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at Allahabad. Those cases are *Saiyed Muhammad Bakar v. Kedar Nath* (1), *Husaini v. Ram Charan* (2), *Avantika Prasad v. Gur Bakhsh* (3), and *Chhotku v. Baldeo* (4).

Hasan
Misra, and
J.J.

We allow this appeal, set aside the decrees of the courts below and grant a decree to the plaintiff-appellant for redemption of the property described in the plaint on payment of Rs. 254 within six months of this date. A decree in terms of order 34, rule 7 of the Code of Civil Procedure, will be prepared. The plaintiff-appellant will be entitled to his costs in all the three courts and he will be at liberty to deduct the same from the mortgage money and to pay the balance.

Appeal allowed.

APPELLATE CIVIL.

Before Mr. Justice Gokaran Nath Misra and Mr. Justice Muhammad Raza.

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PIRTHIPAL SINGH AND ANOTHER (PLAINTIFFS-APPELLANTS)
v. RAMESHWAR AND ANOTHER (DEFENDANTS-RESPONDENTS).*

Hindu Law—Joint Hindu family property—Mortgage by manager of joint family property—Foreclosure suit against manager only without impleading other members—Decree, whether binding upon the other members—Suit not specifically mentioning as being against manager, effect of.

Where the manager of a joint Hindu family executed a mortgage of the family property and the mortgagee brought a suit on the basis of his mortgage and obtained a decree for foreclosure against the mortgagor only without impleading the other brothers, *held*, that the other members were effectively represented in the suit by the manager and the provisions of order 34, rule 1 of the Code of Civil Procedure, were substantially complied with and the decree passed in that suit was binding upon them.

* Second Civil Appeal No. 510 of 1925, against the decree of Sitta Sahai, Additional Subordinate Judge of Unao, dated the 21st of July, 1925, upholding the decree of S. Qadir Hasan, Munsif of Salsputra at Unao, dated the 28th of November, 1924.

(1) (1908) 11 O.C., 89.

(2) (1915) 18 O.C., 280.

(3) (1924) 27 O.C., 60.

(4) (1912) I.L.R., 34 All., 659.

If a deed is executed for family necessity it affects the entire family property, and if a suit is brought on the basis of that deed against the manager alone, the decree passed in such suit is binding on all the members of the family. *Hori Lal v. Munman Kunwar* (1), *Kishan Prasad v. Har Narain Singh* (2), *Sheo Shankar Ram v. Jaddo Kunwar* (3), *Ganpat Lal v. Bindbasini Prasad Narain Singh* (4), *Bhagirathi v. Onkar Nath* (5), *Mahadeo Bakhsh Singh v. Suraj Bakhsh Singh* (6), *Tulsi v. Bishnath Rai* (7), *Jog Sah v. Ram Chandra Prasad* (8), and *Daulat Ram v. Mehr Chand* (9), relied upon.

Where it is clearly established that the property is joint family property and the mortgage is executed by one who is proved to be the manager of the family, the description in the deed that he is the owner of the mortgaged property would not affect in any way the actual character of the deed, it being one executed by him as manager of the family.

Where the circumstances of the case clearly show that the person sued happened to be the manager of the joint family and the property involved in the suit was the family property, the natural and legitimate inference to be drawn should be that the defendant had been sued in the capacity of the manager. It is not necessary that the plaintiff should state in distinct terms that he is suing as manager or the defendant is being sued as manager. *Jigamba Bai Sahib v. Jathai Row Sahib* (10) and *Sheo Dulare v. Brij Bhukhan Lal* (11), relied upon.

Mr. *Ram Bharosey Lal*, for the appellants.

Mr. *Raj Bahadur*, holding brief of Mr. *Mukand Behari Lal*, for the respondents.

