FULL BENCH.

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April, 29.

Before Mr. Justice Wazir Hasan, Chief Judge, Mr. Justice Muhammad Raza and Mr. Justice Bisheshwar Nath Srivastava.

ANGRAJ BAHADUR SINGH AND ANOTHER (DEFENDANTS-APPELLANTS) *v.* RAM RUP (PLAINTIFF) AND OTHERS (DEFENDANTS) RESPONDENTS.*

Hindu Law—Joint family—Mortgage by a Hindu father of ancestral property—Suit for possession by mortgagee impleading sons of mortgagor—Mortgagor's sons attacking mortgage as being without necessity and unsupported by antecedent debt—Determination of question whether mortgage was binding on sons, necessity of—Mortgage by Hindu father not for legal necessity or for discharging antecedent debt, whether void and unenforceable.

Where in the case of a mortgage executed by a Hindu father the mortgagee brings a suit for possession of the mortgaged property and the sons of the mortgagor are impleaded as defendants and they question the mortgage on the ground that it was neither justified by legal necessity nor supported by any antecedent debt, *held*, that it is necessary to determine in such a case whether the mortgage is binding upon the sons or not. A mortgage of joint ancestral property effected by a Hindu father not for legal necessity or for discharging an antecedent debt is void from its inception and so the mortgagee cannot be allowed to enforce it. Therefore, where the mortgagee of a Hindu father in respect of the ancestral property seeks to enforce the mortgage against the sons he must establish either that the mortgage was justified by legal necessity or was supported by antecedent debt. *Bhawani Din* v. *Satrohan Singh* (1) explained. *Narain Prasad* v. *Sarnam Singh* (2) and *Shambhoo* v. *Dhaneshar* (3) relied on. *Madho Parshad* v. *Mehrban Singh* (4) *Musammat Rajwanta* v. *Rameshar* (5) and *Sukh Lal* v. *Babu Murari Lal* (6) referred to.

*Second Civil Appeal No. 260 of 1929, against the decree of Pandit Raghubar Dayal Shukla, 1st Additional District Judge of Bara Banki, dated the 24th of July, 1929, reversing the decree of Babu Tirbeni Prasad, Munsif, in addition to strength at Bara Banki, dated the 13th of February, 1929.

(1) (1925) 3 O.W.N., 457.
(2) (1917) L.R., 44 I.A., 163.
(3) (1927) 4 O.W.N., 256.
(4) (1890) L.R., 17 I.A., 194.
(5) (1925) 12 O.L.J., 235.
(6) (1926) 13 O.L.J., 95.

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The case was originally heard by a Bench consisting of Mr. Justice SRIVASTAVA and Mr. Justice NANAVUTTY who, in view of the importance of the question involved, referred it to a Full Bench of three Judges for decision. The referring order of the Bench is as follows:—

SRIVASTAVA and NANAVUTTY, JJ.:—This is an appeal against the decision, dated the 24th of July, 1929, passed by the 1st Additional District Judge of Bara Banki setting aside the decision, dated the 13th of February, 1929, passed by the Munsif of Fatehpur, district Bara Banki.

The suit which has given rise to this appeal as originally instituted was a suit for mortgagee possession and in the alternative a suit for recovery of the mortgage money by sale of the property. It was based on a mortgage deed, dated the 9th of September, 1916, executed by two brothers Shankar Bakhsh Singh and Jwala Singh, defendants Nos. 1 and 2, in favour of Ambar Prasad Singh, defendant No. 4, in respect of one plot No. 481 in mauza Bhitaura, pargana Ramnagar, which corresponds to plots Nos. 454 and 455 of the current settlement. Ram Rup plaintiff is the auction purchaser of the mortgagee rights of Ambar Prasad Singh, defendant No. 4. Basdeo Singh, defendant No. 3, was impleaded as he had, under a sale deed exhibit 4, dated the 10th of June, 1926, purchased the interest of Shankar Bakhsh Singh in the plot in suit together with certain other plots. Angraj Bahadur Singh and Thakur Prasad Singh, appellants, who were impleaded as defendants Nos. 5 and 6 in the trial court, are the sons of Shankar Bakhsh Singh.

The only defence raised on behalf of the defendants-appellants with which we are now concerned in this appeal was the one based on the ground that the mortgaged plot was the joint ancestral property of the family and that the mortgage deed in suit was without

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legal necessity and not supported by any antecedent debt and therefore not binding upon the defendants-appellants.

The learned Munsif found that the mortgage in question was not executed for legal necessity or for payment of any antecedent debts and that it was not therefore binding upon the defendants-appellants. He accordingly dismissed the suit. On appeal the learned Additional District Judge relying upon a decision of a Bench of this Court in *Bhawani Din* v. *Satrohan Singh* (1), held that in a suit by the mortgagee for possession of the mortgaged property it was not necessary for the court to determine whether the mortgage was or was not justified by legal necessity or supported by antecedent debt. He further held that the defendants-appellants were not entitled to question the mortgage in suit because the share of their father in the mortgaged property had been sold by him to Basdeo Singh, defendant No. 3, before the institution of the present suit.

