

APPELLATE CIVIL

Before Sir Syed Wazir Hasan, Knight, Chief Judge,
and Mr. Justice Muhammad Raza

1932
October, 11

SHEO GOVIND (PLAINTIFF-APPELLANT) v. RAM ADHIN
AND ANOTHER (DEFENDANTS-RESPONDENTS) *

Hindu law—Mortgage by the de facto guardian of a minor Hindu girl for expenses of minor's marriage—Legal necessity—Mortgage, whether for legal necessity and binding upon the minor and her donee—Mitakshara—Succession among daughters of a deceased Hindu—Unmarried daughter, if has preference over married daughters—Second appeal—Finding of fact based upon admissible evidence, if can be impugned in second appeal.

Held, that a mortgage executed by the *de facto* guardian of a minor Hindu girl to raise money for the expenses of her marriage is a mortgage for legal necessity and is binding on the girl as well as on a person who claims the property as a donee from her.

Held further, that under the Mitakshara law a married daughter cannot succeed to the property of her deceased father in the presence of her unmarried sister.

Held also, that findings of fact based upon admissible evidence cannot be impugned in second appeal.

Mr. *Radha Krishna*, for the appellant.

Mr. *Rajeshwari Prasad*, for the respondents.

HASAN, C.J., and RAZA, J. :—This is an appeal from a decree of the Subordinate Judge of Rae Bareli, dated the 1st of May, 1931, affirming a decree of the Munsif of Rae Bareli, dated the 31st of July, 1930.

The dispute in this case relates to a house and a shop appurtenant thereto, situate in Bazar Girdhariganj, hamlet of Bachrawan, in the District of Rae Bareli.

The facts relevant to this appeal may be shortly stated :

The property in suit originally belonged to one Dwarka. He died long ago leaving a mother (Musammat Bakhta), one married daughter (Musammat Sarju Dei) and one unmarried minor daughter (Musammat Sheo Rani).

*Second Civil Appeal No. 280 of 1931, against the decree of Pandit Bansidhar Misra, Subordinate Judge of Rae Bareli, dated the 1st of May, 1931, confirming the decree of Thakur Surendra Vikram Singh, Munsif of Rae Bareli, dated the 31st of July, 1930.

Musammat Sheo Rani is alive. Musammat Bakhta and Musammat Sarju Dei are dead. Musammat Bakhta had mortgaged the property in suit to the defendant-respondent No. 1 and his brother Ganga (since deceased), father of the defendant-respondent No. 2, for Rs.400, bearing interest at Re.1 per cent. per mensem, on the 29th of August, 1916. The defendants are in possession of the said property by virtue of that mortgage. Musammat Sheo Rani gifted the property in suit to the plaintiff-appellant on the 31st of August, 1929. He brought the present suit claiming the property in suit as donee from Musammat Sheo Rani. He impeached the validity of the mortgage and claimed possession of the property without payment of any sum as mortgage money to the defendants. He prayed, in the alternative, for possession of the property on payment of such amount as might be found due to the defendants on the mortgage in question.

The suit was contested by the defendants. They alleged that the mortgage was perfectly valid and that the entire consideration money was taken for the legal necessity of performing the marriage of Musammat Sheo Rani.

The learned Munsif held that the mortgage was executed by Musammat Bakhta in the capacity of the guardian of Musammat Sheo Rani and for legal necessity, as alleged by the defendants. He therefore decreed the plaintiff's claim for possession of the property in suit but ordered the plaintiff to pay the entire money due on the mortgage to the defendants. The plaintiff was not satisfied with the decree of the first court. He therefore appealed, contending that he was not liable to pay anything to the defendants. His appeal was, however, dismissed by the learned Subordinate Judge.

The plaintiff has now come to this Court in second appeal.

In our opinion there is no substance in this appeal.

