incurring the loan for which any portion of the properties sued for was mortgaged, the widow will be entitled to no share in the property included in such mortgages; with respect to the properties not included in the mortgages, she is entitled to a one-fourth share, as also to the same share in the mortgaged properties if no sufficient necessity shall be found to have existed. The decree of the lower Appellate Court will be modified accordingly, all such parts of the properties sued for as were not mortgaged for purposes of necessity being for this purpose divisible into fourths, and the cross-appeal is allowed with full costs, or apportioned costs according to the findings which the lower Appellate Court shall arrive at.

By their plaint the plaintiffs prayed that mesne profits for the period of pendency of suit up to the day of recovery of possession to such amount as may be determined in execution of decree, may be awarded to them. Such mesne profits will, of course, be governed by the ultimate decision in the case.

Decree varied.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Jackson, Mr. Justice Pontifex, Mr. Justice Morris, and Mr. Justice Mitter.

LUCHMUN DASS (DEFENDANT) *v.* GIRIDHUR CHOWDHRY BY HIS GUARDIAN KAMINI CHOWDHRANI (PLAINTIFF).* 1880 *April* 5, 6, 7, & *June* 2.

Hindu Law—Mitakshara Family—How far Alienation by Father of Ancestral Property is binding on Sons—Suit by Mortgagee against Family before or after Father's Death for Sale of the Property—Rights of Mortgagee as against Infant Son if Suit is brought against Father alone.

The manager of a joint Mitakshara family (the family consisting of the father and a minor son) raised money on the mortgage of certain family property, it not being proved, on the one hand, that there was legal necessity for raising the money, nor, on the other hand, that the money was raised or expended for improper purposes, or that the lender made any enquiry as to the purpose for which the money was required,—

* Full Bench Reference on Regular Appeal No. 228 of 1878, from a decision of Baboo Ram Pershad Roy, Subordinate Judge of Tirhoot, dated 30th May 1878,—and on Regular Appeals, Nos. 279, 288, and 289 of 1879.

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Held that, under such circumstances, a mortgagee could not enforce, by suit against the father and son, the mortgage itself during the father's lifetime, but the debt being an anteoedent one, he would simply be entitled to a decree directing the debt to be raised out of the whole ancestral estate, including the mortgaged property.

He would, *assuming the minor* to be the only son, also be entitled to a similar decree against the son after the father's death.

Supposing the mortgagee, under the above circumstances, to have obtained a decree against the father *alone for* payment and sale of the property, and at the sale to have himself become the purchaser, he could not be considered a *bonâ fide* purchaser for value, and would not be entitled to the property as against the infant son, except to the extent of the father's interest therein.

A mortgagee, under the same circumstances (but supposing the son to have attained majority at the time of the loan, and to have been made a party to the suit) would be entitled to a decree directing the debt to be raised out of the whole ancestral estate.

In the case of a joint Mitakshara family consisting of two brothers and their two minor sons, the former, being the managers, raised money by executing a zurpeshgi lease of specific family property, the lender making no enquiry as to the necessity for the loan; subsequently such managers took a sublease of the same property from the zurpeshgidar, and continued in possession, and the zurpeshgidar sued for rent and obtained a decree, and in execution became the purchaser and obtained possession. It was found as a fact that the zurpeshgi and the sub-lease were merely a device by the managers to raise money and to continue in possession of the property, but it was not shown for what purpose the money was raised. *Held*, the minor sons not having been made parties to the suit by the zurpeshgidar, would be entitled to recover their shares as against the purchaser.

THIS was a reference to a Full Bench of certain questions of Hindu law arising out of Regular Appeals, Nos. 228, 279, 288, and 289 of 1878. These cases were heard by GARTH, C. J., and MITTER, J., who, before giving judgment, referred certain points therein raised to a Full Bench. The referring order was as follows:—

In all these cases the question has arisen in different forms, and under different circumstances, how far, in the case of a joint Hindu family governed by Mitakshara law, an alienation of ancestral property by the father of the family is binding upon his sons.

Certain recent decisions of this Court, which are mentioned below, appear to throw some doubt upon the meaning of the rule laid down by the Privy Council, first, in the cases of *Gir-*

dhari Lall v. *Kanto Lall* and *Muddun Thakoor* v. *Kanto Lall* (1), and afterwards explained and confirmed in the case of *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (2).

