"is a view to be commended, inasmuch as it is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible." For these reasons we are of opinion that the suit cannot be maintained, and that the decree of the Subordinate Judge dismissing the suit must be upheld. We, accordingly, dismiss the appeal with costs.

Appeal dismissed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

KANHAIA LAL AND ANOTHER (DEFENDANTS) *v.* RAJ BAHADUR (PLAINTIFF).*

Hindu law—Mitakshara—Joint Hindu family—Mortgage by father—Suit for sale on mortgage, son not being made a party—Subsequent suit by son for declaration that his share is not liable under the mortgage decree against father—Further plea that mortgage-debt was contracted for immoral purpose—Act No. IV of 1882 (Transfer of Property Act), section 85.

The mortgagees to a mortgage of joint family property made by the father in a joint Hindu family, consisting of father and son, brought a suit for sale against the father without making the son a party, and obtained a decree for sale of the entire property mortgaged. The son sued the mortgagees for a declaration that his share was not bound by the decree, firstly, because he was not made a party to the mortgagee's suit for sale, and secondly, because the mortgage-debt was contracted by his father for immoral or impious purposes. It was found in that suit that the mortgagees had at least constructive notice of the son's existence, and ought to have made him a party to their suit for sale. But it was also found in the son's suit that the original mortgage debt of the father was not contracted for immoral or impious purposes.

Held, that although the son might have been entitled to the decree sought by him, had he contented himself with raising the first plea only; yet, inasmuch as he himself had raised the issue of the immorality of the debt, which had been found against him, and as that was the only issue which could in any subsequent suit be raised as between himself and the mortgagees, he was not in this suit entitled to any decree save a decree for redemption if he should desire to redeem. *Lala Suraj Prosad* v. *Golab Chand* (1) followed.

Held also, that the mere fact that the son had asserted his right to a moiety of the mortgaged property, and had brought the suit above referred to, did not work a partition of the property or create any separate title in the son. *Padarath Singh* v. *Raja Ram* (2) referred to.

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* First Appeal No. 262 of 1898 from a decree of Babu Bipin Behari Mukerji, Additional Subordinate Judge of Cawnpore, dated the 21st September, 1898.

(1) (1901) I. L. R., 28 Calc., 517: at p. 531. (2) (1882) I. L. R., 4 All., 235.

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THE facts of this case are fully stated in the judgment of the Court.

Pandit *Sundar Lal* (for whom Babu *Durga Charan Banerji*), for the appellants.

Babu *Jiwan Chandra Mukerji* (for whom Babu *Devendra Nath Ohdedar*), for the respondent.

STANLEY, C. J., and BURKITT, J.—This is an appeal from a decree of the Subordinate Judge of Cawnpore declaring that the plaintiff Raj Bahadur was the owner of a moiety of a zamindari share of 8 annas in village Daheli Sujanpur, and that his share of 4 annas was not liable to sale under a decree in suit No. 98 of 1896, dated the 8th of July 1893. After the filing of the appeal, Raj Bahadur died, and his widow, Musammat Rup Rani, has been brought upon the record as respondent in his place. The facts are shortly as follows:—The defendant Kashi Prasad, father of the plaintiff, acquired the share of the property in dispute as ancestral property. He, on the 3rd of January, 1887, mortgaged the property in favour of one Tapeshri Prasad, to secure a sum of Rs. 1,400, and subsequently on the 9th of February, 1892, he mortgaged it in favour of Jagdish Prasad and Baij Nath to secure a sum of Rs. 845. The defendants, Kanhaia Lal and Bishambhar Nath, are the heirs of Jagdish Prasad and Baij Nath, both of whom are dead. On the 24th of January, 1893, Tapeshri Prasad, the first mortgagee, brought a suit upon his mortgage without impleading the plaintiff, who upon his birth had become entitled to a moiety of the mortgaged property, and he obtained a decree on the 30th of March, 1893. Jagdish Prasad and Baij Nath instituted a suit on the basis of their mortgage of the 9th of February, 1892, against Kashi Prasad, and also against the first mortgagee, Tapeshri Prasad, and likewise did not implead the plaintiff. They obtained a decree on the 8th of July, 1893, and paid off the debt of the first mortgagee, Tapeshri Prasad. Jagdish Prasad and Baij Nath having died, their heirs, Kanhaia Lal and Bishambhar Nath, the appellants, took out execution of the decree of the 8th of July, 1893, and caused the entire 8 annas share in the village to be advertised for sale on the 20th of May, 1898. The plaintiff thereupon brought the present suit, alleging that Jagdish Prasad and Baij Nath had knowledge of his interest

