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BANK OF  
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But if they have acquired no right adverse to the plaintiff as owners, by prescription, or otherwise, in the land, their right of use can only be as licensees of the plaintiff; and, on the facts found in this case, it can be revoked by the plaintiff, except in respect of the wells, which are works of a permanent character, and on which the defendants have incurred expenses.

The principle of ss. 60 and 61 of the Easements Act is quite applicable to this case, although that Act is not in force here.

In this case, their right to the wells which they have made cannot be interfered with; but the zamindar can revoke the license as to the other use claimed of the land.

The decree of the Court of first instance, which, while decreeing the claim to build the house, preserves the rights as to the wells and taking water from them, and also provides, by consent of the plaintiff, facilities for a threshing-floor, &c., is fit to be affirmed.

We set aside the decree of the lower appellate Court, and restore that of the first Court, with costs.

*Appeal allowed.*

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December 9.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice ~~Duffield~~

BHOLAI AND ANOTHER (PLAINTIFFS) v. KALI AND ANOTHER (DEFENDANTS)\*

*Hindu widow—Mortgage by Hindu widow in possession of property in lieu of maintenance—Declaratory decree—Act I of 1877 (Specific Relief Act), s. 42.*

The name of the widow of a member of a joint Hindu family was allowed by the other members to be recorded in her husband's place in respect of his rights and interests in the family property by way of compliment to her, and they consented that, in lieu of maintenance, she should receive the profits of the property during her lifetime. The widow executed a deed of mortgage of the property, which did not specifically state the amount of the estate mortgaged, and also a bond, upon which the obligee obtained a decree, in execution whereof he attached part of the property recorded in the name of the obligor. The members of the family brought a suit in which they prayed for a declaration that the mortgage executed by the widow was invalid, and that the property was not liable for the amount due thereunder, or to attachment in execution of the decree obtained upon the bond.

*Held* that if the widow's possession were only a possession by the plaintiffs' consent entitling her merely to receive the profits for her maintenance, the plaintiffs

\* First Appeal No. 18 of 1885, from a decree of Rai Raghunath Sahai, Subordinate Judge of Gorakhpur, dated the 3rd December, 1884.

might eject her from the property, and that before they could obtain a declaration under s. 42 of the Specific Relief Act, they must seek their relief by ejectment, that being the substantial and real relief appropriate to the cause of action. On the other hand, if the widow had an estate in possession, given to her in exchange for her maintenance, she had an interest which she was competent to alienate.

*Held* also that inasmuch as the deed of mortgage contained no description of the amount of the estate mortgaged by the widow, and, upon its face, mortgaged her share of the property only, it could have no operation beyond her share, and the Court would not be justified in granting a declaration under s. 42 of the Specific Relief Act, merely because the plaintiffs apprehended some possible future claim based upon the allegation that the transfer comprised the entire estate.

The plaintiffs in this suit alleged in their plaint that they and one Doman Pandey were members of a joint and undivided Hindu family; that Doman Pandey died leaving him surviving a minor son called Nihor; his other son, Behari, having died during his father's lifetime leaving a widow, the defendant Musammat Kali; that Nihor died a few days after his father and before his name was entered in the revenue records in respect of the rights and interests of his father; and that, owing to the circumstances mentioned above, "the name of Musammat Kali, daughter-in-law of Doman Pandey, was caused to be entered in respect of the rights and interests of Doman Pandey, merely by way of consolation and courtesy to the said Musammat, who had in fact no right to the property in question, and her name had hitherto continued to be recorded." The plaintiffs then went on to allege that, "notwithstanding her want of right in every way," Musammat Kali had, on the 21st May, 1877, executed a bond for Rs. 778 in favour of the defendant Raghubans Pandey, in which she made a simple mortgage of a one anna and one pie share in mauza Sihonda, a part of the property recorded in her name; that Musammat Kali was not competent to make the mortgage, nor was there any necessity for the loan, nor was the bond in question in any way valid and enforceable as regards the plaintiffs, nor had Musammat Kali any right in the property "other than her possession as a trustee in lieu of her alimony;" that in addition to the bond mentioned above Musammat Kali had given another bond to Raghubans Pandey, on which the latter had, on the 6th February, 1884, obtained a decree, in execution of which he had caused a part of the property recorded in the name of Musammat Kali to be attached; and that the property was not liable for this debt and had

