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execution of the mortgage decree of the plaintiffs subject to the prior charge of the defendants 2nd and 3rd parties, and in agreement with the view of the learned District Judge would hold that the plaintiffs are not entitled to sell the said properties.

JWALA PRASAD, J.

The result is that the order passed by this Court in Second Appeal no. 68 of 1925, dated the 22nd of February, 1928, is set aside and that of the District Judge is restored. The defendants 2nd party appellants are entitled to their costs of this litigation throughout.

COURTNEY TERRELL, C.J.—I agree.

*Appeal allowed.*

## APPELLATE CIVIL.

*Before Ross and Chatterji, JJ.*

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BISWANATH SINGH

*v.*

THE KAYASTHA TRADING AND BANKING CORPORATION, LIMITED.*

*Hindu law—karta, power of, to start new business—liability of minors—benefit to the joint family—test—legal necessity, recital as to, in the deed, whether evidence.*

It is not within the authority of a karta of a Hindu joint family to bind the minor members by starting a new business, and so far as the power to bind the interests of the minor members is concerned, it makes no difference whether the transaction is entered into by the karta alone or by all the adult members of the family.

In all such cases the test is whether the transaction was one into which a prudent owner would enter, the question of benefit to be determined by reference to the nature of the transaction and not by reference to the result thereof.

*Appeal from Original Decree no. 163 of 1925, from a decision of Babu Shyam Narain Lal, Subordinate Judge of Saran, dated the 10th of August, 1925.

*Inspector Singh* v. *Kharak Singh* (1), *Sanyasi Charan Mandal* v. *Krishnadhan Banerji* (2), *Ramchandra Singh* v. *Jang Bahadur Singh* (3), *Sheotahal Singh* v. *Arjun Dass* (4), *Mahabir Prasad Misr* v. *Amla Prasad Rai* (5) and *Gopal Bhagat* v. *Raghubar Bhagat* (6), referred to.

Recitals in a mortgage bond with regard to the existence of legal necessity for an alienation are not of themselves evidence of such necessity without substantiation by evidence aliunde.

*Brij Lal* v. *Inda Kunwar* (7), followed.

Appeal by defendants 3 and 4.

The facts of the case material to this report are stated in the judgment of Ross J.

*S. M. Mullick* and *B. P. Sinha*, for the appellants.

*Sambhu Saran*, *Rajeswari Prasad* and *Jadubans Sahay*, for the respondants.

Ross, J.—This is an appeal by the defendants 3 and 4 in a suit on a mortgage. The plaintiff is the Kayastha Trading and Banking Corporation, Limited, in liquidation, through the official liquidator. Ambika Prasad Singh and Barhamdeo Singh who is defendant no. 1, and the father of Bishunath Singh, minor defendant no. 3, were brothers Ambika died leaving a son Jadunandan Singh, defendant no. 2, whose son is Moti Singh, minor defendant no. 4. A mortgage was executed on the 27th of June, 1913, by Ambika Prasad Singh, Barhamdeo Singh and Jadunandan Singh, the three adult male members of this joint Mitakshara family for Rs. 8,000 by which they hypothecated joint family property. The mortgage bond recites that the mortgagors often have

(1) (1928) 26 All. L. J. 577.
(2) (1922) I. L. R. 49 Cal. 560, P. C.
(3) (1926) I. L. R. 5 Pat. 198.
(4) (1920) 1 Pat. L. T. 136.
(5) (1924) I. L. R. 46 All. 364.
(6) (1926) 98 Ind. Cas. 651.
(7) (1914) I. L. R. 36 All. 187, P. C.

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to carry on contract works in Patna and Chapra and require money and that they had already taken various sums from time to time which amounted to Rs. 4,495-13-4 and, as they are in need of money for this contract work, they executed the mortgage for Rs. 8,000 to cover future advances also for the balance of that sum. Out of that balance of Rs. 3,504-2-8, a sum of Rs. 3,189 was in fact advanced making a total debt of Rs. 7,684-13-4. The stipulated rate of interest was 12 annas per cent. per mensem with half-yearly rests. The suit was brought for this sum with interest and it has been decreed.

