

*Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeal of Bodh Sing Doodhoria and another v. Guneschunder Sen, and others, from the High Court of Judicature at Calcutta: delivered 27th March, 1873.*

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Present :

SIR JAMES W. COLVILE.

SIR BARNES PEACOCK.

LORD JUSTICE MELLISH.

SIR ROBERT P. COLLIER.

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SIR LAWRENCE PEEL.

ON the 21st of November, 1864, the Appellants became the purchasers, at an execution sale, of the right, title, and interest of one Ramsoondur Sen in two distinct estates, viz., Shahjehanpore and Cossipore. Both had been attached by one Inderchunder Doogur in execution of a decree which he had obtained against the representatives of Ramsoondur in a suit commenced against that person in his lifetime for what is admitted to have been his separate debt. The price paid by the Appellants would have been adequate if the Judgment debtor had been the sole owner of the properties purchased. In August 1865, the Respondents, representing themselves to be the persons who jointly with the sons of Ramsoondur, his brother Ramchunder, and one Benoderam Sen constituted a joint and undivided Hindoo family; and alleging that the properties so purchased formed part of the joint estate of that family; brought the suits out of which this appeal has arisen, in order to recover both estates minus the assumed shares of Benoderam, Ramsoondur, and Ramchunder therein. And the first question for their Lordships determination, is whether there are sufficient grounds for disturbing

the conclusion to which both the Indian Courts have come, viz., that the properties in dispute were, in fact, part of the joint family estate.

It is not disputed that Ramsoondur was a member of this joint and undivided family. The status, however, of the family was peculiar. Mr. Justice Loch says (and neither party has disputed the accuracy of the description), "The evidence of the witnesses and of those members of the family who have been examined, clearly shows that though the family were joint in food, and at particular seasons of the year lived together in the family dwelling-house at Koredha, they also had separate dealings and funds of their own. The facts thus brought to our attention, render it impossible for us to look upon the family as a joint Hindoo family in the ordinary sense of the term, that is, as a family having all things in common; all acquisitions being made from the joint funds of the family, and all members being entitled to share in the benefits of any property held in the name of any member of the family. It is clear to us from the evidence that, while the family have some ancestral property in joint possession, some of the members of the family acquired separate property from their own funds and dealt with it as their own without reference to the other members of the family." Such a state of things may in their Lordships' judgment be fairly held to weaken, if not altogether to rebut, the ordinary presumption of Hindoo law as to property in the name of one member of a joint family; and to throw upon those who claim, as joint property, that of which they have allowed their coparcener, trading and incurring liabilities on his separate account, to appear to be the sole owner; the obligation of establishing their title by clear and cogent evidence. There can be no doubt that, if the evidence adduced by the Respondents, the Plaintiffs in the suit, be believed, there is enough to prove their case. And both of the Indian Courts have found in their favour. The two Courts have however, differed considerably in their appreciation of parts of the evidence; and the decision of the High Court is based upon narrower grounds than that of the Principal Sudder Ameen.

The following are undisputed facts concerning the two estates: Shahjihanpore, or at least that portion

of it which is in question in this suit, was the zemindary of one Rajah Soorjnarain Sing. At various dates before 1859 he had granted a putnee of part, and several ijarahs of other parts, of this estate in the name of Ramsoondur, and had assigned the rents reserved by these ijarahs, by way of security for certain advances ostensibly made to him by other members of Ramsoondur's family. On the 4th of July, 1859, the zemindary which has been attached at the suit of other creditors was put up for sale, and was knocked down to Ramsoondur as the highest bidder. He was afterwards put into possession of it, and from that time until the date of his death, his name stood in the Collector's register as that of the sole registered proprietor. It has been admitted at the bar that there is no question in this suit touching the putnee or other interests acquired in the name of Ramsoondur before this execution sale. The only question is, whether the zemindary interest which was then sold, became, by virtue of that sale, the separate property of Ramsoondur, or part of the joint property of the family.

Of Cossipore, a four-anna share belonged to one Kissoreemonee Dossee, the remaining 12 annas standing in the name of Shihbram Dey, who has been called as a witness in the cause. In 1855 the four-anna share was purchased in the sole name of Ramsoondur Sen, and on his petition his name was substituted for that of the vendor as the proprietor of this share in the Collector's book. In April, 1856, the interest of Shihbram Dey was, on the suggestion that it had been purchased by Ramsoondur, also transferred into his name, and he was thenceforward, until the time of his death, the sole registered proprietor of the whole property.

