1926.

RAJA DHAKESHWAR PRASAD NARAIN SINGH v. GULAB KUER.

On the whole, their Lordships are of opinion that this appeal should be allowed, the decree of the High Court should be reversed, and that of the Subordinate Judge restored with costs.

And their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant: *W. W. Box and Co.*

Solicitors for respondents: *Ranken Ford and Chester.*

APPELLATE CIVIL.

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

1926.

April, 29, 30; May, 11.

ACHUTANAND JHA

v.

SURJANARAIN JHA.*

Hindu Law—family property, sale of—consideration, portion of, not justified by legal necessity—sale, whether should be set aside—son's pious obligation to pay father's time-barred debt.

A sale of joint Hindu family property to a bona fide purchaser should not be set aside merely because the consideration paid is somewhat greater than the actual requirements of the joint family.

Lal Bahadur Lal v. *Kamleshar Nath*(1), *Felaram Roy* v. *Bagalanand Banerjee*(2), *Chattar* v. *Chote*(3), *L. A. Niqlakanta Sarma* v. *Ganesha Iyer*(4) and *Medai Dalavoi Thirumalaiyappa Mudaliar* v. *Nainar Tevan*(5), followed.

*Second Appeals nos. 1056 of 1923 and 41 of 1924, from a decision of Ashutosh Chattarji, Esq., District Judge of Darbhanga, dated the 30th June, 1923, modifying a decision of Babu Parmeshwari Dayal, Munsif of Darbhanga, dated the 14th June, 1923.

(1) (1926) I. L. R. 48 All. 183, F. B.
(2) (1909-10) 14 Cal. W. N. 895.
(3) (1917) 40 Ind. Cas. 269.
(4) (1925) 91 Ind. Cas. 310.
(5) (1922-23) 27 Cal. W. N. 365; (1922) A. I. R. (P. C.) 307.

Deputy Commissioner of Kheri v. *Khanjan Singh*(1) and *Sanmukh Pande* v. *Jagarnath Pande*(2) distinguished.

The pious obligation of a Hindu son to pay his father's debts, does not extend to the payment of his father's time-barred debts.

Appeal no. 1056 of 1925, by the plaintiffs. Appeal no. 41 of 1924 by defendant no. 5.

The facts of the case material to this report are stated in the judgment of Dawson Miller, C. J.

Murori Prasad and *R. K Jha*, for the appellants in no. 1056 of 1925 and for the respondents in no. 41 of 1924.

S. K. Mitter, for the respondents in no. 1056 of 1923 and for the appellants in no. 41 of 1924.

Cur. adv. vult.

May, 11.

DAWSON MILLER, C.J.—These two appeals numbered 1056 of 1923 and 41 of 1924 are brought from a decision of the District Judge of Darbhanga modifying the decree of the Munsif.

The appellants in appeal no. 1056, who are the plaintiffs in the suit, are the younger son and the widow of Deokishun Jha who died in 1913 leaving, in addition to the plaintiffs, an elder son, Subhanand Jha (son of a deceased wife) who became the karta of the family on Deokishun's death

By a kabala dated the 17th March, 1917 (Exhibit E), Subhanand Jha, during the minority of his half-brother, sold to the defendants first party a portion of the family property consisting of between 6 and 7 bighas of kasht and brahmottar land in mauza Ranti for a sum of Rs. 750. By a second kabala dated the 20th May, 1918 (Exhibit I), he sold two other plots of land and a dwelling-house to the defendant second party for a sum of Rs. 128.

In 1922 the male plaintiff, who by that time had attained majority, together with his mother instituted

(1) (1907) I. L. R. 29 All. 331; L. R. 34 I. A. 72.
(2) (1924) I. L. R. 46 All. 531.

1926.

ACHUTANAND JHA v. SURAJNARAIN JHA.

