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without properly deciding the plaintiff's title. It is clear that the question as to whether the plaintiff is entitled to avail herself of the provisions of Act II of 1929 is one which could not be decided in a summary proceeding for possession in a revenue court.

FAZL ALI, J. In my opinion, therefore, the decree of the court below should be affirmed and the appeal dismissed with costs.

KHAJA MOHAMAD NOOR, J.—I agree.

JAMES, J.—I agree.

DHAVLE, J.—I agree.

VARMA, J.—I agree.

*Appeal dismissed.*

J. K.

### APPELLATE CIVIL.

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October, 9.

*Before Courtney Terrell, C.J. and James, J.*

RAI BAHADUR KHARAG NARAYAN

v.

JANKI RAI.\*

*Hindu Law—Joint family—mortgage by one member of undivided share, if void ab initio—mortgagor representing that he was separate—transferee for value without notice—Transfer of Property Act, 1882 (Act IV of 1882), sections 3, 43—Transfer of Property (Amendment) Act, 1929 (Act XX of 1929), section 4.*

G, a member of a joint Hindu family, mortgaged his 1/6th share in certain properties alleging that he was separate from the other members of the family to J in 1918. In 1928 there was a formal partition and in 1929 G mortgaged a part

\* Appeal from Original Decree no. 156 of 1933, from a decision of Babu Sachindra Nath Ganguli, Subordinate Judge of Monghyr, dated the 22nd December, 1932.

of the property which had fallen to him on partition to K and also sold a portion to L. J instituted a suit on the basis of the mortgage aforesaid and impleaded the sons of G and K and L as defendants. The defendants pleaded *inter alia* that since G was a member of the joint family when the mortgage was executed nothing was conveyed by the transaction. The Subordinate Judge held that as the mortgagor represented to the mortgagee that he was separate the provisions of section 43 of the Transfer of Property Act applied, and the subsequent transferees although for value were not protected as they had failed to prove want of notice. K and L the subsequent transferees appealed.

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*Held* that a mortgage by a member of a joint Hindu family is not void but voidable at the option of the other members of the family or any one of them.

*Madan Lal v. Chiddu*(1), relied on.

Section 43 of the Transfer of Property Act provides that where a person erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists. Therefore the mortgage lien was transferred on that portion of the property which the mortgagor had obtained on partition.

*Bhup Singh v. Chedda Singh*(2), followed.

Appeal by the defendants, the subsequent transferees.

The facts of this case material to this report are set out in the judgment of James, J.

*Khurshed Husnain* (with him *B. C. Mitra, B. B. Saran* and *J. M. Ghosh*), for the appellants.

*B. C. De* and *M. K. Mukharji*, for the respondents.

JAMES, J.—Gobardhan Lal and his brother Girwar were members of a joint family, with their father Banarsi Lal, and their two uncles Brlj Lal

(1) (1930) I. L. R. 53 All. 21.

(2) (1920) 18 All. L. J. 807.

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and Dularchand. Gobardhan Lal at an early stage began to quarrel with his family and to do business on his own account with Janki Rai. On the 9th of February, 1918, he executed a bond whereby he purported to mortgage a share of 1/6th in the property specified, part of which was ancestral property of the family, while part had been bequeathed by Nandu Lal, the maternal grand-father of Banarsi Lal, to his three grandsons Banarsi Lal, Dularchand and Brij Lal. In the mortgage bond there was a recital to the effect that Gobardhan Lal had demanded partition of the family property; but the members of the family were unwilling to make it: so this mortgage was executed in part for payment of antecedent debt and in part to raise money for the purpose of instituting a suit for partition. The money was not utilised for the institution of the partition suit, but it was utilised for a separate business carried on by Gobardhan Lal. After 1918 the three brothers made further acquisitions of joint family property. They did not mention the name of Gobardhan Lal in any deed; but as there is no mention of any sons, this fact would not necessarily be of any significance. If Gobardhan Lal had actually separated in 1918, he would not prima facie have been entitled, when partition was ultimately made, to a share in this property, though he might possibly have been entitled if while he still remained a tenant in common, the property was acquired from the joint fund. On the 21st of May, 1927, after the death of Banarsi Lal, Gobardhan Lal's two uncles with his brother executed a mortgage, wherein they recited that Gobardhan Lal had cut himself off from his family in the lifetime of his father and had ceased to have any right to the family property. The mortgagee, doubtful on this point, obtained another mortgage bond in the following year in the execution of which Gobardhan Lal took part, wherein it was recited that the family was joint. On the 25th of September, 1928, a formal partition of the property was made, wherein a third share went to Gobardhan Lal and his

