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the Jury to decide whether the pardon was forfeited, is not supported by section 298 (1) (c) of the Code of Criminal Procedure. That clause refers only to a finding on a question of fact which it is necessary to prove to make other evidence admissible. Here the question of forfeiture of the pardon was important not for the purpose of making other evidence admissible, but for the purpose of determining whether the trial could at all continue as against Shashi. That was a question of fact for the Jury.

As regards the arguments that the learned Judge misdirected the Jury, it is sufficient to say that no passage in the charge has been pointed out, which justifies the suggestion.

I agree that the appeal should be dismissed.

E. H. M.

*Appeal dismissed.*

### PRIVY COUNCIL.

P.C.\*  
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Oct. 27, 28 ;  
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HARI KISHEN BHAGAT

v.

KASHI PERSHAD SINGH

(AND ANOTHER APPEAL CONSOLIDATED).

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

*Hindu Law—Alienation by widow—Mortgages executed with alleged consent of reversioners—Nature of proof required of consent which must be established by positive evidence—Absence of proof of legal necessity—Presumption afforded by consent of reversioner.*

In this appeal which arose out of suits to recover property mortgaged by a Hindu widow it was held (affirming the decisions of the Courts in India), that the part taken by the reversioners with respect to the mortgages in question did not, under the circumstances, amount to a consent to bind

\*Present: LORD DUNEDIN, LORD SHAW, SIR JOHN EDGE AND MR. AMEER

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their interests. When a "stringent equity" arising out of an alleged consent by reversioners is sought to be enforced against them, such consent must be established by positive evidence that upon an intelligent understanding of the nature of the dealings they concurred in binding their interests; and that such consent should not be inferred from ambiguous acts, or be supported by dubious oral testimony such as appeared to have been relied upon in this case.

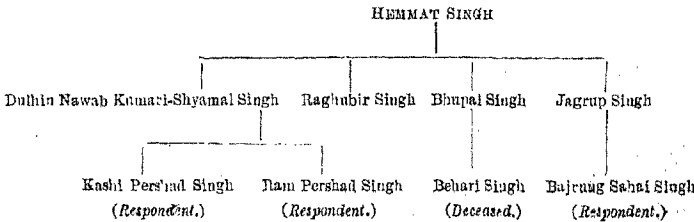
*Jivan Singh v. Misri Lal* (1), per Lord Hobhouse, referred to.

CONSOLIDATED Appeal 74 of 1912 from a judgment and decree (11th March 1909) of the High Court at Calcutta which affirmed a judgment and decree (22nd June 1906) of the Subordinate Judge of Monghyr.

The defendants were appellants to His Majesty in Council.

The only question for determination on this appeal was as to whether the purchase by the appellant Hari Kishen Bhagat of the lands in suit gave him an absolute title therein or only an estate for life of a Hindu widow.

The facts of the case were that Shyamal Singh was the owner of a four annas share of a mokurari tenure consisting of five mouzahs with kamat lands the subject-matter of the two suits which gave rise to the appeal. He died in 1812 leaving Dulhin Nawab Kumari his widow and sole heiress who succeeded to his estate. The pedigree of his family so far, as now material was as follows:—



On 26th November 1877 Dulhin Nawab Kumari mortgaged 1, 2 and 3 of the properties in suit to Hari

(1) (1895) I. L. R. 18 All. 146 ; L. R. 23 I. A. 1, 4.

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Kishen Bhagat for Rs. 950. The mortgage was witnessed by Raghubir Singh, who was at that time the sole reversionary heir of Shyamal Singh, and by Behari Singh, and was signed on behalf of the widow, the mortgagor, by the respondent Bajrung Sahai Singh.

On 11th July 1882 the widow mortgaged 1, 4 and 5 of the properties in suit to Hari Kishen Bhagat to secure a farther loan of Rs. 1,775. And on 10th July 1889, she executed a zurpeshgi lease to Hari Kishen in respect of properties 2, 3, 4 and 5 of the properties in suit for eleven years in consideration of an advance of Rs. 1,250.

On 8th May 1893 Hari Kishen Bhagat brought a suit on the mortgage of 26th November 1877 against Dulhin Nawab Kamari, in which on 14th July 1893 he obtained a decree under which he brought properties 1, 2 and 3 to sale and purchased them on 12th February 1894 for Rs. 2,550: and on 19th February 1897 he brought a similar suit on the mortgage of 11th July 1882, obtained a decree on 23rd March 1897, under which on 13th September 1897 he brought to sale properties 4 and 5 and purchased them for Rs. 2,000. Both these suits were brought in the Court of the Subordinate Judge of Monghyr; they were both undefended, and none of the reversioners were parties to them.

