

1905
August 12.

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice
Sir William Burdett.*

LAL SINGH (DEFENDANT) v. PULANDAR SINGH AND OTHERS (PLAINTIFFS)
AND THAKUR DAS (DEFENDANT).*

*Hindu law—Joint Hindu family—Mortgage of ancestral property by father
—Sale under decree on mortgage—Suit by sons to redeem their interests.*

Where ancestral property of a joint Hindu family has been sold in execution of a decree upon a mortgage executed by the father, no suit for redemption of their interests is maintainable by the sons upon the ground solely that they were not made parties to the suit under the decree in which the ancestral property was sold. *Debi Singh v. Jai Ram* (1), *Banko Rai v. Raghurir* (2) followed. *Girdharee Lall v. Kantoo Lall* (3) referred to.

THIS was a suit to redeem a mortgage executed by one Tota Ram, deceased, in favour of one of the defendants, Thakur Das. The mortgage was executed on the 15th of March 1888, and by it Tota Ram purported to hypothecate the ancestral property belonging to himself and his sons. Thakur Das instituted a suit for recovery of the mortgage debt by sale of the mortgaged property, and that property was, in execution of a decree for sale passed in that suit, sold, and a portion of it was purchased by Lal Singh, appellant, in May 1893. The sole mortgagor was Tota Ram, but the mortgage was attested by his three sons, Pulandar Singh and Gokul Singh, two of the plaintiffs, and Het Ram, the father of the remaining plaintiffs. Tota Ram was the head of the family and the managing member. The Court of first instance (Munsif of Aonla-Faridpur) decreed the plaintiffs' claim, and this decree was upheld in appeal by the lower appellate Court (Subordinate Judge of Bareilly). The defendant, Lal Singh, appealed to the High Court.

Babu *Sital Prasad Ghosh*, for the appellant.

Dr. *Satish Chandra Banerji*, for the respondents.

STANLEY, C.J. and BURKITT, J.—The suit out of which this second appeal has arisen was brought by the plaintiffs to redeem a mortgage executed by one Tota Ram, deceased, in favour of one of the defendants, Thakur Das. This mortgage

* Second Appeal No. 88 of 1904, from a decree of Babu Prag Das, Subordinate Judge of Bareilly, dated the 11th of November 1903, confirming a decree of Babu Pirthivi Nath, Munsif of Aonla-Faridpur, District Bareilly, dated the 4th of June 1903.

(1) (1902) I. L. R., 25 All., 214. (2) S. A. No. 641 of 1903, decided 6th August 1904.

(3) (1874) L. R., 1 I. A., 321.

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was executed on the 15th of March 1888, and by it Tota Ram purported to hypothecate the ancestral property belonging to himself and his sons. Thakur Das instituted a suit for recovery of the mortgage debt by sale of the mortgaged property, and the property was, in execution of a decree for sale passed in that suit, sold, and portion of it was purchased by Lal Singh, the appellant, in May 1893. The sole mortgagor was Tota Ram, but the deed of mortgage was attested by his three sons, Pulandar Singh, Gokul Singh (two of the plaintiffs), and Het Ram, the father of the remaining plaintiffs. Tota Ram was the head of the family and managing member, and his sons attesting the execution of the document must be taken to have admitted the necessity for the mortgage.

The Court of first instance decreed the plaintiffs' claim, and that decree was affirmed by the learned Subordinate Judge on appeal. They held that, inasmuch as the plaintiffs were interested in the mortgaged property and were not made parties to the suit which was instituted by Thakur Das, the mortgagee, they were not bound by the sale which took place in execution of that decree, and, therefore, are entitled to redeem the mortgage as parties having an interest in the mortgaged property.

