1882

MORGAN v. MORGAN,

inconvenient for us as a primary appellate Court, having power to determine questions of fact as well as law, to refuse to look at evidence almost if not entirely conclusive of the substantial issue before us, as being strongly corroborative of the story told by the appellant, and to relegate her to a fresh suit, which would involve the respondent himself in further expense. Upon our intimating this view, the counsel for the respondent admitted that the letters in question were in the handwriting of his client and Mrs. Muller respectively, and that having regard to their contents, it would be only stultifying himself and wasting the time of the Court to contest the appeal further. We have thought it right to look into the evidence given before the Judicial Commissioner as also to peruse the letters B, C, and D, and having satisfied ourselves that there has been no collusion or connivance between the parties, and that it has been clearly established that the respondent was guilty of incestuous adultery with Mary Muller his sister-in-law, we have no hesitation in allowing the appeal, reversing the decision of the lower Court, and granting the petitioner a decree *nisi* for dissolution of her marriage with the respondent, who will pay all the costs of the proceedings. (The judgment then proceeded to deal with the question of alimony and the custody of the children of the marriage).

APPELLATE CIVIL.

1882
March 7.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

PHUL CHAND AND ANOTHER (DEFENDANTS) *v.* MAN SINGH (PLAINTIFF).*

Joint Hindu Family—Adult Son—Mortgage of family property by father—Decree against father—Right of Son.

The father in a joint undivided Hindu family governed by the law of the Mitakshara mortgaged the ancestral property of the family as security for a debt incurred by him. His son was of age at the time of the mortgage, but the mortgagee did not make the son join in the mortgage. When the mortgagee brought a suit to enforce the mortgage, he brought it against the father alone; and he obtained a decree against the father alone for the sale of the property. On the property being attached in execution of the decree, the son objected to the sale of the property, so far as his own share according to Hindu law was concerned. This objec-

* Second Appeal, No. 603 of 1881, from a decree of S. M. Meens, Esq., Judge of Aligarh, dated the 27th May, 1881, modifying a decree of Sayyid Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 31st March, 1881.

1882

PHUL CHAND v. MÁN SINGH.

tion having been disallowed, he sued the mortgagee for a declaration that such share was not liable to be sold in execution of the decree, claiming on the ground that he was not bound by the mortgage or the decree, not having joined in the mortgage or been a party to the suit in which the decree was made, and that the debt secured by the mortgage had been incurred by his father for immoral purposes.

Held that the son was not entitled to succeed in such suit merely because, although he was of age, he was not required by the mortgagee to join in the mortgage, and was not made a party to the suit to enforce the mortgage; but that he was in the same position as he would have been had he been a minor at the time the mortgage was made and the decree was passed, and was therefore only entitled to succeed if he showed that the debt incurred by his father was incurred for immoral purposes of his own.

Held further that, inasmuch as the debt in question was incurred for necessary purposes, and as the son was aware of the mortgage and did not protest against it, but on the contrary stood by and benefited thereby, and as he was aware of the suit and did not apply to be made a party thereto, he was asking too late for the relief which he sought. *Ram Narain Lal* v. *Bhawani Prasad* (1) referred to.

On the 23rd October, 1873, Rati Ram and Hardeo Singh, two brothers, having borrowed Rs. 2,000 from one Nathu Ram, gave the latter a bond for that amount, in which as collateral security for its payment they mortgaged their ancestral landed estate, consisting of a two and a half biswas share of a certain village. On the 24th April, 1880, Nathu Ram, having sued Rati Ram and Hardeo Singh on this bond, obtained a decree thereon against them. In execution of this decree he caused the whole property to be attached and advertized for sale. Upon this Mán Singh, a son of Hardeo Singh, who was an adult at the time of the execution of the bond of the 23rd October, 1873, and who had not been made a defendant in the suit brought by Nathu Ram on that bond, objected to the sale of the property, so far as his share thereof under Hindu law was concerned. His objection having been disallowed, he brought the present suit against the heirs of Nathu Ram and against his father for partition of his share of the property, and to have it declared that such share was not liable to sale in execution of the decree of the 24th April, 1880. He alleged that the money borrowed by his father under the bond of the 23rd October, 1873, was borrowed for improper and immoral purposes and without lawful necessity; that his consent was necessary to a transfer of the ancestral property, and such consent had not been obtained;

