

Before Mr. Justice Sen and Mr. Justice Niamat-ullah

MADAN LAL (PLAINTIFF) v. CHIDDU AND OTHERS  
(DEFENDANTS).\*

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June. 19.

*Hindu law—Joint family property—Mortgage by father not for legal necessity or antecedent debt—Whether void or voidable—Subsequent auction purchaser of mortgaged property in execution of a simple money decree against father—Right of auction purchaser to challenge validity of mortgage.*

On the authorities of this Court it must be accepted as settled that an alienation made by a member of a joint Hindu family is not void but voidable at the option of the other members thereof or any one of them, and that it can not be impeached by the alien or himself or by any transferee who has not acquired by transfer or prescription the interest, in the property alienated, of the entire joint family.

But the position of an auction purchaser, in execution of a simple money decree, of the interests of a coparcener, especially those of the father in a joint Hindu family consisting of himself and his sons or grandsons, is materially different from that of a transferee under a private alienation by the father or any other coparcener. Although ordinarily a member can not impeach his own alienation and a transferee of his interest can not be in a better position, yet an auction purchaser of his interest can do so, being entitled to obtain a partition which can be effected only by including the whole of the family property. The position of the auction purchaser at sale held in execution of a simple money decree against the father is still stronger, where the family consists of father and sons, as the right of the sons to challenge the sale is strictly limited to their being able to show that the debt was contracted for immoral purposes, to the knowledge of the purchaser.

Where, in a joint Hindu family consisting of a father and his sons, the father made a simple mortgage of a house belonging to the joint family, and subsequently this house was sold by auction in execution of a simple money decree against the father, it was held, accordingly, that in a suit for sale brought on the mortgage the auction purchaser in possession

\* Second Appeal No. 1999 of 1927, from a decree of Ali Ausat, Additional District Judge of Aligarh, dated the 18th of October, 1927, confirming a decree of Kedar Nath Mehra, Munsif of Kasganj, dated the 3rd of August, 1927.

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was entitled to impeach the validity of the mortgage on the ground that it was not for legal necessity or antecedent debt.

*Muhammad Muzammil-ullah Khan v. Mithu Lal* (1), *Chandradeo Singh v. Mata Prasad* (2), *Jagesar Pande v. Deo Dat Pande* (3), *Madan Lal v. Gajendrapal Singh* (4), *Sheo Ghulam v. Badri Narain* (5), *Lachhman Prasad v. Sarnam Singh* (6), *Manna Lal v. Karu Singh* (7), *Bakhshi Ram v. Liladhar* (8), *Tota Ram v. Hargobind* (9) *Durga Prasad v. Bhajan* (10), *Sarju Prasad Rao v. Mangal Singh* (11), *Deendyal Lal v. Jugdeep Narain* (12), *Balgobind Das v. Narain Lal* (13), and *Suraj Bansi Koer v. Sheo Persad Singh* (14), referred to.

Mr. K. D. Malaviya, for the appellant.

Mr. T. A. K. Sherwani, for the respondents.

SEN and NIAMAT-ULLAH, JJ. :—This is a plaintiff's appeal arising out of a suit brought by him for recovery of Rs. 218 by sale of a house hypothecated to him under the mortgage deed dated the 20th of November, 1923, executed by the defendant No. 1, Chiddu. Defendants Nos. 2 to 6 are the sons of the mortgagor. Defendant No. 7 is his wife. Defendant No. 8 is one Bal Kishen, who purchased the house to which the mortgage deed in suit relates, at an auction sale held in execution of a simple money decree passed against Chiddu on the 22nd of August, 1925. The suit was not contested at all by the defendants Nos. 1, 4, 5, 6 and 7. The defendants Nos. 2 and 3, who originally contested it, subsequently withdrew in favour of the plaintiff. Defendant No. 8 contested the plaintiff's claim on the ground that the mortgage deed in suit was executed by the defendant No. 1 without any legal necessity, presumably for immoral purposes. Both the courts below have held that the mortgage deed in suit was not justified by any legal necessity. The learned Additional District Judge has

