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learned counsel for the applicants. We accordingly allow this application with costs and set aside the order of the court below confirming the award and we direct that the objection under order XXI, rule 58 be tried according to law.

FULL BENCH

Before Sir Shah Muhammad Sulaiman, Chief Justice, Mr. Justice Bennet and Mr. Justice Bajpai

1935 *December*, 19

BHARATPUR STATE (PLAINTIFF) *v.* SRI KISHAN DAS AND OTHERS (DEFENDANTS)*

Hindu law—Alienation by father—Suretyship for payment of money—Mortgage of joint ancestral property by father as security for due payment of rent under a lease taken by him of certain property—Lease not executed for legal necessity—Antecedent debt.

Where the father in a joint Hindu family took a lease of a village for nine years at an annual rent of Rs.2,700, and three months afterwards executed a mortgage of joint ancestral property for Rs.8,000 by way of security for the due payment of the rent; and it was found that the transaction was not supported by legal necessity or benefit to the estate:

Held that in these circumstances, and if there was no antecedency of the original debt or liability in point of time and in fact, the hypothecation of joint ancestral property by way of security was invalid.

Held, also, on the question of antecedent debt,—

(1) If the execution of the lease and the subsequent execution of the security bond were part and parcel of the same transaction, then obviously there could be no antecedent debt in point of time or fact.

(2) [*Per* SULAIMAN, C.J.; BENNET, J., concurring; BAJPAI, J., *contra*] If, however, the two transactions were separate and independent, the first would be antecedent in point of time. If the pecuniary liability incurred under the lease was certain, definite and unconditional, it would amount to a debt, even though the payment was to be by future instalments. But if under the terms of the lease the pecuniary liability were not only contingent but also conditional, and might accrue in certain

*First Appeal No. 233 of 1931, from a decree of Nawab Hasan, Subordinate Judge of Aligarh, dated the 11th of March, 1931.

contingencies and might not accrue in others, then the legal liability would not amount to the incurring of a debt.

(3) The Mitakshara puts suretyship as something distinct and different from debts. Even in those classes of suretyship in which the Hindu law makes the liability binding on the heirs of the surety it is the sons only and not the grandsons who are so declared liable; to hold that the father could make a valid alienation of the family property on account of his suretyship obligation, without there being an antecedent debt, would mean that the liability was binding on the grandsons also. The liability of the sons to pay a debt is not the same thing as the right of the father to alienate the property to discharge the debt. The validity of an alienation in discharge of an antecedent debt is an exception to the general rule of want of authority in the father to transfer property without legal necessity or benefit to the estate, and the exception should not be extended to the case of a suretyship where no antecedency in point of time and fact exists.

The facts of the case would appear from the Referring Order which was as follows:

COLLISTER and BAJPAI, JJ.:—This is a plaintiff's appeal, the plaintiff being the Bharatpur State through its Administrator. On the 15th of January, 1924, Bohra Dip Chand deceased, who was the father of defendants second set, took a lease of the village of Pani Gaon for a period of nine years from the plaintiff at an annual rental of Rs.2,700. On the 24th of April, 1924, he executed a security bond for Rs.8,000 for due payment of the lease money and by means of that security bond he mortgaged a certain property in the village of Kanchrouli. Bohra Dip Chand defaulted in payment of the lease money in 1332 and 1333 Fasli; and then he gave up the lease, and soon afterwards he died. Thereafter the plaintiff State sued the sons of Bohra Dip Chand, i.e., defendants second set, for recovery of the arrears of rent in respect to 1332 and 1333 Fasli and the suit was decreed by a revenue court in the district of Muttra on the 25th of May, 1928. That decree was subsequently transferred for execution to Aligarh, in which district the property in suit is situated; and in execution of the said decree the property in suit was attached and the 21st of October, 1929 was fixed for sale. Meanwhile, however, defendants first set, having obtained in 1927 a simple money decree against Bohra Dip Chand and his son Sardar Singh defendant No. 6, put the property in suit to sale and purchased it themselves on the 21st

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of August, 1929. They accordingly filed an objection under order XXI, rule 58 of the Civil Procedure Code in the execution proceedings of the plaintiff, and on the 19th of December, 1929, the executing court passed an order to the effect that the property in suit could not be sold in execution of the decree for arrears of rent of the Bharatpur State, but at the same time the court recorded a finding that there was a charge of Rs.8,000 of the State on the property in suit, for recovery of which the State was competent to sue. The plaintiff State has accordingly instituted the present suit for recovery of the said amount with interest and costs by sale of the property in suit.

