APPELLATE CIVIL.

Before Das and Ross, J.J.

BENI MADHO SINGH

v.

CHANDER PRASAD SINGH.*

1924.

January, 25.

Hindu Law—Joint family property—purchase of share in immovable property by karta*—mortgage to pay off encumbrance on purchased share—mortgage binding on joint family property.*

Where the *karta* of a joint Hindu family purchased a share in a village in which the family already possessed a share, and, in order to obtain money to pay off a mortgage decree which was binding on the purchased share, executed a mortgage of joint family property, *held*, that the purchase was not speculative because the family already held a share in the village and therefore knew the value of the equity of redemption of the purchased share, and that inasmuch as the purchase was not itself imprudent but was one which yielded a profit, although small, the transaction was for the benefit of the family and the mortgage was binding on the family property.

Hunooman Persad Panday v. *Mussammat Babooee Munraj*(1), *Sanyasi Charan Mandal* v. *Krishnadhan Banerji*(2) *Manna Lal* v. *Karu Singh*(3), *Raja Brij Narain Rai* v. *Mangla Prasad*(4), *Sahu Ram Chandra* v. *Bhup Singh*(5), *Marugesam Pillai* v. *Manikavasaka Dasika Gnana Sambanda Pandara Sannadhi*(6), referred to.

Appeal No. 250 of 1920, by the defendants.

Appeal No. 20 of 1921, by the plaintiffs.

First Appeal No. 250 of 1920 was an appeal by the plaintiffs in a suit on two mortgages. The first bond

* Appeal from Original Decree No. 250 of 1920 and No. 20 of 1921, from a decision of M. Saiyid Hasan, Subordinate Judge of Gaya, dated the 27th July, 1920.

(1) (1854-57) 6 Moore. I. A. 393 (423).
(2) (1922) I. L. R. 49 Cal. 560; L. R. 49 I. A. 108.
(3) (1920) 1 Pat. L. T. 6.
(4) (1924) I. L. R. 46 All. 95.
(5) (1917) I. L. R. 39 All. 437; L. R. 44 I. A. 126.
(6) (1917) I. L. R. 40 M. 402; L. R. 44 I. A. 98.

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was executed on the 23rd of July, 1910, by Jamna Prasad Singh, father of defendants Nos. 1 and 2 and grand-father of defendant No. 3, in favour of Janardan Singh, the predecessor of plaintiff No. 1, for a consideration of Rs. 20,000 which was advanced at a rate of interest of Rs. 1-4-0 *per cent. per mensem*. The second bond was executed on the 24th of May, 1917, by defendants Nos. 1 and 2 in favour of plaintiff No. 1 for a consideration of Rs. 2,600 which was advanced at compound interest of Rs. 1-4-0 *per cent. per mensem* with yearly rests. The Subordinate Judge gave the plaintiffs a decree in respect of the second bond (*Ex. 8*), but dismissed the claim on the first bond (*Ex. 3*), First Appeal No. 20 of 1921 was an appeal by the defendants.

The bond (*Ex. 3*) recited that the executant had purchased a 4-annas share in *mauza* Pharha Rahimabad at an auction sale held for arrears of road-cess and obtained possession thereof. The aforesaid share was subject to encumbrances created by the former proprietor and a decree had been obtained by the mortgagee in execution of which the interest had been sold for Rs. 19,010-9-6 and purchased by the decree-holder himself. In order to get the sale set aside the executant borrowed Rs. 10,000. A further sum of Rs. 9,425 was borrowed to repay the loans due to one Sital Prasad under two mortgage bonds executed on the 27th of April, 1909, (*Ex.* 7), and on the 3rd of June, 1909, (*Ex.* 6). A further sum of Rs. 575 was required to meet household expenses. The learned Subordinate Judge dismissed the claim on this bond holding as to the first item that the purchase of an encumbered estate was an imprudent act, and, therefore, not binding on the family property. As to the second item he held that the case was governed by the decision in *Sahu Ram Chandra* v. *Bhup Singh*(1) and as to the third item he held that the evidence was insufficient to establish legal necessity.