Three points were taken by the learned Advocate for the appellants, the minor members of the family who alone defended the suit (defendants 3 and 4): (*1*) that the bond had not been proved as a mortgage; (*2*) that as to Rs. 4,495-13-4, the debt was tainted with immorality; and (*3*) that as to the balance, the minors were not bound by these advances made for a new business which was neither an ancestral nor a family business and was not such a business as would justify the borrowers in binding the interest of the minors in the estate.

On the first point reference was made to the evidence of plaintiff's witness no. 1 who stated that the bond had been executed by the three executants in his presence and in the presence of the attesting witnesses whom he named and that he also attested it. It was contended that the evidence of this witness is not reliable, because he was unable to say where the executants signed the bond and which of the attesting witnesses signed first; and also for a further reason that the other attesting witness who was examined, Syed Ali Abbas, stated that he signed the deed as a marginal witness, although the executants did not sign it in his presence; consequently he was not an attesting witness and as the signature of this witness stands on the deed above the signature

of the plaintiff's witness no. 1 Bhawnath Lal, Bhawnath Lal could not have been an attesting witness either. Section 2 of Act XXXI of 1926 provides that it

> "shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied."

Now there is no specific denial of the execution of this registered mortgage by the persons by whom it purports to have been executed. All that the appellants pleaded was that they did not admit the genuineness of the bond. This is not sufficient to put the plaintiffs to proof of attestation. But, in any case, if it were necessary to prove it, I should hold on the evidence that the execution and attestation of the bond are sufficiently proved. The fact that Bhawnath Lal could not remember at that distance of time where the executants signed the bond and which of the attesting witnesses signed first, is no reason for disbelieving his evidence which is formally sufficient to prove execution and attestation. Nor is the fact that his signature finds a place on the deed below that of Syed Ali Abbas sufficient to show that his evidence of attestation is untrue.

As to the next point, the sum of Rs. 4,495 it was conceded that as this was an antecedent debt incurred before the execution of the mortgage bond, it was binding upon the appellants unless they could show that it was tainted with immorality; and, in order to prove this immorality, the evidence was referred to. It appears from the evidence that at some time Barhamdeo Singh had a mistress named Zaitoon and the evidence was directed to show that he had provided this mistress with various articles, to provide which he had taken money from the Kayesth Bank. It appears that the plaintiff corporation had a shop as well as a bank and there is evidence that Zaitoon used to come to the shop to make purchases. This is admitted by some of the plaintiffs' witnesses. The

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evidence is that Barhamdeo Singh signed slips of paper for the money that he required for Zaitoon; and the argument of the learned Advocate for the appellants is that as there is no suggestion that any other debts were incurred to the bank than those which constitute this mortgage debt, therefore these slips of paper must be included in the promissory notes which make up the debt in suit.

Now it was held by the Judicial Committee in *Srinarayan* v. *Raghubans Rai* (1) that it is not sufficient for a son to prove that the father was a man of immoral habits; but he must prove that the particular debt was incurred for an immoral purpose There is no evidence that any of the debts included in this mortgage was incurred for the benefit of Zaitoon, and it is not for the alienee to prove that there were other hand-notes than those in suit, but for those who contest the transaction to complete the links in the chain of evidence. And the whole of the defence on this point is in my opinion exceedingly doubtful. The plaintiffs' witness no. 1, the cashier of the Bank, says that he used to advance money when promissory notes or bonds were sent to him, but that he used not to receive slips by way of orders for money. The fourth witness for the defence who professes to have taken those slips to the Bank, admits that no receipt or signature for the money was taken from him. Similarly the fifth witness for the defence who also professes to have drawn money in this way and for this purpose, admits that he gave no receipt. But in the present case we find that for each item there is not only a promissory note, but also a receipt. Consequently if the defence evidence is believed, it is clear enough that any money taken for the benefit of Zaitoon was not the money which is the subject matter of this suit. On the evidence also it is doubtful whether the period of Barhamdeo Singh's connection with Zaitoon at all corresponded with the

(1) (1912-13) 17 Cal. W. N. 124, P. C.

period of the debts in suit. These debts were incurred between 1911 and 1915; but the combined effect of the evidence of Zaitoon and the witness no. 5 who was in her service, would show that the connection between Zaitoon and Barhamdeo had ceased long before the debts were incurred. While the evidence seems sufficiently to show that Barhamdeo Singh had at some time kept a mistress Zaitoon, it does not in my opinion prove either that he borrowed money from the bank or that there was any connection between such borrowings, if any, and the debts with which this case is concerned. And it is difficult to understand why Ambika Singh and Jadunandan Singh should have joined in the mortgage if the money had been borrowed for the immoral purposes of Barhamdeo Singh; and it is significant that Jadunandan Singh who must have known the facts does not give evidence. In my opinion there is no substance in this part of the appeal.

