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within the time fixed by the court. In that case the decree, which Kalika Singh had obtained in the pre-emption suit, would have become void and he would have lost the right of pre-emption over the property to which the decree related. In my opinion the lower courts were wrong in not allowing interest to the defendant in this case.

Hence I allow the appeal and setting aside the decrees of the lower courts pass the following decree. Plaintiff to pay into court Rs. 900, together with the defendant's costs of the suit in all the three courts, on or before the 13th of August, 1926. If such payment is not made on or before that date, the mortgaged property in suit shall be sold. Let a preliminary decree for redemption be prepared under order XXXIV, rule 7, schedule I of the Code of Civil Procedure.

Appeal allowed.

Before Mr. Justice Wazir Hasan and Mr. Justice Muhammad Raza.

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NAND LAL AND ANOTHERS (PLAINTIFFS-RESPONDENTS) *v.* UMRAI AND OTHERS (PLAINTIFFS-RESPONDENTS).*

Hindu law—Joint ancestral property—Mortgage of ancestral property by father to save self-acquired property—Family necessity—Antecedent debt—Mortgage-debt not contracted for immoral or illegal purposes—Decree against father on mortgage, sons and grandsons, liability of.

Where a Hindu father in order to save his self-acquired property, which he had obtained by inheritance from his cousin, mortgaged the joint ancestral property of the family, *held*, that the mortgage in question was not effected for any family necessity or for antecedent debt and his sons and grandsons were not liable to pay that debt under the Hindu law.

* Second Civil Appeal No. 356 of 1925, against the decree, dated the 9th of April, 1925, of Saivid Khurshed Husain, Subordinate Judge of Hardoi, affirming the decree, dated the 8th of May, 1924, of Krishna Nand Pandaya, Munsif of Hardoi, decreeing the plaintiffs' claim for declaration of right.

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Where, however, a decree is passed against the father on the basis of the mortgage, *held*, that the sons and grandsons cannot escape liability under the decree when they have failed to prove that the mortgage-debt was contracted for immoral or illegal purposes. [17 O.C., 318; 26 O.C., 266; 10 O.L.J., 252; 27 O.C., 124; 26 O.C. 355; 1 O.W.N., 48; 21 A. L. J. 934, relied upon 26 O. C., 299 and 22 A. L. J., 980, referred to].

Mr. *Niamatullah*, for the appellants.

Mr. *A. P. Sen and* Mr. *H. K. Ghosh*, for the respondents.

RAZA, J.:—This is an appeal from a decree of the Subordinate Judge of Hardoi, dated the 9th of April, 1925, affirming a decree of the Munsif of Hardoi, dated the 8th of May, 1924.

The facts of the case, so far as it is necessary to state them for the purpose of disposing of this appeal, are as follows:—

Jhabbu, defendant No. 1 (since deceased), was the father of the plaintiff Nos. 1 and 2 and grandfather of the plaintiff No. 3. He was the owner of certain zamindari shares in village Bikharya, district Hardoi. He inherited certain share from his cousin Bhabhuti and that property was subject to a mortgage. Jhabbu raised money to pay off that mortgage by mortgaging the property in suit (8 biswansis share) to the contesting defendants, Nand Lal and Hardwari Lal (appellants), on the 6th of July, 1909. The property comprised in the mortgage in question was the joint ancestral property of Jhabbu and his sons. The mortgagees (defendants-appellants) brought a suit on the basis of their mortgage against Jhabbu alone and obtained a decree for sale of the mortgaged property on the 19th of August, 1920. The final decree for sale was passed subsequently and then the decree-holders took out execution and

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applied for sale of the property in suit. The sale was fixed for the 20th of August, 1923. The present suit was brought by the plaintiffs on the 15th of August, 1923. They prayed for a declaration that the decree, dated the 19th of August, 1920, under which 8 biswansis ancestral property had been put up for sale was null and void and could not affect their shares in the property.

The claim was resisted by the defendants on various grounds. The first court gave the plaintiffs a declaratory decree to the effect that the decree, dated the 19th of August, 1920, was inoperative against the plaintiffs' share which was to the extent of three-fourths of 8 biswansis and the said share could not be sold in execution of the said decree.

The defendants appealed; but their appeal was dismissed by the learned Subordinate Judge who agreed with the finding of the learned Munsif on all the points decided against them. The defendants have now come to this Court in second appeal.

