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In these circumstances we see no reason to interfere with the court's order and dismiss this application with costs.

Application dismissed.

APPELLATE CIVIL

Before Mr. Justice G. H. Thomas and Mr. Justice Ziaul Hasan

1937
August, 23

BABU BRIJ MOHAN LAL (DEFENDANT-APPELLANT) *v.* SARABJIT SINGH AND OTHERS, PLAINTIFFS AND OTHERS, DEFENDANTS (RESPONDENTS)*

Hindu Law—Joint family—Manager of joint Hindu family, Powers of—Acquisition of new property by money raised by mortgage of joint family property—Transaction, when binding on joint family—Test, whether transaction beneficial and prudent—Civil Procedure Code (Act V of 1908), order XLI, rule 1, order XLIII, rule 1(w) and order XLVII, rule 7—Review application granted—Appeal against order granting review application, when lies—Provision of order XLI, rule 1, if imperative—Memorandum of appeal not accompanied by copy of decree appealed against—Appeal, if valid without copy of decree.

There is nothing in the Hindu Law to prevent the head and manager of a joint family from doing anything in the interest of the family which any other prudent manager may do. The test should always be whether the transaction entered into by the head or manager was advantageous and for the benefit of the estate. No hard and fast rule can be laid down as to what constitutes and what does not constitute "the benefit to the estate", and it must vary according to circumstances of each case. There can be circumstances in which the acquisition of new property, by pre-emption or otherwise, can be held to be justified by legal necessity. Also, in certain circumstances, it may be held that such acquisition was a beneficial and prudent act such as would justify a mortgage of joint Hindu family property by a manager. But the fact showing that the transaction was beneficial and prudent must be proved,

*First Civil Appeal No. 61 of 1935, against the decree of Sheikh Ali Hammad, Civil Judge of Hardoi, dated the 15th of March, 1935.

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the acquisition of new property, with money raised upon a mortgage need not necessarily be of benefit to the estate. *Hunoomanpersaud Panday* v. *Babooee Munraj Koonweree,* (1), *Muneshar Bakhsh Singh* v. *Arjun Singh* (2), *Beni Madho Singh* v. *Chander Prasad Singh* (3) and *Jan Mohammad* v. *Bikoo Mahto* (4), referred to.

Order XLIII, rule 1(*w*) gives a right of appeal against orders granting an application for review but does not specify the grounds on which the appeal can lie. Those grounds are specified in order XLVII, rule 7. The general right of appeal given in order XLIII, rule 1(*w*) must, therefore, be held to be subject to the specific provisions of order XLVII, rule 7 as regards the grounds on which an appeal can lie. *Bankey Behari Lal* v. *Abdul Rahman* (5), and *Gajraj Kuer* v. *Chabraj Kuer* (6), relied on.

The provision of order XLI, rule 1, Civil Procedure Code, is imperative and states that a memorandum of appeal shall be accompanied by a copy of the decree appealed against. It is a condition precedent to there being a valid memorandum of appeal that it should be accompanied by a copy of the decree appealed from.

Messrs. *M. Wasim* and *Bhawani Shankar,* for the appellant.

Messrs. *Radha Krishna Srivastava* and *Raj Bahadur,* for the respondents.

THOMAS and ZIAUL HASAN, JJ.:—This is a defendant's appeal against the judgment and decree of the learned Civil Judge of Hardoi dated the 15th of March, 1935.

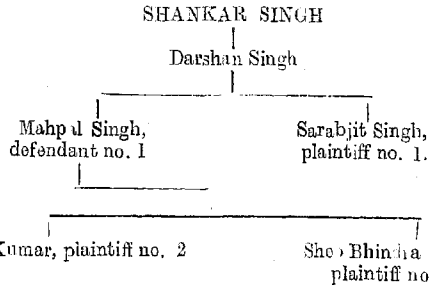
It arises out of a suit for a declaration.

The plaintiffs brought two declaratory suits, No. 20 of 1934, which is First Civil Appeal No. 61 of 1935, and No. 21 of 1934 which is Miscellaneous Appeal No. 55 of 1935 in this Court. The learned Civil Judge disposed of both the suits by one judgment. We propose to do the same. In order to appreciate the

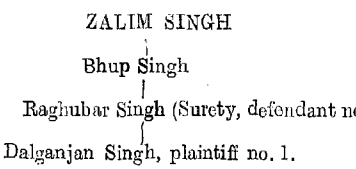
(1) (1856) 6 M.I.A., 393.
(2) (1916) 19 O.C., 100.
(3) (1924) I.L.R., 3 Pat., 451.
(4) (1928) I.L.R., 7 Pat., 798.
(5) (1931) I.L.R., 7 Luck., 350.
(6) (1936) I.L.R., 12 Luck., 362.

facts the following short pedigrees in the two suits are necessary:

First Civil Appeal No. 61 *of* 1935/*Suit No.* 20 *of* 1934



Miscellaneous Appeal no. 55 *of* 1935/*Suit no.* 21 *of* 1934



Brijmohan Lal, defendant-appellant in both the appeals.

