APPELLATE CIVIL

Before Mr. Justice Muhammad Raza and Mr. Justice Bisheshwar Nath Srivastava

PUTTOO LAL AND OTHERS (DEFENDANTS-APPELLANTS) *v.* RAGHUBIR PRASAD AND ANOTHER (PLAINTIFFS-RESPONDENTS)* 1933 *October*, 3

Civil Procedure Code (Act V of 1908), section 11—Uncle executing mortgage-deeds for himself and on behalf of his minor nephew as guardian—Suit by mortgagee against minor dismissed—Finding that uncle was separate and had no power to execute deed on behalf of minor—Subsequent suit by minor to recover his share of property—Finding in previous suit, if operates as res judicata*—"Litigating under the same title" and "same title", meaning of—Hindu Law—Joint Hindu family—Mortgage by uncle purporting to act as manager of joint Hindu family and as guardian of his minor nephew—Recitals in deed as to legal necessity, whether binding on nephew.*

Where a person purports to execute some mortgage-deeds on his own behalf as well as on behalf of his minor nephew acting as his guardian and as the head and manager of their joint family and a suit by the mortgagee is dismissed as against the minor on the ground that the uncle was separate and had no power or authority to execute the deed on behalf of his minor nephew, the finding operates as *res judicata* in a subsequent suit by the minor brought, after he attains his majority, to recover his share of the property. The words "litigating under the same title" in section 11 of the Code of Civil Procedure do not refer to the identity of the ground of action but mean that the question must have been raised and decided in the same right and the phrase "same title" in that section means the same capacity and also the same common right. It is the identity of title and not the identity of the subject-matter of the suit on which the doctrine of *res judicata* is based. If the subject-matter of the two suits are different, but the title is identical, then the principle of *res judicata* will apply. *Abdul Gani* v. *Nabendrakishore Ray* (1) and *Rafiq-un-nissa Bibi* v. *Abdul Shakur Khan* (2) relied on.

The recitals in a deed are, strictly speaking, evidence only as against the parties to the deed or those claiming through or under them. Any general recitals in mortgages or deeds of sale

*First Civil Appeal No. 69 of 1932, against the decree of Sh. Mohammad Baqir, Additional Subordinate Judge of Sitapur, dated the 4th of July, 1932.

(1) (1930) I.L.R., 57 Cal., 258: (2) (1929) A.I.R., All., 400.
A.I.R., 1930 Cal., 47: 33
C.W.N., 876.

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with regard to the existence of legal necessity for any alienation are not of themselves evidence of such necessity without substantiation by evidence *aliunde*. Different considerations, however, arise in the case of an ancient alienation, having regard to the great lapse of time since the transaction took place. Such recitals, therefore, in a mortgage-deed purporting to have been executed by an uncle on his own behalf and as manager of a joint Hindu family and guardian of his minor nephew are not of themselves evidence of legal necessity in a suit by the nephew to recover his share of the property mortgaged, where the transaction does not appear to be an ancient alienation. *Lachhman Narain Prasad* v. *Sarnam Singh* (1) and *Balwant Singh* v. *Glancy* (2), referred to and applied.

Messrs. *Hyder Husain* and *Badri Prasad*, for the appellants.

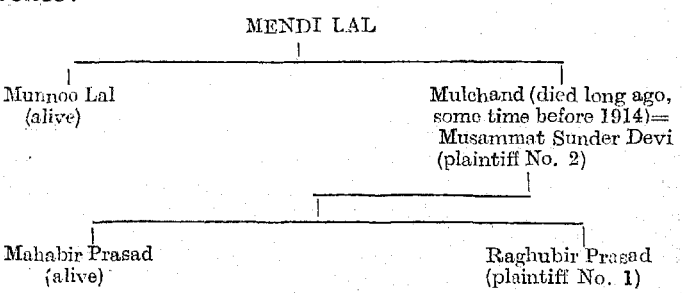
Mr. *Anant Prasad Nigam*, for the respondents.

RAZA and SRIVASTAVA, JJ.:—This appeal arises out of a suit brought by the plaintiffs for possession of a one-third share in village Nasirpur in the district of Sitapur.

