

**(1892) 08 CAL CK 0022**  
**In the Calcutta High Court**

Saheb Lal and Another

APPELLANT

Vs

Sheo Pershad Singh and Another and Rajkumar Lal and Others

RESPONDENT

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**Date of Decision :** 20-08-1892

**Acts Referred:**

**Citation :** (1893) ILR (Cal) 453

**Hon'ble Judges :** Rampini, J; Pigot, J

**Bench :** Division Bench

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### Judgement

Pigot and Rampini, JJ.—In the two suits out of which the present appeals arise the plaintiffs, who are members of a Hindu family governed by the Mitakshara law, seek to recover a share in two properties named Adai and Udaibigha, on the allegations that these properties were joint family properties, that they were wrongfully sold in execution of a decree obtained against certain members of the family on the basis of a bond executed by those members for a personal debt for which those members only were liable, and that they were accordingly dispossessed from those properties, on the 4th August 1877, and on the 18th July and the 25th September 1878, by the principal defendants, who are the purchasers of the properties at the Court sales. The genealogy of the family, which is admitted, is given in the judgment of the Subordinate Judge. The plaintiffs, Saheb Lal and Gharib Chand, are the grandsons of one Meher Chand Sahu, who died in March 1872. The plaintiff's own father, Raghu Nath Lal, died in 1862. When Meher Chand died he had three sons then living, viz., Gajadhar, Lalji, and Sitaram. Gajadhar died in 1880, leaving a widow, Ganga Koer, who died in October 1888. Lalji and Sitaram are now both alive, and they and their respective sons, Mangal Pershad and Ram Pershad, have been made parties defendants to the suits. The family was a joint family. According to the plaintiffs a separation took place in 1879, but this is denied by the defendants. The properties which form the subject of dispute were purchased, the first in 1869 in the name of Bishen Sahu, the gomastha of the family, and the second in the name of the plaintiffs' uncle Sitaram. It (i.e., the second property) was first held

under a mokarari lease dated 12th December 1865, and was subsequently acquired outright by a kobala dated 18th February 1872, The family was a trading family, and carried on several businesses, as detailed in the judgment of the Subordinate Judge. The only business with which we need concern ourselves in these cases is the money-lending business, which was carried on by Bishen Sahu under the supervision mostly of the plaintiffs' uncles, Lalji and Sitaram. Now, one Zaki Mistri had dealings with Lalji and Sitaram. In the course of these dealings he deposited with them a certain sum of money, for which a registered bond dated the 25th June 1872 was executed by Lalji, Sitaram, and Bishen Sahu. In this bond the properties acquired in 1869 and February 1872 were pledged as security. Subsequently, Zaki Mistri sued on this bond, obtained a decree, and put up the properties to sale. They were sold and purchased by the several defendants, who in due course took possession.

2. Now the plaintiffs sue the purchasers of the properties, alleging that the properties were joint family properties, that the debt for which the bond of the 25th June 1872 was given was a personal debt for which only the executants of the bond were liable. They are therefore entitled, they say, to the share of their father Raghu Nath Lal in these properties. The plaintiff No. 2 also claims the share of his uncle Gajadhar in the properties, on the ground that in 1879 before his death the family separated, that his share passed to his widow Ganga Koer, who bequeathed it to the plaintiff No. 2 by a will dated 14th Assin 1296 (4th October 1888).

3. The allegations of the defendants, on the other hand, are that the properties were the separate properties of Lalji and Sitaram and were rightly sold in execution of the decree obtained against them. They deny the alleged separation of the family, and they impugn both the genuineness and the validity of the will alleged to have been executed by Ganga Koer.

4. The Subordinate Judge has found that the family was joint in estate at the time of the acquisition of both Adai and Udaibigha; (2) that these properties were acquired for the benefit of the whole family; (3) that the money-lending business, carried on by Bishen Sahu and supervised by Lalji and Sitaram, was the business of the joint family; (4) that the debt for which the bond of the 25th June 1872, by which Adai and Udaibigha were mortgaged, was a personal debt of Lalji and Sitaram; (5) that consequently the decree obtained on that bond and the subsequent sales in execution of it did not affect the interests of the plaintiffs in these properties; (6) that no separation of the family in estate ever took place either before or after the death of Gajadhar; consequently that nothing passed to Ganga Koer on her husband's death, and that therefore she could make no valid will in favour of the plaintiff No. 2; and (7) that the plaintiffs are entitled to recover in these suits both their own share and such amount of Gajadhar's share as they are entitled to otherwise than under the alleged will of Ganga Koer.

