decision in this High Court, there would ensue a further serious delay which might extend to years before the widow would succeed, if she be entitled to succeed, in establishing her rights to this large sum of money in this High Court. To allow such a result would, in my opinion, be encouraging an abuse of the proceedings both of the First Class Subordinate Court of Ratnagiri and of this High Court, and it is, in my opinion, our incumbent duty to prevent any such abuse under the powers inherent in us under section 151 of the Civil Procedure Code.

Appeal dismissed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Hayward.

PANDURANG NARAYAN SAMANT AND OTHERS (ORIGINAL DEFENDANTS NOS. 1, 3, 5 TO 7), APPELLANTS *v.* BHAGWANDAS ATMARAMSHET AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANTS NOS. 2 TO 4), RESPONDENTS.*

Hindu law—Debts—Debts by father—Antecedent debts binding on the sons—Debts must be antecedent to the transaction—Joint family property—Alienation of his share for consideration by a co-parcener.

The defendants' father passed a mortgage of ancestral property to plaintiffs' father for Rs. 1,499, out of which Rs. 700 were due by the mortgagor to the mortgagee, and the sum of Rs. 799 was received in cash by the former to pay off debts which he owed to others. The mortgagee having sued to recover the mortgage amount, the defendants contended that the debt not having been an antecedent debt of their father they were not bound under Hindu law to pay it:

Held, that the defendants were liable to pay the mortgage debt contracted by their father, inasmuch as the object of the mortgage was to pay off the antecedent debts created by him prior to the mortgage.

* Second Appeal No. 460 of 1916.

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There is nothing in the judgment of *Sahu Ramchandra* v. *Bhup Singh*[1] which supports the contention that the antecedent debts must be due to the mortgagee himself, and that the object of the alienation must be to satisfy the antecedent debts due to the alienee.

In the Bombay Presidency the rule is well established that a co-parcener can alienate his share in the joint family property for consideration.

SECOND appeal from the decision of K. B. Wasoodew, Assistant Judge of Thana, confirming the decree passed by B. N. Shah, Subordinate Judge at Bassein.

Suit to enforce a mortgage.

The defendants' father passed a mortgage on the 1st June 1891 to the plaintiffs' father for Rs. 1,499, mortgaging joint family property. Out of the consideration amount, Rs. 700 were due by the mortgagor to the mortgagee; and the remaining Rs. 799 were paid in cash to the mortgagor who applied the amount in paying off debts which he owed to others.

The plaintiff sued in 1910 to recover the amount due on the mortgage. The defendants contended *inter alia* that the mortgage debt not being antecedent debt of their father they were not bound under Hindu law to pay it.

The lower Courts overruled the contention and decreed the claim.

The defendants appealed to the High Court.

Bahadurji with *S. R. Bakhale* and *B. V. Desai*, for the appellants:—The mortgage is null and void as it was executed by Narayan not for an antecedent debt. The recital in the mortgage bond, Exhibit 97, shows that the whole of the mortgage debt was not antecedent. Rs. 799 which were borrowed at the time of the mortgage to pay off debts due to others cannot be treated as an antecedent debt. The Privy Council decision in *Sahu Ram Chandra* v. *Bhup Singh*[1] supports this view.

[1] (1917) L. R. 44 I. A. 126.

The mortgage not being executed for an antecedent debt is not binding upon the sons of the alienor.

Further, Narayan had no power to mortgage the joint family property. Narayan and his brother Damodar were joint in 1891, the year in which the mortgage was executed. Narayan was not the head of the family nor is the mortgage debt for family necessity. The mortgage bond itself shows that the debts were Narayan's personal debts. In *Sahu Ram Chandra* v. *Bhup Singh*[1] their Lordships of the Privy Council remark at page 130 that "Under the law of the Mitakshara the joint family property owned...by all the members of the family as co-parceners, cannot be the subject of a gift, sale, or mortgage by one co-parcener except with the consent, express or implied, of all the other co-parceners." Now, it is not shown by the present plaintiffs that such a consent was obtained. The mortgage is not valid even to the extent of the share of Narayan. We rely on the Privy Council decision in *Lachhman Prasad* v. *Sarnam Singh*[2] which reaffirmed the principle laid down in *Sahu Ramchandra's* case[1]. No doubt the rule established by the decisions of this Court in *Vasudev Bhat* v. *Venkatesh Sanbhav*[3] and *Fakirapa bin Satyapa* v. *Chanapa bin Chanmalapa*[4] is against our contention. But that rule is no longer good law. Those decisions have been overruled by the Privy Council case of *Sahu Ramchandra* v. *Bhup Singh*[1].

Lastly, the present suit is barred by limitation.

