

P. C.
1912
February 2,
6, 7, 8, 28.

BALWANT SINGH (PLAINTIFF) v. R. CLANCOY (DEFENDANT) AND BALWANT SINGH (PLAINTIFF) v. MAHARAJ SINGH (DEFENDANT).

[On appeal from the High Court at Allahabad.]

Minor—Mortgage executed by minor—Money borrowed to discharge debts of father—Contract executed by minor—Effect of—

In this appeal, which was one from the decision of the High Court in *Maharaj Singh v. Balwant Singh* (1), their Lordships of the Judicial Committee on the evidence upheld that decision on the question whether the defendant Maharaj was a minor at the time he signed the mortgage, and said:—"Having found as a fact that Maharaj Singh was a minor," at that time "it is not necessary for their Lordships to consider any other issue. This suit has been brought on the mortgage deed of the 28th of October, 1892, by the assignee of that mortgage, and as their Lordships have held that the mortgage was not made by Sheoraj Singh as the manager of the family or in any respect as representing Maharaj Singh, and as Maharaj Singh was then a minor, the mortgage deed as against him and his interest in the estate was not merely voidable, it was void and of no effect and must be regarded as a mortgage deed to which he was not even an assenting party, and as a mortgage deed which did not affect him or his interest in the estate.

Two consolidated appeals (3 and 4 of 1910) from two judgements and decrees (27th March, 1906) of the High Court at Allahabad which varied the decree (11th April, 1903) of the Subordinate Judge of Aligarh.

The facts of this case are fully stated in the report of the appeal to the High Court (SIR JOHN STANLEY, C. J., and BURKITT, J.) in the judgement of the High Court, which will be found in I. L. R., 28 All., 510.

On these appeals, of which No. 3 was heard *ex parte*.

DeGruyther, K. C., and *B. Dube* for the appellant, contended that on the evidence the respondent Maharaj Singh had attained his majority at the date of the execution of the bond in suit, and the High Court had wrongly exempted him from liability on the bond on the ground of his being a minor at that time. Eighteen was the age of majority by Act IX of 1875, and reference was made to an application made by Sheoraj on the 22nd of September, 1891, in which Maharaj was stated to be 19; proceedings in which he had acted as having attained his majority, in May, 1892, signing a written statement, and appointing a pleader in a suit; on the 26th of July, 1892, executing a mortgage; and on the 2nd of February, 1896, executing another mortgage in which he stated his age to be 23 all showing

Present:—Lord SHAW, Lord ROBSON, Sir JOHN EDGE and Mr. AMBER ALI.
(1) (1906) I. L. R., 28 All., 508.

that he was more than 18 when he signed the bond in suit. Even if he were not a minor then, he had ratified the transaction on attaining majority. But, irrespective of his age, he was, by the Hindu law, under a legal obligation to discharge those of the debts in suit which were contracted by his father or brother as managing member of the joint family. The father and the two sons were members of a joint family, and the two sons remained joint after the father's death: there was no evidence of any partition between them, and the presumption until there was a separation was that they were joint. If so, the obligation to discharge the father's debts arises, unless they can show that the debts were contracted for immoral purposes, and the onus was on the sons to show that. General evidence that the father was immoral or extravagant was not sufficient to relieve the sons from the liability to pay the father's debts; nor because some of the debts were contracted for immoral purposes can it be inferred that all of them were; the High Court had wrongly presumed this. Reference was made to Mayne's Hindu law, 7th edition, 387, 388, and note (h) at page 389, and *Bhagbut Pershad Singh v. Girja Koer* (1). A bona fide purchaser in execution of a decree in such a case would obtain a good title; even if it were shown afterwards that the debt in respect of which the decree was made was tainted with immorality—*Girdharee Lall v. Kantoo Lall* (2); and the proposition applied equally to the case where the property was attached in execution of a decree, and the money was borrowed to relieve it from attachment,—*Suraj Bunsji Koer v. Sheo Persad Singh* (3). [Sir John Edge referred to *Nanomi Babuasin v. Modhum Mohun* (4).] That question had been dealt with in *Pem Singh v. Partab Singh* (5), *Dabi Dat v. Judu Rai* (6) and *Chintamanrav Mehendale v. Kushi Nath* (7). The Transfer of Property Act (IV of 1882) section 59, and, as to admissibility of documents in evidence, Evidence Act (I of 1872), sections 34, 47, 68 and 70 were referred to. There was no question of

(1) (1888) I. L. R., 15 Calc., 717 (723, 724); L. R., 15 I. A., 99 (103, 104).

