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defendants have been appropriating such benefit as the *babul* trees and other produce were capable of yielding. We are in agreement with the learned Judge in holding that the defendants' possession of this part of the land was adequate as regards continuity and extent. We have already referred to the evidence which shows that no attempt was ever made on behalf of the plaintiff to take possession of this land and that as any strip of land emerged from water it was taken possession of by some or the other of the defendants. In this view the plaintiff cannot be considered to have been in possession within limitation, and the defendants must be considered to have had adverse possession of the whole of this part of the land in dispute.

The result is that this appeal fails, and is dismissed with costs.

MISCELLANEOUS CIVIL

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

1934
 October, 1
 ISHWAR DAYAL (DEFENDANT) v. ANNA SAHEB AND OTHERS
 (PLAINTIFFS)*

Court fee—Mortgage suit—Prayer for sale subject to an alleged prior mortgage in plaintiff's favour—No relief claimed with respect to the prior mortgage—Ad valorem court fee not payable on prior mortgage but a declaratory court fee payable.

In a suit for sale upon a mortgage the plaintiffs alleged the existence and gave details of another prior mortgage in their favour, and prayed that the mortgaged property be sold subject to the prior mortgage. The plaintiffs claimed no other relief with respect to the prior mortgage, although, no doubt, their object was to have the matter of the prior mortgage settled once for all, as if the defendants did not impugn it they would be barred from challenging it in any subsequent suit: *Held* that the suit should be considered to be one for recovery of money due under the subsequent mortgage, coupled with a declaration in respect of the existence of the prior mortgage, and the plaintiffs were liable to pay a court fee of Rs.10 for the

*Stamp Reference in First Appeal No. 508 of 1930.

declaration, in addition to that payable in respect of the amount claimed on the subsequent mortgage.

The Government Advocate (Mr. *Muhammad Ismail*), for the Crown.

Messrs. *S. N. Gupta* and *Gadadhar Prasad*, for the respondents.

NIAMAT-ULLAH and ALLSOP, JJ.:—This is an office report which raises the question of court fee payable on the plaint and on the memorandum of appeal filed in this Court by the defendant appellant. We refrain from expressing any opinion on the question of court fee payable in appeal, as that matter will be disposed of by the taxing officer and, possibly, by the Taxing Judge. As regards the court fee payable on the plaint the matter has been judicially determined by the lower court and should be disposed of by this Bench.

The suit which has given rise to this appeal was brought by the plaintiffs respondents for enforcement of a mortgage dated 5th July, 1924. The sum claimed under that mortgage was Rs.2,06,091. In paragraph 7 of the plaint it was alleged that besides the mortgage in suit the plaintiffs had a prior charge under a mortgage deed dated 24th June, 1923. The principal sum advanced thereunder is said to be Rs.65,000. In the concluding paragraph of the plaint it is prayed that the mortgaged property be sold subject to the charge arising from the prior mortgage of 24th June, 1923. The plaintiff paid court fee on the sum of Rs.2,06,091, alleged to be due under the puisne mortgage in suit. No separate court fee was paid in respect of the prior mortgage. A question of court fee arose in the lower court, and the learned Subordinate Judge decided that no separate court fee was payable in respect of the prior mortgage. Eventually the plaintiffs' suit was decreed in terms of the relief claimed by them. The defendant appealed to this Court and impugned the entire decree. He also attacks the finding of the lower court in so far as that court held that the plaintiff was

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entitled to have the mortgaged property sold subject to the prior encumbrance under the mortgage deed dated 24th June, 1923, which the defendant had unsuccessfully characterised as invalid on certain grounds, which it is not necessary to mention in detail.

According to the office report, the plaintiff should have paid court fee *ad valorem* not only on the mortgage money under the deed in suit, but also in respect of the mortgage money due under the prior mortgage deed of 24th June, 1923. The office report has been supported before us by the learned Government Advocate, who contends that the plaintiffs are, in effect, seeking a relief not only in respect of the subsequent mortgage but also in respect of the prior mortgage, and should therefore pay separate court fees on the amounts due under both the mortgages. We do not think that this contention is correct. The plaintiffs would have run a great risk if they had sued on the subsequent mortgage without making a mention of the existence of a prior encumbrance in their favour, to avoid a possible plea hereafter that the prior mortgage not having been specifically mentioned in the plaint the sale under the puisne mortgage should be considered to have been made free from the encumbrance under the deed of 24th June, 1923. The plaintiffs, therefore, were advised to specifically refer in their plaint to the prior mortgage and claim the relief of sale of the mortgaged property subject to the prior mortgage, as in fact it is, assuming the prior mortgage is valid. In the plaint itself there is no allegation of anything which might indicate that the validity of the prior mortgage is at all in question, though we have no doubt that the object of the plaintiffs was to have the matter settled once for all and, therefore, they made a prominent mention of the prior mortgage in their plaint, so that, if the defendants did not impugn it, they would be barred in any subsequent proceeding from challenging the validity of the prior mortgage. Beyond alleging the

existence of the prior mortgage and claiming the relief of sale of the mortgaged property in enforcement of the subsequent mortgage subject to the prior encumbrance, the plaintiffs have not claimed any consequential relief. We think that the plaintiffs have claimed the mortgage money due under the puisne mortgage coupled with a declaration that the prior mortgage of 24th June, 1923, is valid and binding on the defendants. In this view, the plaintiffs were not bound to pay court fee *ad valorem* on the amount due under the prior mortgage. Taking paragraph 7 and the last paragraph of the plaint in which relief is claimed, we think that the plaintiffs' suit should be considered to be one for recovery of money due under the subsequent mortgage and a declaration in respect of the prior mortgage. They were, therefore, bound to pay an additional court fee of Rs.10, which they have not paid. There is, therefore, a deficiency in court fee to that extent, which should be paid within a month.

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FULL BENCH

Before Sir Shah Muhammad Sulaiman, Chief Justice, Mr. Justice Thom and Mr. Justice Rachhpal Singh

RAM NATH AND ANOTHER (DEFENDANTS) v. CHIRANJI LAL AND ANOTHER (PLAINTIFFS)*

1934
October, 3

Hindu law—Alienation by father—Non-ancestral family business—“Benefit to the estate”—Wider than compelling necessity or calamity—Extension of ancestral family business—Contract Act (IX of 1872), sections 60, 61—Appropriation of payments—Principle applicable where only one debt, but partly of the nature of a secured debt and partly of the nature of unsecured debt.

The father, in a joint Hindu family consisting of himself and his sons, raised money on a mortgage of the family property, two-thirds of the amount being expressed to be for the purpose

*Second Appeal No. 947 of 1932, from a decree of Bhagwan Das, Additional Subordinate Judge of Muttra, dated the 31st of May, 1932, confirming a decree of Sri Nath, Munsif of Muttra, dated the 20th of August, 1931.