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APPELLATE CIVIL.

Before Mr. Justice Lindsay and Mr. Justice Sulaiman.

TULSHI RAM (PLAINTIFF) *v.* BISHNATH PRASAD AND OTHERS (DEFENDANTS).* 1927 *February*, 23.

Hindu law—Joint Hindu family—Son's liability for father's debts—Defences to suit by creditor—Immorality of father or want of legal necessity—Burden of proof—Antecedent debt.

Once a mortgagee has established that the loan advanced by him to the mortgagor was for payment of antecedent debts, it is no longer incumbent upon him to prove that these antecedent debts were in themselves for necessity. In order to get rid of his liability, the burden then lies on the son to establish that those antecedent debts were tainted with immorality or illegality. *Maharaj Singh* v. *Balwant Singh* (1), referred to. *Nanomi Babuasin* v. *Modhun Mohun* (2), and *Brij Narain* v. *Mangal Prasad* (3), followed.

Mere proof of the general immoral habits of a mortgagor at the time the debts were advanced is insufficient to justify the court in presuming that the debts were so tainted. The connexion between the immorality and the debt must be proved before the debt can be vitiated. *Sri Narain* v. *Lala Raghubans Rai* (4), referred to. *Babu Singh* v. *Bihari Lal* (5), *Narendra Bahadur Singh* v. *Abdul Haq* (6), and *Dhullipallia* v. *Kappa Venkatakrishnayya* (7), followed.

THE facts of this case were as follows :—

There were two suits, the first by Tulshi Ram mortgagee to enforce a mortgage executed by Bishnath Prasad

*First Appeal No. 38 of 1924, from a decree of Raja Ram, Additional Subordinate Judge of Ballia, dated the 29th of September, 1923.

(1) (1905) I.L.R., 28 All., 508. (2) (1885) I.L.R., 13 Calc., 21.
(3) (1923) I.L.R., 46 All., 95. (4) (1912) 17 C.W.N., 124.
(5) (1908) I.L.R., 30 All., 156. (6) (1915) 30 Indian Cases., 216.
(7) (1918) 36 M.L.J. 296; 58 Indian Cases., 797.

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in 1917 and the other a suit for a declaration by Bishnath Prasad's minor son that a simple money decree of 1921 obtained by Tulshi Ram was not binding on the plaintiff. The case for the minor son in both the suits, apart from a denial of consideration, was that Bishnath Prasad was a person of grossly immoral character and that the money taken by him, if at all, was spent on immoral objects. On the other hand Tulshi Ram's position was that the money had been acquired for purposes of legal necessity, family business and for the payment of antecedent debts. In Tulshi Ram's suit the court of first instance found that the full consideration did pass and that the money was taken to a large extent for payment of previous debts, and passed a personal decree against Bishnath Prasad. That court, however, held that the burden of proving that the previous debts were of a binding character was on Tulshi Ram and that he failed to discharge that burden. His claim to enforce the mortgage was, therefore, disallowed. In the suit brought by the minor son the same court held that the burden of proving that the antecedent debts were contracted for illegal and immoral purposes lay on the minor and that he had failed to discharge it. That suit was accordingly dismissed. Both parties filed cross-appeals.

On these appeals—

Babu *Piari Lal Banerji*, Pandit *Narmadeshwar Prasad Upadhiya* and Munshi *Brij Behari Lal*, for the appellant mortgagee.

Dr. *Surendra Nath Sen*, Dr. *Kailas Nath Katju* and Mr. *B. Malik*, for the respondents debtors.

