therefore, obtain from the court below a finding on the following issue, which we refer to that court under the provisions of order XLI, rule-25, of the Code of Civil Procedure:—

Was the amount secured by the mortgage of the 5th of August, 1905, or any part thereof, paid by the defendant to the plaintiff?

The court will take such additional evidence relevant to the above issue as may be tendered by the parties. On receipt of the finding ten days will be allowed for filing objections.

Issue referred.

FULL BENCH.

1911
June 17.

Before The Hon'ble Mr. H. G. Richards, Chief Justice, Mr. Justice Banerji and Mr. Justice Chamier.

MUHAMMAD MUZAMIL-ULLAH KHAN (DEFENDANT) *v.* MITHU LAL AND ANOTHER (PLAINTIFFS) AND CHOKHEY SINGH AND OTHERS (DEFENDANTS).*

Hindu law—Joint family property—Mortgage by father alone—Subsequent sale by father to a third party—Suit by mortgagees for sale—Competence of purchaser to rely on invalidity of the mortgage.

The head of a joint Hindu family mortgaged in 1886 property belonging to the joint family, but neither for legal necessity nor to pay an antecedent debt. In 1888 the mortgagor sold the same property to a third person. The purchaser remained in possession for more than twelve years, when the mortgagees instituted a suit for sale on their mortgage.

Held by RICHARDS, C. J., and BANERJI, J., that in view of the fact that the purchaser had acquired a title to the property by adverse possession as against all the members of the family, it was open to him, notwithstanding that his title was originally acquired from the mortgagor alone, to set up as a defence the invalidity of the mortgage.

Per CHAMIER, J., according to the ruling of the majority of the Full Bench in *Chandradeo* v. *Mata Prasad* (1) the mortgage made by the father alone was void, and, this being so, it was open to the purchaser, who was in possession of the property, to rely upon its invalidity, whatever the weakness of his own title might be.

Chandradeo v. *Mata Prasad* (1), *Balgobind Das* v. *Narain Lal* (2), *Brijbasi Lal* v. *Gopal Das* (3), *Kuli Shankar* v. *Nawab Singh* (4) and *Bhagirathi Misr* v. *Sheobhik* (5) referred to.

* Second Appeal No. 712 of 1910 from a decree of D. R. Lyle, District Judge of Aligarh, dated the 30th of May, 1910, reversing a decree of Jagat Narain, Additional Subordinate Judge of Aligarh, dated the 2nd of March, 1910.

(1) (1909) I. L. R., 31 All., 176.
(2) (1893) I. L. R., 15 All., 339
(3) Weekly Notes, 1903, p. 200.
(4) (1909) I. L. R., 31 All., 507.
(5) (1898) I. L. R., 20 All., 325.

1911

MUHAMMAD MUZAMIL-ULLAH KHAN v. MITHU LAL.

THIS appeal, coming first before STANLEY, C. J., and GRIFFIN, J., was sent, by order of the Chief Justice, to a Bench of three Judges. The facts of the case appear from the following order, as well as from the judgements of the Full Bench.

