APPELLATE CIVIL.

Before Dawson Miller, C.J. and Foster, J.

KULDIP SAHAY

v.

RAM BUJHAWAN MAHTO.*

1924.

January, 16.

Hindu Law—Joint family—Purchase of interest in immovable property by karta*—mortgage of ancestral property to raise purchase price—subsequent mortgage to pay off first mortgage—antecedent debt—liability of grandson for antecedent debt—antecedent debt at excessive rate of interest, whether binding.*

The *karta* of a joint Hindu family purchased a *mukarrari* interest in a village in which he resided and had certain proprietory rights. In order to obtain money to pay the purchase price he executed a mortgage of his ancestral property stipulating for interest at 3 *per cent. per mensem* with quarterly rests on the principal sum advanced. Later he borrowed a further sum from another person in order to pay off the first mortgage. The security for the second mortgage was the ancestral property of the mortgagor and the said *mukarrari* interest.

The mortgagor having died before the present suit on the mortgage was instituted, his son and grandson were sued as defendants, the grandson having been born after the mortgage was executed.

Held, that the obligation incurred by the mortgagor under the first mortgage was antecedent both in time and in fact, and that the debt was independent of the transaction in suit, and that it did not cease to be an antecedent debt merely because the borrower purported to secure its repayment by mortgaging the family property.

Raja Bahadur Raja Brij Narain Rai v. *Mangla Prasad*(1), followed.

Sahu Ram Chandra v. *Bhup Singh*(2), referred to.

* First Appeal No. 80 of 1921, from an order of Lala Damodar Prasad, Subordinate Judge of Patna, dated the 22nd December, 1920.

(1) (1924) I. L. R. 46 A. 95, P. C.

(2) (1917) I. L. R. 39 All. 457; L. R. 44 I. A. 196.

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The pious obligation upon which the doctrine of antecedency is founded extends to grandsons as well as to sons.

The sons and grandsons are not relieved from the pious obligation to discharge the antecedent debt of their ancestor which is neither illegal nor immoral merely because it is extravagant or reckless by reason of the rate of interest being excessive.

Darbar Kacha v. *Kachar Harsur*(1), *Venugopala Naidu* v. *Ramanadhan Chetty* (2), *Suraj Bansi Koer* v. *Sheo Prasad Singh*(3), *Nanomi* v. *Modhun Mohan* (4) and *Chhakauri Mahton* v. *Ganga Prasad* (5), referred to.

This was an appeal by the plaintiffs from a decision of the Subordinate Judge of Patna in a suit brought to enforce a mortgage bond dated the 29th July, 1904.

The facts in so far as they are material to this report were as follows: In January 1903 the late Hari Charan Mahto, the father of Ram Bujhawan Mahto and grandfather of Ram Narain Prasad Mahto, the first and second defendants in this suit, purchased from one Mussammat Bibi Kulsum a 5-annas *mukarrari* interest in *mauza* Sabalpur Chipra in the Patna district in which village Hari Charan Mahto resided and had certain proprietary rights. In order to pay the purchase price he borrowed a sum of Rs. 5,000 from Ghansham Das and Premsukh Das repayable within six months, and on the 12th January, 1903, executed in their favour a mortgage of his ancestral property. The loan carried compound interest at 3 *per cent. per mensem* with quarterly rests. About eighteen months later, on the 29th July, 1904, the mortgagor borrowed from Chhedami Lal a sum of Rs. 8,000 towards paying off the principal and interest on the

(1) (1908) I. L. R. 32, Bom. 348.
(2) (1904) I. L. R. 27 Mad. 458.
(3) (1880) I. L. R. 5 Cal. 148; L. R. 6 I. A. 88.
(4) (1886) I. L. R. 13 Cal. 21; L. R. 13 I. A. 1.
(5) (1912) I. L. R. 39 Cal. 862.

mortgage. A few days later, on the 2nd August, 1904, the mortgage of the 12th January, 1903, was discharged by a cash payment of Rs. 7,830 and a *hundi* for Rs. 1,600 drawn in favour of the mortgagees. In order to secure the loan of Rs. 8,000 advanced by Chhedami Lal, Hari Charan granted him a mortgage of his ancestral property as well as of the *mukarrari* interest in Sabalpur Chipra which he had purchased in 1903. The rate of interest stipulated in that bond, which was the subject of the present suit, was 1 *per cent. per mensem* compound interest with quarterly rests. The principal sum was repayable within three years.

