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mortgage having priority over the mortgage in favour of the plaintiff the rights of the plaintiff were altogether extinguished. The lower appellate court upheld this contention and without considering the other pleas raised in the appeal decreed the appeal and dismissed the plaintiff's suit *in toto*. In second appeal it is contended that the view taken by the lower appellate court is wrong. Section 50 of the Registration Act provides that a registered document of the kind mentioned in clauses (*a*), (*b*), (*c*) and (*d*) of section 17 and clauses (*a*) and (*b*) of section 18 shall, if duly registered, take effect as regards the property comprised therein against an unregistered document relating to the same property. The defendant Tejpal relies on his purchase in execution of a decree obtained by him on a registered mortgage. What he purchased at the auction sale was the right, title and interest of his mortgagor. The mortgage held by the plaintiff, although not created by a registered document, was not invalid merely by reason of the document not being registered. If a valid mortgage was created by that document the debt secured was recoverable from the surplus, if any, left after the satisfaction of the registered mortgage held by Tejpal. As the only point decided by the lower appellate court was that the rights of the plaintiff were altogether extinguished, and as we are unable to agree with that view, we must allow this appeal, set aside the decree of the lower appellate court and remand the case to that court for decision of other questions raised in the appeal before that court.

Cost of this appeal will be costs in the cause.

Appeal decreed and cause remanded.

PRIVY COUNCIL.

BASANT SINGH (DEFENDANT) *v.* MAHABIR PRASAD (PLAINTIFF).

[On appeal from the Court of the Judicial Commissioner of Oudh.]

*P. C.** 1913. *February*, 11, 12. *March*, 14.

Vendor and purchaser—Sale to raise funds for litigation—Transfer whilst vendor was out of possession—Agreement depending on success of litigation—Transfer of undivided share in joint ancestral property—Interest in property giving right to sue—Vendee and provider of funds made co-plaintiffs.

The original plaintiffs in the two suits out of which these appeals arose were, in one suit the sons, and in the other the grandson of the heads and

*Present:—Lord ATKINSON, Lord MOULTON, Sir JOHN EDGE and Mr. AMEER ALI.

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managers of two distinct joint Hindu families, owners of an estate in Oudh, by whom alienations of the joint ancestral property had been made in favour of the appellant, whom they sued in ejectment to set aside those alienations on the ground that the managing members had no power to make them. As they required funds to enable them to prosecute the suits, they entered into agreements with a third person (who was made a co-plaintiff in the suits and was now respondent) to the effect that "in the share of each of them in the property he will be a co-sharer of a one-half share, and the remaining one-half share will belong to us . . . He will bear the entire expenses in connexion with the suit, and in case of success he will be entitled to proprietary possession of the above mentioned one-half share, or one-half of the share which may be decreed, which can remain joint or be partitioned by him as he pleases." In the course of the litigation the original plaintiffs compromised the suits with the appellant and withdrew from them leaving the respondent to prosecute them alone.

Held (reversing on this point the decision of the Courts in India) that the agreements (which constituted his only right to sue) conferred upon the respondent no present right to the possession of any share in the property in suit. He would only have the right to possession in case of success, and success had not been achieved. Until then he was merely a co-owner in a certain undivided share of the property. There was no present grant or assignment to him of any separate share of the property, divided or undivided, and he could not therefore maintain the suit.

Achal Ram v *Kazim Husain Khan* (1) distinguished.

THREE consolidated appeals from the judgements and decrees (19th March, 1909, and 29th March, 1911) of the Court of the Judicial Commissioner of Oudh, which partly affirmed and partly reversed judgements and decrees (22nd July, 1908, and 5th February, 1910) of the Subordinate Judge of Partabgarh, and of the District Judge of Rae Bareli respectively.

For the determination of the only question decided by their Lordships of the Judicial Committee in these appeals, the facts will be found fully stated in their Lordships' judgement.