brother Girwar who immediately partitioned this share between themselves. On the 7th of December, 1929, Gobardhan Lal mortgaged part of the property which had fallen to him on partition to Rai Bahadur Kharag Narain. On the 12th of January, 1930, he sold a portion of that property to Musammat Lal Pari who redeemed to that extent the mortgage of Kharag Narain.

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On the 11th of May, 1931, Janki Rai instituted a suit on the basis of his mortgage of 1918, claiming to proceed against the property which had fallen to Gobardhan Lal on partition. The suit was instituted almost twelve years after the date of payment fixed by the mortgage bond, but within time. It was contested on various grounds by the sons of Gobardhan Lal, and also by the mortgagee of the 7th of December, 1929, and the purchaser of the 12th of January, 1930, who asserted that the bond was a colourable transaction not executed for consideration; that there was no family necessity for the bond; and that since the mortgagor was a member of the joint family when the mortgage was made nothing was conveyed by the transaction. The Subordinate Judge found that the mortgage was for consideration and that so far as the sons of Gobardhan Lal were concerned, it was binding on them because it was executed on account of antecedent debt and for family necessity. He found that the mortgagor was not separate from his father and uncles at the time when the deed was executed, but that he represented to the mortgagee that he was separate. The learned Subordinate Judge accordingly applied the provisions of section 43 of the Transfer of Property Act holding that since the mortgagor by actual separation had placed himself in a position to carry out the alienation which in 1918 he had represented himself to be able to make, the mortgage deed must be enforced. The mortgagee of 1929 and the purchaser of 1930 were transferees for value; but the learned Subordinate Judge found that they had failed to prove that they had no notice of the option conferred

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by the mortgage of 1918, and it could therefore be enforced against them. Immediately after the institution of the present suit the mortgagee of 1918 instituted a suit on his own mortgage bond which was apparently disposed of more promptly than the suit with which we are here concerned, so that he was able to obtain a decree and purchase the property in dispute while this suit was pending. The mortgagee and the transferee of the 12th of January, 1930, have appealed from the decision of the Subordinate Judge.

Mr. Khurshed Husnain on behalf of the appellants attacks in the first place the finding of fact of the learned Subordinate Judge that at the time of the mortgage, the mortgagor represented to the mortgagee that he had made a definite announcement of his intention to separate such as would amount to separation in the eye of law. Mr. B. C. De supporting the decree on grounds decided against him in the trial court argues that the learned Subordinate Judge ought to have found that there was actual separation in 1918. Whatever representation might have been made, Mr. Khurshed Husnain argues that the mortgage should not be regarded as taking effect upon the share which ultimately fell to Gobardhan Lal on partition, because the mortgagor did not purport to transfer a share of an undivided estate but merely a share in specific property. He argues also that the mortgage of an undivided share is void ab initio and no equity can be created by it, such as would call for the application of the provisions of section 43 of the Transfer of Property Act or of any other equitable rule. Finally he argues that the appellants are transferees for value without notice of the option and that they are therefore protected from the operation of section 43.