The learned counsel for the defendants-appellants has in the first place argued that the lower appellate court has made out a new case for the plaintiffs in holding that the defendants-appellants were not entitled to question the mortgage deed in suit on account of the sale deed, dated the 10th of June, 1926, executed by Shankar Bakhsh Singh. We think this contention is correct and must be accepted. It appears that the plaintiff raised a plea to this effect by means of an application filed by them on the 1st of December, 1928, after the issues had been framed in the case. This application seems to have been taken up for consideration by the trial court on the 6th of December, 1928. On this date the counsel for the plaintiff withdrew the second relief claimed in the plaint, viz., for recovery of money by sale of the mortgaged property and confined his claim to a decree for mortgagee possession.

(1) (1925) 3 O.W.N., 457.

Further, by agreement between counsel for both parties the court made certain amendments in issues Nos. 7 and 8. At the end of the proceedings the counsel for the plaintiff made a statement as follows:—

"I do not require any more issues now."

It is quite clear from the issues as they stand after the amendments made on this date that no issue was framed questioning the right of the defendants to challenge the mortgage made by their father and uncle. Under the circumstances we find no reference to this plea in the judgment of the trial court. The lower appellate court was therefore in our opinion not justified in deciding the appeal on this ground when the matter was never tried by the Munsif and the defendants-appellants had no opportunity of meeting it in the trial court. Further, it seems to us that the finding arrived at by the learned Additional District Judge is based on a very slender foundation. He relies upon a recital in the sale deed, exhibit 4, to the effect that the executant Shankar Bakhsh Singh and his brother Jwala Singh were both in possession of the property in equal shares, and draws the inference from it that each of the two brothers was in separate possession of the share. In this connection it might be pointed out that on the 5th of February 1929, the plaintiff's pleader admitted that the property in suit was the ancestral property of Shankar Bakhsh Singh and Jwala Singh. This admission seems to have been entirely overlooked. Be it as it may we are of opinion that as the plea raised in the application, dated the 1st of December, 1928, was not pressed and the plaintiff accepted the issues as they had been amended on the 6th of December, 1928, the lower appellate court was not justified in holding that the defendants-appellants could not question the mortgage in suit.

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The next question is whether in a suit by the mortgagee for possession of the mortgaged property to which the sons of the mortgagor are parties it is necessary or not to determine whether the mortgage is binding upon the sons. In *Shambhoo Shukul* v. *Dhaneshar Singh* (1) a Bench of this Court consisting of Mr. Justice RAZA and Mr. Justice KING held that where a mortgage of joint ancestral property is effected by a Hindu father not for legal necessity or discharge of antecedent debt the mortgage is void from its inception. We are in entire agreement with this view, if we may respectfully say so. It seems to us to follow from this that if a mortgage is void from its inception, no suit for mortgagee possession can be maintained on foot of such a mortgage. As stated above the trial court had found that the mortgage deed in question was not executed for legal necessity or for payment of antecedent debt and that it was therefore void and not binding upon the defendants-appellants. The lower court did not consider it necessary to enter into this question. The learned Additional District Judge seems to be supported in the view adopted by him by certain observations contained in *Bhawani Din* v. *Satrohan Singh* (2). We feel doubtful if these observations were intended to be of such general application as they have been understood to be by the learned Additional District Judge. However, in view of the importance of the question, we think it desirable that we should have a clear and definite pronouncement of a Full Bench on this point. We therefore refer the following question for decision by a Full Bench under section 14(1) of the Oudh Courts Act:—

> In the case of a mortgage executed by a Hindu father, the mortgagee brings a suit for possession of the mortgaged property and the sons of the mortgagor are impleaded

(1) (1927) 4 O.W.N., 256.

(2) (1925) 3 O.W.N., 457.

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as defendants. They question the mortgage on the ground that it was neither justified by legal necessity nor supported by any antecedent debts. Is it necessary or not to determine in such suit whether the mortgage is binding upon the sons?

Messrs. *Ali Zaheer* and *Ghulam Imam*, for the appellants.

Mr. *Radha Krishna*, for the respondents.

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HASAN, C. J. :—A Divisional Bench of this Court consisting of my learned brothers, Justices BISHESHWAR NATH and NANAVUTTY, has referred the following question for decision by a Full Bench :—

> In the case of a mortgage executed by a Hindu father, the mortgagee brings a suit for possession of the mortgaged property and the sons of the mortgagor are impleaded as defendants. They question the mortgage on the ground that it was neither justified by legal necessity nor supported by any antecedent debt. Is it necessary or not to determine in such suit whether the mortgage is binding upon the sons?