On the 24th of October, 1916, Bhikham Singh and Musammat Phul Kunwar sold 1 biswa and 5 biswansis share in village Gaju for Rs.14,000 to one Maharaj Ram Lotan (*vide* exhibit 19).

On the 6th of November, 1917, Raghunath Singh, Mangal Singh, Mahpal Singh, Pahlad Singh, Chandrika Singh and Jagat Singh filed a suit for possession of the property sold to Ram Lotan by right of pre-emption on payment of Rs.9,521-12. It may be mentioned that Jagat Singh died during the pendency of the suit and the name of his widow, Musammat Dharam Kuar, was brought on the record. The suit was compromised and a decree was passed in favour of the plaintiffs on the basis of the compromise, under which the plaintiffs were to pay Rs.9,204-4 by the 16th of July, 1918, to Maharaj Ram Lotan (*vide* exhibits 21 and 22) and it was ordered that in default of payment the suit would stand dismissed.

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It may be mentioned that a sum of Rs.5,645-12 was due to prior encumbrances and the pre-emptors agreed to pay that amount.

On the 16th of July, 1918, all the pre-emptors including Mahpal Singh, defendant No. 2 of suit No. 20 of 1934, executed a mortgage-deed (exhibit A-3) in favour of defendant No. 1, Brijmohan Lal, hypothecating the entire share which they had pre-empted for Rs.10,000 bearing interest at the rate of Re.1-2 per cent. per mensem compoundable at six-monthly rests. The idea no doubt was to raise money in order to pay off the pre-emption decree.

Kalka Singh, Raghubar Singh and Mahpal Singh executed a surety deed in favour of Brijmohan Lal (exhibit A-4) hypothecating their ancestral shares of 2 biswas and 10 biswansis in village Gaju and two annas share in village Lohri. The pre-emption amount was deposited on the 16th of July, 1918, and a decree was passed.

On the 28th of October, 1926, Brijmohan Lal filed a suit on the basis of his mortgage-deed claiming Rs.26,960-8-6 by sale of the mortgaged and secured property (*vide* exhibit 27, plaint). On the 31st of May, 1927, he obtained a decree for Rs.32,429-11 (*vide* exhibit A-2 judgment and A-1 decree). On the 20th of March, 1929, the decree was made absolute. In execution of the decree the mortgaged property was put to an auction sale and purchased by the decree-holder (Brijmohan Lal) for Rs.6,000; subsequent to the auction sale the decree-holder applied for the sale of the property hypothecated under the surety deed and this sale is now pending in the court of the Sale Officer at Hardoi. These sale proceedings have led to the institution of the present declaratory suits. The plaintiffs of both the suits seek a declaration to the effect that they are not bound by the decree dated the 31st of May, 1927, and that the shares in dispute which are their ancestral shares are not liable to sale in

execution of that decree. The plaintiffs in both the suits further alleged that although the hamlets of Guthwa, Bhadin and Fatehpur were included in Gaju, which is the *hadbast* village, yet they are treated as distinct villages: that their ancestral shares in the aforesaid hamlets were not covered by the surety deed and were not liable to sale, that there was no legal necessity to hypothecate the ancestral shares of Gaju, and that the transaction was not beneficial to the joint family.

Thomas and Ziaul Hasan, JJ.

Sarabjit Singh and his co-plaintiffs also asserted that the pre-emption suit was not launched in the interest of the joint family but was instituted for personal motives and that the profits of the pre-empted share, which was acquired for Rs.14,000 on the basis of the compromise decree, amounted to Rs.300 only, and the value of the share did not exceed Rs.6,000.

Defendant No. 1 denied that the property in suit was the ancestral property of the plaintiffs. He pleaded that the mortgage debt was raised for the benefit of the joint families, that the mortgage debt was raised on foot of an insufficient security, which necessitated the hypothecation of other property, and that the plaintiffs were bound by the decree. He further pleaded that the suits were barred by limitation.

The learned Civil Judge framed the following issues:

1. (*a*) Where the mortgage deed and the surety bond dated the 16th of July, 1918, executed for the benefit of the joint families as alleged by the defendant No. 1?

