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although an annual rent is reserved. A lease on which a yearly rent is reserved, as contemplated by s. 17, cl. (*d*), of the Registration Act, must, we think, be one which on the proper construction of it would create a tenancy from year to year. This we presume was the opinion of the Allahabad Court in *Khuda Bakhsh* v. *Sheo Din* (1).

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Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nanabhai Haridas.

CHINTAMANRAV MEHENDALE (*Original Defendant*), *Appellant v.* KASHINATH, MINOR, BY HIS GUARDIAN (*Original Plaintiff*), *Respondent.** [2nd December, 1889.]

Hindu law—Father and son—Liability of ancestral estate for father's debts—Improper and immoral debts of father—Evidence of general immoral character of father not enough—Evidence—Burden of proof.

The power of the father, as representative of the family, to bind the son's interests in the family estate except in special cases, being judicially recognized, [321] the *onus* of establishing the existence of those special circumstances necessarily lies on the sons for the purpose of defeating his creditor's remedies against the ancestral estate.

The plaintiff sued to recover the balance of a debt due on a mortgage-bond alleged to have been executed in 1878 by the defendant's father (since deceased) to the plaintiff's father. The defendant (*inter alia*) pleaded that the loan was contracted without his knowledge and for immoral purposes, and that his share in the mortgaged property was not answerable for the debt. He also contended, as to a sum of Rs. 109-8-0 claimed by the plaintiff, that this sum was claimed in respect of *saranjam*, and was not recoverable by the plaintiff without a certificate under the Pensions Act.

The lower Court found that the defendant's father had been a man of extravagant and vicious habits, but held that the defendant had failed to prove that the debt in question had been contracted for immoral purposes. The Judge, therefore, awarded the plaintiff's claim. On appeal by the defendant to the High Court,

Held, confirming the decree of the lower Court, that the burden lay on the defendant of proving that the loan to the father secured by the mortgage-bond in the suit was for an illegal or immoral purpose, and that the defendant had not discharged this burden. The mere proof that his father had been a man of extravagant and immoral habits was not enough.

Held, also, that as no certificate from the Collector had been produced, as required by the Pensions Act XXIII of 1871, the claim to Rs. 109-8-0 should be disallowed.

[F., 20 B. 534 (537); 9 Bom.L.R. 125 (135); Appr., 24 B. 343; 2 Bom.L.R. 450; R., 28 A. 508=3 A.L.J. 274=26 A.W.N. 117; 30 A. 156=5 A.L.J. 175=28 A.W.N. 61; 31 A. 176=6 A.L.J. 263=1 Ind. Cas. 479; 36 B. 68=13 Bom. L.R. 1161; =12 Ind. Cas. 949; 20 C. 328; 29 M. 200 (F.B.)=16 M.L.J. 69=1M.L.T. 28: 17 C.L.J. 38=17 C.W.N. 280=18 Ind. Cas. 625; 6 C.P.L.R. 140; 6 M.L.J. 139; 14 M.L.J. 181.]

APPEAL from a decision of Rav Bahadur G. A. Mankar, First Class Subordinate Judge of Satara.

Suit by a mortgagee praying for sale or foreclosure.

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* Appeal, No. 12 of 1885.

(1) 8 A. 405.

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The mortgage had been executed by the defendant's father (since deceased) to the plaintiff's father in December, 1878.

The defendant denied the mortgage. He also contended that in any event his share in the mortgaged property, which was ancestral, could not be affected by the mortgage, the debt having been incurred for immoral purposes. He further stated that his father was of such vicious or extravagant habits that in 1868 he (the plaintiff) had published a notice in the newspapers warning people against lending his father money.

The Subordinate Judge, who tried the suit, found that the defendant's father was a man of vicious and extravagant habits, but that the defendant had failed to prove that the particular debt in question had been contracted for an immoral purpose. He was, therefore, of opinion that the whole property was liable [322] to the debt, and he awarded the plaintiff's claim, and directed that the mortgaged property should be sold.

The defendant appealed to the High Court.

Mahadev Chimnaji Apte, for the appellant.—The lower Court found that the defendant's father was immoral and extravagant in his habits. The debt in question ought not, therefore, to be held binding on the defendant, unless the creditor shows that his debt was not incurred for an immoral purpose, or was incurred for some legal necessity—*Jamna* v. *Nain Sukh* (1). The *onus* of proof was shifted, once general immorality and extravagance was shown. Moreover, the creditor had notice of these habits, and ought to have inquired as to the object for which he was lending money.

The power of the father to bind his son's interest is limited to necessary and proper debts only. If the debts are found improper, they will affect the father's interest only. The claim to Rs. 109-8-0 *saranjam* allowance must fail, as no certificate from the Collector was obtained before filing this suit, as required by the Pensions Act XXIII of 1871.

