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the plaintiff had allowed it to be sold as non-ancestral. This appeal fails and we dismiss it accordingly with costs.

Appeal dismissed.

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February, 9.

Before Mr. Justice Piggott and Mr. Justice Walsh

SURAJ PRASAD (DEFENDANT) *v.* MAKHAN LAL AND ANOTHER (PLAINTIFFS) AND MUSAMMAT KAMLA DEVI (DEFENDANT.)*

Hindu law—Joint Hindu family—Mortgage by father to pay off prior mortgage executed before the birth of his only son—Antecedent debt—Legal necessity.

In 1906, a Hindu who had a son living, executed a mortgage of the joint family property for Rs. 8,000. Of this sum Rs. 3,100 went to pay off a prior mortgage on the property executed by the father before his son was born and Rs. 800 was due to the prior mortgagee on a promissory note. The remainder was paid in cash, and it was found that this portion of the mortgage debt was undoubtedly borrowed for legal necessity. After the death of the father, the mortgagees sued the son and other persons interested, or supposed to be interested, in the mortgaged property on their mortgage.

Held that it was not open to the son to plead that there was no legal necessity to support that part of the mortgage debt which was incurred for the purpose of paying off the prior mortgage. *Sahu Ram Chandra* v. *Bhup Singh* (1) and *Ram Sarup* v. *Bharat Singh* (2) discussed. *Chuttan Lal* v. *Kallu* (3) referred to.

THE facts of this case are fully stated in the judgment of PIGGOTT, J.

Munshi *Narain Prasad Ashthana*, for the appellant.

Munshi *Gulzari Lal* and Babu *Piari Lal Banerji*, for the respondents.

PIGGOTT, J.—The suit out of which this appeal arises was brought to enforce a mortgage-deed of the 7th of June, 1906. The executants were Reoti Prasad, his step-mother Musammat Man Kunwar and his brother's widow Musammat Hukam Kunwar. It is fully established, and has been practically admitted before us in argument, that the whole of the property affected by the mortgage was the property of Reoti Prasad. The ladies concerned were simply living with him as female members of a joint undivided Hindu family in the enjoyment of their right

* First Appeal No. 242 of 1919, from a decree of Ali Ausat, Subordinate Judge of Aligarh, dated the 13th of December, 1918.

(1) (1917) I. L. R., 39 All., 437. (2) (1921) I. L. R., 43 All., 703.
(3) (1910) I. L. R., 33 All., 283.

of maintenance. It so happened, however, that their names had been shown in the village papers in respect of fractional shares in the property. On the case as admitted before us, we must take it that these entries had in fact been made as a mere formality out of consideration for the feelings of the two widows, and that the property was Reoti Prasad's. The consequence, however, was that the mortgagee, before entering into the transaction, insisted upon execution of the deed by the two widows as well as by Reoti Prasad. On the date of the institution of this suit both the widow ladies who joined in executing the bond were dead; so also was Reoti Prasad. The suit was brought against Suraj Prasad, minor son of Reoti Prasad, and his mother Musammat Kamla Devi, the widow of Reoti Prasad, was formally impleaded as an additional defendant in case any question might arise as to her rights. In reply to the suit the defendant put the plaintiffs to proof of execution, but this has been fully established and is no longer in question in appeal. The point for determination in appeal is whether the debt represented by this bond was incurred by Reoti Prasad alone or by Reoti Prasad and the two widows jointly, and whether as a matter of law the money paid as consideration for this bond was taken by Reoti Prasad in whole or in part for family necessity, so as to make the transaction binding upon the minor appellant. The court below having decided all the questions raised in favour of the plaintiffs, it is the minor Suraj Prasad who appeals to this Court. The first question we have to consider is whether the whole of the consideration was received by Reoti Prasad. According to the bond itself a sum of Rs. 3,900 was left with Budh Sen for payment to a creditor named Hardeo Das. The balance of Rs. 4,100 was paid over in cash at registration. It is in evidence that it was formally paid to the two ladies. There is also a great deal of evidence to show that at about this time Reoti Prasad was making a number of payments urgently necessary on account of Government revenue and to meet other debts. We have already pointed out that the whole of the property affected by the mortgage was Reoti Prasad's. On this state of facts, we think the court below was abundantly justified in finding that the whole of the consideration, including the sum of Rs. 4,100 paid in cash, reached the hands of Reoti Prasad

