LETTERS PATENT APPEAL.

Before Mr. Justice Shadi Lal and Mr Justice LeRossignol.

1919

Dec. 22.

JHANDU (DEFENDANT)—*Appellant*,

versus

NIAMAT KHAN—(PLAINTIFF),
HEMUN KHAN AND CHHAJJU KHAN—(DEFENDANTS)— } *Respondents.*

Letters Patent Appeal No. 3 of 1919.

Custom—alienation—ancestral property—"just antecedent debt"—nature of enquiry to be made by the alienee—rule laid down in Devi Ditta v. *Saudagar Singh* (1), explained.

The main question for determination in this case was whether an alienee of ancestral immovable property from a person governed by custom is bound to prove *necessity* or enquiry as to *necessity* with respect to a debt which was due by the alienor to an antecedent creditor and which had been discharged by the alienee. In other words, is it the duty of the alienee to enquire, not only into the existence of the antecedent debt, but also into the nature and necessity thereof ?

Held, per Shadi Lal, J., that an alienee discharging an antecedent debt is not required to make an enquiry into the nature thereof, and that this is in accord with the rule laid down in *Devi Ditta* v. *Saudagar Singh* (1).

Muhammad Hayat Khan v. *Sandhe Khan* (2), and *Muhamma Islam* v. *Hari Lal* (3), approved.

Maharaj Singh v. *Balwant Singh* (4), and Trevelyan's Hindu Law, page 310, referred to.

But the law enunciated above only helps an honest alienee who acts in perfect good faith. An alienee paying off an antecedent creditor gets no advantage, if he has knowledge of the true nature of the debt or acts in bad faith, or where he and the antecedent creditor are in effect one and the same person.

Held, per LeRossignol, J., that the principle paid down in *Devi Ditta* v. *Saudagar Singh* (1) is that the initial *onus* lies on the outsider alienee to show that the debts were due, and when he has discharged that *onus*, the turn of the opposite party then comes to show that the alienee made no proper enquiry or that if he made

(1) 65 P. R. 1900 (F. B.)
(2) 55 P. R. 1908.
(3) 7 P. W. R. 1914.
(4) (1906) I. L. R. 28 All. 503 (541).

one, he must have learnt of the real nature of the debts. The words "made no enquiry whatever" in *Devi Ditta* v. *Saudagar Singh* (1), refer to an enquiry as to the *existence* of the debts but include also an enquiry as to their *nature* if the party challenging the alienation can show that the result of the first enquiry should have raised doubts in the minds of an ordinarily prudent man as to the morality or reasonableness of the debts.

Held, per *Curiam*, that in this case all the circumstances including the fact that the alienor was a neighbour of the alienee, showed that the alienee must have known that the debts were contracted as an act of reckless extravagance and could not be regarded as just debts.

Appeal from the decree of Mr. Justice Bevan-Petman, dated the 13th May 1919.

FAKIR CHAND, for Appellant.

NEMO, for Respondents.

The facts of the case are briefly as follows :—

Hemun Khan and Chhajju Khan, defendants No. 2 and 3, sold the land in dispute to Jhandu, defendant No. 1. Plaintiff claimed that he was a collateral of the vendors, that the alienation was without consideration and necessity, that the land was ancestral, and that, therefore, it should be declared that the alienation would not in any way affect his reversionary rights. He further prayed that if it should be held that he was not entitled to the declaration prayed for, he should be granted a decree for possession by pre-emption. Defendant No. 1 pleaded that the property was not ancestral, that plaintiff was not a collateral of the vendors, and that in any case the sale was for consideration and necessity.

The Sub-Judge held that no necessity for the alienation had been proved, but that as the vendees had paid third party debts these debts were to be regarded as "just antecedent debts" in accordance with the law laid down in *Devi Ditta* v. *Saudagar Singh* (1). He therefore dismissed the suit of the plaintiff in so far as the prayer related to a declaratory decree, but gave plaintiff a decree for possession by pre-emption on payment of Rs. 1,500.

The learned District Judge on appeal upset the decision of the Sub-Judge, holding that the vendors

(1) 65 P. R. 1900 (F. B).

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were recklessly wasting their property in order to injure the reversionary rights of the plaintiff, and that defendant No. 1 had full knowledge of this fact. He held that the debts were not "just antecedent debts" and the plaintiff was, therefore, entitled to a declaratory decree. On appeal to the High Court the judgment of the District Judge was upheld by Mr. Justice Bevan-Petman with the exception that Rs. 106, out of Rs. 1,500 were held to constitute a "just antecedent debt." The defendant-vendee then presented this appeal under the Letters Patent.

