1910. OCTOBER, 10, 11, 13, 26.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Krishnaswami Ayyar.

MAHARAJA SREE RAO SIR VENKATA SWETACHELAPATHI RANGA RAO, BAHADUR GARU, K.C.I.E., MAHARAJA OF BOBBILI (PLAINTIFF), APPELLANT.

v.

RAJA KAMINAYANI BANGARU KUMARA ANKAPPA NAYANIM GARU, ZAMINDAR OF CHUNDI, BEING MINOR REPRESENTED BY THE COLLECTOR OF NELLORE (THIRD DEFENDANT), RESPONDENT.*

Hindu Law—Unsecured debt contracted by limited owner when binding on estate—Will bind if made after due inquiry—Proof of due inquiry—Nature of right liable to be devested by adoption—Transfer of Property Act, s. 38.

Unsecured debts contracted by a limited owner will be binding on the estate if incurred for purposes which will justify a charge on such estate.

The rule laid down in the case of *Hanooman Persaud Pandey* v. *Mussumat Koonwree*, (1856) [6 M. I. A., 393], as to the sufficiency of a reasonable inquiry satisfying the creditor of the existence of reasonable necessity to validate a claim against the estate in the hands of a manager applies in the case of all loans whether secured or unsecured.

Representations by the borrower are evidence of the existence of such necessity but are not generally in themselves sufficient to discharge the burden which rests upon the creditor of showing a reasonable inquiry as to the binding nature of the purpose for which the loan is contracted. In particular circumstances however they may suffice to shift the burden of proof to the person impeaching the debt or alienation.

If section 38 of the Transfer of Property Act is deemed to enact a rule as to reasonable inquiry in excess of what is required by the Privy Council in Hanuman Pershad's case, it cannot override the Hindu Law settled by the Privy Council.

The estate of a person whose right is liable to be devested by an adoption is not analogous to a life estate. It is that of a limited owner who represents the estate.

APPEAL against the decree of T. M. Rangachariar, District Judge of Nellore, in Original Suit No. 25 of 1904.

The facts for the purpose of this case are fully set out in the judgment.

P. R. Sundara Ayyar for appellant.

* Appeal No. 150 of 1907.

The Hon. the Advocate-General for respondent.

JUDGMENT.—The late Zamindar of Chundi, which was an impartible estate descendible according to the rule of primogeniture, died in 1899. On his death disputes arose between his brother, the first defendant, and his widow, the second defendant, as to the succession. There was litigation between the parties. A compromise was entered into and embodied in exhibit A, dated the 13th April 1901. Under it both were to enjoy the zamindari in common, and, in case a son was born to the first defendant, the second defendant was to adopt him. A son was born to the first defendant in February 1903 and adopted by the second defendant on the 27th of June 1903. The adopted son is the third defendant represented by the Court of Wards. The plaintiff sued to recover a sum of Rs. 7,000 with interest thereon under the promissory note, exhibit C-2, dated the 16th September 1901, executed by defendants Nos. 1 and 2, on the liability of the Chundi estate in the hands of the third defendant. The third defendant admitted a part of the claim. The District Judge passed a decree in respect of it and dismissed the suit as regards the remainder as against the third defendant. The present appeal by the plaintiff relates to the amount disallowed. The District Judge based his decision on the authority of the judgment in *Nachiappa Chettiar* v. *Chinnayasami Naicker*(1) which held that in the case of an impartible zamindari the unsecured debt of the zamindar not incurred for family necessity was not recoverable from the estate in the hands of the next heir taking by survivorship. The principle of that decision must be held to be no longer good law. See *Rajah of Kalahasti* v. *Achigadu*(2) and *Zamindar of Karvetnagar* v. *Trustee of Tirumalai, Tirupati, etc., Devastanams*(3).

The ground of the District Judge's judgment being erroneous, it becomes necessary to consider the third issue which raises the question whether a debt contracted by the first and second defendants not secured upon the estate is nevertheless binding upon it. The District Judge has given no finding but he has recorded the evidence. We think it unnecessary to send the case back as both sides have agreed that we may deal with the issue.

(1) (1906) I.L.R., 29 Mad., 453. (2) (1907) I.L.R., 30 Mad., 454.
(3) (1909) I.L.R., 32 Mad., 429.

ABDUR RAHIM AND KRISHNA-SWAMI AYYAR, JJ.

MAHARAJA OF BOBBILI v. ZAMINDAR OF CHUNDI.

