ALLAHABAD HIGH COURT

Jagdish Prasad

Vs

Hoshyar Singh

(Sulaiman,Ag CJ.)

06.07.1928

JUDGMENT

Sulaiman, Ag. C.J.

1. In the present case the sons' suit was filed after the mortgagee had obtained a mortgage decree against the father without impleading the sons, but before the mortgage property was actually put up for sale at auction.

2. I agree in the final conclusion arrived at by my learned brethren that the sons can obtain a declaration avoiding the mortgage if the mortgagee fails in establishing legal necessity for the advance, even though the sons themselves fail to show that the debt was tainted with immorality. My reasons, however, are slightly different.

3. I agree that the case of *Brij Narain v. Mangal Prasad*[1] must be taken to summarize all the propositions which follow as a result of the previous authorities, and should be deemed to include all the observations made in the case of *Sahu Ram Chandra v. Bhup Singh*[2] which were supported by authority. It is clear from the remark at pp. *102-3 in Brij Narain's case* [3] that the Sahu Ram Chandra's case *A.I.R. 1917 P.C. 61(SUPRA)* must not be taken to decide more than what was necessary for the judgment.

4. In this view it is unnecessary for me to examine the passage in the case of *Sahu Ram Chandra*[4] relied upon by the learned advocate for the defendant with reference to its context. The present case must be governed by one or other of the five propositions laid down in Brij Narain's case *A.I.R. 1924 P.C. 50(SUPRA)*.

5. Inasmuch as the present suit was instituted before the auction sale could take place, I agree that the case is not governed by proposition No. 2 and, therefore, falls under proposition No. 3. But I have great difficulty in holding that the word "debt" used in proposition, No. 2 means "simple money debt" or "debt other than a mortgage debt."

6. In the first place Brij Narain's case *A.I.R. 1924 P.C. 50(SUPRA)* was one in which a mortgage decree had actually been obtained by the mortgagee. The debt which their Lordships had to consider was a mortgage debt. One would therefore expect that where ever there was a clear distinction between the rule governing a "mortgage debt" as distinct from a "simple money debt," their Lordships would be specific in making their meaning clear. Throughout the judgment at several places their Lordships describe a "mortgage debt" as a "debt." While referring to Sahu Ram Chandra's case *A.I.R. 1917 P.C. 61(SUPRA)* which was one of a mortgage debt their Lordships repeatedly call it a "debt." While explaining what was meant by an antecedent debt, their Lordships draw no distinction between a "mortgage debt" and a "simple money debt." Can it for a moment be suggested that a "mortgage debt" is not a "debt" or that the word "debt" by itself is not comprehensive enough to include a "mortgage debt?"

7. Their Lordships also relied on the authority in the case of Bhagbut Prasad Singh v. Girja Koer [1888] 15 Cal. 717. That-also-was a case of a mortgage debt, and their Lordships referred to the loan as a "debt." I think it unnecessary to quote more passages from the judgment, for I am convinced that throughout the judgment their Lordships used the word "debt" as comprehensive enough to include both a "mortgage debt" and "simple money debt." I, therefore, see no justification for introducing the words "other than a mortgage debt" after the word debt in proposition No. 2 in order to give it a meaning.

8. It cannot be denied for a moment that the same word " debt," when used in propositions Nos. 3 and 4 includes a "mortgage debt." Although therefore I find it very difficult to give a narrow and limited meaning to the word "debt" in proposition No. 2, I hold that proposition in not applicable to the present case, because no auction sale has taken place yet.

9. I am inclined to interpret the expression "lay the estate open to be taken in execution proceedings upon a decree for payment of the debt" as the equivalent of "make it liable to be sold at auction in execution of the decree," which to my mind means that as soon as the property has been sold at auction, the transaction cannot be impeached without showing immorality. The clause does not necessarily mean that after the decree and before the sale the sons cannot, by obtaining a declaratory decree in a separate suit, say that the transaction is not binding on them, and thus prevent the sale. That the expression does not mean that the passing of the decree itself prevents the sons from challenging the debt, will be obvious if we apply proposition No. 2 to the case of a simple money debt. Surely the debt creates no charge on the estate. The decree on the foot of such a simple money debt also creates no lien or charge upon the estate. So long as the property has not been attached in execution of such a simple money decree, the family is at liberty to transfer it so as to place it out of the reach of the creditor. The decree by itself has no special efficacy. The position of the creditor remains the same as it was when the loan was contracted, or when the suit was instituted. The liability of the estate to pay off this debt is also not altered materially by the passing of a simple money decree. Such being the case it cannot be

said that the mere passing of the decree lays the estate open to be seized by the decree-holder in the literal sense. The expression quoted by me above is a paraphrase of another expression used by their Lordships at p. 101: "It may become liable by being taken in execution on the back of a decree obtained against the father," which means that estate can be purchased in execution of such a decree.

