APPELLATE CIVIL.

Before Jenkins C.J. and Chatterjea J.

1912

Aug. 16.

BISWANATH PERSHAD MAHTA

v.

JAGDIP NARAIN SINGH.*

Mortgage—Entire interest mortgaged for family purposes—Liability of minor son when authority may be presumed—Alienation—Onus of Proof—Evidence Act (I of 1872), s. 106—Transfer of Property Act (IV of 1882), ss. 85, 90—Civil Procedure Code (V of 1908), O. XXXIV, r. 6.

Where a mortgage purports to charge the entire interest in a property, and the mortgage-money was advanced for legitimate family purposes, express or implied authority of minor co-parceners may be implied, and the mortgage may be enforced against the entire family interest.

Suraj Bunsi Koer v. *Sheo Persad Singh* (1) referred to.

Authority to mortgage may also, according to the peculiar circumstances of a case, be implied even in cases where the mortgage-money was not advanced for legitimate family purposes.

A mortgage is an alienation, even though it is for a very particular purpose, *e.g.*, as security only for the amounts drawn or paid on account of instalments of rent.

Gharibullah v. *Khalak Singh* (2) referred to.

Where on the one side it is proved that the whole of the mortgage-money, with the exception of a very small portion of it, was advanced for legitimate family purpose (and there is, therefore, a sufficient foundation for a decree for sale on the mortgage), and on the other side it is not shown that the small portion of the debt was not for any immoral purpose, the smaller item may be regarded as a debt of the father binding on the son.

* Appeal from Original Decree, No. 188 of 1910, against the decree of Tarak Nath Dutt, Subordinate Judge of Patna, dated Aug. 27, 1909.

(1) (1879) I. L. R. 5 Calc. 148; L. R. 6 I. A. 88.

(2) (1903) I. L. R. 25 All. 407; L. R. 30 I. A. 165.

Hunoomanpersaud Panday v. *Munraj Koonweree* (1), *Luchmun Dass* v *Giridhur Chowdhry* (2), *Maheswar Dutt Tewari* v. *Kishun Singh* (3), *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh* (4), *Lala Suraj Prosad* v. *Golab Chand* (5) referred to.

APPEAL by Babu Biswanath Pershad Mahta and others, plaintiffs.

The plaintiffs in this suit sought to recover certain sums as principal and interest due on a *zamanatnama*, which is in the nature of a mortgage-bond, executed in favour of the plaintiffs by defendant No. 1. Plaintiffs alleged that defendant No. 1 was the manager of the joint family of the defendants, that by executing the *zamanatnama* he had opened an account with the plaintiff's firm for the payment of *ticca* rent, etc., that defendant No. 1 had taken several amounts from the plaintiff's firm and had made several payments to it, that the principal sum of Rs. 5,000 and Rs. 3,554-10-8 yet remained due by the defendants, and that as defendant No. 2 was a minor when the account was opened and defendant No. 1 had opened transaction for the benefit of the defendant's family, defendant No. 2 was also liable for the debt.

Defendant No. 1 in his written statement stated that the defendant No. 2 was a minor. Defendant No. 2 did not appear. The Court decided the point against both the defendants and decreed the suit after contest against the first defendant and *ex parte* against the other. The *ex parte* decree was set aside on the 17th December 1908. Defendant No. 2 filed his written statement on the 22nd January 1909, contending that as the loan was contracted for illegal and immoral purposes, the contending defendant was not bound to satisfy it, that it did not benefit the family, that the

(1) (1856) 6 Moo. I. A. 393 ; 18 W. R. 81n.
(2) (1880) I. L. R. 5 Calc. 855.
(3) (1907) I. L. R. 34 Calc. 184.
(4) (1907) I. L. R. 34 Calc. 735.
(5) (1901) I. L. R. 28 Calc. 517.

1912

BISWANATH PERSHAD MAHTA v. JAGDIP NARAIN SINGH.

claim was barred by limitation, that he was separate from defendant No. 1 when the debt was contracted, and that the *zamanatnama* sued on is not binding on him or on the family property.

The Subordinate Judge on a review of the authorities held that, as far as the contesting defendant was concerned, a money decree might be passed against him, but as the suit was instituted after six years from the due date, the suit so far as it concerned defendant No. 2 was barred by limitation. In the result the suit was dismissed against the said defendant No. 2 or against his share in the family property. The Subordinate Judge further overruled the contention of the plaintiffs that the whole case was now open for trial. The plaintiffs thereupon preferred this appeal.