Chhedami Lal, the mortgagee, died in January 1908, leaving a widow and five daughters but no male issue. The widow and daughters, by a family arrangement, divided up the property amongst themselves in certain agreed shares. Some of them subsequently disposed of their interest to other parties. The plaintiffs were the successors in interest to the extent of 14-annas out of 16-annas in the mortgage held by Chhedami Lal and brought the present suit to enforce the mortgage. The defendant No. 28, Mussammat Bhagwat Kuer, one of the daughters of Chhedami Lal, was interested in the remaining 2-annas share. The principal defendants were the son and grandson of Hari Charan Mahto who died before the institution of the suit. The remaining defendants, except Mussammat Bhagwat Kuer, were puisne mortgagees or other persons alleged to have an interest in the equity of redemption. The suit was instituted on the 21st July, 1919, the amount then due, together with interest, being Rs. 27,509-14-9.

Various issues were raised at the trial. The Subordinate Judge found that the mortgages of 1903 and 1904 were genuine documents executed for consideration, that there was no necessity to borrow under the earlier mortgage at the high rate stipulated, that the interest on the bond in suit of 1904 was not high and that this stipulation did not amount to a

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penalty. He further found that the family arrangement already referred to was genuine and that the plaintiffs had a right to sue. The main issue in the case was formulated thus:

"Whether the debt contracted under the bond in suit was for payment of an antecedent debt which was for valid family legal necessity and benefit of the joint family? Is the defendant bound to pay the debt?"

Upon the questions thus raised he found that the earlier mortgage transaction of 1903 carrying the high rate of interest was clearly ruinous to the joint family, that there was no necessity to purchase the *mukarrari* interest in *mauza* Sabalpur Chipra, nor was the family benefitted by it, nor was it proved that any enquiry was made by the creditor as to the necessity of the loan under the earlier mortgage. On the question of antecedent debt justifying the mortgage transaction in suit he considered that the case was governed by the decision of the Judicial Committee in *Sahu Ram Chandra* v. *Bhup Singh* (1) on the ground that the debt, although antecedently incurred, was not incurred wholly apart from the ownership of the joint estate. He accordingly held that the mortgage, although binding upon the *mukarrari* properties which were the self-acquired properties of the mortgagor was not binding on the other properties comprising the ancestral family estate. It may be mentioned that at the date of the mortgage in suit the defendant No. 1, Ram Bhujawan Mahto the son of the mortgagor, was alive. The grandson, Ram Narain Prasad Mahto, the defendant No. 2, was born subsequently.

From this decision the plaintiffs appealed and contended that the mortgage of 1904 was valid not only against the self-acquired property but also against the ancestral property on the ground that it was executed by Hari Charan Mahto in order to pay off an antecedent debt, namely, the obligation incurred under the transaction of 1903.

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

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Susil Madhab Mullick and *Kailas Pati*, for the appellants.

Manuk (with him *Sailen Nath Palit*, *S. Lal* and *Bimola Charan Sinha*), for the respondents.

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

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The appellants rely upon the recent decision of their Lordships of the Judicial Committee in *Raja Bahadur Raja Brij Narain Rai* v. *Mangla Prasad Rai* (1) in which judgment was delivered on the 14th November last. In that case the decision in *Sahu Ram Chandra's* case (2) was reviewed and it was decided that the earlier case must not be taken to decide more than what was necessary for the judgment, namely, that the incurring of the debt was there the creation of the mortgage itself and that there was no antecedency either in time or fact and their Lordships observed: "There are, however, some observations in *Sahu Ram's* case (2) which are not necessary for the judgment but which their Lordships are bound to say they do not think can be supported." Their Lordships concluded their judgment by laying down five propositions the result of decided authorities as follows:

"*(1)* The managing coparcener of a joint undivided estate cannot alienate or burden the estate *qua* manager except for purposes of necessity

but

(2) If he is the father and the reversionaries are the sons he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt.

