

(1923) 02 AHC CK 0036
In the Allahabad High Court

Bhagwan Das Naik and Others

APPELLANT

Vs

Mahadeo Prasad Pal and Others

RESPONDENT

Date of Decision : 15-02-1923

Acts Referred:

Citation : AIR 1923 All 298 : (1923) ILR (All) 390

Hon'ble Judges : Muhammad Rafiq, J; Lindsay, J

Bench : Division Bench

Judgement

Muhammad Rafiq and Lindsay, JJ.—The suit which has given rise to this appeal was brought to enforce a mortgage, dated the 24th of May, 1907, executed in favour of the predecessor in interest of the plaintiffs by three mortgagors, Mahadeo Prasad Pal, Harihar Prasad Pal and Banke Bahadur Pal.

2. Of these the only survivor is Mahadeo Prasad, who was impleaded as the first defendant. Banke Bahadur died without issue, while Harihar Prasad, also deceased, is now represented by his two sons and a grandson, defendants 2, 3 and 4.

3. The fifth defendant is a grandson of Mahadeo Prasad.

4. The suit was resisted by the sons and grandson of Harihar Prasad, who pleaded that the property mortgaged was joint family property and that the mortgage debt had not been incurred for any family necessity nor for any purpose which would render the family property liable for its discharge.

5. The lower court dismissed the suit, finding that there was no legal necessity for the loan.

6. The learned Subordinate Judge was pressed with the plea that at any rate, the joint family had derived a benefit from the taking of the loan. He was, however, of opinion that although the mortgage might have been binding if the family had got some benefit from the loan, it was not proved that any such benefit had accrued up to the time the suit was brought.

7. The facts of the case are not now in dispute. They are as follows:

One Dan Bahadur Pal, a step-brother of the mortgagors, was the owner of a lalua in the Partabgarh district in Oudh. He died in March, 1906, and Mahadeo Prasad put forward a claim to succeed, him. His case was that the estate was held under a primogeniture sanad, descending to a single heir and that he was the heir entitled to succeed. His claim was opposed by one Adya Bakhsh Singh, the daughter's son of Dan Bahadur, who claimed under a will.

8. The first contest between the parties was in the revenue court, where each sought to have mutation made in his favour. Mahadeo Prasad lost his case there. The revenue court of first instance ordered mutation in favour of Adya Bakhsh, on the 8th of October, 1906, and this order was affirmed by the Board of Revenue on the 8th of February, 1907. In the year 1912 Mahadeo Prasad, with the assistance of a financier, one Seth Kanhaya Lal, brought a suit in the court of the Subordinate Judge of Partabgarh for recovery of the estate. He won his case in the first court but lost it on appeal in the court of the Judicial Commissioner of Oudh.

9. Thereafter Mahadeo Prasad obtained leave to appeal to His Majesty in Council but before the case could come on for hearing, the parties filed a compromise before the Judicial Commissioner and the appeal was withdrawn.

10. This fact was not within the knowledge of the court below when it gave judgment, but a certified copy of the compromise has been filed before us which shows that some property out of the estate of Dan Bahadur has been awarded to Mahadeo Prasad.

11. The mortgage now in suit was, as we have said, executed on the 24th of May, 1907, for a sum of Rs. 4,000.

12. All this money, except a sum of Rs. 401-2-0, was left with the mortgagee to pay off four usufructuary mortgages executed between the 0th of June and the 30th of October, 1906. The balance, Rs. 401-2, was said to have been taken by the mortgagor to defray (he stamp and registration charges in connection with the mortgage and to meet unspecified household expenses.

13. The learned Judge of the court below finds that the sums borrowed under the four mortgages of 1906 were spent in support of the claim for mutation put forward by Mahadeo Prasad in the revenue courts--a claim which, as already stated, failed. He further finds that the mortgagee knew that these sums had been borrowed for the purpose of that litigation.

14. As regards the balance of Rs. 400 odd his finding is that no legal necessity for the borrowing of this sum was proved, and that the mortgagee made no inquiry.

15. It has been argued before us, as it was in the court below, that on the facts so found it should be held that there was legal necessity for the debt on the

ground, apparently, that Mahadeo Prasad has derived some benefit from the litigation which was finally determined by the compromise filed in the court of the Judicial Commissioner. And it is said that this benefit accrues not only to Mahadeo Prasad, but to all the members of the family, in virtue of an agreement entered into between them and Mahadeo Prasad.

