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appeal. The final order remains yet to be made by the District Judge.

The preliminary objection prevails, and I hold that this appeal has been prematurely preferred and does not lie. I dismiss it with costs.

Against this judgment the present appeal under s. 10 of the Letters Patent was preferred by the petitioners.

Mr. *Amir-ud-din*, for the appellants.

Munshi *Ram Prasad*, for the respondents.

EDGE, C. J., AND STRAIGHT, J.—We entirely concur with the order passed by our brother Mahmood, and with his reasons for it. The appellants applied for a certificate under Act VII of 1889. The Judge, acting under s. 9 of that Act, required security as a condition precedent to his granting the certificate. He was proposing to proceed under s. 7, cl. (3). S. 19, provides for appeals. There was no order granting or refusing a certificate. Our brother Mahmood was right in holding that no appeal lay. We dismiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

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BHAWANI BAKHSH AND ANOTHER (PLAINTIFFS) *v.* RAM DAI AND OTHERS (DEFENDANTS.)*

Hindu law—Joint Hindu family—Mortgage executed by father on the whole joint family property in respect of his own debts—Liability of sons—Burden of proof.

The father of a joint and undivided Hindu family executed a mortgage over the whole immovable property of the joint family. The mortgagees having obtained a decree on their mortgage and having put an attachment on the joint family property, the minor sons of the mortgagor sued for a declaration that their interest in the attached property was not liable under the mortgagees' decree, inasmuch as the debts in respect of which the mortgage had been executed had been contracted for immoral purposes and were not such as they, by the Hindu law, were under a pious obligation to discharge. *Held* that the burden of proving that the debts in question were contracted for the purposes alleged lay on the plaintiffs.

* First Appeal, No. 144 of 1888, from a decree of Babu Nilmadhub Roy, Subordinate Judge of Gorakhpur, dated the 21st June 1888.

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Beni Madho v. *Basdeo Patak* (1) followed; *Lal Singh* v. *Deo Narain Singh* (2); *Basa Mal* v. *Maharaj Singh* (3); *Subramanya* v. *Sadasiva* (4); *Hanooman Persaud Panday* v. *Munraj Koonweree*; (5) and *Bhaghut Pershad Singh* v. *Girja Koer* (6) referred to.

The facts of this case are fully stated in the judgment of Straight, J.

Mr. *C. Dillon*, Munshi *Jwala Prasad* and Babu *Jogindro Nath Chaudhri*, for the appellants.

Mr. *T. Conlan* and Hon. *G. T. Spankie*, for the respondents.

STRAIGHT, J.—This appeal relates to a suit that belongs to a well-known class of cases in which the minor sons of a Hindu father, along with whom they were members of a joint and undivided Hindu family, seek to exempt their interests in the joint estate from the operation of a mortgage executed by the father of the entire family share in immovable property and a decree obtained thereon by the mortgagee, followed by attachment of the whole joint family interest. The two minors in the present suit, with their mother as their guardian "*ad litem*," who also sues on her own account, are the plaintiffs, and the first defendant, when the suit was instituted, was their father, Sada Nand, who has died *pendente lite*, while the sons of Lala Ram Charan Lal, the mortgagee and creditor of Sada Nand, were the two other defendants. It is not necessary to detail at length the terms of the plaint. It is enough to say that the plaintiffs allege that the mortgage transaction, out of which the decree passed against their father upon the mortgage arose, represented a debt incurred by their father, which, under the Hindu law, it was not their pious duty or obligation to discharge. This particular mortgage transaction was dated the 5th August 1882, and the total consideration for it was the sum of Rs. 2,959-10-0. The decree was obtained by the mortgagee for the sale of the mortgaged property upon the 31st July 1886. An attachment of the whole zamíndári interest was then put on, to which attachment the plaintiffs offered objections. Their objections were disallowed on the

(1) I. L. R. 12 All. 99.
(2) I. L. R. 8 All. 279.
(3) I. L. R. 8 All. 205.
(4) I. L. R. 8 Mad. 75.
(5) 6 Moo. I. A. 393.
(6) I. L. R. 15 Calc. 717.