Before, however, going into the evidence it is necessary to deal with the legal contentions that were raised in connection with this issue. The first point to be noticed is whether, the debt not having been secured upon the estate by the first and second defendants, the estate in the hands on the third defendant, who has on adoption devested them of the zamindari, under the Hindu Law can be made liable. The learned Advocate-General who appeared for the third defendant admitted that *Royelle Jogayya* v. *Venkataratnamma*(1) was against him and did not seriously dispute its authority. Although the execution of a promissory note by the first and second defendants might suggest *prima facie* that the creditor looked to their personal credit it would be competent to him to show that the estate was intended to be bound as well in the circumstances of the case. In the case of the present loan the estate was heavily involved and the very fact of the first and second defendants being both required to execute the promissory note shows that, if the loan was made after due enquiry as to the purpose being of a character binding upon the estate, there can be no difficulty in coming to the conclusion that the creditor looked to the estate for repayment and not merely to the personal credit of the first and second defendants. Mr. Sundara Ayyar for the appellant has argued that, apart from the evidence of the actual application of the loan, he is entitled to a decree binding upon the estate, because the loan was made after reasonable enquiry as to the purpose. The Advocate-General, however, raised a question that the decision in *Hunooman Persaud Panday* v. *Mussumat Koonweree*(2), as to the sufficiency of a reasonable enquiry to validate a claim against the estate in the hands of a manager should not be extended to loans unsecured upon the estate. His argument was that it is only where the widow or other limited owner of an estate or the manager of a joint family or guardian of an infant heir alienate the estate in some form that *bonâ fide* enquiry and the satisfaction of the creditor as to reasonable necessity have been held sufficient to justify the alienation. But we see no grounds to limit the decision in that case in this manner. There is nothing in principle to confine the observations of their Lordships as to the sufficiency of a *bonâ fide* and reasonable enquiry to the case of

(1) (1910) 20 M.L.J., 412. (2) (1856) 6 M.I.A., 393.

alienation. In the case of *Kotta Ramasami Chetti* v. *Bangari Seshama Nayanivaru* (1), both Mr. Justice KERNAN and Mr. Justice MUTHUSAMI AYYAR were of opinion that the *dicta* of the Privy Council applied with equal force to a simple loan as well as an alienation. Mr. Justice KERNAN observed "In *Hunooman Persaud Panday* v. *Mussumat Koonweree*(2), the case dwelt with was one of an express charge and so it was in very many other cases. The principle, however, to be applied, whether in respect of an express charge in writing or by deposit, or of a loan of money to, or other debt created by, a manager without such express charge, is the same." After referring to the sufficiency of due and proper enquiry the learned Judge proceeds to add "The same principle applies to a simple loan or debt. In each case the manager acts as agent of the family and his acts are subject to the same consideration and question. In point of principle and law, the simple loan and express charge require the same foundation to bind the family and the estate" (pages 148 and 149). Mr. Justice MUTHUSAMI AYYAR observed at page 161 with reference to a debt not secured upon the estate by the *de facto* Poligar but sought to be recovered from the rightful successor "It is true that though there was no real necessity for the debt, the plaintiffs should not fail if their claim were within the equity recognized by *Hunooman Persaud Panday* v. *Mussumat Koonweree*(2)." This being the law, the only question that we have to consider in the case is whether, as contended by the learned vakil for the appellant, there was a reasonable and *bonâ fide* enquiry by the lender as to the purpose of the loan. The learned Advocate-General argued that the enquiry contemplated by the Privy Council is one independent of the representations of the borrower and that such representations, even if evidence are not in themselves sufficient to discharge the burden which rests upon the creditor of showing a reasonable enquiry as to the binding nature of the purpose for which the loan is contracted. In *Hunooman Persaud Panday* v. *Mussumat Koonweree*(2), the Privy Council said at pages 419 and 420 of the report "The representations by the manager accompanying the loan as part of the *res gestae*, and as the contemporaneous declarations of an agent, though not actually selected by the principal, have been held to be evidence against

(1) (1881) I.L.R., 3 Mad., 145. (2) (1856) 6 M.I.A., 393.

ABDUR RAHIM KRISHNASWAMI AYYAR, J.

MAHARAJA OF BOBBILI v. ZAMINDAR OF CHUNDI.

the heir; and as their Lordships are informed that such *primâ facie* proof has been generally required in the Supreme Court of *Calcutta* between the lender and the heir, where the lender is enforcing his security against the heir, they think it reasonable and right that it should be required." The foregoing extract from the judgment of their Lordships makes it abundantly clear that the representations of the borrower are not merely evidence but may in particular circumstances be sufficient to shift the onus from the lender to the person impeaching the debt or alienation. The above principle has been accepted by the Courts in India. In *Sarat Chandra Banerjee* v. *Bhupendra Nath Basu* (1) Chief Justice MACLEAN applied the rule above enunciated to the case of a loan to an executor not governed by the Succession Act. We wish, however, to guard ourselves from being supposed to lay down the rule that the representations by the borrower are generally sufficient. In many case the interests of the borrower are likely to be opposed to those of the reversioner or the infant heir or other person whose manager he or she may happen to be and in such cases reasonable enquiry should not be limited to the representations of the borrower. Section 38 of the Transfer of property Act seems to require, in addition to good faith, reasonable care in ascertaining the existence of circumstances alleged by the transferor of immoveable property. This section, if deemed to enact a rule as to reasonable enquiry in excess of what is required by the Privy Council in *Hunooman Persaud's* case (2) cannot override the Hindu Law so settled by the *Privy Council*. See section 2, clause (*d*). But it may well be taken to indicate that ordinarily something more than the mere representation of the borrower is necessary to constitute reasonable enquiry on the part of the lender.