Mr. Khurshed Husnain suggests that there is no averment in the plaint that Gobardhan Lal at the time of the mortgage represented that he was separate. In the translation of the plaint which has been prepared

for this Court, the expression "*apne khwahish zahir kiya*" has been translated "expressed desire" (for separation and partition); but "announced an intention" would be an equally good translation and it cannot be said that the representation has not been pleaded. Two witnesses Bihari Lal and Damri Sao state that Gobardhan Lal actually did make an announcement of the fact that he was separate before the execution of the mortgage; and since it appears to be clear that he was at that time and for a long time afterwards on bad terms with his family and he did actually separate from them, there is no reason why this evidence should not be accepted. The recitals in the bond of the 21st of May, 1927 (Exhibit 2), indicate what the rest of the family thought on this matter. This deed executed by the surviving members of the joint family Dularchand, Brij Lal and Girwar Lal, the brother of Gobardhan Lal, recites that Gobardhan Lal, the eldest son of Banarsi, separated during the lifetime of his father and went to his father-in-law's house in Benares on relinquishing his claim, leaving the executants in possession and occupation of all the property of the joint family. But later we find Gobardhan Lal joining with the other members of the family in executing a mortgage deed and at the time of the partition they described themselves as joint.

Mr. Khurshed Husnain argues with some reason that we have not here anywhere a definite unequivocal and irrevocable announcement of intention to separate until the commencement of the actual proceeding for partition. There were attempts to obtain partition; Gobardhan Lal deserted the family home and went to Benares; and the impression which would be conveyed by this evidence is that either of the two parties represented themselves as joint or separate as it suited their convenience. The position of Gobardhan Lal appears to have been uncertain and equivocal and it cannot be said that there was any unequivocal announcement of separation actually effected. On the other hand it appears to be clear that

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Gobardhan did represent in 1918 that he had cut himself off from his family; although it does not appear from the subsequent conduct of the parties that the representation was regarded by them as irrevocable. I would accept both the findings of the Subordinate Judge: that the representation was made at the time of the mortgage and that the mortgagee believed it; and that there was no actual separation until 1928.

The objection that what was mortgaged was not a share in the undivided estate but was a share in specific property was not taken in the written statement and is now raised for the first time. The plaintiff asserted by his plaint that Gobardhan Lal's 1/6th share in the family property mortgaged to him represented the share which was allotted to Gobardhan at the partition. He distinctly stated in paragraph 8 of his plaint that the property detailed and specified below in schedule 2 had been allotted to Gobardhan Lal in lieu of the mortgaged 1/6th share. We do not know that at the time of the mortgage, the joint family possessed any property other than that specified in the mortgage bond; nor whether the subsequent acquisitions to the joint family were made from the common fund represented by this property. A new point of this kind must not be raised for the first time in appeal. If the point had been taken in the written statement parties would have entered into evidence on this question; and it would have been possible to ascertain whether what was mortgaged was part of Gobardhan's share or the whole of it. The learned Subordinate Judge has pointed out that at the time of the mortgage Gobardhan's share would not have been 1/6th but 1/9th; but he appears to have been under the impression that he would be entitled to 1/6th on partition, the share to which he would become entitled on the death of his father and which he actually obtained when the partition was made. I consider that the learned Subordinate Judge rightly treated the mortgage as a mortgage of the share of Gobardhan Lal in the joint family property, together with his

share in the property which descended to the family under the will of Nanu Lal.

