APPELLATE CIVIL.

Before Mr. Justice Ashworth and Mr. Justice King.

MADAN LAL AND OTHERS (PLAINTIFFS) *v.* GAJENDRAPAL SINGH (DEFENDANT).* 1929 *January*, 3.

Civil Procedure Code, order XLI, rule 33—Whether appellate court can pass decree against a person not party to the appeal—Hindu law—Alienation by manager—Right of transferee from coparceners to question the alienation.

Order XLI, rule 33, of the Code of Civil Procedure does not authorize the passing of a decree against a person who is not a party to the appeal, though it allows a decree in favour of a plaintiff who has not appealed.

A transferee of any property or interest in property from a coparcenary body acquires along with that property or interest the right of the coparcenary body to call in question a previous alienation made by the manager of the family, otherwise than for legal necessity, for the purpose of protecting or defining the property or interest acquired. Hence, where a manager executed a mortgage without legal necessity, and subsequently the coparceners executed a second mortgage in which no mention was made of the first, and the second mortgagees obtained a decree for sale on their mortgage and at execution sale purchased the property subject to the first mortgage, it was *held* that the second mortgagees were entitled to impugn the validity of the first mortgage, it being necessary to do so in order to define their interest; they could also claim to avoid as being by their purchase the successors in interest to the coparceners of the right to avoid.

Rukia v. *Mewa Lal* (1), doubted. *Nannu Prasad* v. *Nazim Husain* (2), *Muhammad Muzamil-ullah Khan* v. *Mithu Lal* (3), *Jagesar Pande* v. *Deo Dat Pande* (4), *Sarju Prasad Rao* v. *Mangal Singh* (5), *Raj Ballaw* v. *Dalip Narain Singh* (6), *Subba Gounden* v. *Krishnamachari* (7).

* Second Appeal No. 195 of 1926, from a decree of R. L. Yorke, District Judge of Bulandshahr, dated the 16th of December, 1925, reversing a decree of Kashi Nath, Subordinate Judge of Bulandshahr, dated the 19th of September, 1924.

(1) (1928) I. L. R., 51 All., 63. (2) (1927) I. L. R., 50 All., 517.
(3) (1911) I. L. R., 33 All., 783. (4) (1923) I. L. R., 45 All., 654.
(5) (1925) I. L. R., 47 All., 490. (6) (1926) A. I. R., (All.), 718.
(7) (1921) I. L. R., 45 Mad., 449.

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Nasir-uddin v. *Ahmad Husain* (1), referred to. *Durga Prasad* v. *Bhajan* (2), distinguished.

THE facts of the case are fully set forth in the judgement of the Court.

Maulvi *Iqbal Ahmad* (with him Munshi *Jang Bahadur Lal* and Munshi *Shiva Prasad Sinha*), for the appellants.

Munshi *Shambhu Nath Seth* (with him Babu *Peary Lal Banerji* and Pandit *Uma Shankar Bajpai*), for the respondent.

ASHWORTH and KING, JJ. :—This appeal is by the plaintiffs. It arises out of a suit for sale of property mortgaged under a mortgage-deed dated the 3rd of May, 1912, executed by one Ganeshi Lal, defendant No. 1, in favour of Paras Ram father of the plaintiffs appellants for Rs. 900. There are three sets of defendants, namely Ganeshi Lal defendant No. 1, first party; his sons, defendants Nos. 2 to 5, second party; and defendants Nos. 6 to 13, subsequent transferees of the mortgaged property, third party. The respondent Gajendrapal Singh is one of the subsequent transferees. He was the only defendant to contest the suit. He did so on the ground that the mortgage by Ganeshi Lal in favour of the plaintiffs was invalid for want of consideration and also of legal necessity. The trial court rejected this defence and decreed the suit in favour of the plaintiffs appellants. Gajendrapal Singh respondent appealed. The District Judge of Bulandshahr, came to a finding that the actual consideration paid for the mortgage was Rs. 550 but that even for this sum there was no legal necessity. Accordingly he allowed the appeal and set aside the decree of the trial court. He set aside that decree not only as against Gajendrapal Singh the appellant but as against all the defendants, that is to say as against the rest of the defendants who had not contested the suit.

