1937.

SYED ABDUL HAKIM v. MANGAL CHAND.

ROWLAND, J.

so held the Munsif ought to have dismissed the application of the decree-holder to be given possession of the property. So Mr. Syed Ali Khan argues what the Court dealing with the title suit ought to do is the same as what the executing court ought to have done. But the consequences of this would be that the present title suit would be decided in favour of the plaintiff and the first defendant who has been held to be a usufructuary mortgagee would be defeated in a title suit for the right to possession over the land and this decision would be res judicata in any subsequent suit by him to declare and give effect to his title. It seems inconceivable that the legislature should have contemplated or intended such a result and therefore I agree for this reason as well as those given by my learned brother that the appeal should be dismissed with costs.

Appeal dismissed.

S. A. K.

APPELLATE CIVIL.

1938.

October, 5.

Before Wort and Rowland, JJ.

RAMKARAN THAKUR

v.

BALDEO THAKUR.*

Hindu Law—legal necessity—antecedent debt, what constitutes—benefit to family—acquiring fresh property by mortgaging ancestral property, whether beneficial to family—amendment of plaint, whether should be allowed after claim is barred by limitation.

Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached.

*Appeal from Appellate Decree no. 288 of 1935, from a decision of Bashiruddin, Esq., District Judge of Darbhanga, dated the 26th of March, 1935, confirming a decision of Babu Umakant Prasad Sinha, Munsif of Samastipur, dated the 30th of July, 1934.

1938.

RAMKARAN THAKUR v. BALDEO THAKUR.

Where the karta and one adult member of a joint Hindu family entered into a *sudbharna* transaction as mortgagees on the 19th of November, but, not having ready money with them, they simultaneously agreed to execute, in payment of the consideration money, a simple mortgage bond in favour of the mortgagors and eventually did execute it on the 3rd of December, hypothecating ancestral property :

Held, that there was no dissociation in fact between the two transactions, and, therefore, that the mortgage by the family was not based on antecedent debt.

Brij Narain v. *Mangla Prasad*(1) and *Raghunath Singh* v. *Modnarayan Singh* (2), followed.

The right of allowing an amendment of the plaint, although a matter of discretion, should not be exercised (unless there are very special circumstances) where the party affected thereby has acquired a valuable right.

An amendment might well be allowed if the application to make it is presented at a time when, failing leave to amend, it would have been still open to the plaintiffs to ask the court's permission for the suit to be withdrawn with leave to sue again, that remedy not yet being dead. But where the application is made after the claim is barred by limitation then although there is still a discretion in the court to allow amendment, the discretion will as a general rule be more wisely exercised by refusing it.

Charan Das v. *Amir Khan*(3), followed.

Per Wort, J. (Rowland, J. *dubitante*) : Although no precise definition of what is a benefit to the joint family estate can be given, it is well established that jeopardising a property, which is already the property of the joint Hindu family, for the purpose of purchasing another property can never, under any circumstance, be considered a benefit to the estate.

Palaniappa Chetty v. *Deivasikamony Pandara*(4) and *Rambilas Singh* v. *Ramyad Singh*(5), followed.

(1) (1923) I. L. R. 46 All. 95; L. R. 51 Ind. App. 129.
(2) (1927) 9 Pat. L. T. 142.
(3) (1920) I. L. R. 48 Cal. 110, P. C.
(4) (1917) I. L. R. 40 Mad. 709; L. R. 44 Ind. App. 147.
(5) (1920) 5 Pat. L. J. 622.

1938.

RAMKARAN THAKUR v. BALDEO THAKUR.

Per Rowland, J.—It is a doubtful proposition that it can never be beneficial to an estate to acquire a fresh property by hypothecating ancestral property of the estate for the purpose. The transaction must be judged not by its actual result but what might have been expected to be its result at the time it was entered into.

Jagat Narain v. *Mathora Das*(1), referred to.

Appeal by the plaintiffs.

The facts of this case material to the report are set out in the judgment of Wort, J.

S. N. Roy and *Ganesh Sharma*, for the appellant.

S. M. Mullick (with him *B. N. Mitter* and *K. N. Moitra*), for the respondents.

WORT, J.—This appeal is by the plaintiffs who brought an action on a mortgage, dated the 23rd of December, 1921. The questions which arise in the appeal are these: whether the mortgage was executed for the benefit of the joint family; whether in the circumstances of the case the consideration was an antecedent debt; and further, in the alternative, whether the plaintiffs failing upon the earlier points are entitled to obtain a money decree which question will depend very largely upon whether the learned Judge in the Court below ought to have allowed the amendment in the circumstance to which I shall in a moment refer.

