APPELLATE CIVIL.

Before Bucknill and Foster, J.J.

1926.

April, 19.

ACHUTA RAM

v.

JAINANDAN TEWARY.*

Mortgagor, purchaser from, whether personally liable to pay the debt.

Where a mortgagor executed a mortgage in favour of the plaintiff and subsequently sold the property to a third party, who, in the recitals of the sale-deed, agreed to pay off the mortgage, the plaintiff not being a privy to the contract, *held*, that the plaintiff (mortgagee) could not avail himself of the stipulation made in the contract between the purchaser and the mortgagor, and that the purchaser was not personally liable to pay the debt.

Jamna Das v. *Ram Autar Pande* (1) and *Nanku Prasad Singh* v. *Kamta Prasad Singh* (2), followed.

Khajwa Muhammad Khan v. *Husaini Begum* (3), and *Deb Narain Dutt* v. *Chuni Lal Ghose*(4), distinguished.

Dwarika Nath Ash v. *Priya Nath Malki* (5), not followed.

Tweddle v. *Atkinson* (6), referred to.

Appeal by the plaintiffs.

This was a second appeal from a decision of the District Judge of Shahabad dated the 7th March, 1923, modifying a judgment of the Subordinate Judge of the same place dated the 18th February, 1922. The material facts were as follows: The plaintiffs (who were the appellants) were the mortgagees of

*Appeal from Appellate Decree no. 668 of 1923, from a decision of Jadunandan Prasad, Esq., District Judge of Shahabad, dated the 7th March, 1923, modifying a decision of Babu Phanindra Lal Sen, Subordinate Judge of Shahabad, dated the 18th February, 1922.

(1) (1911) I. L. R. 34 All. 63, L. R. 39, I. A. 7.
(2) (1922) 3 Pat. L. T. 637, P. C.
(3) (1910) I. L. R. 32 All. 410, L. R. 37 I. A. 152.
(4) (1913) I. L. R. 41 Cal. 137.
(5) (1917-18) 22 Cal. W. N. 279.
(6) (1861) 1 B. & S. 393.

certain property from defendants nos. 1 and 4. These mortgages were effected by five deeds. In addition to these five mortgages there were also three other mortgages of which the plaintiffs were not the direct mortgagees but assignees from those who were the original mortgagees. It was only with the five transactions in which the plaintiffs were the direct mortgagees that this appeal was concerned. The plaintiffs brought their suit to enforce the mortgages and, in addition to joining the mortgagors, they also joined certain persons (who were defendants nos. 8 to 13) who had bought from the mortgagors the equities of redemption of the properties hypothecated by virtue of the five mortgage deeds referred to above. In the trial court the plaintiffs succeeded in obtaining a personal decree not only against the mortgagors but also against the purchasers of the equities of redemption. But on appeal the learned District Judge came to the conclusion that the decree, so far as it related to relief against these purchasers of the equities of redemption, could not be in law upheld; he therefore set aside that portion of the judgment of the Subordinate Judge and it was from that part of the decision of the District Judge that the plaintiffs appealed to the High Court.

L. N. Sinha, *R. B. Saran* and *N. C. Sinha*, for the appellants.

P. Dayal and *Jal Gobind Prasad*, for the respondents.

BUCKNILL, J. (after stating the facts set out above, proceeded as follows): The simple point for consideration is whether the plaintiffs could obtain a money decree against the purchasers of the equities of redemption. It must first be pointed out that in the instruments under which the purchasers of the equities of redemption so purchased, they (the purchasers), stipulated that they would pay off the debts due under the mortgages. It is common ground that they did not do so. It is also common ground

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that the plaintiffs had no notice of what had taken place between the mortgagors and the purchasers of the equities of redemption and were not privy to the contract. It is important to observe that some support was lent to the argument which was put forward before us by the learned Advocate who has appeared for the plaintiffs by the ruling in the case of *Dwarika Nath Ash* v. *Priya Nath Malki*(1). In that case the facts were certainly very similar to those which obtain in this appeal now before us. The defendants had borrowed a sum of money from the plaintiff for which they had given a promissory note; they subsequently transferred their property to another party who executed an agreement in their favour expressly undertaking to pay to the lender of the money under the promissory note his dues thereunder. The lender of the money under the promissory note was no party to this contract and had no notice thereof; but, having ascertained the circumstances, he proceeded to sue the borrowers as well as the individual who had purchased the borrower's property: he claimed that, in view of the agreement entered into between the borrowers and the purchasers of the borrowers' property, he (the lender) was entitled to take advantage of that agreement. Mookerjee and Cuming, J.J., of the Calcutta High Court held that the plaintiff was entitled to enforce his claim against the purchaser of the borrowers' property.

