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err. If, therefore, the rule of law laid down in Ghulam Jilani's case be held to be of universal application it follows that the aggrieved party has no remedy whatever in a case in which a subordinate Court comes to a wrong decision in dealing with objections to an award.

It may also be said that the jurisdiction vested in the High Court by section 115 of the Code of Civil Procedure is only discretionary; but to say that section 115 does not apply to cases in which a decree has been passed in terms of an award is to take away that discretion altogether in such cases—a conclusion which does not appear to be warranted by the terms of section 115 or by any other provision of the Code.

Ziaul Hasan, J.

BY THE COURT (KING, C.J. and ZIAUL HASAN, J.).—The application is dismissed with costs.

Application dismissed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice Ziaul Hasan

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August, 12

MALAK CHAND (DEFENDANT-APPELLANT) *v.* HIRA LAL AND 4 OTHERS, PLAINTIFFS AND OTHERS (DEFENDANTS-RESPONDENTS).*

Hindu Law—Joint Hindu family—Family consisting of father and sons—Presumption of jointness—House built by one member of joint family—Nucleus adequate—Presumption of house being joint family property—Alienation by member of joint family—Justification of alienation on ground of family benefit—Burden of proof that the alienating member was manager—Suretyship bond—Junior member of joint family entering into suretyship transaction—No benefit of family—Other members, if bound—Ratification cannot justify alienation by junior member of joint family without family necessity or family benefit—Suretyship for payment—Death of surety—Sons, liability of—Civil Procedure Code (Act V of

*First Civil Appeal No. 23 of 1934, against the decree of Mr. R. F. Baylis, I.C.S., Subordinate Judge of Lucknow, dated the 13th of February, 1934.

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1908), *sections* 23 *and* 145—*Father standing surety—Execution of decree against surety—Death of surety pending execution —Son's undivided share, whether can be attached and sold.*

Where a family consists of father and sons, there is a strong presumption of their being joint. If there is no evidence of any separation having taken place amongst them, it must be taken that they constituted a joint Hindu family.

Where a house is built by a member of a joint Hindu family, in the absence of evidence about the house having been built with the separate income of the member, the presumption arising from the existence of an adequate nucleus of joint family property must be that the house is also the property of the joint family.

Where a person sets up the plea that an alienation of joint family property made by a member of a joint Hindu family is for family benefit and binding on the family it is his duty to allege and prove that the member was the manager of the family.

A transaction of suretyship is in its nature a transaction of a risky character and a junior member cannot bind the other adult members of a joint Hindu family by entering into a speculative transaction of this character, and the transaction cannot be regarded as one for family benefit or binding on the family. *Tammireddi* v. *Gangireddi* (1), and *Mahabir Prasad Misr* v. *Amla Prasad Rai* (2), referred to.

A transaction entered into by a junior member of the family alienating joint family property without any legal necessity and not for the benefit of the family is entirely void and not merely voidable and there cannot be any ratification of it. *Angraj Bahadur Singh* v. *Ram Rup* (3), *Manohar Das Mohanta* v. *Tarini Charan Nandi* (4), and *Kandasami Asari* v. *Somaskanda Ela Nidhi Ltd.* (5), referred to.

Where the father in a joint Hindu family incurs a suretyship debt for payment and dies, his sons are bound by the obligation incurred by the father irrespective of any question of family benefit or family necessity. *Maharaja of Benares* v. *Ramkumar Misir* (6), *Mata Din Kandu* v. *Ram Lakhan* (7), and *Dwarka Das* v. *Kishan Das* (8), referred to and relied on, *Baij Nath Prashad* v. *Bindeshwari Prasad Singh* (9), referred to.

(1) (1921) I.L.R., 45 Mad., 281. (2) (1924) I.L.R., 46 All., 364.
(3) (1930) I.L.R., 6 Luck., 158. (4) (1929) 34 C.W.N., 135.
(5) (1910) I.L.R., 35 Mad., 177. (6) (1904) I.L.R., 26 All., 611.
(7) (1929) I.L.R., 52 All., 153. (8) (1933) I.L.R., 55 All., 675.
(9) (1925) Pat., 609.

