

(1922) 12 AHC CK 0030
In the Allahabad High Court

Shambhu Dyal Singh and Others

APPELLANT

Vs

Iswar Saran and Others

RESPONDENT

Date of Decision : 11-12-1922

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 63

Citation : AIR 1923 All 306 : 75 Ind. Cas. 597

Hon'ble Judges : Stuart, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Stuart, J.—The facts of the litigation out of which this appeal arises afford some indication of the hardness of the way of the decree-holder in India. Ram Richpal Singh is the father of two sons, Shambhu Dayal Singh and Girja Dayal Singh. They were members of a joint Hindu family governed by the Mirakshara Law. Shambhu Dayal Singh was born about 1908, Girja Dayal Singh was born about 1910. Before they were born, the father, Ramrichpal Singh, commenced borrowing money from the Kayasth Trading Company, Gorakhpur. He continued borrowing money and in 1913, when Shambhu Dayal Singh was five and Girja Dayal Singh was three, he executed a promissory-note for Rs. 2,028, and in 1914 executed a second promissory-note for Rs. 350 in favour of the same Company. In 1916 the Company obtained a decree on the first promissory-note and sold the decreeholder's rights under that decree together with this second promissory note to Munshi Chhotu Lal. Munshi Chhotu Lal subsequently obtained a decree on the second promissory-note later. Both decrees were against Ramrichpal Singh alone, he being the executant of the promissory notes in question. In execution of the first decree Munshi Chhotu Lal attached certain property in 1918. Shambu Dayal Singh, aged ten, and Girja Dayal Singh, aged eight, objected in execution proceedings that two-thirds of the property so attached was not liable to attachment under the decree for the following reason:

2. Their allegation was that they and their father were members of a joint Hindu

family, and that in the year 1916 after both the decrees had been passed against their father they, the elder: then being eight, and the younger, then being aged six, had separated from their father by means of a partition decree which had been obtained not in the Gorakhpur District where they resided and where the property under attachment is situated, but in the Fyzabad District under the jurisdiction of the Judicial Commissioner of Oudh. Their plea was accepted in 1918 by the Court executing the first decree an a two-thirds share of the property in question was exempted from attachment accordingly. Within a year of the success of the plea of Shambhu Dayal Singh, an Girja Dayal Singh, Munshi Chhotu Lal instituted a suit in the Court of the Subordinate Judge of Gorakhpur for a relief which must be examined rather closely. The relief which he sought was for a declaration that the decree of the 20th December 1916 passed by the Fyzabad Court was invalid; secondly, for a reversal of the order passed in execution on the 27th July 1918 declaraing two-thirds of the property not liable to attachment, and, thirdly, for a declaration that the whole of certain family property was liable to attachment and sale in execution rot only of the first decree but of the second decree, and, as far as I can gather, he also desired that the two-thirds share of the property already exempted should be liable for the satisfaction of both decrees. Upon the facts before me it does not appear that he has as yet put the second decree into execution. In the meanwhile, the situation has become further complicated by the fact that Ramrichpal Singh has become an insolvent. The Receiver was added as a party to the suit.

3. The learned Counsel who represents the plaintiff in this appeal has said that all that the plaintiff wishes is for a declaration that both these decrees bind as much joint family property as is at present in the hands of Shambhu Dayal Singh and Girja Dayal Singh and that he wants nothing more. The plaint might have been drafted more artistically. It, however, in my opinion, suggests that that is the actual relief which the plaintiff desired from the beginning. In respect of the father's property, such as it is, he can of course only obtain such satisfaction as the Receiver can give him and what he clearly now desires is that he shall be at liberty to execute both his decrees against the joint family property which has come to the sons, and which is not in the lands of the Receiver. The Trial Court decided that the promissory-note of 1913 was executed in satisfaction of antecedent debts and that the whole of the joint family property was thus liable under the decree passed upon it. It held that the second promissory-note had not been executed in lieu of antecedent debts or for legal necessity and that, therefore, the joint family property was not liable under the decree passed upon it. It gave relief accordingly. The learned Second Additional District Judge in a careful and reasoned judgment on an appeal by the defendants and a cross-objection by the plaintiff decreed the whole relief for which the plaintiff had prayed. The present appeal is preferred by the two minor children, Shambhu Dayal Singh and Girja Dayal Singh. Before I discuss the grounds taken in the Memorandum of Appeal it is necessary to go back to the original pleadings, and it is to be noted, that not only are the reliefs sought completely separate but that

in two instances they (sic)open upon separate causes of action. The first relief is for a declaration that the decree partitioning the property between the father and the two sons which was passed by the Court of Fyzabad is invalid as against the plaintiff. The second relief, for a reversal of the order in execution exempting the sons' property, is clearly based on Order XXI, Rule 63 and the cause of action there arose upon the order exempting that property which was passed on the 27th July 1918. The third relief, however, for a declaration that other property held by the present appellants is liable in execution of the first decree and that that other property and the property already exempted are liable in execution of the second decree, is based not upon the order of the 27th July 1918 but upon the denial of the plaintiff's rights to execute against such property which was implied in the objection filed in 1918, upon which the order of the 27th July 1918 was passed. There were, thus, three declarations sought and a Court-fee of Rs. 30 should have been paid and only Rs. 20 were paid but that error can be corrected now.

