Privy Council Appeal No. 183 *of* 1924.

Allahabad Appeal No. 36 *of* 1921.

Sri Krishn Das and others . . . . . *Appellants*

v.

Nathu Ram and another . . . . . *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH DECEMBER, 1926.

Present at the Hearing:

LORD PHILLIMORE.
LORD BLANESBURGH.
LORD SALVESEN.
SIR JOHN WALLIS.

[*Delivered by* LORD SALVESEN.]

This is an appeal from a judgment and decree dated 30th March, 1921, of the High Court of Judicature at Allahabad which on second appeal reversed a judgment and decree dated the 1st February, 1919, of the Additional District Judge of Aligarh who had set aside a judgment and decree dated 30th August, 1918, of the Subordinate Judge of Aligarh.

The petition of plaint was at the instance of Nathu Ram and his brothers, sons of one Dungar Mal, and was directed against Kanhaiya Mal who had purchased ancestral property from the plaintiffs' father in the year 1902, and the main relief sought was that the sale deed dated 23rd December in that year should be declared invalid, and the plaintiffs awarded proprietary possession of the property thus alienated by their father. The property sold consisted of :—

1. One moiety share in a 6 biswa, 5 biswansi zamindari share of a property in mauza Daulatpur.

2. A proportionate share in 51 bighas, 18 biswas, 13 biswansis "pukhta" of a zamindari property in the same mauza both situated in the district of Aligarh.

The plaintiffs were members of a Hindu joint family of which their father Dungar Mal was manager, and were minors at the date of the sale deed, and the eldest of them only attained majority some short time before the suit was brought. The plaintiffs' father, Dungar Mal, was made a party to the action but did not defend. He was alive at the date of the trial, but has since died.

The facts found by the District Judge of Aligarh, which are admittedly conclusive, may be summarised as follows :

1. The sale deed in favour of the defendant No. 1's father was executed in December, 1902, and the consideration therein stated of Rs. 3,500 was paid in cash.
2. The property in question had been previously sold by auction, but on the 5th January, 1902, Dungar Mal paid Rs. 1,300 to get this sale set aside, and shortly before that he had spent a sum of about Rs. 4,000 on his sister's wedding.
3. In order to meet part of his indebtedness thus incurred Dungar Mal had borrowed on promissory notes from Kewal Ram a moneylender, two sums of Rs. 1,000 and Rs. 1,600.
4. These two sums, with interest, bringing the total up to Rs. 3,000, were discharged out of the consideration money paid by the vendee, and the promissory notes delivered up.
5. Before purchasing the property from the Hindu father the vendee ascertained the facts above mentioned.
6. There was no evidence as to how Dungar Mal applied the Rs. 500, the balance of the purchase price, and he did not tender himself as a witness.
7. The Additional Judge accepted the conclusion of the Subordinate Judge that the sale was made for adequate consideration, and indeed, that the seller got a good price for it.
8. He appears also to have accepted the view of the Subordinate Judge that there was no truth in the allegations made by the plaintiffs against their father as to his leading an immoral life, but that there were grounds for holding that the suit had been instigated by him.
9. During the sixteen years preceding the action the vendee spent large sums on the improvement of the property, the value of which at the date of the suit now exceeds Rs. 10,000. On these facts the Additional Judge held in law that the sale was executed "for legal necessity" and, therefore, the transaction was one which the plaintiffs cannot set aside. He accordingly dismissed the suit with costs.

The plaintiffs appealed to the High Court, the main, if not the only ground of their appeal being that the sum of Rs. 500 had not been applied in payment of debts for which the property sold could have been charged. This argument prevailed. In their judgment the learned judges said " It is difficult to decide cases of this nature upon any fixed principle. It has been held by their Lordships of the Privy Council that in cases where the father has sold ancestral property for the discharge of his debts if the application of the bulk of the proceeds has been satisfactorily accounted for the fact that a small part is not accounted for will not invalidate the sale. That principle has been followed in numerous cases. The difficulty always is to ascertain what amount, in cases like this, is the bulk of the purchase money."

