APPELLATE CIVIL.

Before Mr. Justice Tudball and Mr. Justice Muhammad Rafiq.

BRIJ NARAIN RAI (DEFENDANT) *v.* MANGAL PRASAD AND ANOTHER (PLAINTIFFS) AND SITA RAM AND ANOTHER (DEFENDANTS).*

1918 *October*, 28.

Hindu law—Mitakshara—Joint Hindu family—Mortgage of joint family property by father—Liability of sons—Antecedent debt—Family necessity—Burden of proof—Disputed mortgage executed to pay off earlier mortgages.

The joint ancestral estate of a Hindu family cannot be effectively sold or charged in such a manner as to bind the issue of the father, except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate.

Hence where it was sought by the sons to invalidate a decree for sale obtained by the mortgagee upon a mortgage of joint family property executed by the father, and it appeared that the mortgage in question had been executed to pay off two earlier mortgages of joint family property also executed by the father; it was *held* that it was for the defendant mortgagee to show that these earlier mortgages fell within the exception recognized by the Judicial Committee of the Privy Council in the case of *Sahu Ram Chandra* v. *Bhup Singh* (1).

THE facts of this case were briefly as follows:—

A Hindu father executed a mortgage of joint ancestral property in 1908, for Rs. 11,000, in order to pay off two prior mortgages created by himself, of 1905 and 1907 respectively. It was found that the money, with the exception of Rs. 735, was applied towards the said payment. It appeared that the mortgage of 1905 was partly in lieu of a prior mortgage and partly on account of parol and account-book debts. The mortgage of 1907 appeared partly to have been for account-book debts and partly for the satisfaction of a decree. In a suit to enforce the mortgage of 1908 the mortgagor and his two minor sons were impleaded as defendants, the minors' father being proposed as their guardian *ad litem*. Notice of the proposed guardianship was not served on the father, and he did not appear. The minors were living with their mother and were under her custody. No notice was issued to her. The central nazir was appointed by the Court as guardian *ad litem*, but no notice of the appointment was sent to the minors or to their mother, nor were any funds supplied to him to

* First Appeal No. 78 of 1916, from a decree of Kunwar Sen, Subordinate Judge of Ghazipur, dated the 23rd of December, 1915.

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enable him to defend the suit on behalf of the minors. No defence was put in on behalf of any of the defendants and the suit was decreed *ex parte* on the 27th of November, 1912. The mortgaged property being put up to sale, the minors brought a suit on the 13th of March, 1915, through their mother as their next friend, to have the *ex parte* decree set aside, on the allegations that they had no knowledge of the suit or decree until the sale proclamation took place, that they had not been duly represented by a lawfully appointed guardian in the mortgage suit and had, therefore, been prejudiced, and that the mortgage had been executed without legal necessity and was invalid. The defence was, mainly, that the central nazir had been duly appointed guardian of the minors by order of the Court, and that the mortgage was valid and binding on the sons, inasmuch as it was executed to pay off antecedent debts. The court of first instance held that the minors had not been properly represented in the mortgage suit and that at least a portion of the mortgage-money was not for antecedent debt or family necessity. The suit was decreed and the mortgage decree was set aside as null and void as against the minor plaintiffs. The defendant mortgagee appealed to the High Court.

Dr. *S. M. Sulaiman* (with Mr. *M. Ishaq Khan*) for the appellant:—

In the mortgage suit the minors were represented by the central nazir, who had been duly appointed their guardian *ad litem* by order of the court. Even if that appointment be deemed to have been for any reason invalid, the mortgage decree would not be vitiated thereby; for, the father and manager of the joint family was impleaded as defendant, and as he alone was sufficient to represent the whole family, the minor sons were unnecessary parties. The point is well settled, and it is only necessary to refer to the case of *Hori Lal* v. *Munman Kunwar* (1). The mortgagee in his suit need not have impleaded the minor sons at all; and it cannot be said that by impleading them he put himself in a worse position than if they had not been made parties to the suit. If the minors were not properly represented, it amounted to no more than that they were not

