THE INDIAN LAW REPORTS

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APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan and Mr. Justice Gokaran Nath Misra.

ABHAIDAT SINGH AND OTHERS (PLAINTIFFS-APPELLANTS) *v.* RAGHO INDAR PARTAB SAHI AND OTHERS (DEFENDANTS-RESPONDENTS.)* 1925 *November*, 3.

Hindu law—Joint Hindu family—Nucleus of ancestral property—Burden of proof that property is self-required—Civil Procedure Code, order II, rule 2, *applicability of.*

Two out of three brothers forming a joint Hindu family purchased certain land. They paid part of the consideration cash and for the balance executed a mortgage of the entire property purchased as well as 2 biswas of ancestral property. The mortgagee obtained a decree for sale on foot of his mortgage. The plaintiffs who were members of the joint family brought a suit for declaration that the mortgage decree was not binding on them in respect to the 2 biswas ancestral property and got a decree. The rest of the property was then sold. They then brought the present suit to challenge the validity of the mortgage and sale with regard to the property sold.

Held, that the suit was barred by order II, rule 2, of the Code of Civil Procedure as the mortgage was one and entire and the cause of action for both the properties arose from the same transaction.

Held further, that where it is proved that the family possessed a nucleus the onus is shifted on the other side to show that the property was not joint family property.

* First Civil Appeal No. 15 of 1924, against the decree of Damodar Rao Kelkar, Additional Subordinate Judge of Sultanpur, dismissing the plaintiffs-appellants' suit.

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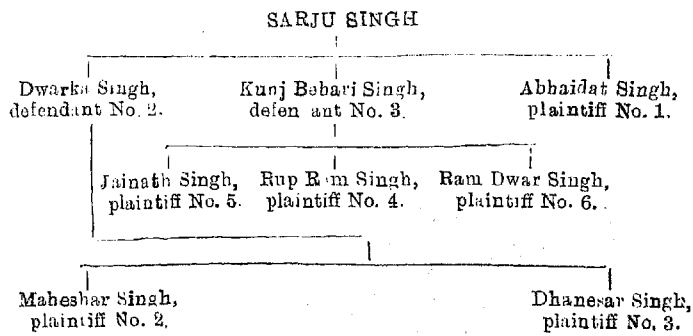
Mr. *Moti Lal Saxena*, for the appellant.

*Messrs. *Bhagwati Nath Srivastava* and *Bishambhar Nath Srivastava*, for the respondent No. 1.

HASAN and MISRA, JJ. :—This is the plaintiffs' appeal from the decree of the Subordinate Judge of Sultanpur, dated the 7th of January, 1924. The plaintiffs prayed for the relief that a declaratory decree be passed in their favour against the defendants to the effect that the property in suit specified in paragraph 1 of the plaint was the joint family property of the plaintiffs and the defendants Nos. 2 and 3 and that the defendant No. 1 acquired no right therein by purchase at an auction sale.

The facts of the case are few and simple. A short pedigree may be given at the outset of the judgement.



As the pedigree will show, Sarju Singh was father of three sons. Two of his sons are defendants in the case. The remaining, Abhaidat Singh, is one of the plaintiffs. The other plaintiffs are the two sons of Dwarka Singh and the three sons of Kunj Behari Singh. The property in question is situate in village Mirpur Saraiyan, pargana Baraunsa, in the district of Sultanpur. The plaintiffs' case is that they and the defendants Nos. 2 and 3, that is Dwarka Singh and Kunj Behari Singh, constitute a joint Hindu

family, that the property in suit was acquired with the funds of the family and that consequently it was joint family property.

It appears that this property was purchased by the father of the defendant No. 1, Ragho Indar Partab Sahi, from certain persons under a sale-deed dated the 4th of February, 1914. That sale was challenged in a suit for pre-emption by the defendants Dwarka Singh and Kunj Behari Singh. The claim for pre-emption was decreed and the decree of the court specified that the money should be deposited by the 31st of August, 1915. The money was not so deposited and the result was that the claim for pre-emption eventually failed. Eleven days after the expiry of the period fixed in the decree for depositing the pre-emption money, Dwarka Singh and Kunj Behari Singh obtained re-sale of the property for which they had instituted their suit for pre-emption from the father of the defendant No. 1. The sale-deed bears the date of 11th of September, 1915, and the ostensible consideration stated therein was Rs. 7,500. The defendants Nos. 2 and 3, Dwarka Singh and Kunj Behari Singh, had no money to pay the sale consideration except a small portion of Rs. 1,300-6. This last mentioned amount was paid to the vendee in cash. The payment of the rest of the purchase money was secured by a deed of simple mortgage executed by the defendants Nos. 2 and 3 in favour of the vendee. The deed of mortgage was of the same date as the deed of sale.