Dulhin Nawab Kumari died in 1900; and on 14th and 16th December 1904 respectively the present suits were filed the former by the respondent Bajrung Sahai Singh for a one-third share of the properties, and the latter by the respondents Kashi Pershad Singh and Ram Pershad Singh, sons of Raghubir Singh for a two-third share. The defendants in the former suit Hari Kishen Bhagat (the first appellant) and his two sons Kedaru Bhagat and Mahabir Bhagat, Kashi Pershad Singh, and Ram Pershad

Singh as the persons claiming the other two-thirds of the properties, and the zamindar, Raja Ram Narayan Singh, as the superior landlord: and the defendants in the latter suit were the appellants, Bajrung Sahai Singh, and the said zamindar.

The plaintiffs claimed as the reversionary heirs of Shyamal Singh on the death of Dulhin Nawab Kumari, and they alleged in their plaints that the mortgages and other transactions by her were not executed for legal necessity, and that the purchases by Hari Kishen Bhagat, therefore, conveyed to him only a life interest in the properties in suit which was determined on the widow's death.

The defence set up by Hari Kishen Singh in each case was that the loans and advances taken by the widow (the mortgagor) were for legal and valid necessities, and that the transactions had been entered into by her with the knowledge, approval and consent of the then reversionary heirs of Shyamal Singh; he claimed therefore that he had acquired an absolute estate in the properties, and that the money covered by the zurpeshgi lease was still due and unpaid.

The Subordinate Judge held that by the mortgages only the limited interest of the widow was mortgaged, that there had been no such legal or valid necessity for the loans and advances taken by her as would bind the reversioners after her death; that the attestations of the reversioners were only a recognition that she had pledged her widow's estate; and that even if the purposes to which some of the money had been applied were necessities, Hari Kishen Bhagat had been sufficiently recouped by the income of the properties covered by the zurpeshgi lease. The Subordinate Judge, therefore, held that all that passed to Hari Kishen Singh under the sales in execution of the mortgages decrees was Dulhin Nawab Kumari's

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limited interest as a Hindu widow which came to an end on her death.

On appeal, the High Court (LALMOHAN DOSS AND RICHARDSON JJ.) held that no legal or valid necessity for the mortgages had been established; that the attestations of the deeds by the reversionary heir did not amount to consent; that even if it did amount to consent on his part to the transactions, it could not be treated as being corroborative evidence of legal necessity inasmuch as there was no other independent evidence of such necessity: and that consent to such a transaction by the reversionary heir could not validate a mortgage for which no legal necessity had been proved. The High Court also found that the amount received by Hari Kishen Bhagat under the zurpeshgi lease was in excess of that which he could claim as valid charges on the properties. In the result the High Court affirmed the decision of the Subordinate Judge.

On this appeal,

*A. M. Dunne*, for the appellant, contended that the mortgages were executed with the approval and consent of the reversionary heirs, and bound them and their successors in interest; and such approval and consent to the transactions were of themselves evidence rendering proof of legal necessity unnecessary. The consent of the next reversioner raised a presumption in favour of the propriety of an alienation by the widow, which unless fraud was shown would not be set aside; and such consent even given after an alienation had been made would validate it. In the first mortgage the then next reversioner signed on behalf of the mortgagor, and both were signed or attested by other reversioners some of whom were the present claimants. The second mortgage was given to pay off the interest on the first mortgage. Reference was

made to *Collector of Masulipatam v. Cavalry Venkata Narainapah* (1), *Raj Lukhee Debea v. Gocool Chunder Chowdhury* (2), *Bajrangi Singh v. Manokarnika Baksh Singh* (3), [LORD DUNEDIN referred to *Muirhead v. Muirhead* (4), and LORD SHAW to *Sham Sundar Lal v. Achhan Kunwar* (5).] The doctrine of the consent of the next reversioner has been held by the High Court in the present case [see *Hari Kissen Bhagat v. Bairang Sahai Singh* (6)] to apply only to an out-and-out sale and not to an alienation by mortgage, it being said that the doctrine of consent only applied to cases where the widow alienated the whole of her estate, and there was acceleration of the succession, and not where she alienated only a portion of it. But that decision was in fact the cause of a reference to a Full Bench of the High Court which did not agree with it, but held that the doctrine of consent by a reversioner applied to the case of a mortgage: *Debi Prosad Chowdhury v. Golap Bhagat* (7). It was submitted that consent had been established on the evidence, and that an absolute title passed to the appellant in the properties by the execution sales under both mortgage decrees. In any case the appellants were entitled to their rights under the *zurpeshgi* lease if any of the money advanced had been applied for legal necessities. The advances were taken by the widow to meet the expenses of pilgrimages, *shradhs* and other religious undertakings by her and to meet other necessary expenses.

