

MIR ALI
HUSSAIN
v.
SAJUDA
BEGUM.

We make this modification in the Munsif's decree in accordance with the findings of the Subordinate Judge which were overlooked in the passing of his decree. We also modify the decree of the Munsif as to costs by directing that the costs of the parties be borne by themselves throughout.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

SAMI AYYANGAR (DEFENDANT NO. 2), APPELLANT,

v.

PONNAMMAL (PLAINTIFF), RESPONDENT.*

Hindu law—Mortgage—Loan at time of mortgage—Whether mortgage binding on the property of the mortgagor's undivided son.

In order to justify a sale or a mortgage by a father so as to bind his son's share of the property, there must be in fact an antecedent debt, *i.e.*, a debt prior to the mortgage or sale.

SECOND APPEAL against the decree of T. M. Horsfall, District Judge of Tanjore, in Appeal Suit No. 504 of 1894, affirming the decree of A. Sambamurthi Ayyar, District Munsif of Valangiman, in Original Suit No. 358 of 1889.

The appellant (defendant No. 2) was the undivided son of defendant No. 1 who in 1883 executed a hypothecation bond to the husband (since deceased) of the plaintiff who brought this suit on the bond, it having fallen to her share on a razinama entered into between her and another widow of her husband.

Both the lower Courts gave a decree for the amount claimed on the security of the mortgaged property including the second defendant's share. Hence this appeal.

The Acting Advocate-General (Hon. V. Bhashyam Ayyangar) and *Gopalasami Ayyangar* for appellant.

Sankaran Nayar for respondent.

JUDGMENT.—As regards the liability of the son's share for the debt of the father as a mere money claim, there can be no question, since it is found that the mortgage was for consideration and was not illegal or immoral.

* Second Appeal No. 1597 of 1895.

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The next question is whether the mortgage is binding on the son in respect of his share. It is argued for the appellant that, the father having borrowed money not prior to the mortgage but only at the time of the mortgage, the debt cannot be considered to be an antecedent debt so as to come within the rule in the Privy Council case *Suraj Bansi Koer v. Sheo Persad Singh*(1). This is the view taken by this Court in *Srinivasa Ayyangar v. Ponnammal*(2) and *Chinnayya v. Perumal*(3). The respondent refers us to the case reported as *Khalilul Rahman v. Govind Pershad*(4) in which it was held that even in circumstances such as those of the present case, the mortgage will be enforced against the son's share as well as against that of the father. We do not find any sufficient grounds for differing from the rule hitherto followed by this Court, viz., that in order to justify a sale or a mortgage by a father so as to bind the son's share, there must be, in fact, an antecedent debt, i.e., a debt, prior to the mortgage or sale.

We must, therefore, allow the appeal with costs, and modify the decree of the Lower Appellate Court accordingly, but this will not affect the right of the plaintiff to proceed against the son's share in execution of the decree, treating it as a mere money decree. We make no order as to costs in the Lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Benson.

ABDUL RAHIMAN AND OTHERS (PLAINTIFFS), APPELLANTS,
 v.
 MAHOMED KASSIM (DEFENDANT), RESPONDENT.*

1897.
 August 6.

Civil Procedure Code—Act XIV of 1882, ss. 244, 337 (a)—Order directing the release of judgment-debtor—Appeal.

A judgment-debtor, who had been arrested in execution of a decree of a District Munsif, made an application for his release under Civil Procedure Code, section 337 (a), and his application was granted:

Held, that an appeal lay against the order granting the application.

(1) I.L.R., 5 Calc., 148. (2) Letters Patent Appeal No. 12 of 1893 unreported.
 (3) I.L.R., 13 Mad., 51. (4) I.L.R., 20 Calc., 328.

* Appeal against Appellate Order No. 1 of 1897.