

(1941) 01 BOM CK 0010
In the Bombay High Court
Case No : Second Appeal No. 741 of 1938

Krishnaji Dattambhat Joshi	Vs	APPELLANT
Parappa Datto Patil		RESPONDENT

Date of Decision : 13-01-1941

Acts Referred:

Citation : (1941) 43 BOMLR 539

Hon'ble Judges : Sen, J; John Beaumont, J

Bench : Division Bench

Final Decision : Allowed

Judgement

John Beaumont, Kt., C.J.—This is an appeal from a decision of the Assistant Judge of Belgaum. The material facts are that defendant No. 2 and the plaintiff are father and son, members of a joint family, and part of the coparcenary property consists of some Joshi service inam land, in the year 1922 defendant No. 2, as manager of the family, mortgaged this Joshi service inam land to defendant No. 1 for Rs. 300. In 1928 defendant No. 1 obtained a mortgage decree against defendant No. 2, and in 1933 defendant No. 1 issued a darkhast and obtained an order for sale of this property. In March, 1935, the plaintiff filed the present suit asking for a declaration that the Joshi service inam land is inalienable and not liable to be sold in execution of the decree of defendant No. 1, and he asked for an injunction restraining defendant No. 1 from selling any portion of the land in execution of the decree. The learned trial Judge held that the land was inalienable but that defendant No. 2 was estopped from raising the point by virtue of the decree which had been obtained against him, and accordingly the learned Judge made a declaration that the plaintiff's joint half share in the suit land was not liable to sale in execution of the decree and that defendant No. 2's joint half share in the suit land was liable for sale. What exactly that order amounts to, I am not sure. The property being joint, all that sale of defendant No. 2's interest would amount to ultimately would be a right to the purchaser to apply for partition of the property, and having got partition, he

could then sell defendant No. 2's share. In appeal the learned Assistant Judge held that the property was not inalienable and also that the plaintiff was bound by the decree obtained against defendant No. 2, the manager of the property, and he dismissed the plaintiff's suit. From that order this appeal is brought.

2. On the first question as to whether this land is alienable or not, it seems to me clear that under the sanad, by which Government granted the land, it is made inalienable. The sanad is in the ordinary form used for grants of land given in return for services to be rendered to a village community, and such lands are normally rendered inalienable. This Court in an unreported case, *Narayanbhat Gundbhat joshi v. Vishnu Abarao Mahajan* (1936) S.A. No. 800 of 1932," decided by N.J. Wadia and Sen JJ., on August 19, 1936, (unrep.) dealing with a sanad in the same terms as the present sanad, held that the land was inalienable, and I feel no doubt that that decision is right. Act XV of 1895, to which the learned Government Pleader referred, saves restrictions on alienation in grants by Government, from any objection under the Transfer of Property Act. I think, therefore, that the suit land is in fact inalienable.

3. The question then arises to what extent the plaintiff is bound by the alienation effected by defendant No. 2 and by the decree obtained against defendant No. 2. It was held by both the lower Courts that the alienation by defendant No. 2 was made by him as manager for the purpose of legal necessity, and, therefore, if the land were alienable in the ordinary way, there can be no doubt that the plaintiff would be bound by the alienation, although he was no party to it. But I know of no authority for the proposition that a manager of a joint Hindu family can bind other members of the family by an alienation of coparcenary land which is not alienable. It seems to me obvious that if the land is not alienable, the manager of the family cannot alienate it as against other members of the joint family. In my opinion, therefore, the plaintiff is not bound by the alienation made by defendant No. 2 or by the decree obtained against defendant No. 2. We are not concerned with the rights of defendant No. 1 and defendant No. 2 inter se. I think all that we can do is to make a declaration that the suit property is inalienable, and not liable to sale as against the plaintiff in execution of the decree of 1933, and grant an injunction against defendant No. 1 executing the decree to the prejudice of the plaintiff.

4. The appeal will have to be allowed with costs throughout.

Sen, J.

5. I agree.

6. On the question, whether the property in suit is alienable, the Assistant Judge in my opinion was clearly wrong in holding that in spite of the terms of the sanad the subsequent resolutions of Government have enlarged the right of the grantee, rendering the inalienability "a thing of the past." The sanad in this case is similar in terms to that which this Court had to deal with in *Sattappa v. Mahomedsaheb* (1935) 38 Bom. L.R. 221, though the land there was a Kazi inam

land. Section 8 of Schedule B to Act XI of 1852 places the Joshi and the Kazi inam lands on the same footing, and in *Narayanbhat Gundbhat Joshi v. Vishnu Abarao Mahajan* (1936) S.A. No. 800 of 1932, decided by N.J. Wadia and Sen JJ., on August 19, 1936, (unrep.) it was expressly held that the Joshi inam land of the kind we are dealing with was not alienable.

7. The lower Courts have held that defendant No. 2 is now estopped from repudiating his alienation and, therefore, from challenging the sale in execution. But it has to be remembered that in this suit it is not defendant No. 2 but the plaintiff who is challenging the sale of the land, and the fact that defendant No. 2 might be estopped from challenging the sale in execution is not strictly relevant in this suit as we are not concerned with the rights of defendant No. 1 and defendant No. 2 inter se. Even granting that defendant No. 2 may be estopped from challenging the sale, what we are concerned with is what effect that has on the contentions of the plaintiff and on the reliefs that he has asked for.

8. It seems to me that the rule of estoppel or of res indicate will not apply against the plaintiff's suit. Such a rule would no doubt apply to the son where the father as manager was competent to alienate the property on behalf of the son, but in this case obviously he was not so competent. The father can represent the son only where he is competent to sell or enter into any transaction in respect of the family property.

9. It also seems to me that the rule as to the pious obligation of the son would also not apply, although that rule would apply during the lifetime of the father, and although a debt incurred for family necessity but by acting in a manner contrary to the terms of the grant may not be strictly what is known as "avyavaharika." It is obvious that the pious obligation must be confined to the question of the payment of the father's debt and that it cannot be allowed to override the provisions of a grant that the land was not to be alienated at all. The plaintiff, therefore, is not precluded from contending that the payment of his father's debt should not take a form which is prohibited by his sanad.

10. The effect of the foregoing discussion seems to be that neither the principle of res judicata nor the son's liability for his father's debt nor the son's pious obligation can be allowed to encroach on the inalienability of the land, and the plaintiff is therefore clearly entitled to the declaration he seeks. As to his prayer for an injunction, I agree that it should take the form proposed by my Lord the Chief Justice.