

We accept the appeal and setting aside the order of the Lower Appellate Court restore the decree of the first Court with costs throughout.

*A. R.*

*Appeal accepted.*

### APPELLATE CIVIL.

*Before Mr. Justice Scott-Smith and Mr. Justice Abdul Qadir.*

LAKHU MAL (DEFENDANT)—*Appellant,*

*versus*

BISHEN DAS & OTHERS—

(PLAINTIFFS).

RAM CHAND—(DEFENDANT)

} *Respondents.*

Civil Appeal No. 3026 of 1917.

*Hindu Law—joint family property in the hands of the sons—how far such property is liable for the payment of mortgage debts incurred by the father.*

*Held,* that family property in the hands of the sons is bound by a mortgage executed by their father, during his lifetime, to pay off antecedent debts, only if two conditions have been fulfilled, firstly, the mortgage must have been to discharge an obligation antecedently incurred and secondly, the obligation antecedently incurred must have been incurred wholly apart from the ownership of the joint estate.

*Sahu Ram Chandra v. Bup Singh* (1), *Brij Narain Rai v. Mangal Prasad* (2), and *Bankhandi Rai v. Kishori Mandal* (3), followed.

*First appeal from the decree of Sayyad Wali Shah, Subordinate Judge, Rawalpindi, dated the 31st July 1917, decreeing plaintiffs' claims.*

M. S. BHAGAT, for Appellant.

SHEO NARAIN, for Respondents.

The judgment of the Court was delivered by—

ABDUL QADIR, J.—This is a first appeal against a declaratory decree passed by the Senior Subordinate Judge, Rawalpindi, setting aside two mortgage deeds and one sale-deed executed by defendant (1), Ram Chand, in favour of Lakhu Mal, defendant (2), as

(1) (1917) I. L. R. 39 All. 437 (P. C.). (2) (1918) I. L. R. 41 All. 235.

(3) (1920) 81 Indian Cases 102.

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without necessity and consequently null and void against the plaintiffs, Bishen Das, son of Ram Chand, and Harbans Lal, etc., grandsons of Ram Chand. The alienee has come up to this Court in appeal and his case has been argued before us at length by Mr. M. S. Bhagat, while the case for the respondents has been argued by Mr. Sheo Narain.

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The facts of the case are briefly as follows :—

Ram Chand and his son and grandsons are members of a Joint *Hindu* Family. Their property consists of a residential house, four shops and some land in Rawalpindi. The property is admittedly ancestral. There is no dispute at present about the house and the land and the deeds against which the plaintiffs have asked for a declaration all relate to the shops. Three of these shops had been mortgaged by Ram Chand's father, Prabh Dial, to Hari Shah-Hem Raj, two in April 1902 and one in October 1904. In 1906 Ram Chand executed a consolidated mortgage deed in respect of the same three shops for Rs. 8,500 in favour of the same mortgagees and gave possession. He mortgaged the fourth shop to one Lachhman Das in April 1907 for Rs. 2,500. An additional mortgage deed without possession was executed by Ram Chand in respect of all the four shops for Rs. 2,500 in favour of the appellant Lakhu Mal, on the 24th May 1916. This was followed by a deed of sale of one shop in favour of the same person for Rs. 8,000. This was dated 6th September 1916 and the sum of Rs. 2,500 due on account of the mortgage deed, dated 24th May 1916, was a part of its consideration. Ram Chand executed another mortgage deed on 2nd October 1916 for Rs. 4,300 in favour of Lakhu Mal with regard to two of the shops. This sum as well as a sum of Rs. 4,000 out of the money raised by the sale of the shop was for redeeming the previous mortgage in favour of Hari Shah-Hem Raj. The suit of the plaintiffs to impugn the three last transactions, *viz.*, those of the 24th May, 6th September and the 2nd October 1916, was brought on the 24th October 1916. The shops in dispute were admittedly in possession of Hari Shah Hem Raj at the time the suit was brought but they were redeemed on the 11th November 1916.

