

Agriculturists' Relief Act is to be calculated not on the accumulated amount due under the loan as at the 31st of December, 1929, but upon the principal amount advanced as loan.

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The answer to the second question is that no application in civil revision would lie if the court below has merely decided a case wrongly, but that an application in revision would lie where it has acted with material irregularity in the exercise of its jurisdiction, which it has done in the present case by not applying its mind at all to the mandatory provisions of the law.

FULL BENCH

Before Sir Shah Muhammad Sulaiman, Chief Justice, Mr. Justice Bennet and Mr. Justice Ganga Nath

MAHADEI KUNWAR (PLAINTIFF) v. PADARATH CHAUBE
AND ANOTHER (DEFENDANTS)*

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April, 29

Compromise—Family arrangement—Petition signed by parties in mutation proceedings—"Transfer of property"—Registration, want of—Transfer of Property Act (IV of 1882), sections 5 and 53A—Registration Act (XVI of 1908), sections 17 and 49.

In a contested case of application for mutation of names the applicant and the objector filed a petition signed by both, praying that the applicant's name might be entered in respect of a specified portion of the property and the objector's name in respect of the remainder for her life, and that after the death of the objector the applicant would be the owner of the whole property; there was a further provision that the applicant should discharge certain debts of the deceased owner of the property. This petition of compromise was unregistered. The court, however, acted on it and ordered mutation accordingly. Subsequently the objector filed a suit challenging the compromise on the ground, *inter alia*, that it was not binding for want of registration:

*Second Appeal No. 1259 of 1934, from a decree of R. C. Verma, Additional Civil Judge of Azamgarh, dated the 30th of July, 1934, reversing a decree of Ejaz Husain, City Munsif of Azamgarh, dated the 1st of June, 1933.

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Held, in accordance with the decision of the Full Bench in *Ram Gopal v. Tulshi Ram* (1), that although a family settlement could be arrived at orally without any registered document, yet if the arrangement be reduced to writing then registration is necessary under section 17 of the Registration Act, although the transaction does not amount to a transfer of property. The family arrangement in the present case was therefore invalid for want of registration of the document containing it.

Held, also, that section 53A of the Transfer of Property Act could not be applied to cure the defect of want of registration in such a case. In the usual type of family arrangement, as the one in the present case, there was no question of any property being transferred by one party to the other, or any transfer of ownership which might bring the case within the definition of "exchange" in section 118 of the Transfer of Property Act. The application in the present case did not indicate that either party was conveying any property to the other; it only embodied the agreement between the parties in which the title of each was acknowledged and recognized by the other, and it was prayed that effect be given to such recognition of title. As the family settlement in question could not be regarded as either a transfer of property or even a contract to transfer immovable property, section 53A of the Transfer of Property Act could not be applied to the case. Had that section been applicable to the case, then under the amended section 49 of the Registration Act the unregistered document would have been admissible in evidence, and there would have been no defect.

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

Mr. *Mukhtar Ahmad*, for the respondents.

SULAIMAN, C.J., BENNET and GANGA NATH, JJ.:—This is a plaintiff's appeal, arising out of a suit for recovery of possession, which on account of the importance of the question of law involved in the case has been referred to a Full Bench. Rambaran was the last male owner of 7.295 acres of land which he held at the time of his death. On his death his mother Mst. Sartaji succeeded to the property as a Hindu mother and was entitled to remain in possession of the property for her lifetime and could have made a transfer of it only for legal necessity.

(1) (1928) I.L.R., 51 All., 79.

On the 14th of April, 1928, she executed a deed of gift of the entire lands in favour of her daughter's son Mahabir, defendant No. 1. The court below has found that Mahabir entered into possession of the property; but it appears that mutation of names was not effected in the lifetime of Mst. Sartaji. She died in October, 1931, and an application for mutation of names was made by Mahabir who was the applicant, which was resisted by the present appellant Mst. Mahadei Kunwar as the objector. Mahadei Kunwar is sister of Rambaran. On the 1st of February, 1932, a document was filed in the revenue court which was signed by Mahabir and bore the thumb-impression of Mst. Mahadei Kunwar. It was in the form of an application addressed to the court, in which it was prayed that the name of the applicant Mahabir should be recorded in the revenue papers against 5·473 acres out of 7·295 acres, and that the name of the objector should be recorded against 1·822 acres. The compromise further stated that the objector would remain in possession of her property without any power of transfer during her lifetime and that after her death the applicant would be the owner in possession of that property. There was a further provision that the applicant would discharge certain debts of the deceased. The application contained the final prayer that the mutation case should be decided in accordance with the said compromise. The petition of compromise was not registered but was acted upon by the court, which ordered mutation accordingly. The present suit was instituted somewhat promptly on the 3rd of September, 1932, by Mst. Mahadei Kunwar on the ground that the said compromise had been obtained by fraud and that for want of registration it was not binding upon her. The first court decreed her suit, but on appeal the learned Judge has reversed that decree. There is a finding that she failed to prove the fraud alleged by her and there is a further finding that she had understood the compromise and that she had executed it

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independently and there is also a finding that inasmuch as Mahabir had undertaken to discharge certain debts of Rambaran, the compromise was for consideration and was not unfair. There is however a finding that defendant No. 2 is not a *bona fide* transferee for value, as he must have come to know of the compromise, although he paid consideration for his transfer from Mahabir under a deed dated the 7th of May, 1932.

