

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal (ex parte) of Rai Babu Mahabir Pershad v. Rai Moheshwar Nath Sahai and another, from the High Court of Judicature at Fort William in Bengal; delivered 20th November, 1889.*

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Present:

LORD HOBHOUSE.

SIR BARNES PEACOCK.

SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

THE sole question in this Appeal is whether the purchaser, whom the Defendant represents, acquired the entirety of the 5a. 4p. which were put up to sale in execution, or only such share as the judgment debtor, Moheswar Nath, would take on a partition. Other questions have been raised in the Courts below, which are not relevant to this Appeal. It has been considered whether the sale was necessary for the benefit of the family estate; but the question is whether the Plaintiff, who is the son of the judgment debtor, can set up his right as a co-sharer to impeach a sale decreed against his father for the purpose of defraying the debts of his father and grandfather. He can only do so on condition that he shows the debts to have been contracted for immoral purposes, and that issue has been found against him in this suit. Again the First Court then examined the circumstances at considerable length to show that the purchaser bought the property subject to encumbrances, and that his purchase money ought not to have been applied, as the Court in fact applied it, to the payment of those encumbrances. But if

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the Plaintiff could have raised any such case as that, he must have done so in a suit differently framed in point of parties, of allegations, of prayer, of issues, and of proofs. Except for the issue raised as to immorality, this suit is solely for the purpose of treating the Defendant as nothing more than a co-sharer in the estate, and the decree which the Plaintiff has obtained does so treat him.

There have been of late years a great number of suits of this kind, and some difficulties have been felt as to the proper mode of treating them. It is to be hoped that recent decisions by this Committee have lessened these difficulties. At all events, their Lordships feel none in this case, treating it on the principles laid down in the cases reported in 13 Ind. App., p. 1 (*Nanomi Babuasin and others v. Modun Mohun and others*) and 15 Ind. App., p. 99 (*Bhagbut Pershad and others v. Girja Koer and others*), and addressing themselves to the question of fact, whether the thing meant to be sold and bought was the entirety of the estate, or only a share in it.

It would be more convenient if the record contained the whole of the proceedings in the execution and sale, because they must always be important evidence, often the best, as to the nature of the thing sold. In this case, the application for attachment and sale, and the orders made thereon, and the notification of sale, are not to be found, and their Lordships are left to infer their tenor from an adverse petition presented on behalf of the Plaintiff, and from the sale certificate. The difficulty is increased by the circumstance that there were three, or probably four, decrees then standing against Moheswar; whereas the sale proceeded on one of them founded on a mortgage to one Chowaram of only a fraction of the estate. From the plead-

ings and judgments, their Lordships conclude that in some way not explained, the various creditors combined to have the estate sold for the common benefit. At all events, no difficulty on this score has been felt in the courts below.

Chowaram's decree, dated 7th March 1874, is for the realisation of a sum of money out of the property mortgaged to him by Moheswar, viz., "my rights and interest in 6 pie out of 5a. 4p. of the entire 16 annas" of the estate in question.

The day fixed for the sale was January 5, 1875. On the 4th January 1875, the Plaintiff filed a plaint against Chowaram and Moheswar, in which, after alleging fraud and immorality, he claimed that "the ancestral property of the Plaintiff which he has inherited from his grandfather, ought not to be sold in satisfaction of such illegal and personal debts"; and he prayed for a declaration protecting his estate.

On the next day the Plaintiff's pleader presented a petition in the execution proceeding, stating that the 5a. 4p. share of Mouzah Udoypore, &c. "which is the ancestral property of my client, is to be sold to-day in this Court." The petition then states the suit commenced the day before, and prays postponement of the sale till the suit should be disposed of.

That petition was rejected, not on the ground that the thing to be sold was only the share of Moheswar, which could not prejudice the Plaintiff, but on this ground, that "the Plaintiff is at liberty, in case of the sale taking place, to make the purchaser a Defendant in his suit, so that he (the purchaser) may defend the right purchased by him."

It is hardly possible to make it clearer that all parties, judgment creditors, judgment debtor, the Plaintiff and his advisers, and the Court itself, considered that the thing put up to sale was the entirety of the estate.

The sale certificate was issued on the 6th February 1875 to the vakeel of Chowaram the decree holder. After stating that all the "right interest and connection which the judgment debtor had in the property" had been purchased "from the decree holder," and "that in future the certificate shall be considered as a good evidence of transfer of the right and interest of the judgment debtor"; it describes the property thus—

"Five annas, four pie of Mouzah Udoypore *alias* Maharajgunge, pergunnah Cherand, which belonged to the judgment debtor, Rai Moheshwar Nath, is sold (for) Rs. 10,000" Record p. 28.

The Procedure Code at that time required that property sold in execution should be described as the right title and interest of the judgment debtor, and it has been held in many cases that the presence of these words in the sale certificate is consistent with the sale of every interest which the judgment debtor might have sold, and does not necessarily impart that when the father of a joint family is the judgment debtor, nothing is sold but his interest as a co-sharer. It is a question of fact in each case, and in this case their Lordships think that the transactions of the 4th and 5th January 1875, and the description of the property in the sale certificate are conclusive to show that the entire corpus of the estate was sold.

They are of opinion that the High Court should have reversed the decree of the Subordinate Judge and have dismissed the suit, with costs, and that a decree to that effect should now be made in reversal of the decree of the High Court. The Appellant should have his costs in the High Court and also his costs of this Appeal. Their Lordships will humbly advise Her Majesty accordingly.