5. The purchaser-defendants in the two suits now appeal and contend (1) that the Subordinate Judge is wrong in finding that the properties Adai and Udaibigha

are the joint properties of the whole family, and that the money-lending business managed by Bishen Sahu, Lalji and Sitaram was the business of the joint family; (2) that if the Subordinate Judge is right on this point and the properties are held to belong to the whole family, then the Subordinate Judge was wrong in holding that the debt for which the bond of the 25th June 1872 was given was a separate debt of Lalji and Sitaram, and that the sales held in execution of the decree obtained by Zaki Mistri did not affect the plaintiff's interests; and (3) that in any case the Subordinate Judge was wrong in giving the plaintiffs a decree for any portion of Gajadhar's share which one plaintiff did not claim at all and which the other claimed under a different title from, and one inconsistent to, that set up for him by the Subordinate Judge.

6. The plaintiffs, on the other hand, cross-appeal and urge that the Subordinate Judge was wrong in holding that no separation of the family ever took place, and that the will of Ganga Koer was consequently invalid.

7. As to the first of the appellants' contentions, we would say that we feel no doubt that the Subordinate Judge is quite right. The family was clearly a joint family. The property of Adai was undoubtedly acquired for the benefit of the whole family in the name of Bishen Sahu, the servant of the family, probably, as it is said in the evidence of Kamha Charan and Guru Sahai, because his name was considered an auspicious name to acquire the property in. Similarly, the property of Udaibigha purchased in the name of Sitaram, when Sitaram was a youth of 16 or 17 years of age, was no doubt acquired for the benefit of the whole family. As to the money-lending business, this was, like all the other businesses of the family, a family business, was carried on by the family servant, Bishen Sahu, in the family dwelling house, and supervised principally by Lalji and Sitaram,--their father, Meher Chand, being too old to take an active part in the management. So far we see no reason to disturb the findings of the Subordinate Judge.

8. We consider, however, that he has erred in thinking that the bond executed by Bishen Sahu, Lalji and Sitaram in favour of Zaki Mistri on the 25th June 1872 was executed on account of a personal debt of Lalji and Sitaram. The circumstances of the case all point to a different conclusion. This bond was executed to secure the payment of a sum of money which Zaki Mistri had previously deposited, we feel no doubt, with the money-lending business : as indeed the recital in the bond itself seems to indicate. For this, all the partners in the business, that is, all the members of the family, would be liable. The fact that Lalji and Sitaram only of the members of the family executed the bond does not show that they only were liable. They only executed the bond because they only managed this business, which was carried on in their names. The facts that the family servant Bishen Sahu, the benami holder of the family property Adai, joined in executing the bond, and that the family properties Adai and Udaibigha were pledged as collateral security for the debt, point to the same conclusion. All this we think would not have been done, if the debt had been only a personal

debt of Lalji and Sitaram. Finally, there is another circumstance which forcibly suggests the same inference viz., that the plaintiffs into whose possession the books of the money-lending business admittedly passed, do not produce them. They tell a story improbable in itself and which has been disbelieved by the Subordinate Judge, as to these books having been destroyed by white-ants, the children, and the females of the family. Now these books, if produced, would have shown whether the debt was a debt of the joint family or a personal debt of Lalji and Sitaram; their suppression, therefore, is very much against the plaintiffs.

9. The next question is as to how far the interests of the plaintiffs have been affected by the sales held in execution of the decree obtained by Zaki Mistri against Lalji, Sitaram, and the heirs of Bishen Sahu. We think their interests must be held to have been affected by these sales, which in our opinion conveyed to the purchasers the interests of the whole family in the property. It is true that Lalji and Sitaram were the only members of the family sued, that execution proceedings were taken out only against them, and that the sale certificates obtained by the defendant-purchasers only purport to convey to the latter the right, title and interest of Lalji and Sitaram in the properties. But, on the other hand, the debt for which they were sued, was, as we have found, a joint debt of the family. Lalji and Sitaram were sued because they only managed the money-trading business and had as agents of the family contracted the debt. The heirs of Bishen Sahu were also sued because Bishen Sahu had been the ostensible owner of the family property Adai. In the execution proceedings execution was asked for against the whole share which as a matter of fact the united family possessed in the two properties in dispute, and the sale certificates purport to convey this share in them, though they describe it as the interest of Lalji and Sitaram only, whereas, as a matter of fact, Lalji's and Sitaram's several shares in the properties were much less. In these circumstances we think the sales did convey the interest of the family in the property, and the plaintiffs (who have taken no steps to assert their right in the properties for upwards of eleven years) are not now entitled to the decree which the Subordinate Judge has given them. Mr. Mayne in paragraph 308 of his "Hindu Law and Usage" has said, on the authority of Manu and Raghu-nandan: "All the members of the family, and therefore all their property, divided and undivided, will be liable for debts contracted on behalf of the family by one who was authorized to contract them. The most common case is that of debts contracted by the common manager of the family. He is ex-officio the accredited agent of the family and authorized to bind them for all proper and necessary purposes within the scope of his agency." This seems exactly applicable to this case, for Lalji and Sitaram, though not the managers of the family, were yet its accredited agents in the management of the money-lending business, and as such had the authority of the other members to pledge the family property for a joint debt contracted apparently in the ordinary course of that business. *Pontifex, I., in Johurra Bibee v. Sreegopal Misser* ILR 1 Cal. 470 has pointed out that "all persons carrying on a family business, in the profits of which all the members of the family would participate, must have

authority to pledge the joint family property and credit for the ordinary purposes of the business, and therefore debts honestly incurred in carrying on such business must override the right of all members of the joint family in property acquired with funds derived from the joint business."