(1) (1926) 25 A. L. J., 20. (2) (1919) I. L. R., 42 All., 50.

The plaintiffs, i.e. the first mortgagees, have filed this second appeal to the High Court, asking for the restoration of the trial court's decree as against all the defendants. But they have impleaded only Gajendrapal Singh out of the defendants. This respondent has raised, as a preliminary objection to the appeal, the contention that this is not permissible. The decree of the lower appellate court is a decree against all the transferees. Indeed a decree in favour of the plaintiffs must inevitably be a decree against all or none of the co-transferees.

In reply to this objection counsel for the appellants invokes order XLI, rule 33, which enacts that an appellate court shall have power to pass any decree which ought to have been passed, and that this power may be exercised "in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection." Now it is obvious that this provision will not assist the appellants unless it is construed to mean that the appellate court can pass a decree against a person who has not been made a respondent. On behalf of the respondent it is contended that the word "parties" in the rule must be construed to mean "parties to the appeal" and that no decree can be passed either for or against a person who although a party to the suit is not a party to the appeal. There is, no doubt, the authority of *Rukia* v. *Mewa Lal* (1), recently decided by a two-Judge Bench of this Court, for holding that the word "parties" in order XLI, rule 33, "was not intended to connote persons other than those who had been arrayed as appellants or respondents in the appeal." If it were necessary to hold thus, for the disposal of the present objection, we should have much hesitation in following this decision, or holding that it was rightly decided. The rule, in our opinion, clearly allows a decree in favour of a plaintiff who has not appealed.

(1) (1928) I. L. R., 51 All., 68.

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Otherwise we should have found in the rule in the place of the words "all or any of the respondents or parties" the words "all or any of the appellants or respondents". Order XLI, rule 4, permits a decree in favour of a plaintiff who has not appealed against a respondent where another plaintiff has appealed on a ground common to both plaintiffs, and there can be no reason for not allowing a decree in favour of a plaintiff who has not appealed when the decree is one not asked for but one that ought to have been passed. But the question that arises is whether a decree can be passed *against* a person who is no party to the appeal. Rule 33 states that the appellate court shall have power to pass any decree which ought to have been passed, and this is wide enough to allow a decree against a party to the suit who is not a party to the appeal. But the rule, by using the expression "in favour of all or any of the respondents or parties", seems to imply that the rule shall not be used to the prejudice of a person who is not a party to the appeal. This is consonant with equity. A person who has been heard in the appeal cannot object to a decree in favour of a person, merely because that person is not a party to the appeal, whereas it would appear inequitable to pass a decree against a party who has no chance of being heard in the appeal. It has been argued for the appellants that the lower appellate court's decree was only in favour of Gajendrapal Singh, and consequently the present appellants could only appeal against him. This is to repeat a fallacy pointed out in a recent decision of a two-Judge Bench of this Court on which one of us sat, namely *Nannu Prasad* v. *Nazim Husain* (1). It was there pointed out that there can be only one decree in a suit existing at any one time, and that a trial court's decree after an appeal was replaced by the decree of the appellate court, whether the appellate court's judgement resulted in a totally different decree

(1) (1927) I. L. R., 50 All., 517.

or only in a decree having the effect of modifying the trial court's decree. In the present case the effect of the lower appellate court's judgement was to bring into existence a decree in favour of all the transferees and not only in favour of Gajendrapal Singh. It was, therefore, necessary for the appellants to make all the transferees respondents in order to get set aside the decree of the lower appellate court. Not having done so, they cannot be allowed to ask us to pass a decree against not only Gajendrapal Singh but also against the other transferees.