The judgement of the Court (LINDSAY and SULAIMAN, JJ), after stating the facts as above, thus continued—

We propose to take up F. A. No. 504 of 1923 first. The subject of controversy in this case is the mortgage-deed, dated the 14th of April, 1917, for Rs. 38,000. As

stated above, the court below has found that the whole of the consideration money has been paid by Tulsi Ram. The mortgage-deed recited that Rs. 17,700 were set off on account of debts due to Tulshi Ram himself and had been required for family necessity and for business under *bahi khata* and *sarkhats*, and that the balance of Rs. 20,300 was taken in cash from the mortgagee for payment of previous valid debts due to other creditors. According to the plaintiff's account books Rs. 17,700 were due to him on previous accounts, including large sums advanced shortly before the mortgage-deed to pay off certain previous creditors. The cash consideration of Rs. 20,300 was actually paid to Bishnath Prasad before the sub-registrar. That the first portion of the consideration was actually due to Tulshi Ram is not now disputed before us. There is thus no suggestion that Tulshi Ram has played any trick and taken the mortgage-deed for an inflated amount. In fact the learned Subordinate Judge has passed a personal decree for the whole amount together with full interest against the executant, Bishnath Prasad, who has submitted to the decree and has not chosen to appeal from it. It is, therefore, quite clear that the payment of the full consideration is established. Indeed the learned advocates for the appellant have not challenged that part of the finding of the court below.

The learned Subordinate Judge has, in our opinion, been led into error by the supposition that even if the mortgagee proves that the amount of the mortgage money was required for the payment of antecedent debts, it was still incumbent upon him to prove that there was legal necessity for those earlier debts. His whole judgement is affected by this assumption. When dealing with the various items of the mortgage money and the debts for the payment of which they were taken, he has over and over again repeated that the plaintiff has failed to prove necessity for these earlier debts. In this view his chief reliance

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is on the case of *Maharaj Singh* v. *Balwant Singh* (1). He has quoted the following passage from the judgement in that case :—

"It has been repeatedly held in this High Court that where a Hindu son comes into court to assail either a mortgage made by his father or a decree passed against his father, or a sale held or threatened in execution of such a decree, it rests upon him to show that the debt in respect of which the decree was obtained was of such a character that he would not be under a pious obligation to discharge it. . . . . But the appellant in this case is not the assailant, he is defending his title."

From this he has inferred that where the mortgagee is the plaintiff it is not sufficient for him to show that the mortgage money was utilized for the payment of antecedent debts but that he must further show that those debts were required for necessity. We do not think that this is a correct statement of the law as laid down by their Lordships of the Privy Council. In all cases the mortgagee must, in the first instance, establish that his debt was either for legal necessity or for payment of antecedent debts or for the benefit of the family. Once the mortgagee has established that the loan was for payment of antecedent debts it is no longer incumbent upon him to prove that these antecedent debts in themselves were for necessity. In order to get rid of his liability the burden then lies on the son to establish that those antecedent debts were tainted with immorality or illegality. Without proving such immorality or illegality the son cannot succeed, whether he be a plaintiff or defendant to a suit : see *Nanomi Babuasin* v. *Modhun Mohun* (2) and *Brij Narain* v. *Mangal Prasad* (3). We must, therefore, first consider whether the mortgagee has proved that the loan was required for the payment of antecedent debts. If he has succeeded in proving this, we shall then have to see whether the son has discharged the burden of showing

(1) (1905) I.L.R., 28 All., 508. (2) (1885) I.L.R., 13 Calc., 21.
(3) (1923) I.L.R., 46 All., 95.

that these antecedent debts were tainted with immorality or illegality.

The appellant is a minor son of the age of 8 years who contested the suit under the guardianship of his own mother. Having regard to the circumstances of this case we have no doubt in our mind that it is Bishnath Prasad, the mortgagor himself, who has put up his minor son to defend the claim. We find no good ground for supposing that Bishnath Prasad is not helping the appellant or that so far as the defence of this suit is concerned his interest is in any way adverse to that of the minor. The first significant fact to which the court below has not attached due weight is the absence from the witness-box of Bishnath Prasad himself, who must be in a position to explain what he did with the money which he admittedly borrowed. We realize that it cannot be expected that Bishnath Prasad would expose himself by deposing to his alleged immoral habits, nevertheless when, in our opinion, the defence is a collusive one he might have been put into the witness-box and asked whether he did not spend a large part of the money on his family business.

