

power of revision conferred on us by s. 622 of the Code of Civil Procedure, and make an order allowing the application, and directing the Judge to enter the action on his list of pending cases, and dispose of it according to law. Costs to abide the result.

MAHMOOD, J.—I concur.

Application granted.

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GOHIND
PRASAD
v.
CHANDAI
SEKHAR.

APPELLATE CIVIL.

1887
March 26.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.

JAMNA AND OTHERS (PLAINTIFFS) v. NAIN SUKH AND OTHERS (DEFENDANTS).*

Hindu Law—Joint Hindu family—Mortgage by father—Suit to enforce the mortgage against sons' shares—Legal necessity—Burden of proof.

As a general rule, a creditor endeavouring to enforce his claim under a hypothecation bond given by a Hindu father against the estate of a joint Hindu family in respect of money lent or advanced to the father having only a limited interest, should, if the question is raised, prove either that the money was obtained by the father for a legal necessity, or that he made such reasonable inquiries as would satisfy a prudent man that the loan was contracted to pay off an antecedent debt, or for the other legal necessities of the family.

There is a distinction between such cases as this and cases in which a decree has been obtained against the father and the property sold, or cases in which the sons come into Court to ask for relief against a sale effected by their father for an antecedent debt. Where a decree was obtained against the father, and a sale effected, the presumption is that the decree was properly made. Where a son comes into Court to ask for relief against a sale effected by his father for an antecedent debt, it is for the son to make out a case for the relief asked for.

In a suit against the members of a joint Hindu family upon a bond given by their father, and in which family property was hypothecated, no evidence was given on either side as to the circumstances in which the bond was given. There was no evidence to show that any inquiry had been made by the plaintiff as to the objects for which the bond was executed by the father.

Held that the burden of proof was upon the plaintiff to show either that the money was obtained for a legal necessity, or that he had made reasonable inquiries and obtained such information as would satisfy a prudent man that the loan was contracted to pay off an antecedent debt or for the other legal necessities of the family; and that, no evidence having been given, the suit must be dismissed.

The facts of this case are stated in the judgment of Edge, C. J.

* Second Appeal, No. 738 of 1886, from a decree of Manvi Saiyyid Muhammad, Subordinate Judge of Aligarh, dated the 30th March, 1886, confirming a decree of Babu Ganga Prasad, Munsif of Aligarh, dated the 30th September, 1885.

The Hon. Pandit *Ajudhia Nath* and *Manshi Ram Prasad*, for the appellants.

Pandit *Sundar Lal*, for the respondents.

EDGE, C. J.—In this case, the plaintiffs sued the sons upon an hypothecation bond which was given by their father. The family was a joint Hindu family. The plaintiffs gave no evidence as to the circumstances under which the bond was given or to show that any inquiry had been made by them. The defendants, on the other hand, have given no evidence as to the circumstances under which the bond was given. In both Courts, the Judges decreed the claim so far as the father's interest in the property was concerned, and dismissed the claim so far as the interests of the other parties (the defendants) were concerned. The single question before us is as to upon whom the onus of proof lies. Pandit *Ajudhia Nath* and Mr. *Ram Prasad* have contended that the onus of proof was on the defendants, and that their clients, the plaintiffs, were entitled to succeed, unless it was shown that the bond was given for illegal or immoral purposes. In support of this contention, they cited the following cases:—*Narayanacharya v. Narsa Krishna* (1), *Luchmun Dass v. Giridhar Chowdhry* (2), *Gunga Prasad v. Ajudhia Pershad Singh* (3), *Girdharee Lall v. Kantoo Lall* (4), *Sita Ram v. Zalin Singh* (5), *Nanomi Babuasin v. Modun Mohun* (6), *Rampardip Rai v. Salig Rai* (7), *Ponnappa Pillai v. Pappuwayyengar* (8), *Gangulu v. Ancha Bapulu* (9), *Hannuman Singh v. Nanak Chand* (10). With regard to the cases cited, with the exception of two, to which I will refer, they do not appear to bear out the proposition contended for on behalf of the plaintiffs. They are cases in which a decree had been obtained against the father, and the property sold, or cases in which the sons had come into Court to ask for relief against the act of their father. These are cases that seem to me to afford no safe guide, because, where a decree was obtained against the father, and a sale effected, the presumption is that the decree was properly made. Where a son comes into Court to ask relief against a sale effected by his father for an antecedent debt, it would be for the son

(1) I. L. R., 1 Bom. 262.

(2) I. L. R., 5 Calc. 355.

(3) I. L. R., 3 Calc. 131.

(4) I. L. R., 1 I. A., 321.