(2) (1874) L. R., 1 I. A., 321 (323, 326, 331, 333).

(3) (1879) I. L. R., 5 Calc., 148 (165, 168, 172); L. R., 6 I. A., 88 (101, 104, 107).

(4) (1885) L. R., 13 I. A., 1; I. L. R., 13 Calc., 21.

(5) (1892) I. L. R., 14 All., 179.

(6) (1902) I. L. R., 24 All., 459.

(7) (1889) I. L. R., 14 Bom., 320 (327).

1912

 BALWANT
SINGH
v.
R. CLANCY,

612
BALWANT
SINGH
v.
R. CLANCY.

limitation here on the case made out in the pleadings and evidence. It was submitted that the judgement of the Subordinate Judge should be restored.

Sir *Erle Richards, K. C.*, and *Kenworthy Brown* for the respondent, Maharaj Singh, contended that he was not bound by the mortgage sued upon, first, on the ground that he was a minor when he executed it, and against him it was therefore void. The evidence, it was submitted, showed that he was born on the 20th of December, 1874, and at the date of the mortgage (28th October, 1892) he had therefore not attained his majority. The appeal therefore failed as the deed could not be used in any way against Maharaj Singh. Secondly Sheoraj was not the manager of the joint family. In the courts below that question was not raised either in the pleadings or the issues. Sheoraj's act could not bind Maharaj. He was not in fact manager, nor did he purport to act as manager in the matter of borrowing the money. He represented himself to be the owner of an impartible estate, and it was in that character the Bank gave him credit, and accepted his security for the loan. Moreover, a large proportion of the debts could be traced to immorality, and the debts of the respondent's father were barred by limitation before institution of the present suit. The Bank, so far as appears from the evidence, made no inquiries, and did not deserve any consideration.

DeGruyther, K. C., replied citing *Oakud Buksh v. Bindoo Bashince Dossee* (1) as to the authority of an elder brother to sell property for payment of debts, *Succaram Morarji Shetay v. Kalidas Kaltieshi* (2) as to the power of a widow in a like case where there are minor sons, and *Sayad Muhammad v. Futteh Muhammad* (3) and *McLean v. McKoy* (4), as to the discretion of the Privy Council in deciding a case on the merits without too strictly regarding the terms of the pleadings.

1912, February 28th :—The judgement of their Lordships was delivered by Sir JOHN EDGE:—

These are two consolidated appeals from decrees of the High Court of Judicature for the North-Western Provinces at Allahabad, dated the 27th of March, 1906, which varied a decree of the Subordinate Judge of Aligarh, dated the 14th of April, 1903.

(1) (1867) 7 W. R., C. R., 298. (3) (1894) I. L. R., 22 Calc., 324; L. R., 22 I. A., 4.

(2) (1894) I. L. R., 18 Bom., 631. (4) (1873) L. R., 5 P. C., 327 (337).

1912

BALWANT
SINGH
v.
R. CLANCY.

The suit in which these appeals have arisen was brought on the 26th of September, 1901, by the assignee of a mortgage to recover Rs. 5,67,978-8-0 principal and interest, claimed under the deed of mortgage. The mortgage deed, which is dated the 23th of October, 1892, purports to have been made between Raja Sheoraj Singh Bahadur, mortgagor, of the first part, Maharaj Singh, the only brother of the said Raja Sheoraj Singh, of the second part, and the Bank of Upper India, Limited, of the third part. Sheoraj Singh and Maharaj Singh were, with others, made defendants to the suit.