Daji Abaji Khare, for the respondent.—It lies on the defendant to establish that his father contracted the debt in question for immoral purposes. The mere fact of his being an extravagant man does not of itself establish that the debts were immoral. The son must show the loan was applied to immoral purposes—*Hanuman Singh* v. *Nanak Chand* (2); *Sadashiv Dinkar Joshi* v. *Dinkar Narayan Joshi* (3). The defendant has failed to show this in the present case—*Nanomi Babuasin* v. *Modhun Mohun* (4); *Jagabhai Lalubhai* v. *Vijbhukandas Jagjivandas* (5). The particular debt impeached must be shown to be immoral. The certificate from the Collector under the Pensions Act may be obtained now.

JUDGMENT.

SARGENT, C. J.—The plaintiff sues to recover the sum of Rs. 13,996-15-11, being the balance of a debt due on a mortgage-bond executed on 15th December, 1878, by the defendant's father Sadashivrav, since deceased. The defendant pleads that the loan was contracted without his knowledge and for immoral purposes; [323] and that his share in the mortgaged property could not be held answerable for the debt.

It was found by the Subordinate Judge, and indeed was not disputed before us, that the evidence established that Sadashiv had been a man of

(1) 9 A. 493. (2) 6 A. 193. (3) 6 B. 520.
(4) 13 C. 21 = 13 I.A. 1 (17). (5) 11 B. 37.

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vicious and extravagant habits, but he held, on the authority of *Sadashiv Dinkar* v. *Dinkar Narayan* (1), that the burden lay on defendant of proving that the debt in question was contracted for an immoral purpose, and that he had failed to prove any connexion between the debt and Sadashiv's immoralities; and consequently the mortgage in dispute "created a valid charge, not only upon the father's share, but upon that of the son also." It was contended for the appellant that the *onus* lay on the plaintiff of proving that the mortgage-debt was contracted for a proper purpose, or, at any rate, that he was led to suppose so after making such inquiries as would satisfy a prudent man, and we have been referred in support of this contention to the case of *Jamna* v. *Nain Sukh* (2), where the creditor sued was the sons on an hypothecation bond given by their father, and no evidence given on either side as to the circumstances under which the bond was passed, and it was held by the Chief Justice Sir J. Edge and Mr. Justice Mahmood that it was "good sense and general rule that a creditor endeavouring to enforce his claim under a bond given by Hindu father against the estate of a Hindu family in respect of money lent or advanced to the father having only a limited interest should, if the question is raised, prove either that the money was obtained by the father for a legal necessity, or that he made such reasonable enquiries and obtained such information as would satisfy a prudent man that the loan was contracted to pay off an antecedent debt, or for the other legal necessities of the family. He is the person who would know, or ought to have known, the circumstances under which he parted with his money on the security of the property of the Hindu family, and, in such a case as the present, it is only reasonable that the *onus* of proof should fall on him." It appears from the judgment that the Court relied mainly on the decisions in *Modhoo Dyal Singh* v. *Golbur Singh* (3) [324] and *Bheknarain Singh* v. *Januk Singh* (4). The former was a Full Bench decision of the Calcutta High Court, but it was pronounced in 1868, and only decided that the son could not recover his share of the estate, which had been sold by his father without any necessity for doing so, unless he refunded his share of the purchase-money which it was found to have come to his hands. In the case of *Bheknarain Singh* v. *Januk Singh*, which was decided in 1877 by Mr. Justice L. Jackson and Mr. Justice White, the *onus* was doubtless thrown on the creditor under circumstances similar to those in the present case; but it is clear, from the language of the judgment at p. 443, that those learned Judges considered that the right of the father in his lifetime to charge the interest of his sons in the ancestral estate was confined to cases in which "there was a legal necessity for the transaction, or if it had reference to family purposes," and they accordingly held that as the son was a minor, the principles to be applied were those which are laid down in *Hanooman Persad* v. *Mussamat Babooee* (5). That view, however, of the father's power to charge the family estate with his debts is no longer tenable, having regard to the decisions of the Privy Council in *Suraj Bunsi's case* (6) and *Nanomi Babuasin* v. *Modhun Mohun* (7). In the former case (at p. 104) their Lordships after referring with approval to the conclusion arrived at by the late Chief Justice of this Court, Sir M. Westropp, in *Udaram Sitaram* v. *Ranu Panduji* (8), that "subject to certain limited exceptions (as, for instance, debts contracted for immoral or illegal purposes), the whole of the family undivided estate would be, when in the hands of

(1) 6 B. 520. (2) 9 A. 493. (3) 9 W.R. C.R. 511.
(4) 2 C. 438. (5) 6 M.I.A. 393. (6) 5 C. 148 (169) = 6 I.A. 88.
(7) 13 C. 21 = 13 I.A. 1 (15). (8) 11 B.H.C.R. 76 (83).

the sons or grandsons, liable to the debts of the father or grandfather," and also to the decision of the Privy Council in *Kantoo Lall's case* (1), say that that case was an authority for certain propositions which are set out at p. 106.

