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K. C. KAPOOR

v.

RADHIKA DEVI (DEAD) BY L. RS. & OTHERS

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October 15, 1981

[A.D. KOSHAL, V. BALAKRISHNA ERADI AND R.B. MISRA, JJ.]

C

Second Appeal—It is not open, in second appeal, to the High Court to interfere with the finding of facts based on good evidence of the trial court—Code of Civil Procedure, section 100.

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Estoppel by conduct and construction of pleadings in the absence of an application under Order XI C.P.C.

Sale for legal necessity of joint Hindu family property—"Kutumbarthe" explained.

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Sheo Dularey Misra, in terms of a compromise decree dated 29th August, 1931 was declared the exclusive owner of a block of houses situated in Rae Bareli and also one half of 4 annas and 9 pies share in a Zamindari. He died in 1951 leaving his widow, his son Parmeshwar Din Misra and grand-sons Gajendra Narain and Sunil. His entire property was then mutated in the name of his son Parmeshwar Din Misra both in the revenue records as well as in the registers maintained by the Rae Bareli Municipal Committee. From then onwards, Parmeshwar Din Misra was in possession of the entire property left by his father and also acted as its exclusive manager. He received compensation for some of the zamindari property, a part of which was also sold by him on 12th January, 1959 for a consideration of Rs. 800. In the year 1960 and 1961, he constructed a one-storey building on a plot of land in Khurshid Bagh, Lucknow, where he was employed and residing with his wife and children. On 14th February, 1964, he sold the western portion of the block of houses purchased by his late father, to the appellant vide sale deed Exhibit A-1. In that sale deed he described himself, as "exclusive and complete owner" of the Rae Bareli property and claimed that he was "in possession and occupation thereof with powers of transfer of all kinds.....". The necessity for the sale was thus described by him : "I am constructing a house in Mohalla Khurshed Bagh, City Lucknow, the lower portion whereof has already been constructed and for the construction of the upper portion whereof funds are required."

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On 17-9-1964 his mother (Plaintiff No. 1) and his two sons (Plaintiff Nos. 2 & 3) instituted a suit claiming the share in the said property and to have the

A sale covered by Exhibit A-1 set-aside on the ground that the transaction was not for any necessity of the family. The trial court dismissed the suit holding : (i) all the three plaintiffs and defendant No. 2 formed a joint Hindu family of which defendant No. 2 was the karta and his two sons (Plaintiffs 2 & 3) acquired an interest by birth in the property left by their grand-father; (ii) the Lucknow house was the property of the said joint Hindu family; (iii) the disputed sale was and act of good management and was in the circumstances for the benefit of the B family and, therefore, for legal necessity; (iv) the vendee (appellant) was not entitled to any protection under section 41 of the Transfer of Property Act; and (v) it was the duty of defendant No. 1 to give the details of misrepresentation constituting estoppel in the written statement, which was not done so that the evidence on the point could not be looked into. The first appeal before the District Judge failed. But the High Court, accepting a second appeal cancelled sale deed Exhibit A-1 and passed a decree for possession of the disputed property C in favour of the plaintiffs. Hence the appeal after obtaining special leave.

Allowing the appeal, the Court,

HELD : 1 : 1. The findings given by the first appellate court on the point of estoppel was eminently reasonable and the short ground on which the High Court turned the tables on the appellant was untenable. That finding being a D finding of fact and being based on good evidence, it was not open to the High Court to interfere with it in a second appeal. [923 B-C]

1 : 2. Proper foundation was laid for the plea of estoppel in the pleadings. A combined reading of paragraphs 14 and 16 of the written statement gave sufficient notice to the plaintiffs of what case they had to meet. The representation said to have been made by plaintiff No. 1 is set out in paragraph 14, E while the plea that she was estopped from contesting the sale is taken in paragraph 16. Undoubtedly, the written statement is inartistically drafted and leaves much to be desired, but then pleadings are not to be construed in a hypertechnical manner. In fact, no objection to the lack of particulars was taken at the stage when issues were framed or later when statements of parties' counsel were recorded on a subsequent occasion or during the course of arguments addressed to the trial court, the District Judge and the High Court, F even though the issue of estoppel was hotly contested before all three of them. All these circumstances unmistakably indicate that the case put forward by defendant No. 1 was throughout understood by the plaintiff to be that it was the belief induced in him by the representation of plaintiff No. 1 which made him accept the title of defendant No. 2 as being exclusive. [923 C-H]

1 : 3. The declaration of plaintiff No. 1, in the presence of the appellant, G that the property belonged to her son and that he was at liberty to deal with it as he liked, does not suffer from any ambiguity and makes it clear that she had nothing to do with the property. [921 A-B]

1 : 4. The onus of proof of the allegation that she was the owner of a half share in the property at the time of the sale was on her and she was duty bound H to depose to facts which would make section 3 of the Hindu Women's Right to Property Act, 1937 applicable to her case. Her failure to depose to the existence thereof must result in a finding that she has failed to prove the issue. [922 E-F]