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| (1) (1911) I. L. R., 33 All., 783.  | (2) (1909) I. L. R., 31 All., 176. |
| (3) (1923) I. L. R., 45 All., 654.  | (4) (1929) I. L. R., 51 All., 575. |
| (5) (1913) 11 A. S. J., 798.        | (6) (1917) I. L. R., 39 All., 500. |
| (7) (1919) 56 Indian Cases, 766.    | (8) (1913) I. L. R., 35 All., 353. |
| (9) (1913) I. L. R., 36 All., 141.  | (10) (1919) I. L. R., 42 All., 50. |
| (11) (1925) I. L. R., 47 All., 490. | (12) (1877) I. L. R., 3 Cal., 198. |
| (13) (1893) I. L. R., 15 All., 339. | (14) (1879) I. L. R., 5 Cal., 148. |

gone further and found that the money advanced by the plaintiff under the mortgage deed in suit was borrowed by the defendant No. 1 for gambling to which he was addicted and that the plaintiff was fully aware of the absence of legal necessity of the loan which he advanced. He has not, however, found that the plaintiff was also aware that the defendant No. 1 required money for gambling. In any case the finding was sufficient for the view which he took, namely that the mortgage deed in suit was invalid and not enforceable against the family or the family property to which the deed related.

It is contended before us, as was contended before the courts below, that the members of the joint Hindu family to which the property in suit belongs are the only persons who can impugn the validity of the mortgage deed in suit and that the defendant No. 8 cannot, by virtue of the auction sale at which he purchased, be considered to represent the interest of the entire coparcenary body. It is therefore argued that it is not open to the defendant No. 8 to put the plaintiff to proof of the validity of his mortgage as one made for legal necessity.

The learned advocate for the appellant, Mr. *K. D. Malaviya*, who has argued his case with skill and ability, has placed before us all the authorities bearing on the question. The earliest case to which it is necessary to refer is *Muhammad Muzammil-Ullah Khan v. Mithu Lal* (1), in which a subsequent purchaser, who remained in possession adversely to a joint Hindu family for more than twelve years, was held by the majority of the learned Judges composing the Full Bench to be competent to impugn the validity of a mortgage made by the head of the joint Hindu family, on the ground of want of legal necessity. In this view it is obvious that the interests of all the coparceners were conveyed to the subsequent transferee, who acquired it by adverse possession, though

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originally he had obtained a transfer from one member alone. CHAMIER, J., went further and held that the mortgage sought to be enforced not being proved to be for legal necessity was invalid and could not confer any title; hence any party to the suit in which the question arises, being himself in possession, can put the plaintiff to proof of the validity of his mortgage regardless of the weakness of his own title. This view proceeds on the assumption that an alienation made by one of the family without the consent of the other members and without legal necessity is void and not merely voidable, and as such it can be ignored. CHAMIER, J., based his view on the authority of the Full Bench case of *Chandradeo Singh v. Mata Prasad* (1), which he treated as an authority for the proposition that a transfer made by the father without legal necessity conveys no title. Though he doubted that an alienation by one member of the family without the consent of the others and not for legal necessity is void and not voidable, he held in substance that it is void, in so far as he maintained that it conveys no title. A transfer voidable in its nature is good till it is avoided by those at whose option it is voidable. Later decisions of this Court definitely hold that such a transfer is only voidable, see *Jagesar Pande v. Deo Dat Pande* (2). In a recent case, *Madan Lal v. Gajendrapal Singh* (3), it was assumed to be settled law, on the decisions of this Court, of which the case last noted is an instance, which proceeds on the authority of two Madras cases and a case of this Court, viz., *Sheo Ghulam v. Badri Narain* (4).

Two Privy Council cases which lead to the contrary result, if not positively against that view, were not brought to the notice of the Court then or at any subsequent occasion when the question arose. In *Lachhman Prasad v. Sarnam Singh* (5), a mortgage made by three

(1) (1909) I. L. R., 31 All., 176. (2) (1923) I. L. R., 45 All., 654.

(3) (1929) I. L. R., 51 All., 575. (4) (1913) 11 A. L. J., 793.

(5) (1917) I. L. R., 39 All., 500.