In *Luchumun Dass* v. *Girdhur Chowdhry* (2) the effects of the decisions in *Kantoo Lall's case* and *Suroj Bunsi* v. *Shev Pershad* [325] were considered by a Full Bench of the Calcutta High Court, and the Court held that the loan for which the bond was passed by the father, as stated by the reference, was an antecedent debt within the contemplation of the propositions set out in *Suraj Bunsi's case*, and that (as shown by the first question referred) although "on the one hand it was not proved that there was any necessity for raising the money, nor on the other that the money was raised or expended for immoral or illegal purposes," the mortgagee was at any rate entitled to a decree directing the debt to be raised out of the whole ancestral property, including the mortgage property. This ruling was followed by Mitter and Maclean, JJ., in *Ganga Prosad* v. *Ajudhia Pershad* (3).

Later on in *Nanomi Babuasin* v. *Modhun Mohun* (4), the Privy Council again had an opportunity of considering the question which had been before them in *Suraj Bunsi's case*, and after remarking that it was impossible to say that the decisions are on all points in harmony either in India or in their Lordships' Court proceed to say: "It appears to their Lordships that sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable to answer the father's debt, and the question how far the sons can be precluded by proceedings taken by or against the father alone from disputing that liability. 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."

A Division Bench of this Court consisting of West and Birdwood, JJ., in *Jagabhai Lalubhai* v. *Vijbhukandas Jagjivandas* (5) after referring to the Privy Council decision in *Nanomi Babuasin* v. *Modhun Mohun*, state, and we agree with that statement, that [326] the effect of the decision of the Privy Council in that case is, that "the father's disposition of the family estate, or a disposal of it under proceedings taken against the father alone, is made to affect the sons' as well as the father's interest, except so far as the son can establish, in a proceeding taken for that purpose, that the voluntary disposal was made under circumstances which deprived the father of the disposing power, or that the enforced disposal was on account of an obligation to which the son was not subject. The father, in fact, is made the representative of the family, both in transactions and suits, subject only to the right of the sons to prevent an entire dissipation of the estate by particular instances of wrong-doing on the father's part."

This view of the power of the father to bind the sons' interest in the family estate, except in certain special cases, necessarily throws the *onus* on the sons of defeating his creditors' remedies against the

(1) 1 I.A. 321. (2) 5 C. 855 (857). (3) 8 C. 131.
(4) 13 C. 21 (35) = 13 I.A. 1 (17, 18). (5) 11 B. 37 (41).

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ancestral estate by establishing the existence of those circumstances. Sir C. Petheram, C. J., and Tyrrell, J., acted upon this presumption against the sons in *Sita Ram* v. *Zalim Singh* (1) where the suit was by a mortgagee against the son after the father's death, and the loan was found to have been contracted to meet the father's expenses, but there was no evidence given by the son to show that it was for an immoral purpose; and the Court held that the mortgage was enforceable against the entire estate. And it is to be remarked that it was on this ground alone, after referring to *Suraj Bunsi's case* and the ruling of Sir M. Westropp, and not because a decree had been obtained against the father in execution of which the defendant had purchased, that the Privy Council in *Bhagbut Pershad* v. *Musummat Girja Koer* (2) threw the *onus* on the sons of proving that their father's debt had been contracted for an immoral purpose. We think, therefore, that the Subordinate Judge was right in holding that the *onus* lay on the defendant of proving that the loan to the father secured by the mortgage-bond in suit was for an illegal or immoral purpose, and so gave rise to a debt for which he was not liable.

[327] It has, however, been contended before us that the burden of proof was discharged by the defendant when he had established that his father was an extravagant man who kept a mistress and delighted in nautches, and that the *onus* was then shifted to the plaintiff of proving that this particular transaction was not for an illegal or immoral purpose. This is inconsistent with the rulings in *Hanuman Singh* v. *Nanak Chand* (3) and *Sadashiv Dinkar* v. *Dinkar Narayan* (4), which are to the effect that some connection must be shown between the debt and the father's immoralities. This evidence was wanting, although it might perhaps be to some extent inferred from the evidence as a whole that the loan was used to minister to the father's extravagant habits.

We must, therefore, confirm the decree, with costs, except as to the allowance of Rs. 109-8-0, as to which no certificate from the Collector having been produced as required by the Pensions Act XXIII of 1871, the claim must be disallowed. Costs in proportion.

Decree confirmed.

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14 B. 327.

APPELLATE CIVIL.

Before Mr. Justice Scott and Mr. Justice Jardine.

NARSINHA MANOHAR (*Original Defendant*) *Appellant v.* BHAGVANTRAV (*Original Plaintiff*), *Respondent.** [8th July, 1889.]

Mortgage—Usufructuary mortgage—Redemption—First suit by mortgagee for possession—Decree for possession—Second suit by mortgagor for redemption—Second suit not barred by the first.

In 1864 the lands in dispute were mortgaged under an agreement that the mortgagee should hold the lands and apply the profits towards the satisfaction of the mortgage debt.

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* Second Appeal No. 782 of 1887.

(1) 8 A. 231. (2) 15 C. 713=15 I.A. 99 (105).
(3) 6 A. 193. (4) 6 B. 520.