APPELLATE CIVIL.

Before Khosla, J.

KISHAN CHAND AND OM PARKASH—*Defendants—Appellants*

versus

RAKESH KUMAR AND OTHERS,—*Respondents*

Regular Second Appeal No. 413 of 1954.

1956

May, 1st.

Hindu Law—Alienation—Father—Mortgage by father of coparcenary property for new business—Whether son can challenge the mortgage on the ground that it is without necessity—Effect on son's suit in cases the mortgagee has obtained a decree on the basis of the mortgage and where *no such decree has been obtained, stated.*

Held that a mortgage by a Hindu father of coparcenary property for new business can be challenged by the sons on the ground that there was no necessity without proving that the money was raised for an immoral purpose, where no decree on the basis of the mortgage had been obtained.

Held also, that a distinction must be made between cases in which the mortgagee has filed a suit on the basis of the mortgage and obtained a decree and cases in which no such decree has been obtained. Proposition (2) laid down by their Lordships of the Privy Council in *Raj Brij*

Narain Rai v. *Mangla Prasad Rai*, (1), refers clearly to those cases in which a decree has been obtained and not to those cases in which the sons merely seek to challenge an alienation. A mortgage is a double transaction. It consists of an alienation of immovable property and added to it is a contractual obligation to pay the debt. This debt can be realised by sale of the immovable property. As far as the alienation is concerned the sons can certainly challenge it because Hindu Law is quite clear on this point. A father cannot alienate coparcenary property unless he does so for necessity. It is not sufficient that the money which he raises was not raised for an immoral purpose. Along with this there is another principle of Hindu Law, namely, that when a father contracts a debt, there is a pious obligation upon the sons to pay this debt unless it was an immoral one. This proposition has nothing to do with the question of what happens when the father alienates co-parcenary property. When the creditor obtains a decree against the father and the decree was in respect of a loan which was not immoral the creditor can execute the decree and realise his dues out of the property in the hands of the sons. Therefore, in considering proposition (2) we must first find out whether the mortgagee has obtained a decree on the basis of the mortgage or not. If he has, then clearly proposition (2) applies and the sons cannot challenge the decree on the ground that there was no necessity. All that the mortgagee or the decree-holder need prove is that the debt was not immoral. But where no suit has been filed by the mortgagee and no decree has been obtained, it is a case of simple alienation and the sons can say that they are not bound by the alienation because there was no necessity for it.

Second Appeal from the decree of the Court of S. Harbans Singh, District Judge, Ludhiana, dated the 1st April, 1954, modifying that of Shri Chandra Gupta Suri, Sub-Judge 1st Class, Ludhiana, dated the 14th April, 1953, (dismissing the plaintiffs' suit against defendants 2, 3, 4, and 6 and in respect of mortgages dated 14th March, 1943, for Rs. 2,000, dated 13th May, 1943, for Rs. 4,000 and dated 21st July, 1943, for Rs. 1,000; but granting the plaintiffs decree that the mortgage in favour of defendant No. 4 for Rs. 12,000 by mortgage deed, dated 22nd October, 1944, shall not be binding on the plaintiffs as it is not for family

(1) A.I.R. 1924 P.C. 50

benefit and ordering that the plaintiffs shall pay costs of defendants 2, 3, 5 and 6 and defendant No. 4 shall pay plaintiffs' costs of this suit) to the extent of granting to plaintiffs a decree for a declaration that the mortgages Exh. D. 4 and D. 8 would not be binding upon the plaintiffs except to the extent of Rs. 429 and 275, respectively and ordering that the question of granting a decree for possession does not arise and directing to bear their own costs in the Lower-Appellate Court.

N. L. WADHERA, for Appellants.

ANAND MOHAN SURI, for Respondents.

JUDGMENT

KHOSLA, J. This second appeal arises out of a suit by the minor sons of Balwant Rai to challenge four mortgages effected by him on the ground that the mortgages were without consideration and necessity and therefore not binding upon them. All the mortgages were in respect of one house and the transactions were as follows— Khosla, J.

