## APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

1911. August 10.

DATTATRAYA VISHNU DHAMANKAR (ORIGINAL PLAINTIFF), APPELLANT, *v.* VISHNU NARAYAN DHAMANKAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

*Hindu Law—Suit for partition—Decree for father's personal debt not illegal or immoral—Decree to be enforced by sale in execution of the entire family estate during father's life-time—Debt antecedent to the institution of the suit.*

A son brought a suit against his father and the father's creditors for partition of his half share in certain ancestral properties and for a declaration that the incumbrances by way of mortgages created by his father were not binding on him and against his share. About the time the partition suit was filed, the father's creditors also filed suits to enforce their mortgages.

*Held* that a decree for a personal debt of the father not illegal or immoral might be enforced by sale in execution in his life-time of the entire family estate.

*Meenakshi Naidu* v. *Immudi Kanaka*(1), followed.

FIRST appeal against the decision of Gulabdas Laldas, First Class Subordinate Judge of Thana, in Original Suit No. 8 of 1904.

Suit for partition against father and his creditors and to recover free of incumbrances a moiety of ancestral immoveable property burdened by the father with mortgage debts.

One Vishnu Narayan Dhamankar was possessed of considerable immoveable property which was ancestral in his hands. He mortgaged some of it to his creditors known by the surname of Rode for Rs. 12,000 under a registered mortgage-deed, dated the 14th November 1898. He had also borrowed from his creditor surnamed Risbud, on the security of his property, Rs. 5,000 and Rs. 4,712 under two registered mortgage-deeds, dated the 20th June 1889 and 21st June 1896, respectively.

On the 25th November 1903 the Rodes filed a suit, No. 231 of 1903, against Vishnu Narayan Dhamankar and his son Dattatraya for the recovery of Rs. 17,000, that is, Rs. 12,000

* First Appeal No. 125 of 1906.

(1) (1888) L. R. 16 I. A. 1.

principal and Rs. 5,000 interest, due under their mortgage of the 14th November 1898.

After the said suit was filed Vishnu's son Dattatraya, on the 6th January 1904, brought the present suit, No. 8 of 1904, against his father Vishnu Narayan Dhamankar as defendant 1, the Rode mortgagees as defendants 2—6, the Risbud mortgagee as defendant 7, and three coparceners as defendants 8—10, alleging that he, the plaintiff, was the only son of defendant 1, that the properties in suit were the ancestral properties of the family, that defendant 1 was addicted to vicious habits, that all the debts with which the properties were encumbered were squandered by him in profligacy and vice and no money was ever required or borrowed for the use of the family, that the plaintiff demanded his share in the properties from defendant 1, but he refused to make a division and that the mortgage debts contracted by defendant 1 were not binding on the plaintiff. He, therefore, prayed that his half share in the properties enumerated in the plaint be partitioned off and given over to him with a declaration that the encumbrances created by defendant 1 by way of mortgages to the Rodes, defendants 2—6, of one set and to Risbud, defendant 7, of the other, were not binding as against him and on his share in the properties.

Defendants 1 and 8—10 did not defend the suit though they were duly served with summonses.

The Rodes, defendants 2—6, denied that defendant 1 had spent the loans advanced by them for immoral purposes and answered *inter alia* that he borrowed money for paying antecedent debts and for satisfying decrees passed against him for the expenses of plaintiff's marriage and other ceremonies in the family, that plaintiff and defendant 1 were colluding to defeat their mortgage rights and that the suit having been instituted with notice and since the institution of their suit, No. 231 of 1903, was not maintainable.

Defendant 7, Risbud mortgagee, who had filed two suits, Nos. 212 and 214, on the 26th and 27th August 1904, respectively, raised substantially the same defences.