The suit was contested by defendants first set and the main ground of contest was that the property in suit was the joint ancestral property of Bohra Dip Chand and his sons and that the mortgage was without legal necessity and was therefore invalid. * * * *

The Subordinate Judge of Aligarh, who tried the suit, has found against the plaintiff on the main issue; that is to say, he has found that Bohra Dip Chand was not competent to charge the property under the hypothecation bond of the 24th of April, 1924, which he executed by way of security. The suit has accordingly been dismissed with costs and the plaintiff State has come to this Court in appeal. * * * *

Various pleas have been taken before us by learned counsel for the plaintiff appellant; but some of them can be briefly disposed of. [These not being material for the purpose of the report have been omitted here.]

It is, however, pleaded that the hypothecation bond was executed to liquidate an antecedent debt inasmuch as the mortgage bond would only become operative when a debt or liability came into existence; that is to say, when the hypothecation bond became operative, there would already be an existing liability. The position was this: The hypothecation bond was executed as security for payment of a potential debt; and when the potential debt became an actuality, the hypothecation bond would automatically come to life. Thus its operativeness was dependent upon the contingency of a future debt coming into existence; and when that occurred, the hypothecation bond would *ipso facto* become enforceable. The happening of these two events would be to all intents and purposes simultaneous and in our opinion it cannot be held that there was any such

antecedence in time as was contemplated by their Lordships of the Privy Council in *Brij Narain* v. *Mangal Prasad* (1), and as would render the sons' interests in the ancestral property liable to sale under the mortgage.

* * * * * *

The last point which arises in this appeal is whether or not Bohra Dip Chand was competent to charge the ancestral property as security for payment of the lease money as it fell due under the deed of lease dated the 24th of April, 1924. In the case of *Maharaja of Benares* v. *Ramkumar Misir* (2) one Ram Prasad took a lease of four villages from the Maharaja of Benares and in order to secure due payment of the rent a surety bond was entered into by the lessee himself and two other persons, each surety hypothecating certain property as security. The rent for certain years fell into arrears and the Maharaja sued in the revenue court and obtained a decree; and having failed to realise the decretal money by execution in the revenue court, he sued the sons of Ram Prasad and of the two other securities, the fathers being then dead. A Bench of this Court held that the property was liable under the hypothecation bonds. No plea appears to have been taken in that case to the effect that only a personal liability would rest upon the son of a surety for payment of money. In *Chakhan Lal* v. *Kanhaiya Lal* (3) the question of a son's liability for the suretyship of his father was considered by the learned CHIEF JUSTICE and KENDALL, J. They referred to the case of *Maharaja of Benares* v. *Ramkumar Misir* (2) and observed that in that case "The contention that the text and the commentary (i.e. of the Mitakshara) refer only to a case where the amount has been previously paid and exists as a debt was repelled by this High Court"; but they expressed the view that "the liability of the father as surety did not entitle him to alienate the family property." They accordingly held that a charge which the father had created upon the family property as a surety was not a valid charge, but that his liability as surety still held good and that it could not be repudiated by the sons. In *Mata Din Kandu* v. *Ram Lakhan* (4) a different view appears to have been taken by YOUNG, J., and BENNET, J., who followed the view which was taken in the case of *Maharaja of Benares* v. *Ramkumar Misir* (2), and they remarked that no authority to the contrary had been shown to them, from which observation it

(1) (1923) I.L.R., 46 All., 95.
(2) (1904) I.L.R., 26 All., 611.
(3) [1929] A.L.J., 199.
(4) (1929) I.L.R., 52 All., 153.

