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GIRJA CHARAN v. SHEORAJ SINGH.

Misra and Nanavutty, JJ.

High Court reported in *A. J. E. Abraham* v. *H. B. Sookias* (1), but chose to follow the decison of the Patna High Court reported in *Ram Krishna Misra, Ex. parte* (2) in which case the same view was taken which we have now taken in the present case. We are in full agreement with the view taken by the Patna High Court and by the Bench of this Court. The case in this Court was decided on the 30th of September, 1927 and it was unfortunate that the attention of the learned Judge was not directed to the said decision.

We, therefore, accept this appeal and set aside the order of discharge granted by the learned District Judge to Sheoraj Singh Under the circumstances we make no order as to costs.

Appeal allowed.

APPELLATE CIVIL.

Before Mr. Justice Gokaran Nath Misra and Mr. Justice E. M. Nanavutty.

1928. *August*, 8.

JAGDAT SINGH (PLAINTIFF-APPELLANT) v. RAWAT KANHAIYA BAKHSH AND ANOTHER (DEFENDANT-RESPONDENT.)*

Hindu law—Hindu widow—Debts incurred by a Hindu widow to meet the costs of litigation—Reversioners, how far bound to pay those debts.

If a Hindu widow has incurred debts to meet the costs of litigation brought against her, in order to protect her title to the estate, the debt so incurred would be binding on the reversioner. If, however, she has incurred debts in litigation

*First Civil Appeal No. 28 of 1928, against the decree of Pandit Damodar Rao Kelkar, Subordinate Judge of Rae Bareli, dated the 14th of November, 1927.

(1) (1924) I. L. R., 51 Calc., 337. (2) (1925) I. L. R., 4 Pat., 51.

undertaken by herself not with the object indicated above—those debts will not be binding on the reversioners.

Indar Kuar v. *Lalta Prasad, Singh* (1), *Amjad Ali* v. *Moniram Kalita* (2), *Palaniappa Chetty* v. *Deivasika Mony Pandara* (3), *Bhagwan Das Naik* v. *Mahadeo Prasad*, (4), *Jado Singh* v. *Nathu Singh* (5), *Upendra Nath* v. *Kiran Chandra* (6), and *Abdul Ghaffur Shah* v. *Pir Muhammad Khan* (7), relied upon.

Mr. *Radha Krishna*, for the appellant.

Mr. *Prithwi Nath Chaudhry*, for the respondents.

MISRA and NANAVUTTY, JJ. :—This appeal arises out of a declaratory suit. The plaintiff-appellant brought a suit to the effect that the mortgage deed, dated the 24th of July, 1926, executed by one Musammat Rachhpal Kuar, widow of Darshan Singh, respondent No. 2 in the appeal before us, in favour of Rawat Kanhaiya Bakhsh Singh, respondent No. 1 for Rs. 6,000 be declared as inoperative and not binding on him as having been executed without any legal necessity. The plantiff alleged himself to be the next reversioner of the husband of the said lady. It was alleged that two prior mortgages had been executed by Darshan Singh, in favour of respondent No. 1, one on the 2nd of June, 1908, and the other on the 11th of June, 1909, which the plaintiff-appellant was entitled to redeem, but in order to deprive him of that right a fresh deed of mortgage had been executed by the lady in favour of the respondent No. 1, fixing a long period of redemption, namely 50 years before which the property could not be redeemed. The plaintiff also sought for a declaration

(1) (1882) I. L. R., 4 All., 532.
(2) (1885) I. L. R., 12 Calc., 52.
(3) (1917) L. R., 44 I. A., 147.
(4) (1923) I. L. R., 45 All., 390.
(5) (1926) I. L. R., 48 All., 592.
(6) (1926) A. I. R., Calc., 1046.
(7) (1890) 22 P. R., p. 60.

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to the effect that this condition be declared not to be binding on him.

The widow did not put in any appearance in the suit, which was mainly contested by the defendant-respondent No. 1. He denied the plaintiff's reversionery title, his right to redeem the two prior mortgages and pleaded that the deed was binding upon the plaintiff since it had been executed for legal necessity.