There remains now the third and the most important point in the case, namely, as to that part of the debt represents subsequent advances for the contracting business, amounting to Rs. 3,189. The contention on behalf of the appellants is that there was no necessity for this loan and no benefit to the family; that no enquiry into the nature of the business was made by the Bank and that it has not been proved that the borrowing was the borrowing of a prudent manager. On behalf of the respondents reliance was placed on the recital in the mortgage bond to which I have already referred and on the fact that it was executed by the three adult members of the family; and it was contended on the authority of *Balvant Santram* v. *Babaji Bin Sambhapa* (1) that when both branches of the family were thus represented, the mortagagee might reasonably suppose that a transaction entered into by them and apparently necessary for the common interest was really necessary. But this in itself will not supply the place of proof of benefit to the family. Reliance was also placed

(1) (1884) I. L. R. 8 Bom. 602.

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on Exh. 3, an extract from the cash book of the District Board of Saran, which shows that on the 31st of March, 1912, Barhamdeo Singh was paid a sum of Rs. 751-15-0 for constructing a well at Sonepur; and it was argued that this business, being a contracting business with the District Board, was not speculative in character. It was also contended that this is not a case of starting a new business, because the business was in existence for some time before the mortgage bond was executed. Reliance was placed on the decision of this Court in *Sheotahal Singh* v. *Arjun Dass* (1) and on two decisions of the Allahabad High Court, *Mahabir Prasad Misr* v. *Amla Prasad Rai* (2) and following it, *Gopal Bhagat* v. *Raghubar Bhagat* (3) the last two cases as showing that where there exists a family business which is carried on bona fide for the benefit of the family and with the assent of all the adult members, whether the business is ancestral or not, it is within the competence of the manager to borrow money from time to time for the purpose of the business; and the lender is not bound to enquire into the necessity for each advance that may be made. On the other hand, *Mahabir Prasad's* case (2) has been considered in a later case, *Inspector Singh* v. *Kharak Singh*(4) and has practically been dissented from. Their Lordships in that case relied upon *Sanyasi Charan's* case(5), decided by the Judicial Committee and not referred to in the earlier decision and expressed themselves against the authority of a karta of a family to bind the minor members by starting a new business—thus adopting a view for which *Sanyasi Charan's case*(5) is a clear authority. In that case the family was apparently a trading family; but a new business had been started and their Lordships accepted the views of the Courts below as

(1) (1920) 1 Pat. L. T. 186.
(2) (1924) I. L. R. 46 All. 364.
(3) (1926) 98 Ind. Cas. 651.
(4) (1928) 26 All. L. J. 577.
(5) (1922) I. L. R. 49 Cal. 569, P. C.

to the inability of a karta to impose on the minor coparceners the risk and liability of a new business started by himself and other adult members. On the point of principle it makes no difference whether the mortgage transaction is entered into by the karta alone or by all the adult members of the family so far as the power to bind the interests of the minor members is concerned. The decision in *Sheotahal Singh's* case (1) was considered by Das J., whose decision it was, in *Ram Chandra Singh* v. *Jang Bahadur Singh* (2) where his Lordship explained the decision and made it clear that the manager of a joint family had no authority to dispose of any portion of the joint family property in order to enable him to embark on speculative transactions and observed: "It is one thing to say that a manager of a joint Hindu family has complete power to enter into business transactions, where the particular business is part of the ancestral joint family property; it is another thing to say that he has power to enter into speculative transactions. I still adhere to the opinion which I expressed in that case that the test is not whether benefit was bound to accrue to the joint family; but it is still necessary for the mortgagee to show that the transaction was one into which a prudent owner would enter; and as soon as this test is laid down, we must hold that it is not in the power of the karta of a joint family to bind the joint family by entering into speculative transactions. In my opinion the question of benefit must be determined by reference to the nature of the transaction and not by reference to the result thereof." This makes it necessary to examine the evidence that the plaintiffs have given as to the nature of the business for which this money was taken in order that it may be ascertained whether the borrowing was the act of a prudent manager or not. That the venture has turned out disastrously would appear from the fact that none of the advances was repaid and that the debt has risen to over twenty thousand rupees. But, apart

(1) (1920) 1 Pat. L. T. 136. (2) (1926) I. L. R. 5 Pat. 198.