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is clear that the case of *Chakhan Lal* v. *Kanhaiya Lal* (1) was not referred to. The Privy Council case of *Brij Narain* v. *Mangal Prasad* (2) and the propositions of law laid down therein were discussed and in that connection the court observed as follows: "But we are of opinion that in laying down these five propositions their Lordships of the Privy Council had no intention to apply the propositions to a case like the present, which is a case of a hypothecation bond of suretyship. There was no mention at all in the judgment of their Lordships of any such question having been raised before them. We consider that if their Lordships had intended to lay down the proposition that a Hindu father could not bind the estate of the joint family by hypothecating the estate for the purpose of suretyship, the proposition would have been clearly stated in the judgment of their Lordships. We consider that a proposition of such an importance as that in the present case would not have been laid down by their Lordships merely by implication, but would have received separate treatment and consideration. Accordingly, as we consider that this ruling of their Lordships is not intended to apply to the circumstances of the present case, we consider that we ought to follow the ruling in *Maharaja of Benares* v. *Ramkumar Misir* (3)."

In the case of *Dwarka Das* v. *Kishan Das* (4) the existence of some difference of opinion in this Court was recognized. As regards other High Courts, we have been referred to *Hira Lal Marwari* v. *Chandrabali Haldarin* (5), *Rasik Lal Mandal* v. *Singheswar Rai* (6) and *Brij Nath Prashad* v. *Bindeshwari Prasad* (7). In view of the conflict which appears to exist, particularly in this Court, as to whether a son's liability for security given by his father is a personal liability or whether a valid charge can be made by the father on the ancestral property, we are of opinion that the matter is one which should be decided by a Full Bench. We accordingly direct that the case be laid before the Hon'ble Chief Justice with a request that the following question be referred for determination to a Full Bench:—

Whether the father of a joint Hindu family can lay a valid charge upon the ancestral property as security for the payment of the rent which would fall due under a deed of lease which had been executed by himself and which has been found to have been executed otherwise than for the benefit of the family or for family necessity.

(1) [1929] A.L.J., 109.
(2) (1929) I.L.R., 46 All., 95.
(3) (1904) I.L.R., 26 All., 611.
(4) (1933) I.L.R., 55 All., 675
(5) (1908) 13 C.W.N., 9.
(6) (1912) I.L.R., 39 Cal., 843.
(7) A.I.R., 1925 Pat., 609.

Messrs. *P. L. Banerji* and *N. Upadhiya,* for the appellant.

Messrs. *Panna Lal* and *S. B. L. Gaur,* for the respondents.

SULAIMAN, C.J.:—I am doubtful whether any question as to the existence of an antecedent debt has been referred to us. In the body of the order of reference there is a clear expression of opinion that no antecedent debt existed, though the form in which the question referred to us is framed does not preclude such a consideration.

If the execution of the original lease and the subsequent execution of the security bond were part and parcel of the same transaction, then obviously there could be no antecedency in fact or in point of time. The two transactions would become one and the alienation, if without legal necessity and not for the benefit of the estate or the family, would be unjustified.

If, however, the two transactions were separate and independent. the first would be antecedent in point of time. If the pecuniary liability incurred under the lease were certain, definite and unconditional, it would in my opinion amount to a debt, even though the payment were to be by future instalments. For instance, a person may borrow money promising to pay it after five years; he owes the debt from the very moment of borrowing, though he cannot be sued before the expiry of five years. Or again a person may purchase a motor car promising to pay the price after a year; he has incurred a debt, although the debt does not become recoverable until after the expiry of one year. But if under the terms of the lease the pecuniary liability were not only contingent, but also conditional and may accrue in certain contingencies and may not accrue in others, then the legal liability may not amount to the incurring of a debt. In the present case the execution of the security bond was really an offer of a further security in addition to the personal liability previously

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incurred. It was not a case of a discharge or repayment of an antecedent debt. As the terms of the lease are not before us, it is impossible to express any final opinion on this matter.

Sulaiman, C.J.