So far as the first point is concerned, it seems to admit of only one answer. The learned Judge in the Court below has pointed out that the *sudbharna* property which was acquired by the money raised on the mortgage in suit was only valued at Rs. 60 less certain charges, that the liability under the mortgage was in excess of that amount, and on that footing he has come to the conclusion that it was a fact that the transaction could not benefit the joint family

(1) (1928) I. L. R. 50 All. 969, F. B.

of which the defendants were members. The question what is a benefit to the estate within the meaning of the rule of Hindu law was discussed by Lord Atkinson delivering the opinion of their Lordships of the Judicial Committee of the Privy Council in *Palaniappa Chetty* v. *Deivasikamony Pandara*(1) more particularly at page 155 where Lord Atkinson states: "No indication is to be found in any of them (i.e., the authorities cited) as to what is, in this connection, the precise nature of the things to be included under the description 'benefit to the estate'. It is impossible, their Lordships think, to give a precise definition of it applicable to all cases, and they do not attempt to do so. The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits". Delivering a judgment of this Court in a case where the question was whether the acquisition of an ijara property was a benefit to the estate, Sir Dawson Miller observed, in *Rambilas Singh* v. *Ramyad Singh*(2), as follows: "From the evidence on the record in the present case I am unable to find that any benefit to the joint family arising from the mortgage has been proved. With respect to the learned Judge I think he approached the question for decision from a wrong stand-point. Because the sum borrowed was spent in acquiring the *ijara* property and because all the defendants enjoyed the produce of that property he considered that they were benefited thereby and that the mortgage was therefore authorized. He did not consider whether the mortgage could be justified on the ground that the transaction as a whole was beneficial to the interests of the family. I think on the evidence before him he could hardly have decided that it was". Then the learned Chief Justice makes a reference to the fact that the family of the defendants collected and

(1) (1917) I. L. R. 40 Mad. 709; L. R. 44 Ind. App. 147.
(2) (1920) 5 Pat. L. J. 622.

1938.

RAMKARAN THAKUR v. BALDEO THAKUR.

WORT, J.

enjoyed the rents and profits of the *ijara* property. It is, as their Lordships of the Judicial Committee of the Privy Council pointed out in the case of *Palaniappa Chetty* v. *Deivasikamony Pandara*(1), impossible to give a definition of what is a benefit to the estate, but I have no hesitation in going so far as to say that jeopardising a property, which is already the property of the joint Hindu family, for the purpose of purchasing another property can never under any circumstance be considered a benefit to the estate, and that proposition in my opinion is clearly borne out by a large number of authorities and well established by the decision of their Lordships of the Judicial Committee of the Privy Council. Both for that reason and for the reasons stated by the learned Judge in the Court below I come to the conclusion that the first point urged in the appeal must fail.

The second and more substantial point is whether the mortgage was for consideration being a debt which was antecedent. Their Lordships of the Privy Council in the well-known case of *Brij Narain* v. *Mangal Prasad*(2) have left no doubt as regards that matter. Lord Dunedin delivering the judgment of their Lordships states the fourth proposition thus: "Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached". Now, on the findings of the Courts below in this case it is impossible in my judgment to come to the conclusion that the mortgage transaction was independent of the earlier *sudbharna* transaction. The *sudbharna* transaction was in fact some days or weeks antecedent to the mortgage transaction; but, as their Lordships pointed out, mere antecedency in time is not in itself sufficient. That matter has been discussed somewhat elaborately in this Court in the case of *Raghunath Singh* v. *Modnarayan Singh*(3).

(1) (1917) I. L. R. 40 Mad. 709; L. R. 44 Ind. App. 147.
(2) (1923) I. L. R. 46 All. 95; L. R. 51 Ind. App. 129.
(3) (1927) 9 Pat. L. T. 142.

1938.

RAMKARAN THAKUR v. BALDEO THAKUR

WORT, J.

