APPELLATE CIVIL

Before Mr. Justice Ziaul Hasan

WAJID ALI (PLAINTIFF-APPELLANT) *v.* GANGA DIN (DEFENDANT-RESPONDENT)*

1938 February, 3

Family settlement—Mutual recognition of pre-existing rights is the essence of family settlement—Property whose ownership rests in one party allotted to other party—Transfer of ownership, if takes place—Registration, necessity of—Transfer of Property Act (IV of 1882), *section* 9.

The essence of a family settlement is a mutual recognition of a pre-existing right of the parties to the settlement.

Where any property in regard to which there was no doubt as between the parties that its ownership rested in one of the parties, is brought within the scope of the family arrangement and is allotted to one of the other parties, then *qua* that property there would be a transfer of ownership. But if the property so allotted is immovable the transfer is valid only if it is effected by a registered and duly signed and attested instrument. *Ram Gopal* v. *Tulshi Ram* (1) relied on. *Mewa Kunwar* v. *Hulas Kunwar* (2), and *Khunni Lal* v. *Gobind Krishna Narain* (3), referred to.

Mr. *Nazir Uddin,* for the appellant.

Mr. *S. Mohammad Husain,* for the respondent.

ZIAUL HASAN, J.—This is a plaintiff's appeal against a decree of the learned Civil Judge of Malihabad dismissing his appeal against a decree of the learned Munsif of Havali, Lucknow, by which his suit for sale on two mortgages was dismissed in respect to a portion of the mortgaged property.

The plaintiff-appellant brought his suit on foot of two simple mortgages executed in his favour by one Ram Charan on the 15th of August, and 23rd of September, 1932. The suit was brought against the two sons of Ram Charan, namely, Ganga Din, the present respondent, and Sita Ram who appears to have been subse-

*Second Civil Appeal No. 307 of 1936, against the decree of Mr. Brij Krishna Topa, Civil Judge of Malihabad at Lucknow, dated the 31st of July, 1936, upholding the decree of Mr. Grish Chandra, Munsif, Havali. Lucknow, dated the 15th of February, 1936.

(1) (1928) I.L.R., 51 All., 79. (2) (1874) L.R., 1 I.A., 157. (3) (1911) I.L.R., 33 All., 356.

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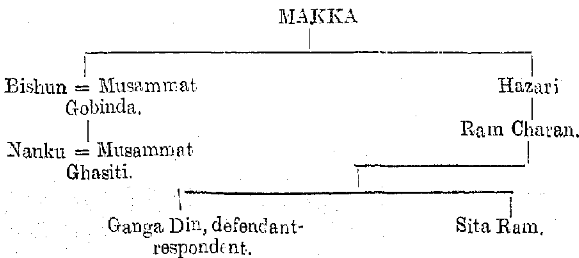
quently discharged as Ganga Din purchased his share from him. The main defence in the suit was that Ram Charan had no authority to mortgage the property in suit as by a family settlement arrived at between him and his sons, Ganga Din and Sita Ram, he had relinquished his rights in the family property which was divided half and half between Ganga Din and Sita Ram.

The learned trial court held that the alleged family settlement had not been proved in respect of the property in suit other than plot no. 1076. It therefore gave the plaintiff-appellant a decree against that property but dismissed the suit in respect of plot no. 1076. This decree was confirmed on appeal by the learned Civil Judge against whose decree the present appeal has been filed.

The admitted pedigree of Ram Charan's family is as follows:



So far as the plot in question is concerned the admitted facts are as follows:

The plot in suit originally belonged to Nanku. On the 26th of June, 1900, Nanku made a gift of this plot and of another plot to his mother Musammat Gobinda for her life in lieu of her maintenance. It was specifically provided in the deed that after Musammat Gobinda's death the property would revert to Nanku. Nanku died in the lifetime of Gobinda and his widow Musammat Ghasiti also died in Gobinda's lifetime. On the 12th of March, 1919, Gobinda executed a deed

of gift in respect of the plot in suit in favour of Ram Charan's son Sita Ram but no mutation of names was effected in pursuance of this deed in Gobinda's lifetime. In 1927 Gobinda died and it is not denied that on her death the person entitled to the property gifted to her by Nanku was Ram Charan but it appears that on the 17th of August, 1927, the revenue court ordered mutation of names in respect of the plot in question in favour of Ganga Din and Sita Ram.

It may also be mentioned that on the 28th of March, 1928, Ram Charan purported to sell the plot in question to one Sita Ram Bakkal in order to raise money for financing a suit which he contemplated to bring against his son Sita Ram to claim the family property but this deed of sale does not appear to have been given effect to and no suit was filed by Ram Charan or his vendee.