MISRA and RAZA, JJ.:—This is a plaintiffs' appeal in a suit brought by them for possession of a 3 pies share in village Brijpalpur, district Unao. The facts of the case are that one Bhabhuti Singh, who is the own brother of the plaintiffs-appellants, mortgaged the said share to one Rameshwar, defendant-respondent No. 1, for a sum of Rs. 300 by means

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| (1) (1912) I.L.R., 34 All., 549. | (2) (1911) I.L.R., 33 All., 272. |
| (3) (1914) I. L. R., 36 All., 383. | (4) (1920) I.L.R., 47 Calc., 924. |
| (5) (1923) 10 O.L.J., 185. | (6) (1923) 10 O.L.J., 252. |
| (7) (1923) 21 A.L.J., 175. | (8) (1921) 6 Pat., L.J., 649. |
| (9) (1887) I.L.R., 15 Calc., 70 :s.o., | (10) 22 M.L.J., 45. |
| S.C., L.R., 14 I.A., 187. | |

(11) 1 O.L.J., 456.

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of a deed of mortgage, dated the 29th of September, 1909. The mortgage provided for foreclosure and consequently respondent No. 1 obtained on the 11th of July, 1916 a decree for foreclosure on the basis of the said deed, which was made absolute on the 16th of March, 1918; and the effect of which was that the mortgage in favour of respondent No. 1 had become foreclosed. The case laid by the plaintiffs in the plaint is to the effect that the mortgaged property being ancestral and thus joint family property the decree for foreclosure was invalid and unenforceable. It was denied that the money borrowed under the said deed of mortgage was borrowed for family necessity. The plaintiffs, therefore, claimed a decree for proprietary and actual possession of the aforesaid 3 pies share with a declaration to the effect that the absolute decree for foreclosure, dated the 16th of March, 1918, was not binding on them.

Defendant No. 1, Rameshwar, who was the principal defendant in the case, contended in defence that defendant No. 1, the original mortgagor, was separate from the plaintiffs and had mortgaged only his own share. He also urged that if the family be found to be a joint family consisting of the plaintiffs and defendant No. 2, the decree for foreclosure obtained by him was binding on the plaintiffs also, in as much as the mortgage-deed, dated the 29th of September, 1909, had been executed for legal necessity and they were therefore not entitled to recover any portion of the property in suit.

The learned Munsif of Safipur who tried the suit found that the family of the plaintiffs and defendant No. 2 was joint and that the property in suit was their ancestral joint family property. He, however, found that the money borrowed under the mortgage-deed on the basis of which the decree for foreclosure

had been passed was borrowed for legal necessity and the decree therefore was binding upon the plaintiffs. On these findings he dismissed the plaintiffs' suit.

The learned Additional Subordinate Judge of Unao who heard the appeal agreed with all these findings of the learned Munsif and dismissed the appeal.

The plaintiffs have now come to this court in second appeal and it is now admitted on their behalf that the mortgage, dated the 29th of September, 1909, was executed for legal necessity by defendant No. 2, Bhabhuti Singh, who happened to be the manager of the family at the time of the execution of the deed. It is also admitted that he was also the manager of the family when the decree for foreclosure was passed against him. The only point that has now been urged in second appeal is that the plaintiffs not having been impleaded in the foreclosure suit were no parties to the foreclosure decree, and on that ground alone they are entitled to recover the property in suit.

We have heard the parties in this case at great length and have come to the conclusion that the appeal must fail. We now proceed to give our reasons for that decision.

It is clear from the findings arrived at in the case, as stated above, that the mortgage in dispute was executed for legal necessity by Bhabhuti Singh who then happened to be the manager of the family consisting of himself and his two younger brothers, who are now appellants before us. It is also clear that when defendant-respondent No. 1 brought a suit on the basis of his mortgage and obtained a foreclosure decree against defendant No. 2 he even then occupied the position of the manager. The sole point which we are, therefore, asked to decide is whether a decree for foreclosure obtained against the manager of a