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Mr. G. T. *Spankie*, for the appellants.—The evidence on the record shows that Behari, husband of the defendant Musammat Kali, predeceased his father Doman and his brother Nihor. The family was joint, and Kali enjoyed the profits of the estate, by permission of the plaintiffs, in lieu of her maintenance only, and not by reason of any interest possessed by her in the property. This being so, her possession was necessarily restricted to her own personal enjoyment, and could not be alienated by her. The mortgage executed by her in favour of the defendant No. 2 was therefore an illegal transaction, and the plaintiffs are entitled to a declaration to that effect.

[PETHERAM, C. J.—If the defendant's possession depends wholly on the plaintiffs' permission, she is their tenant-at-will, and they can eject her at any moment. In that case, however, they must seek their relief by ejectment, and cannot, with reference to the proviso to s. 42 of the Specific Relief Act, sue for a mere declaration of their title. The Legislature intended by that section that the Court might grant to a plaintiff the relief granted by the Court of Chancery in cases where no relief at common law was available. Where a proprietor's title was in danger, and he could not bring an action at common law to try the question of title, the Court of Chancery would give him this indirect form of relief, the more direct kind not being open to him. A mere declaration was never granted except on this condition. On the other hand, if the plaintiffs in this case cannot eject the widow at their will, she has at all events a right to possession, and that is surely a transferable interest?]

What the plaintiffs desire is not the ejectment of the widow, but the invalidation of the mortgage of the estate by her. All that the proviso to s. 42 of the Specific Relief Act forbids is a suit for a pure declaration, without further relief: it does not compel a plaintiff to sue for all the relief which could possibly be granted, or debar him from obtaining a relief which he wants unless at the same time he asks for a relief which he does not want. The plaintiffs here ask for consequential relief, in addition to a declaration, for they seek to set aside the alienation and the attachment proceedings. Secondly, assuming that the plaintiffs

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cannot eject the widow, it does not follow that she has a transferable interest in the property. Her interest was by its very nature confined to her personal enjoyment, and incapable of transfer, resembling in this particular the interest of an occupancy-tenant under Act XII of 1881 (N.-W. P. Rent Act), whose alienations though invalid do not entitle the landlord to eject him from his holding. The analogy of English estates is misleading when applied to the possession and transfer of property under the Hindu law.

[PETHERAM, C. J.—You say that the family being joint, the widow of Behari took no interest in the estate, but a mere right of maintenance, but that, by a family arrangement, the reversioners allowed her a life estate in lieu of her maintenance. What evidence is there to show that this life estate was confined to her personal enjoyment, and that she was not competent to transfer it? ]

That is the necessary legal consequence of the facts that the family was joint, and that the widow's possession was in lieu of maintenance. She was by her possession the possessor of the property of a separated Hindu.—*Hurji Singh v. Shewdyal Singh* (1).

[OLDFIELD, J.—Surely the power of the widow to transfer an interest of this kind is a matter of evidence in each case.

PETHERAM, C. J.—If the widow had the limited interest you have described, nothing beyond that interest can be affected by her alienations. If the mortgage-deed does not specifically refer to the whole estate, it must be assumed to relate to such interest only as the mortgagor could legally deal with, and you cannot sue upon the assumption that she meant to deal with more. How then is the title of the reversioners endangered? ]

Such a transfer is injurious to the reversioners, because the transferee may be put in possession, and they may be compelled to sue him for ejectment, possibly long after the evidence regarding this transaction has ceased to exist. The bond purports, upon its face, to mortgage the whole one anna and one pie share: it contains nothing which confines its operation to the widow's interest, and

(1) N.-W. P. S. D. A. Rep., 1864, vol. ii, p. 104.

the *onus* of proving such restriction would lie upon any person asserting it.