The judgment of the Court was delivered by—

SHADI LAL, J.—This is an appeal under clause 10 of the Letters Patent from the judgment of a Single Bench, and the main question for determination is whether an alienee of ancestral immovable property from a person governed by custom is bound to prove necessity or enquiry as to necessity with respect to a debt which was due by the alienor to an antecedent creditor and which has been discharged by the alienee. In other words, is it the duty of the alienee to enquire, not only into the existence of the antecedent debt, but also into the nature and necessity thereof.

Now, the passage in the Full Bench judgment in *Devi Ditta* v. *Saudagar Singh* (1), which deals with the subject, is in the following terms:—

"An outsider who pays antecedent debts in consideration of a transfer of the property, if he acts honestly and makes proper enquiry whether the debts are actually due, is not responsible if he has been deceived, and is entitled to ask for his alienation to be treated as binding. He can, however, be put in the same position as the other alienee if the circumstances show that he had knowledge of the true nature of the debts, or that he made no enquiry whatever or acted with bad faith. The difference between the two kinds of alienees may, perhaps, be best illustrated by the case of a decree against the proprietor. The decree-holder by taking a transfer of land to pay off the decree does not put himself in a better position than before if the original debts were not just debts, but an alienee who is an outsider is not bound to go behind the decree. In his case, in order to avoid the alienation, it would have to be specially shown that he was fully aware of the nature of the previous debts or acted in collusion with the

(1) 65 P. R. 1900 (F. B.)

former creditor. The main difference between the two classes of alienees thus appears to lie in the greater strictness of proof required from the alienee who is also the antecedent creditor, that the debts were actually incurred, and that they were not of the character mentioned above."

The first sentence of the above passage shows that the enquiry to be made by the alienee relates only to the existence of the antecedent debt, and that he is not required to enquire into the nature of the debt, according to this view he has discharged his duty if he shows that he made a proper enquiry into the matter whether the debt was actually due to the antecedent creditor, and the result of the enquiry was that the debt was so due. He is not required to go further and enquire into the character or the necessity of the antecedent debt.

If the matter depended upon the aforesaid sentence alone, there would be no difficulty whatever in defining exactly the duty of the alienee. But the second sentence in the passage cited above attempts to lay down the consequence of an omission to make the enquiry, and it is difficult to reconcile it with the first sentence. Does it mean that the alienee's omission to make the enquiry places him in the same position as an alienee who has not paid off an antecedent debt, and imposes upon him the duty of establishing necessity for the antecedent debt, even if he satisfies the Court that the antecedent debt discharged by him was actually due by the alienor? One would suppose that, as the sole object of the enquiry is to ascertain the existence of the debt, the alienee not making an enquiry should be in no worse position, if he succeeds in establishing the very fact for which the enquiry was required, *viz.*, that the debt paid off by him was as a matter of fact due to the antecedent creditor. The only difference in his position would be that in the event of making a proper enquiry he would be entitled to protection even if it turned out that the debt did not exist and that he had been deceived; while in the case of non-enquiry he must prove that the debt discharged by him was actually due to the antecedent creditor. If the second sentence in the passage cited above determines the duty of the alienee, *i.e.*, that an alienee omitting to make an enquiry is required to prove necessity for the antecedent debt, then it may be

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urged with some reason that the inference to be deduced from that sentence is that the duty of the alienee is not over when he has ascertained the existence of the debt, but that he should go further and enquire into the character of that debt.

It is unfortunate that there should be any ambiguity or uncertainty on a question of this kind which repeatedly comes up for decision before the Subordinate Courts It, however, seems to me that the alienee discharging an antecedent debt is not required to make an enquiry into the nature thereof, and this is the view which finds expression in at least two Division Bench judgments, *viz.*, *Muhammad Hayat Khan* v. *Sandhe Khan* (1) and *Muhammad Islam* v. *Hari Lal* (2). It appears that the *dicta* contained in those judgments were not absolutely necessary for the decision of the cases before the Court, but they certainly go to show how the learned Judges interpreted the rule laid down by the Full Bench judgment in the two sentences quoted above, and what they considered to be the duty of the alienee. It may not be out of place to point out that the rule of Hindu Law on the subject is to the effect that a vendee or a creditor claiming under a sale or a mortgage has to prove either that the antecedent debt existed or that he made due enquiry and honestly believed that it existed. He is not required to prove either actual necessity or enquiry as to necessity,—*vide* Trevelyan's Hindu Law, page 310, and the remarks in *Maharaj Singh* v. *Balwant Singh* (3).