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1 : 5. In view of the fact that on Shiv Dularey Misra's death all his property was mutated in favour of his son to the exclusion of plaintiff No. 1 and was all along being dealt with by him as its sole and absolute owner without any objection whatsoever having been raised by her at any point of time to such exclusion or dealing leads to the presumption that plaintiff No. 1 had relinquished her share in favour of her son either immediately after her husband's death or at any other point of time prior to the disputed sale. In the above situation the appellant was fully justified in accepting her word on the point of ownership, the said section 3 notwithstanding. [922 G-H, 923 A]

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2 : 1. That the disputed sale was for legal necessity is clear from the following: (a) The written statement of the appellant contains a definite plea in para 15 to the effect that if the disputed house is proved to be joint Hindu family property, its transfer was made by the karta for legal necessity so that it was binding on the family; (b) no objection by the plaintiffs was taken at any stage of the trial to any lack of particulars of the legal necessity in the plea so set up; (c) in the said para it was specifically asserted that the disputed house was sold by defendant No. 2, "for the purpose of building a more profitable and advantageous house at Lucknow with a view to dispose of a construction which was old and in perilous condition and which was of no present utility." The appellant was, therefore, had the right to let in evidence that putting up a second storey in the Lucknow house constituted legal necessity. Nor was any on objection taken at the evidence stage to such right; (d) the appellant was a total stranger to the family of the plaintiffs and in the very nature of things could not have had any *personal knowledge referable to the actual manner in and the precise source from which either the Lucknow house or, for that matter, the Rae Bareli property was acquired,* such manner and source being within the special knowledge of plaintiff No. 1 and her son, defendant No. 2, both of whem had stayed away from the witness box and had thus deprived the Court of the only real evidence which could throw light on the source of the consideration paid for the purchase of Lucknow house; (e) the salary of defendant No, 2 which was no more than Rs. 240 per mensem was too meagre to have sufficed for the maintenance of his family and any savings therefrom were out of question and (f) defendant No. 2 was not only the karta of the family and its sole adult male member at the time of the sale but was also the father of the only other two coparceners for whom he must naturally be having great affection and whose interests he would surely protect and promote, rather than jeopardise, there being no allegation by the plaintiffs that he was a profligate or had other reason to act to their detriment. [924 C-H, 925 A-E, G-H, 926 A, D-E, 927 B-C]

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2 : 2. The Lucknow house being the property of the joint Hindu family consisting of defendant No. 2 and his sons and the disputed sale being an act of good management, the sale is "Kutumbarthe" and justified by legal necessity. [927 C-D]

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Nagindas Maneklal and Others v. *Mohomed Yusuf Mitchella,* ILR (1922) 46 Bombay 312, approved and applied.

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Hunoomanpersaud Pandey v. *Mussumat Babooee Munraj Koonweree,* (1856) 6 Moo. I.A. 393, referred to.

A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 515 of 1970.

Appeal by special leave from the judgment and order dated the 19th February, 1970 of the Allahabad High Court (Lucknow) Bench) Lucknow in Second Appeal No. 362 of 1966.

B *G.L. Sanghi* and *K.P. Gupta* for the Appellant.

G.C. Mathur and *C.P. Lal* for Respondent Nos. 2 & 3.

The Judgment of Court was delivered by

C KOSHAL. J. This is an appeal by special leave against a judgment of a learned Single Judge of the High Court of Allahabad dated 19th February, 1970 reversing in a second appeal the first appellate decree passed on 1st June, 1966 by the District Judge, Rae Bareli in confirmation of the decree of the trial Court. The prayer made by the plaintiffs in the suit, which was dismissed by the D first two Courts, was to the effect that a sale-deed executed on 14th February, 1964 (Exhibit A-1) by defendant No. 2 in favour of defendant No. 1 in respect of a portion of a block of houses situated in Rae Bareli, be cancelled, and that possession of that portion be delivered to the plaintiffs who should also be awarded mesne profits. While accepting the second appeal, the High Court decreed the suit E except in regard to mesne profits.

2. Most of the facts giving rise to this appeal are undisputed and may be briefly stated with reference to the following pedigree-table :

F Sheo Dularey Misra-Radhika Devi (Plaintiff No. 1)

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Parmeshwar Din Mishra (Defendant No. 2)

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G Gajendra Narain (Plaintiff No. 2) Sunil (Plaintiff No. 3)

In the years 1916 and 1918 Sheo Dulary Misra (S.D. Mishra for short), who was a leading lawyer at Rae Bareli, purchased a bloek of Houses in that town by means of two sale-deeds (Exhibits 2 and H 3), both executed by one Shambhu Dayal. In the year 1931 S.D. Mishra filed a suit against his father and brothers for a declaration

that he was the absolute owner of the Rae Bareli houses above mentioned as also of a 4 annas and 9 pies share in proprietory Zamindari situated in Mohal Badri Prasad of village Tera Baraula in Pargana and District Rae Bareli. On the 29th August 1931 a decree based on a compromise (Exhibit 5) was passed in that suit to the effect that S.D. Mishra was the exclusive owner of the Rae Bareli houses and also of a half of the salid 4 annas and 9 pies share in the Zamindari.