The original plaintiffs in the two suits out of which these appeals arose, were, in the first suit, Sheopal Singh and Chandra Bhukan Singh, the two sons of Binda Sewak Singh; and in the second suit, Bhopal Singh, the grandson of Ram Prasad Singh. Binda Sewak and Ram Prasad were the heads of the two distinct joint families of which the plaintiffs were respectively junior members. Together Binda Sewak and Ram Prasad were owners of the village of Lohangpur in the Partabgarh district of Oudh, which was ancestral property; Binda Sewak and his

(1) (1904) I.L.R., 27 All., 271; L.R., 32 I. A., 113.

family owning a 7 anna 2 pie share, and Ram Prasad and his family an 8 anna 10 pie share. The suits were brought to recover the undivided shares of the respective plaintiffs in the estate on the ground that certain alienations made by Binda Sewak and Ram Prasad in favour of the principal defendant in each suit (the present appellant) were made without legal necessity, and were therefore not binding on the plaintiffs.

Being in want of funds to enable them to prosecute their suits, the plaintiffs had by two formal deeds transferred a moiety of their respective shares of the estate to one Mahabir Prasad (the present respondent) in consideration of his finding the money to pay for the expenses of the suits; and Mahabir was thereupon joined as a co-plaintiff in each suit. One of the agreements (which were similar in terms) is set out in their Lordships' judgement.

The suits were defended by Basant Lal, whose material pleas were that the alienations were made for family necessity and were binding on the plaintiffs; and that the plaintiff Mahabir Prasad had no existing interest in the property in suit. During the progress of the suits in the courts below the defendant Basant Lal came to a compromise in each suit with the original plaintiffs; and Mahabir Prasad was eventually left to carry on the suits as sole plaintiff.

There were two main questions therefore for decision, (*a*) whether Mahabir Prasad had sufficient interest in the property to enable him to maintain the suit, and (*b*) whether the alienations sought to be set aside were or were not binding on the plaintiffs.

Of these the first question was not much discussed by the lower courts, the Subordinate Judge in the first suit merely holding on an issue raised that Mahabir had an existing right, and, after dismissing the suit on the second question, (holding that the alienations were binding) saying:—"The suit however cannot fail altogether as plaintiff No. 3 (Mahabir Prasad) has acquired an interest in half the property," and the Judicial Commissioner's Court agreeing that Mahabir Prasad was by the agreement "admitted as a partner to the extent of one half of the property."

Both suits were eventually disposed of on the second question by the Court of the Judicial Commissioner (Mr. *E. Chamier*,

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Judicial Commissioner, and Mr. *T. C. Piggott*, 2nd Additional Judicial Commissioner) in favour of the present respondent (1) on the authority of a decision of a Full Bench in the case of *Chandradeo Singh* v. *Mata Prasad* (2).

On these appeals—

De Gruyther, *K.C.*, and *B. Dube* for the appellant contended that the alienations were binding on the plaintiffs. In the absence of any allegation that the debts, to satisfy which the alienations had been made, were incurred for immoral purposes, the alienations, as having been made by the heads of the joint families, were binding upon the other members of the families. The burden of proof that they were not binding was in any case on the plaintiffs, and they had failed to discharge it. The manager of a joint Hindu family had certain limited powers of alienation, and where the joint family consisted of a father and his sons, the father had all those powers, and he also possessed the power to alienate the joint ancestral property for his antecedent debts, and the sons were liable unless those debts were tainted with immorality. Reference was made to *Girdharee Lall* v. *Kantoo Lall* (3): *Suraj Bunsi Koer* v. *Sheo Proshad Singh* (4): *Nanomi Babuasin* v. *Modun Mohun* (5): *Bhagbut Pershad Singh* v. *Girja Koer* (6): *Mahabir Pershad* v. *Moheswar Nath Sahai* (7): and *Chandradeo Singh* v. *Mata Prasad* (2).

