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There should then (in their Lordships' opinion) be one preliminary decree for redemption in both suits in accordance with order XXXIV, rule 7, of the Code of Civil Procedure, 1908. But in taking the accounts the period during which the mortgagee may have been in possession under the decree in suit No. 234 of 1913 should be excluded, for, though the provisions of the mortgage entitling the mortgagee to possession cannot operate to defeat section 60 of the Transfer of Property Act, effect should be given to them so far as they provide that the mortgagee is to appropriate in lieu of interest all the produce Mal and Sewai and profits of the mortgaged villages after payment of the Government revenue. And so, during this period, as in effect provided by the mortgage, neither will the mortgagee be accountable for profits nor the mortgagor for interest.

The decree should further provide that if payment is not made on the fixed day the mortgaged property should be sold.

Their Lordships will humbly advise His Majesty that the case ought to be remitted to the Court of the Judicial Commissioner of Oudh with directions to pass a decree in accordance with the opinion expressed. There will be no order as to the costs of these appeals.

*Appeal allowed and cause remanded.*

Solicitors for the appellant :—*Barrow, Rogers and Nevill.*

Solicitors for the respondent :—*T. L. Wilson & Co.*

## APPELLATE CIVIL.

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

BHUP KUNWAR AND ANOTHER (PLAINTIFFS) v. BALBIR

SAHAJ AND OTHERS (DEFENDANTS). \*

*Hindu law—Joint Hindu family—Mortgage by father—After-born son's right to question validity—Suit by a son to set aside mortgage—Right of second son born pending suit to question the validity of the mortgage after death of plaintiff—Antecedent debt—Legal necessity.*

The father in a joint Hindu family consisting of himself and one son (a minor) executed a mortgage of some of the joint family property. Shortly after the execution of this mortgage, the son, under the guardianship of his uncle, filed a suit for a declaration that this mortgage was not binding on the joint family property, as it had been made without legal necessity.

\* First Appeal No. 349 of 1913, from a decree of Muhammad Ali Ausat, Subordinate Judge of Aligarh, dated the 26th of July, 1913.

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Pending this suit another son was born to the mortgagor. The first son died, and at a later period the representatives of the mortgagee brought a suit against the surviving son and the widow of the mortgagor, for enforcement of their mortgage.

*Held* that the second son was not debarred from raising as a defence to the suit the same pleas as had been raised by the elder son in the earlier suit. *Kesho Prasad Singh v. Sheo Faryash Ojha* (1) and *Venkatanarayana Pillai v. Subbammal* (2) distinguished.

*Held* also, that, part of the consideration for the mortgage being a promissory note executed very shortly before the mortgage by the mortgagor in favour of the mortgagee, it was upon the plaintiffs to show that this debt, although it might be called an antecedent debt, was borrowed for purposes which would be binding on the joint family.

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

Dr. S. M. Sulaiman, Babu Saila Nath Mukerji and Munshi Beni Bahadur, for the appellants.

Dr. Kailas Nath Katju for the respondents.

MUHAMMAD RAFIQ and LINDSAY, JJ. :—This is an appeal against a decree of the Subordinate Judge of Aligarh in a suit brought by the plaintiffs appellants to enforce a mortgage executed on the 12th day of October, 1904, in favour of one Bishan Singh.

Bishan Singh has died and his property has descended to various members of his family. The first plaintiff, Musammat Bhup Kunwar, is a grand-daughter of Bishan Singh and the second plaintiff, Debi Singh, is Bishan Singh's grand-son. It appears that since the death of Bishan Singh his property has been divided among the members of the family under an arbitration award and it was stated in the plaint that a definite share of this mortgage debt had been assigned to the plaintiffs. The defendants second party in the suit are the other members of Bishan Singh's family to whom shares also have been allotted in this particular debt. They were joined as defendants because they had failed to join as plaintiffs.

The contesting defendants in the suit were Balbir Sahai, a minor aged ten years, who is the son of the mortgagor Ganga Sahai, and Musammat Saraswati who is the widow of the mortgagor.

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The amount of the mortgage money was Rs. 4,500 and the claim was for the recovery of a sum of Rs. 9,700 by sale of the mortgaged property. It was stated in paragraph 6 of the plaint that the original mortgage-deed upon which the suit was based was not available and that the suit had, therefore, been brought upon a certified copy of the document.