The facts of the case are sufficiently set out in the judgment under appeal and it is not necessary to repeat them in detail.

The facts relevant to this appeal may be shortly stated.

The following short pedigree will be useful for reference:



Munnoo Lal and Mahabir Prasad executed two mortgage-deeds (one, a simple mortgage for Rs.6,500 and the other a usufructuary mortgage for Rs.19,500) in favour of Puttoo Lal (defendant No. 1) and Gobardhan Das (since deceased, father of defendants Nos. 2 and 3) in respect of village Nasirpur, on the 28th of October,

(1) (1914) L.R., 44 I.A., 163. (2) (1912) L.R., 39 I.A., 109.

1921, several years after the death of Mulchand. Raghubir Prasad (plaintiff No. 1) was then a minor. It appears that he attained majority some time in 1924. The two deeds mentioned above purport to have been executed on behalf of Raghubir Prasad (plaintiff No. 1) also, by Munnoo Lal, his uncle, acting as his guardian and as the head and manager of the family. The defendants obtained a decree on the basis of the simple mortgage-deed mentioned above against Munnoo Lal and Mahabir Prasad on the 19th of August, 1930. Raghubir Prasad (now plaintiff No. 1) was also impleaded in that suit, but it was dismissed against him on the ground that Munnoo Lal had no right to execute the deed on his behalf. Puttoo Lal and the legal representatives of Gobardhan Das appealed to this Court, but their appeal was dismissed on the 10th of August, 1931. The shares of Raghubir Prasad, Mahabir Prasad and their mother, Musammat Sunder Devi, were fixed at one-third each out of half of the village Nasirpur, under a partition decree dated the 19th of September, 1930. Thus Raghubir Prasad (plaintiff No. 1) and Musammat Sunder Devi (plaintiff No. 2) became entitled to a (two-third of half)=one-third in village Nasirpur by virtue of the partition decree.

Raghubir Prasad and Musammat Sunder Devi brought the present suit for possession of their one-third share in village Nasirpur against Puttoo Lal and the legal representatives of Gobardhan Das on the 7th of September, 1931. They alleged that Munnoo Lal was separate from Raghubir Prasad and Mahabir Prasad, that he (Munnoo Lal) was neither the guardian of Raghubir Prasad, nor the *karta* of the family, that he had no right or power to execute the usufructuary mortgage dated the 28th of October, 1921, on behalf of Raghubir Prasad in favour of the defendants and that the defendants were thus in wrongful possession of the plaintiffs' one-third share in the village in suit (Nasirpur). The plaintiffs prayed for possession of their one-third share in the village and also for *mesne* profits.

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The claim was resisted by the defendants on various grounds.

The learned Additional Subordinate Judge framed several issues and found as follows:—

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(1) Munnoo Lal was separate from Raghubir Prasad when the mortgage-deed in suit was executed. He had already separated from his brother Mulchand in 1891.

(2) Munnoo Lal was neither the *karta* nor the guardian of Raghubir Prasad, and could not execute the mortgage-deed in suit in that capacity.

(3) The pleas involved in the first two issues are barred by the rule of *res judicata*.

(4) The mortgage-deed in suit was not executed for the benefit of the family and is not binding on the plaintiffs.

(5) The defendants are not barred by the principle of *res judicata* from proving the legal necessity of the sum of Rs.3,500 alleged to have been paid to Lala Bhagat Ram.

(6) The suit is not barred by limitation.

(7) The plaintiffs are entitled to the relief asked for without paying the mortgage money due to the defendants.

(8) The plaintiffs' suit for possession of the property is maintainable.

(9) The plaintiff No. 2 (Musammat Sunder Devi) is also entitled to bring the suit.

(10) Raghubir Prasad (plaintiff No. 1) did not ratify the mortgage-deed of 1921 (i.e. the mortgage-deed in suit) at the time of the execution of the deed of 1927, and is not estopped from bringing the present suit.

