APPELLATE CIVIL.

Before Das and Adami, JJ.

1929.

Jan., 10.

HITENDRA NARAYAN SINGH

v.

SUKHDEB PRASAD JHA.*

Hindu Law—mortgage by karta—legal necessity, proof of, in respect of large sum of money—presumption of legal necessity as regards balance—alienations made by father when son not born—son, whether can object—guardian ad litem, appointment of—Code of Civil Procedure, 1908 (Act V of 1908), Order XXXII, rule 4 (3) and (4), non-compliance with—appointment, whether null and void—guardian, gross negligence of—minor, when entitled to have decree set aside.

A Hindu son has no right to object to alienations validly made by his father before he was born or begotten.

Bholanath v. *Kartik* (1), followed.

Where enquiry is made, and it is established that there is a valid necessity in respect of a very large portion of the money raised by a karta on the security of the Hindu joint family, there is a presumption that the portion not accounted for has been spent for proper purposes and for the benefit of the family.

Sri Krishn Das v. *Nathu Ram* (2) and *Hanooman Prashad Panday* v. *Munraj Koonwerree* (3), applied.

Order XXXII, rule 4 (3) and (4), Code of Civil Procedure, 1908 (as it stood before its amendment in 1927), provided as follows :—

" (3) No person shall without his consent be appointed guardian for the suit.

(4) Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian, ..."

*Appeal from Original Decree no. 188 of 1926, from a decision of Babu Krishna Shaya, Additional Subordinate Judge of Bhagalpur, dated the 31st July 1926.

(1) (1907) I. L. R. 34 Cal. 372.
(2) (1926-27) 31 Cal. W. N. 462, P. C.
(3) (1856) 6 Moo. I. A. 393.

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Held, that although an appointment of a guardian without an inquiry by the Court as to the existence of any other "person fit and willing to act as guardian" is irregular, it is not null and void.

In order that a minor may be entitled to have a decree already passed against him vacated on the ground of gross negligence of the guardian ad litem, he must first satisfy the court that a defence was available to him which could properly be taken in the suit.

Appeal by the plaintiff.

The facts of the case material to this report are stated in the order of Das, J.

Hasan Imam, with him *Mehdi Imam*, *Sambhu Saran* and *C. P. Sinha*, for the appellants.

R. K. Jha, *A. C. Roy* and *Brij Kishore Prasad*, for the respondents.

DAS, J.—In this suit the plaintiffs who are the minor sons of one Jogendra Narain Singh claim to set aside a decree passed in suit no. 518 of 1917 and the sale held in pursuance of that decree. The learned Subordinate Judge has dismissed the suit and the plaintiffs appeal to this Court.

On the 24th November, 1904, Jogendra Narain Singh and his minor son Bradhendra Narain Singh executed a mortgage bond in favour of Guna Lal Jha represented in this action by defendants first party to secure an advance of Rs. 6,400 made by the latter to the former. It appears that there was a decree against Jogendra Narain Singh and the joint family properties were advertised for sale; and it is admitted that as much as Rs. 5,672-10-0 out of Rs. 6,400 went to satisfy the judgment-creditor of Jogendra Narain Singh. There is no evidence in this case as to whether Rs. 637-6-0, the balance of the money borrowed, was applied for a necessary purpose of the family. So far as the mortgage bond is concerned, it is recited that

"'We that is to say, the mortgagors' therefore borrowed on interest Rs. 6,400, half of which is rupees three thousand and two

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hundred from the said mahajans in cash and paid the said decree, spent the balance on our other necessary expenses and executed this mortgage bond on the following conditions."

There is therefore a recital that the balance of the money was borrowed for a necessary purpose; but there is no evidence in the present litigation that it was so applied.