A still more important circumstance is the suppression of the account books which admittedly exist. We have no doubt in our mind that the defendants' account books have been deliberately withheld in order that no light may be thrown on the needs for which the money was required and on which it was spent.

[The judgement then referred to certain facts and continued :—]

Having regard to all these facts we have no doubt whatsoever in our mind that the defence put forward that these books have been removed by and are in the possession of the plaintiff is deliberately false and has been concocted for the purpose of suppressing material evidence. Even the learned Subordinate Judge, who has

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used unnecessarily strong language against the plaintiff, found it difficult to hold that the plaintiff had in fact removed the books. He has passed over the defendants' assertion lightly and, then assuming that that assertion was untrue, remarked :—

"It was contended that the defendant has failed to produce his books of account and if produced they would have shown the necessity. It is an admitted fact that the necessity of loans is not recorded in *bahi khatas*, and *bahi khatas*, if produced, would have merely shown that such items were credited and such items were debited and would not have proved anything else."

This is a startling statement. The plaintiff's whole case was that the money advanced by him was required for the payment of debts incurred by the defendants for their business and that the money so taken was actually utilized for this purpose. The account books of the two shops would have most undoubtedly shown whether there were any existing previous debts at the time when the loan was taken and whether those debts were discharged with the amount borrowed. If the money taken under the mortgage-deed was received in the shop and spent for the purpose of the shop it would most certainly have disproved the case that this sum was spent on immoral or illegal purposes. Those account books must have contained a separate personal account of Bishnath and that account would most assuredly have shown the amount of money which was spent by Bishnath on his private purposes. The defendants have deliberately withheld these books which would have been almost conclusive evidence of the facts to be inquired into and would have thrown a clear light on the points at issue. When they have withheld such clear evidence every presumption is to be drawn against them.

Before we go into details there is another circumstance which requires mention. The plaintiff's case is that before the execution of the mortgage-deed he wanted

to be satisfied that a large amount of antecedent debts really existed which were required to be paid off. He accordingly asked for a copy of the defendants' accounts to be supplied to him in order that he might see what those debts were. Some *chitthas* in the handwriting of defendants' servants have been produced by the plaintiff which are said to be copies of the accounts supplied to him. The defendants did not admit the genuineness of these *chitthas*.

[The judgement then discussed certain evidence and continued :—]

We must, therefore, hold that these *chitthas* were supplied to the plaintiff about the time when the mortgage-deed was executed. Both these *chitthas* contain amounts previously due to creditors, with their names, and in the absence of the account books they are, in our opinion, good evidence to show that antecedent debts did exist. The learned Subordinate Judge has not appreciated their importance and has not attached to them the weight which they deserved.

With these preliminary remarks we now proceed to examine the various items of the mortgage consideration.

[The judgement here discussed the evidence, and continued :—]

The result of our findings is that the entire sum of Rs. 38,000 was advanced and was actually utilized towards the discharge of previous debts of the mortgagor. Under the circumstances it was wholly unnecessary for the plaintiff to go further and show that these previous debts were for actual necessity. After the proof of these debts the burden lay upon the son to show that these previous debts were tainted with immorality.

The learned Subordinate Judge when dealing with most of these items has held that no necessity for these previous debts has been established. He has arrived at this conclusion by ridiculing the plaintiff's oral

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evidence that almost all these debts were required for the purpose of the family business or the *gola*. He has criticized the plaintiff when he stated that he made inquiries from the previous creditors when he met them in the bazar and was told that the money had been required for the purposes of the *gola* and for payment to the customers of the defendant's business. . . We are wholly unable to follow the criticism of the learned Subordinate Judge, which we suppose can be explained only on the assumption that in his opinion the necessity for the antecedent debts has also to be definitely established. We have already held that this view was utterly erroneous.