Stating the facts not dissimilar to the facts of this case with perhaps one exception, the parties to the mortgage were amongst those who negotiated the earlier transaction. Mr. Justice Das (as he then was) makes this statement: " The question which I have to consider is whether in this case there is a real dissociation in fact between the transaction of the 16th January, 1911 and that of the 21st January, 1911 ", having pointed out that one transaction was for the purpose of carrying out another which was the fact in this case. In course of the judgment reference was made not only to *Brij Narayan's* case(1) but also to the decision in *Sahu Ram Chandra's* case(2) referred to by their Lordships of the Judicial Committee of the Privy Council in deciding *Brij Narayan's* case(1) at page 137 of the Report. Das J, then proceeds to sum up his conclusion with regard to this matter in these terms: " But so far as the second point is concerned I have not been able to satisfy myself that there was a real dissociation in fact between the transactions. Referring again to the decision of Lord Shaw in *Sahu Ram Chandra's* case(2), the following passage may be usefully referred: ' The argument in support of the validity of the mortgage also took this shape '. It was said ' what difference would it make if the father had contracted the debt an hour, a day, a year before granting the mortgage? Then *de facto* it would be an antecedent debt, and the creditor would have a mortgage good upon that ground. Their Lordships cannot assent to any such proposition '. The case as put might instantly raise the presumption that what occurred was substantially this: that the father contracted the debt knowing that he was at the end of his personal resources and that the creditor advanced the money relying upon an understanding or agreement, express or implied, given by the father". Das, J. was justified, if I may be allowed to say so,

(1) (1923) I. L. R. 46 All. 95; L. R. 51 Ind. App. 129.
(2) (1917) I. L. R. 39 All. 437; L. R. 44 Ind. App. 126.

1933.

RAMKARAN THAKUR v. BALDEO THAKUR.

WORT, J.

in relying upon the decision of Lord Shaw to which he referred although that decision has been questioned. But their Lordships of the Judicial Committee limited their criticism of that judgment by making this statement in the case of *Brij Narain* v. *Mangla Prasad*(1)—"They (i.e., their Lordships) think that *Sahu Ram Chandra's* case (2) must not be taken to decide more than what was necessary for the judgment—namely, that the incurring of the debt was there the creation of the mortgage itself and that there was there no antecedency either in time or in fact".

Now, in this case we are not left, nor was the Court below left to draw an inference from the fact which quite clearly appears, namely, that it was for the purpose of carrying out what I call the *sudbharna* transaction that the money was borrowed from the plaintiffs under the mortgage in suit. As the trial Court pointed out, one of the witnesses of the plaintiffs themselves made this statement. The trial Judge says:

> "We have it in the evidence of the P. W. 2 that Amilal, Kamaldhari, Govind and Lachhmi executed the bond (Exh. E) in favour of Lakshman and Prayag for Rs. 998 and the latter (Lachman and Prayag) then not having ready money with them, then and there agreed to execute, in payment of the said consideration money, a simple mortgage bond in favour of Ramkaran for Rs. 998."

It is, therefore, clear that the only inference that could be drawn from the facts of this case was that one transaction was involved in another and we have the evidence of the plaintiffs' own witness with regard to that. It seems to me that the only conclusion which the Judge in the Court below could arrive at (although he has expressed himself very briefly) was the conclusion at which he has arrived, namely, that the mortgage of 1921 was not based on antecedent debt.

The only other question that arises is whether the plaintiffs could recover the money from the defendants

(1) (1923) I. L. R. 46 All. 95; L. R. 51 Ind. App. 129, 137.
(2) (1917) I. L. R. 39 All. 437; L. R. 44 Ind. App. 126.

as for a money decree? On the face of the transaction, the due date being the 30th of April, 1923, the action was clearly barred by limitation. But reliance was placed in the Court below, at a very late stage of the hearing, indeed after the argument had been concluded so I understand, upon a document which was a mortgage transaction of the 22nd of January, 1929 (Exh. 1-a in the case) and which was one of the documents exhibited by the plaintiffs. There it appears that there was a recital as regards this earlier mortgage, that is to say, the mortgage in suit, and Mr. Roy on behalf of the plaintiff-appellants contends that he is entitled to rely upon that recital as an acknowledgment under section 19 of the Limitation Act. It may be that having regard to section 19 and section 21, other circumstances being equal, he might so rely upon that recital as an acknowledgment within the meaning of those sections. But he made no claim for this and his application for leave to amend was, as my learned brother pointed out during the course of the argument, made at a time when the action on the covenant was barred by limitation. If all the facts and all the possible defences to a claim based upon the allegations to which I have referred had been before the Court, and at the time the application was made the claim for a money decree had not been barred by limitation, there would seem hardly any argument which could be addressed to us entitling us to come to the conclusion that the Judge was right in deciding that the amendment should not be allowed. But the circumstances are entirely different in this case. First of all it is not a decree for money against the person who executed the mortgage; the action was against the sons of two brothers and one of the grandsons, and if the plaintiffs' claims were to succeed it must succeed on the footing of the pious obligations of the sons to pay their father's debts. I am not much impressed by Mr. Mullick's argument that there were

1938.