Ramsoondur died in December 1863, pending the suit in which the execution, which is the foundation of the Appellant's title, issued, but before judgment had been recovered therein. He left as his heirs two infant sons, and, on the 15th of January, 1863, his brother, Ramchunder, obtained a certificate of administration under Acts 40 of 1858 and 27 of 1860, empowering him to manage the estate of the deceased. In his application for this certificate, Ramchunder had stated that his brother's property in debts, zemindaree, trade, cash, and Company's paper, was worth about 50,000 rupees. On the same

15th of January, Benoderam Sen, the eldest member, and manager of the joint family, presented two petitions to the Collector of Zillah Moorshadabad, praying in the one that Shahjehanpore, in the other, that Cossipore, might be transferred into his name, on the allegation that each had been purchased by him in the name of Ramsoondur, and therefore that he was the true owner thereof. In February 1863, Ramchunder, as manager of Ramsoondur's estate, filed petitions admitting the title of Benoderam, and, on the 26th of May, 1863, orders were made that the name of Benoderam should be recorded instead of that of Ramsoondur as that of the proprietor of both estates.

In June 1863 judgment was recovered against the estate of Ramsoondur in the suit of Inderchunder Doogur, and both estates were afterwards attached as part of the property of the judgment debtor. It follows, from what has been just stated, that both when so attached stood in the name of Benoderam.

Thereupon Benoderam came in to set aside the attachments. His claims were dealt with separately according to the provisions of the 246th section of the Code of Civil Procedure. In each case he claimed to be the sole proprietor of the whole estate and, as such, entitled to have the attachment removed. Both claims were dismissed by separate orders, dated the 20th of September, 1864, which directed the property claimed to be sold. The usual proclamations of sale were made on the 23rd of September, and the execution sale took place on the 21st of November, 1864.

It may be well, before considering the grounds upon which the two Indian Courts have held the estates in question to be the property of the joint family, to dispose of a point taken by the Appellants which applies only to Shahjehanpore. The Appellants contend that, whatever be the weight of the evidence as to the real nature of the purchase, the title of Ramsoondur to this estate as his separate property must prevail, by reason of his having purchased it at an execution sale held after Act VIII of 1859 (the Code of Civil Procedure) had come into operation; and by force of the 260th section of that Statute, which provides that "any suit brought against the certified purchaser on the ground that the purchase was made on behalf of another

person, not the certified purchaser, though by agreement the name of the certified purchaser was used, shall be dismissed with costs." Their Lordships will not inquire whether there is sufficient proof that Ramsoondur, who purchased at an auction sale held a few days after the Act came into operation, did obtain a certificate under the Act, or of its terms, if he did obtain one; because, assuming him to have been the certified purchaser within the meaning of the Act, they are of opinion that the provisions of the section do not apply to such a case as the present. They were designed to check the practice of making what are known as benamee purchases at execution sales: *i.e.*, transactions in which A. secretly purchases on his own account in the name of B. Their Lordships think that they cannot be taken to affect the rights of members of a joint Hindoo family, who by the operation of law, and not by virtue of any private agreement or understanding, are entitled to treat as part of their common property an acquisition, howsoever made, by a member of the family in his sole name, if made by the use of the family funds.

It need hardly be observed that, on the trial of the issue now under consideration, the principal fact to be ascertained was the source from which the purchase money of the property in question was derived, *i.e.*, whether it came from the common family chest at Koredha in Beerbhoom; or from the separate funds of Ramsoondur employed by him in carrying on his business, admitted to be separate, at Khagra near Moorshedabad. The evidence adduced by the Respondents in support of their claim consisted mainly of a large body of oral testimony; of certain books and accounts kept at the family house at Koredha, being part of the joint family accounts; of the separate books and accounts of Ramsoondur kept at Khagra; and of letters purporting to be letters which had passed between him and Ramkristo the son of Benoderam being together at Khagra, on the one side, and Benoderam residing at Koredha, on the other. The Principal Sudder Ameen treating the whole of this evidence, whether oral or documentary, as trustworthy, came to the conclusion that the Plaintiffs had established their case. The Judges of the High Court appear to have considered that the letters on which the

Principal Sudder Ameen had relied were not admissible in evidence against the Defendants, the Appellants; to have found reasons for discrediting the accounts; but to have held that, nevertheless, the finding of the Lower Court was capable of being supported upon the oral testimony viewed by the light cast upon it by the conduct of the parties.