10. It may be that the logical result of such an interpretation is that the right to impeach an auction sale on the ground of want of legal necessity is taken away even if the sale takes place in execution of a mortgage decree, but such a result is not necessarily startling. It is in accordance with at least two previous cases decided by their Lordships of the Privy Council: *Suraj Bunsi Koer v. Sheo Prasad Singh*[5] and *Bhagbut Prasad Singh v. Girja Koer*[6] Both were auction sales in execution of mortgage decrees. The judgments in both of these cases show that their Lordships did not draw any distinction between an auction purchase in execution of a simple money decree and that in execution of a mortgage decree. Several previous cases dealing with auction sales in execution of simple money' decrees were referred to and applied to the case before their Lordships. There would have been no necessity to refer to them if they were inapplicable. Without drawing any distinction their Lordships laid down the general proposition that after sales in execution of a decree for the father's debt, the sons cannot recover the property without showing immorality or illegality to the knowledge of the purchasers.

11. No doubt the original basis of the doctrine appears to have been the protection of third parties, but in view of a series of pronouncements of the Privy Council, it may now have become settled that after an auction sale the son can impeach the transfer only on the ground of immorality.

12. Even in cases of simple money decrees innocent strangers need not necessarily come in, for the creditor himself, who may have known that there was no legal necessity for his debt, may purchase the property himself, but the rule will still apply. On the other hand the mere fact that a mortgagee decree-holder has himself purchased the property does not necessarily show that he is not a bona fide purchaser. He may be an heir of the original mortgagee, he may be an alienee of the mortgagee rights or he may have acquired the mortgagee rights at an auction sale, and in such cases he may have no knowledge whatsoever that the mortgage transaction was defective, or that it was going to be attacked by the sons. At the time, when he makes the auction purchase, he may be acting innocently, and may honestly take it for granted that the decree is good and binding on the whole family.

13. When authorities have laid down a rule, it is not always necessary to try to discover the original basis of it. If one were asked to give an explanation why an auction sale in execution of a mortgage decree should prevent the sons from challenging it except for immorality, one can certainly find a reason for it. Once a decree has been obtained or for the matter of that a debt exists, unless it is immoral the father can voluntarily sell the family property in payment of such

debt and the sons cannot dispute such a sale without showing immorality or illegality. What can be done voluntarily by the father himself may also be done compulsorily by the Court. If the father can satisfy his own previous debt by alienating such property, why cannot a Court of law order his property to be sold in satisfaction of such debt? After all an auction sale is merely an involuntary transfer of property in satisfaction of his debt and the principle which governs a voluntary transfer to pay off such debt, may equally be applicable to an involuntary transfer in payment of the same debt brought about through a Court sale.

14. In the present case only a decree has been passed on the basis of the mortgage debt. The decree is a necessary result of the execution of the mortgage. When the sons were not impleaded in the suit, the mortgagor himself could not plead that he had no authority to make the mortgage. The mere fact that a decree has been obtained behind the back of the sons, has not improved the position of the mortgagee. The auction sale has not yet taken place. The property has, therefore, not yet passed out of the family. It is still in the possession of the family.
15. In these circumstances my answer to the question referred is that the sons need not prove the immoral character of the debt if the mortgagee fails to establish legal necessity for the loan.

Mukerji, J.

16. This appeal which has been referred for disposal to a Bench of three Judges arises out of the following facts. The plaintiffs, who are the appellants before this Court, are the sons of defendant 2 Chandra Kishore. Chandra Kishore executed two simple mortgages over a part of what now must be taken to have been joint ancestral property belonging to himself and his sons, the plaintiffs, in favour of defendant 1 Hoshyar Singh. Hoshyar Singh obtained a decree for sale on foot of the two mortgages. Thereupon, the plaintiffs instituted the suit out of which this appeal has arisen to obtain a declaration that the property mortgaged being joint Hindu family property, is not liable to be sold in satisfaction of the decree No. 44 of 1922 passed by the Court of the Subordinate Judge of Muzaffarnagar in favour of Hoshyar Singh and against Chandra., Kishore. It will appear from the foregoing statement of facts that the plaintiffs were no parties to the decree.

17. The plaintiffs in support of their case alleged that their father Chandra Kishore contracted the debts for immoral purposes. The defendant pleaded, among other matters, that the mortgages had been executed for legal necessity.

