Faqir Chand

Vs

Harnam Kaur & Anr.

Civil Appeal No. 572 of 1963

(K. N. Wanchoo, J. C. Shah, R. S. Bachawat JJ)

05.08.1966

JUDGMENT

BACHAWAT, J.

Murari Lal is the manager of a joint family consisting of himself and his son, Faqir Chand. On June 7, 1949, he borrowed Rs. 75,000 from Sardarni Harnam Kaur, and by a regi__stered deed of the same date, he mortgaged an immovable property for securing repayments of the loan. The mortgaged property belongs to the joint family. By a covenant in the mortgage deed, Murati Lal bound himself to repay the loan. Part of the loan was borrowed by Murari Lal for discharging an antecedent mortgage debt. On July 4, 1952, Harnam Kaur instituted Suit No. 219 of 1952 against Murari Lal claiming the usual preliminary decree for sale othe property. On March 13, 1953, Faqir Chand instituted the present suit against Harnam Kaur and also Murari Lal claiming a declaration that the mortgage deed was for immoral and illegal purposes and without legal necessity and was not binding on him and for consequential reliefs. On April 20, 1953, Harnam Kaur obtained a preliminary decree for sale in Suit No. 212 of 1952. Thereafter, Faqir Chand obtained an order for amendment of the plaint in his suit and by the amended plaint he claimed a declaration that the decree passed in the mortgage suit was not binding on him. The trial Court raised several issues, of which issues Nos. 2 and 3 only are material. They are as follows :-

> "(2) Whether the mortgage in dispute is for consideration and legal necessity, if not to what effect ?
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> (3) Whether the previous mortgages were for illegal and immoral purposes, and purposes repugnant to good morals and whether defendant No. 1 had notice of the same ?"

At the trial, councel for Faqir Chand conceded that the mortgages were not for illegal or immoral purposes and gave up issue No. 3. With regard to issue No. 2, his counsel conceded that there was consideration for the mortgage. The trial Court did not decide the question whether the mortgage was made for legal necessity. It held that as Harnam Kaur had obtained a decree in the mortgage suit, Faqir Chand could not challenge the mortgage and the decree in the absence of proof that the mortgage was created for an illegal or immoral purpose and as he could not challenge the mortgage, he could not claim any other consequential relief. The trial Court accordingly dismissed the suit. Faqir Chand filed an appeal to the Punjab High Court. We are informed by counsel that during the pendency of the appeal a final decree for sale was passed in the mortgage suit. Harnam Kaur took steps for the execution of the decree. By an order of the High Court, the execution of the decree was stayed pending the disposal of the appeal. At the hearing of the appeal, a Division Bench of the

High Court referred to a larger Bench the following question of law :

> "Whether when a mortgage has been created on joint family property by a father who constitutes a joint Hindu family along with a son or sons, and a decree has been obtained by the mortgagee on the basis of the mortgage, it is open to a son to challenge the mortgage and the decree merely on the ground that the debt was incurred without legal necessity, or whether he must prove that the debt was incurred for illegal or immoral purposes."

A Full Bench of the High Court gave the following answer :

> "In the case of a Hindu joint family consisting of a father and sons when a mortgage has been created by the father of joint property, and a decree has been obtained on the basis of the mortgage, the only ground on which the sons can challenge the mortgage and the decree is that the debt was incurred for illegal or immoral purposes and that for this purpose it is immaterial whether the mortgaged property has actually been brought to sale in execution of the decree or not."

The appeal was thereafter heard by another Division Bench, and in the light of the decision of the Full Bench, the Division Bench dismissed the appeal. Faqir Chand now appeals to this Court under a certificate granted by the High Court.

The object of the suit and this appeal is to prevent the sale of the mortgaged property in execution of the mortgage decree. Accordingly, the appellant obtained an order for stay of sale of the property. In view of the stay order, the sale of the property has not yet taken place. The first and the main question arising in this appeal may be formulated thus; in a case where a father mortgages a property of a joint family consisting of himself and his sons for payment of his debt, but the mortgage is neither for legal necessity nor for payment of his antecedent debt and the mortgagee has obtained a decree against the father for sale of the property but the sale has not yet taken place, have the sons any right to restrain the execution of the decree or the sale of the property in execution proceedings without showing either that there is no debt which the father is personally liable to repay or that the debt has been incurred for an illegal or immoral purpose ? We think that this question should be answered in the negative.

In Brij Narain v. Mangla Prasad ((1923) L.R. 51 I.A. 129, 139.), the Privy Council laid down five propositions, of which the following three are material for the decision of this appeal :

> "(1) The managing member of a joint undivided estate cannot alienate or burden the estate qua manager except for purposes of necessity; but
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> (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.
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> (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."
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> Brij Narain's case ((1923) L.R. 51 I.A. 129, 139.) received the approval of this Court in Luhar Amritlal Nagji v. Doshi Jayantilal Jethalal ([1960] 3 S.C.R. 840, 852-853.).