It is open to a decree-holder to enforce the personal obligation incurred by a Hindu father under a surety bond against his son by attachment and sale of the latter's undivided share in the joint family property, although the family may consist of other members besides the sons. The expression "property in the hands of a son" in section 53 of the Code of Civil Procedure does not necessarily signify tangible property exclusively possessed by the son without any co-sharers or co-parceners; it means and includes the undivided share of the son in the joint family property held by himself and the other co-parceners who may be in existence. *Chhotey Lal* v. *Ganpat Rai* (1), relied on. *Hashmat Ara Begam* v. *Barati Lal* (2), referred to.

Mr. *Makund Behari Lal,* for the appellant.

Messrs. *M. Wasim* and *Nazir Uddin Siddiqi,* for the respondents.

SRIVASTAVA and ZIAUL HASAN JJ.:—The facts of the case which are no longer in dispute are as follows:

Malak Chand, defendant No. 1, and Mehta Gurdas Ram, defendant No. 2, were partners in business. Malak Chand brought a suit for dissolution of partnership and made an application for attachment before judgment of a certain sum of money due to Mehta Gurdas Ram from the East Indian Railway. The application was granted and an order for attachment was made on the 20th of February, 1929. Mehta Gurdas Ram persuaded Kanhaiya Lal father of Sheo Narain, defendant No. 2, to stand as a surety for him for the sum of Rs.8,000 which formed subject of the attachment before judgment and on the 18th of March, 1929, Kanhaiya Lal executed the deed in suit (exhibit 20) by which he bound himself to pay Rs.8,000 in the event of the default of Mehta Gurdas Ram and hypothecated by way of security the house in dispute situate on Abbot Road, Lucknow. Simultaneously with this Mehta Gurdas Ram executed a bond in favour of Kanhaiya Lal for Rs.2,000 as remuneration for Kanhaiya Lal standing surety for him. At the same time Kanhaiya Lal also obtained a surety deed

(1) (1934) I.L.R. 57 All., 176. (2) (1934) I.L.R., 9 Luck., 534.

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(exhibit A4) in his own favour from one Raja Ram, a resident of the Punjab under which Raja Ram hypothecated some of his property in the Punjab in favour of Kanhaiya Lal and undertook to pay the latter the sum of Rs.8,000 in the event of Gurdas Ram's default. Malak Chand eventually got a decree in the suit against Mehta Gurdas Ram for Rs.16,000 on the 12th of October, 1931. On the 3rd of December, 1931, Malak Chand made an application for execution of his decree against Sheo Narain, Kanhaiya Lal having died in the meantime. On the 12th of January, 1932, Sheo Narain objected to the execution on the ground that the aforesaid house on Abbot Road was joint family property and Kanhaiya Lal had no right to hypothecate it. The objection was dismissed by the Subordinate Judge of Lucknow on the 9th of May, 1933, and the execution was allowed to proceed. This order of the Subordinate Judge forms the subject of appeal by Sheo Narain in Execution of Decree Appeal No. 43 of 1933.

Soon after the order of the Subordinate Judge, Lucknow, just mentioned, was passed a regular suit was instituted on the 31st of July, 1933, by plaintiffs 1 to 5, the brothers and brothers' sons of Kanhaiya Lal for a declaration that the house in question was the joint family property of the plaintiffs and that the security bond of the 18th of March, 1929, and the order for sale passed by the Subordinate Judge of Lucknow, were null and void as against them.

The relationship of each of the plaintiffs with Kanhaiya Lal will appear from the following pedigree:

SURAJ BALI

Hira Lal, plff. No. 1	Kanhaiya Lal	Jawahar Lal, plff. No. 2	Faqire Lal, plff. No. 3
Lachhmi Narain, plff. No. 4	Sheo Narain, defdt. No. 3	Dwarka Prasad, plff. No. 5	

Malak Chand and Mehta Gurdas Ram were impleaded in the suit as defendants 1 and 2 respectively. Defen-

dant No. 1 denied that the house in suit was the joint family property of the plaintiffs and maintained that it was the self-acquired property of Kanhaiya Lal. He further pleaded that the transaction of suretyship entered into by Kanhaiya Lal was for the benefit of the family inasmuch as Kanhaiya Lal had protected himself up to Rs.8,000 by getting a surety bond from Raja Ram and had obtained a bond for Rs.2,000 from Gurdas Ram by way of remuneration. Lastly he pleaded that the transaction in question had subsequently been ratified by the plaintiffs.

