APPELLATE CIVIL

Before Mr. Justice Dixit.

BANSILAL LALCHAND FIRODIA, AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 2), APPELLANTS *v.* SHIVLAL ZUMBARLAL CHOPADE, AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANT NO. 3), RESPONDENTS.* 1952 *Oct.* 7

Hindu law—Alienation of ancestral property by father—Substantial part of consideration not for legal necessity nor for payment of antecedent debts—Whether alienation binding on the son's interest—Whether cause of action survives after plaintiff's death pending appeal.

The plaintiff's father sold an ancestral house for Rs. 15,000, the consideration being made up of three prior mortgages for an aggregate amount of Rs. 10,285-4-0 and of Rs. 4,714-12-0 in cash. In a suit brought by the plaintiff for a declaration that the sale was not binding on his interest in the property,

Held, that although the three mortgages constituted antecedent debts, the sale itself was not justified as a substantial part of the consideration viz. the cash consideration was not for legal necessity as it was taken by the father for his personal benefit and there was no pressure upon the father for the payment of the mortgage debts which had not then become due.

Brij Narain v. *Mangla Prasad,*[1] relied upon.

Ragunath v. *Ramchandra,*[2] referred to.

Masit Ullah v. *Damodar Prasad,*[3] distinguished.

Held further that the interest which the plaintiff claimed was an interest in the family property, the right claimed was not merely a personal right but a right to property; and that the cause of action therefore survived the plaintiff's death pending appeal.

Second Appeal against the decision of B. C. Patil, Civil Judge (Senior Division) with appellate powers, at Ahmednagar, confirming the decision of S. R. Kaprekar, First Class Subordinate Judge at Ahmednagar.

The facts are set out in the judgment.

Y. B. Rege, with *J. G. Rele* and *B. J. Rele,* for the appellants.

P. V. Nijsure and *K. V. Joshi,* for respondents Nos. 2 and 3.

M. M. Jape, for respondent No. 4.

Dixit J. This second appeal arises out of a suit filed by three plaintiffs to obtain a declaration that a sale deed dated May 26, 1936 executed by defendant No. 3, who is the father of plaintiffs Nos. 1 and 2 and the husband of plaintiff No. 3,

* Second Appeal No. 667 of 1949.

(1) (1923) 26 Bom. L. R. 500, P. C. (2) (1939) 41 Bom. L. R. 779.

(3) (1926) L. R. 53 I. A. 204.

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was not binding upon their interest in the suit property which is a house situate at Ahmednagar. The circumstances giving rise to the suit are shortly these.

The house in suit originally belonged to a family of three brothers, of whom defendant No. 3 was one. There was a partition in the year 1932 between the three brothers and at this partition the family house fell to the share of defendant No. 3. The evidence shows that at the partition defendant No. 3 obtained property worth about Rs. 40,000. It appears that defendant No. 3 was then a minor and the property which fell to his share was managed by trustees who made over possession to defendant No. 3 in or about the year 1934. The fact of handing over possession is evidenced by a receipt which is produced in the case. It also appears from the evidence that during the time the trustees were in management a business called a "cloth business" was being carried on on behalf of defendant No. 3.

On December 2, 1935, that is to say after defendant No. 3 attained the age of majority, he executed in favour of defendants Nos. 1 and 2 a mortgage for the consideration of Rs. 5,000 and by this mortgage he gave as security the house in suit. On January 21, 1936, he effected a second mortgage in relation to the same property in favour of defendants Nos. 1 and 2 for the consideration of Rs. 2,000. On March 3, 1936 he effected a third mortgage in relation to the same house in favour of defendants Nos. 1 and 2 for the consideration of Rs. 3,000. It is obvious that the total consideration of these three documents was a sum of Rs. 10,000.

The first plaintiff was born on May 23, 1936 and the second plaintiff was born in the year 1939. On April 4, 1940 the two plaintiffs and their mother, plaintiff No. 3, filed this suit to obtain the aforesaid declaration. The basis of the plaintiffs' claim was that the sale deed executed in favour of defendants Nos. 1 and 2 did not affect their right, title and interest in the suit house, notwithstanding the sale deed executed in favour of defendants Nos. 1 and 2 on May 26, 1936.

Defendants Nos. 1 and 2 resisted the plaintiffs' suit and raised various contentions. One of the principal contentions was that the sale deed dated May 26, 1936 was binding upon the plaintiffs because that sale deed was executed either for legal necessity or for the payment of antecedent debts.