These decisions seem also to be, to some extent, conflicting *inter se* upon certain points, which it is necessary for us to decide in these cases, and which therefore we think it right to refer to a Full Bench, as follows: —

1. In the case of a Mitakshara family, consisting of a father and one minor son, where the father (being the manager) raises money by hypothecating certain ancestral family property by bonds, and it is not proved, on the one hand, that there was any legal necessity for his raising the money, nor, on the other, that the money was raised or expended for immoral or illegal purposes, or that the lender made any enquiry as to the purpose for which it was required, can the lender (the mortgagee) enforce by suit against the father and the son the payment of his money by sale of the property during the father's lifetime?

2. Can he do so, under similar circumstances, by suit against the minor after the father's death?

3. If the mortgagee, under such circumstances, brings a suit against the father alone, obtains a decree for payment and for sale of the property, and at the sale buys the property himself, is he entitled, as a *bonâ fide* purchaser for value, to hold the property as against the infant son, either during the life or after the death of the father?

4. Would it make any difference to the right of the mortgagee in any of the above cases, if the son, at the time of the raising of the money, and the giving of the bond, were an adult instead of a minor?

5. Would it make any difference, if the money were borrowed partly to pay an antecedent debt of the father, and partly for some other unexplained purpose?

6. Would it make any difference, if, in the sale under the decree, the right, title, and interest of the father in the property were sold instead of the entire property?

7. In the case of a Mitakshara joint family, consisting of two

(1) L. R., 1 I. A., 321; S. C., 14 B. L. R., 187.

(2) *Ante*, p. 148; S. C., L. R., 6 I. A., 88.

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brothers and their sons, the former, being the managers, raise money by executing a zurpeshgi lease of specific family property, the lenders making no enquiry as to the necessity for the loan. Immediately after this, the two brothers take a sublease at a rent of the same property from the zurpeshgidar, and continue in possession. The rent not being paid, a suit is brought by the zurpeshgidar, and a decree is obtained for it against the two brothers; and in execution of the decree the same property is sold, and the zurpeshgidar becomes the purchaser and obtains possession. We find as a fact, that the zurpeshgi and the sublease were merely a device by the two brothers to raise money and to continue in possession of the property, but it is not shown by either side for what purpose the money was raised. Are the sons entitled to recover back the property; or any, and what, portion or share of it from the purchaser?

The following cases are the recent decisions of this Court above referred to:—*Adurmoni Deyi* v. *Chowdhry Sib Narain Kur* (1), *Gunga Pershad* v. *Sheo Dyal Singh* (2), *Gonesh Pandey* v. *Dabee Doyal Singh* (3), *Pursid Narain Sing* v. *Honooman Sahay* (4).

Baboo *Chunder Madhub Ghose* for the appellant (and purchaser of the property comprised in Appeal No. 288 of 1878).—The first two questions are included in the class of cases—(i) where a mortgagee wishes to enforce his lien against father and son; and (ii) where a son brings a suit to set aside a sale held under a decree on a mortgage-bond obtained by a creditor of the father. The case of *Girdhari Lall* v. *Kanto Lall* (5) lays down that a son is bound to pay his father's debts; the father was alive at the time the suit was brought, and the sons had entirely failed to prove that the debts contracted by their father were for an immoral purpose, and this is the only ground on which exemption from paying the debt could have been claimed. In *Hanooman Persad Panday* v. *Babooee Munraj Kooniveree* (6)

(1) I. L. R., 3 Calc., 1.
(2) 5 C. L. R., 224.
(3) *Id.*, 36.
(4) *Ante*, p. 845.
(5) L. R., 1 I. A., 321; S. C., 14 B. L. R., 187.
(6) 6 Moore's I. A., 393.

the alienation was made by the mother, she being the guardian. The case of *Omed Rai* v. *Heera Lall* (1), which is referred to incidentally at p. 421 of 6 Moore's Ind. App., decides that a son is bound to pay his father's debts when the latter are charged against the estate, and when the transaction was *primâ facie* for the benefit of the estate. The case of *Kanto Lall* (2) is not referred to in *Deendyal Lall* v. *Jugdeep Narain Singh* (3). *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (4) shows that a father has a right to sell an ancestral property for any debts that are not immoral. [PONTIFEX, J.—It is impossible that the passage quoted from that case at page 106 of L. R., 6 I. A., could, in the face of *Deendyal's case* (3), be intended as a general rule; the case then discussed was one where there had been a sale under an execution of a decree for a debt.] The first question referred may be answered by the last proposition in *Suraj Bunsi Koer's case* (4), which adopts *Bai Amrit* v. *Bai Manik* (5). [GARTH, C.J.—It seems that there are some points in which this case differs from that of *Suraj Bunsi Koer* (4):—(i) it does not appear that the money was borrowed for an antecedent debt; (ii) the property here has not passed out of the family; and can the alienation therefore be questioned? And further, does the rule laid down apply when a creditor is seeking to enforce his lien,—*i.e.*, can he do so without showing necessity? PONTIFEX, J.—Those questions may be answered in the affirmative.] The second question referred is answered by the arguments as to the first. The third question may be answered by *Kanto Lall's case* (2), which is distinguishable only from the fact that in that case a stranger was the purchaser. The difference between the first and third questions is only a question of the form of the decree. As to the fourth question, ss. 28 and 29 of Chap. I of the Mitakshara may be cited against us. Yet these sections must be read with the qualification that a son is bound to pay his father's debts, and there are texts which go so far as saying, that, even during the lifetime of the father, a son is bound to pay his father's debts. [GARTH,

