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**(1931) 03 AHC CK 0006**

**Allahabad High Court**

**Case No:** None

Pateshwari Parsad Pal

APPELLANT

Vs

Jai Karan and Another

RESPONDENT

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**Date of Decision:** March 31, 1931

**Hon'ble Judges:** Mukerji, J

**Bench:** Single Bench

**Final Decision:** Disposed Of

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### **Judgement**

Mukerji, J.

This appeal has arisen out of a suit brought by the appellant Pateshwari Parsad Pal, a minor, in the following circumstances:

2. One Mahadeo Parsad Pal had three brothers Bankay, Harihar and Dan Bahadur. Dan Bahadur, who was a stepbrother of Mahadeo Parsad Pal, succeeded to a taluka property, which originally belonged to his father-in-law under a will. Dan Bahadur died sometime in 1908. His widow was Mt. Sukhpal Kunwar and his daughter was Mt. Balraj Kunwar, and Mt. Balraj Kunwar's son was Adya Bakhsh, Mahadeo Parsad Pal, being the eldest of the brothers, believed that he had a substantial claim to the property of Dan Bahadur. The taluka was known as that of Dandikachh. The litigation for the taluka property was a costly affair, and Mahadeo Parsad Pal had not got money. He and his brothers Harihar and Bankey raised some money and fought out a case in the mutation department with Adya Bakhsh, who claimed the property by virtue of a will from his maternal grandfather, Dan Bahadur. In the mutation department Adya Bakhsh was successful, and then Mahadeo Parsad Pal thought of instituting a suit in the civil Court at Partabgarh. To raise money for the litigation he executed the bond of 18th March 1911 in favour of the respondent Jai Karan's father Razawand Singh. By this document, Mahadeo Parsad Pal mortgaged five properties in the District, of Basti, which were a part of his ancestral property, and one village of the taluka property to which he was laying claim. At the date of the mortgage Mahadeo Parsad Pal's son, Raj Bahadur, was alive and was an adult.

Ha was not made a party to the mortgage.

3. A suit was actually filed by Mahadeo Parsad Pal on 17th June 1912. Apparently he required more money, and one Seth Kandhaiya Lal of Jubbulpore advanced some money as a transferee of a part of the taluka property, and he was impleaded in the suit as a co-plaintiff with Mahadeo Parsad, by virtue of an order dated 15th October 1913,

4. The suit succeeded in the Court of the Subordinate Judge on 2nd May 1914, but it was lost on an appeal by Adya. Bakhsh and on an appeal by his mother Mt. Balraj Kunwar (there are two appeals). The learned Judicial Commissioners delivered judgment on 29th June 1917. An attempt was made by Mahadeo Parsad Pal to file an appeal before their Lordships of the Privy Council, and an application was made to the Judicial Commissioners of Luoknow for leave to file an appeal. In the mean-while, the litigants came to terms, and by an agreement dated 10th August 1922 it was agreed between on the one hand Mahadeo Parsad Pal and Kandhaiya Lal his transferee, and Adya Bakhsh and his mother Balraj Kunwar on the other, that Adya Bakhsh should have one of the properties in the taluka estate absolutely for himself, that he should have a life estate as regards the rest and that on his death, 10 annas share in the property should be taken by Kandhaiya Lal and 6 annas by Mahadeo Parsad Pal. The agreement was placed before the learned Judicial Commissioners and by their order dated 21st August 1922 the agreement; was recorded and was made a part of the decree.

5. It has happened since that Adya Bakhsh died on 16th February 1928 and Kandhaiya Lal and Mahadeo Parsad Pal have taken possession of the property over which Adya Bakhsh had only a life interest.

6. Now we go back to what led to the present suit.

7. Raza wand Singh having died, his son Jai Ktiran, respondent 1, filed a suit in 1923 for the sale of the mortgaged property. To this suit Mahadeo Parsad alone was party. It was decreed ex parte on 29th September 1921. The decree was taken for execution to the district of Basti, because, as we have already stated, live villages in the district of Basti were among the properties mortgaged. Thereupon the plaintiff, who is a son of Raj Bahadur and a grandson of Mahadeo Parsad, instituted the suit out of which this appeal has arisen, to obtain a declaration that the properties in Basti, ordered to be sold by the mortgage decree of 1924, were not liable to be sold being an ancestral property in which the plaintiff had a share.

8. The defence to the suit was various. It was alleged that the property was the self-acquired property of Mahadeo Parsad Pal, and the plaintiff had no interest in it, that the plaintiff was born after the execution of the mortgage, that the mortgage had been executed for legal necessity, and the plaintiff was bound by the transaction. One of the points taken by the plaintiff was that the mortgage deed had not been properly registered, and in answer to that defendant 1, Jai Karan pleaded

that there was a valid registration.

9. The learned Subordinate Judge held that the property was joint family property, that it was not proved that the plaintiff was alive at the date of the mortgage, that the registration of the document was good, and that there was no legal necessity for the loan. The learned Subordinate Judge however held that the plaintiff had been benefited by the transaction of the mortgage, inasmuch as he would succeed as an heir to his grandfather, and therefore he was bound to pay the debt which the grandfather incurred in order to acquire the property in Partabgarh. The learned Judge accordingly dismissed the suit.