On the death of S.D. Misra in 1951, his entire property was mutated in the name of defendant No. 2, both in the revenue records as well as in the registers maintained by the Rae Bareli Municipal Committee. From then onwards till the date of the disputed sale-deed (Exhibit A—1) defendant No. 2 was in possession of the entire property left by his father and also acted as its exclusive manager. He received compensation for some of the Zamindari property, a part of which was also sold by him on the 12th January 1959 to one Imam Ali for a consideration of Rs, 800 (vide Exhibit A-19). In the years 1960 and 1961 defendant No. 2 constructed a one-storey building on a plot of land in Khurshid Bagh, Lucknow, where he was employed as a clerk in the Department of Health of the Government of Uttar Pradesh and where he was residing with his wife and children.

The disputed sale-deed (Exhibit A—1) was executed by defendant No. 2 on the 14th February 1964 in respect of the western portion of the said block of houses for Rs. 6500 in favour of K.C. Kapoor, defendant No. 1 who is the sole appellant before us. In that sale-deed defendant No. 2 described himself as "exclusive and complete owner" of the Rae Bareli property and claimed that he was "in possession and occupation thereof with powers of transfer of all kinds.....". The necessity for the sale was thus described by him :

> "I am constructing a house in Mohalla Khurshed Bagh City Lucknow, the lower portion whereof has already been constructed and for the construction of the upper portion whereof funds are required."

3. This litigation started on the 17th September 1964 with the institution of a suit by the three plaintiffs. It was claimed therein that on the death of S. D. Misra, plaintiff No. 1 succeded to a half share in his property, being his widow, while the other half

A was inherited by defendant No.2 so, however, that his sons (plaintiffs Nos. 2 and 3) had an interest therein by birth. In other words, while half of the property left by S.D. Mishra was claimed to belong exclusively to Radhika Devi, Plaintiff No. 1, in respect of the other half the assertion was that it belonged to a coparcenary consisting of defendant No. 2 and his two sons. The relief of B possession of the property sold by virtue of sale-deed Exhibit A-1 was prayed for in consequence of the cancellation of that document which was sought to be set aside for the reason that the transaction covered by it was not for any necessity of the said family.

4. In the written statement the stand taken by defendant C No. 1 was that defendant No. 2 was the sole owner of the entire block of houses above mentioned and had full power to alienate the same, but that even if it was proved to be coparcenary property as alleged, the sale would still be good as it was made for legal necessity. In this connection the contents of paragraph 15 of the written statement may be quoted here with advantage :—

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> "That defendant No. 2 sold the house in suit for the purpose of building a more profitable and advantageous house at Lucknow and with a view to dispose of a construction which was old and in perilous condition and which was of no persent utility. Even if the house in suit is proE ved to be joint family property the transfer is for legal necessity by the Karta and is binding on the joint family and the plaintiffs."

Two other material pleas were put forward in paragraph 14 and 16 of the written statement and are extracted below :

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> "14. That defendant No. 2 represented to the answering defendant No. 1 that defendant No. 2 was the sole owner of house, a portion of which is the subject-matter of dispute, and in fact he has all along been acting as sole owner of the properties left by his father. The answering defendant No. 1 also made diligent and G reasonable enquiries about the right, title and interest of defendant No. 2 and his sole power to transfer it, and as such the answering defendant is a transferee in good faith for considefation and without notice."

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> 16. That defendant No. 2 executed the sale-deed in favour of the answering defendant with the active consent and

approval of plaintiff No. 1 and plaintiff No. 1 is estopped from asserting her right against it."

Statements of counsel for parties were recorded by the trial court on the 27th April, 1965 when it framed 8 issues, of which issues nos. 1 to 3, 5 and 7 were :

"1. Whether plaintiffs and defendant No. 2 formed a joint family ? If so, who was the Karta of the family ?

2. Whether plaintiffs Nos. 2 and 3 have interest in the house in suit by birth ?

3. Whether defendant No. 2 had a legal necessity to sell the house ? If so, its effect ?

5. Whether defendant No. 1 is a transferee for value in good faith and is entitled to protection of Section 41 of the Transfer of Property Act ?

7. Whether the suit by plaintiff No. 1 is barred by estoppel ?"

Statements of learned counsel for the parties were again recorded on 28th May 1965 and 31st May, 1965. On behalf of defendant No. 1 a part of his case was stated like this :

"Defendant is a purchaser for value in good faith and without notice. In any view of the case the disputed portion is not more than the share of Parmeshwar Din and the alienation is valid and cannot be impeached by the plaintiffs. Disputed portion was sold with the active consent and approval of plaintiff No. 1 and she is estopped from challenging the transaction,"

5. In its jugment the trial court held that all the three plaintiffs and defendant No. 2 formed a joint Hindu family of which defendant No. 2 was the Karta and that plaintiffs Nos. 2 and 3 acquired an interest by birth in the property left by their grand-father.

In deciding issue No. 3 the trial court took note of the following facts :

(a) The joint Hindu family consisting of the three plaintiffs and defendant No. 2 received compensation for the Zamindari,

A (b) The family had income from the Zamindari.

(c) The family derived rent from the said block of houses.

(d) S.D. Misra was a successful lawyer, which circumstance made it probable that he had left behind some
B cash in addition to other property.

(e) On 12th January 1959 defendant No. 2 received Rs. 800 as consideration for the sale covered by Exhibit A-19.

(f) Sanction for plan of the building of the Lucknow house
C (Exhibit A-21) was accorded by the Lucknow Municipality on 28th June 1960 and the building was completed in 1961.