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On the 22nd August, 1907 a suit, being suit no. 518 of 1917, was instituted by the defendants first party to enforce the mortgage bond of the 24th November, 1904. The suit was instituted against Jogendra Narain Singh and three of his minor sons, Hitendra Narain, Hemendra Narain and Girindra Narain. Now defendants 2, 3 and 4 in the litigation of 1917 are the plaintiffs 1, 2 and 3 in the present litigation. Plaintiff no. 4 of the present litigation was not born at the date of the litigation of 1917. As I have said, the suit was instituted on the 22nd August, 1917. The Court passed an order that notice should be issued to the minor defendants and proposed guardian fixing 24th September, 1917, for appointment of a guardian ad litem. On the 24th September, 1917, the following order is recorded in the order-sheet:

"Notice served. Proposed guardian does not appear to show his willingness to act as guardian ad litem. Let Maulavi Abdul Hamid, Pleader, be appointed guardian ad litem of the minor defendants. Amend plaint and issue summons to all the defendants fixing the 13th November, 1917, for settlement of issue. Plaintiff to deposit Rs. 75 towards the guardian's fees within 3 days. The guardian will go to the minor's place to take instructions."

Maulavi Abdul Hamid was thereupon appointed guardian ad litem, and it appears that he filed a written statement on behalf of the minor defendants on the 15th January, 1918. The written statement on behalf of defendant no. 1, that is to say, Jogendra Narain Singh was filed on the 21st January, 1918. On the 12th September, 1918, Jogendra Narain applied for adjournment of the case. It appears that he had applied for time on previous occasions and the

Court was unwilling to grant further time on the 12th September, 1918. It was alleged on his behalf that the defendant had missed the train with his witnesses and that adjournment was necessary to enable them to come to Court. The Court was willing to grant one day's time and asked the pleader if he could be ready the next day. The pleader informed the Court that he could not be ready. In these circumstances the Court recorded the following order:

> "If really the defendant missed the train he should come with witnesses by the next possible train especially when the suit is one year old. On the other hand, one of the plaintiffs swears to an affidavit that he saw the defendant no. 1 in this town yesterday in the afternoon. Apart from this affidavit there is not sufficient ground for the grant of an adjournment. He should not have been so careless in bringing witnesses. In the circumstances I reject the application for time as frivolous. I may add that no witness was summoned by the defendant."

Thereupon the defendant's pleader retired from the case and the defendants being absent the Court gave the plaintiff a decree on the evidence of two witnesses examined on his behalf, namely Babuji and Mohesh. Thereafter Jogendra Narain made an attempt to have the ex-parte decree set aside under the provisions of Order IX, rule 13. That application failed because Jogendra Narain did not appear to press the application on the date fixed for it.

The ex-parte decree was passed, as I have said, on the 12th September, 1918. The final decree was passed on the 1st September, 1920. Thereafter the defendants first party took the necessary steps to execute the decree and in due course the mortgaged properties were put up for sale and were purchased by different persons who are substantially represented in this litigation.

The main points taken by the plaintiffs in this litigation are (*1*) that they were not properly represented in the litigation; and (*2*) that there was gross negligence on the part of their guardian ad litem.

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Now so far as the first point is concerned, the argument rests on the provisions of Order XXXII, rule 4 (*3*), (*4*) of the Code which provides as follows :

"(*3*) No person shall without his consent be appointed guardian for the suit.

(*4*) Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian, and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in court in which the minor is interested and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require."

Now the order-sheet shows that Maulavi Abdul Hamid was appointed as guardian ad litem on the 24th September, 1917, when the Court found that the proposed guardian did not appear before it to show his willingness to act as guardian ad litem. Mr. Hasan Imam contends that it was not right for the Court to appoint any of its officers to be the guardian of the minors unless it were satisfied that there was no other person fit and willing to act as guardian for the suit. I agree that under the section as it stood before its amendment in 1927 it was necessary for the Court to have some evidence that there was no other person fit and willing to act as guardian for the suit before it could appoint any of its officers to be such guardian. There is no evidence in this case that the Court enquired into the question whether there was any other person fit and willing to act as guardian in the suit. There was undoubtedly an irregularity in appointing an officer of the Court to be the guardian of the minors without such enquiry as is contemplated under Order XXXII, rule 4 (*4*); but in my opinion it is impossible to contend that because there was no such inquiry by the Court, the appointment itself was null and void and that in the circumstances the minors were not properly represented in the suit.

