APPELLATE CIVIL.

Before Sir Grimwood Mears, Chief Justice, and Mr. Justice Mukerji.

1928 *November, 7.*

KISHEN SAHAI AND OTHERS (PLAINTIFFS) *v.* RAGHUNATH SINGH AND OTHERS (DEFENDANTS).*

Hindu law—Joint Hindu family—Alienation by father—Mortgage for payment of a pre-emption decree—Antecedent debt—Pre-emption decree not a debt—"Benefit to the estate"—Mortgage binding on pre-empted property.

A pre-emption decree gives an option to the pre-emptor to obtain the property on making payment, but does not carry any order for payment, it is, therefore, not a "debt" in the proper sense of the term and can not constitute an antecedent debt. *Nathu* v. *Kundan Lal* (1) and *Kapildeo* v. *Thakur Prasad* (2), dissented from. *Bhagwan Das* v. *Mahadeo Prasad* (3) and *Shankar Sahai* v. *Bechu Ram* (4), followed.

Ordinarily a Hindu father cannot mortgage joint ancestral property for the purpose of making payment in compliance with the terms of a pre-emption decree obtained by him for the purchase of fresh property. *Shankar Sahai* v. *Bechu Ram* (4), followed. *Jagat Narain* v. *Mathura Das* (5), referred to.

Where, with the mortgage money the pre-emption decree was complied with, and the property obtained by pre-emption was included in the mortgage, the mortgage was binding and effective as regards the pre-empted property.

Dr. *Kailas Nath Katju*, for the appellants.

Dr. *N. C. Vaish*, for the respondents.

MEARS, C. J., and MUKERJI, J. :—The suit arose out of a mortgage executed on the 12th of July, 1916, by Raghunath Singh, defendant No. 1, and his father

* First Appeal No. 380 of 1925, from a decree of Syed Ali Mohammad, Subordinate Judge of Meerut, dated the 21st of May, 1925.

(1) (1910) 7 A.L.J., 1182. (2) (1913) 11 A.L.J., 961.
(3) (1923) I.L.R., 45 All., 690 (4) (1925) I.L.R., 47 All., 381.
(5) (1928) I.L.R., 50 All., 969.

1928

KISHEN SAHAI v. RAGHUNATH SINGH.

Sewak Ram, who has since died. The amount borrowed was a sum of Rs. 4,000. The plaintiffs pleaded that the mortgage was executed for legal necessity and was therefore binding, not only on Raghunath Singh, one of the mortgagors, but on his minor brother Khair Singh, defendant No. 2, and also on his minor son Bhopal Singh, defendant No. 3. Bhopal Singh alone contested the suit through his guardian. His contention was that the mortgage was not supported by legal necessity.

The learned Subordinate Judge found that there were four items which went to make up the entire mortgage money. These were the sums of Rs. 1,586, Rs. 1,800, Rs. 64 and Rs. 550.

As regards the first sum, the learned Judge found that it was borrowed to pay an antecedent debt payable by the mortgagors. Accordingly he found that both the defendants Nos. 2 and 3 were liable to pay the sum. He found that the sum of Rs. 64 had been obtained to meet the costs of the execution of the mortgage-bond. In his opinion this amount was for legal necessity. The learned Judge accordingly made a decree for the sale of the property mortgaged to recover these two sums.

As regards the sum of Rs. 1,800, the learned Judge found that it had been borrowed to pay the purchase-money for a pre-emption decree, and he thought that the members of the joint Hindu family could not jeopardize the ancestral family property in order to purchase fresh property. He accordingly held that the mortgage for the sum of Rs. 1,800 was not binding on the family.

As regards the sum of Rs. 550, the learned Judge found that it had been paid by the mortgagees, but that there was no legal necessity to support the same. The learned Judge accordingly granted a personal decree for the sums of Rs. 1,800 and Rs. 550.

In appeal the plaintiffs-appellants contend that on the evidence the entire mortgage-money was borrowed,

either for legal necessity, or for payment of antecedent debts. The first question that therefore arises with respect to the sum of Rs. 1,800, is this. Was there a debt existing at the date of the mortgage which Sewak Ram and Raghunath Singh were bound to pay? The learned counsel for the plaintiffs-appellants has relied on two cases, namely the case of *Nathu* v. *Kundan Lal* (1), and the case of *Kapildeo* v. *Thakur Prasad* (2), as laying down the proposition that where a Hindu father borrows money to pay the purchase-money under a pre-emption decree, he borrows money to pay an antecedent debt. This opinion has been dissented from in later cases and they are *Bhagwan Das* v. *Mahadeo Prasad* (3), and *Shankar Sahai* v. *Bechu Ram* (4).

We have considered the point and we are clearly of opinion that no debt, in the proper sense of the word, existed on foot of the pre-emption decree. The pre-emption decree gave the option to the pre-emptor to obtain property on payment of money. A pre-emption decree does not carry any order for payment. The decree is always conditional, namely, in case of payment certain property would belong to the plaintiff, and in case of non-payment the suit would stand dismissed, probably with costs. The mere fact that in the case of non-payment of the purchase-money a decree for costs would be passed against the pre-emptor, cannot invest the whole transaction with the character of a debt. It may be pointed out that the amount of costs is usually very small as compared with the purchase-money. The appellants' case, therefore, so far as it is based on the principle of antecedent debt, cannot be maintained.