From the decrees of the Courts below the present appeal has been preferred, the grounds of appeal being that the Courts below were in error in holding that the sale which took place in May 1893 in favour of Lal Singh could be impeached by the sons and grandsons of Tota Ram, the debt in respect of which the mortgage was executed not having been a debt contracted for immoral purposes. We are of opinion that this question is concluded by a ruling of a Full Bench of this Court in the case of *Debi Singh v. Jia Ram* (1). In that case it was held that where property belonging to a joint Hindu family has been sold by auction in execution of a decree obtained upon a mortgage executed by the father of the joint family, it is open to the sons of that father to sue for the recovery of their shares of the property so sold, provided they based their claim upon some ground which under the Hindu law would free them from

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liability as sons to pay their father's debts, but that a sale once having taken place the sons cannot succeed in a suit to recover the property sold upon the sole ground that they were not made parties to the original suit. The decision in that case was based to a large extent upon rulings of their Lordships of the Privy Council, and particularly upon the statement of the law contained in the case of *Girdharee Lall v. Kantoo Lall* (1). In that case, their Lordships stated the law as follows:—"This case, then, which is a decision of this tribunal, is undoubtedly an authority for these propositions, first, where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt or *under a sale in execution of a decree for the father's debt*, his sons, by reason of their duty to pay their father's debt, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and secondly, that the purchasers at an execution sale being strangers to the suit, if they had no notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings." In the case before us there is no suggestion that the debt in respect of which the mortgage was given and the property was sold was contracted for immoral purposes. The plaintiffs bring their suit merely on the ground that they were not impleaded as parties to the suit which was instituted by the mortgagee. It appears to us, therefore, that the case is concluded by the decisions to which we have referred, which were apparently not brought to the notice of the lower Courts. We further find a decision of a learned Judge of this Court in which the very point for decision in this appeal was determined on the principle laid down in the case of *Debi Singh v. Jia Ram*. In (2) *Banke Rai v. Raghubir* which is unreported, our brother Banerji held that a suit similar to that which is before us was not maintainable. The decision is dated the 6th of August 1904. We, therefore, think that the Courts below were wrong in the decision at which

(1) (1874) L. R., 1 I. A., 321.

(2) S. A. No. 641 of 1903 decided 6th August 1904.

they arrived, and we allow this appeal, set aside the decrees of the lower Courts, and dismiss the plaintiff's claim with costs in all Courts.

Appeal dismissed.

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*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice
Sir William Burkitt.*

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August 14.

ABU MUHAMMAD KHAN AND ANOTHER (OPPOSITE PARTIES) v. KANIZ FIZZA
AND ANOTHER (APPLICANTS).*

*Partition—Co-owners—Agreement not to partition not binding upon heirs
of parties thereto—Act No. XIX of 1873 (North-Western Provinces Land
Revenue Act), section 113—Appeal—Question of proprietary right.*

Held that an agreement amongst the members of a family holding property jointly that the family property should not be partitioned could not bind the property in the hands of the descendants of the parties to the agreement; also that the question whether such an agreement could be binding on the property in the hands of the descendants of the parties thereto was a question of proprietary right within the meaning of section 113 of Act No. XIX of 1873, and an appeal would, therefore, lie from the finding thereon.

THIS appeal arose out of a suit for partition of certain immovable property which had belonged in his life-time to one Nawab Muzaffar Husain Khan. The applicants were two daughters of Musammatt Zohra Jan, daughter of Muzaffar Husain Khan. The application was resisted mainly upon the ground that having regard to a certain agreement which was executed shortly after the death of Muzaffar Husain Khan by his heirs the estate was not susceptible of partition. A plea of *res judicata* was also taken, but was not pressed. The Court of first instance (Assistant Collector of the first class) decided that the agreement relied upon by the opposite parties could not be binding upon the descendants of the original owner of the property, who were no parties to it, and ordered partition to proceed. On appeal this decree was confirmed by the lower appellate Court (District Judge of Cawnpore). The opposite parties appealed to the High Court, raising again the question of the effect of the family agreement before relied on, and also the question of the District Judge's jurisdiction to hear the appeal to him.

* Second Appeal No. 423 of 1904, from a decree of J. Denman, Esq., District Judge of Cawnpore, dated the 1st of February 1904, confirming a decree of Munshi Shambhu Nath, Assistant Collector of Fatehpur, dated the 12th of November 1902.