Privy Council Appeal No. 51 *of* 1922.

Allahabad Appeal No. 4 *of* 1920.

Raja Bahadur Raja Brij Narain Rai - - - - *Appellant*

v.

Mangla Prasad Rai and others - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH NOVEMBER, 1923.

Present at the Hearing :

VISCOUNT HALDANE.
LORD DUNEDIN.
LORD ATKINSON.
LORD SHAW.
LORD PHILLIMORE.
MR. AMEER ALI.
SIR LAWRENCE JENKINS.

[*Delivered by* LORD DUNEDIN.]

The facts in this case may be very shortly stated. On the 4th March, 1908, Sita Ram granted a mortgage for Rs. 11,000 in favour of Raja Narain Brij Rai and Jagdish Narain Rai. The mortgage was secured on ancestral and joint property of which Sita Ram was at that time manager, the other members of the joint family being his two sons, minors. In 1912 the mortgagees brought a suit on the mortgage and obtained a decree *ex parte*. In 1913 the present suit was raised by the mother on behalf of her two minor sons (the elder has since become major) to have it declared that the mortgage was not binding on them and that the decree granted was so far as they were concerned null and void.

The mortgage in suit bears to have been executed in order to pay off two prior mortgages on the same property of date the 12th December, 1905, and the 19th June, 1907, respectively.

In the suit the plaintiffs cited the two mortgagees and their father Sita Ram, who had granted the mortgage. Sita Ram did not appear to defend. Jagdish Narain Rai made over his interest to his brother Raja Narain Brij Rai, who appeared to defend and pleaded that the mortgage in question having been granted to pay off an antecedent debt of the plaintiff's father, it was binding on the estate.

The Subordinate Judge found as facts :

(1) That the property was ancestral and joint.

(2) That the money raised under the mortgage was to the extent of Rs. 10,265 employed in paying off the earlier mortgages.

(3) That the sons had not been properly represented when the *ex parte* decree of 1912 was granted.

He then found in law that the plaintiffs' sons were not bound by the decree of 1912, and he accordingly set aside the decree of 1912 so far as the sons were concerned ; he made no further declaration. The defendant appealed. The learned Appeal Judges affirmed the findings of fact of the Subordinate Judge with the variation that they found that the whole Rs. 11,000 had been employed in paying off the earlier mortgages ; but in view of what had been said by this Board in the case of *Sahu Ram Chandra* v. *Bhup Singh*, 44 I.A., 127, decided after the date of the judgment under appeal, they remitted to the Subordinate Judge to find whether the earlier mortgages were incurred to discharge obligations not only previously incurred but incurred wholly irrespective of the joint family property. The learned Subordinate Judge set out additional evidence as to the two earlier mortgages. On this evidence being taken up by the learned Judges of the Court of Appeal, they came to the conclusion that it was impossible to say for what precise purpose the money raised by the two earlier mortgages had been used, or that the debt then incurred was incurred wholly irrespective of the family property. They accordingly dismissed the appeal. Appeal was then taken to the King in Council.

The defendant admits that the *ex parte* decree is not binding on the minors in respect that they were not properly represented, but contends that there ought to have been a declaration that under the circumstances the property became bound and is liable to be taken in execution.

In the case of *Sahu Ram Chandra* v. *Bhup Singh*, the suit was brought upon a mortgage 27 years old for Rs. 200, and Rs. 15,000 was demanded in respect of the principal and accrued interest. It was pleaded that the Rs. 200 had been borrowed for family necessity, but this contention was negatived in fact. It was, therefore, a simple case of a debt having been constituted by way of mortgage on the family estate by the father manager and been allowed to swell to gigantic proportions, no money having been paid thereon. The creditors had put forward the universal proposition that if debt was found to incumber the estate, it was necessary for the other members of the family who

wished to affirm its non-efficiency to prove that it was incurred for immoral purposes. If they failed to do so, then the incumbrance must stand without further question. This view was negatived by the High Court, and in order to allow the point to be settled leave was given to appeal to the King in Council. The appeal was heard *ex parte*. At the appeal it became clear that there was in no sense an antecedent debt. The incumbrance itself was the debt, the money being advanced as the incumbrance was granted. In the course of the judgment, however, Lord Hobhouse's opinion in *Massumat Nanomi Babuasin* v. *Modun Mohun* (13 I.A. 1) was cited, and commenting on this it was said :—

> "In their Lordships' opinion these expressions, which have been the subject of so much difference of legal opinion, do not give any countenance to the idea that the 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 such joint estate."

The learned Judges interpreted that to mean that a mortgage *per se* could not be an antecedent debt, for a mortgage is obviously a security which is not apart from the security of the estate over which it is constituted. If, therefore, it could not be shown that an anterior mortgage had been incurred in respect of an antecedent debt unconnected with the estate, then the anterior mortgage could not be held to be debt antecedent to the subsequent mortgage, and that subsequent mortgage could not stand though its proceeds were entirely used to pay off the prior mortgage.

Before the present case came up to their Lordships, the expression used in the case of *Sahu Ram* had come before the consideration of the High Court in Madras in the case of *Vinjamampati Peda Venkanna* v. *Vadlamannati Sreenivasa Deekshatulu*, 41 Madras, 136, and again in *Armugham Chetty* v. *Muthu Koundan*, 42 Madras, 711, where the question was referred to a Full Bench. In the latter case the pleader had gone the whole length of saying that no mortgage could ever be an antecedent debt the payment of which was capable to support a new mortgage. In both cases the Madras Court came to the conclusion that the judgment of the Board in *Sahu Ram's* case ought not to be so interpreted.