"The question raised in this appeal is of such importance as to justify us in recommending that the appeal be laid before a larger Bench. Property in two villages Kamrahwa and Abhaipur was hypothecated by an instrument of the 21st of July, 1886, by one Padam Singh in favour of the plaintiffs respondents, Lala Mithu Lal and Lala Hulas Rai. Padam Singh is dead, and his sons and grandsons are in possession and enjoyment of the village of Abhaipur. The other village, Kamrahwa, was purchased by the defendant appellant from Padam Singh in the year 1888. The plaintiffs instituted the suit out of which this appeal has arisen to enforce payment of their mortgage, and among the defences set up by the defendants, first party, was the plea that the bond was not executed for legal necessity. The court of first instance held that no legal necessity for the mortgage was proved and dismissed the plaintiffs' suit *in toto*. The plaintiffs appealed, but in the course of the appeal they gave up their claim against Abhaipur and pressed their claim against the village of Kamrahwa only. The lower appellate court held that the question of legal necessity did not arise so far as regards the property in Kamrahwa and gave a decree to the plaintiffs to be realized out of the property in Kamrahwa. From this decree the present appeal has been preferred. The principal grounds of appeal being (1) that the court below was in error in holding that the plea of want of legal necessity was not open to the appellant; (2) that the court below having found that there was no legal necessity, it should not have passed a decree without a finding on the question of legal necessity; (3) that Kamrahwa and Abhaipur having been both mortgaged to secure the plaintiffs' debt, it was not open to the plaintiffs to give up their claim against one of the villages and so throw the entire burden on the village purchased by the appellant alone. An issue was referred by this Court to the lower appellate court as to the existence of legal necessity for the loan. The finding on that issue is in the negative. It appears to us that an important question is involved in this appeal, that is, whether a transferee from the head of a Hindu family who had previously mortgaged joint family property without legal necessity, stands in a better position than his transferor, and can set up the case that a prior mortgage of the property transferred to him was made without legal necessity. We accordingly refer the matter to the Chief Justice with the recommendation that the appeal be laid before a larger Bench."

Mr. *A. E. Ryves* (with him The Hon'ble *Nawab Muhammad Abdul Majid* and Maulvi *Muhammad Ishaq*), for the appellant.

Dr. *Satish Chandra Banerji* (with him Munshi *Gulzari Lal*) for the respondents.

RICHARDS, C. J.—This appeal arises out of a suit to enforce a mortgage, dated the 21st of July, 1886. The mortgage comprised

property in a village called Kamrahwa and also in a village called Abhaipur Rampur. The mortgage was made by one Padam Singh, who was a member of a joint Hindu family. In the year 1888, the same Padam Singh sold the village of Kamrahwa to the defendant appellant. Padam Singh is long since dead. His sons and grandsons are in possession of the village of Abhaipur, while the defendants have ever since the sale of Kamrahwa been in possession of the same. When the suit was instituted, the plaintiffs sought to sell both villages; but, it having been found that there was no legal necessity for the mortgage, the plaintiffs abandoned their claim against Abhaipur and sought to realize the amount of their mortgage entirely out of the village of Kamrahwa. The court of first instance dismissed the suit. The lower appellate court decreed the suit against the village of Kamrahwa. It has to be admitted, having regard to the authorities, that Padam Singh, as a member of the joint Hindu family and in the absence of necessity, was incompetent to make the mortgage of the 21st of July, 1886, in favour of the plaintiffs. It is, however, contended on behalf of the plaintiffs that the defendants' title has the same flaw, and that they ought not to be allowed to set up the fact that Padam Singh was incapable of making the mortgage. It seems to me that the point is concluded by authority. In the case of *Balgobind Das* v. *Narain Lal* (1) the facts were in principle very similar. A son, who, just as in the present case, was a member of a joint Hindu family, mortgaged his undivided interest. Subsequently simple money decrees were obtained against him. His interest was put up for sale on foot of these simple money decrees and purchased by the father. It was held in a suit to enforce the mortgage that the father was entitled to set up the defence that the mortgage was invalid, notwithstanding that he himself was the purchaser at the auction sale of the son's interest. At page 351 of the report their Lordships say :—" In the present case the interest has passed to Nanuidh (the father) not by survivorship but by purchases at sales in execution of decrees. Although it is not the same interest as he would acquire by survivorship, it is sufficient to entitle him to set up the invalidity of

(1) (1893) I. L. R., 15 All., 339.

