

BOMBAY HIGH COURT

Bharmappa Murdeppa Soppin

Vs

Hanmantappa Tippanna Belludi

(John Beaumont, Kt., C.J. Weston, J.)

28.01.1943

JUDGMENT

John Beaumont, Kt., C.J.

1. This is a second appeal against a decision in first appeal of the Assistant Judge of Dharwar, and it raises a question on which there seems to be a difference of opinion between the Allahabad High Court and the Lahore High Court on one of the propositions laid down by the Privy Council in *Brij Narain v. Mangla Prasad*¹

2. The facts are that in 1922 defendant No. 2, the father of the plaintiffs, mortgaged certain family property to defendant No. 1, and on November 7, 1927, there was an award decree for the amount due under the mortgage. The award decree is not a very artistic document. It finds the amount due, and holds that the defendant should pay the amount in seven instalments, and in default of payment of any instalment the plaintiff is to recover the amount of the instalment in default by getting a sufficient portion of the mortgaged property sold, and then it goes on : "In this way if the entire amount is not satisfied the plaintiff to recover from the defendant personally." So that, as I read it, the only personal decree against the mortgagor is for so much as may remain due after the sale of portions of the property to discharge the various instalments; and, as the decree has not been carried out according to its terms, the amount of that personal liability is at present unascertained. In 1934 an application was made to sell the mortgaged property in discharge of the mortgage debt, and the plaintiffs instituted this suit to restrain defendant No. 1 from executing his decree against the share of the plaintiffs in the mortgaged property on the ground that the award decree was not binding on them, since the mortgage on which it was founded was not made for legal necessity. The trial Court held that the plaintiffs were bound to pay the debt, whether incurred for necessity or not, under the pious obligation of a Hindu son to pay his father's debt not incurred for immoral purposes, but in appeal the learned Assistant Judge reversed that decree holding that the mortgage was not for necessity, and that plaintiff No. 1 was entitled to a declaration that his share in the suit property was not affected by

the mortgage decree and an injunction restraining the mortgagee from selling the plaintiff's interest in execution.

3. The two propositions of Hindu law, that a manager can only sell the family property for necessity, but, on the other hand, that a Hindu son is liable under the pious obligation to pay his father's debt and to have his share in the family estate sold for the purpose, were discussed by the Privy Council in *Brij Narain v. Mangla Prasad* (supra). Their Lordships pointed out that it was difficult to reconcile those propositions where the family consisted A. of father and sons, but, having regard to the number of authorities on the question, their Lordships considered it too late to challenge certain propositions of Hindu law, and they proceeded at the end of their judgment to lay down five propositions of Hindu law dealing with this subject, the first three of which are material for the purposes of this case, The first is that the managing member of a joint undivided estate can only alienate or burden the estate qua manager for purposes of necessity, and the third proposition is that if he purports to burden the estate by a mortgage, then unless the mortgage is to discharge an antecedent debt, it would not bind the estate. It is, I think, clear that the third proposition is dealing with antecedent debts, which are not incurred themselves for necessity. It really puts payment of all antecedent debts on the same footing as matters of necessity. The second proposition, which is the material one for the present case, is in these terms : "If the manager is the father, and the other members are his 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 proceedings upon a decree for payment of that debt." The full bench of the Allahabad High Court in *Jagdish Prasad v. Hoshyar Singh*² were dealing with a case in which there had been a mortgage by the father, and a decree obtained, tout no sale had taken place under the decree, and the Court held that the sons' share could not be sold under the mortgage decree, though the debt was not for immoral purposes. A difference of opinion arose between Sir Shah Sulaiman, the learned Chief Justice, and the other members of the Court as to whether in the second proposition in *Brij Narain v. Mangla Prasad* (supra) the word "debt" included a secured debt, or referred only to an unsecured debt. I entertain no doubt that Sir Shah Sulaiman was right in thinking that the word "debt" in the second proposition covers all forms of debt, including secured debts. But it is obvious that the second proposition is dealing with recovery of a debt, not in its character as a mortgage debt, but as a debt for which a decree has been obtained, and the decree is being executed. Where a mortgage is created, not for necessity, or for payment of an antecedent debt, it binds only the father's interest in the property, and it is only that interest which can be sold under a mortgage decree. But if the debt is not for immoral purposes, the sons are liable, and if a personal decree is obtained against the father, then that decree can be enforced by sale of the sons' interest in the property. There must, however, in my opinion, be a personal decree against the father for payment of the debt, and not merely a decree for payment of the debt by sale of the mortgaged

property. In *Jagdish Prasad v. Hoshyar Singh* (supra) it was held that there being nothing but a mortgage decree, under which the property would have to be sold, there was no personal decree enforceable against the shares of the sons. I agree with the judgment of Sulaiman C.J. in that case.

4. In *Jogindar Singh v. The Punjab and Sindh Bank, Ltd., Amritsar* (1939) I.L.R. 21 Lah. 96 the facts appear to have been similar to those in the Allahabad case, and the Court held that as a decree had been obtained on the mortgage, the debt not having been incurred for an immoral purpose, the estate of the family was laid open to be taken in execution proceedings upon the mortgage decree. The Court considered that the effect of the mortgage decree was to include a declaration that a debt was due from the defendants, that is, the father and sons, to the mortgagee, and that under Hindu law all that is necessary is that there should be a debt due from the father. But with all respect, that, in my opinion, is not enough. No doubt, if there is a debt due from the father, not incurred for immoral purposes, the sons are liable, but that debt cannot be enforced against the sons or any property of the sons, except in execution of a decree for payment of the debt. The creditor has got to get a decree for payment either against the father, or against the father and the sons, or against the sons alone, and having got that decree he can enforce it against the sons' interest in the family property; but a decree merely for sale of property mortgaged by the father, which mortgage does not bind the sons, does not enable the sons' property to be sold. No doubt, there is a certain attraction about the Lahore view, because the opposite view involves really recovering the debt in two stages against two undivided interests in the property, unless the creditor chooses to abandon the mortgage; for, unless he does that, he must enforce the mortgage against the father's interest in the property, and then obtain a personal decree and execute that against the sons' interest in the property, and two undivided interests may sell for considerably less than the entire estate. Under the Lahore view you can sell the entire estate under the one decree, the mortgage decree. But it seems to me that in law the Lahore view cannot be supported, because there is no debt enforceable in execution against the sons.

5. In the present case the decree, as I have pointed out, is not in the form of an ordinary mortgage decree. It does not direct that on sale of the property the mortgagee is to be at liberty to apply for a personal decree for the balance not recovered. What it does say is that "if the entire amount is not satisfied, the plaintiff to recover from the defendant personally." That may create a personal liability against the father, but it is an unascertained liability incapable of enforcement against the interest of the son in the property. Until the mortgage decree is carried out, and it is ascertained what the balance is, it is impossible to say for what amount the son's interest in the property is liable.

6. I think, therefore, the decree in this case is not enforceable against the interest of the son in the

property included in the mortgage, though ultimately it is possible that that interest may be rendered liable for the debt secured by the mortgage in proceedings on the personal decree.

7. I think, therefore, that the decree of the lower appellate Court was right, and the appeal must be dismissed with costs.

8. Cross-objections dismissed with costs.

Weston, J.

9. I agree.

Cases Referred.

1(1923) L.R. 51 I.A. 129 : S.C. 26 Bom. L.R. 500

2(1928) I.L.R. 51 All. 136, F.B