4. I shall now tak the grounds of appeal in order:

5. The first ground is, that the suit tarred by limitation. The suit is certainly not barred by limitation in respect to any of the three reliefs. It was instituted in March 1919. The partition decree of the Fyzabad Court was passed on the 23rd October 1916. The plea that Shambu Dayal Singh and Girja Dayal Singh were in no way liable was not put forward till 1918 and the order in the Execution Department was not passed till the 27th July 1918. The period of limitation in respect of the third cause of action was one year, and the period of limitation in respect of the other two causes of action was not less than three years.

6. The next point taken is, that the suit is barred by the provisions of Section 16(2) of Act III of 1907. It certainly is not so barre for two reasons. In the first place, the relier sought, as I (sic)rea it, in respect to property was against Shambhu Dayal Singh an Girja Dayal Singh only. Their father was (sic)ioine as a necessary Party, but no relief was actually soug(sic)t against him, except in respect of the declaration that the decree of 1916 was not binding upon the plaintiff. The plaintiff did not seek relief against any of the property which had come into the hands of the Receiver under the insolvency proceedings, Further, the joining of the Receiver as a party would have been sufficient to cure any irregularity.

7. I now come to the next point. It is, that the two-thirds share of the sons in the family property is not liable to attachment and sale in execution of simple money-decrees obtained against the father. We here have to differentiate the two promissory-notes. The promissory-note for the large amount, Rs. 2,028, has been found by both the Courts to have been executed by Ramrichpal Singh to discharge antecedent debts incurred by him. The finding of the lower Appellate Court on this point is as follows:--"There is abundant evidence to show that the promissory-note dated the 22nd January 1913 was executed in consideration of several promissory-notes. Besides the oral evidence on the point, there is the

certified copy of the ledger of the Kayasth Trading and Banking Corporation, Limited, Gorakhpur, the original creditors, from whom Munshi Chhotu Lal purchased the decree. I find the issue in favour of the respondents." The issue (which he elsewhere calls the point) was whether the lower Court was right in holding that the promissory-note dated the 22nd January 1913 on which the earlier decree was passed was supported by antecedent debts. This finding is a conclusive finding which cannot be contested in second appeal. The first promissory-note was executed in lieu of antecedent de(sic)ts due from the manager of a joint Hindu family. So the appeal must fail upon that point.

8. But in the case of the second promissory-note which was executed only for Rs. 350, on the facts, there were no antecedent debts and no legal necessity is established. The lower Appellate Court has here found that the decree was passed upon the basis of that note before any partition had taken place in the family. I agree with the learned Additional District Judge that, as both decrees were passed against the father at the time that the family was Joint, no subsequent partition could affect the creditor's rights whatever they might be against the joint family property. His rights would be against the joint family property, as it was on the dates on which the decrees were passed in his favour and could not be effected by subsequent actions of the members of the family. But we have it that here there was no legal necessity and no antecedent debt. Nevertheless, the property in the hands of the sons is liable in execution of the decree upon the second promissory-note. This is clear from the decision of their Lordships of the Privy Council in *Sripat Singh Dugar v. Prodyot Kumar Tagore* 39 Ind. Cas. 252 : 44 I.A. 1 : 32 M.L.J. 133 : 15 A.L.J. 147 : (1917) M.W.N. 193 : 21 C.W.N. 442 : 25 C.L.J. 220 : 21 M.L.T. 222 : 19 Bom. L.R. 290 : 44 C. 524 (P.C.). The words used by their Lordships which govern this particular matter are these:

9. "The property in question was joint property governed by the Mitakshara Law. By that law a judgment against the father of the family cannot be executed against the whole of the Mitakshara property, if the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes. In every other event it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone." These words could not be clearer and they are absolutely comprehensive. There are no limitations, qualifications or reservations to the effect that the debt must be incurred by the father as representing the estate of purporting to be for the benefit of the estate or in some capacity other than his personal capacity. The words are: "In every other event it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone"--and there is nothing to qualify the words "the father alone". It has been argued by the learned Counsel for the appellants that, in view of a subsequent judgment of their Lordships of the Privy Council, it must be taken that the share of the sons in such circumstances can only be attached and brought to sale, if at that time their father is dead and they are made liable under the doctrine of