(11) The plaintiffs are entitled to a decree for possession of a one-third share in village Nasirpur (also called Sheopuri), and also Rs.1,200 as mesne profits for three years.

The plaintiffs' claim was decreed accordingly.

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The defendants filed this appeal on the 10th of October, 1932, challenging the findings on the points decided against them.

We have examined the record and heard the learned counsel on both sides at some length.

In our opinion there is no substance in this appeal.

Bajpai and Srivastava, JJ.

The appellants' learned counsel has confined his arguments to three points:—(1) *Res judicata;* (2) Ratification; and (3) Legal necessity.

We shall deal with these points *seriatim.*

(1) *Res judicata*—In our opinion the learned trial Judge was perfectly right in holding that the pleas embodied in the first two issues are barred by the rule of *res judicata.* The defendants had raised the same pleas in the former suit which was dismissed against Raghubir Prasad (plaintiff No. 1 in the present suit, and defendant No. 3 in the former suit). The former suit was based on the simple mortgage for Rs.6,500 which was executed on that very day on which the usufructuary mortgage in suit was executed by Munnoo Lal and Mahabir Prasad. Thus the parties to both the deeds were the same and the mortgaged property was also the same. The points in dispute were decided against the defendants who were the plaintiffs in the former suit, and the findings of the lower court were upheld by this Court in appeal. It is contended on behalf of the defendants (appellants) that the findings in question cannot operate as *res judicata* in the present suit as they are not "litigating under the same title" in the present suit. It is urged that the former suit was brought on the basis of one mortgage-deed and the present suit relates to another mortgage-deed, and so the title is different. In our opinion this contention is not well-founded and must be over-ruled. The expression "same title" used in section 11 of the Code of Civil Procedure means the same capacity—Mulla's Civil Procedure Code, 8th edition, p. 54. The words "litigating under the same title" in section 11 of the Code of Civil Procedure mean that the demand should have

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been made of the same quality in the second suit as in the first one. The expression "matter in issue" in section 11 of the Code is distinct from the subject-matter and object of the suit, as well as from the relief that may be asked for in it, and the cause of action on which it is based; and the rule of *res judicata* requiring the identity of the matter in issue will apply even when the subject-matter, the object, the relief and the cause of action are different. Where the whole title was in issue in a previous litigation, the same cannot be agitated in a subsequent suit. In such cases it is the matter in issue and not the subject-matter of the suit that forms the essential test of *res judicata*—see *Abdul Gani* v. *Nabendrakishore Ray* (1).

The term "title" refers to the capacity or interest of a party, that is to say, whether he sues or is sued for himself, in his own interest or for himself as representing the interest of others along with himself. It has nothing to do with the particular cause of action on which he sues or is sued—see *Rafiq-un-nissa Bibi* v. *Abdul Shakur Khan* (2).

The words "litigating under the same title" do not refer to the identity of the ground of action but mean that the question must have been raised and decided in the same right. The phrase "same title" means the same capacity and also the same common right. It is the identity of title and not the identity of the subject-matter of the suit on which the doctrine of *res judicata* is based. If the subject-matters of the two suits are different, but the title is identical, then the principle of *res judicata* will apply. The section simply says "litigating under the same title"; it does not say anything about the subject-matter of the suit.

We, therefore, decide the question against the appellants, and uphold the findings of the learned trial Judge on the first three issues.

(1) (1930) I.L.R., 57 Cal., 258: A.I.R., 1930 Cal., 47: 33 C.W.N., 876. (2) (1929) A.I.R., All., 400.