On the main question, even after hearing the point argued afresh, I adhere to the opinion expressed in the case of *Chakhan Lal* v. *Kanhaiya Lal* (1). It is not necessary for me to add to what has been already said there. I may only say that the primary idea of suretyship is an undertaking to indemnify if some other person does not fulfil his promise. Again, under the Hindu law the pecuniary liability for suretyship is binding on the sons only and not on the grandsons. To hold that an alienation can be made straight off without there being an antecedent liability would mean that the alienation would be binding not only on the sons but also on the grandsons. The liability of the sons to pay a debt is not the same thing as the right of the father to alienate the property to discharge the debt. One creates a liability which can be met out of the family property and the other involves an alienation out and out. The Mitakshara puts suretyship as something distinct and different from debts. The two are dealt with separately in different sections. Now the validity of an alienation in discharge of an antecedent debt has been characterised by their Lordships of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (2) as an exception to the general rule of want of authority in the father to transfer property without legal necessity or when there is no benefit to the estate, and their Lordships have observed that the exception should not be extended. I would, therefore, hesitate to apply the exception to the case of a suretyship where no antecedency in point of time exists.

BENNET, J.:—I agree with the opinion of the learned CHIEF JUSTICE.

(1) [1929] A.L.J., 199.

(2) (1917) I.L.R., 39 All., 437(444).

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BAJPAI, J.:—The facts of this case are stated at length in the referring order and the question of law that we have got to decide is: "Whether the father of a joint Hindu family can lay a valid charge upon the ancestral property as security for the payment of the rent which would fall due under a deed of lease which had been executed by himself and which has been found to have been executed otherwise than for the benefit of the family or for family necessity."

Learned counsel for the appellant argued that it was open to him to go into the facts of the case and to show that the charge upon the ancestral property was made in lieu of an antecedent debt and as such was valid and that the way in which the question was formulated did not suggest that the charge was not in lieu of an antecedent debt. I am of the opinion that this point has been already decided by the Bench which has referred the question to us, and that it is permissible to us to look into the order with a view to satisfying ourselves whether the matter has or has not been decided by the Bench. The order says: "It is, however, pleaded that the hypothecation bond was executed to liquidate an antecedent debt inasmuch as the mortgage bond would only become operative when a debt or liability came into existence; that is to say, when the hypothecation bond became operative, there would already be an existing liability. The position was this: The hypothecation bond was executed as security for payment of a potential debt; and when the potential debt became an actuality, the hypothecation bond would automatically come to life. Thus its operativeness was dependent upon the contingency of a future debt coming into existence; and when that occurred, the hypothecation bond would *ipso facto* become enforceable. The happening of these two events would be to all intents and purposes simultaneous and in our opinion it cannot be held that there was any such ante-

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cedency in time as was contemplated by their Lordships of the Privy Council in *Brij Narain* v. *Mangal Prasad* (1), and as would render the sons' interests in the ancestral property liable to sale under the mortgage."

Bajpai, J.

Even if the question were open, I am of the opinion that it is impossible to hold that the security bond executed by Bohra Dip Chand, the father, was in lieu of an antecedent debt as understood in Hindu law. The facts are that Dip Chand took a lease of some property on the 15th of January, 1924, from the Bharatpur State on an annual rent of Rs.2,700 for nine years, and on the 24th of April, 1924, he executed a security bond in which he mentioned the fact that he had taken a lease for nine years and that the Bharatpur State had demanded a security of Rs.8,000 from him in respect of the said lease and therefore he was hypothecating 137 odd bighas of land of khewat No. 1 in village Kanchroli. It has been found that the above mentioned property is ancestral property. The lease which Bohra Dip Chand had taken from the Bharatpur State is not on the record of the case, and it may well be that one of the conditions of the lease was that the lessor would have to execute a security bond, in which event the two transactions would be practically one and there would be no "real dissociation in fact". Apart from that the lease was taken, as appears from the evidence of Chaubey Gopi Nath, an employee of the Bharatpur State, at an auction sale held some time in July, 1923, although the thekanama itself was executed on the 15th of January, 1934. We do not know whether any sum was paid by Bohra Dip Chand on the date of the auction, and it may well be that a year's rent was paid in advance, and even if nothing was paid the annual rent was not due at the time when the security bond was executed in April, 1924. It is true that an undertaking had been given by Dip Chand when he took the lease and that undertaking involved