The Subordinate Judge of Rae Bareli, who tried the suit, held that the plaintiff's reversionary right was fully established and that the mortgage deed was only binding upon the plaintiff so far as its consideration went to pay off the two previous mortgages executed by her husband and which have been stated above, and further to the extent of a sum of Rs. 1,200 which had been according to his opinion spent by the lady on account of legal necessity. He also held that the term of fifty years provided in the mortgage deed in suit was an unreasonable term and would not be binding upon the plaintiff-appellant, and that he would be entitled to redeem the two mortgages executed by Darshan Singh ignoring the term fixed in the mortgage deed in suit.

The plaintiff has come to this Court in appeal against the decision of the learned Subordinate Judge and the point raised by him in appeal before us is that the amount declared by the learned Judge to have been borrowed by defendant No. 2 for legal necessity is not proved by the evidence on the record to have been so justified.

We now proceed to determine how far the contention raised by the plaintiff-appellant can be maintained.

Turning to the mortgage deed in suit we find that its consideration consists of the following items :—

		Rs.
(*a*)	On account of pro-note, dated the 28th of May, 1925, executed by defendant No. 2 in favour of one Mahraj Bakhsh	1,960
(*b*)	On account of the prior mortgage deed dated the 11th of June, 1909, executed by Darshan Singh (exhibit 5) ...	200
(*c*)	On account of the prior mortgage deed dated the 2nd of June, 1908, executed by Darshan Singh (exhibit 4) ...	175
(*d*)	On account of the pleader's fee due to one Pandit Satyanarain Shukla, pleader, Rae Bareli ...	2,200
(*e*)	On account of the pro-note, dated the 11th of June, 1925, executed by defendant No. 2 in favour of one Chandra Pal Singh	1,165
(*f*)	For purchase of stamp and registration expenses	200
(*g*)	For another mortgage deed, dated the 10th of November, 1909, executed by Darshan Singh in favour of Mahraj Bakhsh	100
	Total Rs. ...	6,000

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The Subordinate Judge disallowed items (*a*), (*e*) and (*g*) altogether, allowed items (*b*), and (*c*) in full and allowed item (*d*) to the extent of Rs. 1,100 and item (*f*) to the extent of Rs. 100. In result he declared that the deed was binding to the extent of Rs. 1,575. The plaintiff-appellant admitted the two mortgage deeds executed by Darshan Singh constituting the items (*b*) and (*c*) and there is no dispute regarding them here.

The main dispute centres round items Nos. (*d*) and (*f*), under which the learned Subordinate Judge allowed Rs. 1,100 and Rs. 100 respectively.

We proceed to deal with each of these two items separately.

Regarding the item No. (*d*) we may point out that it is an item relating to the fee due to a pleader named Pandit Satyanarain Shukla of Rae Bareli on account of the various suits conducted by him on behalf of Musammat Rachpal Kuar. The learned Subordinate Judge found that out of this sum Rs. 400 had already been paid to the said pleader and the rest was still due out of the total amount which under the mortgage deed in suit she had asked the defendant No. 1 to pay to the said pleader. The learned Subordinate Judge has held that a sum of Rs. 1,100 out of this entire amount should be considered as binding upon the plaintiff. We regret to observe that the learned Subordinate Judge has not approached this question from a proper point of view. What the learned Subordinate Judge should have in our opinion done is to consider the nature of each litigation separately by itself and to determine whether the expenses incurred by the defendant No. 1 in connection with that litigation could be considered as

being justified by legal necessity. We, however, now proceed to do so ourselves.

The evidence regarding these litigations is to be found in the deposition of Pandit Satya Narain Shukla, who was examined in the court below as D.W. 1. According to his evidence we find that the fee due to him was in connection with seven pieces of litigations, the details of which we give below :—

(1) Two suits of profits brought in the Revenue Court by Musammat Rachhpal Kuar against Jagdutt Singh, plaintiff-appellant, in respect of which a fee of Rs. 475 was settled.

(2) A declaratory suit brought by the plaintiff-appellant, Jagdutt Singh, in the Court of the Subordinate Judge of Rae Bareli, against Musammat Rachhpal Kuar, on the ground that the lady was not entitled to possession of the property left by her husband. The fee settled in this case was Rs. 250, which is the legal fee in the case and which comes to the same figure if allowed for ten hearings which the pleader did at the rate of Rs. 25 per hearing.

