PRIVY COUNCIL

Kawal Nain and others

Vs.

Budh Singh and others

P.C.A. No. 140 of 1915
(Viscount Haldane, CJ, Lord Atkinson, Sir John Edge, Mr. Ameer Ali and Sir Walter Phillimore, Bart. JJ)

24.4.1917

JUDGMENT

Viscount Haldane CJ.

1. This is an appeal from a judgment of the High Court at Allahabad which reversed a judgment of the Subordinate Judge of Saharanpur. The question which arose was whether a mortgage of certain interests in land was valid, as contended by the appellants, who were the successors in the title of the original mortgagee. The land had been the property of a joint family subject to *Mitakshara* law, and the controversy turned on whether the respondent *Prabhu Lal,* the mortgagor, had separated from the joint family before executing the deed, and so rendered himself competent to make a valid hypothecation of the interest which had come to him as a member of the joint family.

2. Prior to the mortgage, which was dated the 28th August, 1890, the respondent *Prabhu Lal* had, on the 6th April, 1889, commenced a suit for partition. By his plaint be had claimed a fifth share of the family property, and their Lordships entertain no doubt that the claim amounted to an intimation to the defendants, his co-sharers, of the unequivocal desire of the plaintiff for separation from the joint family. If this be so, the judgment of the Judicial Committee in the recent case of *Girija Bai v. Sadashiv Dhundhiraj*[1] renders it beyond question that the commencement of this suit for partition effected a separation from the joint family. It is immaterial, in such a case, whether the co-sharers assent. A decree may be necessary for working out the result of the severance and for allotting definite shares, but the status of the plaintiff as separate in estate is brought about by his assertion of his light to separate, whether he obtains a

consequential judgment or not.

3. These considerations are sufficient to dispose of the only serious question raised by the present appeal. Had their Lordships' Judgment in the case just referred to been delivered before and not after the judgments now under review, that of the High Court would probably have been different. The Subordinate Judge thought himself bound to examine a number of transactions from which he drew the inference that the members of the joint family had assented to the severance contended for although a complete partition had not been carried out. It was not necessary for him to find so much in order to establish the severance, but the result at which he arrived was right. The High Court, in reversing his decision, proceeded on the footing that no agreement for severance had been established, and that it was necessary that the existence of such an agreement should be shown. This is plainly contrary to the principle as subsequently laid down by this Board in the other case. It has been argued that the suit for partition, commenced by the plaint of 1890, was dismissed and that the plaint was therefore of no effect. Their Lordships cannot assent to this argument. It is true that in the suit of 1890, the Subordinate Judge dismissed the claim, disbelieving the case put forward in support of it, namely that the father, who was head of the joint family, had refused to supply his son Prabhu Lal with the funds required to maintain him, and had otherwise ill-treated him. The High Court says that, while this belief was no valid ground for dismissing the claim for partition, it still shows that on the date when the suit was dismissed the family remained joint. It will, however, be observed that the judgment in that suit proceeded on the ground that owing to the age of the father he might have other children and that in consequence the property could not he divided or the plaintiff's share fixed. But, while this was obviously wrong, the judgment on its face concedes that the plaintiff had a right to partition, although no cause of action for an actual partition was regarded as having accrued. It cannot be said that the plaint did not amount to such an expression of intention as to satisfy the conditions of the law as now settled Their Lordships have thought it necessary to examine the argument for the appellants in the present appeal with the more care because the respondents have not been represented at the Bar. But they are satisfied that the High Court has given a decision which cannot stand. They will therefore humbly advise His Majesty that this appeal should be allowed and the decree of the Subordinate Judge restored. The respondents must pay the costs here and below. But their Lordships desire to point out that as the personal remedy under the mortgage is probably barred by limitation, the liberty to apply for a personal decree, which is given by the decree in accordance with Order 34 of the Code of Civil Procedure and section 90 of the Transfer of Property Act

in the event of the proceeds of a sale proving insufficient, must be subject to the right of the respondents to raise any defense to the personal claim, such as one based on limitation which may prove open to them.

Appeal allowed.

Cases Referred.

1. [1916] 43 Cal. 1031 = 37 I. C. 321 = 43 I. A. 151 (P.C.)