It may now be mentioned that the mortgage, to which we have made reference in the preceding paragraph of this judgement, covered not only the property which was acquired under the earlier sale-deed but also some ancestral property of the family represented by 2 biswas share in village Mirpur Saraiyan.

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The object of the present suit is to impeach the validity of the mortgage of the 11th of September, 1915, on the grounds already stated by us. The defence was that there was no joint family, that the property in suit was the self-acquired property of the defendants Nos. 2 and 3 and that even if it was joint family property the mortgage in question was beneficial to the family as a whole and therefore was not liable to be challenged by the plaintiffs. With these questions of fact a plea in bar of the present suit under order II, rule 2, of the Code of Civil Procedure was also raised.

The trial court has found that the plaintiffs and the defendants Nos. 2 and 3 constitute a joint Hindu family governed by the law of the Mitakshara. On the second question, it has found that the property in suit was the self-acquired property of the defendants Nos. 2 and 3. It has further found that the mortgage in question being beneficial to the family as a whole, was binding on the plaintiffs and on the question of law that court is of opinion that the suit is barred.

On the question of fact as to whether the property in suit is the self-acquired property of the defendants Nos. 2 and 3 as found by the trial court, we find ourselves in disagreement with the finding of that court. It is proved, indeed it is admitted, that the family was possessed of nucleus. It is also proved that Abhaidat Singh plaintiff No. 1 was the only member of the family who earned some income in service at some place in Calcutta. The defendants have failed to establish that they had any other source of income independent of the nucleus and of the contributions which Abhaidat Singh made to the family funds. The criticism of the learned Judge of the trial court that it was not proved precisely as to what sums of

money Abhaidat Singh used to remit to the family from time to time by producing receipts of money orders and so forth does not commend to us as of any weighty significance. We can safely rest our finding on the admitted fact that there was a nucleus of the family. To support the view which we are taking we may refer to the decision of their Lordships of the Privy Council in the case of *Lal Bahadur* v. *Kanhaiya Lal* (1). We therefore, hold that the property in suit was the joint family property of the plaintiffs and the defendants Nos. 2 and 3.

This finding, however, is not sufficient to entitle the plaintiffs to a decree because we find ourselves in entire agreement with the view which the trial court has taken both on the remaining question of fact and on the plea of bar under order II, rule 2, of the Code of Civil Procedure. The plaintiffs challenge the validity of the mortgage but the consideration of the mortgage or the bulk of that consideration was admittedly utilized towards the price paid for the acquisition of this property which the plaintiffs now desire to be characterized as the joint family property. They cannot eat and also have the cake. If they wish to retain this property they must pay for it and the payment has been made not by any other means except the execution of the deed of mortgage in question. In the circumstances of the case and in agreement with the trial court, we hold that the mortgage in question is binding on the plaintiffs. This concurrent finding is enough to dispose of this appeal: but we think it proper to deliver our opinion on the question of law as well.

These plaintiffs brought a previous suit in respect of the mortgage now in question. At the date of

(1) I.L.R., 29 All., 244.

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that suit the defendant No. 1 had obtained a decree on that mortgage and was proceeding to sell the property under the decree which he had obtained. The plaintiffs then brought the previous suit for a declaration that the mortgage and the decree consequent thereon were not binding on them. In the course of the pleadings they limited their claim to the 2 biswas ancestral property and abandoned the attack in respect of the rest of the property included in the mortgage under question. They won that suit. The present suit is now brought to challenge the validity of the mortgage and of the sale which has since taken place of the property which was acquired for the benefit of the family as we have already found. The lower court is of opinion that the present suit is barred by order II, rule 2, of the Code of Civil Procedure. It is argued in appeal that the cause of action for the present suit is different from the cause of action on which the previous suit was founded. The difference is made to rest on the fact that the previous suit was brought before the property had been sold while the present suit has been instituted after the auction sale under the decree obtained by the defendant No. 1. We think that that is a distinction without any difference. The mortgage was one and entire. That transaction gave cause of action to the plaintiffs and if they chose to attack it only in one piece in a previous suit they cannot be permitted to attack it with respect to another piece covered by the same transaction.

The appeal fails and is dismissed with costs.

Appeal dismissed.