
(1950) 09 AHC CK 0022
In the Allahabad High Court
Case No : First Appeal No. 34 of 1945

Raj Kuer

APPELLANT

Vs

Rajendra Bahadur Singh and Others

RESPONDENT

Date of Decision : 07-09-1950

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2, Order 8 Rule 9
Transfer of Property Act, 1882 — Section 122, 53, 53(1)
Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2, Order 8 Rule 9
Transfer of Property Act, 1882 — Section 122, 53, 53(1)
Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2, Order 8 Rule 9
Transfer of Property Act, 1882 — Section 122, 53, 53(1)

Citation : AIR 1951 All 443

Hon'ble Judges : Kidwai, J;Chandiramani, J

Bench : Division Bench

Advocate : B.K. Dhaon, for the Appellant; S.M. Yusuf, Respondent No. 1, for the Respondent

Final Decision : Dismissed

Judgement

Kidwai, J.—This appeal arises out of a suit instituted by Raj Kuer, appellant, on 26-2-1944, for recovery of possession of a house situate in village Bargawan, in the district of Sitapur, against the heirs of one Shahr Banoo Begam and Kuar Rajendra Bahadur, a transferee of the house from those heirs.

2. The plaintiff claimed that she was the donee of the house from her husband Ammar Singh under a deed of gift, dated 25-2-1929, and, as such, entitled to recover possession of it from the defendants who, though they held under colour of an auction-purchase of it by Shahr Banoo, in execution of a mortgage decree obtained by her against Ammar Singh had in fact no right to hold it, since neither the mortgage nor the decree covered the house. She pleaded that her cause of action arose on 1-3-1932, the date on which the execution Court delivered possession to Shahr Banoo Begam.

3. Defendant 1 alone filed a written statement. The other defendants adopted it. It was pleaded : (1) That the house in suit was in existence at the date of the mortgage and was covered by it, being situated on land included in the two annas share of village Bargawan, which was mortgaged; (2) that the house was also sold in execution of the mortgage decree; (3) that the plaintiff, not having filed any objections in the execution case of which she had full knowledge and having herself carried on litigation with regard to the house as the guardian of her minor son, is estopped from disputing the auction-purchaser's title ; (4) that there was no gift in favour of the plaintiff and, even if a deed of gift is proved, it was fictitious and was executed to defeat and delay creditors; (5) that defendant 1, after purchasing the house made

improvements in it at a cost of Rs. 8000 in the bona fide belief that he was the owner of it and so he is entitled to get this back if the plaintiff's title is established.

4. The defendants also took a plea as to sufficiency of court-fee. The first issue was framed to try it and the defendants' contention was upheld. The deficiency was made good and this question is no longer involved in this appeal.

5. The trial Court framed the following 11 further issues :

2. (a) Was the house in suit gifted to the plaintiff by Mannu Singh as alleged?

(b) If so, was the deed of gift fictitious and executed fraudulently in order to defeat and delay the creditors of Mannu Singh as alleged?

3. Was the house in suit not liable to be sold in execution of the decree against Mannu Singh on the basis Of the mortgage deed dated 11-9-1919, as alleged?

4. Do the judgments Exs. A-10 and A-11 operate as res judicata as alleged? If so, its effect?

5. Is the suit barred by limitation?

6. Did no interest in the house in suit pass to the auction-purchaser as alleged?

7. Is the question involved in Issue 6 res judicata as alleged?

8. Is the plaintiff estopped from challenging the defendants' title to the house in suit as alleged?

9. Has defendant 1 made any additions and alterations in the house in suit? If so, is he entitled to any compensation?

10. To what relief, if any, is the plaintiff entitled?

11. Did Ganga Singh, son of Mannu Singh, have any interest in the property in suit on the date of the execution of the gift deed in favour of the plaintiff? If so, is the deed of gift invalid as alleged by defendant 1?

12. Was the gift deed executed during the proceedings of the execution case as

alleged? If so, is the gift deed invalid as against the auction-purchaser as alleged?