It is true that this view of the law as to antecedent debts may in some cases lead to an absurdity; and it may be urged with considerable force that an alienor has only to interpose an antecedent creditor in order to make his alienation unassailable. It is, however, clear that a debt incurred without valid necessity does not become a just antecedent debt merely by its colourable inclusion in a subsequent transaction. If the alienee was no party to this device and acted in good faith, there is no valid reason why he should be required to prove necessity for an antece-

(1) 55 P. R. 1908. (2) 7 P. W. R. 1914.

(3) (1906) I. L. R. 28 All. 508 (541).

dent debt. If he has to prove necessity or an enquiry as to necessity with respect to an antecedent debt, then he is in no better position than a person who takes an alienation in consideration of money paid to the alienor at the time of the alienation, and the doctrine of antecedent debt would then have no meaning.

But the Law enunciated above helps only an honest alienee who acts in perfect good faith. There can be little doubt that an alienee paying off an antecedent creditor gets no advantage, if he has knowledge of the true nature of the debt or acts in bad faith. The same remarks would apply to an alienee who is identified with the antecedent creditor, so that he and the creditor cannot be viewed as two separate persons. Now, the facts of the present case show that, though the alienee made no enquiry whatsoever, he paid the major portion of the consideration to antecedent creditors to whom the alienors were actually indebted. It is, however, clear that the latter had embarked upon a career of reckless extravagance and were wasting their property to injure the reversioners. The circumstances disclosed in the judgment of the District Judge, especially the facts relating to a previous attempt on the part of the alienors to sell their ancestral land, which attempt led to a suit by the reversioner, point to the conclusion that the alienee, who is their next door neighbour, must have been aware of their previous dealings with the ancestral land, and must have come to know that the debts due to the antecedent creditors had been contracted recklessly and without necessity and could not be regarded as just debts. Upon this finding I would dismiss the appeal, but considering that there was no appearance by or on behalf of the respondent I would make no order as to costs.

LEROSSIGNOL, J.—*Devi Ditta* v. *Saudagar Singh* (1) is of course binding on us, but with all deference I find it somewhat difficult to reconcile various passages which occur in it, and it is desirable that the Courts below should be in no doubt as to the true state of the law.

(1) 65 P. R. 1900 (F.B.)

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The expression "just debt" was defined in *Duni Chand* v. *Jagat Singh* (1) to mean a debt which is actually due, is not immoral, illegal nor opposed to public policy. It also means, at any rate, when the rights of reversioners under Customary Law are involved, a debt not contracted as an act of reckless extravagance or of wanton waste or with the intent to destroy the interests of the reversioners. After quoting this definition of the expression "just debt" the judgment *Devi Ditta* v. *Saudagar Singh* (2) goes on to discriminate between the alienee who is also an antecedent creditor, and an outsider who pays antecedent debts in consideration of his alienation, and with regard to the latter class, the first, and to judge by the head-note (for the facts of the case are not given), the main proposition laid down is that if the alienee makes proper inquiry whether the debts are actually due *and has been deceived* he is not responsible if it is subsequently ascertained that the debts do not exist.

The judgment further proceeds to lay down that he will be in no better position than the antecedent creditor if the circumstances show that he had knowledge of the nature of the debts or that he *made no inquiry* or that he acted in bad faith.

Then follows an illustration concerning a decree which *primâ facie* seems to me to clash with those propositions, for it would appear that even if the subsequent alienee is aware that the decree is based on immoral debts, his alienation is unassailable and he is not bound to go behind the decree, but in his case, the judgment continues, "to avoid his alienation it would have to be specially shown that he was fully aware of the nature of the previous debts or had acted in collusion with the previous creditors." This appears to indicate that the *onus* of establishing those conditions lies on the persons challenging the alienation, whilst the next sentence of the judgment would seem to imply that the question is not one of *onus* but of the strictness or *quantum* of proof demandable of the alienee.

These two sentences of the judgment and also the preceding two, the first of which lays down that an out-

(1) 11 P. R. 1890. (2) 65 P. R. 1900 (F. B.)