(3) Appeal in the above declaratory suit brought by the plaintiff-appellant, Jagdutt Singh, in the Court of the District Judge of Rae Bareli, against the said Musammat Rachhpal Kuar. The fee settled in this case was Rs. 250, but Rs. 100 only was paid by the lady.

(4) *Mahadeo Singh* v. *Jagdutt Singh and Musammat Rachhpal Kuar* in the Court of the Additional Subordinate Judge of Rae Bareli. What the nature of the litigation was does not appear to have been stated by Pandit Satyanarain Shukla, nor is there any evidence on the record to prove it. The fee of Rs. 850 is alleged to have been settled in this case.

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(5) Execution proceedings taken by Musammat Rachhpal Kuar for recovery of costs of the declaratory suit brought by the plaintiff-appellant against her in the Subordinate Judge's Court, Rae Bareli. Rs. 25 are claimed as fee due to the pleader in these proceedings.

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(6) *Musammat Rachhpal Kuar* v. *Jagdutt*, a suit instituted by the lady in the Revenue Court for removing the plaintiff-appellant from the post of the lambardar. A sum of Rs. 125 is alleged to have been settled to have been payable to the pleader.

(7) Execution proceedings in *Musammat Rachhpal Kuar* v. *Jagdutt*, the two suits brought by her for profits in the Revenue Court, in which a fee of Rs. 475 is alleged to have been settled.

The total amount of the fees settled according to the statement of Pandit Satya Narain Shukla comes to Rs. 2,450, out of which he admitted a receipt of Rs. 200. The balance left due to him was Rs. 2,250. He stated that he had relinquished a sum of Rs. 75, which would reduce his dues to Rs. 2,175. We do not understand how in the mortgage deed a sum of Rs. 2,200 was stated as payable to him. However, that is a small matter, which cannot affect the decision of our case.

Before taking each of these items it is necessary that we should consider the law applicable in cases where a reversioner is sought to be bound with costs of litigation incurred by a Hindu widow.

The first case on the subject, which has always been followed, is a case decided by BRODHURST and MAHMOOD, JJ., of the Allahabad High Court, reported in *Indar Kuar* v. *Lalta Prasad Singh* (1), MAHMOOD, J. in delivering the judgment observed on

(1) (1882) I. L. R., 4 All., 532.

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page 543 that in his opinion a distinction should be drawn between litigation undertaken to *protect* the property and litigation, the object of which was to obtain a possible *benefit* for the estate, the former relating to the security of that which has already been acquired and in actual possession; and the latter relating to that which may possibly be acquired. According to his decision the former class of litigation would no doubt amount to legal necessity, but in regard to the latter class of litigation the costs of such litigation would only be binding, if it has ended in bringing an actual benefit to the estate. In the latter case, according to the opinion of the learned Judge, any alienation to meet the costs would be binding on the reversioner on the analogy of the maxim—"he who enjoys the benefit ought to bear the burden also."

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In *Amjad Ali* v. *Moniram Kalita* (1) it was held that the legal expenses incurred by a Hindu widow in defending her life estate in her husband's property constitute such a charge on the property as to make a sale thereof by her binding as against the reversioner.

The question of what constitutes "*benefit to the estate*" was discussed by their Lordships of the Privy Council in *Palaniappa Chetty* v. *Deivasika Mony Pandara* (2). Lord ATKINSON in delivering the judgment of their Lordships observed on page 155 that it was impossible for their Lordships to give a precise definition of "benefit to the estate" applicable to all cases and that they would not attempt to do so. It was, however, observed that the preservation of the estate from extinction, the defence against hostile litigation affecting it, the protection of its portions from injury, or deterioration by inundation, these and

(1) (1885) I. L. R., 12 Calc., 52. (2) (1917) L. R., 44 I. A., 147.

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such like things would obviously be benefits. It would, therefore, be clear from this decision that it would constitute legal necessity for a Hindu widow to incur debts in order to meet the costs of the litigation for the purpose of defending herself against the hostile litigation.