DAWSON MILLER, C.J.

the present suit against the respective purchasers and Subhanand Jha, their vendor, claiming to recover a two-thirds share in the property sold on the ground that the plaintiffs had separated from the elder brother after the death of Deokishun and before the sales took place, and that they were entitled to a third share each in the property which the elder brother had no power to sell beyond the extent of his own share. The plaint also alleged that the sale-deeds were not genuine or for consideration, and that they were executed by Subhanand Jha without any legal necessity and that the plaintiffs were not benefited by the transaction They claimed a declaration that the sale-deeds were illegal and inoperative as against the plaintiffs and asked for recovery of their two-thirds share with mesne profits.

It will be seen from what I have stated that the claim was based upon the allegation that at the date of the transfers the family property had already been partitioned, the mother and each of the sons being separately entitled to a third share in the whole. The question of legal necessity was therefore only material in case there had been no separation, but such a case was not specifically pleaded. Nevertheless issues were framed before the hearing dealing with this point. The fourth and fifth issues were as follows:—

"4. Are the kabalas sought to be impugned genuine and for consideration and for the benefit of the plaintiffs?

5. Were the kabalas in question for legal necessities and are they binding upon the plaintiffs?"

Considerable evidence was adduced at the trial upon these issues and the question of legal necessity was discussed in great detail in the judgments of both the Munsif, who originally tried the case and the District Judge before whom it went on appeal.

On the 20th February, 1922, after the evidence was closed, the plaintiffs filed a petition before the Munsif praying that they might be allowed to amend their plaint upon payment of the necessary additional

court-fee by adding to the relief claimed therein the following prayer :—

"That if in the opinion of the Court the separation as alleged by the plaintiffs be not proved then a decree for recovery of possession of the entire property with mesne profits covered by the kabalas dated 27th March, 1917, and 20th May, 1918, may be passed in favour of your petitioners or jointly in favour of your petitioners and defendant no. 6 (Subhanand Jha)."

The learned Munsif rejected the application on the ground that it was unfair to ask the defendants to meet a different case at that stage. Had the question of legal necessity not been raised in the plaint and had no issue been framed on the point I consider that the learned Munsif's decision would have been unassailable and that it would have been improper to allow the amendment at that stage, as it would involve the taking of evidence on a question of fact not raised in the pleadings or the issues. But having regard to the course which the case took it cannot be said that the defendants would be in any way prejudiced by allowing the amendment asked for. The question of legal necessity was one of the issues for trial and both parties had every opportunity to produce evidence and did produce evidence on the point; and as the materials were before the court to enable it to decide the point and both courts in fact decided it, I consider that in the particular circumstances of the case, and in the interests of justice the court should have allowed the amendment under Order VI of rule 17, of the Code of Civil Procedure, for the purpose of determining the real questions in issue between the parties. We accordingly ruled that the plaint should be treated as amended in the manner prayed as above set out.

The trial court found that there had been no separation and that the plaintiffs and the defendant no. 6, Subhanand Jha, were joint in estate. This finding was, in the absence of any amendment of the plaint, sufficient to dispose of the suit, but the learned Munsif, after stating that this decision might not find favour with a higher tribunal, proceeded to determine issues 4 and 5. He found that the sales were

1926.

ACHUTANAND JHA v. SURAJNARAIN JHA.

DAWSON MILLER, C.J.

genuine and for legal necessity and binding on the plaintiffs and dismissed the suit.

From this decision the plaintiffs appealed to the District Judge. The learned District Judge found that there had been no separation in the family of the plaintiffs and the defendant no 6 and that the property in suit was joint family property. With regard to the kabala of 1917 he found that out of the consideration of Rs. 750 a sum of Rs. 550 was required for family necessity but that no legal necessity had been proved in respect to the balance of Rs. 200. He considered that this was only a small portion of the consideration and held that the kabala should not be set aside, but directed that the plaintiffs should recover from the transferees the defendants first party the male plaintiff's half share of this amount, viz., Rs. 100.