10. Again, in *Pursid Narain Singh v. Honooman Sahai* ILR 5 Cal. 845 the same learned Judge has said: "It has been decided that if the managing member of a family, the other members of which are at the time minors (the plaintiffs in these two cases were both minors at the time of the contracting of the debt, and one of them at least was also a minor at the time of the institution of the suit against Lalji and Sitaram), having authority (the touchstone of which is necessity), mortgages the whole 16 annas of the property, then in a suit by the mortgagee the sale under the decree would pass the whole 16 annas of the mortgaged property, although the mortgagor alone was made defendant, and the reason for such decision probably is that the 16 annas having been validly mortgaged to the mortgagee, and his remedy being foreclosure or sale, the decree of the Court would affect what was in the parties before it, viz., the mortgagee's right, validly acquired, to have the whole 16 annas sold."

11. In the case of *Bissessur Lall Sahoo v. Luchmessur Singh* ILR 6 I. A. 233 : 5 C.L.R. 477 it was held that two decrees passed against one of two heirs affected a third heir, "being substantially decrees in respect of a joint debt of the family," and "could be properly executed against the joint family property;" while the case of *Nanomi Babuasin v. Modhun Mohun* ILR 13 IndAp 1 may also be cited as an authority for holding that the interest of a joint family may pass at a sale in execution of a decree obtained on account of a joint family debt, though all the members of the family are not made parties to the suit which resulted in the sale. The present cases are in fact very similar to the case of *Daulut Ram v. Mehr Chand* ILR 15 Cal. 70 : ILR 14 IndAp 187, which was a suit on a mortgage debt in which the mortgagee brought his action, not against the whole joint family, but against the two members of the family who were managers of it and who had executed the mortgage. In this case their Lordships say: "It appears from the cases that have been cited that notwithstanding the defendants were not made parties to the suit, still as the suit was brought upon the mortgage to recover the mortgaged property, and the plaintiff in the suit obtained a decree and executed that decree by seizing the mortgaged property, the question would be whether the mortgage included the interest of all the parties or only the right, title and interest of the two parties who were made defendants." Their Lordships answered this question by holding that the interest of the whole family passed, and reversed the decision of the lower Courts, who held that only the right, title and interest of the two mortgagors had been sold. We may also cite on this subject the cases of *Gaya Din v. Raj Bansi Kuar* ILR 3 All. 191, *Ram Narain Lal v. Bhawani Prasad* ILR 3 All. 443, *Phul Chand v. Lachmi Chand* ILR 4 All. 486, *Bemola Dossee v. Mohun Dossee* ILR 5 Cal. 792, *Baso Kooer v. Hurry Dass* ILR 9 Cal. 495, *Samalbhai Nathu-hhai v. Someshvar* ILR 5 Bom. 38, and *Hari Vithal v. Jairam Vithal* ILR 14 Bom. 597.

12. On the strength of these authorities we think we must hold that the whole interest of the family in the properties in dispute passed at the sale, although Lalji and Sitaram only out of the members of the family were sued, and seeing that the share of the properties advertised for sale certified in the sale certificates granted to the defendants to have passed to them is the share of the whole family in the properties, we do not think that the description of that share as the right, title, and interest of Lalji and Sitaram was material. As has been said by their Lordships of the Privy Council in *Bissesswur Lal Sahu v. Luchmessur Singh* I. L.R. 6 IndAp 233 : 5 C.L.R. 477, in execution proceedings the Courts will look at the substance of the transaction and will not be disposed to set aside an execution upon mere technical grounds, when they find it is substantially right.

13. In this view of the case we need not consider the cross-objection of the respondents, or the third contention of the appellants, the decision of which would depend upon the view we might take of the Subordinate Judge's finding as to the alleged separation of Gajadhar in 1879 and as to the genuineness and validity of the will of Ganga Koer. As we hold that the sales held at the instance of the heirs of Zaki Mistri affected the whole properties, the share which Gajadhar may have had in them must have passed away from him before the time when he is said to have separated himself from the rest of the family. We therefore need not enter into the other questions raised before us.

14. We accordingly decree these appeals with costs and dismiss the cross-appeals.