Sheoraj Singh was the sole mortgagor, and, by the deed of mortgage, Sheoraj Singh, declaring that he was the absolute owner in possession of the several villages, lands, hereditaments, and premises in the deed mentioned, and that there was no sharer in the said property, purported to mortgage the property to the Bank of Upper India, Limited, as security for the repayment with interest of Rs. 3,00,000 lent to him by the Bank. Maharaj Singh was not a mortgagor, nor did it appear by the mortgage deed that he had any proprietary interest in the mortgaged property or was obtaining any benefit from the loan to his brother Sheoraj Singh; Maharaj Singh was made a party to the deed of mortgage in order that the fact of his having signed the deed might afford evidence that he had assented to the taking of the loan by Sheoraj Singh and the granting of the mortgage. The suit is one for sale of the property mentioned in the mortgage deed, and by the suit the plaintiff sought to make Maharaj Singh personally liable for the mortgage debt and interest, and to bring to sale Maharaj Singh's share in the mortgaged property, which in fact, was the ancestral property of the joint Hindu family which at the date of the mortgage consisted of Sheoraj Singh and Maharaj Singh. The mortgage was assigned on the 2nd of August, 1897, by the Bank of Upper India, Limited, to Raja Balwant Singh, who was the plaintiff in the suit. Raja Balwant Singh is now dead, and his minor son, Raja Surajpal Singh, is represented in this litigation by the Collector of Etah, who is in charge of his estate.

Sheoraj Singh, the mortgagor, is the elder of the two sons of Raja Shankar Singh, now dead. The younger of the two sons of Raja Shankar Singh is Maharaj Singh, a defendant in the suit, and the respondent in one of these two appeals. Raja Shankar Singh

1912

BALWANT
SINGH
v.
R. CLANCY.

was the only son of Raja Dilsukh Rai, long since dead. At the time of the Indian Mutiny of 1857-58, Dilsukh Rai, who was then a patwari, did good and meritorious service for the Government. In recognition of those services the Government granted to Dilsukh Rai a considerable estate, now said to produce annually some Rs. 50,000 gross income. The lands granted to Dilsukh Rai were not granted as an impartible estate. They are the lands which were mortgaged by Sheoraj Singh to the Bank of Upper India, Limited. In further recognition of his services the Government conferred upon Dilsukh Rai the title of Raja as a personal distinction. Raja Dilsukh Rai was a saving and apparently a penurious man. On his death the estate was unincumbered, and he left a large sum of money which he had accumulated. The Government also conferred upon Shankar Singh the title of Raja as a personal distinction. The title was never made hereditary, and although Sheoraj Singh was described in the mortgage deed as a Raja he was not entitled to be so described. Raja Shankar Singh borrowed considerable sums of money, and died on the 24th of August, 1891, leaving debts which he had contracted undischarged. It was to discharge those debts of Raja Shankar Singh, and also some debts which had been contracted by Sheoraj Singh, that the mortgage on which this suit has been brought was made by Sheoraj Singh.

Several issues were raised and tried in the Court of the Subordinate Judge. One of those issues arose on a defence of Maharaj Singh that at the date of the mortgage he was under the age of 18 years, and being at that date a minor was legally incapable of entering into any contract or of binding himself or his interest in the estate by his execution of the deed of mortgage as an assenting party to the taking of the loan and the granting of the mortgage by Sheoraj Singh. Another issue which was tried by the Subordinate Judge related to an alternative case which the plaintiff put forward, by which he sought to make Maharaj Singh and his interest in the estate liable for the payment of the money due under the mortgage, on the alleged ground that it was his duty as a Hindu son to pay with interest the money advanced by the Bank of Upper India, Limited, to Sheoraj Singh, as that money had been lent by the Bank to Sheoraj Singh to discharge the debts which had been contracted by Raja Shankar Singh and had been applied

by Sheoraj Singh to the discharge of those debts. On behalf of Maharaj Singh it was alleged in answer to the plaintiff's alternative case that Raja Shankar Singh had contracted those debts for the purposes of immorality, and it was consequently contended that there was no duty on his sons to discharge them by payment, and that the payment of those debts by Sheoraj Singh out of money lent to him by the Bank of Upper India, Limited, for that purpose, created no liability on Maharaj Singh or his interest in the family estate.

