APPELLATE CIVIL.

Before Mr. Justice Baker.

1928 November 30

MADHUSUDAN PANDURANG SAMANT AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS *v.* BHAGWAN ATMARAM AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Hindu law—Alienation—Antecedent debt—Mortgage by grandfather—Decree on mortgage against mortgagor's sons—How far binding on grandsons not parties to mortgage suit—Suit by grandsons to impeach the mortgage decree—Maintainability of.

A Hindu executed a mortgage of joint family property to pay off debts due to the mortgagee as well as to other persons. The mortgagee sued the mortgagor's sons to recover his debt without impleading the mortgagor's grandsons and obtained a decree. The grandsons filed a suit for a declaration that their interest in the plaint property was not liable to be sold in the execution of the mortgagee's decree against their father on the ground that they were not impleaded in the mortgagee's suit.

Held, (1) that as the sons were sufficiently represented by their father in the previous litigation, the decree in that litigation was binding on them:

Ramkrishna v. *Vinayak Narayan*[1] and *Sheo Shankar Ram* v. *Jaddo Kunwar*[2] followed;

(2) that the mortgage effected by the grandfather being effected to pay off the debts due to his mortgagee and others the debt was an antecedent debt both in fact and in time within the meaning of the 4th proposition laid down by the Privy Council in *Brij Narain's case*,[3] viz., "antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached";

(3) that the suit by the grandsons to impeach the mortgage effected by their grandfather for an antecedent debt was not maintainable.

SUIT for declaration and injunction.

One Narayan Yeshwant Samant, a member of a joint Hindu family, executed a mortgage of his share in the joint family property for Rs. 1,499, in favour of Atmaram Pranjivan and others. Out of the consideration amount, Rs. 700 were due by the mortgagor to the mortgagee and the remaining sum of Rs. 799 was paid in cash which was applied towards payment of debts which the mortgagor owed to others.

*Appeal No 924 of 1926 from the Appellate Decree passed by K. C. Sen, District Judge of Thana, in Appeal No. 20 of 1926, confirming the decree passed by I. D. Munim, Subordinate Judge at Bassein.

(1) (1910) 34 Bom. 354. (2) (1914) 36 All. 383.
(3) (1923) L. R. 51 I. A. 129; 46 All. 95.

In 1900 the mortgagee filed a Suit No. 116 of 1910, to recover his debt from the mortgagor's sons; to this suit the grandsons were not made parties. The sons of the mortgagor contended *inter alia* that part of the debt for which the mortgage was effected was not an antecedent debt, and that therefore the mortgage was not binding upon them: they further contended that as the minor sons of one of them were not impleaded, the decree in the suit would not bind these sons. The trial Court decreed the mortgagee's claim, holding *inter alia* that the debt for which the mortgage in suit was passed, was an antecedent debt and that as the sons were fully represented by their father the decree in the suit would bind them. This decree was confirmed in appeal by the District Court and in Second Appeal by the High Court.

The present suit was filed by the grandsons of Narayan for a declaration that their interest in the plaint property was not liable to be sold in execution of the decree passed in Suit No. 116 of 1910 and for an injunction restraining the mortgagees from selling their right, title and interest in execution proceedings and in the alternative praying that an account should be taken under the Dekkhan Agriculturists' Relief Act and that they might be allowed to redeem the mortgage. The trial Court held that the suit, while not barred by *res judicata*, was not maintainable in view of the fact that the mortgage effected by Narayan, the grandfather, was for an antecedent debt, and as such was binding upon the grandsons. The appellate Court held that the suit was barred by *res judicata* and that it was also not maintainable.

Plaintiffs appealed to the High Court.

B. G. Rao, for the appellants.

P. V. Kane, for the respondents Nos. 1, 2, 4, 5, 6 and 8.

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BAKER, J. :—This appeal involves important questions of law. The plaintiffs who are all minors except plaintiff No. 1 sued for a declaration that their interest in the plaint property is not liable to be sold in execution of the decree passed in Suit No. 116 of 1910 and for an injunction, preventing the defendant from selling their right, title and interest in the execution proceedings now pending, and in the alternative praying that an account should be taken under the Dekkhan Agriculturists Relief Act and they might be allowed to redeem the mortgage. The facts are that Narayan Yeshwant, grandfather of the present plaintiffs, who had six sons, mortgaged his property to the defendants. The defendants brought Suit No. 116 of 1910 against the mortgagor, his sons also being parties, and obtained a decree which was confirmed in appeal by the District Court and in second appeal by the High Court, the case being reported in *Pandurang Narayan* v. *Bhagwandas Atmaramshet*.[1]

The present plaintiffs Nos. 1 and 2 are sons of Pandurang. Plaintiffs Nos. 3 and 4 are sons of Yeshwant. Plaintiff No. 6 is the son of Mahadev and plaintiff No. 7 is the son of Waman. Their respective fathers were parties to the suit of 1910. It appears that they are being put forward to contest the mortgage as a last resort. The plaintiffs Nos. 1 and 2 alone were born in 1910, consequently the other plaintiffs who were not in existence at the date of the suit in 1910 have no *locus standi* and may be disregarded. The first Court, the Subordinate Judge of Bassein, framed two preliminary issues. (1) Whether the suit was or was not *res judicata* by reason of the decision in Suit No. 116 of 1910? (2) Whether the suit is maintainable? He found that the suit was not barred by *res judicata* but that it was not maintainable. He accordingly dismissed the suit.