If it were clear that the Judges of the High Court were right in rejecting the letters, and in treating the accounts as untrustworthy, the correctness of their finding would no doubt have to be determined by the sufficiency of the grounds on which they have rested it. Even in that case their Lordships, though unable to adopt the inference which the learned Judges have drawn from the conduct of Ramchunder and Benoderam; or altogether to concur in other parts of their reasoning, would have felt great difficulty in disturbing their finding, inasmuch as both Courts are agreed as to the credibility of the Plaintiffs' witnesses. Their Lordships, however, are of opinion that the letters, if proved as the Principal Sudder Ameen has found them to have been, were clearly admissible in evidence against the Appellants who claim under Ramchunder.

It was said that the Judges of the High Court have treated these letters as not duly proven. But it appears to their Lordships that those learned Judges, thinking that the documents would not, if proved, be admissible against the Appellants, never addressed their minds to the sufficiency of the proof. The judgment on that point of the Principal Sudder Ameen, a native Judge, dealing with letters in the native character, and purporting to have passed between natives, is, in their Lordships' opinion, of very great weight. The letters, moreover, afford internal evidence that they have not been concocted for the purposes of this suit. And since those with which Ramchunder has been directly connected, by proof of handwriting or otherwise, clearly show that he and Ramkristo were acting jointly on behalf of the family in the purchase of Shahjehanpore, the letters of Ramkristo written in the course of the same transaction seem to be also admissible; and the whole correspondence affords the strongest confirmation of the statements made by the Plaintiffs' witnesses.

Again, their Lordships are not satisfied that the

objections taken by the Judges of the High Court to the accounts, are such as ought to deprive them of the credit which the Principal Sudder Ameen (possibly a more competent judge of native books of account than any European can be), gave to them. A distinction is no doubt to be taken between those accounts. The family accounts, taken by themselves, are admissible only as corroborative evidence. But the private accounts of Ramsoondur, produced by his brother from the Khagra Kotee may, if genuine, be direct evidence, in the nature of admissions on his part, against the Appellants. There are entries in the latter which strongly support the Plaintiffs' title. And these are not open to some of the objections taken by the High Court to the family accounts; particularly to one which their Lordships may observe they do not consider to be by any means conclusive, viz., one to the effect that the last mentioned accounts, or some of them, were produced by Benoderam in support of his claims to the sole ownership of the estates. Ramsoondur's grant to Surasuttee Dabee, at p. 698 of the record, also affords some corroboration of the Plaintiff's case as to Shahjehanporé.

Regarding Cossipore, it may be observed that although much of the Plaintiff's documentary evidence, and in particular the letters, have no bearing on the claim to this estate, the direct evidence of its having been acquired as part of the joint family property is stronger than that relating to Shahjehanpore. Shihbram Dey, who has been treated by both Courts as a witness deserving of credit, has distinctly sworn that the twelve-anna share in this estate which once stood in his name was purchased in his name with the family funds, and on account of the family; and that no consideration passed when it was transferred from his name into that of Ramsoondur. The High Court has found that before this benamee purchase, the family was interested as Putneedars in this estate; and every probability is, therefore, in favour of the conclusion that the direct evidence given to prove that the purchase of the other four-anna share in the estate was also a family transaction, is true.

Their Lordships are of opinion that the evidence so given on the part of the Plaintiffs, is too *strong* to be outweighed by the inferences to be drawn from

the conduct of Benoderam and Ramsoondur in the matter of the claims advanced by the former, or from the conduct of the family in allowing Ramsoondur, on the occasion of giving security to the Collector to state that these properties belonged to himself without co-sharers. Their Lordships will afterwards consider how far the representations involved in these last-mentioned transactions (if false) affect the right of the Plaintiffs to succeed in this suit. In determining whether, in point of fact, the property was joint or separate, they can only be treated as in the nature of admissions inconsistent with the title now asserted; and, viewed in that light, they do not seem to their Lordships materially to impair the strength of the case made by the Plaintiffs.

On the whole, then, their Lordships, after full consideration of the arguments for the Appellants, and notwithstanding the omission to call or account for Ramkristo, have come to the conclusion that the finding of the two Indian Courts, to the effect that both estates were purchased with joint family funds, and became joint family property, ought to be affirmed.

If this be so, the next question to be considered is, whether the Plaintiffs have forfeited their right to assert their title against the Appellants by reason of their own conduct, or the acts of any of those with whom they are connected.

Those who set up such a defence are bound to show clearly both the facts on which it is founded, and that the legal consequences on which they insist necessarily flow from those facts. In the course of the argument there was some want of precision upon this point.