Babu Prabhashchandra Mitra (*Babu Susheelmadhab Mallik* with him), for the appellants. The case was not properly tried in the lower Court. The Subordinate Judge treated the son as an ordinary co-parcener of a joint Hindu family governed by Mitakshara. The lower Court has directed its attention solely to the question whether or not the mortgagees had made proper inquiries before advancing the loans. That question, however, is of no importance whatever in deciding whether or not the defendant No. 2 (the son) is bound by the mortgage created by the father (the defendant No. 1). It is well settled that a son cannot escape liability, unless he succeeds in proving that the debt contracted by his father was immoral: *Girdharee Lall* v. *Kantoo Lall* (1). This ungracious defence, viz., that the debt was immoral, was taken in the lower Court in this case and has failed. The law laid down in *Girdhari Lall's* case (1) was followed in

(1) (1874) 14 B. L. R. 187 ; 22 W. R. 56 ; L. R. 1 I. A. 321.

many subsequent cases in which the son attempted to recover his share on the allegation that the debt contracted by the father was not binding upon the son : *Deendyal Lal* v. *Jugdeep Narain Singh* (1), *Suraj Bunsi Koer* v. *Sheo Persad Singh* (2), *Nanomi Babuasin* v. *Modhun Mohun* (3), *Bhagbut Pershad Singh* v. *Girja Koer* (4). In the last mentioned case it was said : "It is not necessary for the creditors to show that there was a proper inquiry, or to prove that money was borrowed in a case of necessity." It cannot be gainsaid, therefore, that if the plaintiffs (appellants) had ignored the son altogether in their suit against the father, and if in execution of their decree had caused the entire property to be sold, the son could not have got back his share without proving that the debt contracted by the father was immoral. The same principle should govern this case also, because a mortgage is unquestionably an alienation : see the definition of "mortgage" in Transfer of Property Act ; see also *Gharibullah* v. *Khalak Singh*(5). It would be unreasonable to hold that a different principle should govern this case, because I was obliged to make the son a party to this suit by reason of the provisions of section 85 of the Transfer of Property Act. A Mitakshara son is a necessary party in such cases : *Lala Suraj Prosad* v. *Golab Chand*(6). The cases referred to in the last mentioned case show that a Mitakshara son was not a necessary party in mortgage suits before the Transfer of Property Act. The law has been materially altered in this respect since the Full Bench

(1) (1877) I. L. R. 3 Calc. 198 ; L. R. 4 I. A. 247.
(2) (1879) I. L. R. 5 Calc. 148 ; L. R. 6 I. A. 88.
(3) (1885) I. L. R. 13 Calc. 21 ; L. R. 13 I. A. 1.
(4) (1888) I. L. R. 15 Calc. 717 ; L. R. 15 I. A. 99.
(5) (1903) I. L. R. 25 All. 407 ; L. R. 30 I. A. 165.
(6) (1901) I. L. R. 28 Calc. 517.

1912

BISWANATH PERSHAD MAHTA v. JAGDIP NARAIN SINGH.

decision in *Luchmun Dass* v. *Giridhur Chowdhry* (1). The learned Judges who decided the two cases *Maheswar Dutt Tewari* v. *Kishun Singh* (2) and *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh* (3) did not take this fact into consideration. Hence the conflict of decisions in the last mentioned two cases, and which conflict is responsible for the wrong conclusion arrived at in the lower Courts in this case. The view taken in *Maheswar Dutt's* case (2), in so far as it lays down that the son cannot escape liability without proving that the mortgage debt was immoral, is the sounder view and supported by the Privy Council decisions cited above. In spite of the view taken in *Kishun Pershad's* case (3) to the effect that in such cases a personal decree only should be passed against the son, I am entitled to succeed in this case, as there is satisfactory evidence to prove that almost all the items of the moneys advanced to the father benefited the son, who was a minor at the time the moneys were advanced. The mortgagees have failed to prove benefit only in the small item of Rs. 600. The mortgage is binding upon the son on the assumption that the father as *karta* had implied authority: *Surai Bunsi Koer* v. *Sheo Persad Singh* (4). Though the mortgagees have failed to prove so, there can be little doubt that this sum also was so spent. The son has failed in proving that any portion of the debt was contracted for immoral purposes. The defendants did not produce their account books. The inference should be in my favour under the circumstances. I also rely upon section 106 of the Indian Evidence Act and upon *Hunoomanpersaud Panday* v. *Munraj Koonweree* (5). The son is therefore liable from this point of view also.

(1) (1890) I. L. R. 5 Calc. 855. (3) (1907) I. L. R. 34 Calc. 735.
(2) (1907) I. L. R. 34 Calc. 184. (4) (1879) I. L. R. 5 Calc. 148, 165.
(5) (1856) 6 Moo. I. A. 393.