This objection then appears to us to be fatal to this appeal as brought. But counsel for the appellants has asked us to allow him to add the names of the other transferees defendants as respondents if we hold that it is necessary to do so. The question of the propriety of our doing so will not arise if we hold that the appeal should be dismissed on its merits, and consequently we proceed to consider the grounds taken in the memorandum of the appeal. Four grounds are set out. The fourth, maintaining that the sons of Ganeshi Lal were under a pious obligation to pay the debt in dispute, has not been pressed and clearly had no chance of success on the findings of fact of the lower appellate court. The first plea, namely that the District Judge was not entitled to reverse the trial court's decree as against those defendants who did not appeal to him, is clearly unsustainable in view of the provision of order XLI, rule 4, of the Civil Procedure Code which authorizes an appellate court, in a case like this, to reverse, in favour of all the defendants to a suit, a decree of the trial court against them. The two remaining pleas respectively are (1) that it was not open to the transferees to impugn the mortgage in suit, on the ground of its being executed by a manager of the family otherwise than for legal necessity, the contention being that the right of avoidance is restricted to

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the coparceners and cannot be passed on to their transferees, and (2) that in view of the fact that in a previous suit, when the respondent Gajendrapal Singh and his cotransferees were suing on a second mortgage, they had entered into a compromise with the appellants as first mortgagees that the property should be sold in pursuance of the second mortgage but subject to the first mortgage, it was not open to Gajendrapal Singh, etc. to impugn the validity of the first mortgage. Although these pleas are taken in the memorandum of appeal in the inverse order, we find it convenient to discuss them in this order, since for the decision of the latter plea we shall require to invoke certain legal conclusions arrived at in our discussion of the former.

The argument is that the right of coparceners (in this case the sons) to avoid a transfer made by the managing member of the family (in this case the father) on the ground that it was made without legal necessity is a right restricted to the coparceners, which cannot be assigned by them to other persons and which does not pass along with the interest of the coparceners when that interest passes to strangers either by voluntary sale or by a sale by the court in execution of a decree. There was a certain amount of argument as to whether a transfer by a manager otherwise than for legal necessity was void or merely voidable, but it was agreed that it was now to be taken as settled law that it is only voidable. There is such a weight of authority in favour of this that it does not appear to us to be necessary to cite any decision. The question, however, is whether such a transfer is liable to be avoided merely by the sons or coparceners, or whether it may be avoided by transferees of the interest in the property of the coparceners. A Full Bench of this Court in *Muhammad Muzamil-ullah Khan* v. *Mithu Lal* (1), in 1911, decided with no uncertain voice

(1) (1911) I. L. R., 33 All, 783.

in favour of the transfer being voidable by transferees of the coparcener's interest. In that case the head of a joint Hindu family had mortgaged property belonging to the joint family, but neither for legal necessity nor to pay an antecedent debt. Subsequently the mortgagor sold the property to a third person who remained in possession for more than 12 years. RICHARDS C.J., held that the transferee of the property by the subsequent transfer having acquired title against the coparcenary body by 12 years' adverse possession must be deemed a transferee of the coparcenary body, and held that such transferee could avoid the mortgage. BANERJI, J., held that the fact of the coparceners having allowed the transferee under the subsequent transfer to remain in possession raised a presumption that the sale to him was for family necessity and with the assent of the other members. CHAMIER, J., held that although their Lordships of the Privy Council, in the case of *Balgobind* v. *Narain Lal* (1), had by their language suggested that the mortgage was voidable and not absolutely void, yet until there was a definite pronouncement on the point by the Privy Council he was bound by the Full Bench decision of this Court in *Chandradeo Singh* v. *Mata Prasad* (2), to hold that the transfer was absolutely void and not merely voidable. Consequently he held that the question did not arise whether, if it was voidable, it was voidable only by the coparceners themselves and not by their transferees. He added, however, as an *obiter dictum* that assuming that a transferee of the coparcenary body could question an assignment by the manager, a transferee in possession could only do so "if a trial of its validity was necessary for his protection against the claim of another person". The context clearly showed that by the words "for his protection" he meant "for the protection of his particular possessory interest." The

(1) (1893) I. L. R., 15 All., 339. (2) (1909) I. L. R., 31 All., 176.

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condition laid down in this *obiter dictum* appears to us sound but not to go far enough. We think that the transferee can use the power of avoidance not merely for the protection of the particular right or interest transferred to him but also for the definition of that interest, when there can exist a doubt as to the quantum or nature of the interest acquired by him.

