumption that the father as a manager represents the family and the sons have been all deemed to be constructive parties. But this case as will appear from the facts refers to a money decree against the father and there is no allegation as we find in the present case of any alienation like mortgage. In fact in Mr 1949 Nag 37, Pandurang v. Bhojalu, Mr. Justice Sen had occasion "to discuss the ruling reported in AIR 1943 70 (Nagpur) and in his lucid judgment he has clearly shown the distinction between the two types of cases. In the latter case which Mr. Justice Sen was dealing and which was on all fours with the instant case, a suit was brought by the sons against their father and his transferee challenging the mortgage and the decree passed on the basis of it. In that case his Lordship Mr. Justice Sen held that "Such a suit is a suit for a pure declaration in which no consequential relief is involved and an ad valorem court-fee is not payable u/s 7(iv)(c) Court-fees Act but a fixed court-fee is payable under Article 17 (iii) Schedule 2, of the Act." He distinguished the case reported in AIR 1943 70 (Nagpur) on the ground that it was a case of simple money decree and not of a mortgage decree and that there is a difference between simple money decree and a mortgage decree. In execution of a simple money decree, the entire joint family property inclusive of the interest of the sons is liable to be sold in execution of that decree. The sale can only be avoided by the sons if they are in a position to prove that the debt incurred by their father was tainted with illegality or immorality. In the case of a mortgage decree it is not necessary for a son to allege or prove that the debt was incurred for an illegal or an immoral purpose; he can succeed if it is proved that the mortgage was not for legal necessity or for the payment of antecedent debt.

4. In an earlier case reported in AIR 1947 69 (Nagpur) , decided by a Division Bench to which Mr. Justice Sen was also a party, the sons were not parties to the mortgage and they were also not parties to the suit, They challenged the mortgage on the ground of want of legal necessity. Their lordships were of the view that the case being one where no personal decree had been passed against the father, the mortgage decree could be enforced only as against the father's share inasmuch as no legal necessity for the mortgage was proved. The sons were therefore entitled to a declaration that their shares could not be sold in execution of the decree.

5. In (S) Nageshwar Vs. Chandmal, which was relied on by the non-applicants, Mr. Justice Dixit (as he then was) has followed the ruling reported in AIR 1943 70 (Nagpur) . A perusal of that case would show that it was a money decree. The counsel for the non-applicant also pointed out to me a decision reported in 1956 MP LR (Civil) 532 Rambaboo v. Nathmal but that is neither a good law nor it is

binding on us. The observations in that case go counter to the decisions reported in AIR 1949 37 (Nagpur) and AIR 1947 69 (Nagpur) .

6. From the perusal of the above rulings it is clear that the principle is that when the decree is a money decree and when it is passed against the father personally, the son on account of the pious obligation is bound unless it is set aside, and the son in that case has to pay ad valorem court-fee. But when there is a decree on the basis of a mortgage and when there is no personal decree against the father. the son can ask for a mere declaration without being obliged to pay the ad valorem court-fee for a consequential relief for setting aside the decree.

7. The result is that the order under revision is set aside and the revision petition is allowed with costs. Counsel fee according to scale, it certified.