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not supply the place of such notice; as the mortgagee, though he would properly look for prior incumbrances, could not be expected to keep up a constant search for those subsequent to his own, and in the absence of notice would properly proceed against the person *primâ facie* liable to him. And if his proceeding was right, the title acquired under it was complete so as to displace the defendant's title.

We must, therefore, reverse the decree of the Joint Judge, and amend that of the Subordinate Judge by awarding to the plaintiff possession of the whole lands sought, with costs in all the Courts.

[APPELLATE CIVIL.]

Before Mr. Justice West and Mr. Justice Pinhey.

July 16.

BA'BA'JI MA'HA'DA'JI (ORIGINAL DEFENDANT No. 2), APPELLANT, *v.* KRISHNA'JI' DEVJI, A MINOR, BY HIS GUARDIAN SAKUBA'I (ORIGINAL PLAINTIFF), RESPONDENT.*

Hindu law—Family necessity—Manager's discretion—Sale by father of ancestral estate.

The expression "family necessity," when used to justify the sale of ancestral property, must be construed reasonably, and the head of the family and those dealing with him must be supported in transactions which, though in themselves diminishing the estate, yet prevent or tend to prevent still greater losses. A reasonable latitude must be allowed for the exercise of a manager's judgment, especially in the case of a father, though this must not be extended so far as to free the persons dealing with him from the need of all precautions where a minor son has an interest in the property.

The fact that a mortgage or a bond, to pay off which ancestral property is sold, had some time to run, is not a sufficient reason to disprove an otherwise apparent family necessity.

The Hindu law recognizes a debt contracted by the father of a family to enable him to earn a maintenance as one contracted under pressure of a family necessity.

THIS was a second appeal from the decision of S. H. Philpotts, Judge of Puna, reversing the decree of Ráv Báhádur Máhádev Govind Ránádè, Subordinate Judge, First Class, of Puna.

Krishnáji, a Hindu minor, by his guardian and mother, brought this suit to set aside the sale of a house made by his father Devji, the first defendant, to Máhádáji, the second defendant, and to ob-

* Second Appeal No. 147 of 1878.

tain possession of half of the said house. In his plaint he alleged that the house, being ancestral property, belonged jointly to his father and himself, and that the sale effected by his father alone and not for necessary family purposes, was unauthorized and invalid.

The defence of Devji (defendant No. 1), the father of the plaintiff, was that he had sold the house for necessary purposes.

Bábáji (defendant No. 2) raised the same defence, averring that the house had been sold to him to pay off a previous mortgage to two bankers Ránádè and Dèkhnè and a bond passed to himself, and also to repay a sum of Rs. 88, borrowed by the said defendant to enable him to purchase some buffaloes, and set up his trade as a milkman.

The Subordinate Judge held that the sale was valid, and rejected the plaintiff's claim. The District Judge reversed his decree, on the ground that the time, mentioned in the mortgage, for the repayment of the loan advanced upon its security by Ránádè and Dèkhnè had not expired at the date of the sale to Máhádáji, and that, consequently, not even a *primâ facie* necessity for the sale had arisen. The bond to Máhádáji had not been produced before the Judge, who suspected that its production had been withheld, because the time for its payment had not arrived. With regard to the item of Rs. 88, the Judge held that the defendants had also failed to prove that any family necessity existed.

Ghanashám Nilkanth Nádkarni (with him *Shántárám Náráyan*) for the appellant:—The Judge has wrongly thrown upon the defendants the *onus* of proving the existence of family necessity. Actual necessity need not be proved to validate the sale. The purchaser of ancestral property from a manager of the family to which it belongs, need prove no more than that, after reasonable inquiry, he *bonâ fide* believed that the person he dealt with was a manager, and that some family necessity led to the sale. A son cannot set aside the sale of ancestral property made by his father as manager for the discharge of his debts, and oust the purchaser: *Girdháree Lall* v. *Kantoo Lall.* (1) This case was followed by this Court in *Náráyán Acháry* v. *Narso Krishna,*(2) where it was

(1) L. R. 1 In. Ap. 321. (2) I. L. R. 1. Bom. 262.