It is clear then that the majority of the Full Bench in that case held that transfer by a manager otherwise than for legal necessity could be avoided by the transferees of the coparceners, and it was held by one Judge, namely RICHARDS, C.J., that it was voidable even by persons who had acquired the title of the coparceners merely by adverse possession. The case of *Jagesar Pande* v. *Deo Dat Pande* (1) has been cited, but does not appear to us relevant. In that case it was held that where a certain person had, as manager of the family consisting of himself and his son, made a deed of gift in favour of his widow, the reversioners could not call in question the deed of gift, as the only persons who could do so would be the coparceners, and the reversioners had not yet acquired the coparcenary interest. The decision has probably been cited because it contains the passage "there is ample authority for the view that an alienation by the manager of a joint Hindu family is not absolutely void. It is voidable at the instance of the persons whose interests are affected by it, namely the coparceners in the property." But the context left it open whether by the expression "the coparceners in the property" the Judges included or excluded the transferees of the coparceners. It was immaterial to decide this question for the purposes of that case. The next case cited is *Sarju Prasad Rao* v. *Mangal Singh* (2). It was there held that a next reversioner could challenge a

(1) (1929) I. L. R., 45 All., 654. (2) (1925) I. L. R., 47 All., 490.

mortgage executed by a father as manager of a joint Hindu family consisting of himself and his son and could challenge a decree obtained through fraud or collusion against the mortgagor's widow. The use of the term in the judgement "next reversioner" seems to suggest that the widow was alive. If so, this decision was in direct conflict with *Jagesar Pande* v. *Deo Dat Pande* just noticed. This decision is at any rate authority for holding that the reversioners who come into property on the death of a widow are entitled to challenge a transfer made by the manager of the family whose rights they inherit. Reliance is placed on the Full Bench decision of *Muhammad Muzamil-Ullah Khan* v. *Mithu Lal* (1) referred to above.

The last-mentioned Bench decision was again followed more recently by a two-Judge Bench of this Court on which one of us sat, namely *Raj Ballaw* v. *Dalip Narain Singh* (2), where it was held that a transferee of the whole interest in joint family property, by an execution sale under a money decree, is entitled to contest the validity of a transfer made by one of the members of the family on the ground of want of legal necessity. In *Subba Goundan* v. *Krishnamachari* (3) it was held that a sale by a father or managing member of a joint family for alleged necessity will be good till avoided, as it is open to the other coparceners to affirm the transaction. This decision is only of importance in the present connection, owing to the fact that it states that the coparceners may affirm the transaction, which we take to mean that an affirmation by the coparceners raises an unrebuttable presumption that the alienation was for necessity, and we agree with the proposition in this sense.

There remains the only decision by the Privy Council bearing on the point which we can discover. This is the case of *Nasir-Uddin* v. *Ahmad Husain* (4). In that

(1) (1911) I. L. R., 33 A.I., 783. (2) (1926) A. I. R., (All.), 718.
(3) (1921) I. L. R., 45 Mad., 449. (4) (1926) 25 A. L. J., 20.

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case a Hindu father as head of a joint family contracted to sell certain property to the plaintiffs but subsequently sold it to one set of the defendants in breach of his earlier contract. A suit for specific performance was brought by the plaintiffs against the father and the subsequent purchasers. The subsequent purchasers pleaded that the contract in favour of the plaintiffs was an improvident one, that is to say, was a contract to sell for an insufficient sum. It was accepted that the coparceners could have avoided the contract on this ground. A two-Judge Bench of the Allahabad High Court had held that the subsequent purchasers, as being only transferees of the coparceners, could not call in question the validity of the contract. Their Lordships stated that they "are not satisfied that the Judges in the appellate court were right upon this; but they did not feel it necessary to pronounce upon this point". They decided the case on the ground that the contract was for sale at a sufficient price. We cannot but regard the remarks by their Lordships in this case as at least showing that at the time they were not disposed to accept the proposition that a transferee of coparceners could not avoid a sale by the manager otherwise than for legal necessity. As the point was not determined, it is no authority for holding the contrary, but it does justify the argument that at any rate in that case their Lordships, though asked to accept the view that the transferees could not avoid, refused to do so.