18. The Court of first instance found that while the plaintiffs had failed to prove that the mortgages were tainted with immorality, Hoshyar Singh, in his turn, had failed to prove that the mortgages were executed for family necessity. Being of opinion, in view of an Oudh case Gauri Shankar v. Jang Bahadur Singh A.I.R. 1924 Oudh 391 that the plaintiffs could not succeed in their suit for a declaration, without proving that the mortgages were tainted with immorality, the learned Judge dismissed the suit. On appeal by the plaintiffs, the learned Judge affirmed the

finding of fact arrived at by the learned Subordinate Judge that the plaintiffs had failed to prove that the mortgages were raised for immoral purposes. It appears from the judgment that Hoshyar Singh did not try to support the decree in his favour, in the lower appellate Court, by showing on the evidence that the mortgages were supported by legal necessity. The learned Judge accepting what he thought was a necessary corrollary of a certain case decided in this Court and reported in Gajadhar Pande v. Jadubir Pande A.I.R. 1925 All. 180 agreed with the learned Subordinate Judge that the plaintiffs could succeed only on proving their allegation as to the father's immorality with reference to the mortgages in question. He accordingly dismissed the appeal.

19. The case relied on by the District Judge will also be found reported in I.L.R. 47 All. 122 A.I.R. 1925 All. 180. The point that had to be decided in that case was slightly different, though a corrollary may certainly be drawn from that decision, in support of the learned District Judge's view. The case aforesaid was one in which the property had already been passed out of the family in execution of the mortgage decree and had been purchased by the mortgagee himself and sold by him to a third party. A Bench of this Court, of which I was a member, held that the case was governed by the second proposition, out of the five, laid down by their Lordships of the Privy Council in the case of Raja Raja Brij Narain Rai v. Mangal Prasad

20. Since the decision of that case, the case of Brij Narain Rai has been considered in this Court and it was further considered in the arguments before us in this very case. Having regard to all the arguments addressed to us I fear that the opinion previously expressed by me in the case in *Gajadhar Pande v. Jadubir Pande*[7] must be treated by me as erroneous. Their Lordships of the Privy Council took an opportunity in the case of Raja Brij Narain to overrule, except on the point directly decided, a previous decision of the Board, viz., Sahu Ram Chandra's case *A.I.R. 1917 P.C. 61(SUPRA)*, and laid down five propositions of Hindu law for the guidance of the Courts. As remarked by their Lordships of the Privy Council in a much earlier case [*Nanomi Babuasin v. Madan Mohan*[8],] the cases relating to the liability of sons for their father's debts contracted with or without the security of the family property, decided both in India and by the Board, could not all be very well reconciled. Their Lordships found that some of the observations made in the case of Sahu Ram Chandra *A.I.R. 1917 P.C. 61(SUPRA)* could not command their Lordship is approval. Their Lordships, therefore, we may take it, were anxious to lay down the five propositions of law with the idea that those propositions would be taken as the final statement of law on the subject and as no longer open to discussion. The Board which heard Raja Brij Narain's case *A.I.R. 1924 P.C. 50(SUPRA)* was described by their Lordships themselves as a "Full Board." I am therefore of opinion that we should not go to any earlier decisions in order to find out what is the law governing the relations of sons, fathers and creditors, so far at least as these propositions are found governing a case. For example their Lordships did not say anything about the rights of an auction-purchaser at a Court sale and his rights will have to be found from earlier decisions, unless we have some guide in the five propositions applicable to the particular case that may arise for decision.

21. The actual facts that were before their Lordships, in Raja Brij Narain's case, were these: A father of a joint Hindu family borrowed money in order to pay off two earlier mortgages executed by himself. When the loan was not repaid, the creditor sued the father and his sons and obtained an ex-parte decree. The sons were not properly represented in the suit. They then brought the suit, which went up in appeal before their Lordships of the Privy Council, to obtain a declaration that the decree passed against the father and themselves was not binding on them. The suit succeeded in the Court of first instance and it also succeeded in this Court. In this Court an enquiry was ordered as to whether the two previous mortgages paid off would support the subsequent mortgage in favour of the principal defendant, the creditor, having regard to the observations of their Lordships of the Privy Council in Sahu Ram Chandra's case *A.I.R. 1917 P.C. 61(SUPRA)*, namely, an antecedent debt to be good, must have been incurred wholly independently of the family property. As the findings were against the creditor the appeal was dismissed. Then the matter went before their Lordships of the Privy Council. Their Lordships mentioned, in the course of the judgment, that there were two conflicting principles of Hindu law. One was that a father, as a member of the joint Hindu family could not alienate and therefore mortgage the joint Hindu family property, without legal necessity. The other proposition of law was that it was the pious duty of a son to pay his father's debt and that the whole of the joint family property could be taken in execution by a creditor in order to realize the father's debt. Their Lordships, at p. 102 of the report remarked: (46 All.) It is probably bootless to speculate as to how these seemingly conflicting principles were allowed to develop.... 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 mortgage 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 held 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.

22. Having made these remarks, their Lordships further remarked that there were some observations in Sahu Rain Chandra's case which were not necessary for their Lordships to make and with which, the learned Judges of the Full Board thought their Lordships could not agree. Then their Lordships proceeded to lay down the five propositions of law to be found at p. 104 of the report. (46 All.)