10. In the present appeal the question of registration "has not been re-agitated, nor has the question as to when the plaintiff was born. For respondent 1, it has not been urged that the property in suit is the self-acquired property of Mahadeo Parsad Pal. We therefore take it that the property in suit is the joint family property of the plaintiff and Mahadeo Parsad Pal. It being common ground that Raj Bahadur was alive in 1914, and if it be not proved that he was a consenting party to the mortgage, the plaintiff would be entitled to impeach it. The learned Subordinate Judge made a casual remark that the mortgage deed had been executed with the consent of Raj Bahadur. The learned Counsel for respondent 1 tried to support this finding, but he could not point out that he over had raised the plea in the Court below, that the mortgage had been executed with the consent of Raj Bahadur. It was a question of fact, and as such had to be pleaded specifically. The plaintiff had no notice of such a plea and could not adduce any evidence. Besides the evidence on which the lower Court expressed the opinion that Raj Bahadur was a consenting party to the mortgage does not support the lower Court. The statement of the witness Mangal Parsad, which will be found at p. 15 of the record, that the brothers of Mahadeo Parsad "opined that some mahajan should be searched and a bima should be written to him and civil suit should be fought" does not support a finding that Raj Bahadur was a consenting party to a mortgage on the ancestral property, in the district of Basti. To start with, among the brothers of Mahadeo Parsad was not his son Raj Bahadur. Then the suggestion was that money should be raised on the security (bima) of the property sought to be acquired, and there was no suggestion that money should be raised by mortgage of ancestral and joint family property. We have looked through other portions of the statement of Mangal Parsad and are of opinion that it has not been established that Raj Bahadur was a consenting party to the mortgage. Under the circumstances it is conceded, that it is established law, so far as this Court is concerned, that it is open to the plaintiff to question the validity of the mortgage of 1911.

11. On the question of legal necessity it is obvious that there was none. We have already mentioned the fact that when the litigation between Mahadeo Parsad Pal and Adya Bakhsh was in the Revenue Court, Mahadeo Parsad Pal and his brothers Bankey and Harihar mortgaged their property to raise a loan to fight out the case.

The mortgagee, Bhagwan Das Naik, brought a suit for sale and failed on the contest of the sons of one of the brothers of Mahadeo Parsad Pal. The judgment of this Court will be found in [Bhagwan Das Naik and Others Vs. Mahadeo Prasad Pal and Others](#). Most of what was said in that judgment would apply with force to the facts of this case. This decision found the approval of the Full Bench case of Jagat Narain v. Mathura Das AIR 1928 All: see remarks at p. 845 (of 26 A. L. J.) There can be no doubt therefore that where as in this case, money is raised by a member of the family, even if he be the head of the family, for a speculative litigation, which is to benefit the family only in the case of its success, it cannot be said that the mortgage was created for family necessity. In this particular case, the benefit, to be acquired as the result of this speculative litigation, was to accrue not to the whole family, namely Mahadeo Parsad Pal, his son and grandson, but to Mahadeo Parsad individually. In the circumstances it is clear that the mortgage of 1911 was not binding on the family estate.

12. It has however been pointed out that, in the events that have happened, a substantial property, being 6 annas of the taluka of Dandikachh, has been acquired by Mahadeo Parsad Pal, and according to the valuation of Mahadeo Parsad's suit filed against Adya Bakhsh, the six annas property is worth nearly two lakhs of rupees. The plaintiff as the only heir-at-law of Mahadeo Parsad Pal has every chance of succeeding to the share of the taluka. In the circumstances, it has been urged by the learned Counsel for respondent 1, that the plaintiff is bound to pay the debt. It was only on this ground that the suit of the plaintiff-appellant was dismissed by the Court below.

13. As against this argument it may be pointed out that the plaintiff may succeed: (1) if he survives his grandfather, and (2) if the grandfather does not bequeath the property to any other person; and (3) if the grandfather leaves the property unencumbered to the extent to be worth the amount due to respondent 1 under the decree.

14. We have given all these arguments their proper weight, and have come to the conclusion that it would be highly unjust to allow the plaintiff to succeed unconditionally in this case and to escape payment of the debt which went substantially to help his grandfather to succeed in the litigation, if ultimately the plaintiff succeeds to that property at Partabgarh. We accordingly have decided to grant the plaintiff only a conditional decree leaving it open to him, as it is open to his grandfather, to pay up the decree at any time he likes.

15. In the result we allow the appeal and grant the plaintiff the following declaration:

The decree No. 290 of 1923, dated 29th September 1924, passed by the learned Subordinate Judge of Partabgarh, in favour of Jaikaran and against Mahadeo Parsad Pal will not be executable against the properties in the district of Basti unless and

until the plaintiff succeeds to the property of the taluka of Dandikachh, or a portion of it, as an heir to or donee or legatee or transferee of his grandfather, the property to which the plaintiff succeeds being equal to or more in value than the amount of the decree then due. It will be open to the , plain-tiff to pay up the decree of respondent 1, Jaikaran, at any time he pleases. We may explain once more the decree which we grant. It is only in the case of plaintiff obtaining a benefit which is equal to or exceeding in value the amount of the decree, that he will be liable to pay the decretal amount due on the property mortgaged. It will be for the Court executing the mortgage decree to decide whether the conditions laid down by us have been fulfilled or not. The plaintiff has substantially succeeded and will have his costs throughout. The temporary injunction issued against Mahadeo Parsad Pal that he is not to alienate his Partabgarh property till the disposal of the appeal is hereby dissolved. Mabadeo Parsad Pal will pay his own costs of this appeal.