The Subordinate Judge found as a fact that at the date of the mortgage, the 28th of October, 1892, Maharaj Singh was of full age, and being apparently under the impression that in obtaining the loan from the Bank of Upper India, Limited, and in making the mortgage, Sheoraj Singh might be regarded as having acted as the manager of the joint Hindu family, the Subordinate Judge dealt with the plaintiff's alternative case and found that it was not proved that the debts which had been contracted by Raja Shankar Singh had been contracted for the purposes of immorality, and exempting certain portions of the property which were held by persons who are not parties to either of these appeals, made a decree for sale of the rest of the property mentioned in the deed of mortgage. With the portions of the property which were exempted from sale these appeals are not concerned. From that decree of the Subordinate Judge Maharaj Singh and another defendant, the Reverend J. B. Thomas, who is now represented by the Reverend Rockwell Clancy, filed separate appeals in the High Court. The High Court on a careful and exhaustive review of the evidence found as a fact that Maharaj Singh was a minor on the 28th of October, 1892, and consequently that the mortgage deed as against him and his interest in the estate was void. Although the High Court obviously considered that an inquiry into the origin and nature of the debts which had been contracted by Raja Shankar Singh was irrelevant in this suit, the High Court reluctantly, and only in view of the question possibly becoming material in an appeal from their decree, carefully considered the evidence bearing on that question, and found as a fact that the debts which Raja Shankar Singh had contracted had been contracted by him for the purposes of immorality. The High Court allowed the appeal of Maharaj

1912

 BALWANT
SINGH
v.
R. CLANCY.

1912

BALWANT
SINGH
v.
R. CLANCY.

Singh, dismissed the suit so far as Maharaj Singh and his interests in the estate were concerned, and, by a separate decree allowed the appeal of the Reverend J. B. Thomas to the extent of a moiety of the property claimed by him. From those decrees of the High Court these consolidated appeals have been brought. In support of the appeal in which the Reverend Rockwell Clancy is a respondent no argument has been addressed to their Lordships to show that the appeal against the decree of the High Court which was passed in the appeal of the Reverend J. B. Thomas could be supported if the appeal against the decree obtained by Maharaj Singh in the High Court should fail.

Some of the questions which had been considered in the Courts below were on behalf of the appellant argued at considerable length before this Board, and it was also contended on his behalf that in borrowing the Rs. 3,00,000 from the Bank of Upper India, Limited, and in making the mortgage of the 28th October, 1892, Sheoraj Singh had acted as the manager of the family, and for the benefit and protection of the estate, and consequently, as it was urged, that it was immaterial whether Maharaj Singh was or was not of full age at the date of the mortgage. It will be convenient to deal with that contention at once. The contention that Sheoraj Singh had acted as the manager of the family in borrowing the Rs. 3,00,000, and in making the mortgage, is unfounded. Evidence, oral and documentary, which their Lordships accept as reliable, proves that Sheoraj Singh, after the death of his father Raja Shankar Singh, assumed without authority the title of Raja, and asserted that the family estate was impartible, and as an impartible estate had descended to him as the elder son of Raja Shankar Singh, and that his brother Maharaj Singh was entitled only to an allowance for maintenance. It was in that assumed position as the absolute owner of an impartible estate, and not as manager of a joint Hindu family, that he obtained the loan from the Bank of Upper India, Limited, and made the mortgage in favour of the Bank. The mortgage deed was drawn up by an official of the Bank, and in that deed Sheoraj Singh is described as Raja Sheoraj Singh Bahadur, mortgagor, and it is recited that—

“the said mortgagor is the absolute owner or proprietor of the several villages, lands, hereditaments, and premises hereinafter mentioned, and more particularly described in the schedule hereto attached and intended to be hereby

mortgaged in possession free from all incumbrances save and except being mortgaged and under attachment of decrees as mentioned hereinafter . . . and the said Maharaj Singh, brother of the said mortgagor, has been made a party to this indenture in order to make known his consent and approval to this loan being taken, and the said villages, lands, hereditaments, and premises, being mortgaged as security for the same, and the said mortgagor doth hereby declare that the said property is absolutely his own and he has full power to alienate the same by a mortgage, sale or otherwise, and that he has only one brother, the said Maharaj Singh, and no sons or any sharer in the said property."

