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was brought to the notice of the learned Judges but they preferred to follow the ruling of their own Court in *Bal Karan Rai* v. *Gobind Nath Tewari* (1).

I am therefore of opinion that nothing has been said in the case of *Shah Chaturbhuj* v. *Shah Mauji Ram* (2) which should incline us to change the view he had taken of sub-section (2) to section 5 in *Nihal Singh* v. *Ganesh Dass Ram Gopal* (3).

The present application is barred in view of the decision in *Nihal Singh* v. *Ganesh Dass Ram Gopal* (3) and I would therefore dismiss it with costs.

THOMAS, C.J.:—I concur.

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BENNETT, J.:—I concur.

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FULL BENCH:—This application is dismissed with costs.

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Application dismissed.

APPELLATE CIVIL

Before Mr. Justice Ziaul Hasan and Mr. Justice Radha Krishna Srivastava

CHANDRIKA PRASAD AND ANOTHER (PLAINTIFFS-APPELLANTS) v. BHAGWAN DAS (DEFENDANT-RESPONDENT)*

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Hindu law—Widow executing mortgage-deed to pay off her husband's debt—Second mortgage by widow paying off her first mortgage—Subsequent mortgage by widow to pay off time-barred claim under her prior mortgage, whether binding upon reversioners—Husband's debt, whether can be regarded as subsisting.

The payment of a husband's debt, though barred, is a pious duty on the part of the widow. The Hindu law does not recognize any bar of limitation. According to the Hindu law leaving a debt unpaid is a sin, the consequences of which follow the debtor into the next world. Therefore, an alienation of property of her husband in order to pay off the debt of her husband, even though barred by statute, is an alienation, which is binding upon the reversioners.

*Second Civil Appeal No. 289 of 1937, against the order of M. Ziauddin Ahmad, District Judge of Gonda, dated the 18th May, 1937.

(1) (1890) I.L.R., 12 All., 129. (2) (1938) A.L.J., 628.
(3) (1936) O.W.N., 1158.

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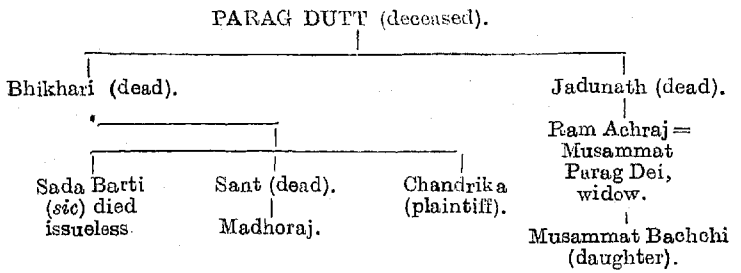
Where a Hindu widow executed a mortgage-deed to pay off a mortgage-deed of her husband and subsequently executed a second mortgage to pay off her first mortgage and she later executed a third mortgage to pay off a claim arising out of her second mortgage, which had become time-barred at the time, *held*, that the mortgage debt of the husband had been paid off by the first mortgage-deed of the widow and had ceased to exist and had been replaced by the deed of the widow and the debt made payable by her third deed was the time barred debt of the widow and not of her husband and therefore that deed was not binding upon the reversioners.

Mr. *Mahabir Prasad Srivastava*, for the appellants.

Mr. *Hydar Husain*, for the respondent.

ZIAUL HASAN and RADHA KRISHNA, JJ.: This is the plaintiffs' appeal. The following pedigree will be helpful in appreciating the facts of the case:



Parag Dutt shown in the pedigree was owner of sixteen annas share in village Charera and six annas share in village Chain. On his death his two sons, Bhikhari and Jadunath, succeeded to the property in equal shares. Later the two brothers separated from each other and Jadunath and his son Ram Achraj died one after the other and Mst. Parag Dei, the widow of Ram Acharaj, succeeded to the eight annas share in village Charera and three annas share in village Chain as a Hindu widow.

Jadunath in his lifetime with his brother Bhikhari had executed a mortgage-deed with possession for a consideration of Rs.9,885-11-1$\frac{1}{2}$ in favour of one Tirbhuwan Datt in respect of the entire sixteen annas share of village Charera (*vide* Ex. A-16).

On the 4th August, 1913, i.e. after the death of Jadunath and Ram Achraj and Bhikhari, Mst. Parag Dei and the sons of Bhikhari executed a simple deed of mortgage for a sum of Rs.5,000 in favour of Bhagwan Das Pande in respect of eight annas share of Charera (*vide* Ex. A-17). It appears that this mortgage was executed by Mst. Parag Dei in respect of her eight annas share in village Charera in order to redeem the share mortgaged by her husband in 1893, and the sons of Bhikhari, who were the nearest male collaterals, seem to have joined the execution of the deed merely to signify their assent to the transfer. It is admitted that the eight annas share was redeemed and came into the possession of Mst. Parag Dei. The interest stipulated in this deed was one per cent. per mensem compoundable yearly.