(1) (1912) I. L. R., 34 All., 540.

parties at all. A decree obtained against the father alone could be executed against the joint family property, except only in the case where the debt had been incurred for immoral purposes The latest authority is that of *Sripat Singh Dugar* v. *Prodyot Kumar Tagore* (1). The plaintiffs in the present case have failed to make out that the money was borrowed for immoral purposes. Indeed, the mortgage in question having been incurred for the purpose of paying off antecedent debts it is binding upon the sons and they have not been prejudiced in any way even if they were not properly represented in the former suit. The prior mortgages were "antecedent debts" in accordance with the interpretation of the term laid down by the Privy Council in the case of *Sahu Ram Chandra* v. *Bhup Singh* (2). The prior debts of 1905 and 1907 were entirely dissociated and distinct from the mortgage now in question; those loans were not advanced with a view to obtaining the present mortgage and merely to give a colourable antecedency to it. They satisfy the tests laid down by STANLEY, C. J., in the case of *Chandradeo Singh* v. *Mata Prasad* (3), and his judgment in that case is repeatedly referred to with approval by their Lordships of the Privy Council in the case of *Sahu Ram Chandra* v. *Bhup Singh* mentioned above (2). The concluding passages of the Privy Council judgment in terms lay down exactly the same tests of an antecedent debt.

The Privy Council judgment has been discussed in the following cases:—*Peda Venkanna* v. *Sreenivasa Deekshatulu* (4) *Ramman Lal* v. *Ram Gopal* (5) and *Mohanta Gadadhar Ramanuj Das* v. *Ghana Shyam Das* (6). In none of them has that judgment been understood as laying down that a prior debt, if secured by a simple mortgage, cannot, by reason of its being so secured, be an "antecedent debt" with respect to a subsequent and entirely distinct mortgage executed for the purpose of paying off the prior debt. Further, in the Privy Council case the suit was brought after lapse of six years from the date of the mortgage; and no question of the sons' pious obligation arose, because the

(1) (1916) I. L. R., 44 Calc., 524.
(2) (1917) I. L. R., 39 All., 417.
(3) (1909) I. L. R., 31 All., 176 (190).
(4) (1917) I. L. R., 41 Mad., 136.
(5) (1918) 21 Oudh Cases, 200 (208).
(6) (1917) 3 Pat., L. J., 533.

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personal liability of the father had gone. Their Lordships were only considering a case in which the personal liability had been extinguished. It was not necessary for them to express any opinion as to whether the mortgagee could or could not enforce against the sons their pious obligation if he brought the suit within six years, as in the present case. In the view that the prior debts, so far as they were secured by mortgages, could not be "antecedent debts" it will be necessary to frame and try an issue as to what portions of the prior debts were simple money debts and what portions were mortgage debts.

Munshi *Kamalakanta Varma* (with The Hon'ble Dr. *Tej Bahadur Sapru*), for the respondents:—

In the former suit the appointment of the central nazir as guardian *ad litem* of the minors was made in an illegal manner, and the minors were not properly represented; *Bhagwan Dayal* v. *Param Sukh* (1). The facts of that case were exactly similar to those of the present case, and it was held that under such circumstances the minors would *primâ facie* be prejudiced, as they had no opportunity of putting forward a defence to the suit, and the suit went entirely undefended. And on that ground alone the Judges deciding that case gave the minors a declaration that the *ex parte* decree was null and void against them, without at all entering into the question whether the mortgage was or was not of such a character as to be binding on the minors. Reference was made to the case of *Nathu Ram* v. *Jwala Prasad* (2). On the authority of these cases it is submitted that it would be proper to dismiss the appeal without sending any issues for trial, and leave the other party to seek his remedy afresh. Further, it not being the appellant's case that the mortgage in his favour was executed for family benefit or legal necessity, the only question is whether that mortgage was executed to pay off "antecedent debts"; and as it was executed in order to pay off two prior mortgages, the sole question is whether the prior mortgages could be called "antecedent debts" within the meaning of the Privy Council decision in *Sahu Ram Chandra* v. *Bhup Singh* (3). The

(1) (1915) I. L. R., 37 All., 179. (2) (1914) 12 A. L. J., Reporter's diary, p. 24.