[1] (1919) 44 Bom. 341.

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On appeal, the District Judge of Thana held that the suit was barred by *res judicata* and that it was not maintainable. He accordingly dismissed the appeal. The plaintiffs make this second appeal and the same two points arise. The first question is whether the suit is barred by *res judicata* by reason of Suit No. 116 of 1910, in which all questions relating to the mortgage were decided as between the fathers of the plaintiffs and the mortgagees, the defendants. We are now only concerned with plaintiffs Nos. 1 and 2, sons of Pandurang; the other plaintiffs not being born at the date of the suit in 1910. The property is ancestral property and the trying Judge decided that the suit was not barred by *res judicata*, on the short ground that the present plaintiffs were not parties to the suit of 1910, and they claim not through their fathers but in their own right and that the grandsons take an inherent interest in the ancestral property as such.

The learned District Judge was of opinion that the defendants in the former suit (the fathers of the present plaintiffs) were held to be litigating in respect of a private right claimed in common for themselves and their children, and the present suit is therefore barred by section 11, explanation 6, of the Civil Procedure Code. It is contended on behalf of the appellants that section 11, explanation 6, has no reference to the facts of the present litigation, that all coparceners are necessary parties to a mortgage suit and that the present plaintiffs were not represented by their fathers. I have already pointed out that plaintiffs Nos. 1 and 2, the sons of Pandurang, who was defendant No. 1 in 1910, were alone born in 1910 and the question whether they were bound by the decree was considered in that suit. Exhibit 33 is the judgment of the appellate Court (District Court

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of Thana). In that suit, issue No. 3 was, whether the share of defendant No. 1's (Pandurang's) sons is responsible for the debt? The finding was in the affirmative. The learned Judge said that though the minors were not parties, the Hindu joint family is represented in all its transactions by its *karta* and the sons by their father. Order XXXIV, rule 1, does not interfere with the rule of Hindu law that the Hindu father can represent his sons. Having regard to the late stage when such an objection was raised for the first time, this contention cannot be allowed. The minor sons of defendant No. 1 are sufficiently represented by their father, defendant No. 1. Compare *Ramkrishna* v. *Vinayak Narayan*.[1] In that case the minor was not a party to the suit but he was represented by the adult members of the family and it was held that they represented him: cf. *Govind* v. *Sakharam*,[2] which, however, is not the case of "a suit on a mortgage." So far as appears from the report of the case in the High Court (*Pandurang Narayan* v. *Bhagwandas Atmaramshet*),[3] this point was not taken in the second appeal. It is argued on behalf of the appellants that *Ramkrishna* v. *Vinayak Narayan*[1] rests on *Ramasamayyan* v. *Virâsami Ayyar*[4] and *Lala Surja Prosad* v. *Golab Chand*,[5] and that this latter case was upset in *Lala Suraj Prosad* v. *Golab Chand*.[6] *Ramkrishna* v. *Vinayak*,[1] however, has never been dissented from and is still good law and binding on me. Reference is also made to *Ramchandra Narayan* v. *Shripatrao*,[7] where it was held that the abatement of a suit by one member of an undivided Hindu family did not deprive his coparceners of the right to sue for

(1) (1910) 34 Bom. 354.
(2) (1904) 28 Bom. 383.
(3) (1919) 44 Bom. 341.
(4) (1898) 21 Mad. 222.
(5) (1900) 27 Cal. 724.
(6) (1901) 28 Cal. 517.
(7) (1915) 40 Bom. 248.

redemption there being no indication that the suit was brought in any representative capacity. That, however, was the case of an adult coparcener, a brother, and not of the father and a minor son.

The appellants further relied on *Debi Prosad Sahi* v. *Dharamjit Narayan Singh*,[1] where it was held that the *karta* of a joint Hindu family was bound in a suit on a mortgage to join as a party—one of the members of the family who had a joint interest with him in the mortgage. That also is the case of a major and the objection as regards parties was taken in the suit itself. The appellants also rely on *Padmakar Vinayak Joshi* v. *Mahadev Krishna Joshi*[2] where the major brother of the plaintiffs during their minority had brought a suit to redeem the property in suit, which had been dismissed. It was held that the second redemption suit by plaintiffs was not barred as they were not sufficiently represented in the previous suit.