6. The trial Court found : (1) That the execution of the deed of gift is proved; (2) that the gift was fictitious and did not confer any title upon the plaintiff; (3) that Mannu Singh was heavily indebted and he executed the deed of gift merely to defeat and defraud creditors; (4) that the house in suit was in existence at the time of the mortgage ; (5) that the mortgage of a specific share in the zamindari property in village Bargawan also operated to mortgage the house in suit; (6) that the house also passed by the sale in execution of the mortgage decree of the two annas share in Bargawan; (7) that the judgments in the objection filed by Mannu Singh to the delivery of possession over the house (Exs. A-10 and A-11) do not operate as *res judicata* on the question whether the house was liable to be sold in execution of the mortgage decree; (8) that the suit is within limitation; (9) that the question whether any interest in the house in suit passed to the auction-purchaser is barred by *res judicata* by reason of Exs. A-10 and A-11; (10) that the plaintiff is estopped from

challenging the title of the auction-purchaser and defendant 1 because she, by her conduct, particularly her request to Drigpal Singh, father of defendant 1 to purchase the house from the other defendants led the defendants to believe that the title of defendants 2 to 3 as the auction-purchaser's successors was good; (11) that the gift of the house was made *pendente lite*. It is, therefore, not valid as against the defendants; (12) that the house was ancestral property and, since Ganga Singh was *en venire sa mere* at the time of the gift, he was in existence and a member of a joint Hindu family with his father. The gift deed, therefore, being without legal necessity is invalid; (13) that defendant 1 made improvements under the bona fide belief that he was the owner but the cost of these improvements is not established; (14) that for the purpose of Issue 1 the house was valued at Rs. 5746. Therefore, even if the plaintiff is entitled to a decree, she cannot get possession without paying this sum to defendant 1.

7. In view of his findings as to the title of the plaintiff and the validity of the sale in favour of the auction-purchaser the learned Additional Civil Judge dismissed the suit.

8. The plaintiff has come up in appeal and her learned counsel has challenged all the findings which are against him except the matter of court-fee.

9. The points that arise for consideration in this appeal are ; (1) Was the deed of gift executed by Munnu Singh in favour of his wife fictitious? (Issue 2 (b)); (2) was it executed to defeat and delay creditors and, if so, does the plea u/s 53; T. P. Act, properly arise in the present suit? (issue 2 (b)); (3) was the deed of gift void because, at the time that it was executed, Ganga Singh, son of Munnu Singh had already come into existence and was a member of the joint family consisting of himself and his father and the gift was of joint family property ? (Issue 11.) (4) Was the gift executed *pendente lite* and can it not be used to defeat the title of the purchaser at the auction in execution of the decree in

which the lis resulted? (issue 12). (5) Was the house not mortgaged and, as such, not liable to be sold in execution of the decree passed on the basis of the mortgage and consequently did not interest in the house pass to the auction purchaser by the sale in execution of the mortgage decree? (Issues 3, 6 and 7). (6) Is the plaintiff estopped from denying the defendants' title? (Issue 8). (7) Did defendant 1 make improvements in the house in the bona fide belief of his title and, if so, is he entitled to recover anything before possession can be taken away from him? (Issue 9).

10. Since a suit can only be decreed on proof of title in the plaintiff and not on the weakness of the defendants' title, the first thing to consider is whether the plaintiff has any title to the house in suit. The genuineness of the deed of gift has been upheld but its validity has been negated on several grounds.

11. The first ground upon which the trial Court has held that the deed was invalid is that it was a fictitious transaction by which Munnu Singh did not in fact divest himself of title in the house but which he executed merely to defeat and delay creditors. In the written statement filed by defendant-respondent 1 it was pleaded, in para. 16 :

"The answering defendant does not admit the deed of gift alleged by the plaintiff. If the execution of the deed of gift is proved, then it would have been executed only as a fictitious deed. Kuar Munnu Singh was greatly indebted; if he, to deprive the creditors or to lengthen the suit, executed any deed in favour of the plaintiff, then it is invalid and ineffectual, u/s 53, T. P. Act."

12. Issue 2 was framed to try the various pleas raised in this para., and, as I have already stated, the trial Court, although it held the execution of the deed of gift proved, held that the gift was fictitious and did not have the effect of divesting Munnu Singh of his title to the house. It also held that, at the time that the deed of gift was executed, Munnu Singh's liabilities exceeded his assets and the deed was executed merely with a view to defeat and delay creditors. It accordingly held that the deed was bad u/s 53, T. P. Act.

13. In this appeal, it was contended that it is only a creditor who may be defeated or delayed that can take action u/s 53 and then he must act as a representative of all the creditors. It was, therefore, urged that the defendants, not being creditors who could be defeated or delayed, could not take advantage of Section 53.