in the property, and yet did not make him a party to the suit which they had instituted, contrary to the provisions of section 85 of the Transfer of Property Act, and claiming a declaration that his share in the property was not liable to be sold in execution of the decree of the 8th of July, 1893. He also alleged that the amount of the decree was spent on immoral purposes, an allegation which was interpreted by the parties and treated by them and the Court as raising the issue, whether or not, the mortgages of the 3rd of January, 1887, and the 9th of February, 1892, were tainted with immorality, and therefore were not binding on the plaintiff. This issue was determined in favour of the defendants, the plaintiff having failed to give any proof in support of his allegation. The Court below, however, held that there was gross negligence on the part of the mortgagees in not making proper inquiry as to whether or not the mortgagor, Kashi Prasad, had a son, and therefore must be held to have had notice of the plaintiff's interest in the property within the meaning of section 85 of the Transfer of Property Act. We think that the evidence fully justified the finding by the learned Subordinate Judge that the mortgagees had, or must be deemed to have had, notice of the plaintiff's interest at the time they brought their suit, and we do not propose to interfere with this finding.

This being so, if the plaintiff had confined himself to this issue, the decree in his favour would have been unassailable, inasmuch as he was not impleaded in either of the mortgage suits. He did not, however, do so, but went further and set up the case that the mortgages were tainted with immorality, and that therefore he in no case was liable in respect of the debts secured by them. This issue having been decided against him, the appellants contend that he must abide by the decision of the Court upon this issue and cannot re-open the question, and that as the moneys secured by the mortgages are found to have been borrowed by his father for legitimate purposes, he as a pious son is liable to satisfy his father's debts, and so is not aggrieved by the sale of his share of the property, and is not entitled to the relief which he sought in this suit.

The contention, which has been put forward on his behalf, is that the question as to the alleged taint of immorality in the

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mortgage transactions was not relevant to the determination of the issue arising under section 85 of the Transfer of Property Act, and that having succeeded on the latter issue, he was entitled to obtain from the Court the declaration which was claimed in the plaint. If the plaintiff himself had not raised the question of immorality the case would have been determined solely upon the other issue: but he chose to raise this question, and it was one of the issues which were settled and decided by the Court. Now that it has been determined against him, it is too late for him or his representatives to resile from the position which he took up. He and the substituted plaintiff must abide by the consequences of his action.

It has been found, then, by the lower Court that the mortgage debts were not contracted for an immoral purpose. This being so, they were debts of Kashi Prasad, which his son, the plaintiff, was, by Hindu law, under a pious obligation to pay; they were debts which the ancestral property was ultimately liable to discharge, and being such, it would seem to follow that any alienation by Kashi Prasad made for the purpose of discharging them, upon, at all events, reasonable terms, would be substantially an unimpeachable transaction. Was the plaintiff then, who was under an obligation to pay the debt which is due to the appellants, and in respect of which they have obtained a decree for sale of the mortgaged property, entitled, despite the fact that the debt (to recover which the suit was instituted) has been found not to have been contracted for immoral purposes, to a declaratory decree that a moiety of the mortgaged property belonged to him, and that his share was not liable to be sold in execution under the appellants' decree? We think not, unless he was prepared to redeem the mortgaged property. He who seeks equity must do equity. Before the plaintiff could obtain a declaration from the Court that his share of the mortgaged property is not liable to be sold in execution of a decree for a debt for which he was responsible, and which the mortgaged property was liable to discharge, he must be prepared to act equitably and discharge the debt. This question was recently considered in the case of *Lala Suraj Prosad* v. *Golab Chand* (1).

(1) (1901) I. L. R., 28 Calc., 517, at p. 531.