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members of a joint Hindu family was sought to be enforced against the mortgagors and other members of the family. Their Lordships referred to the principles of Hindu law and observed at page 505: "Now these are the principles which govern this and all other cases of the kind, and according to these principles there can be no doubt that the present mortgage is *void*." The report of counsel's argument shows that it was actually argued on one side that it was voidable and not void. It is to be observed that the decision of the case would have been the same if the mortgage had been regarded as voidable. In a later case, *Manna Lal v. Karu Singh* (1), the High Court gave the plaintiff mortgagee a decree for sale of the father's share, he being the mortgagor, exempting the shares of the sons. Their Lordships of the Privy Council held that "Upon the findings of the High Court this decree was too favourable to the plaintiff and incorrect. The law was finally established no doubt since the decision by this Board in the case of *Lachhman Prasad v. Sarnam Singh* (noted above) which determined that a mortgage of the joint family property of a *Mitakshara* family by its *karta*, unless necessity or an antecedent debt is proved, is *void*; the transaction itself gives to the mortgagee no rights against the *karta*'s interest in the joint family property." Here, again, the result would have been the same if the transaction had been held to be voidable at the instance of the sons. Their Lordships characterised it as void, possibly because they were considering the question as to whether it is binding on the father who had made the mortgage, as against whom it becomes void when the sons repudiate it. On the one hand it is perfectly clear that their Lordships held the transaction to be "*void*" as distinguished from "*voidable*"; on the other hand it cannot be denied that it was not necessary to decide whether it should be regarded as a nullity, being void *ab initio*, and could be shown to be such by any party.

(1) (1919) 56 Indian Cases, 768.

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whatever its own rights. In this state of the authorities we do not feel disposed to pronounce a definite opinion on the question, in the view of the case we take on the assumption that the mortgage in favour of the plaintiff is only voidable.

On the authorities of this Court, then, it must be accepted as settled that an alienation made by a member of a joint Hindu family is voidable at the option of the other members thereof, or any one of them, that it cannot be impeached by the alienor himself or by any transferee who has not acquired by transfer or prescription the interest in the property alienated, of the entire joint family. See *Muhammad Muzammil-ullah Khan v. Mithu Lal* (1), *Bakhshi Ram v. Liladhar* (2), *Tota Ram v. Hargobind* (3), *Durga Prasad v. Bhajan* (4), *Jagesar Pande v. Deo Dat* (5), *Sarju Prasad Rao v. Mangal Singh* (6), and *Madan Lal v. Gajendrapal Singh* (7).

In none of these cases except *Bakhshi Ram v. Liladhar* (2), the court had to deal with the case of an auction purchaser at a sale in execution of a simple money decree against the father and in possession of the property purchased by him. It must be conceded that the facts of the case last referred to are parallel and cannot be distinguished in any material particular; but the only ground on which the decision of the learned Judges proceeds will appear from the following remarks at page 357: "The appellant must be regarded as the purchaser of the right of Kallu only. His purchase was made as recently as 1909 and might yet be challenged by Kallu's son. He is, therefore, in a different position from that occupied by the purchaser in the case of *Muhammad Muzammil-ullah Khan v. Mithu Lal* (1). In that case it was held by the majority of the court that the purchaser was entitled to challenge a mortgage made by

(1) (1911) I. L. R., 33 All., 788. (2) (1913) I. L. R., 35 All., 358.

(3) (1913) I. L. R., 36 All., 141. (4) (1919) I. L. R., 42 All., 50.

(5) (1923) I. L. R., 45 All., 654. (6) (1925) I. L. R., 47 All., 490.

(7) (1929) I. L. R., 51 All., 575.

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one member of a Hindu family, because he had acquired title to the property by adverse possession against all the members. We must, therefore, hold that the appellant is not entitled to raise the question of the validity of the mortgage." The learned Judges assumed that the position of the auction purchaser was identical with that of a private alienee from the father, and that he did not acquire title to the property against all the members. That, if he is invested with all the rights of the joint Hindu family, he can impeach an alienation made by the father is conceded in that case and in the Full Bench case which it follows. The position of the auction purchaser in execution of a simple money decree of the interests of a coparcener, especially those of the father in a joint Hindu family consisting of himself and sons or grandsons, is materially different from that of a transferee under a private alienation by the father or any other coparcener and has not been considered in any of the cases decided by this Court. As a matter of fact the question did not arise in any of them. It could have been raised and considered and decided in *Bakhshi Ram v. Liladhar* (1), but was overlooked.