On the 11th August, 1916, Mst. Parag Dei, the widow, and the sons of Bhikhari again executed another mortgage-deed (Ex. A-18) in respect of four annas share out of the eight annas share with possession for a sum of Rs.6,000. This mortgage was executed in favour of Bhagwan Das the defendant-respondent in this case. Out of the consideration of Rs.6,000 a sum of Rs.5,421 was left with the mortgagee for redeeming the earlier mortgage, dated the 4th August, 1913. The mortgagee was put in possession of the share mortgaged. It is admittted that the defendant-respondent Bhagwan Das ultimately deposited a sum of Rs.7,341 and succeeded in redeeming the mortgage of 1913 on the 9th December, 1916.

From the above narration it would appear that the defendant-respondent paid a sum of Rs.1,920 in excess of the amount left with him for redemption.

On the 15th March, 1934, Mst. Parag Dei alone executed a mortgage-deed with possession in respect of the remaining four annas share of village Charera, redeemed from Bhagwan Das Pande, and three annas share of village Chain to the defendant-respondent for

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Ziaul Hasan and Radha Krishna, JJ.

a sum of Rs.12,000. This amount of Rs.12,000 consists of the excess amount of Rs.1,920 paid by the respondent for redemption and Rs.10,080 interest thereon from December, 1916 up to the date of the mortgage. It must be noticed that at the date of this mortgage a claim to Rs.1,920 and interest thereon had become barred by time.

The widow died in July, 1934, and the plaintiff filed the present suit for possession of the four annas share of Charera and the three annas share of Chain mortgaged by the deed of 1934 by the widow on the allegation that the mortgage was neither justified by legal necessity nor was executed for the benefit of the estate

The defendant contested the suit. His defence was that the plaintiff No. 1 was not the reversionary heir of the husband of Mst. Parag Dei and was not entitled to sue in the presence of Mst. Bachchi, the daughter of Ram Achraj. It was further pleaded that under a family custom Mst. Parag Dei was entitled to an absolute estate in the property of her husband and that the mortgage was made for legal necessity.

The trial court impleaded Mst. Bachchi as a necessary party to the suit and later as a result of the compromise between her and the plaintiff she was made a co-plaintiff as plaintiff No. 2, in the suit in consequence of which all controversy as to the plaintiff being the nearest heir disappeared. The trial court held on other issues in favour of the plaintiffs and decreed the suit.

In appeal the lower appellate court maintained the finding of the trial court to the effect that the custom relied upon by the defendant was not established. On the question of legal necessity, however, it disagreed with the finding of the trial court and held that the mortgage was for the benefit of the estate and for legal necessity, and on that view dismissed the suit.

In second appeal before this Court the learned counsel for the appellants has argued that the finding of the court below that the mortgage of 1934 was for the benefit

of the estate and legal necessity is on the facts of the case wrong in law. The respondent's counsel, while supporting the judgment of the lower appellate court on the question of the binding nature of the deed of mortgage, argued further that on a correct interpretation of the wajib-ul-arzes the custom set up by the defendant was established. We proceed to give our decision on the above two points argued before us.

The lower appellate court has held that the transaction of mortgage entered into with the defendant-respondent was more advantageous both to Mst. Parag Dei and the reversioners on the ground that the defendant who had to pay Rs.1,920 in excess of what was left with him had become entitled to recover that amount with interest at 12 per cent. per annum compoundable yearly from Mst. Parag Dei and the sons of Bhikhari, who had executed the mortgage-deed in his favour. The view of the court below that the defendant-respondent could recover the amount from Mst. Parag Dei and the sons of Bhikhari is based upon an assumption that the claim to it was still within time. This assumption was clearly wrong as admitted before us by the learned counsel for the respondent. Neither the widow nor the sons of Bhikhari were liable in law for the amount. The mortgage of 1916 by which money was left with the defendant-respondent for redemption of the earlier mortgage did not make any provision about any excess which the defendant-respondent had to pay for redeeming the earlier mortgage. The claim to recover the excess amount arose in 1916 at the time of its payment. Even supposing that the defendant-respondent *qua* the excess amount was subrogated to the rights of Bhagwan Das Pande the mortgagee of the mortgage-deed redeemed, still the claim had become barred. We find that by the year 1934 the claim on the basis of that deed had become barred by time. The period fixed for payment in this deed was three years, and any suit on the basis of this deed was barred at the latest after 15 years from the date thereof. It, therefore, follows that the defen-

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dant-respondent could not claim that money either from Mst. Parag Dei or the sons of Bhikhari personally or from the properties in suit. The learned counsel appearing for the respondent has not supported the judgment of the lower appellate court on the ground that the execution of the mortgage was for the benefit of the estate. There can be no doubt that a widow has got power to alienate the property inherited by her from her husband in case of need or for the benefit of the estate. On the facts mentioned above there was no obligation of any kind whatsoever either upon Mst. Parag Dei or the estate in her possession to pay off the defendant-respondent and no necessity in the nature of any pressure on the estate. We are, therefore, of opinion that the alienation on the ground that it was for the benefit of the estate cannot be sustained.