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from that, the evidence as to the nature of the business is most meagre. The mortgagors are a family of small zemindars and not a trading family. The recitals in the bond do not carry the plaintiff very far, because it has been held by the Judicial Committee in *Brij Lal* v. *Indra Kunwar* (1) that recitals in mortgages or deeds of sale with regard to the existence of legal necessity for an alienation are not of themselves evidence of such necessity without substantiation by evidence aliunde. It cannot therefore, on the recitals alone, be held even that the business was a contracting business. And still less can it be held on the solitary evidence of Exh. 3 that the business was confined to contracts with the District Board of Saran which it might be argued, would be reasonably safe. The plaintiffs' evidence is of the vaguest possible character. The principal witness, the cashier of the Bank, says that the three executants of the bond used to do contract work and the loans in suit " were taken for thika, etc. They took money from the Bank and said that it was for thika, etc., that is, for some other things also which I do not know specifically ". And in cross examination he says that he does not know where Barhamdeo Singh used to take thika and from whom and of what things. Reliance was placed by the respondents on the evidence of the scribe of the bond, Kuldip Sahai, who said that money was taken for doing thika work and that he was told this by the executants at the time of the execution of the deed. But he admits that he had no concern with any contract work of Barhamdeo Singh and had not seen it. The third witness for the plaintiffs, Syed Ali Abbas, says that Barhamdeo Singh used to do thika work, but he cannot say in what department; but he had taken thika of the cattle market of Sonepur fair and opened an arhat for flour and ghee in the year of the mortgage bond and for these purposes he executed the mortgage bond. This witness may not be altogether reliable, but he is the plaintiffs' own witness and this is his

(1) (1914) I. L. R. 36 All. 187, P. C.

statement in examination-in-chief. Now a contract for the cattle market at Sonepur and the opening of an arhat for flour and ghee would certainly be business of a speculative character: and it would be impossible to hold that the family property could be bound by loans taken for any such purposes as these. As to the business not being a new business, there is nothing to show when it originated or that it had any existence before the loans in suit were taken. The burden of proof being on the plaintiff, it seems to me that he has failed to discharge that burden and to show that the contracting of this debt, so far as Rs. 3,189 is concerned, was the act of a prudent manager and, to that extent I think, that the suit must fail. The Subordinate Judge is of opinion that it would appear from the depositions of defence witnesses nos. 7 and 8 that defendant no. 4 was not born at the date of the execution of the bond and that it is doubtful if defendant no. 3 was born then. This was no part of the plaintiff's case and no issue was framed on the point and the evidence of these two witnesses does not support the conclusion drawn by the trial Court and in any case is too vague to be a basis of a decision. The point does not arise.

No argument was advanced to us on the question of the rate of interest.

The result is that the appeal must be decreed in part and the decree of the Subordinate Judge modified. There will be the usual mortgage decree for Rs. 4,495-13-4 with interest at the bond rate down to the expiry of the period of grace fixed by the trial Court and thereafter at six per cent. per annum. As both parties have been partially successful in the appeal, there will be no costs of this Court. In the trial Court the plaintiffs will get proportionate costs.

CHATTERJEE, J.—I agree. As to the immoral nature of the antecedent debt, it is settled law that there must be definite evidence to connect the debt with immorality. Evidence of general immorality which has been

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adduced in this case during some particular period of time is not sufficient in my opinion to show that the debt in question or any part thereof was tainted with immorality. It is essential to take care that the decision of the Court should rest not upon mere suspicion, but upon legal grounds established on legal testimony. Applying this test, it will be clear that the appellants have failed to prove that any part of the debt is tainted with immorality. I may add that the execution of the bond not merely by Brahamdeo Singh who is charged with immorality but also by his elder brother Ambika and his nephew Jadunandan contra-indicates the suggestion that the antecedent debts in respect of which the bond in suit was executed had been contracted for immoral purpose.

As regards the subsequent advances the onus is on the plaintiff to prove that those were contracted for family necessities or for the benefit of the minors so as to be binding on them. The learned Subordinate Judge has observed,

> "Defendant no. 4 was not born at the time of the execution of the bond in suit, he being only 10 or 11 years old, and is not competent to challenge the necessity for the document."

