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which is given by the decree in accordance with order XXXIV of the Code of Civil Procedure and section 90 of the Transfer of Property Act in the event of the proceeds of a sale proving insufficient, must be subject to the right of the respondents to raise any defence to the personal claim, such as one based on limitation which may prove open to them.

Appeal allowed.

Solicitors for the appellants: *Barrow, Rogers and Nevill.*

J. V. W.

LACHHMAN PRASAD AND OTHERS (PLAINTIFFS) *v.* SARNAM SINGH AND OTHERS (DEFENDANTS).

P. C.* 1917 *April*, 26.

33 ML/39

[On appeal from the High Court of Judicature at Allahabad.]

Hindu law—Joint Hindu family—Alienation of joint property of family governed by Mitakshara law—Mortgage not for family necessity or to pay antecedent debt—Suit on mortgage—Non-liability of sons and grandsons of mortgagors.

Where a mortgage had been made by some of the members of a Hindu joint family governed by the Mitakshara law who joined in borrowing Rs. 1,200 on the security of the property of the joint family of which they were the heads without the consent of their co-parceners, and it was found that the mortgage was *primâ facie* invalid as against the family property as being neither for an antecedent debt, nor for any proved necessity of the joint family.

Held that the mortgage could not be upheld on the doctrine laid down in the case of *Mahabeer Prasad* v *Ramyad Singh* (1), which was distinguishable on the ground that there were special circumstances in that case which did not exist in the present case, and it therefore did not lay down the general law.

The general law was laid down in *Madho Parshad* v. *Mehrban Singh* (2), which governed this and all other cases of the kind, and according to those principles the mortgage in suit was invalid as against the sons and grandsons of the mortgagors.

APPEAL No. 19 of 1915, from a judgement and decree (11th of December, 1912) of the High Court at Allahabad, which affirmed a judgement and decree (8th of August, 1911) of the court of the Subordinate Judge of Bareilly.

The main question for determination in this appeal was whether, in a suit brought against a Hindu mortgagor and his

* *Present*:—Viscount HALDANE, Lord ATKINSON, Sir JOHN EDGE, and Mr. AMEER ALI.

(1) (1873) 1 B. L. R., 190: 20 W. R., 192.

(2) (1890) I. L. R., 18 Calc., 157 (163): L.R., 17 I. A., 194 (196.)

sons and grandsons subject to the Mitakshara law, by the mortgagee, on a mortgage executed by the plaintiffs mortgagors alone hypothecating joint family property as security for a loan, the *onus* was on the sons and grandsons of the mortgagor to prove that the debt was incurred for immoral purposes, or on the mortgagee to prove that it was incurred for some family necessity or for a personal antecedent debt of the mortgagor.

The mortgage sued on was executed by Sarnam Singh, Ratan Singh and Kallu Singh, Hindus governed by the Mitakshara law, but separate in estate, on the 21st of September, 1885, in favour Lachhman Prasad, the plaintiff in the suit, and by it they hypothecated their respective rights and interests in certain villages called Rafiabad, Badri Kuian and Chandwa, in consideration of a loan of Rs. 1,200 with interest at 12 per cent. per annum, payable each year in the month of *Jeth*, and in default of such payment, it was to be added to the principal, and the mortgagors agreed to pay compound interest. The village of Chandwa had been purchased jointly by the mortgagees, and Badri Kuian in which they each had a small share, was an ancestral property. It was only with these two properties that the present appeal was concerned.

Payments were made from time to time by the mortgagors and their sons on account of principal and interest, the last of such payments being on the 1st of June, 1903. Ratan and Kallu died long before the present suit was instituted by Lachhman Prasad, the mortgagee, on the 21st of May, 1910.

The defendants were the surviving mortgagor Sarnam Singh and the members of the families of all the mortgagors. Sarnam Singh pleaded he was only a surety. The sons and grandsons of the mortgagors denied knowledge of the mortgage, and put the plaintiff to proof of it. They further pleaded that the mortgage was not binding on them unless it was shown to have been executed for family necessity. Other pleas were that the mortgage was not genuine or for consideration, and that if it were, it had been paid off.