The second proposition laid down in Brij Narain's case ((1923) L.R. 51 I.A. 129, 139.) is founded upon the pious obligation of a Hindu son limited to his interest in the joint family property to pay the debt contracted by the father for his own benefit and not for any immoral or illegal purpose. By incurring the debt, the father enables the creditor to sell the property in execution of a decree against him for payment of the debt. The son is under a pious obligation to pay all debts of the father, whether secured or unsecured. We think that the second proposition applies not only to an unsecured debt but also to a mortgage debt which the father is personally liable to pay. This conclusion is supported by the opinion of Sulaiman, A.C.J. in Jagdish Prasad v. Hoshyar Singh ((1929) I.L.R. 51 All. 136, 138-140.) and the opinions expressed in Bharamappa Murdeppa v. Hanmantappa Tippanna (I.L.R. [1943] Bom. 568, 572.), Hira Lal v. Puran Chand (A.I.R. 1949 All. 685 (F.B.), 687.) Abdul Hameed Sait v. Provident Investment Co. Ltd. (I.L.R. [1954] Mad. 939, 954.). In Hira Lal's case (A.I.R. 1949 All. 685 (F.B.), 687.), Misra, J. observed :

> "A debt secured by a mortgage, it seems almost axiomatic, is as much a debt of the father as an unsecured debt and considered in the light of the spiritual need which the doctrine of pious obligation was designed to meet, there would, in principle, be scarcely any differences between the two transactions. The security would merely provide a means of recovery, and if the payment of a debt is obligatory on the debtor, and therefore on his sons, the payment of a mortgage debt is also morally and religiously obligatory."

In Jagdish Prasad's case ((1929) I.L.R. 51 All. 136, 138-140.), Mukerji and Boys, JJ. took the view that the second proposition did not apply to a mortgage debt, but we are unable to agree with this opinion.

In Bharamappa Murdeppa v. Hanmantappa Tippanna (I.L.R. [1943] Bom. 568, 572.), Beaumont, C.J. said that the second proposition in Brij Narain's case (L.R. 51 I.A. 129.) did not apply to the recovery of a debt in its character as a mortgage debt, and a decree for payment of the debt by sale of the property could not be enforced by sale of the son's interest in it, but if a personal decree is obtained against the father then that decree might be so enforced. He, however, pointed out this view would compel the creditor to recover the debt in two stages. A similar opinion was expressed in Ganpati v. Rameshwar (I.L.R. [1946] Nag. 741, 749.). We are not inclined to confine the second proposition within such narrow limits. It is the existence of the father's debt that enables the creditor to sell the property in execution of a money decree against the father. Likewise, if a mortgage decree against the father directs the sale of the property for the payment of his debt, the creditor may sell the property in execution of the decree. It is true that the procedure for the execution of a money decree is different from that for the enforcement of a mortgage decree. A money decree is executed by attachment and sale of the debtor's property. For the execution of the mortgage decree, an attachment of the property is not necessary and the property is sold by force of the decree. But this distinction in procedure does not affect the pious obligation of a Hindu son to pay his father's debt. As in the case of a money decree, under a mortgage decree also the property is sold for payment of the father's debt. The father could voluntarily sell the property for payment of his debt. If there is no voluntary sale by the father, the creditor can ask the Court to do compulsorily what the father could have done voluntarily. The theory is that as the father may, in order to pay a just debt, legally sell the whole estate without suit; so his creditor may bring about such a sale by the intervention of a suit. See Ramasamayyan v. Virasami Ayyar ((1898) I.L.R. 21 Mad. 222, 224.). Even where the mortgage is not for legal necessity or for payment of antecedent debt, the creditor can, in execution of a mortgage decree for the realisation of a debt which the father is personally liable to repay, sell the estate without obtaining a personal decree against him. After the sale has taken place, the son is

bound by the sale, unless he shows that the debt was non-existent or was tainted with immorality or illegality; see Bhagbut Pershad v. Mussumat Girja Koer (L.R. 15 I.A. 99.). In the earlier case of Suraj Bunsi Koer v. Sheo Proshad Singh ((1878-9) L.R. 6 I.A. 88, 106.) also, the Judicial Committee had clearly laid down :

> "That where joint ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted."

In Jagdish Prasad's case (I.L.R. 51 All. 136.), Sulaiman, A.C.J. took the view that the second proposition in Brij Narain's case (L.R. 51 I.A. 129.) did not apply where the sale had not taken place and the property had not yet passed out of the family. In Abdul Hameed Sait's case (I.L.R. [1954] Mad. 939.), Subba Rao, J. (as he then was), said at p. 955 :

> "I would, therefore, confine the operation of the second proposition only to a case where joint family property is sold in execution of a decree, whether it is a mortgage decree or a simple decree."

We are unable to accept this view. The second proposition applies not only after but also before the sale is held. It is well settled that the second proposition applies in the case of a money decree for payment of the debt before the sale is held, and we see no reason why it should not so apply in the case of a mortgage decree for payment of the debt by the sale of the property. If there is a just debt owing by the father, it is open to the creditor to realise the debt by the sale of the property in execution of the mortgage decree. The son has no right to interfere with the execution of the decree or with the sale of the property in execution proceedings, unless he can show that the debt for which the property is sold is either non-existent or is tainted with immorality or illegality. It follows that the appellant is not entitled to restrain the sale of his interest in the property in execution of the mortgage decree for sale.