The learned Subordinate Judge has found that the mortgage in question was executed by Musammat Bakhta

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as a *de facto* guardian of Musammat Sheo Rani. He has also found that Musammat Bakhta had borrowed the money to meet the expenses of the marriage of Musammat Sheo Rani. The money was thus borrowed for legal necessity. Dwarka had left only the property in suit. These findings are findings of fact based upon admissible evidence and cannot be impugned in second appeal. We think that the learned Subordinate Judge has rightly interpreted the mortgage deed mentioned above. The appellant's learned counsel has contended before us that Musammat Bakhta could not bind the share of Musammat Sarju Dei which came to Musammat Sheo Rani subsequently. In our opinion this contention is not well founded. There appears to be some misapprehension about the succession of the daughters of Dwarka. Musammat Sarju Dei, being a married daughter of Dwarka, could not succeed to the property of Dwarka in the presence of her unmarried sister Musammat Sheo Rani. The only person who was entitled to succeed to the property of Dwarka was his daughter Musammat Sheo Rani. Under the law of Mitakshara, "daughters do not inherit until all the widows are dead. As between daughters, the inheritance goes, first, to the unmarried daughters, next to daughters who are married and unprovided for, that is indigent, and lastly, to daughters who are married and are enriched, that is possessed of means. No member of the second class can inherit while any member of the first class is in existence, and no member of the third class can inherit while any member of the first or the second class is in existence." (See Mulla's Hindu Law, 6th edition, page 34.) Thus Musammat Sheo Rani alone became the owner of the entire property in suit after the death of her father Dwarka. The mortgage mentioned above was executed by her *de facto* guardian to raise money for the expenses of her marriage. The mortgage must therefore be held to be binding on her and the plaintiff also who claims the property as donee from her. The plaintiff's claim was therefore properly decreed by the

lower courts and he must pay the mortgage money if he wants to get possession of the property in suit.

Hence we dismiss the appeal with costs.

Appeal dismissed.

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*Before Sir Syed Wazir Hasan, Knight, Chief Judge, and
Mr. Justice Bisheshwar Nath Srivastava*

DAULAT RAM, BABU (DEFENDANT-APPELLANT) v. INDAR-
JEET AND OTHERS (PLAINTIFFS-RESPONDENTS) *

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*Transfer of Property Act (IV of 1882), section 55(4)(b)—
Sale—Vendor leaving a portion of purchase money with
vendee for payment to his creditors—Vendee's failure to pay
the amount—Vendor, if has a charge on the property sold
for the amount left with the vendee—Covenant, if consti-
tutes a contract contrary to the statutory rights of vendor
to have a charge under section 55—Interest on amount left
with vendee—Nine per cent. per annum, if a reasonable
rate of interest.*

A sum of money left with the vendee under a sale deed by the vendors for the purpose of satisfying the claims of certain previous creditors of the vendors is a portion of the 'unpaid purchase money' within the meaning of clause (b) of sub-section (4) of section 55 of the Transfer of Property Act, 1882, and the vendor has a statutory charge for such an amount upon the property sold. The covenant in the deed of sale under which the vendee agrees to pay the previous debts of the vendor to the latter's creditors does not constitute a contract contrary to the statutory right of the vendors under clause (b) of sub-section (4) of section 55 of the Transfer of Property Act. *Abdulla Beary v. Mammali Beary* (1) *Webb v. Macpherson* (2), *Sivasubramania Ayyar v. Subramania Ayyar* (3), *Meghraj v. Abdullah Khan* (4), and *Rama Nand v. Sheo Das* (5), referred to.

Interest at 9 per cent. per annum on the amount left by the vendor with the vendee for payment to his creditors is a reasonable rate of interest.

*First Civil Appeal No. 78 of 1931, against the decree of Babu Jagdamba Saran, Additional Subordinate Judge of Gonda, dated the 8th of April, 1931.

(1) (1910) I. L. R., 33 Mad., 446.

(2) (1903) L. R., 30 I. A., 238.

(3) (1915) I. L. R., 39 Mad., 997.

(4) (1914) 12 A. L. J., 1034.

(5) (1920) I. L. R., 43 All., 314.