The Subordinate Judge recorded the oral and documentary evidence adduced by the parties and held on the authority of

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the Full Bench decision in *Chandradeo Singh* v. *Mata Prasad* (1), that the mortgage bond in suit would be binding on the sons and grandsons if the plaintiff had proved that the loan was obtained for family necessity, or to meet an antecedent debt, but it had not been proved that any family necessity had existed for the loan, and the money had not been borrowed to pay an antecedent debt, and the bond was therefore not binding on the sons and grandsons. The Subordinate Judge further held that Sarnam Singh had joined in the bond as principal, and, whatever the arrangements might be amongst the mortgagors *inter se*, he would be liable to the plaintiff. All the property included in the mortgage must be liable. Personal liability could be considered when any application under order xxxiv, rule 6, of the Code of Civil Procedure of 1908, was made after the sale of the mortgaged properties.

The suit was consequently dismissed with costs. An appeal by the plaintiff to the High Court was heard by RICHARDS, C. J., and BANERJI, J., who affirmed the decision of the Subordinate Judge and dismissed the appeal with costs in the following judgement.

"This appeal arises out of a suit brought on foot of a mortgage. The defendants are one of the mortgagors and other members of the family of all the mortgagors. It is admitted that the property mortgaged was joint family property. We agree with the court below that the plaintiff failed to prove that the mortgage was made for family necessity. Assuming therefore, that the *onus* of proving necessity lay upon the plaintiff, the suit was properly dismissed. The question whether or not the *onus* of proving family necessity lies upon a person taking a mortgage of joint family property has been recently considered by a Full Bench of this Court in the case of *Chandradeo Singh* v. *Mata Prasad* (1). In that case the majority of the Court held that the *onus* lay upon the mortgagee. We feel bound by this decision, and must hold that the court below was right in dismissing the plaintiff's claim. Following the above ruling it was held in *Kali Shankar* v. *Nawab Singh* (2), that a member of a joint Hindu family, governed by the Mitakshara, cannot validly mortgage his undivided share in ancestral property held in coparcenary on his own private account without the consent of the co-sharers, and that consequently even his interest in the family property cannot be sold in enforcement of a mortgage which is not proved to have been made for family necessity."

(1) (1909) I. L. R., 31 All., 176. (2) (1909) I. L. R., 31 All., 507.

On this appeal, which was heard *ex parte*—

J. M. Parikh and *J. K. Roy* for the appellant contended that, though bound by the decision of the Board in *Sahu Ram Chandra* v. *Bhup Singh*(1), which affirmed the principle laid down in *Chandradeo Singh* v. *Mata Prasad* (2), that, there being no proof of family necessity for the loan or that it was taken to pay antecedent debt, the mortgage was not binding on the sons and grandsons, the appellant was entitled in equity to have relief granted him against the share of the mortgagor. Reference was made to *Mahabeer Prasad* v. *Ramyad Singh* (3). [Viscount HALDANE distinguished that case on the ground that the mortgagors had made a representation as to their powers to make the mortgage which created an estoppel, and the court thought it ought in equity to be carried out.] There was nothing in the report of that case to show much, if any, evidence of such representation; but the court held that the fact of giving the mortgage was a representation: that principle, it was submitted, should be applied in the present case. Reference was made to *Madho Parshad* v. *Mehrban Singh* (4), in which *Mahabeer Prasad* v. *Ramyad Singh* (3) was discussed, and it was said that the judges who decided it had justly considered that it was contrary to equity and good conscience that the mortgagors should keep both the money and the security. In the present case the mortgage was not void but only voidable. Had no objection to it been raised by the sons and grandsons, the court would have given the plaintiff a decree. When objection was taken the surviving mortgagor could have made an unequivocal declaration of intention to have his share of the mortgaged properties separated and so made available for the mortgagee. A decree could then have been made against his share alone, it being considered in equity as having been paritioned.