Taking the law to be as above indicated we have to see how the facts stand in this case. It is perfectly clear that at the time of the suit loan there was a debt due of a lac and a half recoverable from the estate. The Advocate-General did not practically dispute this. Exhibit Ag 2 which is a draft mortgage-deed, dated the 8th of October 1901, is sufficient evidence of the liability. By the letter, Exhibit D, dated the 10th September 1901,

(1) (1898) I.L.R., 25 Calc., 103 at p. 108.

(2) (1856) 6 M.I.A., 393.

the first defendant asked for a loan of a lac and a half. There can be no doubt that this loan was applied for to meet the liability which was enforceable against the estate. In the same letter the first defendant applied for an immediate loan of Rs. 7,000 on account of urgency to meet a decree-debt and other debts out of the debts amounting to a lac and a half that were recoverable from him. Before the date of the loan the defendant's agent had been sent to the plaintiff to represent the urgency. The first defendant examined as the plaintiff's witness No. 3 says that the loan of a lac and a half was absolutely necessary and that the amount of the suit promissory note was also comprised in the said loan. The witness also adds "As I told him (Narasimhayya) that money was urgently needed, he spoke to the Maharajah of Bobbili at Madras on my behalf about the urgency and caused money to be advanced." The second witness for the plaintiff, his second Manager, says "From my enquiries I came to know that defendants Nos. 1 and 2 had a necessity to borrow and I was satisfied with the necessity for borrowing money." It is true he is now unable to give any details of the debts. But we are on the whole satisfied in the circumstances of this case that, even apart from the representations of the borrower, there was enquiry by the lender which was reasonably sufficient to justify the loan so as to make it recoverable from the estate.

It is unnecessary to consider the contention of Mr. Sundara Ayyar that as the first defendant was at the time of the loan the full owner of the estate the amount is recoverable from the estate in the hands of the successor apart from any necessity or reasonable enquiry as to the purpose of the loan. It is difficult to treat the first defendant's estate, which was liable to be devested on adoption by the second defendant and which has as a matter of fact been so devested, as an absolute estate for purposes of validating loans or alienations by the holder of the estate. (See the judgment in *Lakshminarayana Naimar* v. *Valliammal* (1)). It is, however, unnecessary to express any opinion on this point. But we cannot agree with the learned Advocate-General's argument that the estate of the first defendant should be treated on the same footing as that of the holder of a life estate. If that were the true view an alienation for whatever purpose would be

(1) (1911) I. L. R., 34 Mad., 25 [illegible]

ABDUR RAHIM AND KRISHNA-SWAMI AYYAR, JJ.

MAHARAJA OF BOBBILI v. ZAMINDAR OF CHUNDI.

inoperative beyond the date on which the estate was devested. This is not in accordance with the tenor of the observations of the Privy Council in *Shri Raghunadha* v. *Sri Brozo Kishoro* (1) (See also Mayne's 'Hindu Law', section 198). The analogy of the first defendant's estate is rather to that of a limited owner like a widow than to that of a life owner. There is a vested reversion or remainder where there is a life estate. But both in the case of the widow and in the case of a person in the position of the first defendant the holder for the time being represents the estate completely. If a debt or alienation by a widow for proper purposes would bind the reversion it stands to reason that a debt contracted, or alienation made by the first defendant must be dealt with on the same footing. We, therefore, allow the appeal with costs here and in the Court below.

APPELLATE CIVIL.

Before Mr. Justice Krishnaswamy Ayyar and Mr. Justice Ayling.

1910. December, 14, 15.

1911. January, 18.

RAJAI TIRUMAL RAJU BAHADUR VARU AND OTHERS (SECOND PLAINTIFF AND HIS LEGAL REPRESENTATIVE), APPELLANTS,

v.

PANDLA MUTHIAL NAIDU AND OTHERS (DEFENDANTS 2 TO 8), RESPONDENTS.*

Mortgage, validity of, when only part of the consideration paid—Mortgagee in possession cannot prescribe for higher interest by asserting a larger amount as due—Limitation Act, Schedule II, Articles 148, 144.

Where only a part of the consideration for a mortgage has been paid, the mortgage is a good security for the amount that has validly passed. The mortgagee by remaining in possession for more than 12 years under such a mortgage, cannot by merely claiming to hold for the full amount, acquire by prescription a right to hold as mortgagee for such full amount.

Notwithstanding the assertion by the mortgagee of a larger interest than was validly passed to him by the mortgage, article 148 of the Limitation Act will apply to a suit for redemption by the mortgagor. Article 144 will not apply as article 148 specially provides for the case.

APPEAL against the decree of T. M. Rangachariar, Subordinate Judge of North Arcot, in Original Suit No. 2 of 1906.

(1) (1876) 3 I. A., 154. *Appeal No. 145 of 1906.