After referring to two Allahabad cases to which more particular reference will afterwards be made, the learned judges go on to say :—" We have, therefore, to deal with each case on its merits, and to decide whether in a particular instance the amount for which the legal necessity has not been proved is with regard to the whole consideration what may be described as a trifling sum. In the present case it is shown that out of Rs. 3,500 only Rs. 3,000 represented the money which was taken for legal necessity. We should find it difficult, having regard to the decisions of this Court, to hold that Rs. 500 is in this instance a trifling amount, and we think, therefore, that we ought to follow the line which was taken in the two Allahabad cases above referred to." They accordingly gave the plaintiffs a conditional decree by which they were declared entitled on payment of Rs. 3,000 within six months from the date of the decree, to have the sale set aside, and the property returned by the defendant 1.

The two decisions referred to by the learned judges, and which were treated as binding by them are those of *Gobind Singh* v. *Baldeo Singh*, I.L.R. 25, Allahabad, 330, and *Ram Dei Kunwar* v. *Abu Jafar*, I.L.R. 27, Allahabad, p. 494. In the former of these cases on a suit to set aside the sale of family property, it was found that out of the total consideration of Rs. 3,299·8 annas, a sum of Rs. 2,923·8 represented money which had been applied for purposes of legal necessity. In the second case it was found that Rs. 2,550 out of the total consideration of Rs. 2,995 represented money taken for legal necessity. In both cases conditional decrees setting aside the sales were passed on payment of the sums which were found to have been applied for purposes of legal necessity. Considering, therefore, the matter simply as one of arithmetical calculation the decision in the present case may be said to have followed upon these, and so from the point of view of the learned judges, who decided the present case, to have been sufficiently justified.

The appellants, however, contended that the two decisions founded on were wrongly decided, and as they are not binding upon their Lordships' Board their argument involves a review of the whole authorities with a view to ascertaining the correct principles

on which similar questions to those raised in the present suit ought to be decided. In view of the diversity of opinion in the various presidencies of India, their Lordships consider that they are bound to accede to this demand, and not the less so because even in Allahabad a recent judgment of the High Court, which is printed as part of the record, appears to be at variance with the three preceding judgments. In that case the Court of first instance had found that out of the entire consideration of Rs. 1,500 a sum of Rs. 967 only represented debts binding upon the family property. It was held that to the extent of the balance of Rs. 532 no legal necessity was established. The District Judge differing from the Trial Court, held that the sale should be sustained; that there were binding debts to the extent of Rs. 1,196 and that as the bulk of the purchase money went to satisfy these debts the plaintiffs had no right to cancellation of the sale. This judgment was affirmed by the High Court, although the difference between the purchase money and the debts which were found to create the legal necessity was much greater proportionally than in the present case or in the two cases on which reliance was placed above referred to. The ground of differentiation was that the property sold was a moiety share of a fixed rate tenancy over which there also extended a mortgage, and that in such circumstances "it is not always possible for the father of a family to sell just that share of the property which will bring in the precise sum which is wanted to clear the debts which are binding." These two considerations apply equally in the present case.

In their decision the learned judges of the High Court rely on the authority of the case of *Girdharee Lall* v. *Kanta Lall*, L.R. I. I.A. 321, decided in 1874, and especially on the headnote which contains this passage :—

> "Where a father has sold ancestral property for the discharge of his debts, if the application of the bulk of the proceeds is accounted for the fact that a small part is not accounted for will not invalidate the sale."

While this is in itself a correct statement of the law so far as it goes, it does not by any means follow, as the learned High Court judges seem to have thought, that it is a complete statement of the law or that the sale will be invalidated wherever the part of the consideration not accounted for cannot be described as small. If this were sound the question would in each case be a matter of arithmetical calculation, and opinions would necessarily vary as to what constituted the "bulk of the proceeds" or "a small part" of the same in each particular case. The learned judges seem to have lost sight of the true question which falls to be answered in such cases, viz., whether the sale itself was one which was justified by legal necessity. This is the point of view from which the matter is approached in the earliest case cited at the Bar of *Hunoomanpersaud Panday* v. *Munraj Koonweree*, VI Moo I.A., p. 393, decided by the Board in 1856. The case related to a charge upon property by way of mortgage, and not to

a sale, but the principles to be applied appear to their Lordships to be the same as in the case of a sale of property. The head-note states correctly the points actually decided so far as bearing on the present case :—

