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should be set aside for the trust, one-third of the remainder appropriated to himself, one-third of the remainder handed to Mubarak Fatima and the final one-third made over to the two sons of Fida Husain. Between themselves they should agree as to the way in which the one-third allocated to the trust should be dealt with.

BY THE COURT:—We allow the appeal, set aside the decree of this Court and restore that of the lower appellate court with costs of both the hearings in this Court.

Appeal decreed.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

RAM SARUP AND ANOTHER (PLAINTIFFS) *v.* BHARAT SINGH AND OTHERS (DEFENDANTS).*

1921 *May*, 31.

Hindu law—Joint Hindu family—Mortgages executed by father—"Antecedent debt"—Civil Procedure Code, 1908, order XXI, rule 66—Sale proclamation not mentioning existence of decree-holder's mortgage—Whether mortgage enforceable against auction purchaser—Estoppel.

The father of a joint Hindu family first borrowed Rs. 500 on a promissory note. It was stated in the note that the money was borrowed in order that it might form part of a mortgage thereafter to be executed. He then, having borrowed some more money from the mortgagee, executed a mortgage of the joint family property for Rs. 1,000. There was no satisfactory evidence that any of the money purporting to be secured by this mortgage was borrowed for family necessities or that any part of the debt was incurred apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. Subsequently, the mortgagor borrowed more money on promissory notes and executed a second mortgage for Rs. 5,000 consolidating all the previous debts.

Held, on suit by the mortgagee for sale on the basis of the second mortgage, that it was not proved that any of the money purporting to be secured by this mortgage was an "antecedent debt" within the meaning of the ruling in *Sahu Ram Chandra* v. *Bhup Singh* (1).

Held also, that where the plaintiffs, mortgagees, who also held a simple money decree against the mortgagors, applied for the sale of certain property of the judgment-debtor, expressly mentioning that it was subject to their mortgage, but, for some reason unconnected with any action or statement of the plaintiffs, the mortgage was not notified in the sale proclamation, the plaintiffs were not thereby precluded from subsequently enforcing their mortgage against the auction purchasers.

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* First Appeal No. 393 of 1918 from a decree of Rama Das, Subordinate Judge of Farrukhabad, dated the 30th of August, 1918.

(1) (1917) I. L. R., 39 All., 487.

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THE facts of this case are fully stated in the judgment of the Court.

Munshi *Gulzari Lal*, Babu *Piari Lal Banerji* and Munshi *Beni Bahadur*, for the appellants.

Dr. *Surendra Nath Sen* and Dr. *Kailas Nath Katju*, for the respondents.

MEARS, C. J., and BANERJI, J.:—This appeal arises out of a suit brought by the appellants to enforce a mortgage executed by one Lal Singh on the 17th of June, 1912. The amount secured by the mortgage was Rs. 5,000 and the property mortgaged consisted of shares in two villages, namely, Sarjupur and Ahmlapur. The first defendant is the son of Lal Singh, who is now dead. The other defendants are purchasers of the mortgaged property in execution of simple money decrees. The mortgage in question was executed for various sums of money, which, according to the recital in the mortgage-deed, consisted first of money due upon a prior mortgage of the 5th of February, 1912, for Rs. 1,000. There were six promissory notes commencing from the 17th of February, 1912, to the 13th of June, 1912, and the amounts of these promissory notes were included in the consideration for the mortgage in question. There was also a further sum of Rs. 210-8-0 alleged to be the amount of parole-debts due by the mortgagor. Rs. 100 was stated to have been received in cash before the execution of the mortgage and Rs. 2,142 was paid at the time of registration. As to the first item of Rs. 1,000, which was secured by the mortgage of the 5th of February, 1912, the court below held that, in view of the ruling of their Lordships of the Privy Council in the case of *Sahu Ram Chandra* v. *Bhup Singh* (1), the aforesaid mortgage could not be treated as an antecedent debt and therefore it was the duty of the plaintiff to prove that this mortgage was effected for family necessity. The aforesaid mortgage was executed in lieu of an amount of Rs. 500 due upon a promissory note, dated the 11th of January, 1912. This promissory note states that the money was borrowed for the payment of Government revenue and to meet other expenses. Evidence has been given to prove that Lal Singh was arrested by tahsil peons as he was in default