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held that the son's vested interest in ancestral estate was subject to the liability of that estate for the debts of his father and grandfather, not contracted for immoral purposes. He cited also *Adurmoni Deyi* v. *Chowdhry Sib Narain Kur.*(1)

The District Judge also erred in holding that the manager could not sell any property to liquidate a debt secured on a mortgage till the time fixed for its liquidation had expired.

Shamráv Vithal for the respondents (plaintiffs) :—There was no debt in existence which could properly be charged on the family estate. The mere existence of a liability incurred by the manager, is not sufficient to make his co-parceners liable. The District Judge was right in throwing the *onus* on the purchaser to show that the sale was necessary for family purposes. In the case of *Bheknarain Singh* v. *Januk Singh* (2) the Calcutta High Court, in a suit by a mortgagee against a father and his sons to recover the mortgage debt, held that it was incumbent on the mortgagee to show for that purpose the loan had been contracted, and that that purpose justified the father in charging the property, or that the mortgagee believed *boná fide* that such was the case.

WEST, J. :—The suit in this case was by a minor to set aside the sale of half a house made by his father. The Subordinate Judge found that the transaction was one of a kind by which, according to the Hindu law, the minor was bound—one falling under the general principle of a sale for satisfying a family necessity. The District Judge thinks that even a *primâ facie* necessity, the belief in which held in good faith would protect the purchaser, did not exist. His reasons for this conclusion are that the mortgage, to pay off which some portion of the money was raised, still had some time to run, and that the bond to the purchaser, also, payment of which formed part of the consideration, probably had some time to run, too. These are not, in our opinion, reasons sufficient to disprove an otherwise apparent necessity. It might be highly desirable, in the interests of the family, that a mortgage and a bond at high interest should be paid off, even by a sale of ancestral property, rather than allowed to grow to an overwhelming amount. The District Judge does not seem to have found any other grounds than

(1) I. L. R. 3 Calc. 1. (2) I. L. R. 2 Calc. 438.

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those of an anticipation of the day of absolute necessity for payment for differing from the Subordinate Judge's view that the sale was justifiable, or, at any rate, apparently justifiable, under the circumstances; and the mere fact that the father did not wait until the debts and interest had grown to an unmanageable sum or to the whole value of the family estate, is not, we think, a sufficient reason for saying that the apparent ground of necessity was wholly unreal, or a mere invention of the father and the creditor. "Family necessity" is an expression that must receive a reasonable construction, and the head of the family and those dealing with him must, in the interest of the family itself, be supported in transactions which though in themselves diminishing the estate, yet prevent or tend to prevent still greater losses. A reasonable latitude, too, must be allowed for the exercise of a manager's judgment, especially in the case of a father, though this must not be extended so as to free the person dealing with him from the need of all precautions where a minor son has an interest in the property. Here the circumstances, relied on by the District Judge, do not, in our opinion, seriously touch the good faith and propriety of the transaction.

As to Rs. 88, the District Judge says that no "emergent necessity" to borrow that sum was proved. It was borrowed, after the father's illness and consequent impoverishment, to buy a stock of buffaloes with which to resume his business as a milkman. This could not be called an obligation of an immoral character. On the contrary, as the debt was contracted in order to put the father once more in the way of earning a maintenance, it was created under the pressure of a family necessity which the Hindu law fully recognizes. That law does not require the father to lie down in idleness until starvation is actually at his door before parting with the family estate; it recognizes as a necessity any emergency in which plainly, and not through any course of subtle or sophistical reasoning, the proposed transaction is the only obvious means, or the obviously proper means, of averting some greater calamity, as absolute pauperism would be.

For these reasons we reverse the decree of the District Judge, and restore that of the Subordinate Judge, with all costs on respondent.

Order accordingly.