(1) I. L. R., 3 All. 443.

and that his share could not be sold in execution of a decree passed in a suit to which he had not been a party. The Court of first instance dismissed the suit, finding that Hardeo Singh, the plaintiff's father, had not borrowed the money for which the bond of October, 1873, had been given for improper purposes, but for lawful purposes. On appeal by the plaintiff, the lower appellate Court gave him a decree as claimed on the ground that he was an adult at the time the bond of October, 1873 was executed, and a Hindu father had no power, when his sons were adults, to transfer the family property without their consent; that he had not been a party to the mortgage or in any way consented to it; that he had not been a party to the suit on the bond; and that consequently his share of the family property was not liable to sale in execution of the decree made in that suit. The lower appellate Court observed in its judgment, as regards Rs. 1,000 of the money borrowed under the bond of October, 1873, that this amount had not been shown to have been borrowed for necessary purposes.

In second appeal by the heirs of Nathu Ram, it was contended on their behalf that a mortgage by a Hindu father of ancestral property for necessary purposes was valid, notwithstanding his adult sons had not expressly consented to it. It was admitted at the hearing of the appeal, that virtually the whole of the Rs. 2,000 borrowed under the bond of the 23rd October, 1873, had been borrowed for necessary purposes.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the appellant.

Mr. *Dillon* and Munshi *Hanuman Prasad*, for the respondent.

The judgment of the Court (STRAIGHT, J., and TYRRELL, J.,) was delivered by

STRAIGHT, J.—The facts out of which this litigation has arisen are fully and, save in one respect, accurately set forth in the judgment of the lower appellate Court. It is now conceded that the whole of the Rs. 2,000, with the exception of a small sum, applied to immediate necessary purposes, which was raised by Hardeo, father of the plaintiff-respondent, and Rati Ram, his uncle, on the 23rd October, 1873, on a mortgage of their 2½ biswa share, was

1882

PHUL CHAND v. MÁN SINGH.

appropriated to the satisfaction of decrees obtained against them in respect of antecedent debts incurred either by them or their fathers. The substantial, and indeed the only question, for our consideration is, whether the plaintiff-respondent, as a member of a joint Hindu family, adult at the time of hypothecation of the ancestral property, as also when the suit to enforce it was brought, is bound by the mortgage executed by, and a decree obtained thereon against, his father alone.

So far as we are aware this point has not arisen before, or been made the subject of decision by the Privy Council; indeed it is expressly observed by their Lordships in the case of *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1) that "it is not so clearly settled whether in order to bind adult co-parceners their express consent is not required." By way of introduction to a discussion of this question, we presume it may be asserted without fear of contradiction, that every son born to the father of a joint Hindu family in possession of ancestral property, by birth acquires a positive, though undefined, share in the joint estate co-extensive with, and as large as that of, all the other members of the joint family, including his father. We also assume that it is competent for each and every member of a joint family at any time to demand partition of the ancestral property, and having had his share determined and allotted him, to hold and enjoy it in severalty. It has been the fashion, to describe the right acquired upon birth by a son born into a joint Hindu family as amounting to no more than an inchoate interest. To us this expression appears a somewhat unfortunate and misleading one, when we remember that it rests with the son, of his own act and by his own demand at any moment he may wish to do so, to give a distinct and individual existence to the specific claim, which by the Hindu law of inheritance, in virtue of his birth, he is declared entitled to assert in respect of the ancestral property. The current of decisions, including a Full Bench ruling of this Court, has definitely declared that where a Hindu father, as managing member of a joint Hindu family, has made alienations of the joint family estate for necessary family purposes, his minor sons are bound by such

(1) I. L. R., 5 Calc. 148; L. R., 6 Ind. Ap. 88.

