

1910

NAGAR MAL
v.
RAM CHAND.

It is contended before us that this order setting off the two decrees against each other was an order passed without jurisdiction. The contention is that while the first decree is, in strict terms, a decree to recover a sum of money, the second decree is a decree for sale in enforcement of a charge against immovable property and that the Legislature in enacting rule 20 under order XXI meant to draw a distinct line of cleavage between the class of decrees contemplated in rules 18 and 19 and the class of decrees contemplated in rule 20. It has not been pointed out to us that anyone will be prejudiced by a decree of the kind contemplated by rule 20 being set off against a decree of the kind contemplated in rules 18 and 19 and *vice versa*. On the other hand, the practice of setting off decrees in this way is a very salutary procedure, and it is equally open to argument that rule 20 was expressly inserted in order to make it clear that though a decree might be a decree for sale in enforcement of a mortgage or charge, it might yet be dealt with on the same lines as where both the cross decrees are decrees to recover sums of money. At any rate in the present case we see no reason for interference, and we dismiss the application with costs.

Application dismissed.

APPELLATE CIVIL.

1910
November 5.

Before Mr. Justice Richards and Mr. Justice Griffin.

NATHU AND OTHERS (DEPENDANTS) v. KUNDAN LAL (PLAINTIFF).*

Hindu law—Mitakshara—Joint Hindu family—Debt—Legal necessity—Money borrowed to comply with a decree for pre-emption in favour of the father.

A decree for pre-emption, providing that the pre-emptor shall acquire the property if he pays the amount mentioned therein, but otherwise his suit will be dismissed, is a debt such as will support a bond given by the father of a joint Hindu family to raise money for its satisfaction.

THIS was a suit upon a mortgage bond of joint family property executed by the father of the family for the purpose of raising money to fulfil the conditions of a decree for pre-emption passed

* Second Appeal No. 202 of 1910, from a decree of D. L. Johnston, Additional Judge of Meerut, dated the 18th of December, 1909, reversing a decree of Muhammad Husain, Additional Subordinate Judge of Meerut, dated the 16th of August 1909.

in his favour. Amongst other defences it was pleaded that the bond had been discharged and that it was executed without necessity and not for family purposes. The court of first instance (Additional Subordinate Judge of Meerut) found against the plaintiffs on both issues. On appeal the additional District Judge reversed the decree of the first court and decreed the plaintiff's claim. The defendants appealed to the High Court.

Mr. *E. A. Howard*, for the appellants.

Pandit *Rama Kunt Malaviya* (for The Hon'ble Pandit *Madan Mohan Malaviya*), for the respondent.

RICHARDS and GRIFFIN, JJ.—This and the connected appeal No. 201, arise out of suits brought on foot of two mortgage bonds. The bonds were made by the father of a joint Hindu family and the property pledged was ancestral property. A number of defences were raised, and, amongst others, defences that the bonds were discharged and that they were executed by a father without necessity and not for family purposes. The court of first instance found against the plaintiffs on both these issues. The learned Additional District Judge has reversed the decree of the court of first instance. He finds that the bonds were not paid off and after referring in his judgement to two witnesses who are attesting witnesses of the bonds, says as follows :—“ Their evidence is sufficient to show that the money was obtained for a legal necessity, for the enlargement of family estate by exercising rights of pre-emption. It was entirely the interest of the family, even though there is no legal proof that the effect was given to this purpose. I hold that the debts were incurred for legal necessity.” This judgement is not very satisfactory. The court of first instance had given somewhat substantial reason for holding that it had not been proved that the bonds were given for family necessity. He has said that the allegation was that the money was advanced for pre-emptive decrees, but that no such decrees had been filed. It would have been more satisfactory if the learned Additional District Judge had gone into these matters and given his reasons for over-ruling the court below. In the present case it is not even alleged in the bond that the consideration was money advanced to acquire property pre-empted. We feel, however, that in second appeal we must

1910

 NATHU
 v.
 KUNDAN
 LAL.

1910

NATHU
v.
KUNDAN.

accept the judgement of the learned Additional District Judge as a finding that the money was borrowed on two bonds for the purpose of complying with the terms of one or more pre-emptive decrees. We think that in the absence of evidence to the contrary it must be assumed that these decrees were complied with and that the family acquired the property, the subject-matter of the pre-emptive decrees, by means of the money that was advanced on foot of the bonds. A pre-emptive decree provides that the decree-holder shall acquire the property therein mentioned provided he pays the purchase money within a time fixed. If he does not do so, his suit is to be dismissed with costs. It is very hard to say that such a decree with the liability that is attached to it is not a debt. It cannot be urged now that a creditor who has made honest and reasonable inquiry as to the object of the loan is bound to see to the application of the money he advances, and therefore the absence of a finding that the money advanced on foot of a bond was actually applied to the pre-emptive decrees is not fatal to the plaintiff's case. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

1910
November 7.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.
MUHAMMAD FAYAZ ALI KHAN (DEPONDANT) v. KALLU SINGH AND
ANOTHER (PLAINIFFS).*

Civil Procedure Code (1882), section 43—Civil Procedure Code (1908), schedule I, order II, rule 2—Competence to give leave to omit remedies or special causes of action not limited by pecuniary jurisdiction of court—Suit for surplus collections made by mortgagee—Limitation—Act No. IX of 1871, schedule II, article 105—Act No. XV of 1877, section 2, schedule II, articles 105, 109—Act No. IX of 1908, schedule I, articles 105, 109.

The competence of a court to give leave to a plaintiff to omit to sue for a relief to which he may be entitled is not affected by the pecuniary value of the relief in respect of which such leave is sought.

A suit by a mortgagor after the mortgage has been satisfied to recover surplus collections received by the mortgagee may be brought within three years from the time when the mortgagor re-enters on the mortgaged property under article 105 of the second schedule to the Limitation Act of 1877 (schedule I to the Limitation Act of 1908) and there is no restriction as to the way in which the mortgagor may obtain possession. *Ram Din v. Bhup Singh* (1) discussed.

* First Appeal No. 227 of 1909, from a decree of Banko Behari Lal, Subordinate Judge of Aligarh, dated the 31st of May, 1909.