Before Sir Shah Muhammad Sulaiman, Acting Chief Justice, and Mr. Justice Banerji.

BALZOR* SINGH (DEFENDANT) *v.* RAGHUNANDAN SINGH (PLAINTIFF) AND MAKUND SARUP (DEFENDANT).* 1931 *June*, 23.

Hindu law—Joint family property—Alienation by father or manager—Exchange with other property—Invalid if no legal necessity or family benefit.

An alienation of joint family property, by exchange with other property, made by the father or manager is liable to be challenged by the other members of the family if it was not executed for legal necessity or for the benefit of the family.

Although in speaking of the powers of the father or manager to alienate the joint family property the ancient Hindu texts do not refer to exchanges or leases, but only to sales, mortgages or gifts, yet the principles governing the powers of alienation have been applied, by decisions of the Privy Council, to transactions other than sales, mortgages or gifts, *e.g.*, to permanent leases, and are similarly applicable to exchanges, which are equally alienations.

Mr. *S. B. L. Gaur*, for the appellant.

Dr. *K. N. Katju* and Mr. *Panna Lal*, for the respondents.

SULAIMAN, A. C. J., and BANERJI, J. :—This is a defendant's appeal arising out of a suit for pre-emption. The defendant was a stranger at the time of the institution of the suit and the plaintiff was a co-sharer. During the pendency of the suit the defendant vendee first obtained a deed of gift and then two deeds of exchange in order to defeat the claim for pre-emption. This gift and these exchanges were obtained from persons who were members of joint Hindu families and all the members had not joined in these transactions. The learned Subordinate Judge has accordingly held that these acquisitions do not confer an indefeasible interest in the mahal on the defendant

* First Appeal No. 451 of 1929, from a decree of Kedar Nath Mehra, Additional Subordinate Judge of Bulandshahr, dated the 29th of June, 1929.

1931

BALZOR SINGH v. RAGHUNANDAN SINGH.

vendee and so do not entitle him to defeat the plaintiff's claim. He has further found that the gift was obviously voidable at the option of the other members of the donor's family and that the exchanges also were liable to be defeated because they were not for the benefit of the family of those persons from whom they had been obtained by the vendee.

The learned advocate for the defendant appellant argues before us that there is nothing in the Hindu law which allows a Hindu son or a minor member of a joint Hindu family to challenge an alienation by way of exchange made by the father or the manager. The argument is that the power of disposal vested in the father is absolute and is only restricted by certain texts which curtail his power. It is pointed out that the ancient Hindu texts do not speak of exchanges but only refer to sales and mortgages or gifts by the father. It is to be conceded that there is no express text which confers absolute authority on the father to transfer the joint family property by way of exchange. The learned advocate for the defendant argues that inasmuch as in transactions of sale, gift or mortgage the property is frittered away, which is not the case when an exchange is made, there ought to be a distinction.

It is not for us now to go back to the old ancient texts behind the authoritative commentaries. As observed by their Lordships of the Privy Council in *Thakoorain Sahiba* v. *Mohun Lall* (1), "To alter the law of succession as established by a uniform course of decisions or even by the *dicta* of received treatises, by some novel interpretations of the vague and often conflicting texts of the Hindu commentators, would be most dangerous, inasmuch as it would unsettle existing titles." There can be no doubt that the principles governing the powers of alienation of a father have been applied to transactions besides gifts, sales and

(1) (1867) 11 Moo. I.A., 386 (409).

mortgages. The same principles have been extended to the case of permanent leases. We may refer to the case decided by their Lordships of the Privy Council in *Palaniappa Chetty* v. *Sreemath Devasikamony Pandara Sannadhi* (1). It has to be conceded that the old texts do not refer to leases, just as they do not expressly refer to exchanges.