14. The argument confuses, as has very often been done and was done in this very case in the lower Court, two different pleas, one is it he plea that the deed of gift is a fictitious document and the other is that although the gift, although a real transaction, being intended to defeat and delay creditors, is liable to be set aside.

15. As remarked by their Lordships of the Judicial Committee in *Mina Kumari Bibi v. Bijoy Singh Dudhuria* 44 I. A. 72 : AIR 1916 P.C. 238

"First, then, as to the alienation in favour of the plaintiff being, as it is termed in the respondent's case, collusive and fictitious. It is there alleged that "the judgment-debtor, Chhatrapat Singh, was, and always remained, the real owner of the properties in dispute." Strictly this means that the transaction was benami and not that it was a fraudulent transfer within the meaning of Section 53, T. P. Act. The difference is distinct, though it is often slurred."

See also *Mt. Hidayat-ul-nissa v. Jalaluddin* 1940 C.W.N. 1057 : A. I. R. 1941 Oudh 95 *Faqir Bux v. Thakur Prasad* 1941 C.W.N 801 . AIR 1941 Oudh 457 and AIR 1944 314 (Oudh) .

16-17. If, therefore, the finding that Munnu Singh did not, by executing the deed of gift, divest himself of title in the house is upheld, that is an end of the case since the plaintiff would, in that event, have no title to sue. This is a plea that there is no gift at all and no question arises of setting it aside, the deed of gift may simply be ignored as a fictitious document. In respect of this plea, Section 53 has no application and it is a question of fact, to be determined in each case.

18. The second plea presupposes that there was a real transaction but that it offends against the provisions of Section 53, T. P. Act, and may be avoided. It was contended that these two pleas are inconsistent and mutually destructive and cannot be taken simultaneously. There is nothing to prevent two alternative pleas being taken and it cannot be said that the two pleas are mutually destructive. The plea really is that the deed of gift is fictitious but that if it is not so, then it was intended to defeat and delay creditors and it should be set aside.

19. The evidence adduced in this case supports the plea that the deed of gift is fictitious. Munnu Singh had mortgaged his entire share in Bargawan, within which the house stood, to Shahr Banoo Begam without making any exception. (At one time it was disputed that the house stood on land included in the mortgaged patti but there is no longer any controversy with regard to this). On 4-10-1926, the mortgagee obtained a final decree on the basis of this mortgage directing sale of the mortgaged, property. On 21-2-1928, the mortgage decree-holder applied for execution of the decree (then amounting to Rs. 45,274-3-10.)

20. While the proceedings were still in progress (vide Exs. A-39 and A-40), Munnu Singh executed, on 26-2-1929, the deed of gift which comprises some shares in villages and also the house in suit, in favour of his wife. On 29-11-1929, a sale proclamation was issued in respect of the entire mortgaged property and, in assessing the value of the share of village Bargawan, the value of the house was separately entered.

21. On 20-3-1930, some of the mortgaged property, including the two annas share in Bargawan, was sold by public auction in various lots and was purchased by the decree holder

herself for Rs. 25,605. A sale certificate was issued on 3-5-1930. The auction-purchaser was then placed in possession of the two annas share in village

Bargawan but possession was not delivered over the house. Accordingly, on 10-10-1930, an application was made for delivery of possession over the house. Notice of this was issued but possession was not delivered over the house. Accordingly on 10-10-1930 an application was made for delivery of possession over the house. Notice of this was issued but there was difficulty in service and eventually substituted service was effected on 25-11-1930. Even then no one appeared and a warrant was issued for delivery of possession over the house. On 16-12-1930, the process-server reported that possession could not be delivered because the judgment-debtor had locked the house and posted men armed with spears to prevent delivery of possession.

22. On 22-12-1930, the auction-purchaser again applied for delivery of possession with police aid and this application was granted but, before any action could be taken Munnu Singh filed an objection under Sections 47 and 151, Civil P.C., on 5-1-1931. Thereafter he filed a second application on 17th January and a third one on the 7th March, raising numerous objections. In the first application Munnu Singh claimed that "the residential house of the objector was not hypothecated" and that

"the decree-holder purchaser has filed the application for possession of the residential house of the objector only to harass him and to get undue advantage therefrom."