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The matter was considered again in the Allahabad High Court by RAFIQ and LINDSAY, JJ. in a subsequent case reported in *Bhagwan Das Naik* v. *Mahadeo Prasad Pal* (1) in which it was held after a discussion of these different cases that the effect of the decisions was that an act for which the character of "legal necessity" or "benefit to the estate" could be claimed must necessarily be a defensive act—something undertaken for the protection of the estate already in possession and not an act done with the purpose of bringing a fresh property into possession and which may or may not be successful under the chances happening upon litigation (vide page 394).

This principle seems to have been followed in the same court in a subsequent case reported in *Jado Singh* v. *Nathu Singh* (2).

The Calcutta High Court has recently held that costs of litigation are not always a legal necessity; if the costs have been incurred for the purpose of protection of the estate and the limited owner has incurred debts for the purpose of meeting these costs, then only the costs of litigation could be considered as legal necessity [vide *Upendra Nath* v. *Kiran Chandra* (3).]

The same view appears to have been followed by the Punjab Chief Court in a case reported in *Abdul Ghaffur Shah* v. *Pir Muhammad Khan* (4).

(1) (1923) I. L. R., 45 All., 390. (2) (1926) I. L. R., 48 All., 592.
(3) A. I. R., (1926) Calc., 1046. (4) 22 P. R., (1890), 60.

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The rule of law deducible from the above cases, in our opinion, appears to be that if a Hindu widow has incurred debts to meet the costs of litigation brought against her, in order to protect her title to the estate, the debts so incurred, would be binding on the reversioner. If, however, she has incurred debts in litigation undertaken by herself not with the object indicated above, those debts will not be binding on the reversioner. It is this test that we are bound to apply in this case in order to determine how far the plaintiff-appellant can be considered to be bound by the debts borrowed by the defendant No. 2 under the mortgage deed in suit.

As to the two profits cases it appears to us from the evidence that they were suits in no way connected with the protection of her estate. The property which Musammat Rachhpal Kuar had inherited from her husband seems to have been a joint property, and the only way how her husband or she could recover the profits thereof was by instituting suits for the purpose in the Revenue Court. We do not see how such suits can be considered to be a litigation for the purpose of protecting the estate, which was in her possession. These suits were suits for recovering only the profits to which she was entitled. We are, therefore, of opinion that the costs incurred by her in this litigation cannot be allowed.

As to the costs incurred by her in the declaratory suit and in the appeal relating to that suit, we are of opinion that the said litigation comes within the rule of law laid down by us as deducible from the reported cases. The suit was obviously brought by the plaintiff-appellant himself against the lady for declaration that she had no title to the property in suit and it was her clear duty to protect her estate, and if

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she incurred debts to meet costs of that litigation, the plaintiff-appellant must be bound by the said debt. We, therefore, hold that the sum of Rs. 400 which remained to be paid on account of the fee due to Pandit Satya Narain Shukla in this case is a valid charge on the estate and the plaintiff is bound by it.

Misra and Nanavutty, JJ.

We may mention here that it was argued on behalf of the plaintiff-appellant that there was no proof on the record showing that the costs awarded to her in that suit had not been realized by her from the plaintiff-appellant and consequently the said amount should not be declared as a charge. We regret we are unable to accept this contention. It was for the plaintiff-appellant himself to prove whether the debts incurred by the lady had been paid off by the amount of costs realized by her in execution proceedings, if any. The appellant has given no evidence to that effect. He was the best person to give such evidence, because, he himself was the person, from whom such costs must have been realized if at all.

As to the case of *Mahadeo Singh* v. *Jagdutt* we are unable to declare that any debt incurred by the lady of account of the costs of litigation in this case can be held as binding on the estate, since no evidence has been given in the course of the trial proving the nature of the said litigation. In the absence of such proof we regret we cannot hold any debt incurred in respect of the costs of that litigation to be binding on the reversioner.

As to the execution proceedings taken in the Court of the Subordinate Judge of Rae Bareli, for recovering the costs of the declaratory suit, we are of opinion that any such costs would not be costs incurred for the benefit of the estate, but incurred by

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the lady only for the purpose of recovering costs for her own benefit.

As to the lambardari case filed by Musammat Rachhpal Kuar against Jagdutt we are clearly of opinion that the said litigation cannot in any way be considered to have been undertaken for the purpose of protecting her estate. The object of that litigation was obviously to get the plaintiff-appellant removed from the post of the lambardar. This cannot, therefore, be considered a litigation coming within the definition of the words "for the benefit of the estate."