The respondents rely on *Sheo Shankar Ram* v. *Jaddo Kunwar*[3] where it was held by the Privy Council that the plaintiffs who sued to redeem a mortgage after foreclosure, on the plea that they had not been parties to the mortgage suit, were properly and effectively represented in the suit by the managing members of the joint Hindu family of which the plaintiffs were also members. Their Lordships saw no reason to dissent from the Indian decisions which showed that there were occasions, including foreclosure actions, when the manager of the joint Hindu family so effectively represented all the other members,—that the family as a whole was bound, and were of opinion that it was clear on the facts of this case, on the findings of their Lordships, that it was a case where that principle ought to be applied. There was not the slightest ground for

[1] (1914) 41 Cal. 727. [2] (1885) 10 Bom. 21.
[3] (1914) 36 All. 383.

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suggesting that the managers of the joint family did not act in any way in the interest of the family itself.

It is contended that this case was one where a foreclosure decree had been passed, which distinguishes it from the present case. But the remarks of their Lordships of the Privy Council appear to be of general application. In the present case the father of the minor plaintiffs Nos. 1 and 2 was the principal contesting defendant and took every possible objection to the suit which he could have taken—including the objection that his minor sons should be made parties, though this seems to have been taken at a late stage of the case—as appears from the judgment of the first appellate Court, Exhibit 33. If the minor plaintiffs had been brought on the record they would have been represented by their father Pandurang and the result of the suit would have been the same. In these circumstances, in view of the rulings in *Sheo Shankar Ram* v. *Jaddo Kunwar*[1] and *Ramkrishna* v. *Vinayak Narayan*,[2] I am of opinion that the plaintiffs must be held to have been represented by their father Pandurang in the previous litigation and therefore the matter is *res judicata* and cannot be reopened. I am of this opinion apart from section 11, Explanation 6, of the Civil Procedure Code, the applicability of which is perhaps doubtful. This is sufficient for the disposal of the appeal but as the other question, namely, the maintainability of the suit has been argued at some length I will deal briefly with that also.

As to the maintainability of the present suit both the Courts below are of opinion that it is not maintainable, as the mortgage was for an antecedent debt and binding on the plaintiffs. The point has been argued at great length. The consideration of the mortgage in question was admitted and it was held by the High Court in

[1] (1914) 36 All. 383.

[2] (1910) 34 Bom. 354.

Pandurang v. *Bhagwandas*[1] that the object of this alienation by way of mortgage was to pay off the antecedent debts incurred by the father (Narayan) prior to the mortgage. These debts were partly due to the mortgagee himself and partly to others. This finding would appear to be a finding which concludes the matter, but the gist of the argument of the learned pleader for the appellants is that the observations of Shah, J., in *Pandurang* v. *Bhagwandas*[1] must be held to be incorrect in view of the rules laid down by the Privy Council in the subsequent case of *Brij Narain* v. *Mangla Prasad*.[2]

In spite, however, of the lengthy and elaborate arguments advanced by the learned pleader for the appellants I am unable to see that *Brij Narain's* case[2] overrules or dissents from any opinion expressed in *Pandurang Narayan* v. *Bhagwandas Atmaramshet*,[1] on the contrary it supports the view expressed by Shah, J. Five propositions were laid down by the Privy Council in *Brij Narain's* case.[2] They are as follows (p. 139) :—

" (1) The managing member of a joint undivided estate cannot alienate or burden the estate *qua* manager except for purposes of necessity; but

(2) If he is the father and the other members are the sons he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt.

(3) If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate

(4) Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached.

(5) There is no rule that this result is affected by the question whether the father, who contracted the debt or burdens the estate, is alive or dead."

We are not concerned with the first and the fifth propositions. As it was not contended by the father of the present plaintiffs that the debt was for an immoral purpose the second proposition will apply. The consideration was admitted as is shown by the report in

[1] (1919) 44 Bom. 341. [2] (1923) L. R. 51 I. A. 129; 46 All. 95.

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Pandurang v. *Bhagwandas*[1] and it consisted of Rs. 700 due to the mortgagee and Rs. 799 borrowed to pay off debts due to others. It was held by this Court 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 and partly to others. I see no reason to suppose that the view of this Court that these were antecedent debts in fact as well as in time is not in accordance with the 4th proposition laid down by the Privy Council in *Brij Narain's* case.[2]

The learned pleader for the appellants has relied on a Full Bench case of the Allahabad High Court in *Jagdish Prasad* v. *Hoshyar Singh*,[3] in which it is laid down that the word ' debt ' in proposition No. 2 in *Brij Narain's* case[2] does not include mortgage debt. In that case, however, it was held that there was no antecedent debt, whereas in the present case there is a finding of this Court that there was an antecedent debt, and the present case is distinctly covered by proposition No. 3 in *Brij Narain's* case,[2] which lays down that if the father purports to burden the estate by a mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate. The mortgage in the present case being to discharge an antecedent debt, will bind the estate. In these circumstances I am of opinion that the case is distinctly within the ruling in *Brij Narain's* case.[2] The mortgage debt is, therefore, binding on the minor plaintiffs, and the suit is consequently not maintainable. The appeal will, therefore, be dismissed with costs.

Decree confirmed.

B. G. R.

[1] (1919) 44 Bom. 341. [2] (1923) 51 I. A. 129; 46 All. 95.
[3] [1928] A. I. R. All. 596.