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

in the payment of Government revenue, and that with the money borrowed he paid the amount of revenue due by him. As stated above the promissory note itself recites that Rs. 500 was borrowed not only for the payment of Government revenue but also for other expenses. No evidence has been given to prove how much money was required for payment of Government revenue and how much was needed for family expenses. There is also no evidence to prove that what was alleged to have been required for family expenses was in reality needed to meet the expenses of the family. Therefore, if we were to consider the item of Rs. 500 apart from the mortgage, and if we were to consider whether that amount was borrowed for family necessity, the evidence falls far short of proving the existence of such necessity. The promissory note for Rs. 500 itself recites that this money was taken in order that it might form part of the mortgage which was to be subsequently executed, *i. e.*, for the mortgage of Rs. 1,000 executed on the 5th of February, 1912. So that this sum of Rs. 500 cannot by itself be deemed to be an antecedent debt. As for the balance of the sum secured by the mortgage for Rs. 1,000, no evidence was given to prove that that amount was required for family purposes. It is, however, contended that there was a covenant for personal liability in the mortgage-deed of the 5th of February, 1912, and that in consequence of this personal covenant the debt must be deemed to be an antecedent debt. This contention is in our opinion contrary to the view of their Lordships of the Privy Council in the case to which we have already referred. In the judgment in that case their Lordships observe, at page 447, that an antecedent debt which would be binding on the members of a joint family or on the son of the mortgagor must be "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." Again, their Lordships held that a debt to be an antecedent debt must be one "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." It is thus manifest that if the debt is incurred without the aid of family

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property, it would be an antecedent debt; but if the debt is not wholly irrespective of the credit obtainable by reason of the ownership of family property or is not wholly apart from the ownership of that property, it would not be an antecedent debt. Their Lordships observed in their judgment that they felt it necessary to lay down the law on the subject in order to settle the conflicting rulings which existed on the point in this country. We are, therefore, bound to give effect to the ruling of their Lordships, although it may be that the question which their Lordships decided did not directly arise in the case before them. In this view we are unable to agree with the decision of the Judicial Commissioners of Lucknow in the case of *Ramman Lal* v. *Ram Gopal* (1), on which reliance was placed on behalf of the appellants. As the mortgage for Rs. 1,000 was not executed wholly apart from the security of family property and irrespective of the credit which the mortgagor obtained by reason of the ownership of joint family assets, it cannot be held that, because the document contained a personal covenant, the debt secured by it should be deemed to be an antecedent debt.

The lower court was therefore right in excluding from consideration the mortgage of the 5th of February, 1912, as forming part of the consideration for the mortgage now in dispute.

As to the amount of the six promissory notes which formed part of the consideration for the mortgage now sued upon, the last promissory note, namely, the one, dated the 13th of June, 1912, for Rs. 250 was executed with a view that this amount should form part of the amount of the mortgage of the 17th of June, 1912, that is, the mortgage now in suit. The amount of this sixth promissory note should therefore be eliminated from consideration for the purpose of determining whether the amounts of the promissory notes should be deemed to be antecedent debts. The six promissory notes have been fully proved to be genuine and it has also been proved that the amounts mentioned in them had been advanced to Lal Singh, the borrower. The court below assumes that these promissory notes were executed and the amounts of them borrowed with the ultimate object of including them in a mortgage which was then in

(1) (1918) 21 Oud Cases, 200.

contemplation. There is no evidence to justify this conclusion. It is true that in the promissory notes there was no provision for payment of interest, but as the terms were short it may be that the creditor did not insist upon interest being paid on some of the promissory notes. As stated above, there is no evidence that at the time that the money was advanced there was any intention to consolidate these debts into a mortgage to be executed subsequently. We are, therefore, unable to agree with the court below that the amounts of the first five promissory notes should not be deemed to be antecedent debts.

The learned advocate for the respondents contended that the debts secured by the five promissory notes were taken for purposes of immorality, but he has failed to satisfy us that any one of the said amounts was borrowed for such a purpose. General evidence of immoral character or misconduct is insufficient to prove that the particular debts in question were debts tainted with immorality. In our opinion, therefore, the amount secured by the five promissory notes formed valid consideration for the mortgage now in suit.