pious duty. On the facts, here, the debts were not incurred for illegal or immoral purposes, and the qualification which the learned Counsel would apply cannot, as I read the decision which I have quoted, be attached. It is true that in *Sahu Ram Chandra v. Bhup Singh* 39 Ind. Cas. 280 : 39 A. 437 : 44 I.A. 126 : 21 C.W.N. 698 : 1 P.L.W. 557 : 19 Bom. L.R. 498 : 26 C.L.J. 1 : 33 M.L.J. 14 : (1917) M.W.N. 439 : 22 M.L.T. 22 : 6 L.W. 213 : 15 A.L.J. 437 (P.C.) their Lordships of the Privy Council, less than three months after they had pronounced judgment in *Sripat Singh Dugar v. Parody at Kumar Tagore* 39 Ind. Cas. 252 : 44 I.A. 1 : 32 M.L.J. 133 : 15 A.L.J. 147 : (1917) M.W.N. 193 : 21 C.W.N. 442 : 25 C.L.J. 220 : 21 M.L.T. 222 : 19 Bom. L.R. 290 : 44 C. 524 (P.C.), laid down that, under the Mitakshara Law joint family property could not be the subject of gift, sale or mortgage by one co-parcener except with the consent, express or implied, of all the other co-parceners, and that the father in his capacity of manager and head had no power of sale or mortgage in absence of such consent or of family necessity or in payment of antecedent debts, and that the obligation of religion and piety which is placed upon sons and grandsons under the Mitakshara Law to discharge their progenitor's debts does not attach while the said progenitor is alive. It would have been most surprising if their Lordships of the Privy Council had in less than three months after they had passed the first decision arrived at a second decision which in effect overruled their former views. This is what the learned Counsel for the appellants is arguing for. Unless the second decision overruled the first decision, the words of the first decision which I have read, hold good. But as I read them, the second decision not only does not overrule the first decision but in no way covers the same ground. The first decision is to the effect that, once a simple money-decree is passed against the father and manager of a joint Hindu family, that simple money-decree can be executed by the execution creditor against the whole of the estate, and will operate against the interests of the sons, unless the debt has been incurred for illegal or immoral purposes. The second decision lays down an absolutely different proposition that joint family property cannot be transferred by an act of volition on the part of the manager, except with the consent of other co-parceners or order legal necessity or in payment of antecedent debts, and that the doctrine of the pious duty of a Hindu son to satisfy his father's debts can have no operation to validate such a transfer, so long at any rate as the father is alive. But in order to apply the principle of the second decision there must be (sic) transfer by the volition of the manager. In the previous case an (sic) in the case before me there was no transfer at all. There was a decree for debt against the manager. He had transferred nothing. I am concerned with the execution of a decree and not with a transfer of joint family property. I am unable to see that any difficulty arises. The two matters are complete and separate, one is in no way included in the other. There is no advantage, in view of the fact that the law is laid down plainly by their Lordships of the Privy Council, in proceeding to discuss decisions of Benches of High Courts upon the point. The Privy Council decision states the law. Therefore, I agree with the learned Additional District Judge that the property in the hands of the sons is liable to execution of the decree upon the second

promissory-note.

10. The fourth point taken was that some of the property against which it is sought to execute the decrees are buil(sic)ings belonging to agriculturists and occupied by them. The Court below has found that the buildings in qust on are not buildings belonging to agriculturists an occupied by them. This point has not been pressed in appeal.

11. The fifth point was also not pressed in appeal.

12. The sixth point argued, which is not in the grounds of appeal, was that the two reliefs for setting aside the order of the Execution Court and for a declaration that property could be attached in execution of the second decree could not be joine in the same suit. I was inclined to think t(sic) there might be some fo(Sickce in this object on, but in any ci(sic)stonces as it is not in the groans of appeal it could not prevail. However, I o not think that at the appellant has in any way been prejudiced by omitting to place it in the grounds of appeal for, on consideration I am satisfied that the parties being the same, it was open to the plaintiff to join ail three reliefs together.

13. It now remains to consider the question of Court-fees. There has been some slight mistake here. The suit should have been instituted on a Court-fee of Rs. 30. As the lower Court granted only two reliefs out of three, the fee in appeal should have been Rs. 20 and the cross-objections should have been on a stamp of Rs. 42-12-0. Only Rs. 10 were paid in respect of the cross-objections. The Court-fee in this Court on the appeal should have been Rs. 30. Now, there has been a deficiency in the First Court of Rs. 10 by the plaintiff; there has been a deficiency of Rs. 32-12-0 in the second Court by the plaintiff; and there has been a deficiency of Rs. 20 in this Court by the appellants. I dismiss this appeal with costs. The result is that the plaintiff can put his decree into execution, but before he can put his decree into execution he mast make up a deficiency of Rs. 52-12-0. The decree will not issue front his office until he has made up this deficiency.