23. In the light of what preceded the laying down of these propositions, I proceed to examine them. The first proposition is:The managing coparcener of a joint undivided estate cannot alienate or burden the estate qua manager except for purposes of necessity.

24. It will be noticed that their Lordships used the expression "burden the estate" in the sense of mortgaging the estate. They have used the same expression in the last sentence of the long quotation made by me from p. 102 above. By the first proposition, therefore, their Lordships

meant that a manager, which term will include a father with sons, has no power either to make a sale or gift of property or of even mortgaging the same for raising a loan, except for purposes of necessity. It would follow from this that if the father raised a loan on the security of the family property, that security could not be enforced against the family estate.

25. The third proposition is as follows:

26. (I am leaving for the present out of consideration the second proposition which is the important one in the present case.)

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.

27. Here again, their Lordships make it clear that by the use of the expression "burden the estate," their Lordships meant a mortgage and never had a simple money debt in their mind. The rule laid down is that if the manager of the family estate happens to be the father and there is no family necessity, the case of which has been provided by proposition No. 1, the mortgage to be enforceable must be a mortgage which was raised to discharge an antecedent debt. Here again, their Lordships make it clear that a case of a mortgage can be supported by the creditor on two grounds; one is, generally, that the manager can encumber the estate by way of mortgage, for the purpose of necessity, secondly the manager being a father, paid, with the money raised, his own or an ancestor's existing debts.

28. The fourth proposition concerns itself with the definition and explanation of an antecedent debt and we need not consider it.
29. The fifth proposition is also not important for our purposes except in so far as it will help us to understand the right meaning of proposition No. 2. I shall have to consider the language of the fifth proposition after I have discussed the proposition'2.

30. Proposition No. 2 runs as follows:No. 2. If he(the manager) 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.

31. The question is whether the debt which is mentioned in this proposition No. 2 also includes a mortgage debt. Their Lordships lay down by this proposition No 2 that in the case of the manager of the family being the father and the rest of the members being his sons, the father, if be incurs a debt which is not tainted with immorality incurs the risk of the creditor recovering the debt from the entire estate by way of execution of a decree obtained on foot of the debt. As I have said above, the question is whether the word "debt" is proposition 2 includes a mortgage debt. If their Lordships were dealing with a mortgage debt it was not necessary for them to deal with it in propositions 1 and 3. I will refer to the quotation made by me from the observations of

their Lordships at p. 102. Their Lordships give the illustration of the same father borrowing equal sums of money from two different persons. To one he gave a mortgage over the family property and to the other he gave a simple acknowledgment or a simple money bond. Their Lordships point out that while the secured creditor is unable, under the Hindu law, to recover his money by the process of law the unsecured creditor has the advantage of realizing his money from the entire estate. In my opinion, in proposition No. 2, their Lordships were dealing with the case of an unsecured creditor and were not contemplating the case of a secured creditor. It is, therefore, not right to say that as soon as a mortgagee obtains his decree against the father, he comes within proposition No. 2 and is entitled to sell the mortgaged portion of the family property (or the entire family property if the whole has been mortgaged) because it is the pious duty of the son to pay. The fact that their Lordships by using the expression "by incurring debt" in proposition No. 2 were referring merely to a simple unsecured debt, will be clear from an examination of the language of proposition No. 5. Proposition No. 5 runs as follows:

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.

32. In this proposition No. 5 their Lordships used the expression "contracted the debt" and "burdens the estate." Evidently the contracting of a debt was not meant to imply the same thing as the burdening of the estate. By the words "who contracted the debt" their Lordships meant, who incurred a debt without the security of the family property. By the expression, "who burdens the estate" their Lordships meant a father who created a mortgage over the estate. I am satisfied, therefore, that proposition No. 2 applies to the case of an unsecured debt of the father and not to a secured debt.

33. The controversy in the appeal before us is this. It is urged on behalf of the creditor respondent Hoshyar Singh that because he has obtained a mortgage decree, he can proceed to sell the property outright and the sons, the plaintiffs' cannot stop him from selling the property unless and until they can prove that the mortgage was contracted for immoral purposes. He argues that on the findings of the Court below, namely the debt was not tainted with immorality, he, Hoshyar Singh, ought to succeed. For the sons it is argued that proposition No. 2 has no application, that propositions 1 and 3 alone apply to the case of the creditor and that as there is no legal necessity and as the mortgage money did not go to pay off any antecedent debt, the mortgage is bad and is unenforceable. To my mind, propositions 1 and 3 are applicable to this case and proposition No. 2 does not apply to the case.

34. In the result I would allow the appeal, set aside the decrees of the Courts below and grant a declaration to the plaintiffs against the defendant Hoshyar Singh, that the property mortgaged is not liable to be sold in execution of the decree obtained by him.

Boys, J.