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[LORD DUNEDIN said there was no case made out except as to the first mortgage, and asked counsel for

(1) (1861) 8 Moo. I. A. 529, 550. (4) (1890) L. R. 15 A. C. 289, 300.

(2) (1869) 13 Moo. I. A. 209, 228. (5) (1898) I. L. R. 21 All. 71 ;

(3) (1907) I. L. R. 30 All. 1; L. R. 25 I. A. 183.

L. R. 35 I. A. 1. (6) (1909) 13 G. W. N. 544, 548.

(7) (1913) I. L. R. 40 Calc. 721.

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the respondents to confine his argument to that mortgage only.]

*Loundes*, for the respondents (other than the zamindar respondent), contended that the decisions of the Courts below were right in holding that only the limited estate of a Hindu widow passed to the appellant by the sale in execution of the decree on the first mortgage; in fact all that was sold was the right, title and interest of the widow, and that was determined on her death. The concurrent decisions of the Courts below had disposed of the question of legal necessity. The doctrine of acceleration of the estate applied in the case of an out-and-out sale by the widow with the consent of the next reversioner, but not where she gives only a mortgage, in which case it is submitted the mortgage would not, even with the consent of the reversioners, be binding as a surrender of the estate. Reference was made to *Behari Lal v. Madho Lal* (1), and *Raj Lukhee Debea v. Gocool Chunder Chowdhury* (2). On the question of what proof was necessary to establish the consent of the reversioners, *Jiwan Singh v. Misri Lal* (3) and *Sham Sunder Lal v. Achhan Kunwar* (4) were cited. According to these cases there was here not sufficient evidence of consent by the reversioners. The attestations of the mortgage and the signing of the widow's name thereon by the then sole reversioner was not intended to, and, under the circumstances of the case, could not validate the mortgage, as a mortgage of anything more than the widow's interest in the properties, and in any event such attestations and signature could not bind the interest of Raghubir's sons the respondents Kashi

(1) (1891) I. L. R. 19 Calc. 236; (3) (1895) I. L. R. 18 All. 146;  
 L. R. 19 I. A. 30. L. R. 23 I. A. 1.

(2) (1869) 13 Moo. I. A. 209, 228. (4) (1898) I. L. R. 21 All. 71, 81;  
 L. R. 25 I. A. 183, 188, 189.

Pershad and Ram Pershad Singh. If the appellant desired to obtain a decree on the mortgage which would be binding on the reversioners, he should have joined them as parties to the mortgage suit.

*Dume* replied.

The judgment of their Lordships was delivered by

Mr. AMEER ALL. The question for determination in these appeals relates to the validity, as against the reversioners, of certain sales held in execution of decrees obtained on mortgages effected by a Hindu widow, who had succeeded to her husband's estate on his death without leaving any issue. Shyamal Singh, the husband, died in 1842, and the widow, Dulhin Nawab Kumari, held the properties which form the subject of the present litigation until the transactions the validity of which is challenged in these suits.

The first mortgage was executed by Nawab Kumari in favour of the defendant, appellant, on the 26th of November 1877 in respect of three of the properties in her possession. On the 11th of July 1882 she mortgaged the rest of the properties to Bhagat for a further loan, and in 1889 she gave him what is usually called in India a *ticca pottah* of the shares of Shyamal Singh in all the mouzahs save one. Under this usufructuary lease the defendant obtained possession of the shares covered by it.

In 1893 Bhagat brought a suit against Nawab Kumari on the mortgage of 1877 and in execution of the decree on that bond purchased the three properties to which it related. In 1897 he obtained a decree on the bond of 1882, in execution of which he himself purchased again the remaining properties held by the widow. He thus obtained possession of all the shares in the different villages which Nawab Kumari had inherited from her husband for a widow's estate.

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Nawab Kumari died in 1900, and the plaintiffs, who are Shyamal Singh's brothers' sons, and whose reversionary right to his estate, though questioned in the first Court, is not disputed now, brought the present suits to recover possession of the properties held by Bhagat under the execution sales of 1893 and 1897, their main contention being that neither the mortgages executed by Nawab Kumari nor the sales thereunder affected more than her interest which ceased on her death.

Hari Kishen Bhagat is the principal defendant, but his sons have been impleaded in both actions, as they are joint in estate and living in commensality with him, and are, therefore, necessary parties.