(1) a mortgage for Rs. 2,000 effected on the 14th March, 1943, in favour of Kishan Chand, appellant. The document is Exhibit D. 4;

(2) a mortgage for Rs. 4,000 effected in favour of Madu Sudan Lal, father of Niranjan Parshad defendant No. 3, on the 13th May, 1943. By means of this mortgage the previous mortgage in favour of Kishan Chand was paid off. Niranjan Parshad sold his rights to Om Parkash defendant No. 6. The original mortgage deed is Exhibit D. 8;

(3) a mortgage for Rs. 1,000 effected on the 21st July, 1943, in favour of Niranjan Parshad defendant No. 3. The mortgage deed is Exhibit D. 9. Niranjan Parshad brought a suit on the basis of this mortgage and obtained a decree. In execution of this decree

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the house was sold by Ramji Das, defendant No. 5 to whom the decree was assigned; and

(4) a mortgage for Rs. 12,000 effected on the 22nd October, 1944, in favour of Daulat Ram, defendant No. 4. By means of this mortgage the previous mortgages (2) and (3) were paid off and an additional sum of Rs. 7,000 is alleged to have been advanced.

The trial Court found that apart from the previous debt the fourth mortgage was without consideration. This matter is not now in dispute and no appeal against the decision of the trial Court was filed. With regard to the third mortgage the trial Court held that since a decree had been obtained by the mortgagee and the debt was not immoral, the mortgage was good and binding upon the sons. This matter is also no longer in dispute, nor was it challenged in the lower appellate Court. The dispute relates therefore to the first and second mortgages only. The trial Court found that the mortgages were for consideration and necessity and therefore binding upon the sons. It took the view that the debt had been incurred for a joint family business. The lower appellate Court modified the order of the trial Court and held that the first mortgage was good to the extent of Rs. 429 only and the second mortgage was good to the extent of Rs. 275. The lower appellate Court found that the business was not an old business and since there was no evidence of when the business was commenced, it must be treated as a new business. The defendants have come up in appeal to this Court and it has been urged on their behalf by Mr. Nathu Lal Wadehra that these two mortgages are binding upon the sons. The sons have filed cross-objections in which it is contended that the

mortgages should be held to be entirely without necessity.

The decision of this matter rests on the interpretation of the dictum of their Lordships of the Privy Council in *Raj Brij Narain Rai* v. *Mangla Prasad Rai* (1). Their Lordships were considering the principles of Hindu Law under which alienations effected by a member of a joint Hindu family may be challenged and a debt held to be moral or immoral. Their Lordships laid down five propositions which they deduced from a number of authorities. The second proposition was in the following terms—

> "(2) If he is the father and the reversioners are the sons he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for payment of that debt."

It is admitted that in the present case the debt was not immoral. The question, however, is whether a father can legitimately bind his sons by effecting a mortgage of co-parcenary property. Mr. Wadehra contends that the debt mentioned in proposition (2) quoted above includes a secured debt, and therefore where a father effects a mortgage of co-parcenary property and the money which he raises is not raised for an immoral purpose, then the mortgage is binding upon the sons.

It seems to me, however, that a distinction must be made between cases in which the mortgagee has filed a suit on the basis of the mortgage and obtained a decree and cases in which no such decree has been obtained. Proposition (2) laid down by their Lordships of the Privy Council seems to me to refer clearly to those cases in which a decree has been obtained and not to those cases in which the sons merely seek to challenge an alienation A mortgage is a double

(1) A.I.R. 1924 P. C 50

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transaction. It consists of an alienation of immovable property and added to it is a contractual obligation to pay the debt. This debt can be realised by sale of the immovable property. As far as the alienation is concerned the sons can certainly challenge it because Hindu Law is quite clear on this point. A father cannot alienate co-parcenary property unless he does so for necessity. It is not sufficient that the money which he raises was not raised for an immoral purpose. Along with this there is another principle of Hindu Law, namely that when a father contracts a debt, there is pious obligation upon the sons to pay this debt unless it was an immoral one. This proposition has nothing to do with the question of what happens when the father alienates co-parcenary property. When the creditor obtains a decree against the father and the decree was in respect of a loan which was not immoral, the creditor can execute the decree and realise his dues out of the property in the hands of the sons. Therefore in considering proposition (2) we must first find out whether the mortgagee has obtained a decree on the basis of the mortgage or not. If he has, then clearly proposition (2) applies and the sons cannot challenge the decree on the ground that there was no necessity. All that the mortgagee or the decree-holder need prove is that the debt was not immoral. But where no suit has been filed by the mortgagee and no decree has been obtained, it is a case of simple alienation and the sons can say that they are not bound by the alienation because there was no necessity for it. There seems to be almost complete unanimity of opinion on this matter. One of the earliest cases is *Nand Lal* v. *Umrai and others* (1). In this case the mortgagee had obtained a decree on the basis of his mortgage and though there was no proof that the mortgage was

(1) A.I.R. 1926 Oudh 321

effected for family necessity or for an antecedent debt, it was held that the sons or grandsons could not challenge the mortgage because a decree had been passed against the father and the sons and grandsons could not prove that the mortgage debt was contracted for immoral or illegal purposes.