It was then contended that there was gross negligence on the part of the guardian ad litem in not contesting the plaintiffs' suit. It is true that though

there was a guardian ad litem, he did not appear in the suit with the result that the case was heard in the absence of the guardian ad litem. I certainly think that it is not proper for a guardian ad litem not to take any part in the litigation. It was his clear duty to take instructions from those who were in a position to give him instructions and to give such assistance to the Court as was in his power. It was in my opinion improper for the guardian ad litem not to have been present in Court when the case was heard ex-parte. It was possible at any rate for him to cross-examine the witnesses examined on behalf of the plaintiff and then to leave the case of the minors in the hands of the Court; but in this case the guardian ad litem did not appear to take any part in the litigation. The order-sheet shows that the guardian was directed to go to the minors' place to take instructions. There is, however, no evidence in the record one way or the other whether the guardian did go to the minors' place to take instructions; but before acceding to the argument whether there was such negligence on the part of the guardian ad litem as would entitle the minors to a decree vacating the decree already passed against them, I must be satisfied that there was a defence available to the minor defendants which could properly be taken in the mortgage suit. I quite realise that it is considered good tactics in this country for a natural guardian to refuse nomination to act as the guardian ad litem so as to make it possible to urge afterwards that the minor was not properly represented in the litigation; but it serves no useful purpose beyond prolonging the litigation and involving a useless expenditure of money.

Now I propose to consider whether there was any defence available to the minors in the mortgage action. It is contended before us that it was open to the minors to contend first that there was no legal necessity to support the transaction of the 24th November, 1904, at any rate as regards the sum of Rs. 637-6-0 borrowed on that date; and secondly, that the account upon

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which the plaintiffs in the mortgage action were suing was not a correct account and that what was due to the plaintiffs in that action was not Rs. 19,767 but a considerably less sum of money. Now so far as the first point is concerned, I have grave doubt whether it is open to the plaintiffs in this action to take a point of this nature. Now none of the plaintiffs in this action was in existence at the date of the mortgage bond in suit. This is not disputed. I understood that it was settled law that a son cannot object to alienations validly made by his father before he was born or begotten, because he could only by birth obtain an interest in property which was then existing in his ancestor [*Bholanath* v. *Kartik* (1)]. But Mr. Hasan Imam contends that there was one son undoubtedly in existence at the date of the transaction now challenged, namely Bradhendra Narain Singh and that as some of the plaintiffs were born before the death of Bradhendra, it is open to the plaintiffs to raise a question of legal necessity; and the case of *Bhup Kunwar* v. *Balbir Sahai* (2) was relied upon. As at present advised, I am not prepared to accede to the doctrine as laid down in that case; but I do not propose to express any opinion either one way or the other so far as the first point is concerned, for I am satisfied that there is no reliable evidence that any of the present plaintiffs was in existence at the date of the death of Bradhendra. Mr. Hasan Imam relies upon the evidence of Jaikrishna Sahay for this purpose. Now Jaikrishna is not a member of the family, nor was he in the service of Jogendra Narain. He says he was in the service of Kunmun Singh from 1301 to 1315 Fasli and it appears that Kunmun Singh is a cousin of Jogendra Narain Singh. On the pretext that he served Kunmun Singh from 1301-1315 he pretends to be able to give evidence on this point; but his evidence itself shows that he has but the vaguest notion as to the different facts deposed to by

(1) (1907) I. L. R. 34 Cal. 372
(2) (1922) I. L. R. 44 All. 190.