With regard to the second kabala the sale was made to the defendant second party in order to raise money to pay off a sum of Rs. 128 due under a mortgage dated the 1st March 1904 executed by Deokishun Jha, the father of the first plaintiff and the defendant no. 6 whereby certain family property had been mortgaged. The personal debt incurred by Deokishun Jha under the mortgage of 1904 was time-barred in 1918 when the kabala was executed, and, therefore, it could not be justified on the ground of the antecedent debt of the father. The property which was the subject of the mortgage had also passed out of the possession of the family, as it formed part of the property sold to the first party defendants under the kabala of 1917. The District Judge accordingly found that there was no necessity to pay the debt and the family property could not validly be sold for that purpose. In the result the appeal was allowed in part and the decree of the trial court was varied by awarding the plaintiffs the sum of Rs. 100 in respect of the first sale and by declaring that the second sale was not binding on the plaintiffs and had no effect in so far as

the half share of the male plaintiff was concerned. The learned District Judge, although he does not in terms say so, in fact dealt with the suit as if the plaint had been amended.

From this decision the plaintiffs have preferred a second appeal, 1056 of 1923, to this Court and contend that as the lower appellate court has found that legal necessity was not established in respect of the whole of the consideration for the first kabala he should not have set aside the sale upon payment by the plaintiffs of the amount found justified by legal necessity, viz., Rs. 550.

The defendants first party, the purchasers under the first kabala, have also entered a cross-objection and contend that on the pleadings the question of legal necessity did not arise, the plaint not having been amended, and that the lower appellate court was wrong in awarding the plaintiffs the sum of Rs. 100.

The defendant second party, the purchaser under the second kabala, has also preferred a second appeal numbered 41 of 1924 to this Court. He contends (*1*) that the lower appellate court was not justified, in the absence of any amendment of the plaint, in considering the question of legal necessity and allowing the plaintiffs' claim on the ground of the absence of legal necessity, (*2*) that the defendant no. 6 as karta of the family was under a pious obligation to discharge his father's debt under the mortgage of 1904 even though the personal debt was time-barred and (*3*) that the mortgage debt still subsisted after the transfer of the mortgaged property under the first kabala and the liability of the joint family to discharge the debt remained with them.

As to the plaintiffs' contention in appeal no. 1056 of 1923 certain authorities have been relied on to support the argument that where a portion of the consideration for a sale of family property is not justified by legal necessity the sale should be set aside on payment to the transferee of that part of the consideration which is so justified. No doubt this rule has been

1926.

ACHUTANAND JHA v. SURAJNARAIN JHA.

DAWSON MILLER, C.J.

followed where a substantial portion of the consideration is not proved to have been necessary for the needs of the family. In *Deputy Commissioner of Kheri* v. *Khanjan Singh*(1), their Lordships of the Judicial Committee set aside a sale where out of a total consideration of Rs. 19,998 necessity was found to have existed for Rs. 7,080 only. In *Sanmukh Pande* v. *Jagarnath Pande*(2), Rs. 200 out of Rs. 1,000 was found not to have been supported by legal necessity or antecedent debts. The learned Judges of the Allahabad High Court (Sulaiman and Mukherji, J.J.), in setting aside the sale in that case said, "It is impossible to lay down any hard and fast rule which could apply equally to every case; for every transaction has to be considered on its own merits and the court has to come to a finding on the merits of every case." Other cases were cited where in similar circumstances the sale was set aside, but in all of them the portion of the consideration not justified by family necessity or antecedent debt was substantial. The rule, however, is not of universal application and in cases where the part of the consideration not justified on the grounds of legal necessity is small the courts have frequently refused to set aside the sale; and where it is insignificant the courts have even gone the length of upholding the sale without ordering the defendant to restore to the plaintiff that part of the consideration not proved to have been justified by necessity. One of the latest cases on the subject is the Full Bench decision of the Allahabad High Court in *Lal Bahadur Lal* v. *Kamleshar Nath*(3), where the authorities are reviewed and where the court refused to set aside the sale, or even to order a refund, where the sum of Rs. 259 out of a consideration of Rs. 5,995 was found to be unsupported by legal necessity. Other cases where the court exercised its discretion in favour of the purchaser are *Felaram Roy* v. *Bagalanand Banerjee*(4), *Chattar* v. *Chote*(5), *L. A. Niglakanta*

(1) (1907) I. L. R. 29 All. 331. L. R. 34 I. A. 72.
(2) (1924) I. L. R. 46 All. 531. (3) (1926) I. L. R. 48 All. 185, F. B.
(4) (1909-10) 14 Cal. W. N. 895. (5) (1917) 40 Ind. Cas. 269.