23. On 23-3-1931, the learned Civil Judge of Sitapur rejected the objections. There was an appeal from this order in the Chief Court but it appears that Munnu Singh had died before the appeal came on for hearing and his minor son Ganga Singh, under the guardianship of his mother, the plaintiff, was the appellant. During the pendency of this appeal the plaintiff furnished security to the extent of Rs. 500 on behalf of her minor son, as ordered by the Court.

24. The appeal was dismissed on 7-1-1932, it being held that the house was covered by the mortgage, the decree and the sale. On 29-1-1932, the decree-holder again applied for delivery of possession with police aid. Her prayer was granted and on 24-2-1932, the Nazir was directed to put the purchaser in possession of the house. Possession was actually delivered on 1-8-1932.

25. From the above recital of facts, it will be clear that throughout the proceedings following the deed of gift, Munnu Singh continued to treat the house as still his property and filed objections on that basis. What is, however, of

greater importance is that, after the death of Munnu Singh the plaintiff herself continued the litigation on behalf of her son, Ganga Baksh, on the same basis. Although she was well aware of the proceedings for delivery of possession and the validity of the auction sale was being challenged in those proceedings, she pursued the remedy of her son as owner of the house in succession to his father and did not claim any title in herself.

26. The conduct both of Munnu Singh and of the plaintiff herself, including her

failure to come into the witness box, is inconsistent with a genuine gift having been made and fully supports the finding of the trial Court that Munnu Singh did not divest himself of title to the house by executing the deed of gift.

27. It was contended that the deed of gift covers not only the house but other property and mutation of names was effected in respect of that other property in favour of the donee. Further, in proceedings under the Encumbered Estates Act, at the instance of Ganga Singh, the heirs of Shahr Banoo Begum attempted to bring that other property in as the property of Ganga Singh but they failed and it was held that the property belonged to Raj Kuer--Vide Exs. 7 and 12. It was, therefore, contended that : (1) The respondents were barred by the rule of res judicata, from contending that the deed of gift was fictitious ; (2) the respondents must be taken to have affirmed the validity of the deed of gift and cannot be heard now to deny it, and (3) the above proceedings indicate that the gift was acted upon.

28. With regard to the first two pleas the first thing to be noticed is that no such pleas were taken at any stage of the case till the rejoinder by the learned counsel for the appellant. It is highly undesirable that Bach pleas, depending as they do upon proof of facts, should be urged at that stage and we are not really called upon to consider them. Nevertheless the appellant's learned counsel insisted upon placing his contentions on these points before us and we have considered them. We find that there is no evidence to support them.

29. The only pieces of evidence consist of Ex. 12, the objection preferred by Raj Kuer in the Encumbered Estates Act proceedings and Ex. 7, the order passed in respect of it. Before this order was passed, there was an application made by the present respondents 2 to 4 but no copy of that application has been produced and it is impossible to know what that application contained. The order too does not assist us in the matter since it only states that the objection is allowed. It is wholly impossible to ascertain from these documents whether there was any

contest or not and if there was a contest what it was and how eventually the order came to be passed.

30. At that time the houses were in the possession of the auction-purchaser and the title of the auction-purchaser to them had not been challenged. The rest of the property was not covered by the mortgage deed and the mortgagee had no direct interest in them. In these circumstances the evidence is wholly insufficient to establish the plea of res judicata and it also does not indicate that the creditors had barred themselves by reason of any admission of the validity of the deed from challenging it.

31. With regard to the third contention arising out of these proceedings, it must be noticed that, in the present case, no question of the validity of the deed of gift with regard to the other property covered by it arises. We are only concerned with the residential house. It may well be that, while making an actual gift of some property, the donor included in it other properties which he never intended

to convey. The question whether any particular item included in the deed of gift was fictitiously entered is a question of fact. We have already referred to the evidence, and particularly to the conduct of Munnu Singh and Raj Kuar, as shown by that evidence as indicating that Munnu Singh did not part with the property in the residential house.

32. Further, in the present case, it was the residential house that was said to have been gifted. If the gift was real, the donor would be left with no residential house at all. Moreover, the share in which the house was situated was subject to a mortgage on the basis of which a final decree for sale had been passed and an application had already been made for execution of that decree by sale of, among other properties, the share in which the house was situated. It was at least possible that, by the sale, the house would pass with the share. In these circumstances there was good reason to include the house fictitiously in a deed of gift which, with regard to other property covered by it, might be perfectly genuine.