him; for instance, he says that he came to know of the transaction in question in 1312 and that Bhola Babu was living when he heard first about the bond. Bhola Babu, I may mention is the same person as Bradhendra Babu. According to his evidence, therefore, Bradhendra Narain was still living in 1312. He then says that Hitendra Narain was twenty years old when the plaint was filed in 1923. Now if this be so, then Hitendra must have been born in 1903; but we know that at the date of the bond in question, namely, the 24th November, 1904, Hitendra at all events was not in existence. Now we have got the evidence both of Hitendra and of his father Jogendra that Hitendra was born in 1907. It follows therefore that the evidence of Jaikrishna cannot be relied on for establishing that Bhola Babu was actually living at the date when Hitendra was born. In my opinion therefore it is not open to the plaintiffs in this litigation as it was not open to them in the mortgage action to raise a question of legal necessity.

But assuming that the question is available to them, now what is the position? Out of the sum of Rs. 6,400 raised by Jogendra Narain on the 24th November 1904 as much as Rs. 5,762-10-0 went to satisfy the claim of a judgment creditor. It is not disputed that the mortgage transaction was perfectly good so far as Rs. 5,762-10-0 is concerned. There remains a balance of Rs. 637-6-0 and I am willing to assume for the purpose of this argument that there is no evidence of legal necessity, so far as this sum is concerned. The short point is whether the present plaintiffs who were the defendants in the mortgage action could raise the question of legal necessity in regard to this insignificant sum of Rs. 637-6-0; and I am of opinion that the case attracts to itself the doctrine as laid down by their Lordships of the Judicial Committee in *Sri Krishna Das* v. *Nathu Ram* (1). It is quite true that the case before their Lordships was one of sale; but as I shall presently

(1) (1926-27) 31 Cal. W. N. 462, P. C.

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show the case of a mortgage stands exactly on the same footing as a case of sale. In that case the father of a joint Hindu family sold some ancestral property for the sum of Rs. 3,500 and applied Rs. 3,000 to discharging binding family debts. There was no evidence one way or the other as to the remaining sum of Rs. 500. Thereupon the sons sued to set aside the alienation; and the Allahabad High Court held that the criterion for deciding whether such a sale should be upheld was whether the portion of sale-proceeds not spent for legal necessity was so small as might be left out of account and in the view that Rs. 500 in that case was not such a trifling sum, made a decree setting aside the sale on condition that the plaintiffs paid the purchasers the sum of Rs. 3,000 proved to have been spent for legal necessity. Their Lordships of the Judicial Committee held that that was not a proper way of deciding the case and in delivering the judgment of the Board, Lord Salvesen said as follows: "It would rather appear that in any case where the sale has been held to be justified but there is no evidence as to the application of a portion of the consideration, a presumption arises that it has been expended for proper purposes, and for the benefit of the family. This is in line with the series of decisions already referred to, in which it was held that where the purchaser acts in good faith and after due inquiry, and is able to show that the sale itself was justified by legal necessity, he is under no obligation to enquire into the application of any surplus and is, therefore, not bound to make repayment of such surplus to the members of the family challenging the sale." It was contended that though the doctrine may properly apply in the case of a sale it is inapplicable to the case of a mortgage. That the argument is erroneous will be perfectly clear when it is realised that the basis of the decision of the Judicial Commitee was the case of *Hunooman Prasad Panday* v. *Munraj Koonweree* (1) which was a case of a mortgage and

(1) (1856) 6 Moo. I. A. 393.