As regards the defendant no. 3 he says,

> "It is doubtful whether the minor had come into existence at the time of the execution of the bond in suit. There is no allegation in the plaint that the minors were not born at the date of the transaction in suit. On the other hand, it is stated in paragraph 7 of it that the loan was taken for the benefit of the members of the joint family and for legal necessity; and therefore all the defendants are liable to repay the loan, principal with interest."

Therefore, the plaintiff's case is that the minor defendants are liable not because they are not born but because the loan was for their benefit and for legal necessity. The point decided did not arise on the pleadings and the learned Subordinate Judge was not justified in discussing this point and coming to a decision on it. Evidently he relied on the statement of defendants' witness that defendant no. 4 Moti Singh is 13 or 14 years old and defendant no. 3 Bishunath is aged 10 or 11. But it is to be borne in

mind that in this appeal Moti Singh has been brought on the record as a major respondent. Therefore it is clear that the witness made the statement as regards age under misapprehension and no reliance ought to be placed on the opinion of a witness like this as regards age.

The plaintiff's case is that the loans were taken for thika (contract) business. There is no allegation in the plaint that this was an ancestral business. There is also no evidence when this alleged business was started. The earliest loan taken was of September, 1911 on a pronote. The District Board cash book for the month of March 1912, shows a certain payment to defendant Brahamdeo of Rs. 751-15-0 in that month. Thus the business is not shown to have been started before September 1911. There is, as I have said, no allegation that the minors were not born when the business was started. It has been held in *Inspector Singh* v. *Kharak Singh* (1) that it is not open to the father to raise money on the security of the family property in order to start a new business, even if the new business is likely to bring large profit to himself or through himself to his sons. The defendants are zamindars and do not belong to any trading family; and the question whether it is in the power of the karta of a family to bind other members by entering into a transaction must be determined by reference to the nature of the transaction, as held in the case of *Ram Chander* v. *Jang Bahadur* (2). I am satisfied that the adult members could not in the present case incur the liability so as to bind the minors. There is no satisfactory evidence that the loans were taken for the thika business. The evidence of P. W. 3, Syed Ali Abbas, may be referred to in this connection. He states,

"Brahamdeo Singh used to do thika work—can't say of what department. But he had taken thika of the cattle mart of Sonepur fair

(1) (1928) 26 All. L. J. 577. (2) (1926) I. L. R. 5 Pat. 196.

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and he opened an arhat for flour and ghee, in the year of the above deed and for these purposes he executed the above deed (mortgage bond)."

All this business seems to be of a speculative character and certainly a karta, in my opinion, cannot bind the minors by entering into a new venture of such a character. I think, therefore, that the plaintiff's suit must fail as to the subsequent advances.

*Decree modified.*

## APPELLATE CIVIL.

*Before Kulwant Sahay and Macpherson, JJ.*

1928.

*Dec., 6.*

JAGANNATH DAS

*v.*

CHAMU RAGHUNATH KHUNTIA.*

*Execution—pending application, amendment of, when decree becomes barred by limitation.*

An application for amendment of a pending application for execution, made after the decree sought to be executed had become barred by limitation, cannot be entertained.

*Asgar Ali* v. *Troilokya Nath Ghose*(1), and *Hayatunnessa Chowdhurani* v. *Achia Khatun*(2), followed.

*Gnanendra Kumar Rai Choudhury* v. *Sree Sree Shyam Sundar Jiu*(3), not followed.

*Bishnudeo Sahu* v. *Mahadeo Prasad Sahu*(4), and *Rai Bahadur Ram Sumeron Prasad* v. *Ram Bahadur*(5), distinguished.

*Circuit Court, Cuttack. Appeal from Appellate Order no. 10 of 1928, from an order of H. R. Meredith, Esq., I.C.S., District Judge of Cuttack, dated the 20th January, 1928, confirming an order of Babu Brajendra Kumar Ghosh, Subordinate Judge of Cuttack, dated the 1st August, 1927.

(1) (1890) I. L. R. 17 Cal. 681, F. B.

(2) (1923) I. L. R. 50 Cal. 748.

(3) (1918) 27 Cal. L. J. 398.

(4) (1927) 8 Pat. L. T. 771.

(5) (1923) 71 Ind. Cas. 741.