But it was contended that the respondent Mahabir Prasad was not entitled to carry on the suits, as he had, on the true construction of the agreements with the original plaintiffs, no title or interest to enable him to sue, especially after the withdrawal of the other plaintiffs as the result of compromising the suits. The suits were a mere gambling in litigation. The transferors were out of possession of the property, and the transferee acquired no title under the deeds. The case of *Achal Ram* v. *Kazim Husain Khan* (8) was referred to and distinguished.

(1) (1911) See *Mahabir Prasad* v. *Basant Singh*, 14 Oudh Cases, 299.

(2) (1903) I.L.R., 31 All., 176.

(3) (1874) 14 B. L. R., 187 (196): L. R., 1 I. A., 321 (330).

(4) (1879) I. L. R., 5 Calc., 148: L. R., 6 I. A., 88.

(5) (1885) I. L. R., 13 Calc., 21 (35); L. R., 13 I. A., 1 (17).

(6) (1888) I. L. R., 15 Calc., 717: L. R., 15 I. A., 99.

(7) (1889) I. L. R., 17 Calc., 584; L. R., 17 I. A., 11.

(8) (1904) I. L. R., 27 All., 271; L. R., 32 I. A., 113.

G. R. Lowndes for the respondent Mahabir Prasad contended that he had acquired a title under the agreements with the original plaintiffs which enabled him to maintain the suit. He was under these agreements a co-sharer with the original plaintiffs in the property. Both the Courts in India had decided that on the construction of the deed Mahabir Prasad had an existing right. In the present case, as in the case of *Achal Ram* v. *Kazim Husain Khan* (1), the agreements operated as a "present transfer" to the respondent Mahabir Prasad of the interest of the original plaintiffs. As to the alienations, it was contended that they were not within the competence of the alienors and were not binding on the original plaintiffs, nor on the respondent their transferee. They were not made for legal necessity nor required for the discharge of antecedent debts of the alienors. The decision of the majority of the Full Bench in the case of *Chandradeo Singh* v. *Mata Prasad* (2), on which the Judicial Commissioner's Court had relied, was correct.

Counsel for the appellant were not called upon to reply.

1913, *March 14th*:—The judgement of their Lordships was delivered by Lord ATKINSON :—

These are three consolidated appeals from three decrees of the Court of the Judicial Commissioner of Oudh, the first dated the 19th of March, 1909, and the other two the 29th of March, 1911.

By the first of these, certain decrees of the Subordinate Judge of Partabgarh, dated the 22nd of July, 1908, were in part affirmed and in part reversed, and by the two latter a judgement and decree of the District Judge of Rae Bareli, dated the 5th of February, 1910, was also in part affirmed and in part reversed.

By this decree of the 5th of February, 1910, a previous decree of the same Subordinate Judge, dated the 3rd of August, 1909, was in part affirmed and in part reversed.

The facts out of which all this litigation has arisen are shortly as follows :—

A certain estate in five villages in the Partabgarh district was owned by two joint Hindu families, the respective heads of which were two brothers Binda Sewak and Ram Prasad, the share of the

(1) (1904) I. L. R., 27 All., 271 : L. R., 32 I. A., 113.

(2) (1909) I. L. R., 31 All., 176.

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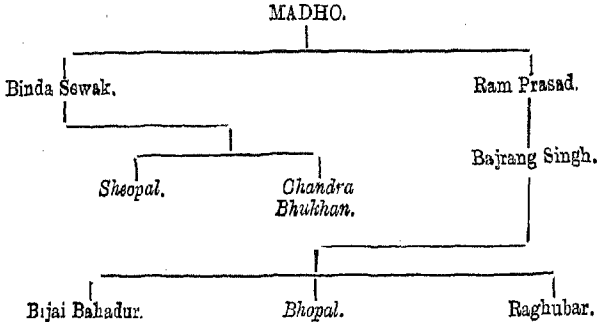
said Binda Sewak's branch being 7 annas 2 pies and that of Ram Prasad's branch 8 annas 10 pies.