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9th April 1887; hence the present suit to have it declared that the rights of the several plaintiffs should be exempted from the attachment and threatened sale; in other words, the plaintiffs say that the defendants are not entitled to sell more than the individual interest of their father. It is admitted on all hands that the mortgage of the 5th August 1882 was a mortgage of the whole of the family interest in two mauzas. It is also admitted that the decree was passed against the father upon the mortgage for the sale of the whole property without limitation or exception of any kind, and it is further admitted that the attachment, which still holds upon the property, is an attachment that *primâ facie* affects the entire interest. The defence of the creditors to the suit was generally to the effect that the father of the minor plaintiffs was not the immoral person he was represented to be; that the money was advanced to meet the valid necessities of the family; and that the father in his character of father of minor sons of a joint Hindu family was the managing member, and, as such, entitled to sell or mortgage for the necessary purposes of the family the joint family property. The learned Subordinate Judge, a Hindu Judicial Officer of long experience, who tried the case, though he does not in terms say that he did so, cast the "*onus*" of proving the allegations contained in the plaint upon the plaintiffs, and, in my opinion, rightly. Upon the evidence which they produced, consisting of the oral testimony of several witnesses and documentary evidence in the shape of prior bonds of Sada Nand's, he came to the conclusion that the money had been borrowed by the father for immoral expenses, and that the defendants were affected with notice of the purpose for which the money was required, and that they knew at the time they made the advances the purposes to which they were to be devoted. He therefore gave the two minor plaintiffs a decree, by which their interests in the property mortgaged by their father were exempted from the operation of the mortgage decree and attachment, but as regards the claim of the plaintiff mother, he held that she, not being an heiress under the Hindu law, could not claim any share, though, had a partition taken place, she would then have been entitled to

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a share. With regard to her, therefore, the suit was dismissed. The appeal to this Court by the defendants has been fought upon two grounds only. The first of them is that the "*onus*" of proof was wrongly thrown upon them. The second is that the proof presented by the plaintiffs and the findings of the learned Subordinate Judge thereon are not sufficient to sustain the decree, and in this connection it was incidentally urged that the defendants had proved that the loan made to the father was for legal purposes. There is no appeal on behalf of Musammat Ram Dai for herself to the effect that the learned Subordinate Judge's dismissal of her claim was erroneous. As to the first point raised, namely, as to with whom rested the *onus*, I do not observe, as I have remarked already, anything in the learned Subordinate Judge's judgment to indicate specific expression of his view as to with whom it lay; but I have no doubt, and in expressing this opinion I am only following the authority of *Beni Madho* v. *Basdeo Patak* (1), that the burden of proof rested upon the plaintiffs, who could only escape from their obligation under the Hindu law to pay the debt incurred by their father by showing that the debt was one incurred for immoral purposes. Reference has been made on the other side in the course of the hearing of the appeal to numerous authorities of their Lordships of the Privy Council and to a ruling of this Bench in *Lal Singh* v. *Deo Narain Singh* (2), which is in consonance with the ruling of the Madras High Court in *Subramanya* v. *Sadasiva* (3). Whatever may have been the view expressed in these two last mentioned rulings upon the authorities as they stood at the time they were given, it seems to me that, for the reasons which were stated by me, with the approval of Sir Comer Petheram, in the case of *Basa Mal* v. *Maharaj Singh* (4), and in the case of *Beni Madho* v. *Basdeo Patak* (1) already referred to, it does not now represent the correct rule of law as declared by the later decisions of their Lordships of the Privy Council which are set out in detail in those two last mentioned rulings. With regard to the case of *Lal Singh* v. *Deo Narain Singh* (2), it was a judgment

(1) I. L. R. 12 All. 99.
(2) I. L. R. 8 All. 279.
(3) I. L. R. 8 Mad. 75.
(4) I. L. R. 8 All. 205.