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and that the payment of this cash to the two widow ladies at the time of registration was as much a matter of form and precaution as the entry of the ladies' names in the village papers and their appearance as joint executants of the bond in suit. There remains the question of legal necessity for the alienation. Of the debt due to Hardeo Das, a sum of Rs. 3,100 was due upon a previous mortgage executed in his favour by Reoti Prasad alone on the 12th of June, 1901. The remainder was due on a promissory note. There is oral evidence, which has been accepted by the court below and which we see no reason to distrust, to prove that Hardeo Das received payment both on his mortgage and in respect of the unsecured debt. This evidence being accepted, the unsecured debt due to Hardeo Das stands beyond question as an antecedent debt for the payment of which Reoti Prasad was entitled to hypothecate the joint family property in his hands. The question of the sum of Rs. 3,100 paid in satisfaction of the mortgage of the 12th of June, 1901, has been strenuously argued before us. We have been referred to the decision of their Lordships of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (1), and more particularly to the manner in which that pronouncement has been interpreted in subsequent decisions of this Court, down to the case of *Ram Sarup* v. *Bharat Singh* (2). I do not feel it incumbent upon me in the present case to discuss or criticize the decision of another Bench of this Court above referred to. I take the liberty of saying only this much that, with all respect to the learned Judges concerned, I entertain some suspicion that the principles laid down by their Lordships of the Privy Council have received a considerable extension at the hands of this Court in the case above referred to. I do not see why stress should be thrown entirely upon the propositions of law laid down by their Lordships in *Sahu Ram Chandra* v. *Bhup Singh* (1) at page 447 of the report, to the entire ignoring of the question discussed in two previous pages, 443 and 444, regarding the pious duty thrown upon the sons and grandsons to discharge their father's debts. Their Lordships expressly noted that in the case before them the argument founded upon this pious obligation, as such, failed by reason of the fact that they were dealing

(1) (1917) I. L. R., 39 All., 437. (2) (1921) I. L. R., 43 All., 703.

with a case in which the father was still alive when the suit was brought by which it was sought to bind the rights of the sons in the joint family property. In a case like the present, in which the son is being sued after the death of the father, it seems clearly necessary that this question should be taken up and considered and decided (if it is to be decided against the creditor) on some other ground than that upon which it was disposed of in the case of *Sahu Ram Chandra* v. *Bhup Singh* (1). At the same time I am satisfied that the case now before us is clearly distinguishable from that of *Ram Sarup* v. *Bharat Singh* (2), so that what I have said above regarding that decision may be taken as a personal expression of opinion not affecting the result of the present appeal. According to the plaint Suraj Prasad's age in the month of June, 1918, when this suit was instituted, was about 16 years. If so, he was born in or about the month of June, 1902. A more reliable piece of evidence as to his age is to be found in the guardianship certificate reproduced at page R. 15 of our printed book. According to this certificate Suraj Prasad was to attain the age of majority under the Guardians and Wards Act (VIII of 1890), that is to say, he was to complete 21 years of age, on the 5th of February, 1925. Assuming this piece of evidence to be correct, he was born in February, 1904; in any case, he was not in existence when his father hypothecated the joint family property in favour of Hardeo Das on the 12th of June, 1901, in consideration for a loan of Rs. 2,000. If the suit were on the bond of Hardeo Das, the appellant, Suraj Prasad, would not be entitled to contest the necessity for the alienation in question. On this point it is sufficient to refer to the decision of this Court in *Chuttan Lal* v. *Kallu* (3). In the year 1901, therefore, Hardeo Das was not dealing with Reoti Prasad as the manager of a joint Hindu family consisting of himself and a minor son, or as a trustee for the interests of that son. Reoti Prasad was at that time the sole owner of the property which he hypothecated to Hardeo Das along with his covenant to repay the loan. Under these circumstances it seems to me clear that the question of legal necessity for the loan advanced by Hardeo Das cannot be raised in the

(1) (1917) I. L. R., 39 All., 497. (2) (1921) I. L. R., 43 All., 703.
(3) (1910) I. L. R., 33 All., 283.

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present suit and must be assumed against the defendant appellant. Therefore the debt due under this bond of the 12th of June, 1901, was an antecedent debt for the repayment of which Reoti Prasad could lawfully charge the joint family property in his hands. This disposes of the sum of Rs. 3,900, which we hold was applied to the satisfaction of the debts due to Hardeo Das. As regards the sum of Rs. 4,100, the court below has arrived at a clear finding regarding the manner in which this money was actually applied. The decision of the court below as printed in our paper book is disfigured by one or two apparent misprints and omits to notice one item of Rs. 100 paid into the Treasury on account of irrigation dues on the 16th of June, 1906. Making the necessary correction, I find that the payments alleged to have been made out of this advance of Rs. 4,100 are the following :—Rs. 1,000 paid on the 22nd of August, 1906, being the last instalment due upon a bond in favour of one Phul Chand executed on the 16th of February, 1899. It is proved that Rs. 1,000 were in fact paid to discharge this liability, *vide* the receipt reproduced on page 11 R. of our printed book. There were a number of payments on account of Government dues land revenue and irrigation dues) aggregating Rs. 2,082-2-0 and there were two payments of Rs. 400 to a creditor named Nathu Ram and Rs. 600 to a creditor named Thakur Das The whole sum of Rs. 4,100 is thus accounted for except a small item of about Rs. 18, which appears on the face of it less than one would have reasonably expected to see charged in connection with the expenses for the execution and registration of the bond in suit. With regard to these items the appellant challenges the findings of the court below on the question of fact. After giving our best consideration to the arguments urged upon us, we think it sufficient to say that we feel satisfied that the court below was right. The payments on account of the Government [redacted] are proved by unimpeachable evidence, as also is the payment of Rs. 1,000 to Phul Chand. The two payments to Nathu Ram and Thakur Das are proved by such oral evidence as one might reasonably expect and accept in a case of this sort. With regard to the payment to Phul Chand, the same question of law is raised as has been already discussed in connection with the mortgage