Sarma v. *Ganesha Iyer*(1), and *Medai Dalavoi Thirumalaiyappa Mudaliar* v. *Nainar Tevan*(2). In the last case cited their Lordships of the Judicial Committee held that where Rs. 711 out of a consideration of Rs. 5,300 was not proved to have been justified by legal necessity the sale was not invalid. It seems obvious that where it is necessary to sell property in order to discharge a binding legal obligation, the purchase price must occasionally exceed the actual cash requirements, and unless it appears that the transaction itself was an improper one or that some more advantageous arrangement could have been made, which is not the case here, I consider that the courts should be slow to set aside a sale to a bona fide purchaser merely because the consideration paid is somewhat greater than the actual requirements of the joint family. Moreover in the present case the transfer has remained unchallenged for a period approaching five years and on a consideration of all the circumstances I am not prepared to hold that the District Judge acted illegally, or exercised a wrong discretion, in allowing the sale to stand on condition that the purchasers pay to the plaintiffs the sum of Rs. 100. Appeal no. 1056 of 1923 is accordingly dismissed with costs. The cross-objection of the defendants first party in this appeal is also dismissed with costs, as we consider that the plaint should be amended as prayed.

With regard to appeal no. 41 of 1924 in which the defendant second party, the purchaser under the second kabala, is appellant, his first point fails as we have allowed the amendment. His second point is based upon the contention that the pious obligation of a son to pay his father's debts extends even to a time-barred debt. Whatever may be the duty or the powers of a Hindu widow succeeding to her husband's estate with regard to the payment of her husband's debts, when barred by limitation, the pious obligation of the son

(1) (1925) 91 Ind. Cas. 310.
(2) (1922-23) 27 Cal. W. N. 365; (1922) A. I. R. (P. C.) 307.

1926.

ACHUTANAND JHA v. SURAJNARAIN JHA.

DAWSON MILLER, C.J.

does not extend to the payment of his father's time-barred debts. If the debt could not have been enforced against the father, were he alive, the son is not bound. This, however, does not conclude the case for it appears that the kabala of 1918 was executed in order to pay off the sum due under a previous mortgage (Exhibit C) executed by Deokishun Jha, father of Subhanand and the male plaintiff, in 1904, and it is conceded that the mortgage Exhibit C created a valid charge upon the family property. The learned District Judge held that, as the property charged by Exhibit C had already been transferred to the first party defendants under the previous kabala of 1917, the liability to discharge the mortgage no longer rested with the plaintiffs' family. If this property had been sold subject to the encumbrance the learned Judge's decision might be justified on the ground that the liability to discharge the encumbrance had passed away from the family. But under the terms of the kabala of 1917 (Exhibit E) it appears that the lands comprised in that sale were sold free of all encumbrances, the vendor undertaking to discharge any encumbrance still subsisting and to indemnify the purchasers from any loss they might suffer by reason of the existence of such encumbrance. This was not creating a new liability but retaining a liability already created and binding on the family in respect to the vended property. I must hold therefore that the transaction of 1918 (Exhibit I) was binding upon the plaintiffs and cannot be set aside. Appeal no. 41 of 1924 is accordingly allowed. The judgment and decree of the District Judge are set aside and the decree of the Munsif is restored in so far as it dismissed that part of the claim which relates to the kabala of the 20th May 1918. The plaintiffs will pay the defendant second party his costs incurred in this appeal and in both the lower courts.

FOSTER, J.— I agree.

Appeal no. 1056 *of* 1923 *dismissed.*

Appeal no. 41 *of* 1924 *decreed.*