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of my own in which my brother Tyrrell concurred, and it is to be noted that it proceeded largely, if not entirely, upon the principles laid down in the well-known case of *Hunooman Persaud Panday* (1). But it seems to me that in the case of *Lal Singh* v. *Deo Narain Singh* (2) I omitted to bear in mind the distinction that the case of *Hunooman Persaud Panday* was the case of a guardian and manager of an infant in the person of a mother with whom certain transactions were had, and that it was not the case of a Hindu father living jointly with his minor sons whose position is a very different one. As regards the powers of an ordinary guardian these are limited, while the powers of a father as manager for his minor sons can only be questioned by those sons when he has effected a charge on the whole property, upon the ground that the charge so created was for immoral purposes, that is to say, for purposes which it was not their pious obligation to discharge. At least this is what I take to be the outcome of all the authorities upon the subject, and that, while it may well be that in a family of joint brothers, or in the case of a guardian of the kind I have mentioned, the rule of *Hunooman Persaud Panday's* case may be properly applied; in the case of a father, who is admittedly the managing member of his joint family, it being the pious obligation of his sons to pay his debts, except under certain circumstances, the presumption is that his debts have been legally incurred until the sons have shown to the contrary. Upon further consideration, therefore, I have come to the conclusion that the case of *Lal Singh* v. *Deo Narain Singh* (2), so far as it laid down that the "*onus*" rested upon the creditor in reference to a transaction with the father in his capacity of a managing member of a joint family, was wrong, and I am borne out in this by the case of *Bhagbut Pershad Singh* v. *Girja Koer* (3). In the last passage of the judgment in the case of *Beni Madho* v. *Basdeo Patak* (4), I stated what seemed to me to be the outcome of the later rulings that succeeded the ruling in *Basa Mal* v. *Maharaj Singh* (5), and for the purpose of guarding against any misunderstanding I may here repeat that in

(1) 6 Moo. I. A. 393.
(2) I. L. R., 8 All. 279.
(3) I. L. R. 15 Calc. 717.
(4) I. L. R., 12 All. 99.
(5) I. L. R., 8 Mad. 75.

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my opinion in all cases like the present, where a son or sons is or are coming into Court to assail a mortgage of the whole joint estate made by the father, upon which a decree has been passed against him and sale has been ordered of the whole estate and an attachment has been made of the whole estate, the son or sons can only escape from the effect of the decree and attachment by showing that the debt in respect of which the transaction of mortgage originated was a debt which they, as the sons of a Hindu and members of a joint Hindu family, were not under a pious obligation to discharge. Whether or not it was necessary for the decree-holder with a decree for sale to resort to an attachment I do not stop to enquire. In the present case he has done so, and in that way an opportunity presented itself to the minor plaintiffs to make the objection which brought about the present suit. In saying this it must not be understood to mean that, if the mortgagee had sold the property without first putting an attachment on it and had purchased it himself or had sold it to others, the sons could not have brought a suit on the same grounds upon which they now come forward. Mr. *Spankie* for the plaintiffs admits that the *onus* may ordinarily rest upon them to establish the immorality of the debt, and the only distinction that he seeks to have drawn is that if the decree-holder himself was the purchaser, then the *onus* would rest upon him; but I fail, for the purpose of dealing with the question with whom the proof lies in cases of this kind, to see why any distinction should be drawn between a stranger purchaser at an execution sale and the decree-holder who himself becomes the purchaser. If my view in this respect is right, then arises the question—have the plaintiffs satisfactorily established the case upon which alone they can succeed? I have remarked above that the learned Subordinate Judge who tried the case was a Hindu gentleman of long judicial experience, and I think that this is not a wholly unimportant circumstance in judging as to the value of his opinion on the merits of a case like the present. He has found in terms that the father of the minor plaintiffs was a dissolute, disreputable person, given to gambling, to keeping prostitutes, to drinking strong liquor and to smoking opium; in other words, he has come to the conclu-

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sion that the life of the father was an evil one. To use the learned Subordinate Judge's own words :—

"Sada Nand was a known gambler and spendthrift. He used to smoke *chandu* and keep prostitutes. He was a confirmed drunkard. He had been borrowing these moneys for these immoral expenses. Defendants live near plaintiff's house. They were fully aware of his bad habits, and yet these greedy and grasping *banias* advanced large sums of money for their own selfish ends and for the ultimate ruin of this wretched family. The character of Sada Nand has been proved by the evidence of the *kotwal* and other respectable witnesses. It is a notorious fact in this city (as proved by the evidence in the record) that Sada Nand was a man of bad character, and that he was borrowing large sums of money to meet his selfish and immoral demands. These creditors, who are almost his next door neighbours, advanced large sums of money fully knowing how those sums were spent. No legal necessity has been proved. I fail to understand how plaintiffs were benefited by this loan. No house was built at Soomli. No money was paid in any *taksim* case, and the private expenses were nothing but money spent in *ganja*, opium, wine, gambling and bazár women. A Court of justice can never tolerate the advancement of money for such immoral purposes, and the ancestral property to the extent of the shares of the minors cannot be held responsible for the discharge of such illegal debts."