Had the matter rested there one might have thought that this case would constitute an authority in favour of the proposition argued in the present instance. There are also other cases which have been quoted by the learned Advocate for the appellant which certainly at first sight appear to support to some extent the learned Advocate's argument. In the case of *Khajwa Muhammad Khan* v. *Husaini Begum*(2) their Lordships of the Privy Council held

(1) (1916) 22 Cal. W. N. 279.
(2) (1910) I. L. R. 32 All. 410, L. R. 37 I. A. 152.

that under certain circumstances (to which I shall refer presently) it was possible for a person who was no party to an agreement to take advantage of the provisions of such an agreement which were in fact beneficial to herself. Their Lordships' decision (which was given by the Right Hon'ble Mr. Ameer Ali) relates the facts at some length. Put very shortly, they were as follows. A minor Muhammadan lady, prior to and in consideration of her marriage with the son of the defendant in the suit, was promised by the defendant under an agreement executed between the defendant and the lady's father to be paid by the defendant the sum of Rs. 500 per mensem from the date of her reception in marriage; the defendant also charged certain specified properties for the purpose of producing the requisite funds. The lady, as I have stated, was a minor; but eventually, after the marriage, lived with her husband for sometime; owing, however, to disagreement she, at the end of some 12 or 13 years, ceased so to do. The defendant then refused to continue to pay the allowance and the lady accordingly brought the suit against him basing her claim upon the document of agreement which had been entered into between the defendant and her (the plaintiff's) father. It was maintained on behalf of the defence on the line of reasoning adopted in the well-known English case, *Tweddle* v. *Atkinson*(1), that as the plaintiff was in no way an actual party to the agreement made between her father and the defendant, she had no locus standi and was unable to sue thereunder. Mr. Ameer Ali, however, pointed out that the case of *Tweddle* v. *Atkinson*(1) was one decided under the common law of England and was not in their Lordships' opinion applicable to the facts which were disclosed in the case before their Lordships. Their Lordships were of opinion that although no party to the agreement (and it must be remembered that the lady was then a minor and the document was executed by her father)

(1) (1861) 1 B. & S. 393.

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she was clearly in equity entitled to enforce her claim against the defendant. The case, however, appears to me to be distinguishable from the present case in view of the fact that the benefit which was to accrue to the plaintiff was one for which the consideration was the marriage to take place between herself and the defendant's son. Then there is another case which was cited on behalf of the plaintiffs, *Deb Narain Dutt* v. *Chuni Lal Ghose*(1). In that case Jenkins, C.J. and Mookerjee, J., held that where the transferee of a debtor's liability acknowledged in the provisions of the registered instrument which conveyed to him all the original debtor's properties, his obligation to the creditor for the debt to be paid by him and where the acknowledgment was communicated to the creditor and accepted by him, the creditor could sue the transferee on the registered instrument. Here again their Lordships based their decision upon the equitable principle which had operated upon the minds of their Lordships of the Privy Council in the case which I have just quoted. Here in this case of *Deb Narain Dutt* v. *Chuni Lal Ghose*(1) it may indeed be said that the facts disclosed that the creditor was actually privy to and concerned in the transaction which took place between the transferee and the debtor. In fact in the judgment of Jenkins, C. J., it is expressly stated that there was an arrangement between the plaintiff and defendant no. 5 by which the liability of defendant no. 5 under the transfer was acknowledged and accepted and it may also be observed that (although under a mistaken idea of their true legal effect) certain title-deeds were actually handed over at that time by the purchaser to the plaintiff. Although, therefore, the last two cases quoted seem to be based upon considerations somewhat different from those which have to be regarded in the present appeal, there is no doubt, as I have said before, that *Dwarika Nath Ash* v. *Priya Nath Malki*(2) does constitute some authority to support

(1) (1913) I. L. R. 41 Cal. 137. (2) (1917-18) 22 Cal. W. N. 279.

the argument which has been addressed to us by the learned Advocate who has appeared for the appellants. There are however, on the other hand, two cases which appear to be conclusive authority upon the point which has been argued in this appeal. The first of these is *Jamna Das* v. *Ram Autar Pande*(1). It is a decision of their Lordships of the Privy Council and although the facts are not set out at any great length in the report they can be found fully reported in I. L. R. 31 Allahabad, 352 (1909). It will be seen, from a perusal of the facts as given in that report, that the circumstances were almost the same as those which obtain in the present appeal. The judgment of their Lordships of the Privy Council delivered by Lord Macnaghten is very short and very much in point here. His Lordship observes—"This is a perfectly plain case. The action is brought by a mortgagee to enforce against a purchaser of the mortgaged property an undertaking that he entered into with his vendor."

I may pause here to observe that the undertaking referred to was to the effect that the purchaser would pay off the debt due to the mortgagee by the person from whom the purchaser had purchased the property. His Lordship continues—"The mortgagee has no right to avail himself of that. He was no party to the sale. The purchaser entered into no contract with him, and the purchaser is not personally bound to pay his mortgage debt."

There is still a later case in which the same proposition has been similarly set forth in another decision of their Lordships of the Privy Council. In that case, *Nanku Prasad Singh* v. *Kamta Prasad Singh*(2), the facts again are in that report but very shortly set out. We have had the advantage, however, of seeing what the facts were from the record of this court, the case having been tried on

(1) (1911) I. L. R. 34 All. 63, L. R. 39 I. A. 7.

(2) (1922) 3 Pat. L. T. 637, P. C.