35. Chandkishore, the father in a joint Hindu family consisting of himself and four sons, executed two mortgages, on 31st March 1919 and 8th June 1919 in favor of Hoshyar Khan, both mortgages being for cash paid before the Registrar; and in both mortgages alleging that the property belonged to him personally and making no suggestion that he was mortgaging the property as property of the joint family and in a representative capacity.

36. Therefore, admittedly no question arises as to there being any antecedent debt which might validate the mortgage as of joint family property, and no question arises of the father having purported to act in a representative capacity.

37. Suit No. 44 of 1922 was brought by the mortgagee Hoshiyar against Chandkishore, the father, without impleading the sons.

38. In May 1922 the mortgagee got a decree and 20th November 1924 was eventually fixed for sale.

39. In the meantime one day before the date fixed for sale, on 19th November 1924, the present suit, No. 307 of 1924, was filed by the sons against the mortgagee and their father. In their plaint the sons pleaded:

(1) That there was no legal necessity:
(2) that their father Chandkishore was of immoral habits; and (3) that the property was joint family and ancestral property. The defendants pleaded:
(1) Legal necessity;
(2) that the father Chandkishore was not of immoral habits; and (3) that the property was the personal property of Chandkishore.

40. As to the third plea, however, they eventually admitted that the property was of the joint family and ancestral.

41. On 7th March 1925 an issue was framed as to legal necessity.

42. On 8th May 1925 the trial Court acceding to the contention of the defendant held that it had been wrong in framing this issue and changed it to an issue "Whether Chandkishore's immoral character had been proved"? throwing the burden on the plaintiff.

43. The trial Court held that the plaintiff had failed to prove immorality, and a phrase in its judgment (p. 10, line 38) rather suggests that it was of opinion also that there was no legal necessity; but finding that the plaintiffs had failed to discharge the onus which lay on them of proving that the debts were immoral dismissed the suit. It held that if the creditor had been suing

for the enforcement of his mortgage against minor sons he could not have got a decree unless he proved legal necessity; but that after a decree against the father had been passed the debt no longer remained a mortgage, debt, but it became a judgment debt which, like any other debt, the sons were bound to pay, unless (semble) they could prove the immorality. It relied on Gauri Shankar v. Jangbahadur A.I.R. 1924 Oudh 391.

44. The lower appellate Court agreed with the trial Court that the sons had failed to prove the immoral character of their father though he had shamelessly endeavoured to support his sons case by swearing to his own immorality. It held that the burden of proof had been rightly laid on the sons to prove the immorality or unlawfulness of the origin of the debt; and referred to *Gajadhar v. Jadubir*[9] and remarked that there could be no further doubt on this point after the latest Privy Council decision, by which reference no doubt was meant the case of *Brijnarain v. Mangal Prasad*[10]

45. The case came in second appeal before a Division Bench of this Court by which it has been referred to the Full Bench.

46. Their Lordships of the Division Bench after remarking that it should be noted that the property is still in possession of the family and has not passed out of it, said:The important question which we are called upon to decide is whether the sons must prove the immoral character of the debt only in a case in which the property has passed out of the family or whether it is equally incumbent upon them to do so where a decree for sale has been passed but the property is still in possession of the family.

47. They referred to the case Lal Singh v. Jagraj Singh A.I.R. 1928 All. 86 in which two learned. Judges of this Court differed, one holding that it is only when property has passed out of the family that the sons, must prove the immoral origin of the debt; the other agreeing with the view consistently taken in the Oudh Court of *Nand Lal v. Umrai*[11] that as soon as a decree has been passed the burden lies on the sons to prove the immoral origin of the debt.

48. Before attempting an answer to the questionn put to us I will consider in some detail the cases *Sahu Ramchandra v. Bhup Singh*[12] and Brij Narain v. Mangal Prasad *A.I.R. 1924 P.C. 50(SUPRA)*. My apology for making a lengthy reference to and comparison of two such well-known cases must rest on the necessity for an exact appreciation of what was laid down in these two cases and of the extent to which any proposition to be found in the former, whether necessary for the decision or as obiter dictum holds good in view of the pronouncements in the matter.
49. In Sahu Ram Chandra's case a ather, Bhup Singh, who was joint with his sons and grandsons, executed three mortgages, all covering the same property, which included some of his own property and some belonging to the joint family.

50. Of the first of these mortgages nothing further is heard. The second mortgage was of date 6th January 1883, in favour of Bhagirath for Rs. 200 "to meet his necessity." The third mortgage was of 7th January 1884. in favour of Sahu Ram Chandra. Sahu Ram Chandra sued on his mortgage and got a decree subject to the incumbrance in favour of Bhagirath. He paid off Bhagirath and so acquired his rights, and at the ensuing sale he himself purchased.