The learned Sessions and Subordinate Judge found that the house in suit was the joint family property of the plaintiffs. He further held that as there was no evidence that Kanhaiya Lal was the *karta,* the plea of family benefit must fail. On the question of ratification he held that the transaction had been ratified by plaintiffs 1 to 3 and by defendant No. 3 but not by plaintiffs 4 and 5. He was therefore of opinion that the decree of Malak Chand could not be executed against the house in suit. As a result of the above findings he decreed the plaintiffs' claim and gave them the declarations prayed for. Malak Chand defendant No. 1 has appealed against this decree of the Sessions and Subordinate Judge and the appeal has been registered as First Civil Appeal No. 23 of 1934.

It will be convenient to take up this appeal first. The learned counsel for the appellant has in the first place questioned the correctness of the lower Court's finding about the house in suit being joint family property. The family consisted of Suraj Bali and his sons. In such a case there is a strong presumption of their being joint. There is no evidence of any separation having taken place amongst them. It must therefore be taken that they constituted a joint Hindu family. It is admitted that Suraj Bali carried on timber business which was continued by his sons after his death. There are a number

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of sale deeds and mortgage deeds on the record of this suit and on the record of the execution of decree appeal case, which have been treated as evidence in this suit, which show that several properties were acquired by Suraj Bali. There are a few deeds in the names of the sons of Suraj Bali also. This is in no way inconsistent with the family being joint as it is not unusual that deeds are sometimes taken in the names of different members. We are therefore satisfied that there was sufficient nucleus from which the property in suit could have been acquired. Exhibit 17 is a lease for building purposes for ten years from the 1st of April, 1905, which was taken by Suraj Bali in respect of Nazul land. The Commissioner who was appointed by the lower Court has found, and this finding is not disputed before us, that the house in suit has been built on this land. Stress has been laid on the fact that a subsequent lease exhibit A-13 of the same land for ninety years is in the name of Kanhaiya Lal and that the application to the Municipal Board for permission to build was also made by Kanhaiya Lal. We are inclined to think that exhibit A-13, is a renewal of the old lease which was in the name of Suraj Bali. The fact of the application for permission to build having been made by Kanhaiya Lal does not necessarily prove that the house belonged to him. In the absence of any evidence about the house having been built with the separate income of Kanhaiya Lal the presumption arising from the existence of an adequate nucleus of joint family property must be that the house in suit was also the property of the joint family. There is also some evidence showing that the rent realized from tenants of the house was credited in the joint account and that the family was jointly assessed for income-tax on the entire family income. Taking all these circumstances into consideration we think that the finding of the lower Court about the house being joint family property is correct and must be upheld.

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Next it is argued that the lower Court is wrong in disregarding the plea about the transaction in question being for family benefit merely on the ground that there was no evidence about Kanhaiya Lal having been the manager. It is contended that the plaintiffs did not impugn the transaction on this ground and never pleaded that Kanhaiya Lal was not the manager. We agree with the lower Court that when the defendant No. 1 set up the plea that the alienation made by Kanhaiya Lal was for family benefit and binding on the family it was his duty to prove all the elements essential for an alienation for family benefit. In such circumstances it was for the defendant-appellant to allege and prove that Kanhaiya Lal was the manager. The plaintiffs never admitted Kanhaiya Lal to be the manager. On the contrary in the course of oral pleadings they have referred to him only as a member of the joint Hindu family. Admittedly Kanhaiya Lal is not the eldest amongst his brothers and there is no evidence that he was the manager. The question therefore is whether as a junior member of the family the transaction of suretyship entered into by him can be made binding on the family. Some authorities have been cited in support of the contention that even as a junior member Kanhaiya Lal could properly enter into the transaction in question if it was for family necessity or for the benefit of the family. It is not necessary for us to discuss these authorities because we are of opinion that the transaction was not justified by any family necessity and was not for the benefit of the family.

In the course of written or oral pleadings the defendants never pleaded that the transaction was for any family necessity. An attempt has been made to build up an argument about the transaction being for family necessity on the basis of a statement which had been made by Shyama Charan Munim that at the time of the transaction the family was indebted to the extent of Rs.12,000. This argument ignores the further state-

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ment made by the said Munim as P. W. 5, that there was also Rs.16,000 due to the firm on the same date. We are convinced that the argument based on the alleged family necessity has no force.

