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further right given them by section 411 proceeded to execute the decree to the extent of the court fees against the property of Rahmat-ullah. Rahmat-ullah was in possession of the house in question, but subject to a mortgage which he had already created in favour of the assignor of the plaintiff. In effect we are asked to say that this decree in favour of Government can be executed against property which Rahmat-ullah had not. All that could be sold in execution of the decree was the house subject to the mortgage. As a matter of fact at the time of the sale the mortgage in favour of the assignor of the plaintiff was duly notified and Government only asked for execution subject to the mortgage. Government had no charge whatever on the property of Rahmat-ullah. All they had was the rights of a preferred creditor, that is, a creditor taking priority over all other unsecured creditors. It seems to me that it is quite clear that this appeal ought to be dismissed. It is unnecessary for me to deal with the case of *The Collector of Moradabad* v. *Muhammad Daim Khan*. I entirely agree with the remarks made by the other members of the Court.

By the Court.—The order of the Court is that the appeal be dismissed with costs.

Appeal dismissed.

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APPELLATE CIVIL.

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

RAN SINGH AND OTHERS (DEFENDANTS) v. SOBHA RAM (PLAINTIFF).*

Hindu law—Joint Hindu family—Liability of sons in respect of a mortgage executed by the father—Exemption of sons' interest—Subsequent suit against sons for share of debt payable by them—Limitation—Act No. XV of 1877 (Indian Limitation Act), schedule II, articles 147, 132, 120.

Certain joint ancestral property was mortgaged by the head of the family first in 1882 and again in 1893. Subsequently the second mortgagee redeemed the first mortgage. The second mortgagee then sued to recover the amount due on both mortgages by sale of the mortgaged property, and obtained a decree in March 1895 and an order absolute for sale on the 25th of October 1897. To this suit the sons and grandsons of the mortgagor were not made parties. The sons and grandsons of the mortgagor sued for and obtained a decree exempting their interest in the mortgaged property from the operation

* First Appeal No. 193 of 1905, from a decree of Pandit Girraj Kishore Datt, Subordinate Judge of Moradabad, dated the 16th of December 1904.

of the mortgagee's decree. The mortgagee then sued the sons and grandsons to recover from them a proportionate part of the amounts due on his mortgages. This suit was instituted on the 6th of April 1904.

Held that the mortgagee's suit against the sons and grandsons of the mortgagor was maintainable, and that it was not barred by limitation, the rule applicable being either article 147 or article 132 of the second schedule to the Indian Limitation Act, 1877.

Badri Prasad v. *Madan Lal* (1), *Maharaj Singh* v. *Balwant Singh* (2) and *Muhammad Askari* v. *Radha Ram Singh* (3) distinguished. *Dharam Singh* v. *Angan Lal* (4) and *Ariabudra* v. *Dorasami* (5) followed.

THE facts out of which this appeal arose are as follows:—

One Badan Singh, father of the first three defendants and grandfather of the other four, in July 1882 mortgaged certain property to Khetal Das and another. On the 24th August 1893 Badan Singh mortgaged the same property to Balak Ram, father of the plaintiff Sobha Ram, to secure the sum of Rs. 2,000. Subsequently Balak Ram obtained a decree by which, under the direction of the Court, he, by paying Rs. 1,858-3-3, redeemed the prior mortgage of Khetal Das and so under the provisions of section 74 of the Transfer of Property Act acquired the position of first mortgagee on paying the Rs. 1,858-3-3, payment of which is admitted.

Balak Ram then instituted a suit against his mortgagor Badan Singh to recover the amount due on his mortgage of August 1893, and also to recover the sum he paid to redeem the prior mortgage, and for sale of mortgaged property in default of payment. He obtained a decree for sale in March 1895 and an order absolute for sale on October 25th, 1897. The only person impleaded as defendant in that suit was Badan Singh; his sons and grandsons were not made parties to it. Then Ran Singh the son of Badan Singh, and his two brothers and four nephews instituted a suit against Balak Ram to have their interest in the ancestral property exempted from sale on the ground that they had not been impleaded as parties in Balak Ram's suit although he knew of their existence. They obtained in April 1902 a decree declaring that their $\frac{3}{4}$ interest in the mortgaged property was not saleable in execution of the decree which had been given against their father and grandfather Badan Singh. Thereupon the

(1) (1893) I. L. R., 15 All., 75. (3) (1900) I. L. R., 22 All., 307.
(2) (1906) I. L. R., 28 All., 508. (4) (1899) I. L. R., 21 All., 301.
(5) (1888) I. L. R., 11 Mad., 413.

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present suit was instituted by Sobha Ram, son of Balak Ram, against the successful plaintiffs in the suit last mentioned to recover the sum of Rs. 5,458-3-3 said to be due on Badan Singh's mortgage and in default for sale of the ⅞ interest of the defendants in the mortgaged property which had been released in compliance with the decree of April 1902.