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joint family alone on the basis of a mortgage executed by him for legal necessity is binding upon other members of the family who have not been impleaded in the suit. We are clearly of opinion that the plaintiffs were fully and effectively represented in the suit which was brought for foreclosure by defendant-respondent No. 1 against defendant-respondent No. 2, and that the decree passed in that suit is binding not only upon the defendant No. 2, but also upon the plaintiffs. It was contended before us on behalf of the appellant that under order 34, rule 1 of the Code of Civil Procedure (Act V of 1908), the plaintiffs having an interest in the mortgaged property and in the right to redeem should have been joined as parties to the suit brought on the basis of the mortgage of 1909, and if they were not impleaded in that suit their right of redemption cannot be destroyed and they must be allowed an opportunity to exercise that right. We are unable to accept that contention for the obvious reason that Bhabhuti Singh, defendant No. 2, being the manager of the family consisting of himself and the plaintiffs, effectively represented them in the foreclosure suit and the provisions of order 34, rule 1, were substantially complied with. This matter was discussed at great length in a Full Bench decision of the Allahabad High Court reported in *Hori Lal v. Munman Kunwar* (1). RICHARDS, C. J., observed in that case that it seemed to him to be impossible to dispute the proposition that it was a general rule of Hindu law that the manager represented the family in all transactions with the outer world, provided these transactions were family matters. "Indeed", he observed, "if it were not so, it would be difficult to understand how the affairs of the family could be carried on".

BANERJI, J., remarked that the requirements of order 34, rule 1 of the Code of Civil Procedure, on

(1) (1912) I.L.R., 34 All., 549.

which reliance had also been placed in that case, were in his opinion fulfilled if the managers of the family of which they were representatives had been impleaded in the case. "A manager", he observed, "represents a joint Hindu family in all business transactions; he can enter into contracts in regard to matters relating to the family, give discharge for debts due to the family, and pay debts due by the family; and when, therefore, in respect of a mortgage due to or by the joint family he sues or is sued in his own name in his capacity as manager, all the other members of the family being represented by him, must be deemed to have sued or been sued through him."

TUDBALL, J., was of the same opinion.

CHAMIER, J., remarked in his judgment that both on principle and on authority he was of opinion that the manager of a joint Hindu family suing as such could maintain a suit alone for the recovery of a mortgage debt due to the family and that a suit could be maintained against the manager of the joint family alone to enforce a mortgage against property belonging to the family. He was also of opinion that if the manager sufficiently represented the family the provisions of order 34, rule 1 of the Code of Civil Procedure, must be deemed to have been complied with. In deciding this case their Lordships of the Allahabad High Court relied on a ruling of their Lordships of the Privy Council reported in *Kishan Prasad v. Har Narain Singh* (1) where it was held that the managing members of a joint Hindu family business were entitled to maintain suits brought to enforce contracts made in the course of that business without joining in the suit with them either as plaintiffs or as defendants the other members of the family. In the case of *Sheo Shankar Ram v. Jaddo Kunwar* (2) which went to their Lordships of the

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(1) (1911) I. L. R., 38 All., 272.

(2) (1914) I. L. R., 36 All., 362.

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Privy Council on appeal from the Allahabad High Court the question for decision before them was whether the plaintiffs in that suit were bound by the foreclosure decree passed against the manager of the joint family on the ground that the family was effectively represented in the suit. Their Lordships observed as follows :—

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“ There seems to be no doubt upon the Indian decisions (from which their Lordships see no reason to dissent) that there are occasions, including foreclosure actions, when the managers of a joint Hindu family so effectively represent all other members of the family that the family as a whole is bound. It is quite clear from the facts of this case and the findings of the courts upon them that this is a case where this principle ought to be applied. There is not the slightest ground for suggesting that the managers of the joint family did not act in every way in the interests of the family itself”

In *Ganpat Lal v. Bindbasini Prasad Narayan Singh* (1) their Lordships of the Privy Council held that a sale held in execution of a decree obtained against the manager alone was binding upon other members of the family and they could not subsequently be allowed to exercise their right to redeem. We would like to quote in full the observations of their Lordships regarding this matter :—