In face of that deed it cannot be contended that the Bank of Upper India, Limited lent the money to Sheoraj Singh, or that Sheoraj Singh made the mortgage in favour of the Bank as manager of the joint Hindu family, which consisted of himself and Maharaj Singh. The Bank of Upper India, Limited, made some inefficient inquiries, and lent the Rs. 3,00,000 to Sheoraj Singh, not as the manager or even as a member of a joint Hindu family, but in his assumed position as the absolute owner of an impartible estate. Sheoraj Singh, on his own behalf and in his own interests, and not as representing Maharaj Singh, discharged the debts which Raja Shankar Singh had contracted. It need hardly be observed that Sheoraj Singh was not an ancestor or a predecessor of Maharaj Singh; he was at the date of the mortgage merely a co-sharer with his brother Maharaj Singh in the property of the joint Hindu family of which they were members.

The evidence on the question of Maharaj Singh's age on the 28th of October, 1892, is partly oral and partly documentary. According to the evidence, oral and documentary, which the High Court considered to be entirely reliable, Maharaj Singh was born on the 20th of December, 1874, and consequently was under the age of 18 years on the 28th of October, 1892. The Subordinate Judge had treated the oral evidence that Maharaj Singh had been born on the 28th of October, 1874, as the false evidence of perjured witnesses, and had treated the documentary evidence as fabricated on behalf of Maharaj Singh for the purposes of his defence to the suit. Before coming to the conclusion that Maharaj Singh was born on the 20th of December, 1874, the High Court, bearing in mind the adverse comments of the Subordinate Judge on that oral and documentary evidence, and with the object of ascertaining how far, if at all, the comments and findings of the Subordinate Judge were justified, had carefully considered the oral evidence of the witnesses, and had

1912

 BALWANT
SINGH
v.
R. CLANCY.

1912

BALWANT
SINGH
v.
R. CLANCY.

examined the documents and papers which had been put in evidence. There was some other documentary evidence which standing alone and unexplained would suggest that Maharaj Singh had probably arrived at the full age of 18 years before the 28th of October, 1892.

The oral and documentary evidence upon which the High Court relied for their finding that Maharaj Singh was a minor when he signed the mortgage deed on the 28th of October, 1892, has been criticised minutely and at length by the learned counsel who argued these appeals on behalf of the appellant, but their Lordships are unable to see any reason for doubting, on the question of the date of birth of Maharaj Singh, the evidence of Pandit Ganesh Ram, Pancham Ram, Jhamman Lah, Ram Prasad, Ganesha Ram the barber, and the defendant respondent Maharaj Singh. If the evidence of those witnesses is believed, Maharaj Singh was born on the 20th of December, 1874. The documentary evidence as to the date of birth of Maharaj Singh is in their Lordship's opinion not open to suspicion. Pandit Ganesh Ram proved that he prepared the *tewa* or abstract horoscope on the day when Maharaj Singh was born, and from it prepared the horoscope which was presented to Raja Dilsukh Rai on the day of the *daston* ceremony. The *tewa* and the horoscope were put in evidence. The horoscope bears upon it in the writing of Raja Dilsukh Rai the name Maharaj Singh which Raja Dilsukh Rai gave to his grandson at the *daston*. That horoscope was produced and examined on the occasion of the marriage of Maharaj Singh, and it has been clearly and amply identified as the original horoscope relating to the birth of Maharaj Singh. Ram Prasad, who with other pandits was called in on the birth of Maharaj Singh to prepare a horoscope, produced the almanac in which at the time he had entered the birth of a son in the house of Kunwar Shankar Singh under the date 12th Aghan Sudi, Sambat 1931, which was the 20th of December, 1874. Ganesha, who was the family barber, took the news of the birth of a son of Shankar Singh, from Bilram to Raja Dilsukh Rai at Etah, and received from him a present of Rs. 2. Ganesha also said in his evidence that on that occasion Raja Dilsukh Rai gave Rs. 50 to Balwant Singh for household expenses. The original accounts of the expenditure of Raja Dilsukh Rai, which according to the evidence bear his signature, on the occasions when he examined them, show