51. On 27th July 1910 by which time the debt to Bhagirath as a simple debt was long ago barred, Sahu Ramchandra sued on the mortgage in favour of Bhagirath making the father Bhup Singh, his sons and grandsons and certain transferees parties. Both Courts dismissed the suit holding that the plaintiff had failed to prove legal necessity, relying on *Chandra Deo v. Mata Prasad*[13]

52. Their Lordships of the Privy Council examined the general Jaw and stated it as follows: After stating the general principle that joint family property cannot be the subject of a gift, sale or mortgage by one coparcener except with the consent, express or implied, of all the other coparceners (p. 442) and treating the doctrine of legal necessity as really a part of that principle (p. 443), they next stated "the only exception" to that general principle as being "antecedent debt" (p. 444).

53. It will be noted that they described the doctrine of antecedent debt as being an exception of the general principle and not as being part of the doctrine of "pious obligations" to which, however, they make a passing reference before dealing with the exception.

54. They describe the doctrine of antecedent debt as having had its birth in the necessity of protecting the right of third persons e.g., purchasers for consideration in good faith (p. 445). They note that the doctrine of the protection of the rights of third parties applies where and only where the property has passed out of the family (p. 446). They next make in regard to antecedent debt the qualification that the debt must have been 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 (p. 447) and point out that a debt does not become an antecedent debt merely because the joint family property was pledged to raise money to discharge it (p. 448). (I shall not take that this is the only proposition in this case which was accepted in Brij Narain's case). Lastly it is to be noted that they hold that the pious obligation to discharge the father's debt only comes into existence after the father's death (p. 44).

55. Now let us examine their Lordship's pronouncements in *Brij Narain v. Mangal Prasad*[14] Sitaram, having two minor sons constituting with him a joint family, made three mortgages of the same joint family property.

56. The first and the second mortgages were made in 1905 and 1907 respectively in favour of mortgagees other than Raja Brij Narain Rai and Jagdish Narain Rai, the mortgagees in the third mortgage. The third mortgage was of date 4th March 1908, for Rs. 11,000 in favour of Raja Brij

Narain Rai and Jagdish Narain Rai, the latter of whom subsequently transferred his rights to the former. This third mortgage was for the purpose of obtaining money to pay off the two earlier mortgages.

57. In 1912 Raja Brij Narain Rai obtained an ex-parte decree on his mortgage. The present suit was brought on 19th November 1913, by the sons against their father and Raja Brij Narain Rai for a declaration that as against them: (a) the mortgage was not binding, and (b) the decree void. As a result of the proceedings in the trial Court and the High Court it was eventually found that: (a) the property was joint ancestral property (b) that the whole Rs. 11,000 had been used to pay off the two earlier mortgages; (c) that the plaintiffs were not properly represented in the first suit; (d) that on the evidence it was not possible to determine the necessity for which determination was indicated by the decision in Sahu Ramachandra's case, whether the first two mortgages had been incurred to discharge obligations not only previously incurred, but incurred irrespective of the joint family property, and that it was not therefore possible to hold it established that the two first mortgages constituted such antecedent debt as would support the third mortgage in suit.

58. The trial Court had dismissed the suit and the appeal was dismissed. Brij Narain appealed to the Privy Council. Before the Board it was argued for the mortgagee-appellants that though they must admit that the respondent sons were not bound by the ex-parte decree as they had not been properly represented, the appellants-mortgagees were entitled to a declaration that the property was bound and liable to execution (p. 99).

59. The appeal was heard by a Full Board, expressly in view of the conflicting decisions in the Allahabad and Madras Courts and expressly with the view of reconsidering the case of Sahu Ramachandra.

60. Their Lordships, after saying that it could not be denied that the law was illogical and in the absence of binding authority could not be accepted (p. 101), stated the general principle as being that a manager can ordinarily only bind the joint family property for legal necessity (p. 101).

61. They then referred to the doctrine of the pious obligation on the sons to discharge their father's debts, if not immoral, as a concurrent doctrine (pp. 101-102). They stated that a son's interest in the joint family property may become liable:

(a) in execution of a decree against the father (p. 101);

(b) by being mortgaged by the father to pay the debt for which otherwise decree might be taken and execution be sought (p. 101).

62. They say:

The term "antecedent" debt represents a more or less desperate attempt to reconcile the conflicting principles (i.e. the general principle and the doctrine of pious duty) p. 102.

63. They refer to the anomaly that where a father takes a like sum from A and B, and where he gives to A a mortgage of the joint family property with a personal covenant, A cannot ordinarily recover on his mortgage, while, where he gives to B a simple acknowledgment, B can recover against the joint family property (p. 102).

64. They describe the doctrine of antecedent debt as seemingly having been invented to help A (if the debt for which the mortgage was given was in any proper sense antecedent) to escape being defeated by the plea that the general principle was being infringed (p. 102).

65. This leaves of course the simple case of a mortgage unsupported by antecedent debt to be covered by the general principle.