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Turning now to the question of family benefit, no doubt Kanhaiya Lal took a security bond from Raja Ram in order to protect the family against the risk which he ran in standing up as surety, but as a matter of fact he failed to get the security bond registered. As regards the bond which he had obtained from Gurdas Ram for Rs.2,000 in lieu of his remuneration, it is admitted that although Kanhaiya Lal had obtained a decree on its basis, yet he was never able to realize a single pie from Gurdas Ram who has now become insolvent. Thus as the events have happened, clearly the transaction has proved a dead loss. It is argued that the transaction is to be judged not by the actual results but by what might have been expected to be its results at the time it was entered into. Even so, we cannot overlook the fact that a transaction of suretyship is in its nature a transaction of a risky character and that even at its inception the transaction in question was more or less of a speculative character. It has been held that even the manager of a joint Hindu family cannot impose upon the other adult members the risk and liability of a new business started by him unless the business is started or carried on with their consent express or implied. *Tramireddi* v. *Gangireddi* (1) and *Mahabir Prasad Misr* v. *Amla Prasad Rai* (2). There is much greater reason to hold that Kanhaiya Lal who was only a junior member could not bind the other adult members of the family by entering into a speculative transaction of this character. We are in the circumstances of opinion that the transaction cannot be regarded as one for family benefit or binding on the family.

Lastly there is the question of ratification. The plea is based on certain facts which need to be stated. On

(1) (1921) I.L.R., 45 Mad., 281. (2) (1924) I.L.R., 46 All., 564.

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the 10th of July, 1929, Kanhaiya Lal presented the deed exhibit A-4 executed in his favour by Raja Ram before the Sub-Registrar of Jullundhar for registration. The registration was refused by the said Sub-Registrar. On the 16th of September, 1929, Kanhaiya Lal filed an appeal before the District Registrar of Jullundhar against the order of the Sub-Registrar refusing registration. Kanhaiya Lal having died the appeal was consigned to records. On the 18th of January, 1933, Faqire Lal for self and on behalf of Hira Lal, Jawahir Lal and Sheo Narain made an application to the District Registrar saying that the applicants had no knowledge of Kanhaiya Lal's application for registration of exhibit A-4 or of his filing an appeal against the Sub-Registrar's order, and having become recently aware of the dismissal of the appeal for want of prosecution, they prayed that the appeal be re-admitted and heard. The appeal was re-admitted and eventually dismissed. On these facts the lower Court has held that the transaction must be deemed to have been ratified by plaintiffs 1 to 3 and defendant No. 3. It was, however, of opinion that the defendants could not derive any benefit from it because there were two other members of the joint family, Lachmi Narain and Dwarka Prasad, who had not ratified it. We are not free from doubt as to whether the application made by Faqire Lal for revival of the appeal to which reference has been made above can constitute ratification of the transaction under which Kanhaiya Lal bound himself as surety, but the question seems to us to be immaterial. It was held by a Full Bench of our Court in *Angraj Bahadur Singh* v. *Ram Rup* (1), that a mortgage of joint ancestral property effected by a Hindu father not for legal necessity or for discharging an antecedent debt is void from its inception. It would apply with much greater force to the transaction under consideration which was entered into by a junior member of the family without any legal necessity and not

(1) (1930) I.L.R., 6 Luck., 158.

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for the benefit of the family. The transaction being therefore entirely void and not merely voidable there could not be any ratification of it. *Monohar Das Monanta* v. *Tarini Charan Nandi* (1), and *Kandasam Asari* v. *Somashanda Ela Nidhi, Limited* (2). It is, also admitted that Lachhmi Narain and Dwarka Prasad never did anything to ratify the transaction. Even though their fathers may have ratified the transaction they had acquired an interest in the property by birth and their right in the joint family property is independent of the father. We are accordingly of opinion that the plea of ratification has been rightly disallowed. This disposes of all the pleas raised in the appeal.

A cross-objection has also been filed by the plaintiffs-respondents challenging the lower Court's order refusing the plaintiffs their costs of the suit. The lower Court taking the circumstances of the case into consideration has in the exercise of its discretion ordered the parties to bear their own costs. We see no sufficient reason to interfere with the discretion exercised by the lower Court in this matter.