(1) 6 S. D. A., 222.

(2) L. R., 1 I. A., 321; S. C, 14 B. L. R., 187.

(3) L. R., 4 I. A., 247; S. C., I. L. R., 3 Calc., 198.

(4) L. R., 6 I. A., 88; S. C., *ante*, p. 148. (5) 11 Bom. H. C. Rep., 84.

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C. J.—The hardship is, that the father might sell any portion of the property without consulting the son.] The cases of *Buddree Lall* v. *Kanto Lall* (1) and *Anoorajee Koer* v. *Bhugobutty Koer* (2), both decide that a creditor is not bound to go behind the decree for the sale of the mortgaged property, unless clear proof were given that the loan was contracted for immoral purposes. *Muddun Gopal Lall* v. *Gowrunbatty* (3), as also the two cases last cited, show, that there is an obligation attaching on the son to pay his father's debts, and that a sale under a mortgage made by the father would bind the son, unless the debts were illegally or immorally contracted. As to the fifth question, the answer to it falls within the principle which has been laid down by the Privy Council; the question has arisen from the words used in page 106 of *Suraj Bunsi Koer's case* as reported in L. R., 6 I. A. The Privy Council were then contemplating a sale that had taken place for an antecedent debt; they say that, having laid down that the debt was binding on the family, a sale made by the father would be binding on the family. [PONTIFEX, J.—Your argument goes as far as this, that all sales are binding unless the debt for which the decree is obtained can be shown to have been contracted for some forbidden purpose.] Yes. The answer to the seventh question may be found in the arguments that I have laid before the Court already.

Mr. *Branson* for the appellant in case No. 289.—*Gunga Pershad* v. *Sheodyal Singh* (4) decides that a son is liable for debts of his father, unless he can establish that the debts were illegally or immorally contracted; see also *Ruder Perkash Misser* v. *Hurdai Narain Sahu* (5).

Mr. *H. Bell* for the respondent.—The questions resolve themselves into two points, *viz.*:—(i) The extent of a son's liability to pay debts contracted by the father; (ii) Assuming the liability, can the son be bound by any decree against the father unless he is made a party to the suit? According to Hindu law, no Hindu

(1) 23 W. R., 260.
(2) 25 W. R., 148.
(3) 15 B. L. R., 264; S. C., 23 W. R., 365.
(4) 5 C. L. R., 224.
(5) 5 C. L. R., 112.

son is liable for the debts of his father during the father's lifetime. It is argued that, where joint property has passed out of the family in payment of a father's debt, the sons cannot recover the property unless they can prove that the debts were contracted for immoral or illegal purposes. If that is correct, it is totally opposed to the texts of the Mitakshara in s. 27, Chap. I. If, under the Mitakshara, the father is subject to his sons, how can he alienate without the consent of the sons ? Are we to take the case of *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (1) as overruling the Mitakshara ? In that case it does not appear from the High Court's judgment that the debts were contracted for an immoral purpose. What the Privy Council say in that case with regard to a purchaser, not being a purchaser without notice, would be good if applied to a mortgagee; but the remarks do not apply to a purchaser. They do not say that any other property, except the father's own property, would have been liable for the debt. *Sadabart Prasad Singh* v. *Foolbash Koer* (2) is an authority for showing that a member of an undivided Mitakshara family has no authority, without the consent of his co-sharers, to mortgage family property in order to raise money on his own account. The case of *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (1), instead of extending *Kanto Lall's case* (3), cuts it down; and it does not seem to have been the intention of the Privy Council to go beyond *Kanto Lall's case* (3). From the case of *Girdhari Lall* v. *Kanto Lall* (3) it is clear, that in that case there was necessity. Moreover, the case was argued *ex parte*, and no suggestion was made that the father's share alone was liable. These decisions of the Privy Council were considered in the case of *Bheknarain Singh* v. *Januk Singh* (4). In the case of *Suraj Bunsi Koer* (1) the father was dead, so there was no question as to the liability of the sons to pay during the father's lifetime. *Gunga Pershad* v. *Sheodyal Singh* (5) follows the case of *Bheknarain Singh* (4). The obligation of

(1) L. R., 6 I. A., 88; S. C., *ante*, p. 148.