[PETHERAM, C. J.—Ought not the plaintiffs to have objected in the execution proceedings to the attachment of the property in execution by the defendant Raghubans Pandey?]

They were not obliged to do so: s. 283 of the Civil Procedure Code does not establish any new form of suit. The form of suit is an old one, and the object of the section is to save it, and to prevent any possible impression that the order refusing to release the property from attachment is conclusive.

Mr. C. H. Hill, for the respondents, was not called on to reply.

PETHERAM, C. J.—I am of opinion that this suit is not maintainable. The facts, as alleged by the plaintiffs-appellants themselves, are, that the female defendant is the widow of a Hindu who was a member of an undivided Hindu family, and that they (the plaintiffs) represent the other members of that family. They allege that, after the death of their brother, they allowed the widow's name to be entered in his place, in respect of his rights and interests in the property in dispute, out of compliment to her, and that subsequently, although she was not entitled to any interest in the property itself, but only to receive maintenance from them, she was allowed to receive the profits in lieu of the maintenance. They further state that, under this arrangement, she obtained and still continues in possession, and that she executed a deed mortgaging the property to the other defendant. They bring this suit to obtain a declaration that the mortgage was an illegal transaction. It is a suit which must be brought under s. 42 of the Specific Relief Act, or it cannot be brought at all.

Upon this state of facts, the widow's possession—which the plaintiffs themselves allege to be an actual possession—must have one of two characters. Either it is a possession by the plaintiffs' consent, entitling her merely to receive the profits for her maintenance, or it is a possession for her life, given to her in exchange for the annuity which, under the arrangement I have referred to, she has released to the plaintiffs. In either case, I am of opinion that the suit is not maintainable. If her possession is merely

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permissive, and extends no further than the collection of the profits, then the plaintiffs may eject her from the property, if they are at any time dissatisfied with her mode of dealing with it. Then, before they can claim the relief provided by s. 42 of the Specific Relief Act, they must claim the other relief to which they are entitled—that is to say, the relief of ejectment, that being the substantial and real relief appropriate to such a cause of action. On the other hand, if the widow had an estate in possession, given to her in exchange for the annuity which she had released to the plaintiffs, then she possessed an interest which, so far as I can see, she had a right to dispose of. The mortgage-deed in question contains no description of the amount of the estate mortgaged by her. It is expressed with extreme vagueness, and, upon its face, mortgages her share of the property only. It could therefore have no operation beyond her share; and, in my opinion, no Court would be justified in interfering, and in making such a declaration as the plaintiffs ask for, merely because the deed is so vague that they apprehend that some imaginary claim may possibly be made by somebody at some time or other. Under these circumstances, I am of opinion that the suit and the appeal must be dismissed. Each of the respondents will be allowed his own costs separately.

OLDFIELD, J.—I agree in the opinion that this is not a case in which the declaration sought for should be granted. I may add that we have heard the appeal on its merits, and I see no reason to interfere with the decision of the Court of first instance. The appeal is dismissed with two sets of costs.

*Appeal dismissed.*

*Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.*

RAGHUNATH PRASAD (DEFENDANT) v. GOBIND PRASAD (PLAINTIFF)\*

*Hindu Law—Joint family—Power of the father to alienate ancestral property for pious purposes.*

According to the Hindu law, the power of a father to make alienations of joint ancestral estate without his son's consent extends to provision of a permanent shrine for a family idol. *Gopal Chand Pandé v. Babu Kunwar Singh* (1) referred to.

\* Second Appeal No. 168 of 1885, from a decree of A. Sells, Esq., District Judge of Cawnpore, dated the 6th January, 1885, reversing a decree of Babu Khetar Mohan Ghose, Offg. Munsif of Cawnpore, dated the 22nd July, 1884.

(1) S. D. A., L. P., 1843, vol. 5, p. 24.

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December 12.