16. Admittedly there is no evidence of this agreement upon the record. It is said that it was registered in Book No. IV of the Registration department and the plaintiffs were, under the rules of the department, not entitled to ask for a copy of it. We are also told that the plaintiffs tried to get Mahadeo Prasad into the witness-box in the court below but were unable to secure his attendance.

17. Coming to the question of legal necessity, we are not aware of any rule of Hindu law which recognizes that the borrowing of money for the purpose of maintaining a suit to recover an estate which has never belonged to the joint family is a legal necessity. In the case cited before the lower court *Indar Kuar v. Lalta Prasad Singh* ILR (1882) All. 532 it was held that a mortgage executed by a widow to raise funds to enable her to sue for an estate to which her deceased husband had an alleged right of succession, which he had never sought to enforce, was not a mortgage executed for "legal necessity" within the Hindu law. At page 548 of the report the learned Judge who delivered the judgment says:

In my opinion a distinction should be worn (? drawn) between litigation undertaken to protect the property, and litigation the object of which, is to obtain a possible benefit for the estate. The former relates to the security of that which has already been acquired and is in actual possession: the latter relates to that which may possibly be acquired; as a general rule the former class of litigation would no doubt amount to legal necessity; and in regard to the latter class of litigation it may be laid down that if such litigation ends in actual benefit to the estate, any alienation which may have been necessary for prosecuting the litigation would be valid and binding upon the reversioner on the analogy of the maxim--He who enjoys the benefit ought to bear the burden also.

18. According to what is stated here the borrowing of money to pursue litigation the object of which is to obtain a possible benefit for the estate cannot be justified under the doctrine of "legal necessity" as known to the Hindu-law, though possibly if the litigation resulted in benefit to the estate the debt would be binding in accordance with the principle of equity embodied in (he maxim quoted).

19. In *Palaniappa v. Deivasikamony* (1917) 44 I.A. 147 it was laid-down that the expression "benefit of the, estate" as used in the decisions with regard to the circumstances justifying an alienation by the manager for an infant heir, or by the trustee of a religious endowment, cannot be precisely defined.

20. At page 155 of the report their Lordships observe:

NO indication is to be found in any of them 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. The difficulty is to draw the line as to what are, in this connection, to be taken as benefits and what not.

21. There is nothing in these remarks to encourage the notion that an adventure in the shape of a speculative suit which might possibly bring profit to the estate could properly be regarded as a "benefit to the estate" or a "legal necessity." Their Lordships' observations rather import that any act for which the character of "legal necessity" or "benefit to the estate" can be claimed must necessarily be a defensive act--something undertaken for the protection of the estate already in possession--not an act done with the purpose of bringing fresh property into possession, and which may or may not be successful under the chances attending upon litigation.

22. We are satisfied, therefore, that the case of legal necessity put forward in the present suit cannot succeed. There remains the question whether the plaintiffs can succeed either wholly or in part, in accordance with the equitable doctrine mentioned in the judgment in the case of *Indar Kuar v. Lalta Prasad Singh* ILR (1882) All. 532 assuming that this doctrine does apply.

23. It is argued that it is now proved that the estate has benefited inasmuch as Mahadeo Prasad has secured some portion of the taluqa under the terms of the compromise.

24. The first difficulty in the way of the plaintiffs is that the benefit, such as it is, has accrued to Mahadeo Prasad himself and not to the joint family of which he is a member. As has been mentioned already, the plaintiffs have failed to prove any agreement between Mahadeo and the other members of the family to share any benefit which might result from the litigation.

25. And then there is a second difficulty which the plaintiffs cannot possibly surmount. It is clear that whatever benefit has accrued from the compromise has not been derived from the fund secured by the mortgage.

26. We know that the money advanced by the plaintiffs' predecessor was applied in the repayment of sums which had been borrowed to finance Mahadeo Prasad in the mutation proceedings. Mahadeo finally lost his case in the revenue courts in February, 1907, and there can be no question of his having got any benefit there.

27. It was not till the year 1912 that he began his suit in the civil courts and it is proved that the funds which enabled him to maintain this litigation which terminated in the compromise were advanced, not by the plaintiffs, but by Seth

Karihaya Lal.

28. In no way, therefore, is it possible for the plaintiffs to trace any connection between the money advanced by them and any benefit which Mahadeo. Prasad has succeeded in winning is the result of his claim in the civil courts. The plaintiffs cannot succeed and their suit was rightly dismissed by the court below whose decree we affirm. The appeal fails and is dismissed with costs to the respondents.