The lower appellate court has decided this question in the negative and the authority referred to for the view taken is a decision of a Bench of this Court in the case of *Bhawani Din* v. *Satrohan Singh* (1). In pursuance of the view thus taken the court below has refrained from deciding the question of legal necessity or of antecedent debt raised by the sons of the mortgagor and has given a decree for possession to the representative of the mortgagee on the terms of the mortgage.

(1) (1925) 3 O.W.N., 457.

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In the order of reference the learned Judges think that the lower appellate court has not correctly interpreted the decision of this Court in *Bhawani Din* v. *Satrohan Singh* (1); but if it has it seems to be in conflict with a decision in the case of *Shambhoo* v. *Dhaneshar Singh* (2).

HARI, C.J.

I am of opinion that the decision in the case of *Bhawani Din* v. *Satrohan Singh* (1) does not afford sufficient support for the view taken by the lower appellate court. The main question argued in that case was as to whether the sons of the mortgagor should be given the relief of redemption of the mortgage on the basis of which the mortgagee had brought the suit for possession of the mortgaged property. The learned Judges held that it was neither necessary nor desirable that the sons should be given an opportunity of redeeming the mortgage in suit at that stage of the litigation and that the opportunity should be left open to them to be availed of whenever they thought fit after the mortgagee had been put in possession by the decree of the court. It must be admitted that there are certain observations in that case which are liable to be misunderstood as to their full effect and it appears to me that they have been misunderstood in the present case. It does not appear from the report of the decision that the learned Judges were asked to decide the question as to whether the mortgage on which the covenant for possession rested was void or not in its relation to the sons of the mortgagor, and if that question was not argued I must hold that it was not decided also.

According to my judgment the question referred for decision to the Full Bench must be answered in the affirmative, that is, it is necessary to determine in such a case whether the mortgage is binding or not upon

(1) (1925) 3 O.W.N., 457. (2) (1927) 4 O.W.N., 256.

the sons. The answer which I propose to give is in my opinion wholly covered by the decision of their Lordships of the Judicial Committee in the case of *Narain Prasad* v. *Sarnam Singh* (1). In that case a suit for the relief of enforcement of a mortgage against the hypothecated property was instituted by the mortgagee. Sons and a grandson of some of the mortgagors were impleaded as defendants. These defendants pleaded that there was no legal necessity and that the debt was not binding upon their joint family. The court of first instance dismissed the suit on the ground that there was no proof of an antecedent debt or of necessity and therefore the mortgage was not binding upon the joint family property. The decision was affirmed by the High Court. When the matter went before their Lordships of the Judicial Committee, Viscount HALDANE, in delivering the judgment of the Board, quoted the well-known observation of Lord WATSON in the case of *Madho Prasad* v. *Mehraban Singh* (2) and said "Now these are the principles which govern this and all other cases of the kind, and, according to these principles, there can be no doubt that the present mortgage is void." The result was that the decree appealed from was affirmed. Now two observations fall to be made. If the plea of the absence of legal necessity or antecedent debt raised by the sons of the mortgagor in the present case is decided in their favour it must follow that the mortgage on which the relief is founded is void. If this is the effect of the determination of the plea raised by the sons of the mortgagor it is difficult to see how the court can refuse to adjudicate it. The second observation, which I desire to make, is that if the mortgage is void as it may be no relief is available to the mortgagee on that mortgage. The relief for possession in this case is expressly based on a covenant contained in the deed of mortgage. That covenant may

(1) (1917) L.R., 44 I.A., 163. (2) (1890) L.R., 17 I.A., 194.

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fall to be decided as void altogether and therefore no relief arising out of it could have been granted.

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In the course of the arguments before us the learned Advocate for the respondents tried to differentiate the decision of their Lordships of the Judicial Committee quoted above on the ground that the case in which that decision was given was a case in which the relief for sale was prayed for. I am of opinion that that fact does not differentiate it in principle from the present case. In both cases the relief was founded on the terms of the deed of mortgage. What is material is that it arises out of the contract of mortgage, and if that contract is void no relief either of sale or of possession can validly be granted.

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RAZA, J. :—I would also answer the question in the way in which it has been answered by the learned CHIEF JUDGE. I have to say something to explain the decision in the case of *Bhawani Din* v. *Satrohan Singh* (1) as I was a party to that decision. It was never intended or meant to lay down in that case the broad proposition that where a mortgage was executed by a Hindu father and the mortgagee brings a suit for possession of the mortgaged property and the sons of the mortgagors are impleaded as defendants, they (that is, sons) cannot question the mortgage on the ground that it was neither justified by legal necessity nor supported by any antecedent debt. In that case the mortgagor was permitted to take many pleas which he should not have been allowed to take. He wanted that his sons and grandsons also should be made parties to the suit and he succeeded in his attempt. If his sons and grandsons had not been parties to the suit, he himself would not have been able to raise the plea that the mortgage was invalid or void for want of legal necessity or an antecedent debt.