The minor defendant Balbir Sahai contested the claim on every possible ground. He denied execution of the deed by Ganga Sahai; he claimed that the property was ancestral and joint family property; that Ganga Sahai was a person of licentious habits; that there was no legal necessity for the loan; that in fact consideration had not passed to Ganga Sahai and that, in any case, if it had passed, the debt had been satisfied. There was a further plea to the effect that the transaction was not binding upon this defendant who was not in existence at the time the mortgage-deed was executed. The learned Judge has dismissed the suit. He held in the first place that the suit could not succeed in the absence of the original document of mortgage, the loss of, or failure to produce, which had not been satisfactorily explained. He did not, however, confine his judgment to this point, but dealt with the case on the merits. He held that the property mortgaged was joint ancestral property. He held further that the first defendant was entitled to impeach the deed of mortgage. He further found that the money specified in the deed had actually passed to Ganga Sahai, but he was of opinion that the plaintiffs mortgagees had failed to prove that the debt was a binding debt upon the joint family property. He held, moreover, that it was proved that Ganga Sahai was a person of profligate character and that the debt incurred must be taken to have been incurred for immoral purposes.

The plaintiffs now come on appeal and attack the judgment of the court below in so far as the findings of the learned Subordinate Judge are against them.

We will deal first with the decision of the learned Subordinate Judge on the technical point, namely, the proof of the loss of the document in suit.

It has been mentioned that in paragraph 6 of the plaint the statement made by the plaintiffs was that the original mortgage

deed had been filed in court in connection with some suit in the life-time of Bishan Singh.

The only direct evidence which was produced in order to prove the loss of the document or in order to establish some reason for its not being forthcoming was that of the plaintiff Debi Singh. Debi Singh's evidence, according to the learned Subordinate Judge, was pure hearsay evidence, and he held that such evidence was not admissible for the purpose of proving the loss of the deed so as to justify the admission of secondary evidence in the shape of the certified copy which was produced in court. An examination of Debi Singh's evidence proves that the learned Subordinate Judge is right in his opinion. All that Debi Singh could say was that he heard from Bishan Singh that the latter in connection with some application for execution of a decree had gone to court with the original document of mortgage for the purpose of having a proclamation made, notifying that the property sought to be sold was subject to the mortgage in his favour. On the evidence as it stands we have no doubt that the decision of the Subordinate Judge on this issue is perfectly correct.

We do not, however, propose to deal with this appeal only upon this ground. We have mentioned that the Subordinate Judge went into the merits of the case and we now proceed to deal with his findings on the various issues which affect the merits. First, as to the issue of legal necessity. The certified copy which was produced in evidence in the court below sets out that the mortgage money of Rs. 4,500 was made up of two items, one of Rs. 400 and the other of Rs. 4,100. The sum of Rs. 400 was recited to be due in respect of a note of hand which had been executed by Ganga Sahai in favour of Bishan Singh on the 18th day of September, 1904, that is to say, some 24 days before the mortgage deed was executed. The balance of Rs. 4,100 is stated in the deed to have been advanced to Ganga Sahai for the purpose of starting a cloth business. The finding of the learned Subordinate Judge is that there never was any cloth business in existence. He bases this finding upon certain direct evidence which was produced before him, evidence given by people who were in a position to know whether or not Ganga Sahai did as a matter of fact carry on a

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business of this kind. On the part of the plaintiffs one witness was put forward who tried to make out that Ganga Sahai had been dealing in cloth. The learned Subordinate Judge, for reasons which commend themselves to us, has declared that the evidence of this witness is not reliable. We agree, therefore, with the finding of the court below that it was not proved that Ganga Sahai was carrying on any business as a cloth dealer.

As regards the sum of Rs. 400 due upon the promissory note the learned Judge seems to have held that this debt was tainted with immorality. He took, however, another ground which seems to us to be a very proper one, and that is that the promissory note had been executed in favour, not of any other creditor, but in favour of Bishan Singh the mortgagor himself. He held that in these circumstances it was upon the plaintiffs to show that this debt, although it may be called an antecedent debt, was borrowed for purposes which would be binding on the joint family. No evidence at all was forthcoming in order to prove the nature of the debt which was secured by this promissory note and on that ground we think the Subordinate Judge was entitled to hold that this did not constitute a debt which was binding on the family.

The result, therefore, is that on the findings of the court below with which we are in agreement, the plaintiffs have failed to establish that the debt secured by this deed of mortgage was a debt which was binding on the joint family property or that they made any reasonable inquiries on the point and satisfied themselves that the money was about to be applied for purposes which would be binding.

It was argued in the court below, and it has also been argued here, that the minor defendant Balbir Sahai was not entitled to challenge this deed of mortgage which, as we have mentioned, was executed before he was born. In dealing with this point the learned Subordinate Judge has quoted a passage from Mayne's Hindu Law, 8th Edition, page 460 (paragraph 342). The law on this subject appears to be well settled, and it is correctly laid down in the passage which the learned Subordinate Judge has cited. The relevant passages in paragraph 342 run as follows :—“Therefore a son cannot object to alienations validly

made by his father before he was born or begotten, because he could only by birth obtain an interest in property which was then existing in his ancestor. Hence if at the time of the alienation there had been no one in existence whose assent was necessary or if those who were then in existence had consented, he could not afterwards object on the ground that there was no necessity for the transaction.....On the other hand, if the alienation was made by a father without necessity and without the consent of sons then living, it would not only be invalid against them but also against any son born before they had ratified the transaction and no consent given by them after his birth would be binding upon him."