1917, April 26:—The judgement of their Lordships was delivered by Viscount HALDANE:—

In this case no difficult question of law arises, and their Lordships are perpared to intimate at once the advice which they will tender to His Majesty upon the appeal.

(1) (1917) I. L. R., 39 All., 437; L. R., 4 I. A., 126.
(2) (1909) I. L. R., 31 All., 176.
(3) (1873) 12 B. L. R., 90; 20 W. R., 192.
(4) (1890) I. L. R., 18 Calc., 157 (163); L. R., 17 I. A., 194 (196, 198), 198).

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It is a suit with regard to a mortgage made on the 21st of September, 1885, by three Hindus subject to the Mitakshara law who joined in borrowing Rs. 1,200 on the security of the property of the joint family of which they were the heads. There is nothing special in the terms of the mortgage, which do not go beyond what is stated. It is contended that although, according to the decisions of this Board, that mortgage is *primâ facie* invalid, as being for neither an antecedent debt nor for any proved necessity of the joint family, it still may be held to be valid on the doctrine laid down by the High Court of Calcutta in the case of *Mahabeer Prasad* v. *Ramyad Singh* (1). There, the head of a joint family and his son, who was of age, united in attempting to raise money. There was a younger son, also a member of the joint family, who was not of age and who did not, and could not, concur. The mortgage was declared bad, but the learned Judges who decided the case thought themselves at liberty to put a condition into the decree which in effect determined that an implied representation or undertaking given by the mortgagors that they had power to charge the joint family property, and would make good the representation by partition or otherwise, should receive effect, and accordingly they, in substance, order by their decree a partition of the property so that the separate shares to be obtained under the partition of the father and the son should be made payable to the mortgagees. Whether that particular case was rightly decided or not it is not necessary to consider here, because the learned Judges proceeded upon the footing that there had been the representation referred to. On looking at the facts, their Lordships agree with the observation of Mr. *Parikh* that there was very little, if any, evidence of such a representation, but that there was such a representation was the basis of the judgement, and, unless the learned Judges had held that an equity arose out of it, their judgement would have amounted to this, that for every mortgage by the head of a joint family the property of the joint family could be made available to the extent of the interest of the mortgagor. Now, whatever may happen when there are special circumstances such as there were in the case referred to, that is not the general

(1) (1873) 12 B. L. R., 90: 20 W. R., 192.

law. The general law is quite plainly laid down by Lord WATSON in delivering the judgement of this Board in the case of *Madho Parshad* v. *Mehrban Singh* (1), where he says, at p. 196, this:—

"Any one of several members of a joint family is entitled to require partition of ancestral property, and his demand to that effect, if it be not complied with, can be enforced by legal process. So long as his interest is indefinite, he is not in a position to dispose of it at his own hand and for his own purposes; but as soon as partition is made, he becomes the sole owner of his share, and has the same powers of disposal as if it had been his acquired property. The actual partition is not in all cases essential. An agreement by members of an undivided family to hold the joint property individually in definite shares, or the attachment of a member's undivided share in execution of a decree at the instance of his creditor, will be regarded as sufficient to support the alienation of a member's interest in the estate or a sale under the execution."

Now these are the principles which govern this and all other cases of the kind, and, according to these principles, there can be no doubt that the present mortgage is void. There were no such special circumstances as the learned Judges seem to find in the first case above quoted entitling them to impose terms upon the plaintiffs, and, whether Lord WATSON approved that case or not, which is not quite clear, he at all events said that it had no application which would affect the operation of the principles which he laid down as above quoted.

The result is that the mortgage in the present case is bad and the appeal fails, and their Lordships will humbly advise His Majesty that it should be dismissed with such costs as the respondents, not having appeared before this Board, may be entitled to.

Appeal dimissed.

Solicitor for the appellants: *Edward Dalgado.*

J. V. W

(1) (1890) I. L. R., 18 Calc., 157 (163): L.R., 17 I. A., 194 (196).