(1) (1917) I. L. R. 39 All. 437; L. R. 44 I. A. 126.

Sir Ali Imam (with him *Jalgobind Prasad Sinha*), for the appellant in Appeal No. 250 of 1920.

Noresh Chandra Sinha and *Kailaspati*, for the respondents.

Kailaspati, for the appellants in Appeal No 20 of 1921.

Susil Madhab Mullick and *Jalgobind Prasad Sinha*, for the respondents.

Ross, J. (after stating the facts, as set out above, proceeded as follows) :—

As regards the first item it appears that a share of 1-anna 6-pies and odd already belonged to the defendants' family and it was natural that, if money was being invested in immovable property, the opportunity should be taken of the sale for arrears of road-cess of a share in this village to make the purchase. The interest on the advance comes to Rs. 1,500 a year. The income has been estimated by the Subordinate Judge at Rs. 1,600. The respondents contend that this valuation is too high. This was a matter which was especially within the knowledge of the defendants and they did not produce any evidence. They left it to the plaintiffs to give what evidence they could. That evidence consists of a statement of Dwarka Prasad, plaintiffs' witness No. 3, to the effect that Jamna had told him that the income of his 2-annas share of *mauza* Pharha was Rs. 2,500 or Rs. 3,000. The plaintiffs also put in evidence a plaint (*Exhibit 30*) wherein the present defendants stated that the gross income from the 3-annas 6-pies and odd share in *mauza* Pharha was not less than Rs. 3,000 a year. They also produced a deposition of the defendant No. 1 made in 1919 (*Exhibit 19*) giving a similar figure. If Rs. 3,000 is the income of 3½-annas share, then the income of 2-annas would be Rs. 1,715; the Government revenue is Rs. 46-10-0 and the road-cess is about Rs. 53, so that a deduction of about Rs. 100 will have to be made; no allowance need be made for collection charges as the defendants already had a share in the village.

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According to this calculation the Subordinate Judge has not over-estimated the value of the property. But in any case, it was the duty of the defendants to place before the Court the best materials for its decision of this question, as pointed out by the Judicial Committee in *Marugesam Pillai* v. *Manikarasaka Dasika Gnana Sambanda Pandara Sannadhi* (1). The defendants had the documents which would have shown definitely what the value of the share was. They have not produced them and the Subordinate Judge's figure must be accepted. It follows, therefore, that the purchase was not in itself imprudent but was one which actually yielded a small profit. It was in no sense speculative because the defendants, being cosharers in the village, were in a position to know the value of the equity of redemption of this 2-annas share. At fifteen years' purchase the 2-annas share of the defendants would be worth Rs. 25,000 and at twenty years' purchase, Rs. 32,000 and the loan was Rs. 10,000 only. During the argument the learned Counsel for the appellants offered to accept a decree in full and to take over this share, allowing the respondents Rs. 32,000 for it; but this offer was not accepted. This also shows that the purchase was not an imprudent one. The learned Vakil for the respondents referred to the evidence of the immorality of Jamna Prasad Singh; but this is immaterial, because it is not said that that immorality had any connection with this debt. But it is said that he was encumbering the estate and that he would never be in a position to repay this loan because of his dissolute habits. But even without repayment the transaction was profitable as has been shown above: and in any view, to use the words of the Judicial Committee in the leading case, if "the charge is one that a prudent owner would make, in order to benefit the estate, the *bonâ fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular

(1) (1917) I. L. R. 40 Mad. 402; L. R. 44 I. A. 98.

instance, is the thing to be regarded. But, of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong, to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause. Therefore the lender in this case, unless he is shown to have acted *mala fide*, will not be affected, though it be shown that, with better management, the estate might have been kept free from debt" [*Hunooman Persaud Panday* v. *Mussammat Babooee Munraj* (1)]. No allegation of this kind is made against the plaintiffs in the present case. Reference was also made to the case of *Sanyasi Charan Mandal* v. *Krishnadhan Banerji* (2) where the Judicial Committee held that: "The *karta* of a joint family cannot impose on a minor member of it the risk and liability of a new business started by himself and other adult members." I cannot see how this decision, which relates to the starting of a new commercial business, has any application to the present question, which is, whether a *karta* of a Hindu family is entitled to borrow money in order to purchase a share in a village in which the family already has a share, in a transaction which is not on the face of it a losing one. In *Manna Lal* v. *Karu Singh* (3) the Judicial Committee upheld a mortgage whereby Rs 1,000 was borrowed for payment of premium of a lease. In my opinion this transaction was for the benefit of the family and is binding on the family property.