It is a well established proposition that though a member of a joint Hindu family cannot by private alienation transfer, for his personal benefit, his own share in the joint family property, his creditor can attach and have such share sold in execution of a simple money decree against him. The auction purchaser at such a sale acquires the right to obtain a partition of the share of the judgment-debtor who has himself at least that right. See *Deendyal Lal v. Jugdeep Narain* (2). If the right to obtain partition is conceded to the auction purchaser, it is difficult to withhold from him the right to challenge an alienation of a particular family property made by another member of the family, since all the members must be parties to the suit for

(1) (1913) I. L. R., 35 All., 353.

(2) (1877) I. L. R., 3 Cal., 198.

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partition and the entire family property must be brought into the hotchpot.

A dictum of their Lordships of the Privy Council in *Balgobind Das v. Narain Lal* (1), which seems to have an important bearing runs thus: "In the present case the interest had passed to Naunidh not by survivorship but by purchases at sales in execution of decrees. Although it is not the same interest as he would acquire by survivorship, it is sufficient to entitle him to set up the invalidity of the mortgage." The father (Naunidh) had purchased the interest of the son in execution of a simple money decree against the son (Narain Lal). The question was whether the father, as *auction purchaser of the son's right*, could impeach a mortgage made by the son. The remark quoted above is their Lordships' answer to it. They pointed out with reference to *Deendyal Lal v. Jugdeep Narain* (2), that the auction purchaser of the interests of a member of a joint Hindu family acquires the right to obtain a partition of his share. In the case before their Lordships the father had purchased at auction the interest of the son in execution of a simple money decree and was held, on that account, to possess sufficient interest to entitle him to impeach a private alienation made by the son. Ordinarily a member cannot impeach his own alienation and a transferee of his interest cannot be in a better position but an auction purchaser can do so, being entitled to obtain a partition which can be effected only by including the whole of the family property. It is noticeable that in the case which their Lordships had to consider the father could be easily held to be competent to impeach the alienation made by the son not as an auction purchaser, but in his own right as an undivided member of the family, but, for reasons which are not clear from the judgment, their Lordships preferred to base their view on the purchase by him of the son's

(1) (1893) I. L. R., 15 All., 339  
(351).

(2) (1877) I. L. R., 3 Cal., 198.



interest in execution of a decree for money, as giving him the *locus standi* to challenge the alienation of family property made by the son.

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We do not think that it can be seriously disputed that a transferee from the father under an alienation made for legal necessity can successfully impeach another alienation made in favour of a transferee who fails to establish legal necessity for it. This is manifest from the *ratio decidendi* adopted in the case of *Bakhshi Ram v. Liladhar* (1), itself, which concedes the right to impeach an alienation not only to members of the family but also to those who acquire its rights even by adverse possession. If, therefore, on the right of the plaintiff, who is himself a transferee, to impeach an alienation in favour of the defendant, being questioned, it is open to him to establish his title by proving adverse possession against the whole family, it follows that the plaintiff can likewise establish his right by proof of legal necessity for the alienation in his favour. It is but a logical extension of the same proposition that a plaintiff or defendant can establish the validity of the alienation in his favour by proving that it was made by the father to satisfy an antecedent debt, and that he can impeach the alienation relied on by his adversary. There is nothing in any of the decided cases to which we have been referred to negative the right of a transferee for an antecedent debt of the father to impeach an alienation not shown to be valid by proof of the existence of justifying circumstances.

The position of the auction purchaser at a sale held in execution of a simple money decree against the father is still stronger, where the family consists of father and sons. Even if the property so purchased is not his share in the entire family property but one of several properties belonging to such family, the right of the sons to challenge the sale is extremely limited. It was

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laid down by their Lordships of the Privy Council in *Suraj Bunsî Koer v. Sheo Persad Singh* (1) that "where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt or in order to raise money to pay off antecedent debt or under a sale in execution of a decree to pay for the father's debt, his sons by reason of their duty to pay their father's debt cannot recover that property unless they show that the debts were contracted for immoral purposes and that the purchaser had notice that they were so contracted."