In our opinion, therefore, unless the son can establish to our satisfaction that those previous debts or any one of them were tainted with illegality or immorality his defence must fail.

The defendant has no doubt produced a number of respectable witnesses whose evidence clearly goes to show that Bishnath Prasad, soon after attaining majority, entered upon a reckless and extravagant career not unattended by immoral pursuits. The learned Subordinate Judge has clearly found this point in favour of the defendant and we have no hesitation in accepting that finding. It may, therefore, be taken that there is proof of the general immoral character of Bishnath Prasad about the time when this mortgage-deed was executed or even about the time when these previous antecedent debts were incurred. The learned Subordinate Judge has quoted extensively from the judgement of this High Court in *Maharaj Singh* v. *Balwant Singh* (1) and has tried to draw an analogy from the similarity of certain circumstances. His inference is that these debts must have been contracted for immoral purposes. The learned Subordinate Judge's view seems to be that it is not necessary for the son to connect the immorality with the debt but

(1) (1905) I.L.R., 28 All., 508.

that proof of the general immoral habits of the defendant Bishnath Prasad at the time the debts were advanced would be sufficient to justify the court in presuming that the debts were so tainted.

We think that we should once and for all refute this contention. In the case of *Sri Narain* v. *Lala Raghubans Rai* (1) the Subordinate Judge had presumed the taint of immorality from the general evidence produced. The High Court of Allahabad held that no inference could be drawn that the debts were connected with the immoral pursuits of the mortgagor unless there was definite evidence to prove the connexion. Their Lordships of the Privy Council entirely agreed with the High Court that the general charge of immorality was wholly insufficient and that the connexion between the immorality and the debt must be proved. This view has been followed in numerous cases. We may only mention *Babu Singh* v. *Bihari Lal* (2), *Narendra Bahadur Singh* v. *Abdul Haq* (3) and *Dhullipallia* v. *Kuppa Venkatkrishnayya* (4).

If this were not the correct law, the position of mortgagees would become wholly insecure and intolerable. Even the payment of antecedent debts would be nullified by proof that the father was an immoral person. Oral evidence showing the private character of the father, which might not have been in any way connected with the antecedent debts, could be easily procured. It, therefore, seems to be a wholesome principle to insist on the son connecting the debt with the immorality before he can vitiate the debt.

Direct evidence to connect the immorality of Bishnath with the debts is lacking or is at any rate unsatisfactory. Similarly, direct evidence to bring home to

(1) (1912) 17 C.W.N., 124.
(2) (1908) I.L.R., 30 All., 156.
(3) (1915) 30 Indian Cases, 216.
(4) (1918) 36 M.L.J., 296; 58 Indian Cases, 797.

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Tulshi Ram the knowledge that the antecedent debts had been incurred for family purposes is also not forthcoming.

The learned Subordinate Judge, however, has relied on certain circumstantial evidence to justify the inference that the previous debts must have been connected with immorality. His view may be summarized as follows :— Bishnath had no ancestral debts to discharge. The entire indebtedness of Bishnath came into existence within three years before the mortgage-deed. He had sufficient income from his zamindari property to maintain himself decently. His commission agency business was not of a kind in which there could possibly be any loss. Bishnath was undoubtedly leading an extravagant and licentious life and squandering money. Tulshi Ram was managing the defendant's estate till Sambat 1975 and must, therefore, have been fully aware of the immoral life of the defendant. From these circumstances he has thought that "the only inference which anyone can derive from the above evidence is that the loan must have been contracted for immoral purposes and the mortgage was executed to pay such debts." As regards the inquiry on behalf of the plaintiff his conclusion was that a mere inquiry from the prior creditors, and their general statement that the money had been advanced for the purposes of the *gola* business, were inadequate.