(3) If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind more than his own interest.

(1) (1924) I. L. R. 46 All. 95, P. C.
(2) (1917) I. L. R. 39 All. 437; L. R. 44 I. A. 126.

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(4) Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached.

(5) There is no rule that this result is affected by the question whether the father, who contracted the debt or burdens the estate, is alive or dead."

In that case, as here, the mortgage was raised in order to pay a debt arising out of previous mortgage transactions with regard to which it could not be said that the debt then incurred was incurred wholly irrespective of the family property. Applying the rules just quoted to the facts of the present case it appears to me that the obligation incurred by Hari Charan under the earlier mortgage was antecedent, both in time and in fact, and that the debt was independent of the transaction impeached and that it does not cease to be an antecedent debt merely because the borrower purported to secure its repayment by mortgaging the family property.

Certain points, however, were argued on behalf of the respondents in support of the view that the facts did not disclose a case of antecedent debt. In the first place it was contended that the second rule of those above referred to included only the case where the interests of sons were involved and not the interests of grandsons. It is well established, however, that the pious obligation upon which the doctrine of antecedency is founded extends to grandsons as well as to sons. Indeed the pious duty would appear to be more pressing in the case of the grandfather's debts than in the case of the father's. *Vrihaspati* states the rule thus :

"The father's debt must be paid first of all, and after that a man's own debt: but a debt contracted by the paternal grandfather must always be paid before these two even" (Vrihaspati, xi. 48).

Vishnu and *Narada* are to the same effect and all the text-books are agreed on this question. I am not aware of any case in which the immunity of the grandsons has been established and I cannot accept the view

that the recent decision of the Privy Council was intended to restrict the accepted rule. It is however unnecessary to pursue this question further as the grandson in the present instance was not born until after 1904 when the mortgage in suit was executed and any interest he took in the family property at birth was subject to the charge created by the mortgage.

It was next argued that the antecedent debt being subject to an exorbitant rate of interest described by the Subordinate Judge as ruinous to the joint family should be regarded as an immoral transaction. The rule as usually formulated in the cases is that the sons are liable to pay the debts of the father except when they are contracted for illegal or immoral purposes. It cannot be said here that the purpose for which the debt was contracted was illegal or immoral. The money was borrowed to pay the purchase price of an interest in land. The question of justifying necessity or benefit to the family does not arise. It is only in cases where those elements are lacking that the doctrine of antecedent debt becomes important and the only exceptions relieving the sons and grandsons from the pious obligation are where illegality or immorality is proved. It is admitted that the mortgagor himself would have been liable in a suit for the recovery of the debt and the exorbitant rate of interest would have afforded him no relief against such a claim. The Usurious Loans Act 1918 applies only to suits for the recovery of a loan made after the commencement of the Act and it is not suggested that the covenant to pay interest was a penal stipulation. The cases dealing with the factors necessary to constitute an illegal or immoral debt are by no means uniform and appear to be incapable of being reconciled. The modification of the rule imposing upon the sons and grandsons the pious obligation to discharge their ancestor's debts is based upon the exceptions recognized by the ancient *Smritis*. Those exceptions are set out in Mayne's *Hindu Law and Usage* (9th ed., section 303) and in other text-books, and include debts which are not

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"*vyavaharika.*" The exact meaning of this term has given rise to varying decisions. The Bombay High Court has given it a wide interpretation as debts which are unusual or not sanctioned by law or custom or which the father ought not as a decent and respectable man to have incurred or those attributable to his failings, follies or caprices [*Durbar Kacha* v. *Kachar Harsur* (1)]. In Madras a much narrower meaning has been attributed to it, namely, "a debt which is not supportable as valid by legal arguments and on which no right could be established in the creditor's favour in a Court of Justice" [*Venugopala Naidu* v. *Ramanadhan Chetty* (2)]. Colebrooke translates it as "a debt incurred for a cause repugnant to good morals" and this would appear to agree in substance with the expression of their Lordships of the Privy Council when dealing with the question of antecedent debt [see *Suraj Bansi Koer* v. *Sheo Persad Singh* (3), *Nanomi* v. *Modhun Mohan* (4) and *Sahu Ram Chandra* v. *Bhup Singh* (5)].