not a case of sale. The starting point of the whole inquiry in the view of their Lordships of the Judicial Committee was the case to which I have already referred, where their Lordships of the Judicial Committee laid down the law as follows: "The power of a manager for an infant heir to charge ancestral estate by loan or mortgage is by the Hindu law a limited and qualified power, which can only be exercised rightly by the manager in a case of need, or for the benefit of the estate.....The actual pressure on the estate, the danger to be averted, or the benefit to be conferred in the particular instance, are the criteria to be regarded.....A lender, however, in such circumstances, is bound to inquire into the necessities of the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. If he does inquire, and acts honestly, the real existence of an alleged and reasonably-credited necessity is not a condition precedent to the validity of his charge, which renders him bound to see to the application of the money." Now as I have said, this was a proposition established in a case of mortgage and their Lordships of the Judicial Committee had no hesitation in applying it to a case of sale and drawing from it the further inference that where inquiry is made and it is established that there is a valid necessity in respect of a very large portion of the money raised, there is a presumption that the portion not accounted for has been spent for proper purposes and for the benefit of the family. In my opinion therefore the question of legal necessity in view of the circumstances of the case could not possibly have arisen in the mortgage action.

There only remains the question that the account given in the plaint was wholly erroneous and that the guardian ad litem should have been careful to bring all the errors to the notice of the Court. Now the

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point arises in this way: I have already mentioned that the mortgage in question was executed on the 24th November, 1904. On that date another transaction took place between the parties. Jogendra Narain assigned certain thika rents payable to him by certain thikadars amounting in all to Rs. 796-7-0 to the mortgagee and it was arranged that the mortgagee should appropriate the thika rent as part of the interest due to him. Now the argument is based upon the fact that although the thika rent was payable in three instalments and therefore presumably received by the mortgagee in three instalments, credit was given in the accounts only at the end of each year. Now the argument is manifestly unsound and for this reason. It appears that the thika rent was received by the mortgagee only for two years and afterwards he had to institute suits for the recovery of thika rent; for instance, we find that in 1909 the mortgagee brought a suit upon the deed of assignment as against the thikadar to recover thika rent from 1314-1317; that is to say, from December 1906 to January 1910. There was a subsequent suit for rent for another year. Now although the mortgagee did not actually receive any thika rent, certainly for five years, we find he is actually giving credit to the defendants for the thika rent at the end of every year. This was obviously due to the interpretation which he placed upon the deed of assignment, namely, that whether he recovers the thika rent or not, he is to give credit to the mortgagee for the thika rent at the end of every year. Now the arrangement was obviously to his disadvantage, for although the mortgagee was entitled to interest at 15 per cent. per year, he was getting interest from the thikadar at $12\frac{1}{2}$ per cent. per year. Now let me take one of the years in question, namely, the year 1907. Now the mortgagee calculated interest at the bond rate and showed Rs. 7,764-6-6 as due to him. He gave credit to the defendants on the 24th November, 1907, for Rs. 796-7-0; but we know that the mortgagee did not recover the thika rent of Rs. 796-7-0 in 1907.

As a matter of fact he did not recover it for many years afterwards. What then is the position? He is giving credit for Rs. 796-6-0 on the 24th November, 1907, and thereby depriving himself of his interest at the rate of 15 per cent. per year with compound interest, although he did get a decree as against the thikadar ultimately for all the rent due to him but with simple interest at the rate of Rs. 12 per cent. per year. The result is that the thikadar as a matter of fact lost a large sum of money by the mode in which he kept the account. That is all in favour of the minor defendants and in my opinion no point could be taken in the mortgage action in regard to the account upon which the mortgagee was suing.

In my opinion this suit is a frivolous one and the learned Subordinate Judge was right in dismissing it. I must dismiss this appeal with costs.

ADAMI, J.—I agree.

Appeal dismissed.

S. A. K.

APPELLATE CIVIL.

Before Das and Adami, JJ.

KASHI LAL

v.

SHAIKH NURUL HUQ.*

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Jan., 14.

Revenue sale—co-proprietor repurchasing the estate from auction purchaser, whether purchases subject to encumbrances —Revenue Sales Act, 1859 *(Act XI of* 1859), *section* 53.

*Appeal from Original Decree no. 134 of 1925, from a decision of Rai Bahadur Surendra Nath Mukharji, Subordinate Judge of Patna, dated the 25th July, 1925.