Upon this appeal when their Lordships were satisfied that there was this discrepancy of opinion between the judgments of the High Court of Allahabad in this case and that of Madras in the others, they thought it advisable to have the question argued before a Full Board, which has been done. Their Lordships have had the advantage of a very full and able argument in which many authorities have been quoted. It is to be regretted that this case also is *ex parte*, but their Lordships are satisfied that the whole of the authorities bearing on the question have been fairly brought to their notice.

It cannot be denied that the law on the subject of what binds an estate when the manager of the joint family estate is the father, and the reversionaries are the sons, is in a state which is somewhat illogical and in the absence of binding authority could not be accepted. On the one hand it is settled law that the manager as such cannot bind the estate at his own free will and without any compelling cause so as to bind the reversionaries. He can bind it for necessity, the necessity being the necessity of the family, and so far there is no difficulty in principle, though the question of whether in any particular instance there was a necessity, may like other questions of fact liable to be involved in a question of decree, be difficult to decide. But then there comes in the further doctrine that debt has been contracted by the father, and the pious obligation incumbent on the son to see his father's debts paid prevents him from asserting that the family estate, so far as his interest is concerned, is not liable to purge that debt. It may become liable by being taken in execution on the back of a decree obtained against the father, or it might become liable by being mortgaged by the father to pay the debt for which otherwise decree might be taken and execution be sought. It is more than apparent how in practice these two principles may clash, nor is this in any sense a new discovery. Nothing clearer could be said than what was said by Lord Hobhouse delivering the judgment of the Board in *Mussumat Nanomi's* case already quoted :—

> " Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have, for some time, established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate, their Lordships think that there is now no conflict of authority."

It is probably bootless to speculate as to how these seemingly conflicting principles were allowed to develop. On the one hand there is the general rule of the Mitakshara law that the manager cannot burden the estate for his own purposes. This is set forth at some length in the judgment in *Sahu Ram's* case. On the other hand there is the obligation of the son to discharge his father's debts, based on the doctrine of pious duty, but perhaps reflecting a remanet, as suggested by Sadasiva Ayyar J. in the 42 Madras case at page 730, from the older laws of Manu under which the son had no interest during the father's lifetime. It is enough to say that both principles are firmly established by long trains of decision, and it certainly occurs to the view that the term " antecedent " debt represents a more or less desperate attempt to reconcile the conflicting principles. For after all, if looked at straight in the face, what position could be more anomalous than this. A father who is manager, borrows a like sum from A and B. To A he gives a mortage on the family estate containing a personal covenant. To B he gives a simple acknowledgment of loan. B sues and gets a decree ; on this decree execution can follow and the estate can be taken. A, suing upon his mortgage, cannot recover. It seems to have been felt that if the debt for which a mortgage was

given was in any proper sense antecedent, then it so to speak escaped the direct infringement of the principle that the father manager could not burden the estate except for necessity.

In such a matter as the present it is above all things necessary *stare decisis*, not to unsettle what has been settled by a long course of decisions. Their Lordships entirely agree with the views of the learned Chief Justice in the Full Bench Madras case. They think that the case of Sahu Ram must not be taken to decide more than what was necessary for the judgment, namely, that the incurring of the debt was there the creation of the mortgage itself and that there was there no antecedency either in time or in fact. Moreover, if proper attention is paid to the word "incurred," they think that it will be seen to be a proper interpretation of the sentence which has caused the doubts.

There are, however, some observations in *Sahu Ram's* case which are not necessary for the judgment but which their Lordships are bound to say that they do not think can be supported. Founding upon them the learned counsel in this case argued in the Court below that no liability of the sons, based on the pious obligation to pay a father's debt, could be made available to the creditor while the father was still alive. Here again, if the point was open, there would be much to be said in favour of a position which seems consonant with common sense. But their Lordships are satisfied that a long train of authorities have settled the question. Instances of sale being permitted when the father for whose debt the sale was made was still alive may be found in the cases reported as follows :—

1 I.A. 321 ; 4 I.A. 247 ; 13 I.A. 1 ; 15 I.A. 99 ; 16 I.A. 1 ; 17 I.A. 11 ; 44 I.A. 1.

It is true that the point was not actually taken so far as appears in any of these cases, but when a long series of cases extending over a long period of time when parties were represented by eminent counsel are decided in a way where if a plea which was evident had been taken and upheld, the decision would have been the other way, there arises an irresistible conclusion that the plea was not taken because it was felt to be bad. The plea, however, was actually taken in *Badri Prasad* v. *Madan Lal*, 15 All., 75, see page 79, and was rejected by a Full Bench. In *Govind Krishna Gujar* v. *Sakharam Narayan*, 28 Bombay 383, at page 389, Chandavarkar J. says :—

> "The law is now well established that under the Hindu law the pious obligation of a son to pay his father's debts exists whether the father is alive or dead."

The point was again taken and negatived in *Ramasami Nadan* v. *Ulaganatha Goundan*, 22 Madras, 49, see at page 63.

Their Lordships may sum up the propositions which they would wish to lay down as the result of these authorities as follows :—

(1) The managing coparcener 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 reversionaries 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 ~~more than his own interest~~ 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.

Applying these propositions to the present case, their Lordships consider that the present mortgage was raised in order to pay an antecedent debt, namely, the two older mortgages and consequently binds the estate.

The result will be that the appeal will be allowed and the decrees of the Courts below set aside with costs and a declaration made that the mortgage of the 4th March, 1908, affects the estate which may be brought to sale.

Their Lordships will advise His Majesty accordingly.

The respondents will pay the costs of the appeal.

In the Privy Council.

RAJA BAHADUR RAJA BRIJ NARAIN RAI

v.

MANGLA PRASAD RAI AND OTHERS.

DELIVERED BY LORD DUNEDIN.

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