> " The power of a manager for an infant heir to charge ancestral estate by loan or mortgage is by the Hindoo law a limited and qualified power, which can only be exercised rightly by the manager in a case of need, or for the benefit of the estate . . . . The actual pressure on the estate, the danger to be averted, or the benefit to be conferred in the particular instance, are the criteria to be regarded. . . .
>
> " A lender, however, in such circumstances, is bound to inquire into the necessities of the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. If he does inquire, and acts honestly, the real existence of an alleged and reasonably-credited necessity is not a condition precedent to the validity of his charge, which renders him bound to see to the application of the money."

In delivering the judgment of the Board Lord Justice Knight Bruce, after stating the law substantially as laid down in the head-note, said :—

> " The purposes for which a loan is wanted are often future as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a *bona fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived." (p. 424).

This decision was followed in the case of a sale by a Hindu widow in the case of *Ram Gopal Ghose* v. *Bullodeb Bose*, Sutherland's Weekly Reporter, 1864, p. 385, where it was held by the High Court of Calcutta that :—

> " where there is no doubt as to the necessity for a sale by a Hindoo widow and the vendee pays a fair price for the property sold, and acts throughout *bona fide*, the mere fact of only two-thirds of the purchase money having been paid to creditors would not invalidate his conveyance, he not being bound to see to the application of his money."

A similar decision was pronounced by the same Court, *Baboo Luchmeedhur Singh* v. *Ekbal Ali*, 8, Sutherland's Weekly Reporter. 1867, p. 75, where it was laid down that :—

> " the rule that only so much of the property should be sold as will meet the necessity, does not apply to cases where the excess is small, or where the money really required cannot otherwise be raised."

The case was a strong illustration of the principle laid down by Lord Justice Knight Bruce, because there was an admitted surplus of about Rs. 14,000 as to the mode of application of which there was no very distinct evidence, the total sale price having been Rs. 65,000. Nevertheless, the learned judge who delivered the opinion of the High Court, made this observation :—

> " Looking at the transaction as a whole we consider it to be one in which it is proved that the purchaser acted with reasonable and sufficient care and caution and in which a sufficient necessity did exist. We, therefore, declare the sale to be good and valid against the plaintiff."

This case was followed by another in the same Court, *Lala Chatranarayan* v. *Uba Kunwari*, I Bengal L.R., 1868, where a sale of a portion of an estate by a widow for Rs. 995 to pay off a debt of her father-in-law of Rs. 670 was not invalidated by the mere fact that she sold it for more than the amount of the debt when the purpose for which the sale was made, namely, the payment of the ancestral debt, was quite legal.

Similarly in *Kamikhaprasad Roy* v. *Srimati Jagadamba Dasi*, V Bengal, L.R. 508, 1870, Mr. Justice Markby expressed the opinion thus paraphrased in the head-note, that :—

> " In purchasing from a Hindoo widow the purchaser is not bound to look to the appropriation of the money, nor is he affected by the fact that the alienation was made for a larger sum than the necessity of the case required."

Reference may also be made to the case of *Felaram Roy* v. *Bagalanand Banerjee*, XIV Calcutta Weekly Notes, p. 895, decided in 1907, in which the Calcutta High Court held that :—

> " Where a Hindoo widow *bona fide* executed a permanent lease upon taking a *selami* of Rs. 125 in order to pay off a debt of her husband amounting to Rs. 100, this was not a case in which the reversioners should be allowed to recover possession upon payment of the amount actually needed to pay off the loan."

In the course of their judgment the learned judges made this observation :—

> " It would manifestly be impossible, and possibly prejudicial to the interest of the estate if the widow were to be held to be bound in every instance to sell property for payment of a debt due from her husband for exactly the sum due to the creditor."