1911

MUHAMMAD MUZAMIL-ULLAH KHAN v. MITHU LAL.

the mortgage deed." It must be remembered in considering the present case that, although originally the defendants acquired their estate by virtue of a deed of sale from Padam Singh, they have long since by limitation acquired title not only against Padam Singh but against the rest of the joint family. In other words the defendants now represent not only the interest of Padam Singh in the village of Kamrahwa but also the interests of the rest of the joint family. The case is in principle just the same as if the sale to the defendants had not been by Padam Singh alone but by the whole joint family. See *Brijbasi Lal* v. *Gopal Das* (1). I would allow the appeal.

BANERJI, J.—This appeal arises in a suit brought by the plaintiffs respondents for sale upon a mortgage executed in 1886 by Padam Singh, deceased, in respect of shares in two villages, namely, Kamrahwa and Abhaipur Rampur. The village Kamrahwa was sold by him to the defendant appellant in 1888. The defendants to the suit were the son and grandsons of Padam Singh and the subsequent transferee of Kamrahwa. The son and grandsons of Padam Singh contended that the mortgage was not made for family necessity. The court of first instance found that there was no necessity for the mortgage of the family property and totally dismissed the suit. The plaintiffs appealed, but in the lower appellate court they abandoned their claim in respect of the village Abhaipur Rampur and pressed it in respect of the village Kamrahwa only. The learned Judge held that so far as that property was concerned the question of legal necessity did not arise, and accordingly passed a decree for sale of the village Kamrahwa. From this decree the present appeal was preferred. It has been found by the lower appellate court on an issue referred to it that there was no family necessity for the loan. The question we have to determine is whether it is open to the transferee from the mortgagor to question the validity of the mortgage on the ground that it was not made for family necessity.

In view of the authorities and of the circumstances of this case the question should, I think, be answered in the affirmative. It was held by a majority of the Full Bench in *Chandradeo*

(1) Weekly Notes, 1908, p. 200.

Singh v. *Mata Prasad* (1) that the father in a joint Hindu family governed by the Mitakshara law cannot execute a mortgage of the joint family property except for family necessity or to meet an antecedent debt, and the mortgage is invalid even in respect of the father's share in the family property. See also *Kali Shankar* v. *Nawab Singh* (2). In *Balgobind Das* v. *Narain Lal* (3) their Lordships of the Privy Council held that the mortgage by a co-parcener in joint family property of his undivided share without the consent of his co-sharers is invalid and that the invalidity of the mortgage could be set up by the purchaser at auction of the mortgagor's interests. Following this ruling, it was held in *Bhagirathi Misr* v. *Sheobhik* (4) that a purchaser from one co-sharer in joint family property was entitled to contest the validity of the mortgage made by another co-sharer of his undivided share. In *Brijbasi Lal* v. *Gopal Das* (5) a mortgage was made by a member of a joint family of a portion of the family property. It was found that the mortgage was not made for the benefit of the family, and that it was made without the consent of the co-parceners. It was held that a purchaser from the co-parcenary body was not precluded from questioning the validity of the mortgage. This decision was upheld in appeal under the Letters Patent (L. P. A. No. 74 of 1908, decided on the 26th March, 1909). These cases are authorities for the proposition that a transferee of joint family property is entitled to contest the validity of a transfer made by one of the members of the family. In the present case it has been found that the mortgage made by Padam Singh was not made for family necessity, that his son did not assent to it and that it is invalid as against his son and grandsons. No question arises in this case as to whether the mortgage by Padam Singh was void or voidable, inasmuch as it was not a mortgage of his undivided share of the family property. It, being a mortgage without family necessity, is invalid according to the ruling of the Full Bench in *Chandradeo Singh* v. *Mata Prasad*, referred to above. In view of the authorities mentioned above, it is open to a transferee of the property to question the validity of such a

(1) (1909) I. L. R., 31, All., 176. (3) (1893) I. L. R., 15 All., 339.
(2) (1909) I. L. R., 31 All., 507. (4) (1898) I. L. R., 20 All., 325.
(5) Weekly Notes, 1908, p. 200.