It is on the basis of the plot in suit being recorded in the revenue papers in the names of Ganga Din and Sita Ram that it is alleged that Ram Charan entered into a family settlement with his sons and gave up his rights in the plot in their favour and this plea has been accepted by both the lower courts.

The learned counsel for the appellant, however, argues that Ram Charan being admittedly the owner of the plot, there could be no family settlement about it between him and his sons and that if he wanted to transfer the plot to his sons it ought to have been done by a deed of gift duly executed and registered under section 123 of the Transfer of Property Act. I am of opinion that the contention of the learned counsel for the appellant is sound. It appears to me that the essence of a family settlement is a mutual recognition of a pre-existing right of the parties to the settlement but in the present case Sita Ram and Ganga Din had admittedly not the shadow of a right to the plot in question as against Ram Charan.

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In *Ram Gopal* v. *Tulshi Ram* (1) their Lordships of the Allahabad High Court after referring to the decisions of their Lordships of the Judicial Committee in *Mewa Kunwar* v. *Hulas Kunwar* (2) and *Khunni Lal* v. *Gobind Krishna Narain* (3) said—

> "These pronouncements of their Lordships of the Privy Council are sufficiently clear to put it beyond doubt that in the usual type of family arrangement in which there is no question of any property, the admitted title to which rests in one of the parties, being transferred to one of the other parties, there is no transfer of ownership such as is necessary to bring the transaction within the definition of exchange in section 118 of the Transfer of Property Act."

It will be observed that in this passage the learned Judges specifically exclude from the definition of a family arrangement a transaction by which some property the admitted title to which rests in one of the parties is transferred to one of the other parties and at page 83 also they say—

> "Where any property, in regard to which there was no doubt as between the parties that its ownership rested in one of the parties, is brought within the scope of the family arrangement and is allotted to one of the other parties, it may be that *qua* that property there would be a transfer of ownership."

This remark fully applies to the present case in which title to the plot in question admittedly rested with Ram Charan alone who by his entering into the alleged family arrangement cannot but be said to have transferred it to his sons Ganga Din and Sita Ram. The learned counsel for the respondent relies on section 9 of the Transfer of Property Act which provides that a transfer of property may be made without writing in every case in which a writing is not expressly required by law; but section 123 of the Act provides that a gift of immovable property to be valid must be effected by a registered and duly signed and attested instrument

(1) (1928) I.L.R., 51 All., 79. (2) (1874) L.R., 1 I.A., 157.
(3) (1911) I.L.R., 33 All., 356.

only. Admittedly there was no such instrument in the present case. The title to the plot in suit therefore did not pass from Ram Charan to Sita Ram or Ganga Din and Ram Charan's mortgage of it must be given effect to against Sita Ram and Ganga Din.

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The appeal is allowed with costs and the decree of the trial court modified so as to decree the plantiff's suit in respect of plot no. 1076 also.

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Appeal allowed.

MISCELLANEOUS CIVIL

Before Mr. Justice G. H. Thomas, Acting Chief Judge and Mr. Justice Ziaul Hasan

THAKUR RAGHURAJ SINGH (APPLICANT) *v.* R. B. LALA HARI KISHEN DAS AND ANOTHER (OOPOSITE-PARTY)*

1938

February, 15

United Provinces Agriculturists' Relief Act (XXVII of 1934), *sections* 5 *and* 30—*Civil Procedure Code (Act V of* 1908), *sections* 115 *and* 109—*Revision whether lies against an order amending a decree under section* 5, *Agriculturists' Relief Act—Mortgage suit—Compromise decree in mortgage suit providing for satisfaction of decree by judgment-debtor executing a sale-deed of portion of mortgaged property—Section* 5, *if applies to such decree—Section* 5, *Agriculturists' Relief Act applies to decrees for payment of money—Construction of decrees—Discretion of court not to apply section* 5 *to a decree—Compromise decree not providing for payment of interest—Section* 30, *Agriculturists' Relief Act, if applies to such decree—Order dismissing an appeal as premature, whether a final order under section* 109, *Civil Procedure Code.*

High Court has power under its revisional jurisdiction to amend the decree so as to make it conform with the judgment and it is not necessary to send back the case to the lower court for amendment of the decree.

There is no bar to an application for revision being entertained against an order of the original court under section 5 if that court has exercised a jurisdiction which was not vested in it by law. *Man Mohan Das* v. *Izhar Husain* (1), followed. *Girdhari Lal* v. *Mohammad Ishrat* (2), distinguished.

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*Privy Council Appeal No. 21 of 1935, for leave to appeal to His Majesty in Council against the order of a Bench of this Court, dated the 18th of October, 1935.

(1) (1937) A.L.J., 370. (2) (1937) O.W.N., 1153.