33. It is true that the gift being of a residential house by the husband to his wife, no change in the possession would follow and it could not be expected that the husband would leave the house in order to establish the gift, but acceptance of the gift was necessary and, in such a case, that could only be established by the evidence of Raj Kuar herself yet she has abstained from appearing in the witness-box.

34. Thus the finding of the trial Court that Munnu Singh did not part with his property in the house must be upheld. The appellant had, therefore, no right to sue and her appeal must fail on that ground.

35. The other points involved were, however, argued by the appellant's learned counsel at considerable length. I shall, therefore, touch upon them also.

36. The next point to be considered is whether the respondent can avoid the deed of gift u/s 53, T. P. Act, and whether this is a properly constituted suit for that purpose. On this part of the case, it was contended that Shahr Banoo was not a creditor who could be, or had been, defeated or delayed by the gift and so she had no locus standi to sue. It was further pleaded that this suit was not properly framed for avoiding the deed of gift since the defendants' pleas were not advanced on behalf of the other creditors also.

37. The findings of the lower Court--which were not challenged in appeal--are that at the time that the deed of gift was executed, Munnu Singh was heavily indebted, his liabilities being about Rs. 2,00,000 while the value of the property which he possessed at that time did not exceed Rs. 1,80,000. It is further established that up to the time of the deed of gift the mortgagee had not realised anything and that, whether rightly or wrongly, the house gifted was also included in the property to be sold in execution of the decree. Further, even after the sale a sum of not less than Rs. 20,000 remained due to the mortgagee decree-holder whereas property of estimated value of about Rs. 13,000 only, out of the

mortgaged property, remained to be sold and this property carried a prior encumbrance of Rs. 19,500.

38. On the facts mentioned above, the finding must be that the mortgagee was one of the creditors whom the transfer was intended to defeat or delay. The contention that the mortgagee could not be defeated or delayed because, if her charge extended over the gifted property, it could be sold in any case and that, if her charge did not extend to the gifted property, she could not sell it and so could not be said to have been defeated or delayed creditors, ignores two factors : (1) It is not only the defeat of creditors that is contemplated by Section 53, T.P. Act, but also their being delayed and the creation of an interest in a third person might well delay, though it cannot defeat, a mortgagee; and (2) if the mortgagee's debt is not satisfied out of the property mortgaged, a personal decree will be obtained and, in satisfaction of that decree other property belonging to the mortgagor may be taken. Thus the transfer of his other property by the mortgagor, when the mortgaged property is not sufficient, as in the present case, to satisfy the

mortgage debt can well indicate an intention to defeat or delay the mortgagee.

39. It was contended that the limitation for a personal decree had expired but documents on record clearly negative this. Exhibit A-1 is the mortgage deed dated 10-9-1919. It stipulates for a ten years" period but provides for the payment of interest, every six months. It then provides that, in case of default of payment of interest, the mortgagee could sue at once for his money. Even if it is considered that there was a default in the payment of the first instalment of interest that default occurred on 10-3-1920. The preliminary decree for sale was passed on 16-12-1925 as Ex. 12 shows. This was within six years of the default and the suit must necessarily have been brought within six years.

40. It was also contended that, since proceedings had already been taken, at the instance of Ganga Bux Singh, under the Encumbered Estates Act, no question of defeating or delaying creditors arises by reason of any transfer made by the debtor before that date. It is obvious that, in the present case at least, such a question does arise. The house had already been sold along with the zamindari share within which it is situated. Its valuation was separately shown and the price paid for the share was about twice the estimated value of the agricultural land and groves in that share as shown in the sale proclamation -- Vide Ex. A-4 and Ex. A-23. The decree holder was herself the auction, purchaser and the amount due to her has been reduced to the extent of the price paid. If the house passes out of her possession now she will have got no value for that portion of the sale consideration which related to the house and, since, a decree under the Encumbered Estates Act has already been passed only for the balance remaining due after crediting the entire price obtained at the auction sale and that decree has become final, she will lose the amount of money which may be attributed to the sale of the house. Thus it is not a question of delaying only but of defeating the creditors to the extent of the value of the house.