In that case, a father, as *karta* of a joint Mitakshara family, consisting of the father and a son, by a mortgage bond hypothecated the joint property. The mortgagee sued the father alone on the bond without making the son a party, although he had notice at the time of the son's interest in the mortgaged property, and he obtained a mortgage decree. The son objected to the execution of the decree on the grounds as here:—(1) That the mortgage debt had been contracted for immoral purposes, and (2) that he not having been made a party to the mortgage suit, the decree in that suit was not binding upon him. It was found at the hearing that the mortgage debt had not been contracted for immoral purposes. On appeal under section 15 of the Letters Patent, against the decision of Ghose, J., differing from that of Harington, J., on the question as to whether the minor plaintiff, not having been made a party to the mortgage suit, was bound by the decree in that suit, having regard to the provisions of section 85 of the Transfer of Property Act, it was held by Sir F. Maclean, C. J., Sale and Brett, JJ., dissenting from the judgment of Ghose, J., that the provisions of section 85 of the Transfer of Property Act being compulsory, the minor son ought to have been made a party to the mortgage suit. This is the view which had been previously taken by this Court—see *Bhawani Prasad* v. *Kallu* (1). It was further held that the issue, whether the debt was incurred for illegal or immoral purposes, having been decided on its merits between the plaintiff and the defendant in the present suit adversely to the minor plaintiff, it must now be taken as between him (the plaintiff) and the mortgagee to have been finally determined; and under the circumstances, the validity of the mortgage ought not to be allowed to be contested in another suit, the plaintiff being in the same position in which he would have been had he been made a party to the mortgage suit, and that the only right which the minor plaintiff had was the right of redemption.

In the course of his judgment Sir F. Maclean observes:—"The only other question is, what are the present rights and remedies of the minor plaintiff? It is urged for the appellan that, inasmuch as the decree in the mortgage suit, by reason of

(1) (1895) I. L. R., 17 All., 537.

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his not having been a party to that suit, is not binding upon him, he is entitled to a declaration to that effect; and we have been told with an almost cynical frankness, that the advisers of the minor propose to leave the mortgagee to bring another suit to enforce his mortgage, and in that suit the minor will again set up that the debt was incurred for illegal and immoral purposes. It has not been suggested that there is any other possible defence open to the minor, except the defence that the money was borrowed for illegal or impious purposes. But that very issue has been raised and tried in the present suit, and has been decided adversely to the minor plaintiff, and must now be taken as between him and the mortgagee to have been finally and conclusively determined.

"If the minor had been a party to the original mortgage suit, and it had been found in that suit that the mortgage-debt was not contracted for immoral or illegal purposes, as has now been found, and there were no other defence to the mortgagee's claim, what would have been the rights of the minor in that suit? Taking the mortgage to be valid, as it has been found in this suit to be, his only right, so far as I can see, would have been a right to redeem."

So likewise in this case it has been established on an issue raised by the plaintiff, Raj Bahadur, himself that the mortgage debts were not contracted for immoral purposes. This being so the plaintiff would have had no answer to the mortgagee's claims if he had been impleaded in the mortgage suits, as he was liable to pay the mortgage-debts, and it would not have been equitable or right for the Court to give any aid to him in his resistance to the execution of a decree which was substantially a just decree, unless at least he was prepared to act equitably and pay off the mortgage debts and redeem the property. Raj Bahadur having died childless pending this appeal, his interest in the property has passed to his father, Kashi Prasad, the mortgagor, subject, it may be, to his widow's right of maintenance out of it.

It has been argued on behalf of the respondent that the effect of the suit brought by Raj Bahadur was to create a partition of the property, so that on his death his share passed,

not to his father as survivor, but to his widow, the respondent. We cannot accede to this agreement. Raj Bahadur and his father remained joint until the death of the former; there was no partition or division of shares between them, nor was even a partition claimed by Raj Bahadur in the present suit. The mere fact that he asserted his right to a moiety of the property and brought the present suit did not create any separate title in him—see *Padarath Singh* v. *Raja Ram* (1). It is clear that the mortgagor, Kashi Prasad, cannot resist the sale of any part of the mortgaged property. The appellants, while not admitting any right in the substituted respondent (widow of Raj Bahadur) to redeem the mortgages, have expressed their willingness to give her an opportunity of redeeming them if she be so advised. We shall provide for this in our decree. We accordingly allow this appeal and set aside with costs the decree of the lower Court, in so far as it declares that the property in dispute in this appeal is not liable to be sold under the appellant's decree. *Provided that* if the substituted plaintiff-respondent shall, within a period of three months from this date, that is, on or before the 15th of April next, pay to the appellants or into Court the amount which shall be found due for principal, interest, and costs under the decree of the 8th of July 1893 (including also the costs of this appeal), then, and in that case, we direct that the appellants shall deliver to the substituted plaintiff-respondent all documents in their possession or power relating to the mortgaged property, and for that purpose we direct that execution of this decree shall be suspended for the period of three months from this date. But if the substituted plaintiff-respondent shall fail to make such payment within the period mentioned above, then, after the expiration of that period, the appellants will be entitled to bring to sale the property, the subject of this appeal, in execution of the decree of the 8th July 1893.

Appeal decreed.

(1) (1882) I. L. R., 4 All., 235.