In the written statement the plea was taken that the suit was barred by section 13 and section 43 of the Civil Procedure Code and also that it was barred by limitation. It was also pleaded that the debt which formed the consideration for the mortgage in suit was not contracted for the benefit or necessity of the family, but was contracted for immoral and unlawful purposes.

The lower Court (Subordinate Judge of Moradabad) held that the suit was not barred by either section 13 or section 43 of the Code of Civil Procedure, and also that it was not barred by limitation. It held that the limitation period applicable was 60 years. The Court further held that the money (Rs. 2,000) which formed the consideration for the mortgage of the 24th August 1893 was borrowed for immoral purposes and was tainted with immorality. It therefore dismissed the plaintiff's suit so far as it was based on this mortgage of August 1893, but gave plaintiff a decree for the amount which had been paid by Balak Ram to redeem the earlier mortgage of July 1882.

From this decision both parties instituted cross appeals, the plaintiff challenging the correctness of the Subordinate Judge's finding as to the mortgage of August 24th, 1893, while the defendants contended that the suit against them is barred by limitation and that the plaintiff is not entitled to any relief. The present appeal is that of the defendants.

Dr. *Satish Chandra Banerji* and Babu *Lalit Mohan Banerji*, for the appellants.

Babu *Jogindro Nath Chaudhri*, for the respondent.

BURKITT, J.—This and the connected Appeal No. 70 of 1905 are cross appeals from the judgment of the Subordinate Judge of Moradabad, dated December 16th, 1904, by which he partially allowed and partially dismissed the suit of the plaintiff Sobha Ram against the defendant Ran Singh and others.

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It appears that one Badan Singh, father of the first three defendants and grandfather of the other four, had in July 1882 mortgaged certain property to Khetal Das and another. On the 24th August 1893 Badan Singh mortgaged the same property to Balak Ram, father of the plaintiff Sobha Ram, to secure the sum of Rs. 2,000. Subsequently Balak Ram obtained a decree, by which, under the direction of the Court, he, by paying Rs. 1,858-3-3, redeemed the prior mortgage of Khetal Das and so under the provisions of section 74 of the Transfer of Property Act acquired the position of first mortgagee on paying the Rs. 1,858-3-3 payment of which is admitted.

Balak Ram then instituted a suit against his mortgagor Badan Singh to recover the amount due on foot of his mortgage of August 1893 and also to recover the sum he paid to redeem the prior mortgage, and for sale of mortgaged property in default of payment. He obtained a decree for sale in March 1895 and an order absolute for sale on October 25th, 1897. The only person impleaded as defendant in that suit was Badan Singh; his sons and grandsons were not made parties to it. Then Ran Singh and his two brothers and four nephews instituted a suit against Balak Ram to have their interest in the ancestral property exempted from sale on the ground that they had not been impleaded as parties in Balak Ram's suit although he knew of their existence. They obtained in April 1902 a decree declaring that their $\frac{4}{4}$ interest in the mortgaged property was not saleable in execution of the decree which had been given against their father and grand father Badan Singh. Thereupon the present suit was instituted by Sobha Ram, son of Balak Ram, against the successful plaintiffs in the suit last mentioned to recover the sum of Rs. 5,458-3-3 said to be due on Badan Singh's mortgage and in default for sale of the $\frac{3}{4}$ interest of defendants in the mortgaged property which had been released from attachment in compliance with the decree of April 1902.

In the written statement the plea was taken that the suit was barred by section 13 and section 43 of the Civil Procedure Code and also that it was barred by limitation. It was also pleaded that the debt which formed the consideration for the mortgage in suit was not contracted for the benefit or necessity

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of the family but was contracted for immoral and unlawful purpose.

The lower Court held that the suit was not barred by either section 13 or section 43 of the Code of Civil Procedure, and also that it was not barred by limitation. It held that the limitation period applicable was 60 years. The record does not contain any information as to the article of the Limitation Act which the defendants contended was applicable. The Court further held that the money (Rs. 2,000) which formed the consideration for the mortgage of the 24th August 1893 was borrowed for immoral purposes and was tainted with immorality. It therefore dismissed the plaintiff's suit so far as it was based on this mortgage of August 1893, but gave plaintiff a decree for the amount which had been paid by Balak Ram to redeem the earlier mortgage of July 1882.

From this decision both parties have instituted cross appeals, the plaintiff challenging the correctness of the Subordinate Judge's finding as to the mortgage of August 24th, 1893, while the defendants contend that the suit against them is barred by limitation and that the plaintiff is not entitled to any relief. I propose first to take up defendants' appeal (F. A. No. 193 of 1905). Both appeals were heard simultaneously.