1911

MUHAMMAD MUZAMIL-ULLAH KHAN v. MITHU LAL.

mortgage. We have now to consider whether a transferee from the mortgagor himself can do so. Ordinarily he cannot. A mortgagor cannot be allowed to question the validity of his own mortgage and thereby derogate from his own grant. A transferee from him who stands in his shoes has no higher right. In the present case, however, the appellant must be deemed to be a transferee not only from Padam Singh but from the whole of the joint family. The transfer to him was made more than twelve years ago and he has been allowed to remain in possession. It must, therefore, be presumed that the sale to him was for family necessity and with the assent of the other members. It is, therefore, a valid sale, and the appellant represents the other members of the family also. As such, he can set up the invalidity of the plaintiff's mortgage and is not estopped from doing so. For the above reasons I agree in allowing the appeal.

CHAMIER, J.—The plaintiffs in the suit out of which this appeal arises having abandoned their claim against the village Abhaipur Rampur, the facts may be stated thus :—

Padam Singh, who with his son and grandson constituted a joint Hindu family, mortgaged a village called Kamrahwa belonging to the family to the plaintiffs. Two years later he sold the village to the defendant appellant. In the present suit the plaintiffs seek to enforce the mortgage against the village. The defendant appellant pleads that the mortgage is invalid as it was not made for family necessity. On an issue remitted to the lower appellate court, it has been found that there was no family necessity for the mortgage. The question for decision is, whether it is open to the defendant appellant to challenge the validity of the mortgage on the ground stated. None of the cases cited seems to me to be exactly in point. In *Balgobind* v. *Narain Lal* (1) a son in a joint family mortgaged his share in the family property. Subsequently the son's interest in the property was put up for sale in execution of a money decree obtained against him and was purchased by the father, the only other member of the joint family. It was found that the father had no notice of the mortgage at the time of his purchase. Their Lordships of the Privy Council held that the interest acquired

(1) (1893) I. L. R., 15 All., 339.

by the father was sufficient to enable him to set up the invalidity of the mortgage. There is a clear distinction between that case and the one before us. There the father who challenged the mortgage had acquired the rights of the only other member of the family by a purchase which was open to no objection, for it is settled law that the undivided interest of a member of a joint family in the family property can be sold, and the purchaser can, if necessary, work out his rights by partition. Moreover, the father had no notice of the mortgage. In the present case the question whether the defendant appellant had notice of the mortgage at the date of his purchase, has not been gone into, but, apart from that, it is to be noticed that he claims under a transfer which seems to be invalid for the same reason that the mortgage to the plaintiff is invalid.

The case of *Brijbasi Lal* v. *Gopal Das* (1) is also distinguishable, for the person who set up the invalidity of the mortgage in that case was a person who had acquired title by means of a transfer made by all the members of the family. He was in as good a position as the father in the case of *Balgobind* v. *Narain Lal*. In the case of *Bhagirathi Misr* v. *Sheobhik* (2) the plaintiff claimed title under a sale of family property made by a father in a joint family and under a purchase at auction made in execution of a decree passed on a mortgage made by the father. The defendant claimed under a mortgage of the property made by the son, the only other member of the joint family. It seems to have been assumed that the sale and mortgage made by the father were good. If that assumption was correct, the plaintiff was no doubt entitled to a declaration that the mortgage made by the son was invalid.

In the first and second cases, and in the third also, if the assumption made was correct, the persons who set up the invalidity of the mortgage claimed the property under a valid transfer. To use the words of their Lordships of the Privy Council, they had acquired an interest in the property sufficient to enable them to challenge the mortgage. If the mortgages in question in these cases were absolutely void, there was no necessity to consider whether the persons who challenged them

(1) Weekly Notes, 1908, p. 200. (2) (1898) I. L. R., 20 All., 325.