in favour of Hardeo Das. The reasons given for deciding in favour of the creditor apply even more strongly in respect of this sum of Rs. 1,000 due in respect of a debt contracted even earlier than that in favour of Hardeo Das. We hold, therefore, that the decision of the court below was correct in law and in fact and we dismiss this appeal with costs.

WALSH, J.:—I agree. I think the judgment of the Subordinate Judge is an excellent one in every respect except that it lays itself open to one small criticism. With regard to the 1901 transaction, I am quite satisfied on the evidence that there was legal necessity to support it, sufficient to bind any minor sons who were living at the time. Where nothing is shown adverse to the character or mode of livelihood of a Hindu father, I do not think the courts ought to be astute to find objections or highly artificial conclusions as to the absence of legal necessity in transactions which took place long ago and which are thus necessarily difficult to establish in all their details by clear verbal proof in a court of law. The history of this man's business dealings laid a sufficient ground, in my opinion, for establishing conclusively the existence of necessity for raising a loan in 1901, in the absence of some definite evidence that the loan was raised for purposes inconsistent with his trust as father and manager of the family. The learned Judge has used language which suggests that in his view the mere antecedency of this debt in 1901 was sufficient to support it. I do not think he meant that. I think if he had asked himself the question whether there was legal necessity, he would have answered it in the affirmative. And it is not correct to say that mere antecedency is sufficient to support a charge made by a father upon family property for a debt. The learned Judge also found that the proof of the cash which was required at the time of the loan for family purposes and of the cash which was actually expended, nearly amounted to the money borrowed. It appears from what my brother has pointed out that the actual proof amounted to even more than what the learned Judge himself thought, but, as far as I am concerned, I should not have held that failure on the part of the plaintiff to prove every pie raised and expended for family necessity constituted a

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sufficient ground in law for interfering with the transaction even *pro tanto*. In all such transactions there must necessarily be some margin for what one may call incidental expenses, and to my mind, the task imposed on a creditor of proving in a transaction at least twelve years old, and in this case going back seventeen years, in a sum so considerable as Rs. 8,000, the intended and actual destination of each rupee, is, humanly speaking, an impossible one, and for courts of justice in India to impose that duty upon a plaintiff as a matter of principle and, so to speak, to punish the creditor to the extent of every pie which he does not prove up to the hilt, is to invite the creditor to commit and suborn perjury in the trial courts. The failure to prove a small margin in a large sum like Rs. 8,000 is amply covered by the old maxim *de minimis non curat lex*. I agree with the order proposed.

Appeal dismissed.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Lindsay.

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February, 15.

BALDEO PRASAD (PLAINTIFF) *v.* BINDESHRI PRASAD (DEFENDANT)*

Hindu law—Liability of son for father's debt—Debt contracted while the father was a ward under the Court of Wards—Son not liable.

A Hindu, whilst a ward of the Court of Wards, and being, under the law then in force, incompetent to enter into any contract which might involve him in pecuniary liability, executed two promissory notes. After the father's death his son executed a bond in favour of the creditor for the amount covered by the promissory notes.

Held on suit by the creditor that the son was not under a pious duty to pay the debts of the father contracted in the above circumstances and that the bond was not enforceable against him. *Rajmal Shah* v. *Court of Wards* (1) distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *Surendra Nath Sen*, for the appellant.

Mr. *B.E. O'Conor*, Mr. *R. Malcomson*, Munshi *Badri Narain* and Munshi *Sarkar Bahadur Johri*, for the respondent.

MUHAMMAD RAFIQ and LINDSAY, JJ.:—It appears that one Ganesh Prasad was under the Court of Wards for several years up to the time of his death in May, 1914. On the 7th of

* First Appeal No. 284 of 1919, from a decree of Jogindro Nath Chaudhri, Additional Subordinate Judge of Banda, dated the 31st of May, 1919

(1) (1918) 46 Indian Cases, 974.