that in December, 1874, Rs. 2 were given to Ganesha, barber, who brought the news of the birth of a son in the house of Kunwar Sahib, who was Raja Shankar Singh, and which show that Rs. 50 was sent to Bilram on account of the birth of a son in the house of Kunwar Singh, who was Raja Shankar Singh. Ganesha, the barber, proved that that son was Maharaj Singh, and there is no evidence to show that Raja Shankar Singh ever had more than two sons. Their Lordships cannot regard that oral and documentary evidence as false or even as open to suspicion. In their opinion it conclusively proves that Maharaj Singh was a minor when he signed the mortgage deed on the 28th of October, 1892. There is, however, documentary evidence that prior to the 28th October, 1892, Maharaj Singh had acted as if he was of full age. For instance, on the 26th of May, 1892, Maharaj Singh signed a vakalatnama appointing Muhammad Tahir Husain, a pleader, as his attorney in a suit in which he and Sheoraj Singh were defendants, and authorizing Muhammad Tahir Husain to appear for him, to file documentary evidence, and to refer the matter to arbitrators or to enter into a compromise. In that suit Sheoraj Singh, in his written statement of the 26th of May, 1892, made an allegation in reference to section 444 of the Code of Civil Procedure which can be construed only as meaning that Maharaj Singh was at that date a minor. For another instance, in a suit in which Sheoraj Singh and Maharaj Singh were plaintiffs, they, on the 13th of August, 1892, signed a vakalatnama appointing Muhammad Tahir Husain, pleader, their attorney, and authorizing him to act for them in the suit. On the other hand, on the 19th of August, 1892, a decree was made in a suit which had been instituted on the 14th of July, 1892, and in which Maharaj Singh had been treated throughout as a minor under the guardianship of his brother Sheoraj Singh. It is probable that until it became necessary in this suit to ascertain the actual date of the birth of Maharaj Singh, neither he nor Sheoraj Singh knew his precise age. However that may have been, their Lordships find as a fact on the clear and reliable evidence to which they have referred that Maharaj Singh was a minor under the age of 18 years when he signed the mortgage deed of the 28th of October, 1892.

Having found as a fact that Maharaj Singh was a minor on the 28th of October, 1892, it is not necessary for their Lordships to

1912

 BALWANT
 SINGH
 v.
 R. CLANCY.

1912

BALWANT
SINGH
v.
R. CLANCOY.

consider any other issue. This suit has been brought on the mortgage deed of the 28th of October, 1892, by the assignee of that mortgage, and as their Lordships have held, that the mortgage was not made by Sheoraj Singh as the manager of the family, or in any respect as representing Maharaj Singh, and as Maharaj Singh was then a minor, the mortgage deed as against him and his interest in the estate was not merely voidable; it was void and of no effect, and must be regarded as a mortgage deed to which he was not even an assenting party and as a mortgage deed which did not affect him or his interest in the estate.

Their Lordships will humbly advise His Majesty that the decrees of the High Court be affirmed and these appeals be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant :—*Pyke, Parrott & Co.*

Solicitor for the respondent Maharaj Singh :—*Douglas Grant.*

J. V. W.

APPELLATE CIVIL.

1912
January 15.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.

GOPI NARAIN AND OTHERS (DEFENDANTS) V. KUNJ BEHARI LAL

(PLAINTIFF) AND SHEO DAYAL (DEFENDANT).*

Act No. II of 1882 (Indian Trusts Act), section 88—Trust—Trustee entering into dealings in which his own interest may come into conflict with his duty as trustee—Purchase of mortgage deed comprising property belonging at the time of purchase to the trust.

A member of a body of trustees purchased for a very low price at an auction sale in execution of a simple money decree held by the trustees as such a mortgage bond comprising, amongst other property, a village of which two-thirds had been previously purchased by the author of the trust and formed part of the trust property. Neither the purchaser nor the trustees had obtained the leave of the court to bid. The auction purchaser claimed the purchase for himself and sought to enforce the mortgage by suit.

Held that the auction purchaser could not be allowed to do this, but must, on the contrary, be taken to have made the purchase for the benefit of the trust. All that he was entitled to was to be repaid the actual sum which he himself paid for the mortgage deed at the auction sale.

THE facts of this case were as follows :—

One Fateh Chand on the 19th of June, 1887, executed a mortgage in favour ostensibly of Abdul Kafil, but really in favour of

* First Appeal No. 132 of 1910 from a decree of Pitambar Joshi, Subordinate Judge of Mainpuri, dated the 8th of February, 1910.