RAMKARAN THAKUR v. BALDEO THAKUR.

WORT, J.

certain defences open to him which were not investigated in the Court below, because as far as I read the record of the case, everything that could be said by way of defence to such an action has already been debated in full. But their Lordships of the Privy Council pointed out in *Charan Das* v. *Amir Khan*(1) that this right of allowing an amendment, although a matter of discretion, should not be exercised where the party affected thereby has acquired a valuable right and then only in very special circumstance. In the last mentioned case both the trial court and the first appellate court refused the amendment, the Judicial Commissioner of the North-West Frontier Provinces allowed the amendment, and it was in special circumstances (the details I need not go into) that their Lordships of the Judicial Committee of the Privy Council came to the conclusion that the course pursued by the learned Judicial Commissioner was correct. But, as Mr. Mullick pointed out, there are no special circumstances in the present case. The plaintiffs have allowed the time to go by, they made no claim, no application for leave to amend until their action was barred by limitation, and in those circumstances it is impossible to hold that the learned Judge in the Court below did not exercise his discretion judicially by refusing the amendment.

There was one other argument which I hardly liked to mention, because it did not seem to be based on any legal proposition that I was aware of. Mr. Roy was arguing for substantial justice to his clients by claiming some sort of undefined right against the *sudbharna* property to which he has got no possible claim whatever. It was not a trust property although Mr. Roy in some form claimed to trace it as such, and it was only in the case of trust property that the plaintiffs could follow that property and acquire some remedy against it. Neither on grounds

(1) (1920) I. L. R. 48 Cal. 110.

of law nor on grounds of equity was Mr. Roy's client entitled to any remedy against the *sudbharna* property and the point therefore fails.

For those reasons I am of opinion that the appeal fails and it must be dismissed with costs.

ROWLAND, J.—The reliefs claimed in this appeal may be divided into the claim for a mortgage decree based on the allegation of benefit to the family, the claim for a mortgage decree based on the allegation of necessity for the loan, and the prayer for a money decree based upon the pious duty of sons to pay their father's debts. There has been advanced also at the hearing a somewhat desperate prayer for a remedy against the property covered by the *sudbharna* over which until the *sudbharna* was executed the plaintiffs had a mortgage of which they accepted satisfaction in a form which has proved infructuous to them. On the facts it may appear a hard case that the plaintiffs should have lost the remedy which they had a right to against that property up till the date when the mortgage on which they now sue was executed in their favour by Lachman and Prayag; but if they wished to avail themselves of any rights that might have remained to them under the earlier mortgage that should have been done in a different proceeding and within the prescribed time. Obviously no step to establish a mortgage lien against the property hypothecated in 1915 could be taken without impleading the original mortgagors of that property, Amilal and others. It would therefore be making a very bad law in a hard case if we were to allow Mr. Roy's clients the remedy prayed for against the *sudbharna* property. Then as regards the prayer for a money decree, this, as pointed out by my learned brother, was not prayed for in the plaint as framed which was instituted about ten years after the due date of payment of the mortgage money and the cause of action for the suit as stated in paragraph 4 of the plaint is said to have arisen on the 1st of Jeth 1330

1938.

RAMKARAN THAKUR v. BALDEO THAKUR.

ROWLAND, J.

by non-payment of the mortgage money on the due date. The amendment would set up a new cause of action at a different date. Such an amendment no doubt might well be allowed if the application to make it had been presented within six years of the new cause of action intended to be set up, that is to say, at a time when failing leave to amend, it would have been still open to the plaintiffs to ask the Court's permission for the suit to be withdrawn with leave to sue again, that remedy not yet being dead. But where the application was made as in this case more than six years after the event on which it is sought to found a fresh cause of action, then although there is still a discretion in the Court to allow amendment, the discretion will as a general rule be more wisely exercised by refusing it and I am fully convinced that the discretion has been rightly exercised in this case.