Zinul Hasan and Radha Krishna, JJ.

The other ground on which the lower appellate court has maintained the alienation as binding upon the plaintiff-appellant is that it was the debt of her (Mst. Parag Dei's) husband and the payment thereof, even though barred by time, was her religious and moral duty, and as the alienation was to discharge a debt of her husband it was binding upon the reversioners. It has been held that the payment of a husband's debt, though barred, is a pious duty on the part of the widow. The Hindu law does not recognize any bar of limitation. According to the Hindu law leaving a debt unpaid is a sin, the consequences of which follow the debtor into the next world. Therefore, an alienation of property of her husband in order to pay off the debt of her husband, even though barred by statute, is an alienation, which is binding upon the reversioners (*vide* Mulla's Hindu Law, 8th Edition, page 182, and Mayne's Hindu Law, 10th Edition, page 782). The question in this case is whether the debt for the payment of which the mortgage-deed of 1934 was executed was a debt of the husband. On the facts it would appear that Jadunath along with Bhikhari had incurred a debt of Rs.9,885-1-1½ in 1893

by mortgaging sixteen annas share in village Charera. The share of Jadunath in the property mortgaged was half and the extent of his liability was also presumably to the extent of half. On the death of Jadunath the liability for this debt descended upon his son, Ram Achraj, the husband of Mst. Parag Dei, and it was Ram Achraj's debt at the time of his death. The share of Jadunath, and after him of Ram Achraj, in this debt amounting to Rs.5,000 roughly was paid off by the mortgage of 1913 executed by Mst. Parag Dei and the sons of Bhikhari in respect of eight annas share only which belonged to Ram Achraj alone in favour of Bhagwan Das Pande. It is clear that thereafter the debt of Ram Achraj, created under the deed of 1893, ceased to exist and was replaced by the liability of Mst. Parag Dei under the mortgage of 1913.

The learned counsel for the respondent has argued that although by the transaction of 1913 there was a change in the creditor, yet the original debt of 1893 continued to subsist. The argument is ingenious but without force.

The contention of the learned counsel for the respondent really comes to this that no payment of the debt of an ancestor can be made unless it is made in cash because when the son or the widow pays off the debt by raising money on the security of the property inherited by him or her, then according to this argument there is no payment but only a change of the creditor. In our opinion in such a case there is not only a change of the creditor but a change of the debtor also which is more important for the consideration of the question whether the original debt has been extinguished or not. In our view the effect of the transaction of 1913 was that the debt of 1893 was paid off and ceased to exist. The debt of 1913 was a debt due from Mst. Parag Dei or the estate inherited by her and hypothecated in lieu of that debt. The debt made payable by the deed of 1916, was therefore, the debt not of Ram Achraj but

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of Mst. Parag Dei, and, therefore, the consideration of the mortgage of 1934, was the time-barred debt of her own and not that of her husband. On these facts the view of the lower court that the mortgage of 1934 was executed for the payment of time-barred debt of the executant's husband is wholly incorrect. It is, therefore, not binding upon the plaintiff.

Ziaul Hasan and Radha Krishna, JJ.

Lastly, it was argued that on a proper interpretation of the wajib-ul-arzes (Exs. A-12 and A-4) the court below should have held that the custom relied upon by the respondent was proved and that Mst. Parag Dei had an absolute interest in the estate of her husband. We have read the two wajib-ul-arzes. The words "malikana qabiz rahegi" and "intiqal ka bhi haq akhtiar rakhti hai" used therein having regard to the context in which those words have been used, are in our opinion quite consistent with a Hindu widow's estate. Power of adoption outside the family is denied to a widow in this family and it is further provided that on the death of a childless widow the property goes to the nearest collaterals. In our opinion these provisions indicate an unmistakable intention to keep the property within the family. The cases reported in *Durga* v. *Lal Bahadur and others* (1) and *Sant Bakhsh Singh and another* v. *Bhagwan Bakhsh Singh* (2) are fully applicable and we over-rule this contention on behalf of the respondent.

We, therefore allow the appeal, set aside the decree of the lower appellate court and restore that of the trial court, with costs throughout.

Appeal allowed.

(1) (1929) I.L.R., 4 Luck., 138. (2) (1931) I.L.R., 6 Luck., 365.