(g) There is no evidence to show that defendant No. 2 had income of his own from which he could save
D enough money to be spent on the said building.

(h) Plaintiff No. 1, who was actively conducting the case on behalf of the plaintiffs, and defendant No. 2, had both stayed away from the witness-box.

E Taking all these facts into consideration the trial court concluded that the Lucknow house was the property of the said joint Hindu family. It went on to point out that the disputed sale was an act of good management in view of the following circumstances :

(i) The portion of the block of houses sold through exhi-
F bit A—1 was in a dilapidated condition and on 14th July 1964, i.e., less than 5 months after the sale, the municipal authorities isssued a notice to defendant No.1 pointing out that the building purchased by him was in a dangerous condition and requiring him to demolish it within 3 days, so that defendant No. 2 was under
G an obligation to pull down the building and either leave the site underneath un-built (which would have meant a loss of some income to the family) or to construct a new building thereon.

H (ii) Construction of a building in Lucknow would have been more rewarding income-wise than erecting one at Rae Bareli.

(iii) Defendant No. 2 was employed at Lucknow and it was in the interest of the family to put on a second storey in the house there.

The trial court concluded that the sale was, in the circumtances above mentioned, for the benefit of the family and, therefore, for legal necessity.

Issue No. 5 was decided by the trial court against defendant No. 1 for the following reasons :

(a) Defendant No. 1 knew that the property sold to him had descended from S.D. Misra who had left behind a widow and a son, so that defendant No. 1 could not be regarded as a purchaser without notice of the fact that the plaintiffs had an interest in the house.

(b) Defendant No. 1 did not consult any lawyer to make sure that defendant No. 2 was the sole owner of the property sold as asserted by the latter.

The trial court, therefore, held that defendant No. 1 was not entitled to any protection under section 41 of the Transfer of Property Act.

In relation to issue No. 7 the trial court remarked that it was the duty of defendant No. 1 to give the details of the mis-representation constituting estoppel in the written statement, which was not done so that the evidence on the point could not be looked into. Issue No. 7 was thus decided against defendant No. 1.

Legal necessity for the disputed sale having been found by the trial court to be established, it dismissed the suit with costs.

6. It is also necessary to recount at some length the findings arrived at by the learned District Judge in appeal. The conclusions reached by the trial court that the plaintiffs and defendant No. 2 formed a joint Hindu family and that the said block of houses belonged to that family were not challenged before him and the main contest in the course of the first appeal embraced points of legal necessity and estoppel as also the applicability of section 41 of the Transfer of Property Act to the facts of the case. Taking up the last point first, the learned District Judge decided it against defendant No. 1 for the following two reasons :

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(a) Defendant No. 1 had had notice that the building in dispute originally belonged to S.D. Misra and that the latter died leaving behind a widow, a son and a grandson. Thus defendant No. 2 was posted with the knowledge that at the time of the sale in his favour persons other than defendant No. 2 had interest in the property in dispute.

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(b) Plaintiffs Nos. 2 and 3 were minors on the date of the sale and even at the time of the institution of the suit and could not, by reason of their minority, be deemed to have consented to the ostensible ownership of the property vesting in their father.

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On the question of estoppel, the learned District Judge discussed in detail the evidence produced before the trial court and concluded that on 22nd January, 1964, when a sum of Rs. 1000 was paid by defendant No. 1 to defendant No. 2 as earnest money through receipts Exhibit A.—26, plaintiff No. 1 gave her consent to her transaction of sale in the presence of defendant No. 1 as well as that of Radha Krishan D.W. 5 and Gopal Nath Chopra, D.W. 6, both of whom were attesting witnesses to that receipt. He went on to hold that the trial court was in error when it refused to look into the evidence on the point with the observation that the particulars of the consent of plaintiff No. 1 were not given in the pleadings. The learned District Judge was firmly of the opinion that the statement in para 16 of the written statement to the effect that the sale had taken place with the active consent and approval of plaintiff No. 1 was enough to raise the question of estoppel and that it was not necessary for defendant No. 1 to further mention in his peladings the particulars of such consent or the details of the evidence by which the same was to be proved. The learned District Judge concluded that by reason of the consent given by plaintiff No. 1 to the sale, she was estopped from attacking disputed sale-deed.

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On the question of legal necessity, the District Judge took note of all those facts which the trial court had taken into consideration, as also of the following additional circumstances :

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(a) Defendant No. 2 was the only adult male member of the family at the time of the sale. He had throughout

been managing the property of his father and was the Karta of the joint Hindu family aforesaid.

(b) The sale had come about with the consent of plaintiff No. 1 who was the only other adult member of the family.

In the result, the learned District Judge upheld the finding of the trial court that the Lucknow house belonged to the joint Hindu family. He further held, for more or less the same reasons as had weighed with the trial court in that behalf, that the sale was an act of prudence on the part of defendant No. 2 who had wisely sold a dilapidated building, and instead of pulling it down and incurring expense over its re-construction, had raised money for the purpose of building the first floor of the new house at Lucknow which was a big city as compared to the "small and sleepy town" of Rae Bareli.

On the above findings, the first appeal was dismissed with costs.