66. As to Sahu Ramaohandra's case they say that it 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 no antecedency either in time or in fact (P 102),

67. (i.e. they repudiate the idea that there was any necessity for the antecedent debt to have been incurred independently of the security of the joint family property).

68. They dissent from the proposition in Sahu Ramachandra's case *A.I.R. 1917 P.C. 61(SUPRA)* that the pious obligation on the sons only arises after the death of the father (p. 103).

69. They next state the well-known five propositions "as the result of these authorities" with which their judgment concludes.

70. Applying those propositions to the case before them they held that there was an antecedent debt, allowed the appeal and gave Raja Brij Narain a declaration that his mortgage affected the estate which might be brought to sale.

71. Contrasting these two judgments the following points may be noted:

72. Sahu Ramchandra's case *A.I.R. 1917 P.C. 61(SUPRA)*(Supra), after stating the general principle describes the doctrine of antecedent debt as constituting an exception to that general principle and only mentions the doctrine of the pious obligation on the sons incidentally.
In Brij Narain's case *A.I.R. 1924 P.C. 50(SUPRA)* the doctrine of the pious obligations on the sons is specifically described as principle concurrent with the general principle, and the doctrine of antecedent debt is described as a part of the doctrine of pious obligation.

73. Again Sahu Ramchandra's case *A.I.R. 1917 P.C. 61(SUPRA)*(Supra) speaks of the doctrine of antecedent debt as having "arisen from the necessity of protecting the rights of third persons" and

again as having been invoked for the protection of third parties, whose right in or with regard to it have been acquired in good faith (top and bottom of p. 445)

74. On the other hand in Brij Narain's case the doctrine of antecedent debt is described as "a-more or less desperate attempt to reconcile the conflicting principles" (i.e. the general principle and the principle of pious obligation: p. 102).
75. In Brij Narain's case *A.I.R. 1924 P.C. 50(SUPRA)*(Supra) the proposition propounded in Sahu Ramchandra's case *A.I.R. 1917 P.C. 61(SUPRA)*, that an antecedent debt to be effective must have been incurred independently of the joint family property, was repudiated.

76. In Brij Narain's case *A.I.R. 1924 P.C. 50(SUPRA)*(Supra) the proposition propounded in Sahu Ramchandra's case *A.I.R. 1917 P.C. 61(SUPRA)* that the pious obligation on the sons only arises after the father's death was repudiated.

77. Finally in Brij Narain's case their Lordships said that Sahu Ramchandra's case 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 no antecedency either in time or fact.

78. In view of all the foregoing I think we are bound to treat anything that was stated in Sahu Ramchandra's case as no longer of weight, except the decision that the debt created by the mortgage itself is not an antecedent debt.

79. The present case before us must then be decided in the light of their Lordships' latest pronouncement in Brij Narain's case *A.I.R. 1924 P.C. 50(SUPRA)*(Supra) unaffected by what may have been said or suggested in Sahu Ramchandra's case.

80. The first question that arises for determination is whether a mortgage debt comes within the second proposition stated by their Lordships. I am of opinion that it does not. In the first place we have in the second proposition the use of the word "debt" and in the third proposition the use of the phrase "burdens the estate by mortgage." Here we have a contrast immediately suggesting a distinction between simple debt and debt secured by mortgage. The distinction between these two phrases if further indicated by the use of the phrase in the fifth proposition "contracted the debt or burdens the estate,"

81. But there is I think another and conclusive consideration. One might naturally expect to find that the five propositions laid down at p. 104 would appear somewhere as having been discussed in the course of the judgment, and examination of that discussion may throw further light, if further light be necessary, on this question. The first proposition is referred to in the middle of p. 101. It deals merely with the general principle. On the same page they refer to the principle of pious obligation and refer to the two characteristics of the principle where they say that the

family estate 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.

82. In speaking of these two consequences their Lordships clearly seem to be contrasting simple debt and mortgage debt, otherwise the phrase would have no meaning, and those two consequences respectively clearly seem to correspond to the second and third propositions. This is made still more clear in the illustration which they give at p. 102, where they speak of the mortgagee giving to B a simple acknowledgment of loan and giving to A mortgage. Here again these two illustrations of the action of the father seem clearly to correspond to the second and third propositions. I have no hesitation then in holding that the present case which is a case of a mortgage does not come within the second proposition.

83. Does it then come within the third proposition? It clearly does. There is a mortgage debt and admittedly the mortgages were not entered into for the purpose of discharging any antecedent debt. The mortgages did not therefore bind the estate and no question of any burden on the plaintiffs to prove immorality arises. It is a simple case of a mortgage by the father manager of joint family property in which, there being no antecedent debt, no question of the operation of the doctrine of pious obligation arises. It comes within the general principle that the mortgage is not binding unless the mortgagee is able to prove legal a necessity.