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(2) *Ratification*—The defendants (appellants) rely on a mortgage-deed (simple mortgage) executed by Raghubir Prasad (plaintiff No. 1) and Mahabir Prasad in favour of Puttoo Lal (defendant No. 1) for Rs.1,375 in respect of village Nasirpur on the 12th of July, 1927. It is contended that Raghubir Prasad (plaintiff No. 1), had in this deed ratified the deed in suit and he is, therefore, estopped from questioning the binding nature of the deed in suit. We have examined the deed of 1927 (exhibit A14). The fact is that there are no clear words of ratification in the deed in question. The learned Additional Subordinate Judge is perfectly right in holding that the words *"Haq Murafiq"* do not necessarily mean the right of redemption. They mean the right, title and interest. If the words *"Haq Murafiq"* be taken to mean the right of redemption as contended by the defendants, then it is not shown to what mortgage they refer. No mention of the mortgage-deed in suit was made in that deed. The mortgage-deed in suit is invalid so far as the plaintiffs are concerned. Munnoo Lal had no power or authority to execute the mortgage-deed in question on behalf of Raghubir Prasad (plaintiff No. 1) who was a minor at the time of the execution of the deed. Hence we decide the question of ratification also against the appellants.

(3) *Legal necessity*—The consideration for the mortgage-deed in suit (exhibit A1) is expressed to be Rs.19,500 made up of the following items:

(A) Rs.14,500 made payable to Nand Ram and others.

(B) Rs.5,000 made payable to Bhagat Ram and others.

These two items may be taken separately.

(A) Rs.14,500. It is said that the entire amount was due to Nand Ram and Kalka Prasad on account of a previous deed of mortgage (simple) for Rs.8,500 (exhibit A2) which was executed by Mahabir Prasad and Munnoo Lal on the 9th of March, 1914. Munnoo Lal had executed this deed

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also as the *karta* or guardian of Raghubir Prasad, though he had no power or authority to do so. The consideration of this deed is made up of two items:

(*a*) Rs.7,200 made payable to Musammat Ram Dulari, widow of Mahabir Prasad, on account of a deed of simple mortgage for Rs.4,000 executed by Mulchand (father of Raghubir Prasad, plaintiff No. 1) and Munnoo Lal on the 11th of October, 1907.

(*b*) Rs.1,300 paid in cash.

Now as to the item of Rs.7,200 the payment of the amount to Musammat Ram Dulari is proved but the original deed has not been produced. The defendants have produced a certified copy of the deed. This is exhibit A3 in the case. It was denied by the plaintiffs. The learned trial Judge has found that the loss of the original is not strictly proved and that the deed is not also proved according to law. We have examined the oral evidence, which has been produced by the defendants to prove the loss and also the execution of the deed in question. In our opinion the loss of the deed is sufficiently proved by the evidence of Bhagat Ram (D. W. 1). Ram Charan (D. W. 3) and Sheo Sahai (D. W. 4) prove the execution of the deed. They swear that they had attested the deed and that it was duly registered. It may be held on their evidence that they had attested it according to law. We think the evidence given by these witnesses is sufficient to prove the loss and also the execution of the deed in question. However, the difficulty is that the defendants have produced no evidence to prove the consideration for the deed and have also made no attempt to prove that the money was advanced for any legal necessity, when the deed in question was executed. They rely on the recitals of the deed, but the existence of the assertions in question in no way advances the defendants' case. The deed in question purports to have been executed to pay off several previous deeds and *rukkas*, but no attempt has been made to produce and prove the previous deeds and

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rukkas. Rupees 470-4 only are said to have been paid in cash at the time of the registration. Mulchand might have got Rs.235-2 out of the said Rs.470-4 but there is nothing to show that he had borrowed the sum for any legal necessity. It appears that Munnoo Lal was liable for the bulk of the consideration money entered in the deed in question. The recitals in a deed are, strictly speaking, evidence only as against the parties to the deed or those claiming through or under them; but the sons in a joint Hindu family governed by the Mitakshara law become by birth and in their own right entitled to the family property. They can enforce this right against their father and do not claim under him. Any general recitals in mortgages or deeds of sale with regard to the existence of legal necessity for any alienation are not of themselves evidence of such necessity without substantiation by evidence *aliunde*. Indeed it is obvious that if such proof were permitted, the rights of the co-parceners in a joint Hindu family, who are entitled to question the propriety or validity of any alienation, could always be defeated by the insertion of carefully prepared recitals. Different considerations arise in the case of an ancient alienation, having regard to the great lapse of time since the transaction took place. It will not be reasonable to expect such full and detailed evidence as to the state of things which gave rise to the alienation in question as in the case of alienations made at more or less recent dates. In such circumstances presumptions are permissible to fill in the details which have been obliterated by time. The transaction in question in the case before us does not appear to be an ancient alienation. There is nothing to show that the necessary independent evidence is not available or that the proof of the alleged antecedent debt or legal necessity has become impossible.