As for the sum of Rs. 250 which was secured by the sixth promissory note, namely, the one dated the 13th of June, 1912, the plaintiffs were bound to prove that this money was required and was taken for family purposes. The court below has found, and this finding has not been challenged, that with the exception of about Rs. 16 the remainder of the money was required for payment of government revenue and in fact was paid as government revenue immediately after the loan was taken. The court below has disallowed this sum of about Rs. 16 because it says that it has not been proved that this sum was applied to any particular purpose. It was not the duty of the creditor to see to the application of the money but as already stated, he did see that the bulk of this money was appropriated towards the payment of government revenue, and this small amount must have been spent on incidental expenses necessary for the purpose of depositing the revenue. We think the court below ought not to have disallowed this small sum of Rs. 16.

Mr. *Gulzari Lal* on behalf of the appellants has admitted that the amount of parole debts mentioned in the mortgage-deed has

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not been proved and was also not proved to have been borrowed for any family necessity. The court below has allowed Rs. 100 as costs of the execution and registration of the mortgage.

There remains then the sum of Rs. 2,142 which was paid at the time of registration. Of this sum Rs. 2,009-15-8 was paid for the purpose of getting an auction sale of the family property set aside, and the court below has allowed this sum to the plaintiffs. But it has disallowed Rs. 132-0-4 on the ground that it had not been shown that that particular sum had been expended for any justifiable purpose. We think that the full sum of Rs. 2,142 ought to have been allowed, inasmuch as for the purpose of obtaining a reversal of the sale which had taken place and in connection with which the sum of Rs. 2,009-15-8 was deposited incidental expenses had to be incurred such as pleaders' fee and other expenses, and those expenses ought to have been taken into account, so that when the creditor advanced Rs. 2,142 he had made sufficient inquiries and there was sufficient justification for his making the advance in the *bond fide* belief that the whole sum was required for the purpose of getting a sale of the family property set aside.

The result of these findings is that in addition to the sum of Rs. 2,530-1-8, which the court below has allowed to the plaintiffs, a further sum has been proved to have formed proper consideration for the mortgage and should have been allowed by the court below. That additional sum is Rs. 1,111-14-4, which, with Rs. 2,530-1-8 allowed by the court below, totals Rs. 3,642.

The court below has reduced the rate of interest mentioned in the mortgage-deed from 18 per cent. compound interest to 9 per cent. compound interest. It was undoubtedly for the plaintiffs to prove that it was necessary for Lal Singh to borrow money at this high rate of interest, and, unless the plaintiffs could do so, they were not entitled to claim that the mortgage should be enforced for this exorbitant rate of interest. The property which was given as security for the mortgage was ample and of sufficient value to secure a loan of Rs. 5,000. It appears that in 1909 Lal Singh could obtain a loan on mortgage of his property which bore interest at the rate of 4½ per cent. per annum. It is true that subsequently he borrowed money

from one of the defendants themselves on interest at 24 per cent. per annum but that was an unsecured debt, and the payment of interest at that high rate for a debt of that character was no criterion for judging of the necessity of borrowing on the mortgage of property of sufficient value at compound interest at the rate of 18 per cent. with half yearly rests. We think that in these circumstances in the absence of evidence proving that Lal Singh could not obtain a loan except at a high rate of interest, the court would be justified in reducing the rate of interest. The court below has in our opinion allowed a rate of interest which seems to us to be low. We think the plaintiffs would be fully compensated for the money advanced by them if we allowed them simple interest at the rate of 12 per cent per. annum and to this extent we should modify the decree of the court below as to the rate of interest.