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As to the execution proceedings taken in the two profits cases we must point out that when we have held that the suits for profits themselves could not be considered as litigation, the costs of which would be a charge on the estate, the execution proceedings in those very cases cannot be considered to be of a character, the costs of which should be declared to be justified by legal necessity.

The result of these findings is that out of the sum of Rs. 500 which was incurred by the lady as costs of the litigation in the declaratory suit and the appeal in connection therewith should be considered to be those justified by legal necessity. The evidence however, shows that Rs. 100 out of the said costs have already been paid by Musammat Rachhpal Kuar out of her own pocket and the only sum which defendant No. 1 had been asked to pay to Pandit Satya Narain Shukla on that account is a sum of Rs. 400. We, therefore, declare that item to be binding on the plaintiff-appellant as a reversioner of the husband of Musammat Rachhpal Kuar.

We now proceed to discuss the other item (*f*) which has been partially awarded by the learned

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Subordinate Judge, that being on account of the costs and expenses incurred in the execution and registration of the deed. The learned Subordinate Judge has allowed a sum of Rs .100 on that account. This sum he has allowed on the basis that the deed which had been executed by the lady was for a sum of Rs. 6,000. According to our finding the sum which is justified for legal necessity consists of the sum due under the two previous mortgage deeds which amounts to Rs. 375 and the sum of Rs. 400 on account of the costs due for the litigation in respect of the declaratory suit. The total amount for which the widow was justified to execute the mortgage deed in suit comes therefore only to Rs. 775. In our opinion Rs. 25 would be quite ample to meet the costs of the stamp and registration of the deed executed for that sum.

We, therefore, hold that the mortgage deed in suit is only operative to the extent of Rs. 375 due under the two mortgages executed by Darshan Singh, one dated the 2nd of June, 1908, and the other dated the 11th of June, 1909, and to the extent of Rs. 400 on account of the costs of the declaratory suit and Rs. 25 on account of the costs incurred in executing the deed in suit. The total of these items, therefore, comes to Rs. 800.

The plaintiff-appellant has in his ground of appeal to this Court admitted his liability to that extent.

We, therefore, allow this appeal and modify the decree passed by the learned Subordinate Judge to this extent that the deed in suit dated the 24th of July, 1926, executed by Musammat Rachhpal Kuar, defendant No. 2 in favour of Rawat Kanhaiya Bakhsh, defendant No. 1, shall be declared as binding and

operative against the plaintiff-appellant only to the extent indicated above. The defendant-respondent Rawat Kanhaiya Bakhsh Singh will bear his own costs in this Court as well as in the Court below, but will pay three-fourths of the costs of the plaintiff in the court below and the plaintiff's entire costs of appeal in this Court.

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Appeal allowed.

APPELLATE CIVIL.

Before Mr. Justice Gokaran Nath Misra and Mr. Justice E. M. Nanavutty.

SARFARAZ KHAN AND OTHERS (APPELLANTS) v. MUSAMMAT RAJANA AND OTHERS (RESPONDENTS).*

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Evidence Act (I of 1872) section 32, clause (5) and section 35—Settlement pedigree, admissibility of—Reversioner, claim by—Evidence necessary to establish one's claim as a next revesioner.

If the settlement pedigree is one signed by the members of the family, it would be admissible under section 32 clause (5) as statements of deceased persons as to relationship since such statements would be considered to be of persons having special means of knowledge. It must, however, be proved that the statements were made by them at a time when there was no dispute as to the pedigree set up. If, however, the pedigree is not signed by the members of the family but is prepared by the Settlement Officer, himself after proper inquiry and bears his signatures it can be admitted under section 35 of the Evidence Act, as an entry in a public record stating a fact in issue and made by a public servant in the discharge of his official duties.

Where a person claims as the next reversioner to a deceased person he has not merely to prove his descent from the same common ancestor as the person whose estate

*First Civil Appeal No. 87 of 1927, against the decree of Pandit Tika Ram Misra, Subordinate Judge of Mohanlalganj at Lucknow, dated the 28th of March, 1927, dismissing the plaintiff's claim.