(1) (1923) I.L.R., 46 All., 95.

a pecuniary liability, but the question is whether it is possible to construe that undertaking involving a pecuniary liability as a debt. It must be remembered that the general principle in regard to the power of the father under the Mitakshara law in his capacity of manager and head of the family with reference to the joint family property is that "he is at liberty to effect or to dispose of the joint property in respect of purposes denominated necessary purposes. The principle in regard to this is analogous to that of the power vested in the head of a religious endowment or muth, or of the guardian of an infant family", but side by side with this principle is the fact that there is "an obligation of religion and piety which is placed upon the sons and grandsons . . . to discharge their father's debts", and "although the correct and general principle be that if the debt was not for the benefit of an estate then the manager should have no power either of mortgage or sale of that estate in order to meet such a debt, yet an exception has been made to cover the case of mortgage or sale by the father in consideration of an antecedent debt", and it was observed by their Lordships of the Privy Council in the case of *Sahu Ram Chandra* v. *Bhup Singh* (1), from which ruling I have been quoting freely, that "this being an exception from a general and sound principle . . . the exception should not be extended and should be very carefully guarded." This conflict was noticed again by their Lordships of the Judicial Committee in the case of *Brij Narain* v. *Mangal Prasad* (2), and they observed: "It is enough to say that both principles are firmly established by long trains of decision, and it certainly occurs to the view that the term 'antecedent debt' represents a more or less desperate attempt to reconcile the conflicting principles."

In the present case the father had not borrowed any sum of money from any creditor prior to the execution

(1) (1917) I.L.R., 39 All., 437. (2) (1923) I.L.R., 46 All., 95.

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of the security bond, and it cannot be said that the bond was executed in lieu of the former borrowing. The bond was in the sum of Rs.8,000, and in no case can it be said that by the time of the execution of the bond he had become liable to pay this sum. The undertaking for the payment of the annual rent given by the father was to mature into a pecuniary liability at a date subsequent to the execution of the bond, and, as such, there was no antecedency in time, and in the absence of the lease it is not possible to say that there was any real dissociation in fact; on the contrary the circumstances suggest that the execution of the security bond was one of the conditions on which the lease was given.

Coming to the question which has been referred to us, I am of the opinion that the father of a joint Hindu family cannot lay a valid charge upon the ancestral property under the circumstances mentioned in the question.

In chapter VI, section IV, § 53 of the Mitakshara, it is laid down as follows: "Suretyship is enjoined for appearance, for confidence, and for payment. On failure of either of the first two, the surety himself in each case shall pay; on that of the third, his sons also must pay."

As pointed out by RANADE, J., in the case of *Tukarambhat* v. *Gangaram Mulchand* (1):

"Brihaspati recognizes four different classes of sureties: (1) sureties for appearance, (2) sureties for honesty, (3) sureties for payment of money lent, and (4) sureties for delivery of goods. The obligation of the first two kinds of sureties is limited to themselves personally, and does not bind their sons; but the obligation incurred by the last two kinds of sureties binds them and their sons also after their death. The commentary of Ratnakar on this text expressly states that the sons shall be compelled to pay debts incurred by their father under the last two classes of surety obligations. The texts of Narad and Yajnavalkya recognize three classes of surety obligations only,—

(1) (1898) I.L.R., 23 Bom., 454(459, 460).