Next it was argued by the learned counsel for the appellants that according to the recent Full Bench case of *Jagat Narain* v. *Mathura Das* (5), a head of a joint

(1) (1910) 7 A.L.J., 1182. (2) (1913) 11 A.L.J., 961.
(3) (1923) I.L.R., 45 All., 390. (4) (1925) I.L.R., 47 All., 381.
(5) (1928) I.L.R., 50 All., 969.

1928

KISHEN SAHAI v. RAGHUNATH SINGH.

Hindu family is entitled to make a fresh purchase of property. It was argued that this case has shaken the authority of the case of *Shankar Sahai* v. *Bechu Ram* (1), and other cases which decided that a transaction by one member of a joint Hindu family which can bind the others must be of a defensive nature. We have accordingly read the Full Bench case and we are of opinion that the facts of the case actually bring themselves within the purview of the decision in the case of *Shankar Sahai* v. *Bechu Ram* (1).

The facts of the Full Bench case were these. A Hindu family possessed property which was situated far away from the place of residence and it was found to be inconvenient to manage the property. The adult male members of the family sold the property with the express purpose of purchasing nearer home, so that the purchased property might be better managed. As a matter of accident, it happened that the purchase-money was lost because the bank, in which the money had been put for safe custody, had closed its doors. As has been laid down by the Privy Council, and in the case of *Inspector Singh* v. *Kharak Singh* (2), to find whether a certain transaction is binding on the family or not its nature must be examined at the date of the transaction and it should not be judged by what happened later. On this principle the fact that the money was lost owing to the bank having collapsed had no bearing. The transaction was found by the learned Judges to have been for the benefit of the family. It was, in fact, in its inception an act which was designed to protect or defend the family from an inevitable recurring loss, the property by reason of its situation yielding less than nearer property would do. As we have stated, the facts bring the case within the principle enunciated in the case of *Shankar Sahai* v. *Bechu Ram* (1). Indeed it has been put forward by the learned

(1) (1925) I.L.R., 47 All., 381. (2) (1928) I.L.R., 50 All., 776.

counsel for the parties before us that a particular purchase which involves the mortgaging of the family property may in very special circumstances amount to a legal necessity. For example, there may be a small patch of land situate inside a larger area owned by the family and the owner of that patch of land may be a constant source of trouble to the family. In the circumstances the purchase may be justified. We need not express any opinion on a hypothetical case. It is sufficient to say that each case will have to be judged on its own merits, and, on the law as it stands, we are of opinion that this particular transaction cannot be upheld and that the appeal must fail as regards this point.

The learned counsel for the appellants prayed that we might remit the case for further inquiry to the lower court. The ground of his prayer was that when the learned Subordinate Judge decided this suit the appellants did not adduce evidence on the merits, necessity, and financial advantages of the transaction, because the case of *Shankar Sahai* v. *Bechu Ram* (1), was sufficient for the purpose. It was argued that the plaintiffs might have, in view of the Full Bench case of *Jagat Narain* (2), led evidence to show that there did exist circumstances which justified the father and the son to make the purchase by the pre-emption suit, but we find that no such ground was taken in the memorandum of appeal, and we are also of opinion that a remand of an issue is likely to encourage the parties to adduce false evidence. We therefore cannot accede to this request.

For the plaintiffs appellants it was then contended that in any case the amount of Rs. 1,800 and Rs. 550 ought to come out of the pre-empted property. As to this there can be no doubt. The minor members of the family repudiate the transaction of the purchase of the

(1) (1925) I.L.R., 47 All., 381. (2) (1928) I.L.R., 50 All., 969.

1928

KISHEN SAHAI v. RAGHUNATH SINGH.

pre-empted property. In the circumstances they cannot possibly object to a mortgage by Sewak Ram and Raghunath Singh of the property which they had acquired by pre-emption.

[The rest of the judgement, not being material to this report, is omitted.]

Decree modified.

Before Mr. Justice Sulaiman and Mr. Justice Kendall.

1928 *November*, 15.

AMARJIT UPADHIYA (DEFENDANT) *v.* ALGU CHAUBE (PLAINTIFF).*

Hindu law—Stridhan—*Inheritance—Daughter's daughter preferential heir over daughter's son.*

A daughter's daughter is a preferential heir, as against the daughter's son, to *stridhan* property left by their maternal grandmother, in cases where their mother predeceased her own mother. *Subramanian Chetti* v. *Arunachelam Chetti* (1), followed. *Sheo Shankar Lal* v. *Debi Sahai* (2), distinguished.

THE facts material to this report were briefly as follows:—The plaintiff claimed to be the heir to certain property which was the *stridhan* of his maternal grandmother, Musammat Gomta. During the trial of the suit it transpired that the plaintiff had two sisters living. It was also established that the plaintiff's mother, Musammat Reshma Kuar, had predeceased her own mother, Musammat Gomta. The trial court having decreed the suit, there was an appeal to the High Court.

Mr. *A. Sanyal*, for the appellant.

Maulvi *Iqbal Ahmad* and Pandit *Narmadeshwar Prasad Upadhiya*, for the respondent.

---

*First Appeal No. 107 of 1925, from a decree of Mathura Prasad, Subordinate Judge of Azamgarh, dated the 28th of January, 1925.

(1) (1904) I.L.R., 28 Mad., 1. (2) (1903) I.L.R., 25 All., 468.