Babu Umakali Mukherji (*Babu Bhudeb Chandra Roy* with him), for the respondents. The burden of proving that the money was spent for family necessity is upon the mortgagee, which the latter has not discharged in this case. There was no inquiry on the part of the mortgagee before advancing the money. The sons are no doubt liable, but there cannot be a mortgage decree against them, and six years' rule of limitation would apply: *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh* (1). The case of *Suraj Bunsi Koer* v. *Sheo Persad Singh* (2) does not decide the precise point raised in this appeal. The phrase 'antecedent debt' has no meaning. The bond, moreover, was only to secure payment of instalment of rent, and nothing else. The Full Bench case of *Luchmun Dass* v. *Giridhur Chowdhry* (3) is of questionable authority, and therefore the case may be referred to a Special Bench.

Babu Prabhashchandra Mitra, in reply.

Cur. adv. vult.

JENKINS C.J. The plaintiffs have brought this suit to realize a mortgage security executed in their favour by Babu Jagdip Narayan Singh, defendant No. 1. They have made defendants to the suit both Jagdip Narain Singh and his only son, Bindeswari Pershad Singh, it being their case that the son, who was a minor at the date of the mortgage, is as much bound by it so far as it creates a security on the property comprised in it, as the father by whom it was executed. The suit was dismissed as against the son and hence this appeal.

The mortgage, Ex. 1, is dated the 21st of November 1893, and to appreciate its meaning it should

(1) (1907) I. L. R. 34 Calc. 735. (3) (1880) I. L. R. 5 Calc. 855.
(2) (1879) I. L. R. 5 Calc. 148; L. R. 6 I. A. 88.

1912

BISWANATH PERSHAD MAHTA v. JAGDIP NARAIN SINGH.

JENKINS C.J.

be borne in mind that the mortgagees were a firm of bankers or *mahajans*.

It begins in these terms: "Whereas I, the declarant, have taken lease of certain mouzas and have to pay the rent thereof to the proprietors instalment by instalment; but the rent is not realized in due time from the tenants of the lease-hold mauzas, and the proprietors are always making pressing demands; therefore I have of my own accord and free will opened for the payment of the rent to the proprietors due on account of the lease-hold mauzas a *khata* for Rs. 5,000 bearing interest at the rate of Re. 1 per cent. per mensem with the firm of Babu Birkeshwar Lal Parmeshar Narain at Koochi Hiranand Sahu appertaining to Thana chawk Kalan, one of the quarters of Patna city, as per details given below."

Then there follow provisions regulating the details of the transaction. The first clause provides for two *chittas*, one to be kept in the bankers' place of business, and the other to remain with the mortgagor, and then says "all sums paid into and received from the *kothi* by me shall be entered in both the *chittas*." The succeeding clauses deal with interest, periodical adjustments, the closing of the transaction, and then the charge is created in these terms (read clause 7). The schedule to the mortgage describes the property, and from this description it is apparent that the instrument professes to charge the entire family interest in this property. This has not been disputed before us.

It is the plaintiff's case that the transaction has been closed, and that there is due to them on the balance of the account a sum of Rs. 5,000 for principal, after giving up Rs. 7-0-9, and Rs. 3,554-10-8 for interest.

The amounts which go to make up this sum of Rs. 5,000 are shown in a tabular form in the judgment

of the Subordinate Judge where nine items are shown totalling Rs. 6,279-10 in all, and extending from *Jeyt Sudi* 6th to *Magh Budi* 11th *Sambat* 1952.

The first two may be left out of consideration, as they are beyond the limits claimed by the plaintiffs.

The rest call for a brief explanation, excluding for the moment the last item of Rs. 600; it has been proved to my satisfaction, not merely by oral testimony but by documentary evidence, that is above all cavil that all these items were expended on legitimate family purposes, as, for instance, the payment of rent, the payment of Government revenue, and family marriage expenses. We have been taken through the items which go to show this with minute detail, but I do not propose to do more than state, as I have done, the general result of this investigation, as no argument was addressed to us in disparagement of this conclusion. The attempt to evade liability by pleading the immorality of defendant No. 1 has been as unsuccessful as it was unmeritorious, and it was particularly unmeritorious, for there is strong reason to think that defendant No. 1 is in reality the person responsible for the advancement of this defence.