(3) (1917) I. L. R., 39 All., 437.

further question whether or not those two prior mortgages were, in their turn, executed in order to satisfy still older "antecedent debts" does not arise. There is nothing in the Privy Council case to warrant the appellant's asking the court to go behind those two prior mortgages and enter into that further question. The issue, therefore, which the appellant now seeks to have tried does not arise.

Dr. *S. M. Sulaiman*, was not heard in reply.

TUDBALL and MUHAMMAD RAFIQ, JJ.:—This appeal, which is by the defendant, arises out of a suit brought by the two minor plaintiffs, seeking to have set aside an *ex parte* decree obtained by the defendant on the 27th of November, 1912, in a suit brought against them and their father on the basis of a mortgage deed, dated the 4th of March, 1908, which their father had executed in lieu of Rs. 11,000, and in which he had mortgaged the joint ancestral property. The father Sita Ram Rai was also made a defendant to the suit. The plaintiffs in this case pleaded that they had not been duly represented by a properly appointed guardian in the previous litigation; that they had, therefore, been prejudiced and that the decree should be set aside as null and void. The defendant appellant, who is the appellant now before us, pleaded that the minors had been properly represented in the previous litigation; further, that the bond of the 4th of March, 1908, was a genuine deed for consideration and was executed to pay off antecedent debts; that the mortgage was therefore binding on the plaintiffs, and they had no right to impeach it as the sons of their father. There was a further plea that the property was not ancestral property, but the self-acquired property of the father. The court below held that the property in question was the ancestral property of the family; that the minors had not been properly represented in the previous litigation. Further, that out of the consideration of Rs. 11,000, Rs. 735 were not for antecedent debt or family necessity, and, this being so, the whole mortgage was not binding upon the plaintiffs in any way. It, therefore, decreed the suit and set aside the previous decree as null and void as against these plaintiffs. In the memorandum of appeal filed in this Court the first ground of appeal was that it had not been established

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that the property in suit was the ancestral property of the plaintiffs and that therefore they were not in a position to question the mortgage. In regard to this, it is admitted before us that with the exception of one small portion of oral evidence, there is no evidence on the record to support the plea. Furthermore, the judgment of the court below shows that this plea was not pressed in that court. We, therefore, must hold on this point against the appellant, and for the purpose of this appeal the property must be deemed to be ancestral property.

The next point pleaded is that the plaintiffs respondents were duly represented according to law in the course of the former litigation. On this point we find it impossible in any way to differ from the decision arrived at in the court below. In the former litigation the present appellant who was then the plaintiff, asked the court to appoint the father, the guardian of the minors. It is obvious in a litigation of this description that the father's interests and the son's interests are not one. Moreover, in the present instance the father was not appointed guardian. The minors had a mother alive and they were under her custody. No notice whatsoever was issued to her. Notice was issued to the minors themselves. In the end the central nazir was appointed by the court as guardian *ad litem* of the minors, but no notice of his proposed appointment was issued either to the minors or their mother. No funds were supplied to the nazir by the plaintiffs to enable him to take steps to protect the minors' interests. No defence was put in on behalf of the minors, and the suit was decreed *ex parte* against them. It is quite clear that the provisions of order XXXII, rules 3 and 4, were not complied with and the minors had no opportunity of putting forward a defence. On this point we agree with the court below. The next plea taken is that, the plaintiffs' father having been the manager and the head of the family, and the money having been borrowed by him in lieu of antecedent debts, the mortgage was binding upon the sons, except perhaps for the small sum of Rs. 735, which was but a small proportion of the total debt of Rs. 11,000 incurred by the father. It is urged that the mortgage having been made in lieu of antecedent debts due from the father, the sons were bound by the mortgage