“ In their Lordships’ opinion,” observed their Lordships, “ these learned Judges (Judges of the High Court of Calcutta) failed to appreciate the effect on the proceedings of the altered plaint and thus misunderstood the real issues involved in the action. The Subordinate Judge rightly says that the plaintiffs ‘ did not impeach the mortgage decree;’ their pleadings show that they could not at the time

have done so, and their prayer does not ask to do so. All that they asked is to exercise their alleged right to redeem and here they have to face the fact that they refused to seek to set aside the sales. Their Lordships have no doubt that while the decree for sale stands and sale has taken place under it, the right to redeem is extinguished unless the sale be set aside. After the sale has taken place the owner holds as purchaser and is entitled to raise all the defences that belong to him as such, and unless the claim to set aside the sale is made in properly constituted action and properly raised in suitable proceedings in that action, the Court cannot interfere with possession which has been given him by the purchase. It follows, therefore, that the plaintiffs can no longer exercise any right of redemption that they may have possessed, so that it is not necessary to decide as to the extent of that right if they have properly asserted it " (vide pp. 930 and 931).

This decision of their Lordships was followed in two recent decisions of the late Court of the Judicial Commissioner of Oudh, one reported in *Bhagirathi v. Onkar Nath* (1), decided by DANIELS, A. J. C., and DALAL, A. J. C., and the other reported in *Mahadeo Bakhsh Singh v. Suraj Bakhsh Singh* (2), decided by DALAL, J. C., and SIMPSON, A. J. C. In the first case it was held that a Hindu son or grandson could not escape the effect of a foreclosure decree passed against his father or grandfather on a mortgage executed for purposes binding on the family estate merely because he was not impleaded by name in the suit, inasmuch as the ancestor of a family must be presumed to represent his descendants in conducting a litigation in the same manner as in executing a mortgage. In the second case a Hindu grandfather had mortgaged joint

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(1) (1923) 10 O.L.J., 185.

(2) (1923) 10 O.L.J., 252.

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ancestral property and after his death the mortgagee obtained a preliminary decree for foreclosure against two sons of the mortgagor, and a final decree for foreclosure was subsequently passed and the mortgagee entered into possession. At the time of the mortgage there was one grandson in existence and two grandsons at the time of the suit brought by the mortgagee. The grandsons who were not impleaded in the foreclosure suit brought a suit to recover the property against the mortgagee and treated the foreclosure decree as a nullity. They also claimed in the alternative that they should be allowed to redeem the property on payment of the sum due under the foreclosure decree. It was decided that the joint family was effectively represented in the suit for foreclosure and the plaintiffs could not recover the property foreclosed merely on the ground that they were not impleaded in the foreclosure suit. They must, in order to be able to do so, prove the illusory character or the immorality of the debt contracted by the grandfather.

It was strenuously contended before us by the learned pleader for the plaintiffs-appellants that these authorities only dealt with cases where suits to recover property or for being allowed to exercise the right of redemption had been brought either by the sons or by the grandsons and could not be treated as good authorities in cases where members of the family who were not sons or grandsons and had not been impleaded brought the suit to recover the property or to be allowed to exercise the right of redemption. In our opinion there is no difference in principle between the two cases. If a Hindu father can effectively represent his sons there is no reason why a brother or an uncle who happens to be the manager of the family should not similarly be able to effectively

represent his younger brothers and nephews in the suit brought against him to enforce a mortgage executed for family necessity. The real point which has to be borne in mind in such cases is whether the deed was one executed for legal necessity. If such be the case it affects the entire family property, and if a suit is brought on the basis of that deed against the manager alone the decree passed in such a suit is binding on all the members of the family. We are supported in this view by a decision of the Allahabad High Court reported in *Tulsi v. Bishnath Rai* (1) decided by MEARS, C. J., and BANERJI, J., by a decision of the Patna High Court in *Jog Sah v. Ram Chandra Prasad* (2) decided by JWALA PRASAD, A. C. J., and DAS, J., and by a decision of their Lordships of the Privy Council reported in *Daulat Ram v. Mehr Chand* (3).