The mortgage bond was executed in 1891. Narayan, the executant, died in 1895 and the suit was instituted in 1910. The right to sue accrued in 1895. It is Article 120 of the Indian Limitation Act that applies and not Article 132. The Full Bench decision of the Calcutta

(1) (1917) L.R. 44 I. A. 126.
(2) (1917) 39 All. 500.
(3) (1873) 10 Bom. H. C. 139.
(4) (1873) 10 Bom. H. C. 162.

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High Court in *Brijnandan Singh* v. *Bidya Prasad Singh*[1] supports our contention.

Jayakar, with *H. V. Divatia*, for respondents Nos. 1 to 3 and 5 to 9, was not called upon.

SHAH, J. :—This appeal arises out of a suit filed by the sons of the original mortgagee against the sons of the original mortgagor to enforce the mortgage executed on the 1st of June 1891 by the defendants' father Narayan in favour of the plaintiffs' father. Both the lower Courts have allowed the plaintiffs' claim.

In the appeal before us it has been argued that the mortgage was null and void as it was executed by Narayan not for an antecedent debt but for a debt incurred at the time of the mortgage. The mortgage bond contains the following recital: "After taking accounts of the past dealings by me with you, I find myself indebted to you for a sum of Rs. 700, and to-day I have taken Rs. 799 to pay off the debts due to others, so in all I have to pay you Rs. 1,499." The property mortgaged was the ancestral property of Narayan. The lower appellate Court has found, and it is not disputed before us, that the recital as to the consideration in the deed is true. Thus as regards Rs. 700 the debt was clearly antecedent. It is, however, contended that the sum of Rs. 799 borrowed at the time of the mortgage to pay the debts due to others cannot be treated as an antecedent debt in view of the decision in *Sahu Ram Chandra* v. *Bhup Singh*[2]. It seems to me, however, that having regard to the observations cited with approval by their Lordships at page 136 of the report it is clear that the object of this alienation by way of mortgage was to pay off the antecedent debts incurred by the father prior to the mortgage. These debts were partly due to the mortgagee himself and partly to others.

(1) (1915) 42 Cal. 1068. (2) (1917) L. R. 44 I. A. 126.

There is nothing in the judgment of *Sahu Ramchandra* v. *Bhup Singh*[1] which supports the contention urged before us that the antecedent debts must be due to the mortgagee himself, and that the object of the alienation must be to satisfy the antecedent debts due to the alienee. If, as is the case here, the money is borrowed on the security of a mortgage to pay off the antecedent debts, it would be an alienation in respect of antecedent debts according to the decision which has been relied upon on behalf of the appellants. I see, therefore, no force in the contention that the mortgage cannot be enforced against the sons as it is not shown to be for an antecedent debt.

It is further argued in support of the appeal that Narayan, who was then joint with his brother Damodar, had no power whatever to mortgage the joint property. In this Presidency, however, the rule is well established that a co-parcener can alienate his share in the joint family property for consideration. (See *Vasudev Bhat* v. *Venkatesh Sanbhav*[2] and *Fakirapa* v. *Chanappa*[3].) It is urged that this cannot be treated as a good rule in view of the decision in *Sahu Ram Chandra* v. *Bhup Singh*[1]. That was, however, a case which went up to the Privy Council from the High Court at Allahabad, and no doubt with reference to that case the proposition as stated at page 130 of the report that "under the law of Mitakshara the joint family property owned, as stated by all the members of the family as co-parceners, cannot be the subject of a gift, sale, or mortgage by one co-parcener except with the consent, express or implied, of all the other co-parceners" was perfectly applicable. But there was no question in that case as to the correctness of the rule recognized in this Presidency that a co-parcener can alienate his undivided share in the family

(1) (1917) L. R. 44 I. A. 126. (2) (1873) 10 Bom. H. C. 139.
(3) (1873) 10 Bom. H. C. 162.

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property for consideration. The general proposition which has been relied on on behalf of the appellants must be taken to have been stated with reference to the particular case and cannot be treated as overruling the current of decisions of this Court on that point. We must, therefore, give effect to the rule as recognized in this Presidency and must hold that the mortgage was valid so far as it related to Narayan's share in the property mortgaged.

Lastly, it is urged that the suit is barred under Article 120 of the Indian Limitation Act. It is clear, however, that that Article cannot apply to a suit based on a mortgage. The point was urged on the footing that the mortgage was void. But the point as to the validity of the mortgage having failed, this point also must fail.

The result is that the decree of the lower appellate Court must be confirmed and the appeal must be dismissed with costs.

HAYWARD, J. :—I concur with the conclusions and reasons of my learned brother.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

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MARTAND TRIMBAK GADRE AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS *v.* DAYA BIN ABAJI PHATAK (ORIGINAL DEFENDANT), RESPONDENT.*

Civil Procedure Code (Act V of 1908), Order XXI, Rules 72 (2) and 73—Decree—Execution—Collector—Decree-holder allowed permission to bid by the Collector—Set-off—Power of the Court to allow set-off.

* Second Appeal No. 47 of 1918.