(2) 3 B. L. R., F. B., 31.

(3) L. R., 1 I. A., 321 at p. 330; S. C., 14 B. L. R., 187 at p. 195.

(4) I. L. R., 2 Calc., 438.

(5) 5 C. L. R., 224.

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sons to pay their father's debts is a religious obligation to secure the father's salvation. This is laid down in Menu, Chap. III, s. 2. See, as to the payment of debts, Colebrooke's Digest, Chap. V, pp. 263, 268, and 273. A son may be compelled to pay his father's debt, but only so far as there are assets. The son is only bound to pay the share of the father in the debt, p. 286. A minor is not liable to pay them, p. 291. See also the chapter on debts in Mayne's Hindu Law, p. 249. As to debts which a son is bound to pay, *see* West and Bühler, Bk. II, introd., s. 64; chapter on Liabilities, p. 340; also 2 Strange's Hindu Law, p. 274. The Privy Council have not discussed or laid down any rule as to the extent of the liability of the son. What is the meaning of the word "*sons*" in page 101 of *Suraj Bunsi Koer's case* as reported in L. R., 6 I. A.? If the position therein mentioned is deduced from *Kanto Lall's case* (1), the meaning of the word is "*minor sons.*" No opinion is given as to grown-up coparceners. The onus is thrown on minor sons to show that the property was parted with for immoral purposes. *Deendyal's case* (2) further lays down that the sons cannot be bound unless they are made parties to the suit, and they were not so made parties in the mortgage suit; and s. 445 of Civil Procedure Code provides that a father of a defendant cannot be the guardian of his son. *Bissessur Lall Sahoo* v. *Luchmesur Singh* (3) does not conflict with *Deendyal's case* (2). The question there was, whether the property could be attached without making a younger son a party. *Sadabart Pershad's case* (4) lays down that, assuming sons are liable to pay a father's debts, they must be made parties to the suit. The answers I would propose to the questions of the Full Bench, so far as they affect my case, are as follows:—

(i) That a purchaser can only enforce his decree against the father's share. If he has attached the father's share before the father's death, he can sell it; if not, the share passes by survivorship to his sons, and he cannot therefore sell. (ii) On the authority of *Suraj Bunsi Koer's case* (5), the mortgagee could enforce by suit against father and son the payment of his money

(1) L. R., 1 I. A., 321; S. C., 14 B. L. R., 187.

(2) L. R., 4 I. A., 247; S. C., I. L. R., 3 Calc., 198.

(3) L. R., 6 I. A., 233.

(4) 3 B. L. R., F. B., 31.

(5) L. R., 6 I. A., 99; S. C., *ante*, p. 148.

by sale during the father's lifetime. (iii) Where the son is of age at the time the debt was contracted, the case would be different, because the consent of such son is a condition precedent to the contraction of the debt, and it is clear that the Privy Council in *Suraj Bunsi Koer's case* (1) have expressly reserved the case of adult sons.

The opinion of the Full Bench was as follows :—

Having regard to the law as laid down by the Privy Council in the cases mentioned in the reference, we think that the questions referred to us should be answered as follows :—

1. The mortgage itself upon which the money was raised could not be enforced, but the debt so contracted by the father being itself an antecedent debt within the rulings of the Privy Council, and the son being a party to the suit, the mortgagee, notwithstanding the form of the proceedings, would be entitled to a decree directing the debt to be raised out of the whole ancestral estate, inclusive of the mortgaged property.

2. Assuming the minor to be the only son, the mortgagee would be entitled to a similar decree against him after the father's death.

3. We think that, under such circumstances, the mortgagee could not be considered as a *bonâ fide* purchaser for value, and would not be entitled to the property, except to the extent of the father's interest, as against the infant son.

4. Assuming the adult son to be a party to the suit, the mortgagee would be entitled to a decree similar to that mentioned in the answer to the first question, directing the debt to be raised out of the whole ancestral estate.

5. In the view which we take of the case, the whole of the money borrowed would be an antecedent debt.

6. We consider it unnecessary to answer this question.

7. The sons not being made parties to the suit, they would be entitled to recover their shares as against the purchaser. If they had been made parties, they would have had apparently a good defence to the suit upon the merits.

(1) L. R., 6 I. A., 88; S. C., *ante*, p. 148.