Thus neither any antecedent debt nor any legal necessity is proved in connection with the mortgage-deed in question (exhibit A3), and the deed cannot be held to be binding on the plaintiffs in this case. We have

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already said that Mulchand had no power or authority to execute the deed for Rs.8,500 (exhibit A2) on behalf of Raghubir Prasad (plaintiff No. 1) in favour of Nand Ram and Kalka Prasad. We should like to note also that the deed of 1907 ceased to exist in 1914 and nothing remained due from the plaintiffs on account of that deed in 1921, when the deed in suit was executed in favour of the defendants. If the person who satisfied the deed of 1907 in the year 1914 had any claim against Raghubir Prasad on the ground that the latter was under a pious obligation to pay his father's debts, he should have enforced his claim against him (Raghubir Prasad) within the time allowed by law.

The second item of Rs.1,300 of the deed of the 9th of March, 1914 (exhibit A2) will be considered later on.

We now proceed to consider the second item of the deed in suit. This is item (B) of Rs.5,000 mentioned above. This amount was made payable to Lala Bhagat Ram, to whom it was due under a mortgage-deed dated the 9th of March, 1914, for Rs.3,500 (exhibit A4). This was a mortgage executed by Munnoo Lal and Mahabir Prasad in respect of a four-anna share in Nasirpur and certain other property. It was also executed by Munnoo Lal personally and as the guardian of Raghubir Prasad, then a minor. The consideration for this mortgage is made up of three items:

(*a*) Rs.611 made payable to Mata Din.

(*b*) Rs.1,426 made payable to Babu Ram.

(*c*) Rs.1,463 cash.

Babu Ram's deed has not been produced but the deeds in favour of Mata Din and Babu Ram were executed by Munnoo Lal alone. Thus Munnoo Lal alone was liable under the deed, for items (*a*) and (*b*).

The cash item of this deed (exhibit A4), i.e. Rs.1,463, and the cash item of Rs.1,300 of the deed of the 9th of March, 1914 (exhibit A2) mentioned above, are alleged to have been taken for the marriage of the sister of Raghubir Prasad (plaintiff No. 1). However, it is not satisfactorily proved that the necessity in question really

existed as alleged. The defendants had alleged in the previous suit this very necessity in respect of the deed of 1919. The necessity is now alleged in respect of the deeds of 1914 also. The defendants have examined Bhagat Ram (D. W. 1) and Krishna Kishore (D. W. 5) to prove the alleged necessity. Bhagat Ram has given hearsay evidence on the point under consideration. The evidence of Krishna Kishore is not at all reliable and appears to have been manufactured. The learned trial Judge who saw and heard the witness was not satisfied with his evidence. We have examined his evidence. We are not also satisfied with his evidence. In our opinion the learned trial Judge was perfectly right in holding that the alleged necessity is not proved.

This exhausts all the items of the deed in suit. The defendants have failed to prove that the deed in suit was executed for any legal necessity or for the benefit of the family. No antecedent debt binding on the plaintiffs is also proved. They have thus failed to establish that the deed in suit is binding on the plaintiffs.

In our opinion this part of the case can be disposed of on one consideration which goes to the root of the matter.

Munnoo Lal had separated from his brother Mulchand and his nephews Mahabir Prasad and Raghubir Prasad (sons of Mulchand) several years before 1914. Munnoo Lal was not the *karta* of the plaintiffs' family or the *de facto* guardian of Raghubir Prasad, plaintiff No. 1. He could not, therefore, execute any valid mortgage in respect of the property of that family. He had no power or authority to do so. The mortgages in question (that is the mortgages of 1914 and 1921) cannot, therefore, affect the plaintiffs or their share (or interest) in the family property. They are invalid, and of no force or effect as against the plaintiffs. Mahabir Prasad was not the *karta* of the family according to the defendants themselves. According to the defendants it was Munnoo Lal who was the *karta* of the family; but this has been found to be untrue. Mahabir Prasad did not

