

APPELLATE CIVIL.

1902
May 9.*Before Mr. Justice Banerji and Mr. Justice Aikman.*

DEBI DAT (PLAINTIFF) v. JADU RAI AND OTHERS (DEFENDANTS).*

Hindu law—Joint Hindu family—Mortgage—Liability of non-executant members on a mortgage executed by some only of the members of a joint Hindu family—Burden of proof.

In a suit for sale on a mortgage of the joint family property executed by the father and three of his sons, the plaintiff made defendants, besides the executants, the fourth son, who was a minor, and four grandsons, also minors. *Held* that the non-executant members of the family were properly arrayed as defendants to the suit, inasmuch as their own interests in the joint family property would be liable under the mortgage, unless they could show either that the mortgage debt was never incurred, or that it no longer subsisted, or that it was tainted with immorality. *Jamna v. Nain Sukh* (1) held to be no longer law. *Badri Prasad v. Madan Lal* (2), and *Nanomi Babuasin v. Modhun Mokun* (3), referred to.

THIS was an appeal arising out of a suit for sale brought by one Debi Dat upon a mortgage of joint family property executed by Jadu Rai, the father, and three of his sons, Gajadhar Lal, Birj Lal and Bhajan Lal. The bond was dated the 5th of November, 1895. In his suit the plaintiff arrayed as defendants not only the executants of the bond, but also Mul Chand a minor son of Jadu Rai, Raghu, Bhaggu and Narain minor sons of Gajadhar Lal, and Debi the minor son of Birj Lal. The Court of first instance (Subordinate Judge of Bareilly) decreed the suit as against the executants, but exempted Mul Chand and the other minors. The decree was against the interests of the executants only. The plaintiff appealed, urging that the Court of first instance was wrong in exempting the minors, and that it was not for the plaintiff to prove that the mortgage debt was incurred for family necessity; but, on the contrary, for the minor defendants to show that for one reason or another they were not liable for the debt incurred by their father and the other executants of the bond. The lower appellate Court (District Judge of Bareilly) overruled this plea and dismissed the appeal. The plaintiff thereupon appealed to the High Court, again raising the

* Second Appeal No. 950 of 1899, from a decree of C. L. M. Eales, Esq., District Judge of Bareilly, dated the 27th September 1899, confirming a decree of Babu Madho Das, Subordinate Judge of Bareilly, dated the 27th April 1899.

(1) (1887) I. L. R., 9 All., 493.

(2) (1893) I. L. R., 15 All., 75.

(3) (1885) I. L. R., 13 Calc., 21.

1902
 DEBI DAT
 v.
 JADU RAI.

question of the liability of the remaining members of the joint family other than the executants of the mortgage deed.

Pandit *Jwala Dat Joshi* and Pandit *Baldeo Ram Dave*, for the appellant.

Babu *Durga Charan Banerji*, for the respondents.

BANERJI and AIKMAN, JJ.—This was a suit for sale upon a mortgage dated the 5th of November, 1895, executed by the first four defendants, namely, *Jadu Rai* and his three sons. The other defendants are a son of *Jadu Rai* and the sons of *Gajadhar* and *Birj Lal*, defendants. These persons were joined as defendants, as they were members of a joint Hindu family with their father and grandfather, and it was sought to make the mortgaged property, which was the joint family property of all these persons, liable under the mortgage. The Courts below, relying on the ruling of this Court in *Jamna v. Nain Sukh* (1) have exempted from liability the shares of the defendant *Mul Chand* and the grandsons. The plaintiff has preferred this appeal. It is true that the ruling referred to above has not in express terms been overruled; but having regard to the later Full Bench ruling in *Badri Prasad v. Madan Lal* (2), and to the ruling of the Privy Council in *Nanomi Babuasin v. Modhun Mohun* (3), it can no longer be considered as law. The sons and grandsons of a mortgagor can only dispute the validity of the mortgage either on the ground that the debt was never incurred or is no longer in existence, or that it was tainted with immorality. None of these pleas were set up in this case. The plaintiff was therefore entitled to the decree which he had asked for. We allow the appeal and vary the decree of the Court below by decreeing the plaintiff's claim against the whole of the property comprised in the mortgage, and we fix the 9th of November, 1902, as the date by which the mortgage money must be paid. The appellant will have his costs in this Court and in the Courts below. We direct that our decree be drawn up in accordance with the terms of section 88 of the Transfer of Property Act.

Appeal decreed and decree modified.

(1) (1887) I. L. R., 9 All., 493. (2) (1893) I. L. R., 15 All., 75.
 (3) (1886) I. L. R., 13 Calc., 21.