and therefore they had not been at all prejudiced and the decree should not be set aside except in respect of the small sum mentioned above. The mortgage-deed in suit, executed on the 4th of March, 1908 (page 20A), was executed by the father and a loan of Rs. 11,000 was taken to pay off the debts due under two mortgage deeds, one of the 12th of December, 1905, in favour of Sheikh Abdur Rahim, and Haji Abdur Rahman, and the other of the 19th of June, 1907, in favour of Hafiz Wali-ullah and Sheikh Akbar Ali. The whole sum of Rs. 11,000 was paid in cash to the mortgagor Sita Ram Rai, and the evidence shows that the money was actually utilized in paying off these prior mortgages. In view of the law laid down by their Lordships of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (1), *primâ facie* the mortgage which is now in dispute was not executed for the payment of antecedent debts. In their judgment their Lordships remarked as follows :—

"In their Lordships' opinion these expressions, which have been the subject of so much difference of legal opinion, do not give any countenance to the idea that the joint family estate can be effectively sold or charged in such a manner as to bind the issue of the father, except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. The exception being allowed, as in the state of the authorities it must be, it appears to their Lordships to apply, *and to apply only* to the case where the father's debts have been incurred irrespective of the credit obtainable from immovable assets which do not personally belong to him, but are joint family property."

In the present case the present mortgage was created in order to pay off two prior mortgages, that is, debts which had been incurred *primâ facie* on the security of the joint family property. If the facts remain at this and go no further, we shall be constrained to hold, in view of the decision of their Lordships mentioned above, that the present mortgage was not created to pay off antecedent debts and we shall have to dismiss this appeal without any further consideration. It is urged, however, that the two prior mortgages may well have been mortgages which were binding upon the estate in that they had been created for antecedent debts within the definition thereof given by their Lordships and quoted above. It is urged that if these mortgages were good mortgages binding upon the

(1) (1917) I. L. R., 39 All., 437.

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estate, then the present mortgage will also be equally good as it merely replaces those two. In other words, that the present mortgagee would be entitled to take his stand upon the mortgages of 1905 and 1907 and to recover whatever was legally due from the estate. It is further pointed out that under the law as it was understood previous to the decision in *Sahu Ram Chandra* v. *Bhup Singh* (1), the present mortgage would be held to be a good one and binding upon the estate; that the present mortgagee was a person who had no connection in any way with the former mortgages; that he advanced his money in good faith after due inquiry as to the existence of the prior debts and taking the law as it was understood previously, he was justified in advancing his money on the security of the property. We think that there is considerable force in this argument and that in view of the fact that the present case was decided by the court below some two years or so prior to the decision in *Sahu Ram Chandra* v. *Bhup Singh* (1), we ought to allow the defendant an opportunity of establishing the fact that the two prior mortgages of 1905 and 1907 were binding upon the estate in that they were executed for antecedent debts of the father. It must be clearly understood that the words "antecedent debts" must be read within the clear meaning of the ruling in *Sahu Ram Chandra* v. *Bhup Singh* (1). It would be for the present appellant to show and prove that the debts incurred under those mortgages were incurred to discharge not only obligations antecedently incurred, but incurred wholly irrespective of the ownership of the joint family property, in other words, that they were personal debts incurred by the father for his own purpose and apart from the security of the joint family property. It will be open to the plaintiffs in the present case to establish the fact that these antecedent debts were incurred for immoral purposes or for purposes which would make them not binding upon them. For this purpose we, therefore, remand the case to the court below to take any further evidence adduced by the parties on this point. The additional evidence recorded by the court below together with its opinion thereon will be submitted to this Court.

Cause remanded.

(1) (1917) I. L. R., 39 All., 437.