

## APPELLATE CIVIL.

*Before Mr. Justice King.*

MARUTHAPPAN SERVAI AND ANOTHER (DEFENDANTS  
2 AND 3), APPELLANTS,

1936.  
November 26.

v.

NIRAIKULATHAN SERVAI AND TWO OTHERS (PLAINTIFFS  
2 AND 3 AND FIRST DEFENDANT), RESPONDENTS.\*

*Hindu Law—Joint family—Debt incurred to assist prosecution for the murder of a member of the joint family—If binding on all members.*

The first defendant, a grandfather, mortgaged the joint family property belonging to himself and his grandsons, defendants 2 and 3, for the purpose of borrowing money to pay an Advocate who was engaged to assist the police in prosecuting a man accused of having murdered the first defendant's son, who was also the father of defendants 2 and 3. In a suit brought upon the mortgage the question was whether money spent in assisting the prosecution which could bring no definite benefit to the family at all but was undertaken either to satisfy feelings of revenge or feelings of prestige should be considered as legally binding upon all the members of the family.

*Held*, that the debt incurred was not binding upon the family as being either for necessity or for family benefit.

In such a case, the decree should be passed against the grandfather's share of the family property and not against the shares of the grandsons.

*Held further*, that since the debt incurred was clearly neither illegal nor immoral, the grandsons were bound by the doctrine of pious obligation to discharge it; and the mortgagee was entitled to a decree against the assets, if any, of the family in their hands.

*Anokh Singh v. Sapuran Singh*, (1923) 79 I.C. 980, considered.

*Krishna Ayyar v. Muthulakshmi Ammal*, (1933) 66 M.L.J. 342, distinguished.

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SECOND APPEAL against the decree of the Court of the Subordinate Judge of Tuticorin in Appeal Suit No. 24 of 1931 preferred against the decree of the Court of the District Munsif of Kovilpatti in Original Suit No. 340 of 1929.

*S. Narasinga Rao* for *K. Rajah Ayyar* for first appellant.

*S. Ramaswami Ayyar* for first and second respondents.

### JUDGMENT.

This is a suit brought upon a mortgage deed of 1920 by the mortgagee to enforce his mortgage. The mortgagor is the first defendant. The other defendants are his two grandsons, defendants 2 and 3. In the mortgage deed the property is described as belonging to the mortgagor himself but it has been found by the Court of first instance that the property mortgaged was really the joint family property of the mortgagor and his grandsons. The purpose for which the money was borrowed was recited to be to pay an Advocate who was engaged to assist the police in prosecuting a man accused of having murdered the first defendant's son, who was also the father of defendants 2 and 3. Both the Courts have held that this was a purpose binding upon the joint family and have given a mortgage decree over the whole of the property, that is to say, including the shares of defendants 2 and 3 as well as the share of the first defendant.

It is contended in this second appeal that this finding is wrong and that the mortgage as a mortgage can be valid only as against the share of the first defendant. The learned Advocate for the

respondent, however, argues that the question whether any particular sum of money had been borrowed for family necessity or a purpose binding upon the family is a question of fact and that, as both the lower Courts have given findings on this question, I am precluded from interfering with those findings in second appeal. I agree that in the main the question whether money had been borrowed for a family purpose is a question of fact. I agree also that there is a finding in the present case that money was necessary if a pleader were to be engaged to assist the police, that is to say, that the money was not otherwise available. But it does not seem to me that either of the Courts below has definitely given any positive finding of fact on this point. They are clearly obsessed by the difficulty of the situation. In the ordinary sense of the word it is not necessary and never can be necessary to spend money in order to assist in the prosecution of a person accused of the murder of a member of one's family. To have that person convicted and even hanged can do the family no good ; it cannot restore the murdered man to life ; it cannot be said to affect the finances of the family or even its prestige. In any case the Courts below have not seriously faced this problem. The District Munsif in giving his finding merely says : " In the absence of decided rulings either way I am inclined to hold that this is an item of expenditure which should bind the family. To hold otherwise would sometimes work grave hardship." And the learned Subordinate Judge says as follows : " In the present instance the debt in question was incurred for the purpose of finding out and bringing to book the

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real offender, that is to say, for the vindication of justice. Such an object seems to me proper and lawful and the vindication of justice is as much a necessity as the defence of an accused member of a family." It seems to me that that finding was given merely as a bare expression of opinion on the part of the learned Subordinate Judge. There is no attempt at showing by any kind of detailed discussion of the circumstances of the family how this benefit is derived or how this necessity arises. I do not, as I have said, consider that these findings thus hesitatingly expressed actually amount to findings of fact which preclude me from interfering in second appeal.

In support of the lower Court's decision I have been referred to two cases. The first is the one reported as *Anokh Singh v. Sapuran Singh*(1). There money was borrowed in order to prosecute a case under section 498, Indian Penal Code. The decision, however, that it was necessary to incur debts in order to prosecute for an offence under that section is not discussed at any length but is contained in a single sentence :

"Debts incurred for a litigation of this nature may in my opinion be reasonably regarded as necessary."

The other case is the one reported as *Krishna Ayyar v. Muthulakshmi Ammal*(2). That is clearly distinguishable from the facts of the present case, for there money had been borrowed partly in order to recover title-deeds and partly to defend a widow against an unfounded charge of having forged a bond. It has never been doubted that money spent in defending a member

(1) (1923) 79 I.C. 980.

(2) (1933) 66 M.L.J. 342.

of a family on a criminal charge is a legal necessity. The question here obviously is whether money spent in assisting a particular prosecution which can bring no definite benefit to the family at all but is undertaken either to satisfy feelings of revenge or feelings of prestige should be considered as legally binding upon all the members of the family. I do not think I can derive very much assistance from either of these two cases. It seems that the matter is one on which authority is practically wanting and one of first impression, and taking the words "necessity" and "family benefit" in their ordinary sense, it seems impossible to hold that the debts incurred in this instance can be binding upon the family. I would therefore set aside the findings of the lower Courts upon this point.

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The result, however, is not to dismiss the plaintiff's suit altogether. He can still have a mortgage decree against the first defendant's share of the family property; and as against defendants 2 and 3, since the debt incurred is clearly neither illegal nor immoral and they are bound by the doctrine of pious obligation to discharge it, he can have a decree against such of the assets of the family as have come or may come into their hands. I make no order as to costs in this appeal.

V.V.C.