Now the suit being admittedly one to enforce the pious obligation which the Hindu law imposes on a son to pay a father's debt not tainted with immorality and being, as contended for the appellants, a suit *sui generis* for which no special rule of limitation is provided, the learned advocate for the appellants contends that it comes under article 120 of the second schedule to the Limitation Act of 1877, which provides a period of six years from the time when the right to sue accrues. If this be the article applicable, there can be no doubt that the suit is barred. The learned advocate contended that there being no "contractual obligation" on the sons to pay, and the obligation being one which arose from their status as sons of the debtor, the only article of the Limitation Act which could apply was article 120. He also contended that the same article applied to the claim to recover the amount paid to discharge the prior mortgage of July 1882. The learned advocate cited the well-known case of *Badri Prasad* v. *Madan Lal* (1). But the

(1) (1893) I. L. R., 15 All., 75.

principal matter decided in that case is that a suit like the present can be instituted against a son during the life-time of his father to enforce the pious obligation. The case nowhere touches on the question of limitation. Nor is the limitation question anywhere decided in *Maharaj Singh* v. *Balwant Singh* (1) which also was cited. It is also strongly contended that the remedy against appellants was exhausted by the suit instituted by plaintiff's father against Badan Singh and that therefore this suit could not be maintained. Pandit *Sundar Lal* for the respondent contended that the suit was one *on the mortgage* for sale of the defendants' appellants' interest in the mortgaged property in default of payment, and that the limitation article applicable to it was article 147 or possibly 132, as a suit to enforce payment of money charged on immovable property, and he also contended that the suit was maintainable. The learned advocate for the respondent chiefly relied on the case of *Dharam Singh* v. *Angan Lal* (2). That case in almost every respect resembles the present case, except that in it no question of immorality was raised. In it four sons of the debtor had obtained a decree for recovery of possession of four-fifths of the mortgaged property on the ground that they were not parties to the suit in which the decree for sale had been passed against their father. Subsequently the mortgagee instituted a suit against the sons to recover from them four-fifths of the amount due under the mortgage and obtained a decree. On appeal to this Court Mr. Justice Banerji, who delivered the judgment of the Court, referred with approval to the case of *Ariabudra* v. *Dorasami* (3). That case was in many respects similar to the present case and to the case in 21 All., 301, mentioned above. One of the contentions in it was that the claim against the sons was one which should have been decided under section 244 of the Code of Civil Procedure in execution of the decree against the father. As to that question the learned Judges of the Madras High Court held (p. 415 of the report) that it (*i.e.*, the son's obligation to pay the father's debt) is an obligation *distinct from that created* by the decree which was passed against the father; that if the decree debt was either illegal

(1) (1906) I. L. R., 28 All., 518. (2) (1899) I. L. R., 21 All., 301.
(3) (1888) I. L. R., 11 Mad., 413.

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or immoral the sons would be under no obligation to satisfy it, though the decree against the father might be perfectly valid." They therefore held that the question of the son's liability could not be decided under section 244 of the Code. Further on the learned Judges, discussing the question of limitation, observe :— "The suit was clearly one to enforce payment of money charged on immovable property, and the contest was whether the charge was validly created by the father as against his sons. The claim is therefore not barred by limitation." As to the above Mr. Justice Banerji observed in 21 All., 301 :—"I agree with the view of the learned Judges and hold that a suit like the present in which it is sought to enforce against Hindu sons their pious obligation in respect of their father's debts not tainted with immorality, is maintainable whether the debts were or were not secured by a mortgage and whether a decree in respect thereof had or had not been obtained against the father alone." These latter observations of our learned brother have reference to the contention raised in the case he was considering, and which is raised also before us, that the suit was not maintainable because judgment had been recovered on the original debt, and reference was made by analogy to the case of joint debtors under the same contract. As to this argument Mr. Justice Banerji was of opinion that such an analogy does not apply to the case of the liability arising from the pious duty of a Hindu son to pay his father's debts not tainted with immorality. "Such liability," the learned Judge observes, "arises not from the contract entered into by the father, but from the fact that he is the son of the father and that the debt incurred by the father is of such a nature that it is the duty of the son to pay it. It is a liability which the Hindu law imposes on the son and is independent of the contract made by his father. Whether the debt of the father has merged in a decree, or whether it subsists as a debt in respect of which no decree has been passed, the son is liable for it, provided it was not incurred for immoral or impious purposes." And further on, when considering the question as to whether a creditor's remedy against the son is lost by the omission to make the son a party to the suit against the father, the learned Judge observes:—"Their Lordships of the Privy Council have held in several well-known cases that the son's liability for