7. Before the High Court it was conceded on behalf of defendant No. 1 that the widow of S.D. Misra had inherited half of his property by reason of the provisions of section 3 of the Hindu Women's Right to Property Act, 1937 (for short the 1937 Act), that she had become the full owner of that half share on the commencement of the Hindu Succession Act in 1956 (hereinafter referred to as the 1956 Act) and that she was, therefore, not bound by any sale of her share effected by her son unless she was estopped from challenging it. The learned Single Judge, therefore, at once took up the question of estoppel, reliance in support of which was placed on behalf of defendant No. 1 on a portion of his own testimony as DW-3 which when freely translated, would read thus :

"Parmeshwar Din told his mother that a portion of the Rae Bareli house was in ruins and yielded low rent, that the family (*ham log*) were residing at Lucknow and that he wanted to sell a portion of the Rae Bareli house and make the Lucknow house two-storeyed which would result in a better rent yield and would also provide comfort for residence (of the family). Then Parmeshwar Din's mother said : 'It is your thing; do as you wish."

A The learned Single Judge was of the opinion that this statement could not estop plaintiff No. 1 from challenging the sale in so far as her share in the disputed house was concerned. His reasons were :

> "The above-cited statement of respondent No. 1
> B (defendant No. 1) does not indicate if the portion which was being actually sold was then specified to appellant No. 1 (plaintiff No. 1) by respondent No. 2 (defendant No. 2). So if in these circumstances she did not resist the proposal saying that Parmeshwar Din was at liberty to do as he chose since it was his property, it can by no means
> C be construed to mean that she thereby readily agreed even for the sale of her share by her son."

The question of legal necessity was also determined by the learned Single Judge against defendant No. 1 with the following findings:

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(a) There was no pleading by defendant No. 1 in his written statement to the effect that the house at Lucknow was the property of the said joint Hindu family. Besides, in his deposition as DW-3, defendant No. 1 had himself stated that to his knowledge
E Parmeshwar Din was the sole owner of that house.

(b) Merely because S.D. Misra possessed property and cash at the time of his death and that property continued to yield some income thereafter did not furnish reasons enough for the Court to presume that
F the Lucknow house belonged to the joint Hindu family. A presumption to that effect could only be raised if it was shown that there was sufficient nucleus for the acquisition of that house.

In view of the above findings the learned Single Judge
G cancelled sale deed Exhibit A-1 and, accepting the appeal, passed a decree for possession of the disputed property in favour of the plaintiffs.

8. After hearing learned counsel for the parties at great
H length we have no hesitation in recording our disagreement with the High Court on the findings reached by it in relation to both the

points canvassed before it, namely, those of estoppel and legal necessity, and are fully satisfied that it stepped outside the limits of its jurisdiction when it interfered with the conclusions of the fact arrived at by the learned District Judge on the basis of fully acceptable evidence and a correct appreciation thereof.

9. Before we proceed to detail our reasons for differing with the view expressed by the High Court we would like to advert to that aspect of the case which concerns the rights of plaintiff No. 1 in the property inherited by her husband. The trial Court acted on the assumption that the entire property left by S.D. Misra on his death vested in the joint Hindu family consisting of his widow, son and grand-sons. No challenge to this assumption was made before the learned District Judge and the case proceeded on the basis that it was correct. Before the High Court, however, the assumption was assailed and, as already stated, it was conceded on behalf of defendant No. 1 that plaintiff No. 1 succeeded to a life estate in a half share in the property of her husband in pursuance of the provisions of section 3 of the 1937 Act and that such an estate ripened into absolute ownership on the enforcement of the 1956 Act. This concession, in our opinion, could be said to have been correctly made only on the assumptions (1) that S.D. Misra died intestate or that if he left a will, he devised a half share in the disputed house to plaintiff No. 1 and (2) that the share to which plaintiff No. 1 succeeded was not relinquished in favour of defendant No. 2 or otherwise transferred to him by her right up-to the time when the disputed sale took place.

10. We shall now take up the question of estoppel. Plaintiffs Nos. 2 and 3 being minors that question does not arise in their case and it is only in relation to the half share of plaintiff No. 1 in the disputed property that it calls for a decision. In this connection the following facts which are undisputed may be taken note of :

(a) On S.D. Misra s death his entire property was mutated in the name of his son (defendant No. 2) to the exclusion of the former's widow (Plaintiff No. 1).

(b) Right up to the date of the disputed sale that property was managed exclusively by defendant No. 2.

(c) No objection to the exclusion of her name from the records of the revenue department or of the municipal

committee or from the management was ever preferred by plaintiff No. 1 who fully acquiesced in such exclusion all through.

(d) Defendant No. 2 alone received compensation for the Zamindari and sold a portion thereof as sole owner (vide exhibit A-19) again without any objection on the part of plaintiff No. 1.

(e) When negotiations for the disputed sale were initiated, defendant No. 1 enquired from defendant No. 2 as to how the latter had acquired full ownership of the property in dispute. The reply of defendant No. 2 as contained in his letter from Lucknow dated 14th January 1964 (exhibit A-25) was:

> "Regarding our talks about the sale of my house at Station Road, Rae Bareli and regarding your enquiry about the title to the said house, I have to inform you that I am the absolute owner of the portion of house proposed to be sold."

> "I own all responsibility and give you word of honour that there is absolutely no dispute about my title to the portion proposed to be sold and you should have no hesitation on that score.