It is now to be mentioned that at the time Ganga Sahai executed this deed there was in existence a minor son of his, named Raghunath Sahai, who subsequently died. On the 5th day of January, 1905, that is to say, less than three months after the mortgage-deed was executed, Raghunath Sahai, acting under the guardianship of his uncle, brought a suit against his father and mother, who was an attesting witness to the mortgage, asking for a declaration that the document was not binding on the joint ancestral family property on the ground that it had been made without any legal necessity. A copy of the plaint in this case is to be found at page 6 of the appellants' book.

The suit was decided by the Subordinate Judge of Aligarh in a judgment which is dated the 31st day of July, 1906, and which is printed at page 8 and the following pages of the appellants' book.

It is an admitted fact that the present minor defendant Balbir Sahai, although he was not in existence at the time when this suit was instituted, was born before judgment was delivered.

In these circumstances, applying the law as has been laid down in the passage above, it seems to us to be impossible to contend that this minor defendant has no *locus standi* to challenge the validity of the mortgage-deed in suit. It is quite clear that at the time the document was executed there was in existence a son of the mortgagor. It is further clear that no question of the consent of this son to the alienation

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can be raised. In the first place, he was a minor, and in the next place we have the fact that a suit was brought on his behalf a few months afterwards for the purpose of contesting the validity of the alienation. It cannot, therefore, be argued, for the reasons just stated, that the defendant Balbir Sahai was not entitled to object in this suit to the validity of the deed in question.

It has, again, been argued that even if this minor defendant is to be allowed to question the validity of this alienation made by his father he is nevertheless bound by the judgment in the earlier suit. The learned counsel for the appellants has relied in this connection upon a Full Bench ruling of this Court in *Kesho Prasad Singh v. Sheo Pargash Ojha* (1).

It was held in that case, following a decision of their Lordships of the Privy Council in *Venkatanarayana Pillai v. Subbammal* (2) that a suit by a reversioner for a declaration that an alienation made by a Hindu widow in possession is without legal necessity and inoperative beyond her life-time, is brought by him not for his personal benefit, but in a representative capacity, that is, as representing the whole body of reversioners, for the protection of the estate and to remove an apprehended injury to the common interest of all the reversioners. A decree in such a suit is, therefore, binding, if obtained after fair contest and in the absence of fraud and collusion, not only between the reversioner who brought the suit and the transferee, but also as between the whole body of reversioners on the one hand and the transferee or his representative in title on the other. It was laid down that this is so not because one reversioner in that case must be deemed to claim title through another but because the reversioner who sues represents the others and Explanation VI of section 11 of the Code of Civil Procedure comes into operation. For, the right claimed by the presumptive reversioner who sues is a right to demand that the estate be kept intact and free from danger during its enjoyment by the widow and it is a right claimed in common for himself and all the members of the reversionary body. This view of the law, which must now be accepted, is based upon

(1) (1921) I. L. R., 44 All., 19.

(2) (1915) I. L. R., 38 Mad., 406.

the identity of the interest of all the reversioners to an estate which for the time being is in possession of a female heir. But we think it would be difficult to apply these principles to a case like the present.

When Raghunath Sahai brought his suit in the beginning of 1905 there were only two persons interested in this estate, one being Raghunath himself and the other his father, who was impleaded as a defendant. It follows, therefore, that the whole estate as it then stood was represented in the suit.

Balbir Sahai, the present minor defendant, had not then been born. Before the suit was decided Balbir had come into existence and had thus come to have an interest of his own in the estate, an interest which was quite distinct from that of his brother and his father. This being so, we cannot see how at the time the suit came to be decided it can be said that Balbir was represented by his minor brother the plaintiff, whose interest was totally distinct from his own. These being the facts, we hold that it is not possible to argue that the minor defendant Balbir Sahai is bound by the judgment in the previous suit upon any of the principles which have been set out in the Full Bench ruling of this Court to which reference has already been made.

We have now dealt with all the points which have been argued before us. We may mention that it was contended that the general evidence of immorality which was led in the court below would not justify a finding that any particular portion of the money borrowed by Ganga Sahai had been applied for immoral purposes. This argument was put forward in connection with the item of Rs. 400 due on the promissory note. We have discussed this matter above, and so far as that item is concerned, we do not base our judgment upon the evidence relating to immorality; but, as we have said, the learned Subordinate Judge took another ground, and we hold that in the circumstances it was the duty of the plaintiffs to offer some explanation regarding the nature of this debt or the circumstances in which it came to be borrowed, for, as we have pointed out, the promissory note was executed in favour of the mortgagee himself only a few weeks before the mortgage in suit was drawn up.

The result, therefore, is that the appeal fails and is dismissed with costs.

*Appeal dismissed.*

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