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A preliminary contention raised in the case was that the defendant having redeemed the property from the possession of the previous mortgagees, the plaintiffs could not bring a suit for a mere declaration and should have sued for possession. It has been held by the Court below that a declaratory suit was permissible at the time when it was brought and we agree with this view, as the property was in the possession of the previous mortgagees at that time and had not actually passed into the possession of the defendant before an injunction issued by the Court maintained the *status quo ante*.

The main question in this case is whether these alienations or any of them were for necessity. Barring incidental references to some other points, the arguments have been confined to this point and the grounds of appeal not argued before us were given up by counsel. Mr. Bhagat contends that the mortgage deed dated 24th May 1916 has merged in the sale of the 6th September 1916, and has no separate existence and the question of the necessity of the items of which the sum of Rs. 2,500 borrowed on the strength of it was composed, should not be now gone into, as the sum must be regarded as an antecedent debt, which under Hindu Law is recognized as a necessity. He adds that the subsequent sale as well as the other mortgage were both made chiefly to redeem the previous mortgage for Rs. 8,500 and therefore those two alienations should also be upheld as made for necessity. He draws our attention to the fact that the mortgage for Rs. 8,500 was mainly on account of debts due from the time of Ram Chand's father, which it is not open to any of the plaintiffs to dispute. He also emphasises the fact that the additional mortgage, dated the 24th May 1916, was executed to raise money to pay off certain decrees against Ram Chand and Bishen Das (plaintiff) due on account of debts incurred by Bishen Das. It is added that Ram Chand had actually been arrested and sent to jail to secure payment of these decrees and that it was really necessary for him to raise money to save his own skin. Besides it is urged that the plan adopted by him to redeem the old mortgage and to discharge the previous debts was an act of good management and in the interests of the joint family.

Mr. Sheo Narain, replying to the above arguments, refers us to *Sahu Ram Chandra v. Bhup Singh* (1) and points out that the law as to antecedent debts incurred by the father of a joint Hindu family is clearly laid down in that ruling. Their Lordships of the Privy Council observe that—

“The statement of the law in *Nanomi Babuasin v. Modhun Mohun* (2), by Lord Hobhouse does not give any countenance to the idea that joint family estate can be effectively sold or charged in such a manner as to bind the issue of the father, except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by the joint estate.”

This ruling was followed and explained by the Allahabad High Court in *Brij Narain Rai v. Mangal Prasad* (3), where it was sought by the sons to invalidate a decree for sale obtained by the mortgagee upon a mortgage of joint family property executed by the father, and it appeared that the mortgage in question had been executed to pay off two earlier mortgages of joint family property also executed by the father. It was held that—

“It was for the mortgagee to show that the earlier mortgages fell within the exception recognised by the Judicial Committee of the Privy Council. In *Sahu Ram Chandra v. Bhup Singh* (1).”

The Patna High Court in a still more recent decision, published as *Bankhandi Rai v. Kishori Mandal* (4), has followed the same principle and has laid down that—

“In order to bring a case within the exception that family property in the hands of the sons is bound by a mortgage executed by the father during his lifetime to pay off an antecedent debt, two conditions must be fulfilled, *first* the mortgage must have been to discharge an obligation antecedently incurred and *secondly*, the obligation antecedently incurred must have been incurred wholly apart from the ownership of the joint estate.”

In the light of these observations the mortgage deed, dated the 24th May 1916, cannot be allowed to pass.

(1) (1917) I. L. R. 39 All. 437 (P. C.)

(3) (1913) I. L. R. 41 All. 235.

(2) (1885) I. L. R. 13 Cal. 21 (P. C.)

(4) (1920) 61 Indian Cases, 102.

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as embodying an antecedent debt because joint property was mortgaged by it and the item of Rs. 2,500 due on account of it will have to be examined on its own merits as to the necessity for it.

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We, therefore, accept this appeal in part and modifying the decree of the Court below, pass a decree declaring that the sale of the 6th September 1916 is set aside but Rs. 1,711 out of half the consideration therefor shall remain as an equitable charge on the property sold. As regards the other half of the consideration which is said to have been paid on account of Hari Shah and Hem Raj's mortgage nothing is decided and no declaration about it is made in this suit.

As regards the mortgage of the 2nd October 1916 we make no declaration in the present suit. Under the circumstances of the case we leave the parties to bear their own costs.

A. R.

*Appeal accepted in part.*