It was argued that the mortgage was security only for the amount drawn or paid on account of instalments of rent, and, in support of this, reliance was placed on the recital I have read. But this (in my opinion) places too narrow a construction on the instrument: the recital explains how the mortgage became necessary, but it does not control its operative provision. The intention and effect of the instrument was, I think, to secure the balance from time to time due on the current account. The result then is this: the mortgage purports to charge the entire interest in the property, and, apart from the Rs. 600 with which I will later deal, the whole of the Rs. 5,000,

1912

BISWANATH PERSHAD MAHTA v. JAGDIP NARAIN SINGH.

JENKINS C.J.

claimed as principal, was advanced for legitimate family purposes. Why then should not the mortgage be enforced against the entire family interest?

The law on this subject is thus stated by the Privy Council in *Surai Bunsi Koer* v. *Sheo Persad Singh*(1): "The right of co-parceners to impeach an alienation made by one member of the family without their authority, express or implied, has of late years been frequently before the Courts of India, and it cannot be said that there has been complete uniformity of decision respecting it. All are agreed that the alienation of any portion of the joint estate, without such express or implied authority, may be impeached by the co-parceners, and that such an authority will be implied, at least in the case of minors, if it can be shown that the alienation was made by the managing member of the family for legitimate family purposes."

This formulates a clear and precise principle, and it would seem to narrow the problem of the validity of a manager's alienation to this: had he an express authority, if not, had he an implied, authority? At the same time the passage indicates the kind of condition which would justify such an implication when it is pointed out that as against a minor co-parcener it may be implied, if there was a legitimate family purpose.

But I do not read this statement of the law as laying down that these are the only conditions under which authority can be implied; each case must be judged according to its own peculiar circumstances. It is true that the word *used* in this passage is *alienation*; but a mortgage is an alienation and none the less so because it is for a particular purpose; and this is recognised by the Transfer of Property Act.

(1) (1879) I. L. R. 5 Calc. 148, 165.

Moreover, this view has the sanction of the highest judicial authority, for a mortgage by a managing member has been upheld on this principle by the Privy Council, and in illustration of this I may refer to *Gharib-ullah* v. *Khalak Singh* (1).

No doubt in the present case the mortgage was executed before the advances were made, but I fail to see that this places any obstacle in the plaintiff's way, in view of the fact that the advances were all made for legitimate family purposes and the mortgage was a necessary part of the arrangement. And I hold that in the circumstances defendant No. 1 as the managing member had implied authority to execute the mortgage so as to make it unimpeachable by his minor son. It follows, then, that the alienation by way of mortgage is good, and that it can be enforced as a mortgage against the defendant No. 2 as well as against his father defendant No. 1.

So far I have dealt with the case apart from the item of Rs. 600: now it is necessary to consider how matters stand regarding this item.

The plaintiffs have been unable to show how it was expended: the defendants have refrained from throwing any light on the point, and yet it is difficult to suppose that they have not family books of account and available sources of information that would show what was done with this sum.

It has been forcibly argued that in view of all the circumstances the position would appear to be one where it would be reasonable to apply the provisions of section 106 of the Evidence Act and hold that as the mode of expenditure is especially within the knowledge of the defendants the burden of proving how it was made was on them: see *Hunoomanpersaud's* case (2).

(1) (1903) I. L. R. 25 All. 407; L. R. 30 I. A. 165.

(2) (1856) 6 Moo. I. A. 393, 418.

1912

BISWANATH PERSHAD MAHTA v. JAGDIP NARAIN SINGH.

JENKINS C.J.

But even if the plaintiffs cannot show that this sum was expended for a legitimate family purpose, on the other hand, the defendants have wholly failed to show that it was used for an immoral purpose. And so we have the position indicated in the case of *Luchmun Dass* v. *Giridhur Chowdhry* (1).

This is a determination of a Full Bench of this Court which has given rise to much discussion, and in token of this I need only refer to two recent but apparently discordant decisions: *Maheswar Dutt Tewari* v. *Kishun Singh* (2) and *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh* (3).

On the strength of this Full Bench determination it is urged on behalf of the respondent that we cannot decide in the plaintiffs' favour without a reference to a Bench specially constituted. At most, however, this contention can only refer to the Rs. 600, and the plaintiffs say they would give up this amount rather than incur the delay and expense of a reference.

But is the reference necessary, having regard to the circumstances of this case? First, then it has to be seen what the Full Bench determined.