A contention was also raised in appeal by the learned pleader for the appellants that Bhabhuti Singh, the mortgagor, had described himself in the deed as the owner of the mortgaged property and that when respondent No. 1 brought the suit to enforce the mortgage he did not describe him as the manager of the family. It was, therefore, urged that the mortgage-deed on the basis of which the foreclosure decree had been obtained should not be considered to have been executed by Bhabhuti Singh as the manager of the joint family; nor could the suit brought against him by the mortgagee be considered to be a suit brought against him in a representative capacity. We regret we are unable to accept the contention. It is within our experience that in many cases of mortgages executed in this province by managers of a joint Hindu family they describe themselves as being themselves the owners of

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(1) (1923) 21 A.L.J., 175.

(2) (1921) 6 Pat. L.J., 610.

(3) (1887) L.L.R., 15 Calc., 70; S.C., L.R., 14 I.A., 187.

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the property just as guardians of minors in several cases describe themselves as owners of the property belonging to the minors. We are of opinion that where it is clearly established that the property is joint family property and the mortgage is executed by one who is proved to be the manager of the family such a description in the deed would not affect in any way the actual character of the deed, it being one executed by him as manager of the family.

Regarding the second contention we are of opinion that where the circumstances of the case are clear showing that a person sued happened to be a manager of a joint family and that the property involved in the suit was the family property, the natural and legitimate inference to be drawn should be that the defendant had been sued in the capacity of the manager. It is not necessary that the plaintiff should state in distinct terms that he is suing as manager or that the defendant is being sued as manager. We are supported in this view by a decision of the Madras High Court reported in *Jigamba Bai Sahib v. Jathai Row Sahib* (1) and by a decision of the late Court of the Judicial Commissioner of Oudh reported in *Sheo Dulare v. Brij Bhokhan Lal* (2).

We are, therefore, of opinion that the mortgage executed by Bhabhuti Singh on the 29th of September, 1909 was executed by him, as found by the courts below, in his capacity of the manager of the joint family of which the plaintiffs also were members and is binding on them because it has been found to have been executed for legal necessity. We are also of opinion that the decree for foreclosure obtained by

(1) 22 M.L.J., p. 45.

(2) 1 O.L.J., 456.

defendant-respondent No. 1 against defendant-respondent No. 2 was passed against him in the capacity of the manager of the joint family and is therefore binding on the plaintiffs also.

The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

*Before Sir Louis Stuart, Kt., Chief Judge, and
Mr. Justice Wazir Hasan.*

HUKUMCHAND KASLIWAL, Kt., AND ANOTHER (PLAINTIFFS-APPELLANTS) v. THE PIONEER MILLS CO., LTD., AND OTHERS (DEFENDANTS-RESPONDENTS).*

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Specific Relief Act (I of 1877), sections 12 and 21, illustration 3—Promise to advance or borrow money, specific performance of—Contract to transfer immovable property, specific performance of—Test of whether suit for specific performance lies is whether damages furnish adequate relief—Transfer of Property Act (IV of 1882), section 58—Agreement to advance on security of movable and immovable property—Company going into liquidation—Charge, creation of, against the sale-proceeds of property in the hands of liquidators in favour of the party making the advance—Companies Act (VII of 1913), section 109.

The plaintiffs entered into an agreement with the Pioneer Mills, Ltd., by which they agreed to make advances to the company up to the maximum limit of Rs. 15 lakhs on the security of the stock in trade and immovable property of the company, and in pursuance of the said agreement they made advances to the extent of Rs. 1,50,000, and made a genuine offer to redeem a prior encumbrance and to perform the rest of their promise. The company went into liquidation and its entire assets were sold and the sale-proceeds were held by the liquidators. The plaintiffs then brought the present suit.

Held, that the agreement does create a charge in favour of the plaintiffs as regards the movable assets, and further it

* First Civil Appeal No. 52 of 1925, against the decree of Ganga Shankar, Subordinate Judge of Unao, dated the 29th of April, 1925.