(*b*) If so, are the plaintiffs of the two suits bound by them?

2. Whether the property hypothecated under the surety bond was ancestral family property of the plaintiffs of the two suits?

3. (*a*) Whether the property forming the security of the surety bond does not comprise the

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shares of Fatehpur, Bhadin, Guthwa as alleged by the plaintiffs?

(*b*) If so, its effect?

4. Is the suit barred by time as alleged by the defendant No. 1 in paragraphs 13 and 14 of the written-statements?

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5. Is there any hamlet known as Gaju or Gaju Khas distinct from village Gaju as alleged by the defendant no. 1?

6. To what relief, if any, are the plaintiffs of the two suits entitled?

7. Is Dalganjan Singh not bound by the decree dated the 31st of May, 1927?

His findings on the main issue with which we are concerned in the appeals were that the property hypothecated under the surety bond was ancestral property of the plaintiffs of the two suits; that Mahpal Singh was the manager at the time when exhibits A-3 and A-4 were executed, and that he had power to alienate for value the joint family property so as to bind the interests of the other members of the family. but the alienation was not made for legal necessity or for the benefit of the estate. He further held that Mahpal Singh acted recklessly in standing surety. He also held that the property forming the security of the surety bond (exhibit A-4) did not comprise the shares of the hamlets of Guthwa, Bhadin and Fatehpur and that the suit was not barred by limitation. He accordingly dismissed Dalganjan's suit (No. 21 of 1934) and decreed Sarajbit Singh's suit (No. 20 of 1934) by passing a declaratory decree in their favour to the effect that the plaintiffs were not bound by the decree of the 31st of May, 1927, and that their ancestral property of Gaju, Fatehpur, Bhadin and Guthwa was not liable to be sold in execution of the decree (exhibit A-1).

On the 18th of April, 1935, Dalganjan Singh under order XLVII, rule 1 and sections 151 and 153 of the Code of Civil Procedure applied for review of the

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judgment and decree passed in suit No. 21 of 1934 on the ground that there was an error apparent on the face of the record. In paragraph 4 of the application it was stated that "the petitioner feels himself aggrieved by the total dismissal of his suit and feels that the court really did intend to give, or at any rate, should have given, after its finding on issue No. 3(A), a limited declaratory decree to the plaintiffs to the effect that the ancestral property of Bhadin, Fatehpur, and Guthwa could not be attached and sold in execution of the decree dated the 31st of May, 1927 (exhibit A-1)". The learned Civil Judge after hearing the parties allowed the application. He passed the following order:

> "I, therefore, amend the order dismissing the applicant's suit in its entirety. A declaratory decree shall be passed in favour of Dalganjan Singh to the effect that the shares of Bhadin, Fatehpur and Guthwa are not liable to sale under the decree in question. His suit otherwise stands dismissed . . ."

Miscellaneous Appeal No. 55 of 1935 is against this order.

The points for consideration in First Civil Appeal No. 61 of 1935 are whether the plaintiffs are bound by the decree dated the 31st of May, 1927 (exhibit A-1) and (2) whether the ancestral property of Gaju, Fatehpur, Bhadin and Guthwa can be sold in execution of the said decree.

It may now be taken to be the settled law that there is nothing in the Hindu Law to prevent the head and manager of a joint family from doing anything in the interest of the family which any other prudent manager may do. The test should always be whether the transaction entered into by the head or manager was advantageous and for the benefit of the estate. There is a conflict of opinion as to the meaning of the words "for the benefit of the estate." Reference may be made to Mulla's Hindu Law, paragraph 243-A (8th edition), page 274, in which he says that "there are

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two views with regard to the meaning of the words for the benefit of the estate. One view is that a transaction cannot be said to be for the benefit of the estate, unless it is of a defensive character calculated to protect the estate from some threatened danger or destruction. Another view is that for a transaction to be for the benefit of the estate it is sufficient if it is such as a prudent owner, or rather a trustee, would have carried out with the knowledge that was available to him at the time of the transaction." The leading case is a decision of their Lordships of the Privy Council in the case of *Hunoomanpersaud Panday* v. *Musammat Babooee Munraj Koonweree* (1).