There remains a decision of a two-Judge Bench of this Court which has been strongly relied upon by the appellants in support of their contention that the transferees of the coparceners cannot exercise the right of avoidance. It is *Durga Prasad* v. *Bhajan* (1), decided by PRAMADA CHARAN BANERJI, J., and WALLACH, J.

(1) (1919) I. L. R., 42 All., 50.

An examination, however, of this decision shows that it in no way helps the appellants and has no bearing on the present question. In that case the father of a joint Hindu family with two sons mortgaged some of the joint family property. Subsequently a later managing member of the family, as it existed at a later date, sold the mortgaged property, and the purchasers of it brought a suit for redemption of the mortgage. The suit was resisted by the mortgagee on the ground that the later sale of the property was not for legal necessity, and it was held that this plea was not open to the mortgagee. Now it is obvious that what the mortgagee acquired at the time of the mortgage was only the rights of a mortgagee, and that he could not thereby acquire the interest of the coparceners to avoid a subsequent sale. The mortgagee was therefore never the successor in interest of the coparceners in respect of the right to avoid. The decision would appear to be correct and consistent with the view expressed by CHAMIER, J., in the *obiter dictum* in the case of *Muhammad Muzamil-Ullah Khan*, discussed above. For the mortgagee was attempting to use avoidance of the later transfer for the purpose of resisting redemption of his mortgage and not merely for the protection or definition of his mortgage. At any rate this decision is no authority for anything more than that it is not everybody whose interest it might be to get a transfer effected by a manager declared invalid who can challenge that transfer, but only persons who have acquired property from the coparceners carrying with it a right of avoidance.

It is, therefore, clear that there is a consensus of authority that a transferee of the interest of the coparceners may call in question a transfer made by the manager even after the coparceners themselves have ceased to have any interest in the property. Apart from this, there is

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a consideration which appears to us decisive for holding that this is so. If the transferees of the coparceners could not exercise the powers of the coparceners to avoid a transfer, then this fact would operate adversely to the coparceners in disposing of their interest in the property. This being so, the improper sale by a manager otherwise than for legal necessity would operate to the disadvantage of the coparceners unless they previous to the alienation of their interest, took steps to avoid the transfer by the manager. It does not appear equitable that the unlawful action of the manager should put the coparceners to this trouble and expense. We take it as settled law that the coparceners can avoid an improper transfer by the manager otherwise than by bringing a suit. They can merely refuse to be bound by it. The only ground that appears to us to exist for refusing to the transferees of the coparceners the right to avoid is that in cases where the coparceners sell property previously mortgaged by the manager or subject to that mortgage it would seem inequitable that the transferees, having paid a smaller price for the property by reason of the existence of the mortgage, should be able to deny the validity of the mortgage. This result, however, is avoided by holding, as suggested above, that a transferee from a coparcenary body can only invoke a power to avoid a previous alienation by a manager when it is necessary for the protection or definition of the property or right acquired by his transfer. In the case of a voluntary transfer by deed the coparceners define the property or right transferred; there is no occasion for further definition; and the transferee is bound by the definition of the coparceners.

We would summarize our view of the law as based on the above decisions on this subject as follows. A transferee of any property or interest in property from a coparcenary body acquires along with that property

or interest the right of the coparcenary body to call in question a previous alienation made by the manager of the family, otherwise than for legal necessity, for the purpose of protecting or defining the property or interest acquired. Certain results follow from this definition. Such transferee cannot call in question a subsequent alienation, since at the time of the acquisition to which the right attaches there was *ex hypothesi* no alienation to avoid. The power cannot be used by a mortgagee to resist a suit for redemption by a subsequent alienee of the equity of redemption, since this would be using it for a purpose beyond protection of the mortgagee's interest. Nor can it be used by the transferee of a mere equity of redemption under a voluntary deed of transfer; for in this case the deed would have sufficiently defined the interest acquired. A purchaser, however, at a court sale in execution of a decree for sale of property subject to a mortgage can use the power to impugn the mortgage unless the validity of the mortgage has been decided by the court as against the mortgagor, i.e. the coparcenary body; because the purchaser purchases at the risk of getting something worse and also on the chance of getting something better than stated as sold in the proclamation of sale; "*caveat emptor, gaudeat emptor.*"