alienations and by decrees in respect thereof obtained against the father alone, and are not entitled to have their shares released from the operation of such alienations and decrees. The crucial test apparently to be applied in all cases of this description is, whether the debt, to secure which hypothecation of the joint family property was made by the father, was an indispensable one, as an act of duty and pious obligation, or was necessary and essential for the wants and requirements of the joint family. It has therefore, as far as we can understand, now become settled law, that sons who were minors at the time of alienation by, and decree against, their father, are bound in a subsequent suit to avoid such alienation and decree brought against a mortgagee or purchaser to show that the obligation was not incurred by their father for any of the purposes above-mentioned. Such being the position in which the minor sons are placed, and the presumption seemingly being that they are affected by their father's act until they negative its propriety or necessity, the question as to the *status* of adult sons under like circumstances is not a little perplexing and difficult. At first sight, bearing in mind the conditions under which the joint Hindu family exists, and the subservience to the father as the head and manager, which is one of its most striking characteristics, it is by no means easy to understand why so long as it continues joint the minor and major sons should be upon a different footing. Their interest in the ancestral property is identical and proportionate, their right to have it defined and declared co-equal. If the broad principle of law, which provides that no person shall be bound by a contract in which he did not participate, or by litigation to which he was not made a party, is of any value or has any applicability to such matters, then it is difficult to see why minor sons, who cannot act for themselves, should be placed in an inferior position to adult sons, who are able to protect their own interests. We cannot help remarking that it seems to us not only inconsistent but inequitable to hold that, while the minor sons are to be presumed bound by their father's acts, until they establish to the contrary through the medium of a suit that such acts were not binding upon them, yet in the case of major sons the inference is to be entirely in the other direction. If the mortgagee's failure to take proper precautions is to be held to limit his right of recovery in the one case, it is not unreasonable to

1882

PHUL CHAND v. MÁN SINGH.

maintain that a like disability should attach to him in the other. Ordinarily speaking, when a person makes advances upon the security of landed estate he is expected to investigate the title of his mortgagor, and to ascertain the precise nature and extent of the interest upon which he is invited to lend his money. So when one man brings a suit against another, and seeks to make third parties jointly liable, he must include such persons in the array of defendants, if he desires to have them bound by the decree. It may be said these are truisms, but it is impossible not to feel that in all the cases which have been decided in reference to the responsibility of the members of a joint Hindu family for the managing member's acts, they have been to some extent lost sight of and possibly intentionally so. However, until we are set right by higher authority, we are not prepared to apply a different test to the case of adult sons to that which now, by a series of decisions, appears to be the proper one to adopt in the case of minors. In other words, we cannot hold that in the appeal before us the plaintiff-respondent is, "*ex necessitate*," entitled to succeed, because he was not required by the mortgagee to join in the execution of the bond of October, 1873, and was not made a party to the suit thereon in 1880. He came into Court alleging that the loan was contracted by his father for immoral purposes of his own. This assertion the first Court most distinctly found that he had failed to prove, and indeed as we have already remarked at the commencement of this judgment, it is now admitted that the Rs. 2,000 were employed in satisfying antecedent debts, for which the plaintiff-respondent's father and uncle were responsible under the Hindu law. Shortly, the facts of this case therefore are, that the plaintiff-respondent and his father, Hardeo, were living jointly at the time of the execution of the bond of the 23rd October, 1873; that the former was then adult; that the loan obtained from Nathu Ram was a necessary and proper one; that the proceeds of it were devoted to the discharge of antecedent debts, for which Hardeo and his brother Rati Ram were according to Hindu law responsible; and that the decree obtained on the 24th April, 1880, by the mortgagee was against his mortgagors Hardeo and Rati Ram alone, and not against the plaintiff-respondent. Rightly or wrongly, it seems to us, that, having regard to