(5) I. L. R., 3 A.H. 231.

(6) I. L. R. 13 I. A. 1;

(7) I. L. R., 13 Calc. 21.

(7) Weekly Notes, 1883, p. 107.

(8) I. L. R., 4 Mad., 1; and see I. L. R., 9 Mad. 313.

(9) I. L. R., 4 Mad., 73.

(10) I. L. R., 6 All. 192.

to make out a case for the relief asked for. I approve of everything which was said by my brother Straight in his judgment in *Hanuman Singh v. Nanak Chand* (1). As to the case of *Sita Ram v. Zalim* (2), it would appear, until examined, to be in point. The difficulty with regard to dealing with that case as an authority is that it was a first appeal to this Court, and it does not appear what the findings of fact of this Court in that case were. It is true that the findings of fact of the Judge of the Court below were referred to in the judgment of this Court. We must assume that this Court, as a Court of first appeal, found facts to which the proposition of law contained in the judgment at p. 234, was applicable. Then I come to the case of *Luchmun Dass v. Giridhur Chowdhry* (3). That is a most important case. It was on the authority of that case that the eminent Judge, Mr. Justice Mitter, decided as he did in the case of *Gunga Prosad v. Ajudhia Pershad Singh* (4). Now as to the case of *Luchmun Dass v. Giridhur Chowdhry* (3), it is difficult to ascertain what the facts were, or what was the precise form of litigation. This alone is certain, that there were certain questions which appear at p. 857 of the report, which were referred to a Full Bench. The answers to these questions are found at p. 863, and taking the first question and answer as an example and as those relied upon by Pandit *Ajudhia Nath* here, it is to be observed that the Judges, in giving their answer, have assumed a most important fact which is not suggested in the question. The same observation applies to others of the questions. They have assumed that the debt contracted by the father was an antecedent debt within the rulings of the Privy Council. It is unfortunate that the full facts of that case do not appear in the report. Now with regard to the case of *Gunga Prosad v. Ajudhia Pershad Singh*, (4) the judgment of Mr. Justice Mitter and Mr. Justice Maclean is based upon the Full Bench decision in *Luchmun Dass v. Giridhur Chowdhry* (3), above referred to. That fact, to my mind, naturally lessens the authority of that case, so far as it may apply to a case like the present. Now on the other side, Pandit *Sundar Lal* for the respondent relied on three cases. The first was a judgment of the Full Bench of the Calcutta Court delivered by Sir Barnes Peacock,

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 JAMNA
 v.
 NAIN SIKH.

(1) I. L. R., 6 All. 493.

(2) I. L. R., 8 All. 231.

(3) I. L. R., 5 Calc. 855.

(4) I. L. R., 8 Calc. 131.

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JAMNA
v.
NAIN SUREH.

C. J.,—*Madhoo Dyal Singh v. Golbur Singh* (1) in which the Full Bench dealt with the onus of proof as to the application of the purchase-money. The son in that case contended that the money borrowed by the father was not for legal necessity. The Full Bench laid down a stronger rule of law than has since been acted upon. The case is, however, important as affording an indication on which side the onus of proof would lie in a case like this. The next case is *Bheknarain Singh v. Januk Singh* (2). In that case the Court, which was composed of Mr. Justice Jackson and Mr. Justice White, applied to a case similar to the present, the principle of law to be found in the judgment of Lord Justice Knight Bruce in the case of *Hunoomanpersaud v. Myssummat Babooe* (3). In my opinion the rule of law applied in the case of *Bheknarain Singh v. Januk Singh* (2) applies also in this case. I think the same rule of law may be deduced from the judgment of this Court in *Lal Singh v. Deonarain Singh* (4). It appears to me that the authorities cited by Pandit *Sundar Lal* govern this case. It is good sense and a general rule that a creditor endeavouring to enforce his claim under a bond given by a Hindu father against the estate of a Hindu family in respect of money lent or advanced to the father having only a limited interest should, if the question is raised, prove either that the money was obtained by the father for a legal necessity, or that he made such reasonable enquiries and obtained such information as would satisfy a prudent man that the loan was contracted to pay off an antecedent debt, or for the other legal necessities of the family. He is the person who would know, or ought to have known, the circumstances under which he parted with his money on the security of the property of the Hindu family, and, in such a case as the present, it is only reasonable that the onus of proof should fall on him. Since no evidence on this point has been given, I am of opinion that the appeal should be dismissed with costs.

MAHMOOD, J.—I concur.

Appeal dismissed.

(1) 9 W. R., 512.
(2) I. L. R., 2 Calc. 438.

(3) 6 Moo. I. A., 393.
(4) I. L. R., 8 All. 279.