his father's debt is *unaffected by the procedure* to which the creditor may have resorted against the father alone for the recovery of the debt. In *Nanomi Babuasin* v. *Modhun Mohun* (1) their Lordships said :—'The decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt or against his *creditors' remedies for their debts* if not tainted with immorality.' If the father's debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own." Upon these and other passages in cases decided by their Lordships of the Privy Council the learned Judge held that "upon the same principle on which a suit is allowable to the son, it seems to me that it is open to the father's creditor to bring a suit against the son to establish the latter's obligation to pay his father's debt." Further on in the judgment, referring to the case of a simple money debt, as to which it has been held that the omission by the creditor to implead the son in his suit against the father on the debt does not preclude the creditor from subsequently suing the son, the learned Judge observes that in his opinion "there is no difference in principle between the case of a debt secured by a mortgage and a simple money debt." "I am unable to hold," says the learned Judge, "that in the case of a mortgage debt the creditor is in a worse position than the holder of an unsecured debt." And finally after pointing out that the "obligation of a Hindu son to pay his father's debt is not an obligation which he has incurred jointly with his father, and the creditor's cause of action against the father and the son is not a single cause of action which is exhausted upon a decree being obtained against one of them only," and that "a judgment recovered against the *father only* does not therefore bar a suit against the son," the learned Judge, referring to the fact that a large portion of the mortgaged property had been taken out of the possession of the creditor, adds as follows :—"As four-fifths of the property which the creditor purchased at auction in satisfaction of

(1) (1885) I. L. R., 13 Calc., 21.

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his debt has been decreed to the sons and the creditor has thus been deprived of that portion of the property, his debt must be held to have remained *pro tanto* unsatisfied." Now these facts exactly fit in with those of the present case, in which three-fourths of the mortgaged property has been restored to the possession of defendants appellants. The decree against the father was unsatisfied to the extent of three-fourths. The case of *Muhammad Askari* v. *Radhe Ram Singh* (1) was not one which has any bearing on the liability of a son to pay his father's debts. In it the defendants were the managing members of a joint Hindu family trading business. Creditors instituted a suit in which they impleaded only the two managing members and obtained a decree for sale of the joint family property. On execution being taken out the other members of the joint family sued and obtained a decree declaring that their interest in the joint family property could not be taken in execution of the decree against the managing members. On this the creditor sued the successful plaintiffs to recover the debt, and it was held that the suit was maintainable and that the creditor's remedy was not exhausted by the first suit.

In my opinion the present suit is clearly maintainable against the appellants. In that matter I fully concur with the decision of our learned brother Banerji from which I have made very copious extracts. The question as to whether this suit was maintainable was not, as far as I can discover from the record, raised in the lower Court, but it was forcibly argued before us. I have no hesitation in holding that the plaintiff's remedy on the mortgage was not exhausted by the former suit, in which the father only was impleaded, and that notwithstanding that suit the defendants appellants are by reason of their pious duty liable to discharge as much of the mortgage debt as remains unsatisfied. On the question of limitation the learned Subordinate Judge was "unable to understand" why such a plea was raised. "The suit," he said, "is brought by the plaintiff to recover mortgage money due under a deed of simple mortgage and the prior mortgage money paid by his late father by sale of the mortgaged property, and a period of 60 years is prescribed for such a suit." In

(1) (1900) I. L. R., 22 All., 307.

these remarks I fully concur. The suit is no doubt founded on the appellants' pious duty of paying their father's debts not tainted by immorality, but it is none the less a suit on the mortgage. The learned advocate for the appellants did not cite any authority to show that the limitation rule applicable to these appellants is article 120 with a limitation of six years. His contention was that as the liability of the defendants appellants arose from their status in the family and was not a contractual obligation the suit against them was governed by article 120 of the Limitation Act. In this I cannot concur. The suit is one on a mortgage to enforce the appellants' liability to discharge Badan Singh's mortgage debt and is governed either by article 147 of the Limitation Act or by article 132 as held by the Madras High Court in the case cited above. To hold otherwise might have a startling result. For, to take the case of a suit instituted less than 60 but more than six years after the mortgage had become payable against a father and his sons, what would be the limitation rule applicable? According to appellants while the father would be liable the suit would be barred against the sons, and the result would be that only the father's interest in the mortgaged property would be affected, the sons wholly escaping. I cannot accept such a possibility as good law. Such an interpretation of the law would have the effect of compelling a mortgagee, perhaps against his will, to sue on the mortgage while the six years' limitation against the sons was still running. For the above reasons I hold (1) that the suit is maintainable against the defendants appellants, and (2) that it is not barred by limitation, the rule applicable being either article 147 or 132. The appellants having failed on both the points raised in their appeal I would dismiss this appeal with costs.

STANLEY, C.J.—I concur. It appears to me that the conclusion arrived at by my learned colleague is the equitable mode of escape from the extraordinary position created by the ruling in *Bhawani Prasad* v. *Kallu* (1).

By the Court.—The order of the Court is that this appeal be dismissed with costs.

Appeal dismissed.

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