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The Subordinate Judge found that the plaintiff was entitled to the share claimed by him in the plaint, that the plaintiff did not prove that defendant 1 had, by contracting debts for immoral purposes, created charges on the properties in dispute and that they were, therefore, not binding on his share, that the suit was maintainable and that the plaintiff was entitled to a half share in the properties in suit subject to the mortgage encumbrances created by defendant 1. He, therefore, passed a decree in the following terms:—

The order therefore is that the plaintiff Dattatraya be declared entitled to one-half share in the properties described in the schedules A, B, C annexed to the plaint as forming the estate of the family of Vishnu Narayan Dhamankar; that he be allotted and be put in possession of his moiety by actual division by metes and bounds subject to the encumbrances created respectively in favour of defendants 2 to 6 of one set and defendant 7 of the other by their respective deeds of mortgage, exhibit 42 of Suit No. 231 of 1903, and exhibits 25 and 26 of Suit No. 214 of 1904, on such of the plaint-properties as are mortgaged by each of them. The plaintiff must bear his own costs and those of the defendants 2 to 7 as one set except those otherwise ordered must come out of the plaint-properties. The other defendants must bear their own costs.

The plaintiff appealed.

*Raikes* with *K. N. Koyaji* for the appellant (plaintiff):—The law stated by the Subordinate Judge under the authorities cited is correct. But we contend that this statement of the law and the authorities cited are not applicable to the present case. The authorities are to the effect that the son is not bound to pay the father's debts if some connection is shown between the father's debts and his immoralities. In the present case such connection is shown. (Evidence discussed.) Besides where an alienation or mortgage is not for an antecedent debt, but for a debt incurred at the time of the alienation or mortgage, the sons are not bound: *Chandradeo Singh* v. *Mata Prasad*[1], *Venkataramanaya Pantulu* v. *Venkataramana Doss Pantulu*[2]. Here the mortgages were effected to secure present advances and not antecedent debts.

*M. M. Karbhari* for respondent 1 (defendant 1).

(1) (1909) 31 All. 176. (2) (1905) 29 Mad. 200.

*G. S. Rao* with *P. B. Shingne* for respondents 2—6 (defendants 2—6) :—The evidence fails to establish a connection between the father's debts and his immoralities. An antecedent debt is one which is antecedent to the institution of the suit: *Khalilul Rahman* v. *Gobind Pershad*[1], *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh*[2].

*D. A. Khare* with *P. P. Khare* for respondent 7 (defendant 7).

SCOTT, C. J. :—The plaintiff in this suit prays for his half share in certain ancestral properties upon a partition and claims a declaration that incumbrances created by his father, the first defendant, by way of mortgage in favour of two sets of defendants, namely, the Rodes and Risbud, are not binding as against him and on his share in the properties.

The learned Subordinate Judge has held that the plaintiff is entitled to have his half share in the properties described in the plaint, partitioned and put into his possession but subject to the mortgages created by exhibit 42, a mortgage of the 14th of November 1898 for Rs. 12,000 in favour of the Rodes, and exhibits 25 and 36 being mortgages of the 20th of June 1889 and the 21st of June 1896 in favour of Risbud for Rs. 9,712.

The mortgagees in each case have filed suits to enforce their mortgages in consequence of the institution of this partition suit and by consent the evidence recorded in this suit is to be taken as evidence in the mortgage suits.

The plaintiff's case is put in this way: he says that the annual profits of the family properties amount to nearly Rs.3,000 on the average and that the family expenses only absorb about one half of that income, and that any sums borrowed by the first defendant upon mortgage cannot have been for family necessities but must have been for immoral purposes such as the support of prostitutes and the expenses of *natches* and other *tamashas*.

The learned Judge who has discussed the evidence with great care and thoroughness has come to the conclusion that

(1) (1892) 20 Cal. 323. (2) (1907) 34 Cal. 735.

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certain sums were spent by the first defendant upon the support of a prostitute named Jivi and her household and on jewellery and clothes for her and in the expenses of *tamashas* and other revelry, but he is unable to arrive at any conclusion as to the amounts which were borrowed from the different creditors for these purposes. The amounts due upon the mortgages of the Rodes and Risbuds above referred to amount to upwards of Rs. 20,000 but there is no evidence to show that anything like that sum was spent upon such immoral purposes as have been described.