41. Mr. Dhaon next relied upon AIR 1946 177 (Privy Council) for the proposition that it is not open to the transferor himself to have the transfer set aside u/s 53, T. P. Act. This is obvious from the wording of the section itself. He then proceeded to contend that the auction-purchaser is the representative of the judgment-debtor i. e. of the transferor and so he cannot challenge the validity of the deed. This contention is negatived by an authority upon which Mr. Dhaon relied in support of another part of his argument, namely, Bai

Bai Hakimbu Vs. Dayabhai Rugnath, in which it is stated :

"A decree-holder does not lose his right to the benefit of Section 53, T. P. Act by himself becoming an auction-purchaser, and if the property purchased by him at the auction had been transferred by the judgment-debtor with intent to delay or defeat him, the transfer is voidable at his option."

42. Further the argument loses sight of the fact that, in the present case, the auction took place in pursuance of a mortgage decree. The auction-purchaser thus represents the interest not only of the mortgagor but also, to a certain extent, of the mortgagee. He ran therefore, take the pleas which were open to the mortgagee herself.

43. The next objection is as to the frame of the suit. It is true that the plea has been taken in defence in a suit brought against one creditor--the decree-holder auction-purchaser--only. It has, however, been held by a Full Bench of the erstwhile Allahabad High Court in Lallu Singh Vs. Lala Chander Sen and by a Full Bench of the Madras High Court in Ramaswami Chettiar v. Mallapa Reddiar A. I. R. 1920 Mad. 748: 43 Mad. 760 and in Bai Hakimbu Vs. Dayabhai Rugnath, that a plea u/s 53, T. P. Act, can be taken in defence by a creditor. Thus the objection on this point also fails and the decision of the lower Court that the gift was intended to delay and defeat creditors must be upheld. The gift can and should therefore be avoided in the present case.

44. The next plea of the defendant was that the deed of gift is bad because, at the time of its execution, Ganga Singh, son of Munnu Singh was en ventre sa mere and, therefore under the Hindu Law, in existence, and a member of the joint family consisting of himself and his father and consequently Munnu Singh had no power to make a gift. The fact that Ganga Singh had been conceived and had, as such, become a member of the joint family was not disputed in appeal but it was contended that the result of this was not to make that gift void but only voidable at the option of coparceners--in this case Ganga Singh. It was further pleaded that it was not open to a stranger to avoid the deed of gift and unless the auction-purchase is held valid (in which case the gift could not, in any case, stand against the earlier mortgage), the defendants were merely trespassers and cannot avoid the deed of gift.

45. The controversy between the parties is whether the deed of gift is void ab initio or only voidable. If it is void ab initio, any one can challenge the title of the donee and consequently the defendants too can make the challenge, even if the

sale in favour of Shahr Banoo is held to be void as being of property not mortgaged and covered by the decree.

46. So far as Avadh is concerned, it has consistently been held by the Chief Court and by its predecessor, the Court of the Judicial Commissioner of Avadh, that a transfer executed by a coparcener, even a father, without such necessity as would justify it under the Hindu Law is not merely voidable but is void--Vide AIR 1930 284 (Oudh) Gaya Ram Sahu v. Bishnath 1935 C. W. N. 777, Bijleshari Bakhsh Singh v. Gajadhar 1940 C. W. N. 982 : A. I. R. 1941 Oudh 123 Gajadhar Bakhsh v. Gauri Shankar 8 O. L. J. 81 : A. I. R. 1921 Oudh 47 and Udairaj Singh v. Ram Udit Tewari 10 A. L. J. 376 : A. I. R. 1924 Oudh 147.

47. In all the cases mentioned, reliance was placed upon the decision of their Lordships of Judicial Committee in Lachhman Prasad v. Sarnam Singh 44 I. A. 163 : A. I. R. 1917 P. C. 41 in which case, according to the note of the arguments as given in respect of the case in Lachman Prasad v. Sarnam Singh 40 I. C. 284 : A. I. R. 1947 P. C. 41 the question as to whether such a transaction was void or only voidable was also raised.

48. In Gajadhar Bakhsh v. Gauri Shankar 8 A. L. J. 81 : A. I. R. 1921 Oudh 47 reliance was also placed upon the decision in Sahu Ram Chandra v. Bhup Singh 44 I. C. 126 : A. I. R. 1917 P. C. 61 in which their Lordships consider the matter at considerable length though they do not use the expressions "void" and "voidable."

