

FULL BENCH

*Before Sir John Thom, Chief Justice, Mr. Justice Bajpai and
Mr. Justice Ganga Nath*

GANGA SARAN AND ANOTHER (PLAINTIFFS) *v.* GANESHI
LAL AND ANOTHER (DEFENDANTS)*

1939
January, 9

Hindu law—Alienation by father—Sons' liability for father's debts—Surety bond by father mortgaging joint ancestral property—Suretyship for debts due by third party—No legal necessity or family benefit—Mortgage not binding on sons or the family property—Whether a personal decree against the father would be binding on the sons.

The father of a joint Hindu family cannot bind the family estate by executing a surety bond creating a charge upon the joint ancestral estate for the due payment of a debt which was due by, and payable to, third parties. So, a decree for sale of the joint ancestral property obtained against the father by the creditor in such a case will, at the suit of the sons and grandsons, be declared to be not binding on the property.

The question whether a personal decree obtained against the father in such circumstances would be binding on the sons was not decided as it did not arise in the case.

Messrs. *E. V. David and Shah Habeeb.* for the appellants.

Dr. N. P. Asthana, for the respondents.

THOM, C.J., BAJPAI and GANGA NATH, JJ.:—This is a plaintiffs' appeal arising out of a suit in which the plaintiffs claimed for a declaration that a certain decree (No. 416 of 1929) of the court of the Munsif of Mahaban is not binding on the plaintiffs and their ancestral property referred to in the plaint.

The trial court dismissed the suit. The decision of the learned Munsif was affirmed by the lower appellate court. The learned single Judge of this Court before whom the matter came in second appeal has sustained the decision of the lower appellate court.

The plaintiffs are the sons and grandsons of one Bidhi Chand. Bidhi Chand executed a deed of

*Appeal No. 55 of 1937, under section 10 of the Letters Patent.

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suretyship under which he undertook to pay the debts due to Ganeshi Lal by two persons Dhanpat Rai and Bidhi Chand. The debtor Bidhi Chand is in no way connected with the surety Bidhi Chand.

The debts due to Ganeshi Lal by Dhanpat Rai and Bidhi Chand (the debtor) were not discharged in full. Ganeshi Lal in the circumstances brought a suit in 1929 against the debtors and the surety. In that suit he obtained a decree in execution of which the property hypothecated under the surety bond was exposed for sale.

The sons and grandsons of Bidhi Chand (surety) thereupon instituted the suit out of which this appeal arises, in which they claimed a declaration that inasmuch as the hypothecation bond referred to was not justified by legal necessity it is not binding upon them and the decree obtained in the suit of 1929 cannot be executed against the family property.

The question for consideration in this appeal is as to whether it is open to the father who is the *karta* of the joint Hindu family to bind the family estate by executing a surety bond. This question is, in our judgment, clearly covered by the decision of a Full Bench of this Court in the case of *Bharatpur State v. Sri Kishan Das* (1). In that case it was held that where the father of a joint Hindu family creates a 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 without the existence of legal necessity or benefit to the estate there is no antecedency (in point of time and in fact) of the liability under the lease, and the hypothecation of joint ancestral property by way of security was not valid.

In that case the facts were that a father executed a hypothecation bond as a security for the payment of

rent under a lease which he himself had entered into. It was held that the hypothecation bond in these circumstances was not binding upon the family property. In the present case the plaintiffs are in a very much stronger position because the surety Bidhi Chand did not execute the surety bond in security for the due performance of a contract which he himself had concluded but in security for payment of a debt which was due by third parties.

Learned counsel for the defendants at the outset of his argument admitted that in view of the decision above referred to he could not succeed in executing the decree obtained on a hypothecation bond against the estate. He contended, however, that the hypothecation bond under which Bidhi Chand agreed to stand surety for the payment of the debts due by Dhanpat Rai and Bidhi Chand (the debtor) created a personal liability and that a decree obtained on the footing of this personal liability was binding at least upon the sons of the surety. A reference to the record, however, discloses that the decree which was obtained in the suit No. 416 of 1929 was a mortgage decree under order XXXIV, rules 4 and 5. No personal decree has been passed against the surety. Whether there is any remedy against the surety now open to the defendants is a question upon which we do not feel called upon to make any pronouncement.

We hold upon the authority of the Full Bench decision in the case of *Bharatpur State v. Sri Kishan Das* (1) that it is not open to the defendants to execute the decree which they obtained in suit No. 416 of 1929 against the joint family property of the plaintiffs.

In the result we allow the appeal. We set aside the order of the courts below and decree the suit with costs throughout to the plaintiffs.

(1) (1935) I.L.R. 58 All. 804.