sider need not trouble to go behind the decree and the second of which provides in effect that the decree will not protect him if he has certain knowledge, have caused me difficulty. If the second sentence, however, be read as a proviso to the first and be read "provided that the alienation may be avoided if it be specially shown, etc., etc.," the difficulty is removed and this is how I read those sentences. I apprehend that the principle laid down is that the initial *onus* lies on the outsider alienee to show that the debts were due, and when he has discharged that *onus*, the turn of the opposite party then comes to show that the alienee made no proper inquiry or that if he made one, he must have learnt of the real nature of the debts. *Muhammad Hayat Khan* v. *Sanahe Khan* (1) is not a very direct authority in this connection, for in that case it was held that the alienor had unrestricted powers of alienation so that the other findings in the appeal were really unnecessary for the disposal of the appeal. But in any case that judgment does not go farther than *Devi Ditta* v. *Saudagar Singh* (2), for although the judgment comprises a sentence which runs :—"If the debts were really due, the alienation made to pay such debts is a necessity according to the Full Bench judgment, *Devi Ditta* v. *Saudagar Singh* (2) and it is binding on the plaintiff," that sentence is followed by another :—"The *onus* is on the plaintiff to prove that the debts were really incurred for immoral purposes and in reckless extravagances," so that *Muhammad Hayat Khan* v. *Sandhe Khan* (1) is no authority for the view that the alienation to an outsider alienee is binding on a reversioner if the reversioner can show that the antecedent debts, which were liquidated by the alienation, were unjust or extravagant debts to the knowledge of the alienee. *Muhammad Islam* v. *Hari Lal* (3) is another authority quoted on the subject ; but its value also is much discounted by the fact that the primary finding in the appeal was that the plaintiffs had failed to prove that they had any right to contest the validity of the alienor's alienations. Later on in the judgment there is a sentence to the effect that the alienee was not bound in any way to inquire into the nature of the

(1) 55 P. R. 1908. (2) 65 P. R. 1900 (F. B.).

(3) 7 P. W. R. 1914.

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antecedent debt and that it was sufficient for him to satisfy himself that the debt really existed. If it was intended by this *dictum* to lay down that the alienation was unassailable merely because the antecedent debt really did exist, that goes farther than the Full Bench judgment.

From the foregoing it is clear that the two sentences in the Full Bench judgment which are hard to reconcile are that which runs—

"He can, however, be put in the same position as the other alienee if the circumstances show that he had knowledge of the true nature of the debts, or that he made no inquiry whatever or acted with bad faith,"

and that which runs—

"The main difference between the two classes of alienees thus appears to lie in the greater strictness of proof required from the alienee who is also the antecedent creditor that the debts were actually incurred, and that they were not of the character mentioned above."

Do the words "or that he made no enquiry whatever" refer to the words in the preceding sentence "makes proper enquiry and has been deceived," or do they mean that he has not made any enquiry as to the mere existence of the debts without regard to their nature? If such is the meaning of the phrase "made no enquiry whatever" then the sentence is in conflict with the second sentence which suggests that the outsider alienee has to consider not only the existence of the antecedent debts but also their character. If A incurs immoral debts with B, C and D and subsequently alienates his property to E in consideration of the liquidation of those debts by E, and the only duty laid upon E is to ascertain that the money is really owning to B, C and D, then the whole agnatic principle of Customary Law in regard to ancestral land is reduced to an absurdity. For these reasons I hold that the words "made no enquiry whatever" refer to an enquiry as to the existence of the debts but include also an enquiry as to their nature if those who challenge the alienation can show that the result of the first enquiry should have raised doubts in the mind of an ordinarily prudent man as to the morality or reasonableness of the debts.

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If these principles be applied to the facts of the present case, it seems to me that the present appellant should have been placed on his guard by the mere magnitude of the debt.

He is a near neighbour of the alienors and of at least one of the antecedent debtors and he must have been aware that he was making an aleatory bargain.

For these reasons I concur with my learned colleague in dismissing the appeal and making no order as to costs.

Appeal dismissed.

APPEAL FROM ORIGINAL CIVIL.

1920

March 24.

Before Mr. Justice Scott-Smith and Mr. Justice Abdul Raoof.

ABDUL RAHMAN AND OTHERS (PLAINTIFFS)—*Appellants,*

versus

SHAHAB-UD-DIN (DEFENDANT)—*Respondent.*

Civil Appeal No. 1741 of 1916.

Civil Procedure Code, Act V of 1908, order XXII rule 3—death of appellant—application by some of the legal representatives under belief that they are the sole heirs—Arbitration—award—not signed by all arbitrators at the same time and place—whether valid.

The plaintiffs and defendant in this case referred their dispute in respect of a contract to arbitration. The arbitrators gave their award, and plaintiffs applied to have it filed in Court. The lower Court rejected the application saying "it is I think quite clear that Ali Ahmad, arbitrator, did not sign the award on the same date or at the same place as Ilam Din, and this is in itself sufficient to invalidate the award."

The plaintiffs appealed to the High Court. At the hearing it was objected that the appeal had abated, as the appellant had died and only his sons and not his daughters and the widow had been brought on the record as his legal representatives, although the latter were also his heirs by Muhammadan Law. For the appellants it was urged that the parties were governed by custom and they therefore *bonâ fide* believed that the sons were the sole heirs and legal representatives of their father.

Held, that as the applicants (present appellants) *bonâ fide* believed that they were the sole heirs and legal representatives of the deceased appellant and had made their application for substitution on that belief the appeal did not abate, notwithstanding that