49. Sahu Ram Chandra v. Bhup Singh 44 I. C. 126 : A. I. R. 1917 P. C. 61), their Lordships quoted with approval certain remarks about the power of a karta made in the judgment of Stanley, C. J., with whom two other learned Judges concurred, in Chandradeo Singh v. Mata Prasad 81 ALL. 176 : 1 I. C. 479).

50. Again in Manna Lal v. Karu Singh A. I. R. 1919 P. C. 108 : 56 I. C. 766), their Lordships relied upon Lachhman Prasad's case 44 I. A. 163 : A. I. R. 1917 P. C. 41 and they used the expression "void" in respect of an alienation of the joint property of a Mitakshara family by its karta without legal necessity.

51. On the other hand, the contention of the appellant is supported by numerous decisions of the erstwhile Allahabad High Court in Sheo Ghulam v. Badri Narayan Lal 19 I. C. 560 :

11 A. L. J. 798), Bakshi Ram v. Liladhar 35 ALL. 353 : 21 I. C. 619 Tota Ram v. Hargovind 36 ALL. 141 : A. I. R. 1914 ALL. 366), Bharat Indu v. Hamid Ali Khan 42 ALL. 487 : A. I. R. 1921 P. C. 93 Jagesar Pande and Another Vs. Deo Dat Pande and Another, , Sarju Prasad Rout Vs. Mangal Singh, and Madan Lal and Others Vs. Gajendrapal Singh .

52. In all these cases it was held that it is only the co-parceners of the transferor or the transferee of the entire interest of the family in the property transferred that can challenge the transfer. In the present case, if the auction purchase is upheld, the respondents are transferees of the entire interest of the family and

may challenge the gift on the ground but there would be no necessity for them to do so since the gift could not stand against their purchase. It is only if the auction sale is not valid that any question as to the plaintiff's title arises. In that event the respondents would not be the purchasers of any interest but would merely be trespassers. The Allahabad decision would therefore, preclude their right to challenge the validity of the gift.

53. All the Allahabad cases mentioned above were considered by another Bench of the same Court in *Madan Lal Vs. Chiddu and Others*. In that decision, while it was stated, on the basis of the earlier decisions of the Court that an alienation by a member of a joint family is voidable, it was pointed out that those decisions had ignored an earlier Full Bench case of the same Court and had made no reference to the Privy Council cases of *Lachman Prasad v. Sarnam Singh* 44 I. C. 163 : A. I. R. 1917 P. C. 41 and *Manna Lal v. Karu Singh* A. I. R. 1919 P. C. 108. 56 I. C. 766 and it was there remarked:

"In this state of the authorities we do not feel disposed to pronounce a definite opinion on the question."

Thus the matter was left open.

54. Mr. Dhaon also referred to two Patna cases, *Shyam Behari v. Rameshwar Prasad* A. I. R. 1942 Pat. 213 : 20 Pat. 904 and *Rai Bahadur Kharag Narain and Another Vs. Janki Rai and Others and Gobardhan Lal and Others*, , which accept the Allahabad view. He also relied upon some cases of the Madras High Court, but as was pointed out by that Court itself, as well as in all the text-books, the law as to the right of a coparcener to alienate is different in Madras and Bombay to the law prevailing in the north of India, though all are founded upon the Mitakshara. The Madras view is thus of no assistance. Nor can any analogy be drawn from the law as to alienation, by a widow since a widow is, for her lifetime.

the owner of the property and fully represents it, so that an alienation of it by her is valid at least during her lifetime and is not void ab initio.

55. In the case of a karta, he is only the manager and is, according to the view prevalent in the north of India, not entitled to alienate even his own interest, since, so long as no partition takes place, the ownership vests not in the individual members of the joint family but in the whole family as such.

56. Mr. Dhaon also referred to *Mt. Ram Dei Vs. Mt. Gyorsi and Others*, , in support of this view. In that case the Bench, of which I was a member, simply accepted the Allahabad decisions and the contrary view was not placed before it. Further a decision of the point was not essential for a decision of the case.

57. The text-books also contain conflicting statements as to the law based upon the conflicting views of the Courts and there is nothing in them which can throw any additional light on the subject.

58. Thus the preponderance of authority seems to favour the view that an

alienation by the karta, even if he is the father, which is not for legal necessity or the payment of antecedent debt is void. It is, however, not necessary to examine this matter further or arrive at any definite conclusion on this point in view of the fact that a decision of it is not necessary for a decision of the appeal.