> "Further I may add that I realize the rent of the shops which you can enquire from the tenants."

Presumably defendant No. 1 was quite satisfied with this reply and asked defendant No. 2 to furnish copies of the municipal records which were shown to defendant No. 1 on the 22nd January 1964 at the Lucknow residence of defendant No. 2.

(f) According to the testimony of defendant No. 1 as DW-3 and of the two witnesses (Radha Krishan-DW-5 and Gopal Nath Chopra-DW-6) who attested receipt exhibit A-26, it was at that stage that defendant No. 1 told his mother about the proposed sale and she consented thereto. In the words of defendant No. 2

she declared : "It is your thing; do as you wish." The evidence of these three witnesses was not challenged during the course of their cross-examination.

These facts would conclusively show that by declaring in the presence of defendant No. 1 that the property belonged to the defendant No. 2 and that he was at liberty to deal with it as he wished, plaintiff No. 1 represented to defendant No. 1 that her son was the sole owner of the property and that she had nothing to do with it. Her declaration is, therefore, a clincher on the point of estoppel and we find it impossible to agree with the learned Single Judge when he says that the declaration did not mean that defendant No. 2 had the permission of plaintiff No. 1 to deal with the latter's share of the property. In our opinion the declaration does not suffer from any such ambiguity as the learned Single Judge has read into. In giving the details of the proposed sale the son had not told the mother that he was selling only his own half share in that part of the block of houses situated in Rae Bareli which was proposed to be sold. He said in clear terms that a portion of the Rae Bareli house was to be sold and his mother declared that he was the sole arbiter in the matter of the disposal of the property. There was no proposal to sell only defendant No. 2's undivided half share nor did any question arise of either defendant No. 1 purchasing it or plaintiff No. 1 being consulted about it. In the absence of any qualifying words limiting the proposed sale to such a share, the lady must be taken to have understood the statement made to her by her son as carrying its plain meaning, i.e., that the sale was to be of the entire portion chosen for the purpose and her consent must be construed accordingly.

Learned counsel for the plaintiff vehemently argued that even if the declaration made by plaintiff No. 1 be interpreted as we have done, it would create no estoppel against her inasmuch as defendant No. 1 had not acted on it but had purchased the property on the strength of the representations made to him by defendant No. 1. Now it is true that defendant No. 1 had made enquiries regarding the title of defendant No. 2 to the property in dispute and the latter had made an unequivocal representation that he alone was the owner thereof, but then it was only after the lady had been consulted and had told her son to go ahead with what he thought proper as he was the owner of the property that receipt exhibit A-26 was executed. Till then defendant No. 1 was not fully satisfied about

A the title of defendant No. 2 and had not only raised the question with defendant No. 1 at Lucknow but even after the assurance given by the latter in communication exhibit A-25 insisted on the municipal records being produced for his inspection. The inquiry into the title was, therefore, very much in progress when defendant No. 2 consulted his mother in the presence of defendant No. 1. This was B presumably done to ally the lurking suspicion in the mind of defendant No. 2 as to the title to the entire property vesting in defendant No. 2

It was contended on behalf of the plaintiffs that the representation made by the lady could not have been taken at its face value C by any prudent purchaser in view of the fact that one-half of the property left by S.D. Misra had admittedly devolved on plaintiff No. 1. This contention suffers from two important infirmities. Under section 3 of the 1937 Act, plaintiff No. 1 would have succeeded to a half share only if S.D. Misra had died intestate. So the question would be whether or not S.D. Misra left a will. The D concession made before the High Court on the point of inheritence of a half share by plaintiff No, 1 was obviously based not on any facts within the knowledge of defendant No. 1 but on the circumstance that nobody had talked of any will by S.D. Misra. Whether or not such a will was made was a fact specially within the knowledge of plaintiff No. 1 and, as stated earlier, that she remained absent E from the witness box so that the Court is left in the dark as to what was the actual state of affairs. The onus of proof of the allegation that she was the owner of a half share in the property at the time of the sale was on her and she was duty bound to depose to facts which would make section 3 aforesaid applicable to her case. Her failure to depose to the existence thereof must result in a finding F that she has failed to prove the issue.

Again, even if it be assumed that plaintiff No. 1 succeeded to a half share in the property of S.D. Misra, there was no impediment in the way of her relinquishing that share in favour of her son either G immediately after her husband's death or at any other point of time prior to the disputed sale. This aspect of the matter cannot be lost sight of in view of the fact that on S.D. Misra's death all his property was mutated in favour of his son to the exclusion of plaintiff No. 1 and was all along being dealt with by him as its sole and absolute H owner without any objection whatsover having been raised by her at any point of time to such exclusion or dealing.

In the above situation defendant No. 1 was fully justified in accepting her word on the point of ownership, the said section 3 notwithstanding.

The above discussion of the evidence has been entered into by us merely to show that the finding given by the learned District Judge on the point of estoppel was eminently reasonable and that the short ground on which the High Court turned the tables on defendant No. 1 was untenable. That finding of the District Judge being a finding of fact and being based on good evidence, it was not open to the High Court to interfere with it in a second appeal.