It has been found by the lower courts that the mortgage-debt for which the decree in question was passed was not contracted for any immoral or illegal purpose, but it has been found at the same time that the mortgage had not been effected for family necessity or for an antecedent debt. It is contended in appeal before us that the plaintiffs as Hindu sons cannot escape liability under the decree, when they have failed to prove that the mortgage-debt was contracted for immoral or illegal purposes. It is also contended that the debt, which had originally been contracted by Bhabhuti, should be taken to be Jhabbu's debt which he became liable to pay on inheriting property from Jhabbu and which he paid off by mortgaging the property in suit to the defendants. The plea of family necessity is also raised in that connection.

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In our opinion the plea that the mortgage in question was effected for any legal neecessity or for an antecedent debt, is not a plea of any substance and must be rejected. Bhabhuti had mortgaged his property to one Raghunath Misir. Jhabbu inherited that property and paid off Raghunath's mortgage by mortgaging the ancestral property in suit to the defendants. The property which Jhabbu inherited from Bhabhuti was not, and could not be, his ancestral property. He, of course, became liable to pay the debt contracted by Bhabhuti when he inherited the property from Bhabhuti, but that debt was Bhabhuti's debt and not his debt. His sons or grandsons were not liable to pay that debt under the Hindu law. He saved that property which was his self-acquired property by mortgaging the ancestral property in suit. We think the lower courts were perfectly right in holding under the circumstances that the mortgage in question was not effected for any family necessity or for an antecedent debt.

The appellants' contention that the plaintiffs cannot escape liability under the decree when they have failed to prove that the mortgage-debt was contracted for immoral or illegal purposes, should, in our opinion, be accepted.

It was held by a Bench of the late Court of the Judicial Commissioner of Oudh in the case of *Gur Narain and others* v. *Gulzari Lal and others* (1), that where a decree has been obtained against a Hindu father whose children are minors, upon a mortgage executed by him of joint family property, whether or no there had been a sale of the property in execution of the decree, it is for the sons who come into court to escape liability thereunder to prove that the debt was contracted for an immoral or illegal purpose or that

(1) (1914) 17 O.C., 318.

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the debt was of an illusory character. It was again held by a Bench of the late Court of the Judicial Commissioner of Oudh in the case of *Rup Kishore* v. *Kanhaiya Lal and others* (1), that a Hindu son cannot escape liability under a decree obtained by a mortgagee against his father and *karta* of the family, unless he proves that the mortgage-debt was contracted for immoral or illegal purposes or was of an illusory character, whether or no the decree has been executed. The father as a *karta* of the joint family property *effectively represents the sons* and any decree obtained against him is binding on the sons. This case was followed in the case of *Mahadeo Bakhsh Singh* v. *Suraj Bakhsh Singh and another* (2). The cases of *Gur Narain and others* v. *Gulzari Lal and others* (3) and *Rup Kishore* v. *Kanhaiya Lal and others* (1) were followed recently in the case of *Gauri Shanker and another* v. *Jang Bahadur and another* (4). It was held in the last-mentioned case that so long as the creditor is seeking to enforce the mortgage executed by the father, he is bound to prove as against the sons that it was executed for valid necessity. But when once a mortgage is merged in a decree, it no longer subsists and the judgment-debt which the creditor is seeking to enforce is on the same footing as any other debt incurred by the father. If the sons desire to dispute such a judgment-debt, the burden lies on them to show that the debt was incurred for an illegal or immoral purpose. The decision in the case of *Ganga Bakhsh Singh and another* v. *Raghubar Singh and another* (5), which was the decision of a single Judge, was disapproved in that case—*Gauri Shankar and another* v. *Jang Bahadur and another* (4).

(1) (1923) 10 O.L.J., 141 and 26 O.C., 266.
(2) (1923) 10 O.L.J., 252.
(3) (1914) 17 O.C., 318.
(4) (1924) 11 O.L.J., 246 and 27 O.C., 124.
(5) (1924) 26 O.C., 299.