Now, as to the claim for a mortgage decree on the ground of benefit to the estate, I am not sure that I can go so far as to endorse the proposition that it can never be beneficial to an estate to acquire a fresh property by hypothecating ancestral property of the estate for the purpose. There is some difference of judicial opinion as to this, the Full Bench of the Allahabad High Court having taken the view in *Jagat Narain* v. *Mathura Das*(1) that transactions justifiable on the principle of benefit to the estate are not limited to those transactions which are of defensive nature. The transaction must be judged not by its actual result but what might have been expected to be its result at the time it was entered into. Thereafter the Hon'ble Judges considered the question of the degree of prudence which was to be required from the managing member who entered into such transactions affecting the family property. But assuming the principle to be correct as laid down in that Allahabad decision, it is clear that on the

(1) (1928) I. L. R. 50 All. 969, F. B.

findings of the Courts below the transactions which we are reviewing were not such as a prudent manager would or should have entered into on behalf of the family estate. The contention then must fail that the mortgage can be supported on the ground of benefit.

Lastly there is the question of legal necessity. The case in which the law directly applicable has been laid down is that of *Raghunath Singh* v. *Modnarayan*(1), where it is said that the question for consideration is "whether there is a real dissociation in fact between the transaction of the 16th of January, 1911, and that of the 21st of January, 1911", that is to say, the question before us will be whether there is a real dissociation between the transaction of the 19th of November, 1921, and that of the 3rd of December. It is not laid down that, in circumstances such as those before us two conveyances separated from each other by a short period of time must always be considered to be connected together. They may be entirely dissociated from one another and where that is so the liability incurred at the former date will be an antecedent debt on the date of entering into the second document, but the question whether this is so or not is primarily a question of fact. I may mention that the decision just cited was a first appeal which was open to the Judges on the questions of fact. Regarding the District Judge's decision as a decision on matter of fact I think it is impossible for us to go behind it. Circumstances, he says, do not indicate that the transaction was in payment of any antecedent debt and he affirms the decision on this point of the Munsif who in his judgment had shown that the borrowing of money for the purpose of taking the zarpeshgi was contemplated by Lachman and Prayag at the very time at which they got the zarpeshgi executed in their favour by Amilal and others.

(1) (1928) 9 Pat. L. T. 142.

1938.

RAMKARAN THAKUR v. BALDEO THAKUR.

ROWLAND, J.

I agree therefore that the appeal should be dismissed with costs.

S. A. K.

Appeal dismissed.

APPELLATE CIVIL.

Before Wort and Varma, JJ.

1937. November, 12.

SHAIKH TAHIR HUSSAIN

v.

SYED BASIRUL HAQUE.*

Mortgage—prior mortgagee also holding a subsequent mortgage impleaded as a puisne mortgagee—suit on basis of prior mortgage, when barred by res judicata.

D brought a mortgage suit and impleaded *P* as a subsequent mortgagee in the suit and having obtained a mortgage decree dispossessed the plaintiff who had an usufructuary mortgage of a prior date. *P* had in his written statement pleaded that he was a prior and not a subsequent mortgagee but no adjudication was made. *P* thereafter brought the present suit and prayed for a mortgage decree in respect of sudbharna money and it was contended that the decree in the mortgage suit was res judicata.

Held, that in order to sustain the plea of res judicata it was necessary for the plaintiff in the former action to allege or claim some relief against the holder of the prior mortgage, in other words, to allege a distinct case in their plaint in derogation of the priority and this not having been done the suit was not barred by res judicata.

Radha Kishun v. *Khurshed Hossein*(1), relied on.

Syed Mahomed Ibrahim Hossein Khan v. *Ambika Persad Singh*(2) *and Brijmohan Singh* v. *Dukhan Singh*(3), distinguished.

*Appeal from Appellate Decree no. 400 of 1935, from a decision of Babu Nirmal Chandra Ghosh, Subordinate Judge of Monghyr, dated the 15th of March, 1935, reversing a decision of Babu Jugal Kishore Narayan, Munsif of Begusarai, dated the 27th of November, 1933.

(1) (1919) I. L. R. 47 Cal. 662; L. R. 47 Ind. App. 11.
(2) (1912) I. L. R. 39 Cal. 527; L. R. 39 Ind. App. 68.
(3) (1930) 11 Pat. L. T. 883.