One witness Ramchandra Vishnu Bhagwat goes so far as to say that Rs. 6,000 was borrowed from Rode and a similar sum from Risbud and handed over to Jivi. But the learned Judge does not believe his evidence, and we think there is good ground for the strictures which he passed upon it. Another witness Vishvanath Gokhale says that money was borrowed from Rode in small sums from time to time for Jivi, and the money was expended in the purchase of clothes from one or other of the mortgagees. The learned Judge however characterizes his evidence as palpably false and we are not prepared to dissent from this estimate.

The conclusion arrived at by the lower Court is that Jivi the prostitute was in the keeping of Vishnu for 17 or 18 years, that her sister Baji was also a prostitute and lived with her for about 6 or 7 years, and that during the whole period of intimacy between Vishnu and Jivi he maintained her household at an expenditure which cannot have been less than Rs. 400 a year, that it is also established that Vishnu was fond of *tamashas* and indulged in them at Jivi's house at his own expense. As is pointed out by Counsel for the appellant an expenditure of Rs. 400 a year for 17 years with simple interest at six per cent. would amount to half the sum due upon the mortgages. The difficulty, however, which lies in his way is that we have two sets of mortgagees and that it is impossible upon the evidence to ascertain whose advances were applied for the benefit of Jivi and the *tamashas*. There is no documentary evidence to show that any sums were consciously

advanced by either of the mortgagees for immoral purposes and there is evidence that a considerable amount of money amounting in the judgment of the Subordinate Judge to not less than Rs. 12,000 was borrowed for family ceremonies. It is also proved that the first defendant was a man in a leading position in the small town in which he lived who was obliged to indulge in the certain amount of hospitality. The plaintiff and his father have greatly added to the difficulty of ascertaining the objects of the various loans taken from the Rodes and Risbuds by suppressing the account-books relating to the family affairs which it is conclusively established were in existence prior to the date of the suit. If all this money had been borrowed from one money-lender upon mortgage it might be possible to give some relief to the plaintiff. But in the circumstances of this case we do not think that he has been able to establish more than was established in other reported cases in which it has been proved to the satisfaction of the Court that the father who has executed the mortgages was addicted to immorality and extravagance, without any evidence being forthcoming of connection between the particular loan and the immoral expenditure. As examples we may refer to the cases of *Chintamanrav Mehendale* v. *Kashinath*[1] and *Bhagbut Pershad* v. *Mussumat Girja Koer*[2].

It has however been argued on behalf of the plaintiff that where property is transferred by way of mortgage to secure a present advance it is not an alienation for an antecedent debt and that therefore the creditor cannot claim that the interest of the son shall be applied to satisfy the debt of the father unless that debt is shown to have been incurred for family necessities.

In our opinion, however, this question was finally decided so far as this Court is concerned in the case of *Chintamanrav Mahendale* v. *Kashinath*[1] already referred to. In that case the plaintiff brought a suit against the son of the deceased mortgagor to recover the balance of a debt due on a mortgage-bond by sale or foreclosure. The defendant pleaded that the loan was

(1) (1889) 14 Bom. 320. (2) 1888) L. R. 15 I. A. 99.

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contracted without his knowledge and for immoral purposes and that his share in the mortgaged property could not be held answerable for the debt. The Subordinate Judge awarded the plaintiff's claim and directed that the mortgaged property be sold. The decree was confirmed in appeal to the High Court. Sir Charles Sargent in delivering the judgment said (p. 324)—"In *Luchmun Dass* v. *Giridhur Chowdhry*[1] the effects of the decisions in *Kantoo Lall's* case[2] and *Suraj Bunsi* v. *Sheo Proshad*[3] 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 mortgaged property." He then referred to the well known passage in *Mussamut Nanomi Babuasin* v. *Modun Mohun*[4]. "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."

Sir Charles Sargent then said that the Court agreed with the statement of the Court in *Jagabhai* v. *Vijbhukandas*[5] that the effect of the Privy Council decision in *Nanomi Babuasin's* case[4] was "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 son's 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

(1) (1880) 5 Cal. 855.
(2) (1874) L. R. 1 I. A. 321.
(3) (1879) L. R. 6 I. A. 88.
(4) (1885) L. R. 13 I. A. 1 at p. 18.
(5) (1886) 11 Bom. 37 at p. 41.

the disposing power, or that the enforced disposal was on account of an obligation to which the son was not subject."

