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NAWAB MOHAMMAD ATA HUSAIN KHAN *alias* MUNNEY SAHEB *v.* NAWAB BAQIR MIRZA

For the above reasons we allow the appeal, set aside the decree of the lower court, and send the case back to the court below for being tried *de novo* after the plaintiffs have been allowed to amend their plaint and the defendants have been allowed opportunity to file fresh written statements. The plaintiffs-appellants will pay the costs of the defendants-respondents in this court as well as their costs incurred hitherto in the lower court.

Appeal allowed.

REVISIONAL CIVIL

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

1937
April, 20

SARDAR NIHAL SINGH (APPLICANT) *v.* CAPTAIN RAJA DURGA NARAIN SINGH (OPPOSITE-PARTY)*

United Provinces Agriculturists' Relief Act (XXVII of 1934), sections 5 and 30—Civil Procedure Code (Act V of 1908), sections 47 and 96—Preliminary decree for sale—Application for decree absolute under order XXXIV, rule 5, Civil Procedure Code—Judgment-debtor's application that he intended to apply under United Provinces Agriculturists' Relief Act and praying for dismissal of application under order XXXIV, rule 5 dismissed—Appeal against order of dismissal of application, if lies.

Where the holder of a preliminary decree for sale applies under order XXXIV, rule 5, Civil Procedure Code, for the decree being made absolute and the judgment-debtor files an application stating that on account of bad harvests and agricultural difficulties, he could not collect the decretal amount and stating that "he was about to present an application to the Local Government that his property and debts be managed according to the new Acts" and praying that the decree-holder's application for the decree being made absolute be dismissed, but the application is disallowed by the court and the decree is ordered to be made absolute, then no appeal lies against the order rejecting the application of the judgment-debtor under the Agriculturists' Relief Act. No doubt under

*Section 115 Application No. 56 of 1937, against the order of Babu Bhagwati Prasad, Civil Judge of Lucknow, dated the 9th of May, 1935.

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clause (1) of section 5 of the Agriculturists' Relief Act, a preliminary decree for sale can be amended on the application of the judgment-debtor but where no such prayer is made by the applicant and all that is prayed is that "the decree-holder's application be dismissed" it cannot be said with reason that the court was wrong in rejecting such a prayer. *Nihal Singh* v. *Ganesh Dass Ram Gopal* (1), and *Raghuraj Singh* v. *Shankar Sahai* (2), referred to.

Mr. *Akhtar Hasan,* for the applicant.

Mr. *B. P. Misra,* for the opposite-party.

THOMAS and ZIAUL HASAN, JJ.:—This purports to be an appeal under sections 47/96 of the Code of Civil Procedure against an order dated the 9th of May, 1935, of the learned Civil Judge of Lucknow.

It appears that the respondent holds a decree for sale for a large amount against the appellant. The preliminary decree was passed on the 29th of September, 1934, and when the respondent applied under order XXXIV, rule 5 of the Code of Civil Procedure for the decree being made absolute, the appellant filed an application stating that on account of bad harvests and agricultural difficulties, he could not collect the decretal amount, and stating that "he was about to present an application to the Local Government that his property and debts be managed according to the new Acts" prayed that the decree-holder's application for the decree being made absolute be dismissed. This application was disallowed by the court below and the decree was ordered to be made absolute. It is against this order of dismissal of his application that the appellant has brought this appeal.

A preliminary objection is taken on behalf of the respondent to the effect that no appeal lies. It is argued that while no appeal lies under section 30 of the Agriculturists' Relief Act as was held in *Nihal Singh* v. *Ganesh Dass Ram Gopal* (1) an appeal under clause (2) of section 5 of the Act lies to the District Judge and not to this Court as was held in *Raghuraj Singh* v.

(1) (1936) O.W.N., 1158. (2) (1936) O.W.N., 534.

Shankar Sahai (2). On behalf of the appellant it is contended that the order of the learned Judge of the court below should be deemed to be a decree and that the appeal should be deemed to be an appeal against the final decree passed by the court rejecting the appellant's application. We are unable to accede to this contention. No doubt the appellant referred to sections 47 and 96 of the Code of Civil Procedure in the heading of his appeal but the heading also clearly shows that the appeal was directed not against the decree but against the order passed by the court below "rejecting the application filed under United Provinces Act XXVII of 1934". The grounds of appeal also show that the complaint of the appellant is that the court below did not exercise its powers under sections 4, 5 and 30 of the Agriculturists' Relief Act, and, further, in the relief claimed in the memorandum of appeal it is prayed that the order of the court below be set aside and that the court be directed that the decree be amended with regard to interest and future interest and be made payable by instalments. In these circumstances there is no force in the contention that the appeal is against the final decree passed by the court below. Moreover the appellant has not paid *ad valorem* court fee on the amount of the decree passed against him and for this reason also the appeal cannot be regarded as an appeal against the final decree.

It was next urged by the learned counsel for the appellant that clause (2) of section 5 of the Agriculturists' Relief Act providing for an appeal against an order refusing to grant instalments or granting a number or period of instalments which the judgment-debtor considers inadequate and making the appellate court's decision final does not apply as the learned Judge of the court below never took into consideration the grant of instalments as the application contained no such prayer, and therefore, never refused to grant instalments and that as the court below failed to exercise a

(1) (1936) O.W.N., 534.

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Thomas and Ziaul Hasan, JJ.

jurisdiction vested in it under clause (1) of section 5, this appeal can be treated as an application for revision under section 115 of the Code of Civil Procedure which would be applicable to proceedings under the Agriculturists' Relief Act by section 27 of that Act. There appears to be some force in this argument and we are not sure if in the present case in which no specific prayer was made by the appellant for the grant of instalments, the court can be said to have "refused to grant instalments" and we therefore assume that a revision lies in the case.

But even treating the appeal as a revision, we fail to see any force in it. No doubt under clause (1) of section 5 of the Agriculturists' Relief Act, a preliminary decree for sale could be amended on the application of the judgment-debtor but the difficulty is that no such prayer was made by the applicant. All that was prayed was that "the decree-holder's application (for final decree) be dismissed" and it cannot be said with reason that the learned Judge of the court below was wrong in rejecting such a prayer. The Agriculturists' Relief Act received the assent of the Governor-General on the 10th of April, 1935 and the Act was published on April 27, 1935, and if by the 9th of May, 1935, when the applicant put in his application the applicant did not care to look into the Act and find out the procedure that he should adopt he has himself to thank for the result. Had the application been one under clause (1) of section 5 of the Act, the learned Judge of the court below was bound to take action under it; but instead of asking for any definite reliefs under the Agriculturists' Relief Act, the applicant made vague statements about his right to get his debts "settled according to the new Act" and about his intention "to present an application to the Local Government that his property and debts be managed according to the new Acts", and ended by making the obviously untenable prayer that the decree-holder's application be dismissed.

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

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Application dismissed.

APPELLATE CIVIL

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

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

1937
August, 23

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,

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