In the case of *Muneshar Bakhsh Singh* v. *Arjun Singh and others* (2), it was held that there was nothing in the Hindu Law to prevent the head and manager of a joint family comprising only minor members, from doing anything in the interests of the family which any other prudent manager may have done under similar circumstances. It would be in the highest degree deleterious to the interests of such minor members if the head and managing member of the family were restrained from doing anything, however beneficial to their interests, which necessitated the raising of a loan on the security of the ancestral property till the minors attained majority. It was further held that a transfer made in the interests of the family, that is to enlarge the means of its subsistence might thus be as binding as one made to pay antecedent debts or to meet an immediate necessity. Where the father acting as manager mortgaged ancestral property in order to acquire by pre-emption on advantageous terms property belonging to a distant branch of the family, held, that the transfer was binding on the minor sons. This is the leading case in Oudh.

(1) (1856) 6 M.I.A., 393. (2) (1916) 19 O.C., 100.

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In the case of *Beni Madho Singh* v. *Chander Prasad Singh* (1), it was laid down that where the *karta* of a joint Hindu family purchased a share in a village in which the family already possessed a share, and, in order to obtain money to pay off a mortgage decree which was binding on the purchased share, executed a mortgage of joint family property, held, that the purchase was not speculative because the family already held a share in the village . . . and that inasmuch as the purchase was not itself imprudent but was one which yielded a profit, although small, the transaction was for the benefit of the family and the mortgage was binding the family property.

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In the case of *Shaikh Jan Mohammad* v. *Bikoo Mahto* (2), the same principle was reiterated.

The point which we have to consider is whether the transaction was for the benefit of the estate and whether it was a transaction into which a prudent owner would enter in the ordinary course of management in order to benefit the estate.

The contention of the learned counsel for the appellant is that the transaction was not speculative and imprudent because the family already held a share in the villages, and, therefore, knew the value. He has urged that the value of the property pre-empted was at least Rs.28,000. The village undoubtedly is a large one as appears from the assessment statement (exhibit A-10). The mortgage-deed undoubtedly was executed by Mahpal Singh and others for the purpose of raising funds for payment of the decretal amount of the pre-emption decree, which was for Rs.14,000; out of this amount Rs.9,204-4 was to be deposited in court for payment to the vendee; and the remaining amount of Rs.5,645-12 was to be paid towards prior encumbrances which had not till then been paid off by the vendee. The property for which the pre-emption decree was passed was 1 biswa 5 biswansis share of village Gaju

(1) (1924) I.L.R., 3 Pat., 451. (2) (1928) I.L.R., 7 Pat., 798.

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along with hamlets with the exception of certain specific plots measuring 66 bighas. The mortgage-deed (exhibit A-3) carried interest at Rs.13-8 per cent. per annum with the stipulation that interest was to be paid six-monthly and in case of default compound interest at the same rate was to be paid with half-yearly rests. Mahpal Singh and Raghubar Singh stood surety for the due payment of the mortgage debt under exhibit A-3 by hypothecating their ancestral shares of village Gaju. It is amply clear that the mortgage-deed was not executed for any recognized legal necessity.

The learned counsel for the appellant relied on the statement of D. W. 1, who has stated that the property which formed the subject-matter of the pre-emption suit was worth Rs.28,000. The witness has not assigned any reason for saying how the property was worth Rs.28,000. In our opinion the trial court has rightly rejected his evidence.

Reference was also made to exhibit D. W. 1/1 but this document is of no avail to the appellant. It shows that under it 2 biswas 10 biswansis share of village Gaju and its hamlets along with other property consisting of 104 bighas and odd of specific plots was sold for Rs.65,000. The pre-empted property as pointed out above comprised 1 biswa 5 biswansis share with the exception of certain plots measuring 66 bighas. There is no evidence to enable us to ascertain the price of the plots sold under this document and those exempted under the sale-deed, dated the 24th of October, 1916 (exhibit 19). In our opinion the defendant No. 1 has failed to prove that the pre-empted property was worth more than Rs.14,000. The pre-empted property was purchased by the defendant No. 1 for Rs.6,000 at the auction sale of 1930, although the price fetched in 1930 affords no ground for determining its value in 1918 but we cannot lose sight of the fact that the property was sold for Rs.6,000. It must be remembered that there was an

encumbrance of Rs.5,645 and odd on the pre-empted property and the mortgages were possessory. It is clear from the record that the joint family was not possessed of funds to enable Mahpal Singh to redeem the prior mortgages, hence the chance of getting any increased income was extremely remote.