The passage in *Nanomi Babuasin's* case[1] above referred to does not in terms lay down a rule for cases in which the joint ancestral property has become the subject of a claim under a mortgage by the father. It is regarded by the Privy Council in *Bhagbut Pershad* v. *Mussumat Girja Koer*[2] as adopting the principle laid down in *Suraj Bunsi Koer* v. *Sheo Proshad Singh*[3] where the Court deduced from *Girdharee Lall* v. *Kantoo Lall*[4] the proposition that when joint ancestral property has passed out of the family either under a conveyance executed by a father in consideration of 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 debt 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.

It is pointed out in *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh*[5] that the cases of *Mussamut Nanomi Babuasin* v. *Modun Mohun*[1] and *Bhagbut Pershad* v. *Mussumat Girja Koer*[2] do not lay down any rule inconsistent with or materially different in principle from earlier decisions of the Judicial Committee which were cited in argument before the Full Bench in *Luchmun Dass* v. *Giridhur Chowdhry*[6] and that the decision of the Full Bench has been uniformly treated as binding in Calcutta in spite of the later Privy Council cases. In Bombay the relief awarded to the plaintiff mortgagee has not been confined as in Calcutta to a mortgage decree against the father and a simple money-decree against the sons for the balance unsatisfied on the sale under the mortgage decree. As observed in *Khalilul Rahman* v. *Gobind Pershad*[7], the result of the Full Bench case seems to be that "debt" in the case of a proceeding by suit means "debt antecedent to the institution of the suit" if it is necessary to have recourse to the

(1) (1885) L. R. 13 I. A. 1 at p. 18.
(2) (1888) L. R. 15 I. A. 99.
(3) (1879) L. R. 6 I. A. 88 at p. 104.
(4) (1874) L. R. 1 I. A. 321.
(5) (1907) 34 Cal. 735.
(6) (1880) 5 Cal. 855.
(7) (1892) 20 Cal. 328.

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canon in *Suraj Bunsi's* case[1]. It is now established that a decree for a personal debt of the father not illegal or immoral may be enforced by sale in execution in his life-time of the entire family estate: *Meenakshi Naidu* v. *Immudi Kanaka*[2].

The only difference between this and the Calcutta Court is one of practice. Shall the mortgaged estate be sold as a whole in order that the proceeds may be applied in satisfaction of the debt or shall it be sold piece-meal, first the interest of the father and then if the proceeds are insufficient the interest of the sons? The advantage of the parties would in most cases we think be best attained by a single sale. There may however be cases in which the Calcutta practice would be the best.

We confirm the decree of the lower Court and dismiss the appeal with costs.

In appeals Nos. 126, 15ß and 127 of 1906 Mr. Coyaji on behalf of his client Dattatraya Vishnu Dhamankar undertaking that if on his father's interest in the family properties being put up for sale the bids do not reach an amount sufficient to satisfy the claims of the mortgagees, he will agree that the interest of his client, as well as that of his father, shall be put up for sale, we order that in the first instance the mortgagees are entitled to an order for sale of the interest of the mortgagor in the family properties, in default of the satisfaction of the decree within three months. The mortgagees are entitled to interest at the rate of six per cent. per annum on the mortgage up to the date of realization. With the above modification we confirm the decree of the lower Court.

The mortgagees are entitled to add their costs of the appeals to the mortgage-debt.

In appeal No. 128 of 1906 we modify the decree of the lower Court by awarding to the plaintiff interest at the rate of six per cent. per annum on Rs. 4,508-9-9 out of the amount decreed up to the date of realization and otherwise confirm the decree. Respondents 1 to 4 to get their costs of the appeal.

*Decree confirmed.*

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(1) (1879) L. R. 6 I. A. 88 at p. 104. (2) (1888) L. R. 16 I. A. 1.