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appeal on the 7th June 1918 before Roe and Coutts, JJ. The facts were substantially identical with those which exist in the present appeal. A mortgagor having executed a mortgage in favour of the plaintiff sold the property to a third party who, in the recitals of this sale-deed, agreed to pay off the mortgage with a portion of the purchase money which was for that purpose left in his hands. The mortgagee sued upon his mortgage not only the mortgagor but also the purchaser; but this court refused to grant any personal decree against the purchaser, holding that he (the mortgagee) could not avail himself of the stipulation made in the contract between the purchaser and the mortgagor. Their Lordships of the Privy Council upheld the decision of this court, Lord Atkinson, in a very short judgment, stating: "Their Lordships have considered this case and they think it is clear that no personal liability was incurred by the purchasers of the equity of redemption. Their Lordships therefore think that the decree of the High Court was right and that the point made by the appellant failed." It may be observed that in the judgment given by this court on the 7th June 1918, the cases to which I have referred above were mentioned and quoted. It seems therefore that we are clearly bound by the authority of these two decisions of the Privy Council which are so directly in point.

The appeal therefore must be dismissed with costs. I should mention that there was a cross-objection which, however, is not pressed and has not been argued and that cross-objection also must be dismissed with costs.

It is said by the learned Advocate who has appeared for the appellants (and it may be mentioned that the question is referred to in ground no. 7 of the appellant's grounds of appeal to this court) that there has been some arithmetical or other mistake with regard to the amount of costs which have been awarded to the defendants nos. 8 to 13. It was suggested

that, as this question had been made a ground of appeal, it might be dealt with in this court. We have, however, no materials whatever before us which would enable us to discuss or consider this point. If there has been any mistake in regard to the quantum of costs, that matter should be referred to and dealt with by the lower appellate court.

FOSTER, J.—I agree. The difference between *Dev. Narain Dutt* v. *Chuni Lal Ghose*(1) and the last cases quoted by my learned brother, *Jamna Das* v. *Ram Autar* (2) and *Nanku Prasad* v. *Kamta Prasad*(3), appears to me to be very important in connection with the facts of the present case. It is to be borne in mind that in the present case there was no notice to the plaintiff at the time of the contract. In the judgment of *Dev Narain Dutt* v. *Chuni Lal Ghose*(1) we see that the promisee, that is to say the plaintiff, had a proposal made to him by the promisor, that is to say defendant no. 5, and he accepted it. So in that case the promisee was in the position indicated in section 2 of the Indian Contract Act. He held the benefit of a contract for consideration. In the present case the plaintiff, who claims to be the promisee, has never had a proposal made to him by the defendants against whom he is seeking a money decree: and he certainly never accepted any such proposal. Therefore section 2 does not bring him into the position of a person who can sue a promisor upon a contract for consideration. That is the distinction between the two classes of cases, and I think the present case falls within the class indicated in the Privy Council cases which have been quoted. There may be a third class of cases in the judgments which we have been studying, namely, the class in which minors or other third parties sue under family or marriage settlements. In such cases as those the plaintiff can hardly be regarded as a promisee who

(1) (1913) I. L. R. 41 Cal. 137.
(2) (1911) I. L. R. 34 All. 63, L. R. 39 I. A. 7.
(3) (1922) 3 Pat. L. T. 637, P. C.

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has accepted any proposal or promise and such cases are probably decided on the traditional principles governing the English Courts of Equity rather by any application of the terms of section 2 of the Indian Contract Act. If I am correct, this third class would I think be exemplified by the case of *Khajwa Muhammad Khan* v. *Husaini Begum*(1).

Appeal dismissed.

APPELLATE CIVIL.

Before Ross and Kulwant Sahay, J.J.

CHAIRMAN, DISTRICT BOARD, MONGHYR,

1926.

April, 19.

v.

SHEODUTT SINGH.*

Provincial Insolvency Act, 1920 (*Act V of* 1920), *section* 2(*l*) (*d*)—*Receiver, right of to sell son's share to liquidate father's debt—son's pious obligation—Hindu Law.*

A Receiver in insolvency in whom Hindu joint family property has vested has the right to sell the share of the son to liquidate the father's debt, not incurred for immoral purposes, and the pious obligation of the son prevents him from asserting that the family estate, so far as his interest is concerned, is not liable for that debt.

Amolak Chand v. *Mansukh Rai Mangan Lal* (2), *Brij Narain* v. *Mangal Prasad* (3), *Bihari Lal Jamna Das* v. *Sat Narain*(4), followed.

Sant Prasad Singh v. *Sheo Dutt Singh* (5), referred to.

*Appeal from Original Order no. 184 of 1925, from an order of Ananta Nath Mitter, Esq., District Judge of Saran, dated the 16th of March, 1925.

(1) (1910) I. L. R. 32 All. 410; L. R. 37 I. A. 152.
(2) (1924) I. L. R. 3 Pat. 857.
(3) (1924) I. L. R. 46 All. 95, P. C
(4) (1922) I. L. R. 3 Lah. 329, F. B.
(5) (1923) I. L. R. 2 Pat. 724.