A genealogical table set out in the respondent's case, the accuracy of which is not disputed, shows of what members these two families were composed:—



The persons whose names are printed in italics are plaintiffs in the two suits, numbered 548 and 549 of 1907, in which the decrees appealed from were respectively made, namely, Sheopal Singh and Chandra Bhukhan Singh in the first, and Bhopal Singh in the second. In each of these suits one Mahabir Prasad, not a member of either family, but claiming an interest in portions of the joint family property under certain agreements, was joined as a plaintiff.

By two deeds, dated respectively the 2nd of January, 1900, and 3rd of October, 1901, Binda Sewak purported to sell to Basant Singh (the appellant) his share of the joint family property.

Thereupon Ram Prasad, as co-sharer in the family estate, instituted two pre-emption suits in respect of these two sales, and obtained decrees therein. He subsequently, by deeds, dated the 4th of June, 1903, and 3rd of August, 1903, respectively, purported to sell and convey to the same Basant Singh (the appellant) the share of the property the right to which he had thus acquired by pre-emption, together with all but a 6 anna share of his own share of the family property. In addition he, by deed dated the 4th of February, 1907, mortgaged this latter 6 anna share to the same Basant Singh to secure a sum of Rs. 12,000. The mortgage was a possessory mortgage for a period of 25 years. Sheopal Singh, Chandra Bhukhan Singh and Bhopal Singh determined to impeach all these dealings with the joint family properties as

being, on several grounds, void according to Hindu law, but they had no money to meet the cost of litigation.

Two agreements, both dated the 25th of April, 1907, were accordingly entered into between them and Mahabir Prasad, the one by Sheopal Singh and Chandra Bhukhan Singh jointly and the other by Bhopal Singh. They are practically identical in terms. They provided that Mahabir Prasad should in each case finance the contemplated litigation on certain terms to be presently considered in detail.

Two actions were accordingly instituted in the court of the Subordinate Judge of Partabgarh, the first on the 10th of August, 1907, in which Sheopal Singh, Bhukhan Singh and Mahabir Prasad were plaintiffs, and Basant Singh, Binda Sewak Singh and Ram Prasad defendants, praying for "a decree for proprietary and actual possession of 4 annas 9 pies $6\frac{2}{3}$ karants under-proprietary share" in five villages therein named and for Rs. 1,704-14-$9\frac{3}{3}\frac{3}{6}$ mesne profits. In other words, it was an action of ejectment and for recovery of mesne rates.

In the second suit Bhopal Singh and Mahabir Prasad were plaintiffs, and Ram Prasad and his grandsons Bijai Bahadur Singh and Raghubar Singh defendants. The relief claimed was similar, namely, to recover possession of one-sixth of the property conveyed away by Ram Prasad by the three deeds already mentioned.

In both suits a plea was filed to the effect that Mahabir Prasad was not entitled to recover possession. That point was thus distinctly raised. Both suits were contested, and both heard together.

The principal defendant in the first suit, by deed, dated the 22nd of April, 1908, compromised with the two principal plaintiffs in that suit, namely, Sheopal Singh and Chandra Bhukhan. The deed provided, amongst other things, that the claim of these plaintiffs to recover the possession of the lands mentioned should be dismissed, and their claim for mesne profits rejected. This deed was filed in court, and on an application made under section 375 of the Code of Civil Procedure, the suit was dismissed as against these plaintiffs. A similar compromise was entered into in the second suit with Bhopal Singh, and that suit was similarly