Only one more question remains to be determined, and that is the question whether the court below was justified in exempting from the claim the share in the village of Sarjupur which was purchased by the respondent, Madan Lal. It appears that the mortgaged share in that village was sold by auction in execution of a simple money decree obtained by the present plaintiffs. The court below has held that the plaintiffs were estopped from enforcing their mortgage on the property purchased by Madan Lal, on the ground that in the proclamation for sale of that village in execution of the plaintiffs' decree no mention of their mortgage was made. We may state at the outset that in the written statement the defendants attributed to the plaintiffs fraud, collusion and misconduct. Of this no evidence whatever was given. But on behalf of Madan Lal it was urged that the plaintiffs were estopped from claiming the sale of this village. We find that in the application for execution the plaintiffs distinctly stated that the property which they sought to sell for the realization of the amount of their simple money decree was subject to the mortgage now in dispute. It it thus obvious that what they sought to sell was the equity of redemption of the mortgage of Lal Singh and not the entire property itself. By some mistake of the court, or its officer, mention of this mortgage was omitted from the proclamation of

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sale which was finally issued. It is urged that under order XXI, rule 66, it was the duty of the plaintiffs decree-holders, to have appeared in court and to have informed the court that there was a mortgage on the property, and that it was their duty to have that information mentioned in the proclamation. In the first place it has not been shown that the plaintiffs decree-holders had notice of the date on which the proclamation for sale was to be settled. In the next place we are not aware what kind of notice was issued to them. Furthermore, it does not appear that they did any act from which it may be inferred that they made a misrepresentation which induced the auction purchaser to believe that the property which he was purchasing was free from any incumbrance. No evidence has been given to show that the decree-holders were present at the time when the auction sale took place or at the time when the proclamation of sale was prepared. We are, therefore, unable to hold that the plaintiffs were estopped from putting forward their mortgage as against the auction purchaser. A number of cases were cited to us, but those were cases in which the decree-holder had not, in his application for execution, mentioned that the property was subject to a mortgage and had in substance applied for the sale of the equity of redemption only. The case which came nearest to the present case is that of *Nursing Narain Singh* v. *Roghoobur Singh* (1). But in that case also the application for execution did not make any mention of the mortgage. The other cases which were cited by Dr. *Katju*, and which we need not refer to in detail, were cases in which the decree-holder deliberately concealed the incumbrance which existed in his favour. In those cases it was held that the plaintiff was estopped from enforcing that incumbrance as against the auction purchaser. This case is, therefore, distinguishable from those cases and in our opinion the plaintiffs are entitled to enforce their mortgage against the village of Sarjupur.

It appears that the share in that village is worth much more than Rs. 1,900 for which Madan Lal purchased it. From this a reasonable inference arises that when Madan Lal purchased the share he purchased it with the knowlege that he was only

1) (1884) I. L. R., 10 Calc., 609.

purchasing the equity of redemption and not the whole property.

There are objections on behalf of two of the respondents, one relating to interest and the other relating to costs. In view of what we have held above the question of interest does not arise as for the purposes of the decree which we are about to pass in this case it will be necessary to calculate interest upon the amount which we have held to be payable to the plaintiffs and that interest should be calculated at the rate of 12 per cent. per annum simple interest. As regards costs we think the parties should pay and receive costs proportionately. To that extent the objection should be allowed.

The result is that we allow the appeal in part, vary the decree of the court below and make a decree in the plaintiffs' favour for Rs. 3,642 principal with simple interest at the rate of 12 per cent. per annum from the date of the mortgage to the date fixed for payment and thereafter at 6 per cent. per annum till payment. We allow six months from this date for payment of the mortgage money. We also direct that the amount found due should be recovered by sale of the property comprised in the mortgage in favour of the plaintiffs. The parties will pay and receive costs in both courts in proportion to failure and success. In other respects we affirm the decree of the court below.

Decree modified.

Before Mr. Justice Tudball and Mr. Justice Sulaiman.

BAIJNATH DAS (PLAINTIFF) *v.* BISHAN DEVI AND ANOTHER (DEFENDANTS).*

1921 *June*, 14.

Civil Procedure Code, 1908, *section* 66—*Hindu law—Joint Hindu family—Status of females in a joint Hindu family—Property purchased* benami *by father in the name of his wife.*

Certain property was purchased at an auction sale held in execution of a decree by the father in a joint Hindu family *benami* in the name of his wife. After the death of the father, one of the sons sued for a declaration that the property so purchased was joint family property, having been purchased from joint family funds in the name of a member of the family.

Held that, females in a joint Hindu family not being members of the family in the sense of having a right to a share in the family property, the

*First Appeal No. 69 of 1919 from a decree of Preo Nath Ghose, Subordinate Judge of Bareilly, dated the 19th of November, 1918.