One of the questions propounded to them was this: "In the case of a Mitakshara family consisting of a father and one minor son where the father being the manager raises money by hypothecating certain ancestral family property by bonds, and it is not proved on the one hand that there was any legal necessity for his raising the money, nor on the other that the money was raised or expended for immoral or illegal purposes, or that the lender made any inquiry as to the purpose for which it was required, can the lender, the mortgagee, enforce by suit against the father and

(1) (1880) I. L. R. 5 Calc. 855. (2) (1907) I. L. R. 34 Calc. 184.
(3) (1907) I. L. R. 34 Calc. 735.

the son the payment of his money by sale of the property during the father's lifetime?" The answer which was returned by the Full Bench was in these terms: "The mortgage itself upon which the money was raised could not be enforced, but the debt contracted by the father, being itself an antecedent debt within the meaning of the rulings of the Privy Council, and the son being a party to the suit, the mortgagee, notwithstanding the form of the proceedings, would be entitled to a decree directing the debt to be raised out of the whole ancestral estate inclusive of the mortgaged property."

This answer has occasioned much discussion, but it is now the accepted view that it cannot mean that the mortgage is incapable of enforcement against the father to the extent of his share.

But even with this gloss the ruling is not free from difficulty.

If in execution of a decree against the father alone for a debt unconnected with any immoral or illegal purpose, a part of the family property is sold in execution, the son's obligation to pay his father's debts would of itself afford a sufficient answer to a suit brought by a son to recover the property. At the date of the Full Bench decision the result would have been the same, though the suit was for enforcement of a mortgage and the son was not a party to it. Since then, however, the Transfer of Property Act has been passed, and by section 85 it is provided: "Subject to the provisions of the Code of Civil Procedure, section 437, all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this chapter relating to such mortgage: provided that the plaintiff has notice of such interest." In *Lala Suraj Prosad* v. *Golab Chand* (1)

(1) (1901) I. L. R. 28 Calc. 517.

1912

BISWANATH PERSHAD MAHTA v. JAGDIP NARAIN SINGH.

JENKINS C J

it was held that this section is compulsory. So a morgtagee must now in a suit on a mortgage of the joint property of a Mitakshara family executed by a father join as a party the executant's son, though he was a minor at the date of the instrument.

Such a son therefore is a person having an interest in the property comprised in the mortgage, and it is on that account alone that he is a necessary party. Moreover, it is only to a suit under Chapter IV of the Transfer of Property Act now reproduced by O. XXXIV, Civil Procedure Code, relating to the mortgage that he is a necessary party.

The purpose of joining the son is not to obtain a personal decree against him on the strength of his obligation to pay his father's debts, but primarily to give him an opportunity of redeeming as a person interested in the mortgaged property and incidentally to resist the suit as against himself on the ground that the character of the debt absolved him from any obligation. In this connection regard may be had to section 90 of the Transfer of Property Act now reproduced in O. XXXIV, r. 6 of the Civil Procedure Code.

That it was not necessary to make the son a party to such a suit before the Transfer of Property Act was passed, or where its provisions did not apply, is clear from the cases to which reference was made in *Lala Surai Prosad's* case (1). And though he was not a party, a decree could be passed for the sale of the entirety, of the mortgaged property. The son's remedy in such a case was that he could sue to recover the property, provided he could show that the debts were contracted for immoral purposes and the purchaser had notice that they were so contracted : *Surai Bunsi*

(1) (1894) I. L. R. 28 Calc. 517.

Koer's case (1). Thus it will be seen that the law has been materially modified by Statute and Statutory rule since the Full Bench decision. But more than that, we have in this case facts which take it outside the scope of the Full Bench decision. Here the sums covered by the mortgage were, with the exception of Rs. 600 advanced for a legitimate family purpose, and so there is a sufficient foundation for a decree for sale on the mortgage. And though it is not shown that the Rs. 600 was for a legitimate family purpose, it certainly was not for any immoral purpose, and in the circumstances I think it may be regarded as a debt of the father binding on the son, and that the second defendant cannot be permitted to redeem the mortgage, except on the terms of paying off the Rs. 600 as well as the balance of the Rs. 5,000 which is shown to have been contracted for legitimate family purposes.

The decree of the Subordinate Judge must therefore be reversed, and a mortgage decree passed on the footing of Rs. 5,000 being due for principal. Unless the parties agree, there must be an account of what is due for interest at the mortgage rate. On payment of the amount so found by the defendants or either of them there will be the usual direction for delivery up of the documents, and if required for retransfer. In default of payment within six months of this decree or the ascertainment of interest, whichever may be the later date, there will be a decree for sale and application of the proceeds. The plaintiffs must have their costs of the suit and appeal which will be added to their security.

N. R. CHATTERJEA J. I agree.

S. M. *Appeal allowed.*

(1) (1879) I. L. R. 5 Calc. 148 ; L. R. 6 I. A. 88.