Before parting with the question of estoppel, we may briefly notice another contention put forward on behalf of the plaintiffs whose learned counsel urged that no plea of estoppel could be countenanced for the reason that no proper foundation was laid for it in the pleadings. A combined reading of paragraphs 14 and 16 of the written statement, hower, furnishes a complete answer to the contention. The representation said to have been made by plaintiff No. 1 is set out in paragraph 14 while the plea that she was estopped from contesting the sale is taken in paragraph 16. It is true that the plea last mentioned is linked with "the active consent and approval of plaintiff No. 1'' and not in so many words with the said representation. It can also not be disputed that defendant No. 1 did not specifically state that he purchased the disputed property in the belief that the representation was true and that he would not have entered into the transaction but for that belief. Thus undoubtedly the written statement is inartistically drafted and leaves much to be desired, but then pleadings are not to be construed in such a hypertechnical manner and what is to be seen is whether the allegations made in paragrapns 14 and 16 gave sufficient notice to the plaintiffs of what case they had to meet. In this connection we may refer to the significant fact that no objection to the lack of particulars was taken at the stage when issues were framed or later when statements of parties' counsel were recorded on a subsequent occasion or during the course of arguments addressed to the trial Court, the District Judge and the High Court, even though the issue of estoppel was hotly contested before all three of them. All these circumstances unmistakably indicate that the case put forward by defendant No. 1 was throughout understood by the plaintiffs to be that it was the belief induced in him by the representation of plaintiff No. 1 which made him accept the title of defendant No. 2 as bein exclusive. In this view of the matter it is too late in the day for the plaintiffs

A to raise the contention under consideration and we have no hesitation in rejecting it as untenable.

11. We may now attend to the controversy about the legal necessity for the disputed sale. The contest on the point is restricted to that half share of the property sold which belonged to the coparcenary consisting of the son and grand-sons of S. D. Misra. In this connection the High Court observed that not only defendant No. 1 did not plead in his written statement that the Lucknow house was the property of the coparcenary but that he also stated in the witness box as DW-3 that to his knowledge defendant No. 1 was the sole owner of that house. We are clearly of the opinion that the High Court erred in taking either of these circumstances as a minus point for defendant No.1. In so far as the written statement is concerned it contains a definite plea in para 15 to the effect that if the disputed property is proved to joint be Hindu family property, its transfer was made by the Karta for legal necessity so that it was binding on the family. Was it then incumbent on defendant No. 1 to further plead how he propsed to prove the legal necessity? This question was pointedly posed to learned counsel for the plaintiffs during the course of arguments and although his answer was in the affirmative, he could quote neither law nor precedent in support of the same.

It may aiso be pointed out that no objection by the plaintiffs was ever taken at any stage of the trial to any lack of particulars of the legal necessity set up by defendant No. 1 in paragraph 15 of the written statement. On the other hand they were fully posted about what case they have to meet on the point by reason of the contents of that paragraph itself in which it was specifically asserted that the disputed house was sold by defendant No. 2 "for the purpose of building a more profitable and advantageous house at Lucknow and with a view to dispose of a construction which was old and in perilous condition and which was of no present utility." In view of this averment it was fully open to defendant No. 1 to prove by evidence that putting up a second storey in the Lucknow house constituted legal necessity and, in the process, to establish that the Lucknow house was owned by the said coparcenary. Again, no objection was taken at the evidence stage to the right of defendant No. 1 to show that the Lucknow house was so owned and thereby to prove the existence of legal necessity for the sale. No fault can thus be found with the case of defendant No. 1 on the ground of his failure to take a specific plea in the written statement abount the ownership of that house vesting in the coparcenary.

Nor was the High Court right in putting the construction that it did on the testimony of defendant No. 1 as DW-3 to the effect that to his knowledge defendant No. 2 was the sole owner of the Lucknow house. Obviously all that he meant was that according to such knowledge as he had, the Lucknow house vested in the exclusive ownership of defendant No. 2; and that knowledge, in the circumstances of the case, could be no more than a belief arising from what he was told by defendant No. 2 who had been at pains to stake his claim to the exclusive ownership of all the property under his control, including the property left by his father. In this connection we cannot lose sight of the fact that defendant No. 1 was a total stranger to the family of the plaintiffs and in the very nature of things could not have had any *personal knowledge referable to the actual manner in and the precise source from which either the Lucknow house or, for that matter, the Rae Bareli property was acquired,* such manner and source being within the special knowledge of plaintiff No. 1 and defendant No. 2 only. That part of the deposition of defendant No. 1 which the High Court has pressed into service against him, cannot, therefore, form the basis of solution to the question of the ownership of the property.

12. In the present case both plaintiff No. 1 and defendant No. 2 have stayed away from the witness-box and have thus deprived the Court of the only real evidence which could throw light on the source of the consideration paid for the purchase of the Lucknow house. There may be some force in the argument that no duty was cast upon defendant No. 2 to appear as a witness in as much as he was not a contesting party, but than such an excuse is not open to plaintiff No. 1 who was actively contesting the case in the trial Court on behalf of herself and her two grand-children. It is in the light of this significant circumstance that the Court must decide whether or not defendant No. 1 has been able to discharge the burden of proving that the Lucknow house was purchased with joint Hindu family funds. This important aspect of the matter was completely lost on the High Court although it was an unassailable ground when it formulated the proposition that before a presumption could be raised that a property acquired by a member of a joint Hindu family could be regarded as the property of the family, it must be shown that the family owned other property which could be regarded as a nucleus providing a sufficient source for the later acquisition. Furthermore, in assessing the evidence on that point, the High Court referred only to two facts, namely, that S.D. Misra left immovable property and cash at the time of his death and that

property continued to yield some income thereafter, but paid no heed to at least three other important circumstances which had been listed by the trial court in support of the finding that a sufficient nucleus for the purchase had been proved. Those circumstances are :

(a) The family received compensation for the Zamindari.