In the Benares school of Hindu law the father is no longer the sole owner of the joint estate, but all the members by birth acquire an interest in it. His status is probably that of a manager, though as against his sons he has the advantage of their pious obligation to pay his personal debts. It would therefore follow that in the absence of any express authority there would be no power in the father to alienate joint family property in which other members are also interested and who do not consent. In numerous cases decided by their Lordships of the Privy Council his powers regarding "alienation" have been referred to. An exchange is equally an alienation. We may refer to the case of *Brij Narain* v. *Mangal Prasad* (2) where the result of the authorities was summarised by their Lordships of the Privy Council and the restricted power of the manager in the family property was emphasised. We must therefore hold that a deed of exchange executed by a father or manager is liable to be challenged by the other members of the family if it was not executed for legal necessity or for the benefit of the estate. The transaction would however be binding on the other members if it was of such a nature as a prudent owner in the ordinary management of an estate would make.

The court below has gone into the facts and come to the conclusion that the exchange made by the transferors to the vendee was not for the benefit of the transferors' family. The learned Subordinate Judge

(1) (1917) I.L.R., 40 Mad., 709. (2) (1923) I.L.R., 46 All., 95.

1931

BALZOR SINGH v. RAGHUNANDAN SINGH.

has pointed out that obviously there was no necessity for them to make the transfers. As regards benefit, it is quite clear that the property given away by exchange was situated in the residential village of these transferors and was conveniently situated and was an advantageous property. On the other hand, the property taken by these transferors was situated in another village which was not their ancestral village and was at some distance and less convenient. It is not disputed before us that the values of the two properties were about the same. There was, therefore, no reason why the transferors should give away a share in their ancestral village in lieu of a share in another village. The suggestion that they might possibly have intended to become co-sharers in the other village was not made in the court below and this explanation was not offered by the transferors. As a matter of fact the learned Subordinate Judge was very sceptical about this transaction, and he was inclined to believe the oral evidence produced on behalf of the plaintiff which was to the effect that some cash consideration was secretly received by the transferors. That consideration would go into the pocket of the executants of the deed of exchange and would not necessarily benefit the family or the estate. The vendee was given a chance in the court below to show that the exchanges were of such a nature as would be binding on the other members of the family and that accordingly they were not defeasible. He failed to do this. We agree with the court below that the vendee has not acquired an indefeasible interest in the property taken in exchange and therefore cannot defeat the plaintiff pre-emptor.

The vendee claimed the amount due under a preliminary decree for sale on the basis of a mortgage deed which creates a charge on the property in dispute. The decretal amount was no part of the sale consideration and therefore the plaintiff was not bound to pay

1931

BALZOR SINGH v. RAGHUNANDAN SINGH.

that amount. The learned Subordinate Judge has rightly pointed out that the property will go to the plaintiff subject to the prior encumbrance, if it subsists.

The appeal is accordingly dismissed with costs.

Before Mr. Justice Mukerji and Mr. Justice Allen.

INDRAJIT PRATAP BAHADUR (PLAINTIFF) *v.* SEWAK RAI (DEFENDANT).*

1931
June, 24

Agra Tenancy Act (Local Act III of 1926), sections 132, 138; schedule IV, group A, serial No. 4—Suit for arrears of rent—Rent payable in kind—Crops no longer existing—Whether suit maintainable.

Where rent is payable in kind by division of crops, a suit for the recovery of three years' arrears of rent in the shape of its money equivalent is maintainable, though the crops are no longer present, according to section 132 and schedule IV, group A, serial No. 4, of the Agra Tenancy Act. There is nothing in section 138 of the Act which stands in the way of such a suit. It is not impossible to estimate the value of a crop if the crop itself has ceased to exist. If in a particular case no criteria for the estimate be available, the suit will be dismissed for want of sufficient evidence, but not because such a suit was not maintainable at all.

Mr. *Sankar Saran*, for the appellant.

Mr. *Shiva Prasad Sinha*, for the respondent.

MUKERJI and ALLEN, JJ. :—This is a plaintiff's appeal arising out of a suit for arrears of rent and it raises a point of law which is not covered by any decision of this Court.

It appears that the defendant pays rent in kind and it is usual to divide the produce of the field on the spot in the presence of both the parties. The plaintiff's case was that there was an arrear of three years'

* Second Appeal No. 1007 of 1928, from a decree of Tej Narain Mulla, District Judge of Gorakhpur, dated the 11th of January, 1928, confirming a decree of Udit Narain Singh, Assistant Collector first class of Gorakhpur, dated the 5th of September, 1927.