Mr. Khurshed Husnain argues that since Gobardhan Lal was not separate at the time of the mortgage, his mortgage of an undivided share was void ab initio. This question was discussed by the High Court of Allahabad in *Madan Lal v. Chiddu*<sup>(1)</sup> where it was pointed out that an alienation made by member of a joint Hindu family is not void but voidable at the option of the other members of the family or of any one of them. It appears that misunderstanding is apt to be caused by declarations that particular alienations are void, which have been made after the alienations have been impeached by persons at whose option they were voidable, when the court finding that the alienation cannot be supported has declared it to be void. When a voidable contract is successfully impeached by a person entitled to challenge it, it becomes void; but this is not a contract of the kind which is in itself void ab initio. The learned Judges in the case quoted pointed out that the alienation cannot be impeached by the alienor himself or by any transferee who has not acquired by transfer or prescription the interest of the entire joint family. They made an exception of the position of an auction purchaser who may have purchased the interest of a co-parcener in execution of a decree. From that decision it would appear that neither of two appellants are entitled to impeach this mortgage of Gobardhan Lal on the ground that his interest in the joint family was not such as to entitle him to make it, since they both appeared in the appeal in their capacities of transferees from Gobardhan. For other property in which the appellant Rai Bahadur Kharag Narain had acquired the interests of the entire joint family, his claim has been allowed by the Subordinate Judge; to that extent the plaintiff has failed, and we are not concerned with that property in this appeal.

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Section 43 of the Transfer of Property Act provides that where a person erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists. In 1918 Gobardhan Lal erroneously represented that he was entitled by reason of his declaration of separation to mortgage a share of 1/6th in the joint family property; and he mortgaged that share to the plaintiff. When he did in the partition proceedings finally and unequivocally separate from the rest of the family, he became entitled to dispose of the one-sixth share. I need only cite the decision in *Bhup Singh v. Chedda Singh*<sup>(1)</sup>, wherein it is pointed out that it is an incident of the mortgage of an undivided share in joint property that the mortgagee cannot follow his security into the hands of a co-sharer who may have obtained part of the mortgaged property on partition; the mortgage lien is transferred to that portion of the joint property which the mortgagor had obtained at the partition. As soon as the partition was effected on the 25th of September, 1928, the mortgage lien was transferred to the property which fell to Gobardhan's share; and the subsequent transfers of the 7th of December, 1929, and the 12th of January, 1930, which were made by Gobardhan Lal were subject to that mortgage lien.

Neither of the appellants proved want of notice. The plaintiff said that he approached the appellant Rai Bahadur Kharag Narain when he was taking the mortgage from Gobardhan and he demanded his dues from him but the appellant declined to satisfy him. His karpardaz, Mumshi Lal, stated in evidence that this appellant had no knowledge of the mortgage; but the Subordinate Judge did not believe him. If he was to avoid being charged with notice, it would have been necessary to demonstrate that there was some

(1) (1920) 18 All. L. J. 807.

irregularity in the registration of the bond of the 9th of February, 1918, in view of the provisions of section 3 of the Transfer of Property Act as amended by section 4 of Act XX of 1929; and in the absence of such evidence the appellants must be deemed to have had notice of the existence of a previous mortgage. Neither of the appellants can claim to be in the position of a transferee without notice.

The appeal accordingly fails and I would dismiss it with costs.

COURTNEY TERRELL, C.J.—I agree.

*Appeal dismissed.*

J. K.

### APPELLATE CIVIL.

*Before Fazl Ali and Madan, JJ.*

HARGOURI PRASAD

*v.*

RAGHUNATH SINGH.\*

*Bihar Tenancy Act, 1885 (Act V of 1885), section 26(O) —whether applies to transfers of transferable occupancy holdings transferred before the commencement of the Act.*

*Held*, on a construction of the various sections of the Bihar Tenancy Act, that section 26(O) applies only to those cases where the title of the transferee has not been perfected, or in other words to those transfers only which relate to non-transferable holdings.

Section 26(B) to 26(M) have no application where the holdings are transferable by custom and have been transferred before the commencement of the Act. In such cases the title of the transferee will be deemed to be perfect even though the landlord may not have consented to the transfer.

*K. C. Mukherjee v. Musammat Ram Ratan Kuer*(1), explained.

\*Appeal from Appellate Decree no. 249 of 1934, from a decision of Rai Sahib Bhuneshwar Prasad Pande, Subordinate Judge of Monghyr, dated the 18th September, 1933, reversing a decision of Babu Ram Anugrah Narain, Munsif of Jamui, dated the 23rd May, 1932.

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