

(1926) 07 AHC CK 0022
In the Allahabad High Court

Jagdish Prasad and Others

APPELLANT

Vs

Sri Dhar

RESPONDENT

Date of Decision : 15-07-1926

Acts Referred:

Transfer of Property Act, 1882 — Section 41

Citation : AIR 1927 All 60 : 97 Ind. Cas. 503

Hon'ble Judges : Kanhaiya Lal, J; Ashworth, J

Bench : Full Bench

Judgement

Kanhaiya Lal, J.—The plaintiff is the adopted son of Dwarka Prasad, and seeks to impugn the validity of two sale-deeds, purporting to have been executed by Dwarka Prasad in respect of certain joint ancestral property belonging to the family. One of the sale-deeds was executed on the 12th July 1911, for a consideration of Rs. 1,500, and the other was executed on the 24th July 1924, for a consideration of Rs. 70. The allegation of the plaintiff was that some differences had arisen between the plaintiff and his adoptive father while he was a minor, and some litigation had taken place between them, the effect of which was that the adoption of the plaintiff was upheld and he was declared to be the owner of a half share in the disputed property. He challenges the right of Dwarka Prasad to sell the share belonging to him.

2. Both the sales were effected in favour of Jagdish Prasad, whose defence was that the plaintiff was not the adopted son of Dwarka Prasad and had no right to the property in question. He further pleaded that the sales were, in any case effective and for valid family necessity and that he, the defendant vendee, had purchased the property in good faith and for consideration, without any knowledge of the right claimed by the plaintiff. Both the Courts below find that the plaintiff was the adopted son of Dwarka Prasad and had a half share in the disputed property, and that Dwarka Prasad had no right to sell the share belonging to the plaintiff. They further find that the sales in question were made with the object of injuring the rights of the plaintiff and that the defendant-

vendee could not be regarded as a bona fide purchaser without notice of the plaintiff's right. The question of legal necessity was not gone into by the Courts.

3. It appears that the plaintiff was adopted by Dwarka Prasad some time in 1893. In 1901 a suit was filed by Dwarka Prasad for the cancellation of the adoption, which was dismissed on the 30th April 1902, and that decision was upheld on appeal on the 13th August 1902. In 1909 there was a further litigation between the plaintiff and his adoptive father, when the plaintiff, through his mother as his next friend, sued for a partition of his half share in the joint property, alleging that Dwarka Prasad was wrongfully wasting and alienating the same. The suit was decreed by the trial Court for a partition of a 1/3rd share of the entire ancestral property inherited by Dwarka Prasad; but on appeal he was declared to be a co-sharer to the extent of a half share; and the claim for partition was dismissed on the ground that the other persons interested in the property had not been impleaded in the suit. The sale deeds in question were executed after the above decree was obtained by the plaintiff. Since then there has been a formal partition between the plaintiff and Dwarka Prasad of the entire property, and the question for consideration is whether Dwarka Prasad was justified in selling the property belonging to the plaintiff after the plaintiff had been declared to be the owner of a half share therein.

4. The conduct of Dwarka Prasad during the entire period commencing from 1901 is not consistent with the theory that the plaintiff was living jointly with him. In the suit of 1901 the plaintiff was represented by his natural father as his guardian. He contested the suit filed by Dwarka Prasad for the cancellation of the adoption and was successful. In 1909 the plaintiff was represented by his natural mother as his next friend; and although the claim for partition was dismissed, he was declared to be entitled to a half share in the joint property. These suits afford indications of the fact that Dwarka Prasad had adopted an adverse and hostile attitude to the plaintiff; and in those circumstances as held in *Mahadev Balwant v. Lakshman Balvant* [1895] 19 Bom. 99 and *Bhola Nath v. Ghasi Ram* [1907] 29 All. 373 the next friend of the minor was entitled to exercise on behalf of his minor ward an intention to separate and obtain a partition, and to demand in the interest of the minor that his share should be set apart and secured for him. The suit filed on behalf of the plaintiff by his next friend in 1909 resulted in a decree specifying his share in the joint property. A partition of that share was claimed in the suit; but it was not allowed, because certain necessary parties had not been impleaded. The intention to separate had, however, been exercised in fact, if it had not been exercised earlier, when the suit of 1909 was contested by his natural father; and from that date the family must be regarded as having separate interests. Dwarka Prasad had thereafter no right left to act as manager or karta of the family or to sell that portion of the joint property, which did not belong to him, but belonged to the minor. The Courts below were, therefore, justified in holding that the plaintiff was not bound by the sales.

5. It is urged on behalf of the defendant vendee that there were antecedent

debts due by Dwarka Prasad to another person, which had been discharged out of the consideration of the sales in question; but if Dwarka Prasad had incurred any debts prior to the separation, he had after separation no right to sell any property belonging to a separated member to pay those debts. No question of legal necessity can, therefore, arise in the case. The sales, in question have, in fact, been found to have been effected to defeat the right of the plaintiff. The defendant vendee had, according to the Courts below a knowledge of the right claimed by the plaintiff. He took a security bond from Dwarka Prasad for the refund of the sale consideration, in case his title to the property conveyed was found to be defective. No question u/s 41 of the Transfer of Property Act, therefore, arises. There is a cross objection on behalf of the plaintiff in respect of that portion of the decree which allows him a half share in a certain compound over which a house has been built by the defendant-vendee since his purchase. The plaintiff claims joint possession of the land occupied by the house; but the Courts below find that he never protested against the construction of the house. He was not entitled in consequence to a decree for joint possession of the compound, specially as the rights of the parties can otherwise be adjusted when a partition takes place. The appeal and the cross-objections are therefore, dismissed with costs, including fees in this Court on the higher scale.

Ashworth, J.

6. The only difficulty in the case is the question as to the separation of the plaintiff from his adoptive father, Dwarka Prasad. As early as 1901, the father had denied that the plaintiff was his adopted son; and it is clear that the plaintiff lived with his natural father. In 1901 the Court declared that the adoption was valid. In 1909 the plaintiff brought a suit for partition. The suit was disallowed on the ground of non-joinder of the necessary parties; but the Court declared that the plaintiff was entitled to a half share in the property. This declaration could only be based on the finding that separation had taken place. The fact of the bringing of the suit for partition along with the circumstance of the father all along denying the claim of the plaintiff to be his adopted son—a denial in which he persists in the present suit—is sufficient evidence that, as a fact, there was a separation of the father and the plaintiff as far back as 1909 or before. The father consequently was not in a position at the dates of these two sale-deeds, 1913 and 1919, to dispose of the son's share in the property even to discharge antecedent debts due by him. After separation the son is no longer liable to the discharge of the antecedent debts of his father. I concur in the order proposed.