The matter was considered by a Full Bench of the Allahabad High Court in *Jagdish Prasad and others* v. *Hoshyar Singh and another* (1). In this case too a decree had been obtained by the mortgagee, but the Allahabad High Court took the view that the debt mentioned in proposition (2) of their Lordships of the Privy Council did not include a mortgage debt. Of the three Judges who heard this case, one, namely, Sulaiman, Acting Chief Justice, took the contrary view. This decision was, however, later differed from in a Full Bench decision of the Allahabad High Court, namely, *Hira Lal and others* v. *Puran Chand and others* (2). In this case the mortgagee had obtained a decree and the Full Bench took the view that a mortgage debt fell within the mischief of proposition (2) of the Privy Council. The occasion for bringing this matter before a Full Bench a second time arose because of the contrary view taken by the Oudh High Court in *Nand Lal* v. *Umrai and others* (3) mentioned by me above. The same view was taken in two decisions of the Lahore High Court, (1) *Muni Lal and others* v. *Gian Singh and another* (4), and (2) *Joginder Singh and others* v. *Punjab & Sind Bank, Limited, Amritsar and others* (5). In both these cases the mortgagee had obtained a decree. In the latter case Addison, J., who wrote the judgment made a clear distinction between cases in which the

(1) A.I.R. 1928 All. 596
(2) A.I.R. 1949 All. 685
(3) A.I.R. 1926 Oudh 321
(4) A.I.R. 1931 Lah. 717
(5) A.I.R. 1939 Lah. 585

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mortgagee obtains a decree and cases in which there is no decree. He observed—

> "It is not disputed that if the mortgage decree had not been obtained the suit would have lain for such a declaration. It is also not disputed that if the sale had taken place after the mortgage decree, such a suit as the present would not have lain. The authorities in these two respects appear to be unanimous. There is not the same unanimity in cases like the present where the mortgage decree has been obtained but the property has not been brought to sale."

His Lordship then referred to a number of cases and came to the conclusion that where a mortgage decree had been obtained the sons must prove that the debt was immoral and in the absence of such evidence they are bound by the mortgage. I may quote the exact words used by him :—

> "It seems clear therefore that it must be held that the second proposition of Lord Dunedin includes a mortgage debt as well as an unsecured debt and, that being so, as a decree had been obtained on the mortgage, the debt not having been incurred for an immoral purpose, the estate of the family is laid open to be taken in execution proceedings upon the mortgage decree."

A similar view was taken by the Bombay High Court *in Bharmappa Murdeppa Soppin* v. *Hanmantappa Tippanna Belludi and another* (1). While

(1) A.I.R. 1943 Bom. 451

dealing with the wording of proposition (2), Beaumont Chief Justice observed—

> "But it is obvious that the second proposition is dealing with recovery of a debt, not in its character as a mortgage debt, but as a debt for which a decree has been obtained, and the decree is being executed."

Kapur, J., had occasion to consider this matter in *Mst. Dhanni and another* v. *Ghisu Ram and another* (1). That was a case in which no decree had been obtained on the basis of a mortgage and Kapur, J., interpreted the second proposition of their Lordships of the Privy Council as meaning that the debt did not include a mortgage debt. His decision was apparently based on the Allahabad Full Bench case, *Jagdish Prasad and others* v. *Hoshyar Singh and another* (2), although he has not cited the case upon which he relies. It appears, however, that the later Allahabad case which is also a Full Bench decision, *Hira Lal and others* v. *Puran Chand and others* (3), was not brought to his notice and no distinction was sought to be made between cases in which a decree has been obtained and the cases in which a decree has not been obtained. In the case before him no decree had been obtained. His decision was therefore entirely in conformity with the previous decisions upon the matter and did not in any way conflict with the two Lahore cases which he chose to disregard.

This being the state of the law, it is clear that the sons were competent to challenge the first and second mortgages because no decree on the basis of either of them had been obtained.

(1) A.I.R. 1951 Punjab 106
(2) A.I.R. 1928 All. 596
(3) A.I.R. 1949 All. 685

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The rest is merely a question of fact and the findings of fact arrived at by the lower appellate Court cannot be challenged in second appeal. It has been found that consideration to the extent of Rs. 429 in respect of the first mortgage and to the extent of Rs. 275 in respect of the second mortgage has been proved and on this finding the decision of the lower appellate Court must be upheld. Nor is there any force in the cross-objections in which the sons seek to disown even the amounts found proved by the lower appellate Court. I, therefore, dismiss both the appeal and the cross-objections, but in the circumstances make no order as to costs.