The mere fact that Ramsoondur, when trading on his separate account, was permitted by the family to appear to the world as the sole owner of the estates, and so, perhaps, to obtain a fictitious credit, can be no foundation for such a defence. It may be an unfortunate consequence of the Hindu law touching the joint and separate property of members of an undivided family, but it is one of which all who deal with a Hindu trader must take their chance. Nor can greater effect be given to the misrepresentation made by Ramsoondur, probably with the concurrence of the adult members of his family when he gave security to the Collector. Such a misrepresentation



might possibly have been used as an estoppel against the family, had any question in respect of the security arisen between them and the Collector. But it has no bearing upon the present suit except as an admission, in which light it has been already considered, or as an instance of tortuous dealing, which affects the general credit due to the Plaintiffs. It was not upon the faith of that representation that the Appellant purchased.

The foundation, therefore, of the defence is to be found, if anywhere, in the acts done after Ramsoondur's death, and before the sale.

The first of these was the transfer of the estates into the sole name of Benoderam, on his application, and with the consent of Ramchunder. Their Lordships think it desirable, before considering its effect, to state their view of the nature of this transaction. They cannot but regard it as a contrivance, between Benoderam and Ramsoondur, at least, to put the estates beyond the reach of Ramsoondur's creditors, and therefore fraudulent as against those creditors. They do not impute to Benoderam or to Ramchunder any intention to defraud either the children of Ramsoondur or any other member of the joint family. But Ramsoondur was known to have died indebted; judgments against his estate, if not actually recovered, were imminent, and the only practicable mode of putting these properties wholly beyond the reach of his creditors was by treating them not as family property in which he would have a seisable interest but as the property of Benoderam alone. In furtherance of this scheme Benoderam, when the estates were attached, filed his claims. If those claims had been successful, the attachment would have been removed, and this execution altogether defeated. If, on the other hand, a claim had been made, according to the truth, on the ground that the estates were joint family property, the execution must have gone on, though with notice to all concerned that such a claim had been made. The dismissal of Benoderam's claims became final by his failure to bring a suit to establish his alleged rights within one year from the date of the orders. But the orders themselves do not state the precise grounds of dismissal; and though they negative the title set up by Benoderam, they in no way affirm that Ramsoondur was the sole

owner of the properties. And the depositions of the three witnesses from page 412 to 416 of the Record, show pretty clearly that the case made by the Decree holders in resisting Benoderam's claim to Shahjehanpore was rather that the estate was family property in which Ramsoondur had an interest as coparcener, than that it belonged to him alone.

How then do these proceedings affect the right of the Plaintiffs to assert against the Appellants the title to the estates which they have been shown to possess. They might be estopped, if it were shown that they had represented Ramsoondur to be the sole owner of the estates; and that the Appellants had purchased on the faith of that representation. But it is impossible from the proceedings in question to extract any such misrepresentation; even if the Plaintiffs on the record are to be held to be bound by every act and statement of Benoderam.

Again is their right affected because when, Benoderam put forward a false claim, they did not formally prefer the true one? There is nothing in the code of procedure which made it imperative on them to do this; the claim, if made, could not have stopped the execution sale altogether.

The highest ground on which the Appellants can put their case is, that Benoderam misled them by his fraudulent attempt to defeat the execution; and that the whole family is bound by his acts. It is not necessary to decide how far Benoderam and Ramchunder, who are not parties to this suit, might be affected individually by these proceedings, if they were suing to recover their respective shares. On the present record it must be held that their shares have passed to, and are now vested in the Appellants. Their Lordships have felt some doubt whether the Respondents, suing as members of a Hindoo family, still joint and undivided, for property which, if recovered, will presumably again fall again into the common stock of that family, might not have been shown to be bound by the acts of Benoderam, whether of omission or commission, and responsible for the consequences of them. But they are of opinion that a defence intended to be founded on such a joint responsibility, should be far more clearly pleaded and proved than it has been in this case. How far the Plaintiffs on the record have been parties to, or are affected in law

by Benoderam's proceedings, and to what extent, if at all, the Appellants were misled by those proceedings are questions which have never been fairly raised or tried in the Courts below. This was so found, and, as their Lordships think, correctly found, by the Principal Sudder Ameen.

Their Lordships are, therefore, of opinion that the second point taken by the learned Counsel for the Appellant is no answer to the suit, and they must humbly advise Her Majesty to affirm the decrees under appeal, and to dismiss this Appeal with costs.