Prior to the amendment of the Transfer of Property Act the question of the validity of a family settlement evidenced by an unregistered document was considered by a Full Bench of this Court in *Ram Gopal v. Tulshi Ram* (1). In that case it was held that a family settlement could be arrived at orally without any registered document, but that if the arrangement be reduced to writing, then registration was necessary under section 17 of the Registration Act, although the transaction did not amount to a transfer of property. In this connection the observations made by their Lordships of the Privy Council in several cases were quoted and relied upon. In *Trigge v. Lavallee* (2) it was observed that "A compromise is an agreement to put an end to disputes and to terminate or avoid litigation, and in such cases the consideration which each party receives is the settlement of the dispute; the real consideration is not the sacrifice of a right but the abandonment of a claim." In *Rani Mewa Kuwar v. Rani Hulas Kuwar* (3) their Lordships observed: "The compromise is based on the assumption that there was an antecedent title of some kind in the parties and the agreement acknowledges and defines what that title is."

In *Khunni Lal v. Gobind Krishna* (4) their Lordships remarked that they had no hesitation in adopting the view of this High Court as expressed in *Lalla Oudh Beharee Lal v. Ranee Mewa Koonwer* (5). Their Lordships then proceeded to point out that in the case

(1) (1928) I.L.R., 51 All., 79.

(2) (1862) 15 Moo. P.C., 270(292).

(3) (1874) L.R., 1 I.A., 157.

(4) (1911) I.L.R., 33 All., 356(367).

(5) (1868) 3 Agra H.C.R., 82.

before their Lordships Khairati Lal "acquired no right from the daughters of Daulat, for the compromise, to use their Lordships' language in *Rani Mewa Kuwar v. Rani Hulas Kuwar* (1), is based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title is." In *Hiran Bibi v. Sohan Bibi* (2) their Lordships again observed: "A compromise of this character is, in no sense of the word, an alienation by a limited owner of the family property but is a family settlement in which each party takes a share of the family property by virtue of the independent title which is, to that extent, and by way of compromise, admitted by the other parties."

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On the strength of these authorities the Full Bench held that the pronouncements of their Lordships of the Privy Council were sufficiently clear to put it beyond doubt that in the usual type of family arrangement there is no question of any property (the admitted title to which rests in one of the parties) being transferred to one of the other parties, and there is no transfer of ownership such as is necessary to bring the transaction within the definition of "exchange" in section 118 of the Transfer of Property Act. Of course, there may be a family settlement in which there is some transfer of property as well, along with the settlement of the dispute, which to the extent of such transfer would stand on a different footing.

In the present case the application did not give any indication that Mst. Mahadei Kunwar was conveying any property to Mahabir. It really embodied the agreement between the parties in which the title of the other was acknowledged and recognized and it was prayed that effect be given to such recognition of title.

Section 53A was added by the Transfer of Property (Amendment) Act XX of 1929, and would certainly apply to the present transaction which took place in

(1) (1874) L.R., 1 I.A., 157.

(2) (1914) 18 C.W.N., 929.

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1932. But section 53A applies "where any person contracts to transfer for consideration any immovable property by writing signed by him etc." The main question is whether it can be said that the family settlement with which we have to deal in this case was a contract to transfer immovable property. Section 5 defines "transfer of property" for the purposes of the following sections of the same chapter which includes section 53A as "an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons." On the authority of the Full Bench referred to above, the family settlement in this case could not be regarded as either a transfer of property or even a contract to transfer immovable property. It was merely an acknowledgment of the right of the other party. However unfortunate the result may be, it is very difficult to apply section 53A to such a case. Had there been any transfer of property or contract to transfer for consideration any immovable property involved in the case, section 53A would have applied. But it does not apply to the case before us. Thus the defect of the want of registration, held to be fatal by the Full Bench, cannot be cured by the provisions of section 53A.

It is to be noted that along with giving to the amendment of the Transfer of Property Act a retrospective effect by the addition of section 63(a), the legislature has also amended section 49 of the Indian Registration Act, and has expressly provided *inter alia* that "an unregistered document affecting immovable property and required by the Registration Act or the Transfer of Property Act to be registered may be received . . . as evidence of part performance of a contract for the purpose of section 53A of the Transfer of Property Act of 1882" etc. Thus, had the case fallen under section 53A, there would no longer have been any defect. It follows that in cases to which the doctrine of part

performance applies, the non-registration of the document would be no bar to the applicability of section 53A or its admissibility in evidence

We accordingly allow this appeal and setting aside the decree of the lower appellate court restore that of the first court with costs in all courts.

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REVISIONAL CIVIL

Before Mr. Justice Collister and Mr. Justice Bajpai

MUHAMMAD ISMAIL (JUDGMENT-DEBTOR) v. JOHRIMAL
SITALPRASAD (DECREE-HOLDER)*

1937
April, 29

*Civil Procedure Code, section 60; order XXI, rules 53, 64—
Attachable property—Preliminary decree on mortgage—Pro-
cedure after attachment—Not executable but saleable.*

A preliminary decree is property within the meaning of section 60 of the Civil Procedure Code and can be attached in execution of a decree, although the preliminary decree may not be executable as it stands. The correct procedure, after attachment of a preliminary decree, is to sell it under order XXI, rule 64, since it does not fall under rule 53(1), which is concerned only with decrees for payment of money and final decrees for sale on a mortgage; the attaching decree-holder can not, upon the attachment, proceed to apply for the preparation of a final decree.

Mr. *Shah Jamil Alam*, for the applicant.

The opposite party was not represented.

COLLISTER and BAJPAI, JJ.:—Muhammad Ismail, the applicant in this case, was an objector in certain execution proceedings. He instituted a suit for the realisation of the unpaid consideration under a mortgage bond and he obtained a preliminary decree upon an arbitration award for a sum of Rs.2,000 odd. This decree was dated 7th February, 1933. The opposite party thereafter obtained an *ex parte* decree for Rs.700 odd against Muhammad Ismail and in execution of his aforesaid decree he attached the preliminary decree of his judgment-debtor Muhammad Ismail. Subsequently