The lower courts have referred to the case of *Ram Dayal* v. *Nimar Singh and others* (1). It was, of course, held in that case that a compromise decree obtained against a Hindu father is in reality no better than a transfer made by the father of joint family property and such a decree cannot deprive the sons of their rights in the joint family property. But it is noticeable that the following observations were made in the judgment in that case :—

> "When the sons come to court to attack the remedy of a decree-holder against the father, the presumption is that the father did represent the sons in the litigation in which the decree was obtained. A Bench of this Court has discussed this rule of law in a judgment delivered today. In the present case, however, the situation is different. In this case the mortgagee comes to enforce a mortgage of which the limitation has been saved by a particular decree. The sons are not attacking the decree but it is the mortgagee who, having omitted to obtain the remedy under the decree, has sued on the basis of his mortgage which, so to say, was revived by the force of the decree. The consideration of representation would be different in such a case."

The following observation was made in the Bench case of *Mahadeo Bakhsh Singh* v. *Suraj Bakhsh Singh and another* (2) :—

> "The other arguments of the learned Counsel were that because of the compromise in the foreclosure suit substantial justice was not done to the plaintiffs and that the property

(1) (1923) 26 O.C., 355 and 11 O.L.J., 360.

(2) (1923) 10 O.L.J., 252 at p. 260.

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had not passed out of the family because the original mortgagee was in possession at present as owner. There is no allegation of fraud or collusion, so a compromise decree is as effective as one after contest."

In the case of *Brij Narain* v. *Mangal Prasad* (1) their Lordships of the Privy Council laid down certain propositions as the result of the authorities referred to by them. The second proposition stands as follows :—

"If he is the father and the reversioners are the sons he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for payment of that debt."

It was held in the case of *Gajadhar Pandey and others* v. *Jadubir Pandey and others* (2) that the word "debt" in the said proposition includes both a simple debt and a secured debt.

The Bench rulings of the late Court of the Judicial Commissioner of Oudh referred to above contain an elaborate examination of the authorities. Almost all the authorities, to which the respondents' learned Counsel has referred in the course of his arguments were duly considered in those rulings. The case of *Gur Narain and others* v. *Gulzari Lal and others* (3) has all along been considered as good law in this Province during the last 11 or 12 years. We must see that conflicting decisions, which are a source of uncertainty and harassment alike to the litigants and to the subordinate courts of this Province, should be avoided, so far as possible. We think the Bench cases mentioned above were rightly and correctly decided by the late Court of the Judicial Commissioner of Oudh. We re-affirm the view laid down in those cases.

(1) (1923) 21 A.L.J., 934. (2) (1924) 22 A.L.J., 980.
(3) (1914) 17 O.C., 318.

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The result is that we allow the appeal and, setting aside the decrees of the lower courts, dismiss the suit with costs. The contesting defendants will get their costs from the plaintiff in all the three courts.

HASAN, J. :—I concur.

Appeal allowed.

Before Sir Louis Stuart, Knight, Chief Judge, and Mr. Justice Gokaran Nath Misra.

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HARDEO BAKHSH AND ANOTHER (DEFENDANTS-APPELLANTS) *v.* DEPUTY COMMISSIONER OF SITAPUR, MANAGER, COURT OF WARDS, KATESAR ESTATE (PLAINTIFF-RESPONDENT).*

Mortgage—Redemption before the stipulated period, whether allowable—Usufructuary mortgage having no period fixed—Suit for redemption before the whole mortgage money paid up, maintainability of—Transfer of Property Act, section 17(b)—Tacking of sum paid by mortgagee to the mortgage-money to save the property from sale— Res judicata.

Where in a usufructuary mortgage no period at all was fixed and the intention of the parties clearly was that the mortgagor should get back his property the moment the mortgage-debt was found to have been satisfied and the plaintiff brought a suit for redemption alleging that the mortgage-debt had been so satisfied but on taking account it was found that some money was still due to the mortgagees, *held*, that the suit was not premature and that redemption could be allowed on ordering the plaintiff to pay the amount so found due. [I.L.R., 10 All., 602; I.L.R., 23 Mad., 33; I.L.R., 20 Bom., 677; 13 O.C., 128 and 17 O.C., 218, followed.]

Held further, that a mortgagee in order to tack on to his mortgage-money the sum paid by him to save the property from sale must show that the payment was necessary for the purpose of protecting his own security from sale. His security must be imperilled and if he paid the money in order to

* First Civil Appeal No. 62 of 1924, against the decree, dated the 23th of May, 1924, of Saiyid Khurshed Husain, Subordinate Judge of Sitapur, decreeing the plaintiff's suit.