the fact that the plaintiff-respondent was all along living jointly with, and undivided from, his father, the reasonable presumptions are, that he must have known of the mortgage transaction, that he virtually benefited by it, in that the ancestral property in which he had a share was saved from sale in execution of the decrees of Muhammad Ali Khan and Nathu Ram, and that he must have been well aware of the suit brought in 1880 against his father and uncle. As he in no way protested against the mortgage being made, but on the contrary stood by and derived advantage from it, and for seven years allowed it to continue in force without objection, and, moreover, did not apply to be made a party to the mortgagee's suit, which it was competent for him to have done, we certainly do not think him entitled at this late hour to have the relief granted to him he asks. The mortgage was executed for indispensable and necessary purposes, and according to every principle of Hindu law the respondent should bear his share of the burden. In expressing this opinion, we wish distinctly to guard ourselves by saying that we base it entirely upon the principles of the Hindu law, defining the *status* of the members of a joint and undivided Hindu family, in reference to the father or managing member, and the decisions which have been passed, as to the rights of minor sons in respect of alienations by the father. One of us took part in the Full Bench decision of this Court upon the point adverted to immediately above (1), and had the misfortune to differ with the rest of his brethren. That difference, whether sound or unsound, was founded on the view that the sure test in these matters was by a strict application of the rules of pleading, to broadly recognize and enforce the principle, that no person, whether minor or major, should be bound by a decree in a suit, to which personally or by a representative he was not a party. This opinion, however, did not meet with approval, and though the member of the Court who expressed it has, with the greatest deference of course, seen no reason to alter it, the reiteration of it in the present case, to which the principle so enunciated by him would seem to be directly applicable, would be presumption on his part. Therefore, accepting and adopting the rulings that have been passed in the case of minor sons of a joint and undivided Hindu family, upon a strict application of the doctrine of the Mitakshara, we think that,

(1) *Ram Narain Lal v. Bhawani Prasad*, I. L. R., 3 All. 443.

1882

PHUL CHAND v. MAN SINGH.

putting aside ordinary principles of law and procedure, we are bound to hold the adult sons as being in neither better nor worse position than the minors.

Such being the case, we think that the Judge wrongly decided in favour of the plaintiff. This appeal must therefore be allowed with costs, the decree of the Judge set aside, and the plaintiff-respondent's suit dismissed.

Appeal allowed.

1882
March 7.

Before Mr. Justice Oldfield and Mr. Justice Brodhurst.

SHAM LAL AND ANOTHER (DECREE-HOLDERS) v. KANAHIA LAL (JUDGMENT-DEBTOR).*

Decree payable by instalments—Execution of whole decree—Payments out of Court—Act XV of 1877 (Limitation Act), sch. ii, No. 179 (6)—Act X of 1877 (Civil Procedure Code), s. 258.

A decree payable by instalments provided that, in default in payment of two instalments, the whole decree should be executed. The decree-holder applied for execution of the whole decree on the ground that default had been made in payment of the third and fourth instalments. The judgment-debtor objected that the application was barred by limitation, as he had made default in payment of the first and second instalments, and three years had elapsed from the date of such default. The decree-holder offered to prove that those instalments had been paid out of court. *Held* that he was entitled to give such proof, in order to defeat the judgment-debtor's plea of limitation, notwithstanding such payments had not been certified. *Fakir Chand Bhose* v. *Madan Mohan Ghose* (1) followed.

THE decree in this case, which was dated the 5th July, 1875, was a decree for the payment of Rs. 450, by instalments of Rs. 40, and provided that, in the event of default in the payment of two instalments, the whole decree should be executed. The 1st, 2nd, 3rd, 4th, and 5th instalments were severally payable on the 9th June, 1876, 27th June, 1877, 16th June, 1878, 6th June, 1879, and 24th June, 1880. On the 2nd February, 1881, the decree-holders applied for execution of the whole decree on the ground that the judgment-debtor had made default in the payment of the 3rd and 4th instalments. The judgment-debtor alleged that he had made default in the payment of the first and second instalments, and the application having been made after the expiration of three years

* Second Appeal, No. 52 of 1881, from an order of R. M. King, Esq., Judge of Sâharanpur, dated the 28th April, 1881, affirming an order of Babu Ishri Prasad, Munsif of Deoband, dated the 12th March, 1881.

(1) 4 B. L. R. 130.