In this case, the appellant obtained an interim order for stay of sale of the property. We think that the High Court improperly passed this order. The appellant had no right to obtain either an interim or final order for stay of the sale having regard to the fact that admittedly the debt was owing by the father and was not incurred for immoral or illegal purposes. Nor did he acquire such a right because he instituted this suit before the decree for sale was passed in the mortgage suit.

The next question is whether the son is entitled to impeach the mortgage of a joint family property made neither for legal necessity nor for payment of an antecedent debt, and if so, whether the remedy is available to him after the mortgagee has obtained a decree against the father on the mortgage. We think that the answer to this question should be in the affirmative.

In the present case, the Full Bench of the High Court took the view that while the first and third propositions in Brij Narain's case (L.R. 51 I.A. 129.) were generally applicable to the managing members of joint families, the second proposition was self-contained and was intended to lay down an exception in the case of joint families consisting of father and sons only. The view taken was that the third proposition did not apply where the joint family consists of father and sons. We are unable to agree with this view. The first proposition sets out the general rule regarding the power of the

managing member of a joint family to alienate or burden the estate. The second and third propositions lay down the special rules applicable when the managing member is the father, and deals specially with his power to mortgage the estate for payment of his antecedent debt. Reading the first and third propositions together, it will appear that a father who is also the manager of the family has no power to mortgage the estate except for legal necessity or for payment of an antecedent debt.

Counsel for the appellant stated that under the law by which the appellant is governed, a mortgage of a joint family property not being one for legal necessity or for payment of an antecedent debt will not bind the property only to the extent of the son's interest therein. Before the mortgagee obtained the decree on the mortgage, the appellant was therefore entitled to a declaration that such a mortgage did not bind his interest in the property. Is the position altered by the passing of the decree ? We think not. The decree against the father does not of its own force create a mortgage binding on the son's interest. The security of the creditor is not enlarged by the passing of the decree. In spite of the passing of the preliminary or final decree for sale against the father, the mortgage will not, as before, bind the son's interest in the property, and the son will be entitled to ask for a declaration that his interest has not been alienated either by the mortgage or by the decree.

It follows that in the absence of a finding on the question of legal necessity, this appeal cannot be completely disposed of. The Courts below have not recorded any finding on this issue. Normally, we would have remanded the matter to the High Court for a finding on the point. But considering that the litigation is now pending for the last 14 years and the sale of the property has been improperly stayed for a long time, we have thought it fit to examine for ourselves the evidence on the record with regard to this issue. Murari Lal took a loan of Rs. 75,000/ from the mortgagee. Out of this sum, Rs. 31,000/ was borrowed for discharging antecedent debts. It is not disputed that the mortgage to the extent it secures repayment of Rs. 31,000/ binds the appellant's interest in the property. Rs. 3,000/ was paid to Murari Lal for meeting the stamp and other expenses in connection with the mortgage. The balance sum of Rs. 41,000/ was paid to him by cheque. In the mortgage deed, Murari Lal stated that he would spend this sum of Rs. 41,000 in his business for the maintenance of the family and for the education of the appellant. Counsel for the appellant submitted that Murari Lal did not carry on any business and the mortgagee's case that the loan was taken partly for purposes of business should not be accepted. The testimony of Baburam, Manohar and Sukhbashi Lal shows that Murari Lal was carrying on business in silver and gold lace. Murari Lal denied that he ever carried on business after his father's death which took place in 1906. The appellant, Sitaram, Ram Sarup and Prabhu Dayal support him. We are unable to accept the testimony of Murari Lal and other witnesses that Murari Lal did not carry on any business since 1906. The deed of partition between Murari Lal and Ram Sarup dated December 14, 1939 recited that Murari Lal was by occupation a sarafa and rentier. The mortgage deed dated June 7, 1949 stated that the occupation of Murari Lal was silver and gold business. The endorsement of the Sub-Registrar on this deed described him as saraf by occupation. Counsel for the appellant submitted that there is a material discrepancy between the oral evidence and the recitals in the mortgage deed. The oral evidence shows that Murari Lal was carrying on business in gold and silver lace whereas the mortgage deed shows that he was carrying on business in gold and silver. We think that the description of 'saraf' or gold and silver business in the mortgage deed was used loosely to indicate business in silver and gold lace. If Murari Lal was, in fact, carrying on a business in gold and silver, it was not necessary for the plaintiff to set up the case that he was carrying on a business in silver and gold lace. If Murali Lal was carrying on a business, it is not disputed that the business was a joint family business. The loan of Rs. 75,000 was thus taken by Murari Lal partly for payment of antecedent debts and partly for purposes of his family business and other legal necessities. The

mortgage in its entirety bound the property including the interest of the appellant therein.

In the result, the appeal is dismissed with costs.

V.P.S.

Appeal dismissed.

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