The evidence also shows that the estate when it came to Sada Nand produced an income of about Rs. 70 a month, which, it is clear, could have in no way sufficed to meet his expenses. It is not unimportant to examine the precise character of the several transactions which took place between the plaintiff's father and the defendants. The first of them was on the 4th April 1880, and it was for the sum of Rs. 699, and a portion of it represented, we do not know how much of it, an antecedent debt due to some bankers of the name of Anant Lal and others, but the residue is spoken of as "for my own private expenses" and the rate of interest was Re. 1-8-0 per cent. *per mensem*. Within a little more than four months from this date a second transaction is entered into in which the first bond

and interest due thereupon is consolidated, and a further cash advance for "personal expenses" is taken amounting to Rs. 1,099. Then in April of the following year a sum of Rs. 700 is taken "for my own private expenses," and again on the 11th August 1881, a sum of Rs. 499 is taken "for my own private expenses," and then at last on the 5th August 1882, all these antecedent loans are lumped together, amounting in all to Rs. 2,959-10-0. They are recited in the mortgage-deed, as also a sum of Rs. 950, "to pay the money of a banker and for meeting the partition and private expenses."

The learned Subordinate Judge, having all the facts before him and the evidence of the witnesses on behalf of the plaintiffs, came to the conclusion that the moneys and former advances covered by the bond of the 5th August 1882, were borrowed for and devoted to immoral purposes. Then comes the question, had the defendants notice that they were borrowed for those immoral purposes. The learned Subordinate Judge has found that they had, and I agree with him that the creditor, not only in this case, but in ninety-nine cases out of a hundred, knows to a nicety the status and character of the father and of the family, the number of his children, his mode and way of life and the purposes for which he wants the money. The money-lenders in the towns and villages of these provinces never lend their money without the most thorough and searching inquiry into the character and antecedents of the borrower, and, if a person was leading such a life as it is found that the father was leading in this particular case, the presumption is overwhelming that the money-lender, who lived within two doors of him, knew well what his character was, why it was he wanted money, and what purposes he required it for. I cannot say that, upon such facts as those found by the learned Subordinate Judge in this particular case, the proof required from the son in a suit of this nature, namely, that the debts were incurred for immoral purposes and that these purposes were well known to the party who lent the money, was not supplied. At any rate, the learned counsel on behalf of the creditor has not satisfied me that the learned Subordinate Judge had no materials before him to warrant

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his conclusions, and this being so, the appeal is dismissed with costs.

I have to add that our decree will not be issued to or on behalf of the plaintiffs-respondents until they have made good the deficiency of Rs. 415 which they should have paid as Court-fee for the suit in the Court of first instance, as reported to us by our Registrar on the 13th August 1888.

TYRRELL, J.—I concur.

Appeal dismissed.

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June 21.

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

BAIJ NATH (DEFENDANT) *v.* SITAL SINGH (PLAINTIFF.)*

Act XIX of 1873 (*North-Western Provinces Land Revenue Act*) *ss.* 166, 168 *and* 188—*Act XII of* 1881 (*North-Western Provinces Rent Act*), *s.* 177—*Interpretation of Statutes—Meaning of the terms "Patti" and "Patti of a mahál"—Pre-emption.*

The expression "patti of a mahál" as used in s. 188 of the North-Western Provinces Land Revenue Act (Act XIX of 1873) means a division of a mahál distinct from the share of an individual co-sharer.

The right of pre-emption, therefore, which is given by the above-named section is not exerciseable on the sale merely of the share of an individual co-sharer not amounting to such a division of a mahál.

Moreover the provisions of s. 188 of Act XIX of 1873 do not apply to a sale under s. 168 of the same Act of land other than that in respect of which the arrears which it is sold to satisfy accrued.

Hence where the share of a co-sharer in an imperfect pattidari village, not being the land in respect of which the arrears of rent, for the satisfaction of which the said share is sold, are due, is sold under the provisions of s. 177 of the North-Western Provinces Rent Act (Act XII of 1881), no right of pre-emption can be claimed in respect of such sale.

So held by EDGE, C. J. and YOUNG, J.

MAHMOOD, J. *contra.* There being no statutory definition of the word "patti" that word must be taken in its ordinary acceptation, and in that acceptation it means the share of a pattidar, whether such share amounts to a definite division of a mahál

* Second appeal No. 967 of 1888 from a decree of Rai Isri Prasad, Subordinate Judge of Farakhabad, dated the 31st March 1888, reversing a decree of Maulvi Muhammad Mazhar Husain, Munsif of Kanauj, dated the 22nd December 1887.