In our opinion there was no immediate gain by this transaction. Out of 1 biswa 5 biswansis share Mahpal Singh's share would be one-sixth only, which would roughly come to about 4 biswansis share. He would have to sue for a partition. The interest at the end of the year would amount to Rs.1,396 and the profits of the entire 1 biswa and 5 biswansis share would be Rs.921 out of which should be deducted the profit of 66 bighas which was exempted. We are told that it would be about Rs.180. Therefore, the balance would be roughly Rs.700 and odd. There is no evidence to show the quality of the land. It is thus clear that the loss would amount to Rs.655 a year. This by no means can be said that it was for the benefit of the family. This certainly was not the action of a prudent manager. There is no evidence to show that the co-mortgagors were financially well off. The mere fact that they were obliged to borrow money was an indication that their financial position was anything but satisfactory. We, therefore, agree with the finding of the learned Judge that Mahpal Singh acted recklessly in standing surety.

Thomas and Ziaul Hasan, JJ.

In our opinion no hard and fast rule can be laid down as to what constitutes and what does not constitute "the benefit to the estate", and it must vary according to circumstances of each case. There can be circumstances in which the acquisition of new property, by pre-emption or otherwise, can be held to be justified by legal necessity. Also, in certain circumstances, it may be held that such acquisition was a beneficial and prudent act such as would justify a mortgage of joint Hindu family property by a manager. But the fact

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showing that the transaction was beneficial and prudent must be proved, the acquisition of new property, with money raised upon a mortgage need not necessarily be of benefit to the estate. In our opinion the defendant has failed to prove that the transaction was beneficial and prudent.

Thomas and Ziaul Hasan, JJ.

In view of this finding it is not necessary to decide the other question.

We accordingly dismiss the appeal with costs.

With regard to Miscellaneous Appeal No. 55 of 1935 it is filed under order XLIII, rule 1(*w*) of the Code of Civil Procedure. Appeal against an order granting an application for review of judgment must be restricted to one or other of the grounds set forth under order XLVII rule 7 of the Code of Civil Procedure. Order XLIII, rule 1(*w*) gives a right of appeal against orders granting an application for review but does not specify the grounds on which the appeal can lie. Those grounds are specified in order XLVII, rule 7. In our opinion the general right of appeal given in order XLIII, rule 1(*w*) must, therefore be held to be subject to the specific provisions of order XLVII, rule 7 as regards the grounds on which an appeal can lie. The grounds on which an appeal under order XLVII, rule 7 can lie are:

(*a*) in contravention of the provisions of rule 2,

(*b*) in contravention of the provisions of rule 4, or

(*c*) after the expiration of the period of limitation prescribed therefor and without sufficient cause.

We are supported in our view by two decisions of this Court: *Bankey Behari Lal* v. *Abdul Rahman* (1) and *Gajraj Kuer, Thakurain* v. *Chabraj Kuer, Thakurain* (2).

It is admitted by the learned counsel for the appellant that the case does not fall within the

(1) (1931) I.L.R., 7 Luck., 350. (2) (1936) I.L.R., 12 Luck., 362.

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provisions of order XLIII, rule 1(*w*), but his contention is that there is nothing in law to prevent him from attacking the judgment of the trial court on merits. We do not agree with this contention. We may point out that the application for review was allowed on the 4th of July, 1935, and the decree was prepared on the same date. The provision of order XLI, rule 1 of the Code of Civil Procedure is imperative and states that a memorandum of appeal shall be accompanied by a copy of the decree appealed against. It is a condition precedent to there being a valid memorandum of appeal that it should be accompanied by a copy of the decree appealed from. No such decree has been filed with the memorandum of appeal.

Thomas and Ziaul Hasan, JJ.

We accordingly dismiss this appeal with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice G. H. Thomas and Mr. Justice Ziaul Hasan

BACHCHA LAL, (DEFENDANT-APPELLANT) *v.* MUNNU LAL (PLAINTIFF-RESPONDENT)*

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August, 23

Civil Procedure Code (Act V of 1908), Schedule II, paragraphs 3(2) and 15(1) and order XXIII, rule 3—Award—One party applying for setting aside of award and other party not objecting—Court, whether can set aside award—Grounds for setting aside of award—Reference to arbitration—Court's jurisdiction to try suit after it is referred to arbitration—Order XXIII, rule 3, applicability of, to agreement of parties to set aside an award.

The words of clause 15(1) of Schedule II of the Code of Civil Procedure are imperative and take away the jurisdiction of the court to set aside an award on any ground other than those specified in the said clause. Where, therefore, a court sets aside the award without coming to a finding whether or not any of the grounds specified in clause 15(1) existed but merely on the ground that one of the parties applied to have the award set

*First Civil Appeal No. 25 of 1935, against the decree of Babu Bhagwati Prasad, Civil Judge of Lucknow, dated the 30th of November, 1934.