The defendant in the case before us is an auction purchaser of the property in dispute at a sale held in execution of a simple money decree against the father who is a member of a joint Hindu family with his sons, and is in possession. The plaintiff sues for sale of it for satisfaction of a mortgage which has been found to be hopelessly invalid, being tainted with immorality. Possession is a good title against all except the rightful owner. It seems to us that the defendant is entitled to defend his possession which he obtained in the manner stated. His right cannot be questioned even by the sons who are the other members of the family except by showing that the debt to which the decree related had been contracted for immoral purposes and, further, that it was known to the defendant that the debts had been so contracted. His interest in the property in dispute, if not absolutely unimpeachable, is, at any rate, such as to entitle him to resist the attempt of the plaintiff to have the property sold for satisfaction of an invalid mortgage.

On a full consideration of the position of the parties we hold, both on principle and authority, that an auction purchaser, at a sale held in execution of a simple money decree against the father, of a part of the joint family property, which has passed out of the family, being in

(1) (1879) I. L. R., 5 Cal., 148.

his possession by virtue of the auction sale, can impeach an alienation of that part of the property made by the father, where the joint family consists of the father and his sons.

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In view of the conclusion arrived at by us this appeal fails and is dismissed with costs.

Before Mr. Justice Sen and Mr. Justice Niamat-ullah.

IMTIAZ BEGAM (DEFENDANT) v. ABDUL KARIM KHAN AND OTHERS (PLAINTIFFS).\*

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June, 13.

*Muhammadian law—Dower debt—Widow in lawful and peaceable possession of the estate—Right to retain possession until payment—Consent of husband or his heirs to such possession not necessary.*

Where a Muhammadian widow lawfully and peaceably takes possession of her husband's estate, without any force or fraud, where her dower debt remains unpaid in whole or in part, she is entitled to retain possession against the other heirs of the husband so long as the debt has not been paid by them or satisfied out of the usufruct of the property, and in order to entitle her so to retain possession of the property it is not necessary that her possession should have originated with the consent express or implied of her husband or of his heirs.

*Amani Begam v. Muhammad Karim-ullah (1), Ali Balxshi v. Allahdad Khan (2), Ramzan Ali Khan v. Asghari Begam (3), Muhammad Shoab Khan v. Zaib Jahan Begam (4), Beeju Bee v. Syed Moorthiya Saheb (5) and Sahebjan Bewa v. Ansaruddin (6), followed. Amanat-un-nissa v. Bashir-un-nissa (7), Muhammad Karim-ullah Khan v. Amani Begam (8) and Sabur Bibi v. Ismail Shaikh (9), disapproved. Mussumat Bebee Bachun v. Sheikh Hamid Hossein (10) and Maina Bibi v. Chaudhri Vakil Ahmad (11), referred to. Hamira Bibi v. Zubaida Bibi (12), explained.*

\* Second Appeal No. 85 of 1928, from a decree of P. C. Agarwal, Subordinate Judge of Budann, dated the 26th of August, 1927, reversing a decree of Fran Nath Aga, Munsif of Sahaswan, dated the 27th of April, 1927.

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| (1) (1894) I. L. R., 16 All., 225.  | (2) (1910) I. L. R., 32 All., 551.  |
| (3) (1910) J. L. R., 32 All., 563.  | (4) (1927) I. L. R., 50 All., 423.  |
| (5) (1919) F. L. R., 43 Mad., 214.  | (6) (1911) I. L. R., 38 Cal., 475.  |
| (7) (1894) I. L. R., 17 All., 77.   | (8) (1895) I. L. R., 17 All., 93.   |
| (9) (1923) I. L. R., 51 Cal., 124.  | (10) (1871) 14 Moo. I. A., 377.     |
| (11) (1924) I. L. R., 47 All., 250. | (12) (1916) I. L. R., 38 All., 581. |