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dismissed as against him. Mahabir Prasad thus became the sole plaintiff in both suits. His claim to recover the possession of the shares of the property mentioned in them respectively thus rests entirely upon the agreements he so entered into with these plaintiffs. Even if all the impeached deeds were absolutely void, he would not be entitled to the relief he claims unless these agreements conferred upon him a right to recover possession of the undivided shares of these villages of which he seeks to recover the possession. The agreements thus become the foundation of his title. Until their true construction and the nature of the rights they confer have been determined, it is irrelevant to consider the question of the validity or invalidity of the deeds. The other is the preliminary question, and it has not only been raised, but actually ruled upon by the Subordinate Judge in his judgement delivered upon the 22nd of July, 1908. In the last paragraph but one of this he, when dealing with the seventh issue, said:—"The suit, however, cannot fail altogether, as was contended by defendant 1. Plaintiff 3 has acquired an interest as to half the property." This seventh issue ran thus:—"To what relief, if any, are the plaintiffs entitled?" Owing to the compromise, that issue came to mean, to what relief is the third plaintiff, Mahabir Prasad, entitled? And the last of the reasons stated in the apppellant's case lodged in these appeals is that the re pondent, Mahabir Prasad, is "not entitled to possession of the property in suit or to any other relief." It may well be that this question, though raised, was not much discussed, or not at all discussed on the hearing of the appeals before the court of the Judicial Commissioner, but since the point arises on the very face of the documents on which the plaintiff's case is founded, their Lordships think they are bound to decide it. It would be quite impossible for them to advise His Majesty to grant to a litigant relief to which, they were of opinion he was not entitled, simply because those concerned for the parties in the cause abstained from discussing in the court from which the appeal to His Majesty had been taken a vital point plainly appearing on the very face of his written proofs, and plainly raised, as this point has been, in this case.

As the two agreements are practically identical in terms, it will be sufficient to consider one of them.

It is elementary law that a plaintiff in an action of ejectment must recover by the strength of his own title, not the weakness of his adversary's.

What may be the rights or interests, if any, which the plaintiff may have under these agreements in the subject-matter of the suit are irrelevant considerations if he has not a right to the possession he seeks to recover.

The primary question for decision, therefore, is, did the agreement in the first action confer upon Mahabir Prasad at the time that action was instituted a then present right to that possession? There is no suggestion that if he had not the right then he has since acquired it.

The provisions of the agreement setting forth the conditions upon which it was entered into, relevant on this point, run as follows:—

"1. That in the share of each declarant amounting to 2 annas 4 pies and 13½ karants Mahabir Prasad *will be a co-sharer of one-half share*, and the remaining one-half share will belong to us, the declarants, as follows:—

Sheopal Singh .. 2 annas 4 pies 13½rd karant share.

Chandra Bhukhan Singh .. 2 „ 4 „ 13½rd „ „

"2. We, the declarants, and Mahabir Prasad, will be bound by the following conditions:—

(a) That Mahabir Prasad will bear the entire expenses in connection with the suit from the original Court to the Court of Appeal from his own pocket in the way he pleases, and if the opposite party prefer any appeal, then Mahabir Prasad will have to defend the appeal also with his own costs.

(b) That in case *of success Mahabir Prasad will be entitled to proprietary possession of the share entered in* paragraph 1 of this document or one-half of the share which may be decreed, and it will be at the pleasure of Mahabir Prasad either to keep his share joint or to have it partitioned. But during the period of jointness he will have all rights of making collections and management of the *zamindari* share decreed.

(c) That Mahabir Prasad will remain a co-sharer and proprietor like ourselves in all the *sir* and *khudkasht* lands and all zamindari rights relating to the zamindari share like ourselves, and we will have no right to keep separate possession over any *sir* and *khudkasht* land, nor will we raise any plea as to exproprietary right."

In the view of their Lordships these provisions did not confer upon Mahabir Prasad a then present right to the possession of any share in the property the subject-matter of the suit. That right would arise, if at all, only when success in the contemplated

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litigation had been achieved. Success has not been achieved. By the agreement it was contracted that up to that time, at all events, he, Mahabir Prasad, should merely be a partner, or co-owner with his co-plaintiffs in a certain undivided fraction of the property mentioned in the first of its paragraphs. There was no present grant or assignment to him of any separate share or fraction of the property divided or undivided. At best the contract only amounted to this, that in a certain future event he should become entitled to the proprietary possession of a certain undivided fraction of it, and then have the right to have that fraction partitioned.