The power of avoidance in the hands of the transferee cannot be greater than that which would have been exercised by the coparcenary body at the moment immediately preceding the transfer. Hence if the coparcenary body at that moment were a father and sons, and the manager the father, the transferee would be bound by the sons' obligation to pay a father's antecedent debt. Hence, again, if the coparceners had affirmed the previous alienation, the transferee would be bound by the unrebuttable presumption that the alienation was for legal necessity.

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Now in this suit the defendant respondent Gajendra-Pal Singh and his co-transferees (defendants) relied on two transfers in their favour. One was the second mortgage executed in their favour by the mortgagors coparceners; and one was the court sale of the property in pursuance of their second mortgage but subject to the appellants' first mortgage. The deed of second mortgage is not before us but we understand that it contained no mention of the first mortgage. If it had, the interest of Gajendrapal Singh, etc., would have been sufficiently defined by that mortgage-deed, and they could not have impugned the validity of the first mortgage. Assuming, however, as we must in the absence of evidence before us, that it did not, the question arises whether as second mortgagees they were entitled to impugn the validity of the first mortgage. On the conclusions reached above they would be. For, by not expressing the second mortgage as being subject to the first, the mortgagors coparceners must either be held to have called in question the first mortgage or at any rate to have made it necessary for the second mortgagees to call it in question in order to define their interest. Their interest as second mortgagees has now merged in their interest as purchasers by court sale (in execution of their decree as second mortgagees) of the property subject to the first mortgage. This being so, it is unnecessary for them to claim to avoid as second mortgagees (possibly they might keep their mortgage alive for this purpose), as they can claim to avoid as successors in interest to the mortgagors coparceners of the right to avoid.

[The judgement then proceeded to consider whether Gajendrapal Singh and others were estopped from challenging the first mortgage by reason of a certain compromise arrived at in a previous suit, and held they were not estopped.]

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Consequently we hold that Gajendrapal Singh, etc., as transferees from from the mortgagors coparceners, are entitled to call the mortgage in suit in question, and on the findings of fact that mortgage must be deemed void. The present appeal is also unmaintainable against Gajendrapal Singh alone, and we see no reason for allowing any other of the defendants to be joined as respondents at this stage. The appeal, therefore, fails and is dismissed with costs.

Before Mr. Justice Sen and Mr. Justice Niamat-ullah.

RAM AUTAR AND OTHERS (DEFENDANTS) *v.* GHULAM DASTGIR AND OTHERS (PLAINTIFFS).*

1929 *January*, 11.

Co-obligees—Heirs of a usufructuary mortgagee—Muhammadan law—Payment to and discharge by one of the heirs —Powers of a de facto *guardian*—A'kar.

Where, upon the death of a usufructuary mortgagee, his estate devolves upon a number of heirs under the Muhammadan law, each of such heirs has a distinct and defined interest in the mortgaged property, and payment to one of the heirs without the concurrence of the rest cannot operate as a valid discharge of the mortgage debt.

Under the Muhammadan law a *de facto* guardian of a minor, (e.g. an elder brother who has taken upon himself the management of the property inherited by himself and his minor brother from their father), has no authority to deal with the minor's interest in immovable property, which is technically described as *a'kar*, and cannot therefore give a valid discharge or release of the minor's interest in the property which had been held by the father as usufructuary mortgagee.

THE facts of the case sufficiently appear from the judgement of the Court.

Munshi *Haribans Sahai*, for the appellants.

Maulvi *S. Majid Ali*, for the respondents.

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* Second Appeal No. 158 of 1926 from a decree of Manmohan Sanyal, Additional Subordinate Judge of Jaunpur, dated the 12th of October, 1925, reversing a decree of J. C. Mallik, Munsif of Jaunpur, dated the 2nd of January, 1925.