(b) On 12th January 1959, defendant No. 2 received Rs. 800/- as consideration for the sale covered by exhibit A-19.

(c) No evidence had been produced to show that defendant No. 2 had income of his own from which he could have saved enough money to be spent on the Lucknow building.

We may add that there is definite evidence in the form of exhibit A-99 to the effect that in 1965 the family of defendant No. 2 consisted of nine souls and that he was then holding a subordinate position in the office of the Director of Health Service, U.P., at Lucknow with a salary of no more than Rs. 240 per mensem. It goes without saying that his salary was to meagre to have sufficed for the maintenance of the family and that any savings therefrom were out of question.

Although each of the facts just above taken note of, when considered in isolation, may not enable the Court to raise a presumption of the sufficiency of the requisite nucleus, collectively they constitute a formidable array and practically a clincher in favour of such a presumption, especially in the absence of any attempt on the part of the plaintiffs to produce evidence showing that defendant No. 2 had any source of income of his own other then his salary. And then the failure (referred to above) of plaintiff No. 1 to step into the witness-box is enough for the Court to raise another presumption, namely, that her deposition would not have supported the plaintiffs' case. The onus of proof of the issue on the defendant was, therefore, very light and stood amply discharged by the facts noted in that behalf by the trial court, with whose finding on the point the first appellate court concurred. No case at all was thus made out for interference by the High Court with that finding.

13. The High Court did not express any dissent from the conclusion concurrently reached by the trial court and the learned

District Judge that the disputed sale constituted an act of prudence on the part of defendant No. 2 and was on that account for the benefit of the family. We find ourselves in full agreement with that conclusion which too is based on fully reliable evidence and follows logically therefrom, as also with the reasons given by the two courts in support thereof. However, we may point to another significant factor which lends strength to that conclusion, the same being that defendant No. 2 was not only the Karta of the family and its sole adult male member at the time of the sale but was also the father of the only other two coparceners for whom he must naturally be having great affection and whose interests he would surely protect and promote, rather than jeopardise, there being no allegation by the plaintiffs that he was a profligate or had other reason to act to their detriment.

14. The Lucknow house being the property of the joint Hindu family consisting of defendant No. 2 and his sons and the disputed sale being an act of good management, the latter must be held to be justified by legal necessity, which expression, as pointed out in *Nagindas Maneklal and Others* v. *Mahomed Yusuf Mitchella*,(1) is not to be strictly construed. In that case the facts were very similar to those obtaining here and may be briefly recapitulated. A joint Hindu family had serveral houses, one of which was in such a dilapidated condition that the Municipality required it to be pulled down. The adult coparceners contracted to sell it to a third person. The joint family was in fairly good circumstances and it was not necessary to sell the house which, however, could not be used by the family for residence and would not have fetched any rent. In a suit for specific performance of the contract to sell instituted by the purchaser, the minor coparceners contended that the contract did not affect their interest in the absence of "necessity" for the sale. In repelling the contention, Shah, J., who delivered the leading judgment of the Division Bench, referred to the manner in which the expression *kutumbarthe* had been construed by Vijnanesvara in the Mitakshara and observed :

> "The expression used must be interpreted with due regard to the conditions of modern life. I am not at all sure that Vijnanesvara intended to curtail the scope of the word *kutumbarthe* while explaining it. I do not see any reason why a restricted interpretation should be placed upon the word 'necessity' so as to exclude a case like the presnt in

(1) ILR (1922) 46 Bombay 312.

A which defendants Nos. 1 and 2, on all the facts proved, properly and wisely decided to get rid of the property which was in such a state as to be a burden to the family. I think that the facts of the case fairly satisfy the test."

B Fawcett., J., who agreed with these observations added a separate short note of his own and relied upon the following passage in *Hunoomanpersaud Pandey* v. *Mussumat Babooee Munraj Koonweree*,(1)

> "But where, in the particular instance, the charge is one that a prudent owner would make, in order to benefit the estate, the bona fide lender is not affected by the pre-
C cedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, *or the benefit to be conferred upon it*, in the particular instance, is the thing to be regarded."
>
> (Emphasis supplied)

D Although these remarks were made in relation to a charge created on the estate of an infant heir by its manager under the Hindu law, it is well settled that the principles governing an alienation of property property of a joint Hindu family by its Karta are identical.

E 15. The perimeters of the expression *kutumbarthe*, as interpreted in *Nagindas's* case (supra) which meets with our unqualified, approval, fully embrace the facts of the present case in so far as legal necessity for the disputed sale is concerned.

F 16. In the result, the appeal succeeds and is accepted. The judgment impuged before us is set aside and that of the District Judge restored. There will be no order as to costs of the proceedings in this Court.

S.R. *Appeal allowed.*

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(1) [1856] 6 Moo. I.A. 393.