those for appearance, those for honesty, and those for payment. Narad does not set forth the son's obligation in this place, but the Yajnavalkya text is quite as explicit as that of Brihaspati. The sureties of the first two classes must pay the debt, and not their sons, but the sons of the last kind of surety may be compelled to pay their father's debt incurred by him as surety. Katyayana refers to the same kind of surety when he lays down that the grandson of such a surety need on no account pay the debt, but the son must make it good without interest. The text of Vyasa makes the same distinction between the son's and the grandson's liabilities for such suretyship. Manu's texts on the subject clearly distinguish between sureties for appearance or good behaviour, and sureties for payment. The son shall not, according to Manu, in general be compelled to pay money due for suretyship, or idly promised to musicians and actresses, or lost at play, or due for spirituous liquors, or for tolls or fines. The general words "money due for suretyship" used in the text are expressly stated by the commentator Kulluka to refer only to sureties for appearance and good behaviour, but as regards a surety for payment, it is enjoined that the Judge may compel even his heirs to discharge the debt. Even as regards the first two classes of sureties, if they have derived any advantage, or received a pledge, their heirs may be compelled to pay the debt. The commentator Haradatta explains a similar text of Gautama by affirming the same distinction. This exposition of the authorities removes all apparent conflict, and the Pandits whose advice was sought by the late Sadar Diwani Adawlat in the case of *Moolchund* v. *Krishna* (1) must have based their opinion on these same texts, though there is no express mention of the texts in the judgment. The more general texts which class suretyship obligation with reckless and immoral debts must, therefore, be qualified by the particular texts quoted above, and when so explained, it becomes clear that they refer to particular classes of sureties which do not include sureties for payment of debts, in respect of which last class, unless the debts can be shown to have been incurred for immoral or illegal purposes, the sons are liable to discharge their father's debts."

It would thus appear that there is an obligation on the *sons only* when the father is a surety for payment of money lent or, at least, for delivery of goods and not when he stands surety for appearance or for honesty and

(1) (1844) Bellasis' Reports, 54.

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so far as Narad is concerned he does not set forth the son's obligation even in these two cases; but none of the ancient law-givers would make the *grandson* liable in any class of suretyship. In ancestral property the grandson has a vested interest by birth and it would be anomalous to hold that although the grandson is under no pious obligation to pay his grandfather's debts incurred as a surety, the grandfather has the right to lay a valid charge on ancestral property for payment of debts incurred by him as a surety.

I have already in an earlier part of my judgment emphasised the conflict that exists in the two principles, namely the limitation imposed on the father of a joint Hindu family in connection with the alienation of the family property when he has sons and grandsons, and the pious obligation of the son and the grandson to pay his father and his grandfather's debts if they are not tainted with immorality, and the attempts to reconcile the conflicting principles, one of such attempts being to give to the father power to alienate ancestral property in lieu of an antecedent debt, but I am not prepared to introduce a further head and to say that a father can mortgage or alienate ancestral property in discharge of debts incurred as "a surety for payment". One anomaly I have already pointed out and I can see no serious difficulty in reconciling the two principles at least so far as the question of suretyship is concerned. The son (and not the grandson) is liable to discharge the debts incurred by his father as a surety for payment; that is his personal obligation and if the creditor is alert he can obtain relief as long as the personal remedy is open to him, for if he were to obtain a decree within the time available for a personal decree the ancestral property might become liable by being taken in execution on the back of the decree, but it is not possible for him to enforce the mortgage after the personal remedy has become barred by time. In the case of *Brij Narain* v

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Mangal Prasad (1), mentioned above, their Lordships of the Privy Council summed up five propositions in connection with the powers of a manager and a father regarding joint ancestral property, and although it cannot be said that these five propositions are fully exhaustive, yet I venture to suggest that if the father had such a power as is contended for by the appellant, one might have expected another proposition.

It is not necessary for me to discuss the various authorities that were cited before us at the Bar, and I hold the view that the case of *Chakhan Lal* v. *Kanhaiya Lal* (2) takes the correct view of the law on the subject. It is one thing to say that the son is under a pious obligation to pay his father's debts incurred as a surety for payment and it is quite another thing to say that a father can lay a valid charge upon the ancestral property for payment of such a debt. The liability of the son is personal and can be enforced only as long as the personal remedy is alive, and recourse might be had by the creditor against the property in the hands of the son after he has obtained a simple money decree.

My answer to the question that has been referred to us is in the negative.

BY THE COURT:—(1) Even if an answer be wanted, no definitive answer can be given as to the antecedency or otherwise of the liability under the lease without knowing the terms of the lease.

(2) In case there is no antecedency in point of time and in fact, the hypothecation of joint ancestral property by way of security would not be valid without the existence of legal necessity or benefit to the estate.

(1) (1923) I.L.R., 46 All., 35. (2) [1929] A.L.J., 199.