1911

MUHAMMAD MUZAMIL-ULLAH KHAN v. MITHU LAL. *Chamier, J.*

and who were in possession of the property had acquired a sufficient interest or not. A person in possession of property can always resist a claim against the property on the ground that no right or title has passed to the claimant or that an assignment to the claimant was made to defraud the person in possession or was illegal or void or opposed to public policy, but where an assignment is sufficient in law to pass title to the claimant and is only voidable at the instance of a third party, the person in possession cannot, as a rule, challenge the validity of the assignment unless a trial of its validity is necessary for his protection against the claim of another person. If the mortgage to the plaintiffs in the present case was not void altogether, but only voidable at the instance of the son and grandsons, it seems to me extremely doubtful whether the defendant appellant, claiming under a sale by the father alone, which was apparently in itself voidable, if not void, can set up the invalidity of the mortgage. The language used by their Lordships of the Privy Council in the case of *Bulgobind* v. *Narain Lal*, suggests that in their opinion the mortgage by the son was voidable only and not absolutely void. In that view it seems to me doubtful whether the defendant appellant who claims under the father alone is entitled to set up the invalidity of the mortgage. He may possibly be regarded as occupying a stronger position than that of a transferee from the father alone because he has held possession of the property adversely to the whole family since 1888. I need not consider this point, for I feel bound to hold that the appeal should be allowed on another ground. The majority of the Full Bench in the case of *Chandradeo Singh* v. *Mata Prasad* (1) seem to have held that a father in a joint Hindu family governed by the Mitakshara cannot execute a mortgage of the joint family property except for family necessity or to meet an antecedent debt, and that the mortgage is in any other circumstances invalid even in respect of the father's share. I prefer the opinion of the minority in that case. The question is, I understand, being taken up to the Privy Council in another case. Meanwhile we are bound by the opinion of the majority, and in accordance therewith I feel bound to hold that

(1) (1909) I. L. R., 31 All., 176.

1911

MUHAMMAD MUZAMIL-ULLAH KHAN v. MITHU LAL.

the mortgage to the plaintiffs conferred no title upon them. If that is so, it follows that the defendant appellant is entitled to resist the plaintiffs' suit on the ground that the mortgage is invalid. For this reason I agree with the order proposed by the learned Chief Justice.

BY THE COURT.—The order of the Court is that the appeal is allowed, the decree of the lower appellate court is set aside, and the decree of the court of first instance restored with costs.

Appeal allowed.

REVISIONAL CIVIL.

1911
June 19.

Before Mr. Justice Sir George Knox and Mr. Justice Karamat Husain.

MUAZZAM ALI SHAH AND ANOTHER (JUDGEMENT-DEBTORS) *v.* CHUNNI LAL (DECREE-HOLDER).*

Act (Local) No. III of 1899 *(Court of Wards Act), sections* 16, 19 *and* 49—*Decree on contract made while a debtor was ward of Court—Collector not made a party —Execution of decree.*

C obtained a decree for money against *M* based upon a contract entered into by the latter after he had become a ward of the Court of Wards. In execution of the decree certain movable property belonging to *M* was attached. Upon objection taken that a certificate that the claim was notified under section 16 of the Court of Wards Act, 1899, should be obtained from the Collector, *held*, that the decree was bad, inasmuch as the suit and proceedings in execution were a fraud upon the court, and that as soon as it was brought to the notice of the court that the judgement-debtor was a ward of court, the court should have of its own motion then and there made the Collector a party and waited for such defence as the Collector might put forward.

IN this case a decree for money was passed against the defendant in a suit on a contract entered into when he was a ward of Court. In execution of decree an objection was raised to the effect that under section 19 of the Court of Wards Act, 1899, the decree-holder should apply for a certificate that the claim was notified under section 16. The court below (Munsif of Meerut) overruled the objection and directed that execution should proceed.

The judgement-debtor applied in revision to the High Court.

Mr. *A. E. Ryves* and Mr. *W. Wallach*, for the applicants.

Mr. *M. L. Agarwala*, for the opposite party.

* Civil Revision No. 13 of 1910.