It would serve no good purpose to refer to, much less to endeavour to reconcile, the conflicting decisions upon this subject. Many of them are set out in Mayne's *Hindu Law* (9th ed., section 303). They are also discussed in an exhaustive judgment of Mookerjee, J., in *Chhakauri Mahton* v. *Ganga Prasad* (6) where it was held that the liability imposed upon a judgment-debtor by a decree for damages for wrongfully obstructing a water channel and thereby injuring his neighbours' crops was not an illegal or immoral debt.

Whatever may have been the origin of the exception to the liability of the sons and grandsons in such cases I consider that it is now established that the exception only exists in cases where the debt was

(1) (1908) I. L. R. 32 Bom. 348.
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(3) (1880) I. L. R. 5 Cal. 148 (169): L. R. 6 I. A. 88.
(4) (1886) I. L. R. 13 Cal. 21(35); L. R. 13 I. A. 1.
(5) (1917) I. L. R. 39 All. 437(444); L. R. 44 I. A. 126.
(6) (1912) I. L. R. 39 Cal. 862.

contracted for an illegal or immoral purpose or where the obligation arises from some illegal or immoral transaction. I do not think that the present case comes within the exception. The transaction was at most extravagant or reckless in so far as interest was concerned but not illegal or immoral.

It was next argued on behalf of the respondents that compound interest at 1 *per cent. per mensem* with quarterly rests which was the stipulation in the bond in suit could not be supported on the ground of necessity as no necessity to borrow at that rate had been proved. Having regard to all the circumstances I do not consider that the stipulation as to interest was unduly onerous. The Judge in fact found that the interest on the bond in suit was not high and it may be pointed out that the bargain as to interest in this bond was much less onerous to the borrower than that contained in the previous mortgage to extinguish which the money was borrowed. I am not prepared to differ from the learned Judge's finding.

The only other point raised by the respondents was that of the Rs. 8,000 borrowed only Rs. 7,830 in cash were applied in payment of the previous bond. I do not think this is material. The sum due on the previous bond was more than Rs. 8,000 and the balance was paid by a *hundi*, whilst the evidence shows that the small balance of Rs. 170 not paid in cash went in defraying the costs of the execution of the document.

On behalf of the respondents 30 to 33 who were separately represented it was further contended that the plaintiffs were not entitled to sue. Those respondents are reversioners being the minor sons of two of Chhedami Lal's daughters. They have no vested interest in Chhedami Lal's estate but merely a *spes successionis* and ought not strictly to have been made parties to the suit. They however raised the point that the family arrangement already referred to was not binding upon them and that the widow as heir of Chhedami Lal had no power to enter into such an arrangement. The widow, however, is a plaintiff in

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the suit and even if the family arrangement should not be binding, she as the sole heir of Chhedami Lal could maintain the action. The learned Subordinate Judge found that the family arrangement was a genuine transaction, meaning, I presume, that it was intended by the parties to it to be acted upon, and this is not challenged. What its legal effect may be as against the grandsons of Baso Kuer should their reversionary interest ever become vested is a matter which it is not necessary to decide in this suit and one which I do not propose to determine. Their interests therefore will not in any way be prejudiced if hereafter they should be in a position to challenge the family arrangement come to by their parents and grandparents.

Finally, it should be mentioned that the appellants contended that the earlier transaction of the 12th January, 1903, resulting in the mortgage of that date was justified by family necessity or benefit to the estate and that on that account also the later mortgage now sued on was binding on the family property. This point was not discussed at length but although I am unable to find that the earlier transaction was justified by any benefit to the estate it is not necessary to determine the question having regard to the finding that the mortgage in suit is binding on the joint family property.

The result is that the appeal is allowed with costs here and in the trial Court, the decree of the trial Court will be varied by ordering that the suit be decreed as against the whole of the mortgaged property with interest at the bond rate until the expiry of the days of grace which are extended to the 15th April, 1924, and at 6 *per cent. per annum* after that date until realization. There will be no personal liability on the respondents 30 to 33 for the costs of this suit.

FOSTER, J.—I agree.

Appeal allowed.