(1) (1925) 3 O.W.N., 457.

It was held by the late Court of the Judicial Commissioner of Oudh in the case of *Musammat Rajwanta* v. *Rameshwar* (1) that a Hindu representing a joint Hindu family consisting of himself and his sons and grandsons can question the validity of the mortgage executed by him on the ground that there was absence of legal necessity for the debt or that there was no antecedent debt. This decision was, however, dissented from by a Bench of this Court in the case of *Sukh Lal* v. *Babu Murrari Lal* (2). It was held in that case that the plea of legal necessity for a mortgage debt incurred on the security of a joint Hindu family property, or for the interest stipulated therein, is available only to such members of the joint family as were not parties to the mortgage-deed and not to such members as were themselves executants of the same. It was therefore observed in the case of *Bhawani Din* v. *Satrohan Singh* (3) that Bhawani Din, the mortgagor in that case, should not have been permitted to take the pleas which he had been allowed to take. If he had not been permitted to take the pleas in question, his sons and grandsons would not have been made parties to the suit and then it would not have been necessary for the court to go into the questions of antecedent debt and legal necessity. The main point which was argued before us in that appeal was that the mortgagor and his sons should be permitted to redeem the mortgage in the suit for possession of the mortgaged property. It was held under these circumstances that a mortgagor should not, if no suit for redemption has been brought, be given a decree for redemption in a suit where he has been sued for possession which he has wrongfully refused to give to the mortgagee under the terms of the mortgage. It is now well settled that a mortgage of the joint property of a Mitakshara family by its *karta*, unless legal necessity

(1) (1925) 12 O.L.J., 235. (2) (1926) 13 O.L.J., 95.
(3) (1925) 3 O.W.N., 457.

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or antecedent debt is proved, is void and the transaction itself gives to the mortgagee no rights against the *karta's* interest in the joint family property. If the mortgage is void for the reason that no legal necessity or antecedent debt is proved, it cannot be enforced against the sons or grandsons of the mortgagor in respect of the joint family property. The suit may be a suit for possession of the mortgaged property or for sale of that property. The rule must be the same in both cases. This being the case, there is no reason why the sons and grandsons of the mortgagor who are made parties to a suit for sale or possession of the mortgaged property under the terms of the mortgage should not be allowed to question the validity of the mortgage. If the mortgagee fails to prove legal necessity or antecedent debt, he cannot be allowed to enforce the mortgage in question and his claim must therefore be rejected. I am of opinion therefore that it is necessary to determine in the suit mentioned in the order of reference whether or not the mortgage is binding upon the sons.

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SRIVASTAVA, J. :—The principle is firmly established that a Hindu father possesses only qualified powers of alienation in respect of ancestral property. It is therefore well settled that if a mortgagee from a Hindu father in respect of the ancestral property seeks to enforce the mortgage against the sons he must establish either that the mortgage was justified by legal necessity or was supported by antecedent debt. The learned counsel for the respondents concedes that it is so in the case of a suit brought by a mortgagee for sale or foreclosure of a mortgage, but he would distinguish a case in which the mortgagee seeks merely to obtain possession of the mortgaged property. I fail to see any particular point of distinction in the two cases. A suit for possession by the mortgagee is as much a suit for the enforcement of a mortgage as a

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suit brought by him for sale or foreclosure of the mortgaged property. I have therefore no doubt that both classes of suits must be governed by the same principles.

The matter may be looked at from another view point. There is a series of cases decided by the late Court of the Judicial Commissioner and by this Court in which it has been held that where a mortgage of a joint ancestral property is effected by a Hindu father not for legal necessity or for discharging an antecedent debt the mortgage is void from its inception. *Shambhoo* v. *Dhaneshar* (1) is one of such cases decided by a Bench of this Court. This view is fully supported by the decision of their Lordships of the Judicial Committee in the case of *Narain Prasad* v. *Sarnam Singh* (2). The learned Counsel for the respondents has conceded, and he could not but do so, that if it is found that the mortgage in the present case was not justified by any legal necessity or was not supported by any antecedent debt it would not be binding upon the sons. I therefore fail to see how we can shut out inquiry into a matter so vital for the determination of the rights of the mortgagee as against the sons of the mortgagor whether the claim by him be one to obtain possession of the mortgaged property or to enforce the mortgage by a decree for sale or foreclosure. For these reasons I agree that the answer to the question referred to us for opinion should be given in the affirmative.

Srivastava, J.

BY THE COURT:—The question referred to the Full Bench is answered in the affirmative.

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(1) (1927) 4 O.W.N., 256. (2) (1917) L.R., 44 I.A., 163.