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and could not execute any mortgage as the *karta* of the family or as the guardian of his brother Raghubir Prasad. The mortgages executed by him are invalid as against the plaintiffs and do not affect their share or interest in the family property. He was, of course, a member of the joint family, but he was not the *karta* (head) of the family. Where the property of a joint Hindu family is mortgaged by one of the members (save and except by the head of the family for antecedent debt or proved necessity of the joint family), the general law is that the mortgage is not valid at all even to the extent of the mortgagor's interest. See *Lachhman Narain Prasad* v. *Sarnam Singh* (1).

It was held in *Balwant Singh* v. *Glancy* (2) that a mortgage by two brothers one of whom was a minor at the date of the mortgage was not binding on the latter, when the mortgage was not made by the elder brother as the manager of the family, though the greater part of the debt for which the mortgage was executed had been contracted by their father. Their Lordships made the following observations in their judgment:

> "Having found as a fact that Maharaj Singh (brother of Sheoraj Singh mortgagor) was a minor on the 28th of October, 1892 (date of mortgage), it is not necessary for their Lordships to consider any other issue. The suit has been brought on the mortgage-deed of the 28th of October, 1892, by the assignee of that mortgage and as their Lordships have held that the mortgage was not made by Sheoraj Singh as the manager of the family or in any respect as representing Maharaj Singh and as Maharaj Singh was then a minor, the mortgage-deed as against him and his interest in the estate was not merely voidable; it was void and of no effect and must be regarded as a mortgage-deed to which he was not even an assenting party and as a mortgage-deed which did not affect him or his interest in the estate."

(1) (1914) L.R., 44 I.A., 163: I.L.R., 39 All., 500.

(2) (1912) L.R., 39 I.A., 109: I.L.R., 34 All., 296.

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This being the case no question of any antecedent debt or legal necessity even arises in the present suit. The deed in suit is invalid and has no force or effect as against the plaintiffs. They are entitled to recover their property from the defendants.. They are also entitled to recover mesne profits from the defendants, who are in wrongful possession of their (plaintiffs') property.

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It should be noted that it is not the defendants' case that the deed in suit should be held to be valid and binding on the plaintiffs on the ground that Mahabir Prasad had also joined Munnoo Lal in executing the deed. It is noticeable that the defendants have succeeded in obtaining a personal decree only against Mahabir Prasad in the former suit and the mortgaged property to the extent of a half share only belonging to Munnoo Lal was ordered to be sold.

No other question was discussed at the hearing of the appeal. Nothing has been urged which weakens the force of the judgment of the learned Additional Subordinate Judge or inclines us to sustain the appeal.

The result is that the appeal is dismissed with costs.

Appeal dismissed.

FULL BENCH

Before Sir Syed Wazir Hasan, Knight, Chief Judge, Mr. Justice Muhammad Raza and Mr. Justice Bisheshwar Nath Srivastava

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KAMTA SINGH AND OTHERS (DEFENDANTS-APPELLANTS) *v.* RUDRA PRATAB SINGH AND FOUR OTHERS, PLAINTIFFS AND OTHERS (DEFENDANTS-RESPONDENTS)*

United Provinces Land Revenue Act (III of 1901), *sections* 111 (1)(*a*), (*b*), (*c*), 112 *and* 233(*k*)—*Partition or union of mahals —Jurisdiction of Civil Court—Civil Court's jurisdiction in cases relating to partition or union of mahals—Revenue Court declining to entertain question of proprietary title—Suit by certain co-sharers in Civil Court relating to the question of proprietary title, maintainability of.*

Per FULL BENCH—The jurisdiction of a Civil Court, in a case relating to the partition or union of mahals, is entirely restricted by the provisions of sections 111 and 112 of the Land Revenue

*First Civil Appeal No. 99 of 1931, against the decree of M. Ziauddin Ahmad, Subordinate Judge of Sultanpur, dated the 19th of October, 1931.