More important than any of these is the decision of this Board in an appeal from Madras, *Medai Dalavoi* v. *Naina Tevan*, reported in XXVII Calcutta Weekly Notes, p. 365. In that case the widow of a separated Mitakshara Hindu sold property belonging to her husband's estate in her possession as limited owner for Rs. 5,300, in order to pay off Rs. 4,588 due on two mortgages executed by her husband. The balance of Rs. 712 was appropriated by the widow to a purpose which did not constitute a legal necessity, but it was held that the sale was not invalid on this account, as the purchasers were not bound to see how the widow applied the purchase money.

All these decisions are, in their Lordships' opinion, entirely inconsistent with the judgment appealed from, and with the Allahabad cases on which it was based. They are equally inconsistent with the decision in a recent case from the same province, *Dwarka Ram* v. *Jhulai Pande*, I.L.R. 45, Allahabad, p. 429 and especially with the ground of judgment therein enunciated in the following absolute terms :—

> " If any part of the consideration was invalid and not binding on the plaintiff, the plaintiff would be entitled to have the sale set aside, but if a portion of the consideration was good and binding on the plaintiff he would be entitled to reimburse it to the defendant. The form of the decree in a case of this kind should, therefore, be a decree for possession in favour of the plaintiff subject to his paying to the purchaser so much of the consideration as was required for the necessities of the family."

In a still more recent case from the same Province, *Daulat* v. *Sankatha Prasad*, I. L.R. 47, Allahabad, p. 355, the judges of the High Court appear to have reverted to the principles upon which the judgment now under review is based, holding that :—

> " the criterion for deciding whether the sale should be upheld or set aside is whether the portion which was not taken for legal necessity was such a small portion of the whole consideration that it might reasonably be left out of account."

As the sum in question was only Rs. 105 out of a total consideration of Rs. 2,142–12–6, the Court upheld the sale transaction, but directed the defendants to repay to the plaintiff the sum of Rs. 105 which was found not to be covered by legal necessity. It is to be remarked that this is the only case of those cited to their Lordships in which an order for repayment of a small sum was made although the sale itself was sustained, and is entirely opposed to the whole current of authority. It was not done in the recent case decided by this Board, *Masit-Ullah and others* v. *Lala Damodar Prasad* (53 I.A., 204). There a sum of Rs. 2,000 out of a total consideration of Rs. 18,400, was not shown to have been applied in the discharge of ancestral debts, but, on the other hand, there was no evidence that it was used for immoral or unauthorised purposes. In setting aside the judgment of the High Court and dismissing the plaintiffs' suit their Lordships made no condition as to the repayment of this balance of Rs. 2,000. It would rather appear that in any case where the sale has been held to be justified but there is no evidence as to the application of a portion of the consideration, a presumption arises that it has been expended for proper purposes, and for the benefit of the family. This is in line with the series of decisions already referred to, in which it was held that where the purchaser acts in good faith and after due enquiry, and is able to show that the sale itself was justified by legal necessity, he is under no obligation to enquire into the application of any surplus and is, therefore, not bound to make repayment of such surplus to the members of the family challenging the sale.

Applying the principles laid down in the above series of cases by this Board, and consistently followed in other Courts in India, except in Allahabad, their Lordships have reached the conclusion that the judgment of the High Court cannot be sustained. On the facts found by the District Judge it must be taken that the sale challenged was made after due enquiry as to the legal necessity by the vendee ; that such necessity has been proved by him to the extent of Rs. 3,000 out of a total price of Rs. 3,500 ; that the sale was for an adequate consideration and that the mere fact that after a long interval of time the appellants have not been able to establish how the surplus of Rs. 500 was applied is not a sufficient ground in law for setting aside the sale. They will, therefore. humbly advise His Majesty that the judgment and decree of the High Court should be set aside, and the plaintiffs' suit dismissed with costs in all the Courts, including the costs of the present appeal.

In the Privy Council.

SRI KRISHN DAS AND OTHERS

v.

NATHU RAM AND ANOTHER.

DELIVERED BY LORD SALVESEN.

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