As to the second item it is conceded by the learned Vakil for the respondents that the earlier mortgages of 1909 were antecedent debts and that this part of the case is governed by the decision in *Raja Brij Narain Rai* v. *Mangla Prasad* (4). But these debts

(1) (1854-57) 6 Moore. I. A. 393 (423).
(2) (1922) I. L. R. 49 Cal. 560; L. R. 49 I. A. 108.
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(4) (1924) I. L. R. 46 All. 95.

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are attacked as immoral debts. The case for the defence is that the money borrowed under these bonds amounting to Rs. 8,000 was actually spent in profligacy. Now the first loan of Rs. 4,000 was said in the bond (*Exhibit 7*) to have been taken to help to pay for the purchase of immovable property. The second loan of Rs 4,000 (*Exhibit 6*) was taken to perform *Ruksati* of the executant's sister and to pay land revenue and road-cess. These are the recitals in the bonds for what they are worth. The evidence offered by the defence is of three witnesses. Jeonandan Proshad says that Jamna Prasad :

"borrowed 8,000 in course of one month and spent all of it on Rasulan (a prostitute) and on wine."

In cross-examination he says that in his presence Jamna borrowed Rs. 4,000 from Sital Babu and about a month after he told him that he had again borrowed Rs 4,000 from the said Sital Prasad and from this money Jamna made gold ornaments for Rasulan. This witness is a brother-in-law of Jamna Prasad and an interested person. The next witness is Jageshar Singh who says that the entire sum of Rs. 8,000 came into his hands and all of it was spent over prostitutes. This witness was a servant of Jamna Prasad. His statement is without details and unsupported by documents or accounts. It is not shown how he came to know of the way in which the money was spent. The last witness is Elahi Buksh, a person of no consideration, who says that he was Rasulan's musician. Without deciding that it is open to the respondents to question an antecedent debt on the ground of immorality, I consider that they have failed to prove that the actual money borrowed from Sital Prasad under these bonds was spent in an immoral fashion. The evidence is, in my opinion, too vague and the witnesses are of too little weight. This item must, therefore, be allowed.

With regard to the third item of Rs. 575, the learned Vakil for the respondents does not seriously

contest it. The Subordinate Judge has disallowed the major portion of this on the ground that the money was taken for executing the bond (*Exhibit* 3) and as the bond was not executed for justifying necessity this charge also must be disallowed; but if the bond was executed for the benefit of the family as has been held above, then it follows that this item must also be supported. The balance consists of Rs. 275 which was said to be required for the repair of the ancestral house. This also depends on the evidence of Dwarka Prasad who says that he enquired about the house repairs from Hazari Lal at Gaya who used to live with Jamna Prasad. In my opinion the evidence is sufficient to prove this small item.

As this case has not been decided on the ground that it was the pious duty of the sons to pay their father's debt no question as to six years' limitation arises.

I would hold, therefore, that the first and the third items of debt were incurred for the benefit of the family and for legal necessity and that the second item is binding as being incurred in discharge of antecedent debt. The plaintiffs are therefore, in my opinion, entitled to a decree on *Exhibit 3* as well as on *Exhibit 8*. The appeal of the respondents against the decree on *Exhibit 8* was not pressed. The result is that Appeal No. 250 of 1920 must be decreed with costs and the decree of the Subordinate Judge varied by decreeing the plaintiffs' claim in full. There will be the usual mortgage decree.

Appeal No. 20 of 1921 is dismissed.

DAS, J.—I agree.

Appeal No. 250 of 1920 decreed.

Appeal No. 20 of 1921 dismissed.