84. In the present case no legal necessity has been established. The plea was taken by the plaintiffs that there was no legal necessity: the defendant contended that there was. The trial Court originally took a correct view of the case and framed an issue as to legal necessity and evidence was recorded on that issue (p. 10, line 15 of the paper-book). The trial Court did not actually decide the issue of legal necessity, but it is clear that the mortgagee defendant himself abandoned his plea, for the trial Court remarks:At the time of argument it was pointed out to me that the fact that the mortgages had merged into a decree had made a great difference and now the plaintiffs cannot succeed unless they can show that the debts were immoral.

85. The defendants clearly then abandoned the plea of legal necessity and endeavoured to throw the burden of proving immorality on to the plaintiffs. It is not surprising that they took at the last moment this desperate step for the trial Court later at the bottom of the same page at line 39 remarked:The evidence of the plaintiffs in proof of the immorality of debts is as bad as that of the defendants in proof of legal necessity.

86. It is true that neither the trial Court nor the lower appellate Court expressly found on the question of legal necessity, but in the view that I take that the defendant abandoned the plea of legal necessity in the trial Court it would be too late for him to endeavour to set it up here or to ask for a remand of the case for the trial of that issue.

87. I need only briefly mention the contention that the plaintiffs' suit was barred by the fact that (though admittedly the property had not passed out of the family) the mortgagee had obtained a decree. We are only asked to hold this on the strength of a current of decisions in the Oudh Court and the view of one Judge of this Court reported in *Lal Singh v. Jagraj Singh*[15] in which view the other member of the Division Bench did not concur. Walsh, J., in holding that the fact that a decree had been obtained on the mortgage threw on the son the burden of proving immorality was very largely influenced by the passage which he

Quotes

at p. 232 of the report (26 A.L.J.) from the judgment of their Lordships in Sahu Ramchandra's case *A.I.R. 1917 P.C. 61(SUPRA)*(Supra) quoted at the top of p. 446 in 39 All. Walsh, J. refers to the fact that if their Lordships who decided Brij Narain's case did not consider that passage to be good law it is strange that although they expressly repudiated another proposition in Sahu Ramchandra's case *A.I.R. 1917 P.C. 61(SUPRA)* they did not repudiate this or refer to it, and that their silence suggests that it met with their approval. I have already given above in extenso my reasons for holding that nothing in Sahu Ramchandra's case *A.I.R. 1917 P.C. 61(SUPRA)* can be taken to be of any weight since the pronouncement in Brij Narain's case *A.I.R. 1924 P.C. 50(SUPRA)*, with the exception of the one point decided which their Lordships in Brij Narain's case *A.I.R. 1924 P.C. 50(SUPRA)* expressly stated. I should not, therefore, be inclined, in any case, to feel that I was bound by the particular proposition quoted from Sahu Ramchandra's case *A.I.R. 1917 P.C. 61(SUPRA)*. Still less do I feel influenced by the passage in question upon a consideration of the particular passage and the connexion in which it found expression. Their Lordships, as appears from the top of p. 445 and again from the bottom of p. 445 (in 39 All.) were only referring to the rights of third parties for the purpose of indicating those rights, as being the source from which the doctrine of antecedent debt had its origin. I have noted that proposition itself was not accepted by their Lordships in Brij Narain's case *A.I.R. 1924 P.C. 50(SUPRA)*. Further, the conclusion which their Lordships in Sahu Ramchandra's case *A.I.R. 1917 P.C. 61(SUPRA)* at the top of p. 416 (of 39 All.) draw from "a perusal of the numerous authorities" is purely a general conclusion, and merely generally illustrating that there are cases where the rights of third parties have to be given effect to.

88. They were not considering whether in order to give those rights of third parties effect the property must have passed out of the family or not. There is no suggestion that there was present in their mind the idea that a decree might have the same effect as a sale. On the contrary in the passage which they subsequently quote from two authorities, there is the express idea evidenced in the passages quoted that the property must have "passed out of" the joint family. In the present case it is manifest that the property had not passed out of the joint family. I am not in this case concerned to consider what would be the consequences of a sale in pursuance of the execution proceedings or a voluntary sale by the father to satisfy the decree. I would allow the appeal and decree the plaintiff's suit with costs.

Cases Referred.

1A.I.R. 1924 P.C. 50
2A.I.R. 1917 P.C. 61
3A.I.R. 1924 P.C. 50
4A.I.R. 1917 P.C. 61
5[1880] 5 Cal. 148
6[1888] 15 Cal. 717
7A.I.R. 1925 All. 180
8[1886] 13 Cal. 21
9A.I.R. 1925 All. 180
10A.I.R. 1924 P.C. 50
11A.I.R. 1926 Oudh 321
12A.I.R. 1917 P.C. 61
13[1909] 31 All. 176
14A.I.R. 1924 P.C. 50
15A.I.R. 1928 All. 86