59. The next point that was argued was the question of *lis pendens*. A decision of the question depends upon the construction of Section 52, T. P. Act which reads as follows :

"During the pendency in any Court having authority in the provinces, or established beyond the limits of the Provinces by the Central Government, of any suit or proceedings which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, under the authority of the Court and on such terms as it may impose."

60. Then follows an explanation which explains what the phrase "pendency of a suit or proceeding" means. In the present case, it cannot be disputed that the gift was executed *pendente lite* but the question is whether the house in suit was property any right to which was directly and specifically in question in the suit or proceedings as a result of which it was sold.

61. The property involved in the mortgage suit was a two annas share in village Bargawan. If that share included the house in suit, there is no doubt--and it is not disputed that the plaintiff could not set up her gift in opposition to the title acquired by the auction-purchaser. If, however, the house is not deemed to be covered by the mortgage deed, then any sale of it was beyond the jurisdiction of the Court executing the decree and no orders passed in the execution proceedings could affect the rights of the transferee. In that event no right to the house would, in the eyes of the law, be directly and specifically in question in the executions proceedings, although the house was in fact entered in the sale proclamation, and consequently Section 52, T. P. Act, would not apply. Thus the question whether Section 52, T. P. Act, applies or not depends upon whether the house was included in the mortgaged share and that is a matter which I will now proceed to consider.

62. According to the view which had prevailed in Avadh, a transfer of a share in zamindari property carries with it all rights in that share and this includes the residential house of the transferor also--see Ex. A-11 and AIR 1927 240 (Oudh) . The view taken by a Full Bench of the erstwhile Allahabad High Court in *Umrao Singh Vs. Kacheru Singh and Others*, is, however, different and there it has been laid down that, if a share of zamindari property is mortgaged and then sold in execution of a decree for sale passed on the foot of the mortgage, the residential house of the mortgagors does not pass to the auction-purchaser. Sir Iqbal Ahmad pointed out some points of distinction but they do not affect the principle

involved and the above decisions cannot have effect given to them in the face of the Full Bench decision.

63. In the present case the question is not material, because I have already held that the deed of gift was a fictitious document and did not confer title. It is, therefore, not necessary for me to pursue the matter further, though the question might arise directly and require consideration hereafter.

64. The next question--whether any title passed to the auction purchaser by the sale in execution of the mortgage decree--is dependent for its answer upon the answer to the question with which I have just dealt, i. e. whether the house was included in the mortgage. If it was included in the property mortgaged, it was rightly sold in execution of the mortgaged decree and the auction-purchaser acquired title. If it was not included in the mortgaged property, it was not covered by the mortgage decree and consequently the execution Court had no jurisdiction to sell it and no title would pass to the purchaser. I do not propose to go any further into this question which is one of law and is of considerable importance but does not call for decision in this case.

65. The next question is one of estoppel. The evidence on this point is not at all satisfactory. The whole case turns upon Drigpal's evidence and that is not of such a character as to be believed. In this connection it is worthy of notice that the case originally set up by Rajendra Singh was that Raj Kuar asked him to purchase the house but Drigpal Singh states that he asked Raj Kuar to purchase the house and she refused to do so on the ground that she had no money. All this talk is said to have taken place not with Raj Kuar herself, but with her agent. Thus it cannot be said that it has been satisfactorily established that Raj Kuar made any representation to Rajendra Singh or his father and she is not estopped from bringing this suit.

66. There remains only the question of improvements. The finding of fact that Rajendra Bahadur did make improvement is not challenged. It is, however, challenged that he did so in the bona fide belief of his own title. There is no evidence on the record to show that Rajendra Bahadur made any enquiries before he took the sale. He himself came into the witness-box but he did not say anything on this matter. Further, in any case, it is not proved what sums of money were spent on the so-called improvements. The trial Court has awarded the entire value of the house but there is no justification for this since the value of the old house had at least to be deducted. Further it cannot be presumed that the price of material and the charges for labour were the same at the date of the Commissioner's report as at the time when the constructions were made. Thus in no case should anything have been allowed to Rajendra Bahadur as expenses of improvements made by him.

67. In the result I would dismiss this appeal with costs.

Chandiramani, J.

68. I agree.

69. By the Court. -- This appeal fails and is dismissed with costs.