The case of *Lal Achal Ram* v. *Raja Kazim Husain Khan* (1) is wholly different from the present. There the sole owner of certain lands, who had already sold one-half of them, executed a deed of sale in which it was set forth that "he has sold half the estate to the Raja for a lakh and a half of rupees." He acknowledged the receipt of one lakh, the balance was to be paid on the termination of certain litigation, which the Raja was to conduct at his own expense. The statement of the amount of the consideration was no doubt exaggerated. But the vendor never impeached his deed as not being a valid transfer of the property. On the contrary, he had more than once affirmed it, urged the Raja to take proceedings founded upon it, and continued to receive payments due to himself under it. The terms of the instrument are not set out at length in the report of the case, but Lord Macnaghten in delivering the judgement of the Board, after dealing with all the facts and quoting from the deed the passage already mentioned, says, at page 121 of the report (2):—"Their Lordships agree with the judgement of the Court of the Judicial Commissioner that the transaction was a present transfer by Ardawan (the sole owner) of one moiety of his interest in the estate giving a good title to Raja on which it was competent for him to sue." The case cannot be relied upon as a guide to the true construction of the agreements in the present case.

On that construction their Lordships are clearly of opinion that neither agreement by its terms confers upon the respondent Mahabir Prasad any present right to recover the possession of

(1) (1905) I. L. R., 27 All., 271; L. R., 32 I. A., 113.

(2) I. L. R., 27 All., 290.

the share of the property mentioned in it which he claims to recover. They accordingly think that these appeals should be allowed, that the three judgements and decrees of the Court of the Judicial Commissioner, dated the 19th of March, 1909, and the 29th of March, 1911, respectively, should be set aside, that the two judgements and decrees of the lower Courts, namely, that dated the 3rd of August, 1909, of the Subordinate Judge, and that of the District Judge of Rae Bareli, dated the 5th of February, 1910, should also be set aside, and that both the suits should be dismissed with costs, and they will humbly advise His Majesty accordingly. The respondent must pay the costs of these consolidated appeals.

Appeals allowed.

Solicitors for the appellants :—*Barrow, Rogers and Nevill.*

Solicitors for the respondents :—*Watkins and Hunter.*

J. V. W.

MOHAN LALJI AND ANOTHER (PLAINTIFFS) *v.* GORDHAN LALJI MAHARAJ AND OTHERS (DEFENDANTS).

[On appeal from the High Court at Allahabad.]

P. C.* 1913 *February*, 11. *March*, 17.

Hindu Law—Endowment—Right of succession to sebaitship of temple belonging to Ballavacharya Gossains—Evidence of dedication—Claim of persons incompetent to be sebaits (as being Bhats) of Ballav temple disallowed as defeating the purpose for which the founder established the worship—Title—Proof of independent title to succession as sebait.

In a suit for possession and the right of sebaitship of a temple belonging to the Ballavacharya Gossains founded by one Muttuji, the maternal grandfather of the plaintiffs (appellants) the defendant (respondent) contended that the ordinary Hindu law was not applicable as alleged by the plaintiffs, and that daughter's sons were excluded by custom from succession.

Held that, apart from positive testimony on the point, the performance of the worship of the idol in accordance with the rites of the sect for whose benefit it was held, might be treated as good evidence of dedication, and the ordinary rule of Hindu law relating to the descent of private property was not applicable.

Held also that the rule that the heirs of the founder succeed to the sebaitship laid down in *Gossamee Sree Greedharreejee* v. *Rumanlalljee Gossamee* (1) was, as there implied, subject to the condition that the devolution in the ordinary line of descent is not inconsistent with or opposed to the purpose the founder had in view in establishing the worship. In the present case the appellants being Bhats, and not belonging to the Gossain *kul* were not competent to be sebaits of a Ballav temple where the rites were performed according to the Ballav

* *Present* :—Lord ATKINSON, Lord MOULTON, Sir JOHN EDGE and Mr. AMEER ALI.

(1) (1889) I. L. R., 17 Calc., 3 ; L. R., 16 I. A., 137.