The result therefore is that First Civil Appeal No. 23 of 1934 as well as the cross-objection fail and are accordingly dismissed with costs.

We next take up Execution of Decree Appeal No. 43 of 1933. As already stated the objection of Sheo Narain was dismissed by the Subordinate Judge and the execution was allowed to proceed. We understand the house has been sold and purchased by the decree-holder, Malak Chand. For the reasons stated by us in deciding the appeal in the regular suit we have no doubt that the transaction in dispute cannot be binding on the brothers or nephews of Kanhaiya Lal. It is equally clear that the sale of the family house which has taken place cannot be upheld. But it seems to us that the case of Sheo Narain, defendant No. 3, son of Kanhaiya

(1) (1929) 34 C.W.N., 135. (2) (1910) I.L.R., 35 Mad., 177.

Lal, stands on a different footing. The Hindu law-givers have laid down detailed rules on the subject of suretyship debts. Chapter VI, section 4 of the Mitakshara contains the following provisions on the subject:

Placitum 53—"Suretyship is enjoined for appearance, for confidence and for payment. On failure of either of the first two, the surety (himself) in each case shall pay; on that of the third, his sons also must pay."

Placitum 54—"If a surety for appearance or for confidence dies, the sons have not to pay; in the case of a surety for payment the sons have to pay."

It is quite clear that the suretyship in the present case was one for payment and not for appearance or for confidence. We have therefore no hesitation in holding that Sheo Narain is bound by the obligation incurred in the present case by his father Kanhaiya Lal, irrespective of any question of family benefit or family necessity. We are supported in this view also by the decision of the Allahabad High Court in *The Maharaja of Benares* v. *Ramkumar Misir* (1), *Mata Din Kandu* v. *Ram Lakhan* (2), *Dwarka Das* v. *Kishan Das* (3), and of the Patna High Court in *Baij Nath Prashad* v. *Bindeshwari Prasad Singh* (4). It is not disputed that under section 145 of the Code of Civil Procedure the decree obtained by Malak Chand could be executed against the surety Kanhaiya Lal. But it was held in *Hashmat Ara Begam* v. *Barati Lal* (5), to which one of us is a party, that it is only the personal liability and not the liability of the hypothecated property which can be enforced under that section. We are satisfied on a perusal of the surety bond that it clearly contains a personal covenant. It follows therefore that the personal liability incurred by Kanhaiya Lal under the said bond was enforceable after his death against his son Sheo Narain. It can be so enforced by the decree-holder attaching Sheo Narain's share in the family

(1) (1904) I.L.R., 26 All., 611. (2) (1929) I.L.R., 52 All., 153.
(3) (1933) I.L.R., 55 All., 675. (4) (1925) A.I.R., Pat., 609.
(5) (1934) I.L.R., 9 Luck., 534.

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property. It might be pointed out that under section 53 of the Code of Civil Procedure property in the hands of a son or other descendant which is liable under Hindu Law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative. It has, however, been argued on behalf of Sheo Narain that the provisions of section 53 of the Code of Civil Procedure are not applicable to the present case because the joint family consisted of several members other than Kanhaiya Lal and his son. A similar contention was raised in *Chhotey Lal* v. *Ganpat Rai* (1). In that case a Full Bench of the Allahabad High Court held that section 53 of the Code of Civil Procedure enacts a rule of procedure only and is not intended to affect in any way the extent of a son's liability for his father's debts under the Hindu Law. The expression "property in the hands of a son" in that section does not necessarily signify tangible property exclusively possessed by the son without any co-sharers or co-parceners; it means and includes the undivided share of the son in the joint family property held by himself and the other co-parceners who may be in existence. If we may say so with respect we are entirely in agreement with this view. We must therefore hold that it is open to the decree-holder to enforce the obligation incurred by Kanhaiya Lal under the surety bond in question against his son Sheo Narain by attachment and sale of the latter's undivided share in the joint family property.

We accordingly allow the appeal, set aside the sale which has taken place and send the case back for execution to be proceeded with in accordance with the view expressed by us above. In the circumstances we make no order as to the costs of this appeal.

Appeal allowed.

(1) (1934) I.L.R., 57 All., 176.