The main defence to the plaintiffs' claims was that the mortgages were effected by the widow for valid and legal necessity under the Hindu law, and, further, that they were concurred in by the reversioners, and that consequently the defendants by virtue of the sales in question acquired the interests of the widow as well as theirs. It is to be remarked that in neither of the mortgage suits were the reversioners made parties.

At the time when the bond of 1877 was executed the nearest reversioner to Shyamal Singh was his sole surviving brother, Raghbir Singh. After him stood Raghbir's sons, of whom there were several, and the sons of two other brothers, Bhupal and Jagrup, who were dead at the time. Among these nephews of Shyamal Singh the names of Behari, the only son of Bhupal, and of Bajrung Sahai, a son of Jagrup and a plaintiff in one of the present actions, should be particularly mentioned, as they figure in the transactions in question.

In the instrument of 1877 the name of the widow is written by Bajrung Sahai Singh. He also appears

to have purchased the stamp paper on which the bond is inscribed. Among the witnesses to the document are Raghubir and Behary.

The name of the widow in the mortgage of 1882 appears to be written by Behari Singh, and one of the witnesses to this bond is Bajrung Sahai. On the lease of 1889 Nawab Kumari's name is written by Modenarain, a son of Raghubir, and the witnesses are Ram Parshad, another son of Raghubir, Bishan Parshad, one of the sons of Behary, and Bajrung Sahai, who also appears to have identified the lady to the Registrar. Both the Courts in India have found that so far as the *ticca poltah* of 1889 is concerned, the debt contracted thereunder has been satisfied out of the usufruct of the properties covered by the lease.

The points for determination in these appeals depend on the transactions of 1877 and 1882 respectively. The law relating to the dealings of a Hindu widow with her husband's estate which devolves on her in default of issue is now too well settled to need a prolonged consideration. To be valid as against the reversioners, or to affect their reversionary rights, a charge created by a Hindu widow or an alienation effected by her can be supported only by proof *aliunde* that such debt was contracted or such alienation was made for valid and legal necessity, and the onus of establishing such necessity rests heavily on the person who claims the benefit of transactions with a Hindu widow or other females taking similar estates. The requirement of the law may, however, be fulfilled by proving the consent or concurrence of the reversioners to or in the transactions.

In the present cases the Trial Judge in a careful and well-considered judgment held that the defendants had failed to prove any valid and legal necessity for the mortgages executed by the widow. This

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view has been affirmed on appeal by the High Court of Calcutta; and there being thus a concurrent finding of fact by the two Courts in India, that subject is now out of the region of discussion. Both the Courts have further held in effect that the part taken by the reversioners with respect to the transactions in question did not amount to a consent to bind their interests. In view of the facts and circumstances of the case, their Lordships have no hesitation in expressing their concurrence with the conclusion at which the Courts in India have arrived. The Trial Judge has carefully examined the phraseology of the two instruments, and he is of opinion that their language is fully consistent with the fact that the interest of the widow alone was intended to be charged. Nor is there anything to show that the reversioners who helped her to raise the loans understood it otherwise. There is no evidence that they benefited from the transactions, or that so far as they were concerned there was any need for the mortgages. Their Lordships think that when a "stringent equity," to use Lord Hobhouse's expression in the course of the argument in *Jivan Sing v. Misri Lall* (1) arising out of an alleged consent by the reversioners is sought to be enforced against them, such consent must be established by positive evidence that upon an intelligent understanding of the nature of the dealings they concurred in binding their interests; and that such consent should not be inferred from ambiguous acts or be supported by dubious oral testimony such as appears to have been relied upon in this case.

In *Raj Lukhee Debia v. Gokool Chunder Chowdhry* (2) this Board refused to affirm the proposition that mere attestation by a relative necessarily imports

(1) (1895) 1 L. R. 18 All. 146; (2) (1869) 13 Moo. I. A. 209, 228.

L. R. 23 I. A. 1, 4.

concurrence, and they added that when the consent of the husband's kindred is relied upon for the validity of alienations effected by the widow "the kindred in such case must generally mean all those who are likely to be interested in disputing the transaction. At all events there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one and one justified by Hindu law." The observations of the Board in that case seem to their Lordships to apply with particular force to the facts of the present case.

On the whole, their Lordships are of opinion that the Judgments appealed from are right and ought to be affirmed, and that these appeals ought to be dismissed with costs. And they will humbly advise His Majesty accordingly.

J. V. W.

*Appeals dismissed.*

Solicitors for the appellants: *T. L. Wilson & Co.*

Solicitors for the 1st and 2nd respondents, in both appeals: *Theodore Bell & Co.*

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