The defendant's case is that there were no ancestral debts to be discharged when Bishnath attained majority. On the other hand, Tulshi Ram stated that after the death of Sheo Shankar Ram when he checked the papers he found that about Rs. 28,000 or Rs. 29,000 were due by Sheo Shankar Ram, and he accordingly told his widow about it. He also advised her that if she had the money she should pay up the debts, but she replied that she had no cash. Tulshi Ram also stated that the shop at Calcutta, which had suffered a loss of Rs. 12,000, was

subsequently closed down. The defendant's version is supported only by oral evidence. We think that in a matter of this kind it is unsafe to rely on the oral testimony of either side. The only conclusive way of finding out whether there was any large indebtedness at the death of Sheo Shankar Ram would have been an examination of the defendant's account books, which, as we have held above, have been deliberately withheld by the latter. The mere fact that balances were struck and accounts on either side balanced year after year is by no means conclusive to show that there were no previous deficits carried over. Nor can the mere fact that the accounts with some of the plaintiff's witnesses were opened within three years of the mortgage-deed necessarily negative the existence of any indebtedness to anybody else. We are accordingly unable to draw the inference which the learned Subordinate Judge has, in spite of the absence of the account books, drawn.

[The judgement proceeded to discuss the reasons for disagreeing with the findings of the court below as to antecedent debts and immorality, and concluded :—]

Tulshi Ram, in our opinion, was justified in advancing money for the discharge of such debts. We have remarked that it is fully established that the whole consideration of Rs. 38,000 was in fact paid by Tulshi Ram. We find it difficult to believe that the latter would have advanced such a large sum of money out of his own pocket if he had known with certainty that the previous debts which were going to be discharged were all directly tainted with immorality and were such as could not have been recovered by the creditors. It would have meant taking a risk which would not be undertaken by a man of ordinary intelligence and prudence. We, therefore, feel it impossible to uphold the decree of the court below.

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We accordingly allow this appeal and setting aside the decree of the court below decree the plaintiff's suit with costs in both courts.

Appeal allowed.

Before Sir Grimwood Mears, Knight, Chief Justice and Mr. Justice Dalal.

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March, 15.

JAGAT SINGH AND OTHERS (PLAINTIFFS) *v.* JAI NARAIN AND OTHERS (DEFENDANTS).*

Civil Procedure Code, order XXXIV, rule 14—Mortgage—Same property subject to a usufructuary mortgage and a later simple mortgage to same mortgagee—Effect of sale under a decree on the later mortgage.

Two villages were mortgaged usufructuarily on the 20th of April, 1877, for Rs. 22,000, and half of a third village was hypothecated as collateral security. Four days later, the mortgagee leased the first two villages to the mortgagor, and the mortgagor hypothecated all three villages to the mortgagee as security for the lease-money. The lease-money was not paid and in consequence the lessee was ejected. The mortgagee then, having taken possession, brought a suit on the deed of the 24th of April, 1877, (the second, and simple, mortgage) for the sale of the three villages, subject to his earlier mortgage of the 20th of April, and, having obtained a decree, brought the property to sale and purchased it himself.

Held, on suit by the heirs of the mortgagor to redeem the earlier (usufructuary) mortgage, that what was really sold and purchased by the defendants, mortgagees, decree-holders was the plaintiffs' equity of redemption, and, therefore, the suit could not be maintained. *Khairajmal* v. *Daim* (1), *Lal Bahadur Singh* v. *Abharan Singh* (2), *Sardar Singh* v. *Ratan Lal* (3), *Mata Din Kasodhan* v. *Kazim Husain* (4), and *Parmanand* v. *Daulat Ram* (5), referred to.

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

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* First Appeal No. 161 of 1924, from a decree of Gauri Prasad, Subordinate Judge of Pilibhit, dated the 3rd of January, 1924.

(1) (1904) L.R., 32 I.A., 23; I.L.R, 32 Calc., 296. (2) (1915) I.L.R., 37 All., 165.

(3) (1914) I.L.R., 36 All., 516. (4) (1891) I.L.R., 13 All., 432.

(5) (1902) I.L.R., 24 All., 549.