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The trial Court raised a number of issues and held that plaintiff No. 1 was entitled to a declaration that he had a half share in the suit house and that his share was not affected in any way by the sale deed dated May 26, 1936. It is to be observed that the trial court also came to the conclusion that no connection was proved between the various alienations and the alleged immorality of defendant No. 3, and also to the conclusion that the sale deed was not justified either by legal necessity or for the payment of antecedent debts. From the decree made in the suit defendants Nos. 1 and 2 preferred an appeal in this court and this court, by its order, dated July 26, 1946, held that the appeal was not competent and directed the same to be presented to the proper Court. The appeal was then presented in the District Court, Ahmednagar. While the appeal was pending in this court, the first plaintiff died and plaintiffs Nos. 2 and 3 and defendant No. 3 were substituted as his heirs and legal representatives. When the appeal was presented in the District Court those plaintiffs and also defendant No. 3 were shown upon the record of the appeal as heirs and legal representatives of deceased plaintiff No. 1. At the hearing of the appeal before the Civil Judge, S. D., with appellate powers, it was contended that inasmuch as the first plaintiff died pending the appeal, the cause of action did not survive to the surviving plaintiffs and defendant No. 3 because the right of the first plaintiff to question the alienation of the father was a personal right. The lower appellate Court came to the conclusion that the right was not a personal right but that the right was a right to property. In this case the first plaintiff died pending the hearing and final disposal of the appeal preferred by defendants Nos. 1 and 2. Prior to that, there was a decree in favour of the first plaintiff and by the decree the Court declared that the first plaintiff had a half share in the suit property and that the suit property was unaffected by the sale deed executed in favour of defendants Nos. 1 and 2 on May 26, 1936. Mr. Rege who appears for the appellants argues that the right was a personal right . It seems to me that the contention is not well founded. The property in suit is a house which was ancestral property. By birth the first plaintiff had an interest in this property and that interest was independently of his father, defendant No. 3. It was this interest which he acquired by birth and which he asserted by the suit which he brought against defendants Nos. 1 and 2. By the trial Court's decree his interest was declared to have been uneffected by the sale deed of

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May 26, 1936. It is obvious that the interest which the first plaintiff claimed was an interest in the family property and by the decree the trial court declared that the interest of the first plaintiff had remained unaffected by the sale deed of May 26, 1936. It seems to me, therefore, that the learned appellate Judge was right in holding that the right claimed by the first plaintiff was not a personal right. The first contention, therefore, fails.

It was contended in the trial Court as well as in the Court of first appeal that the money raised by the three mortgages as also by the sale deed was raised by defendant No. 3 for immoral purposes. Now, the trial Court as well as the Court of first appeal came to the conclusion that no connection was established between the loans and the alleged immorality of the father. In order to succeed in this contention it is necessary for the plaintiffs to establish that there was a connection between the loans and the immorality of the father. That connection not having been established, it seems to me that the lower Courts were right in holding that the loans were not raised for purposes of immorality as alleged by the plaintiffs.

This leads me to the principal question which is argued in this appeal viz., whether the sale deed dated May 26, 1936, is binding upon the first plaintiff. Now, so far as the first plaintiff is concerned, the evidence shows that he was born on May 23, 1936. The alienation took place on May 26, 1936, so that at the date of the alienation the first plaintiff had been in existence and by his birth he had acquired an interest in the family property. Both the courts have come to the conclusion that the first plaintiff was born on May 23, 1936. But apart from this, the first plaintiff will be entitled to question the several alienations, provided he was born on May, 23, 1936, or on any other date before May 26, 1936. The earliest transaction is of December 2, 1935, so that if the first plaintiff could show that at the date of the several alienations he had been conceived, then in that event he would be entitled to question the alienations made by his father. Apart from this, both the courts have come to the conclusion that the first plaintiff was born on May 23, 1936 and sitting in second appeal, I am bound by that finding. On this footing, therefore, the first plaintiff would be entitled to question the alienation of his father, defendant No. 3.

The case of the second plaintiff is different. The second plaintiff was born in the year 1939 and since the alienation had

taken place some three years prior to the date of his birth, the second plaintiff would not be entitled to question the alienation made by his father, defendant No. 3. That was the view taken by the lower Courts and I think, that view is right.

The case of the third plaintiff is slightly different. The third plaintiff is the mother of plaintiffs Nos. 1 and 2 and the wife of defendant No. 3. She would have no interest in this property unless there is a partition between her sons, in which case at the time of the partition she would be entitled to a share equal to that of a son. In this case that question does not arise and, therefore, the third plaintiff would have no interest in this property. The result is that the validity of the alienations has to be considered with reference to the interest of the first plaintiff.

Now, it is urged on behalf of the appellants that the alienation can be supported both on the ground of legal necessity as well as on the ground of antecedent debts. Before I deal with this question, it is necessary to mention some of the facts. The third defendant appears to have come from a well-to-do family. At the partition of 1932 he got property worth about Rs. 40,000. The evidence shows that the father of defendant No. 3 had inherited a large estate from one Navalmal Gulabchand of Ahmednagar and it is indisputable that at the partition of 1932 defendant No. 3 had obtained property worth about Rs. 40,000. This was in the year 1932. Defendant No. 3 appears to have attained the age of majority in the year 1934. He was then 18 years of age and thereafter he appears to have embarked upon a series of alienations which, according to the first and the second defendants, were for the purposes of the cloth business carried on by defendant No. 3. It is to be remembered that this cloth business was not ancestral business of the family. The learned trial Judge said that it was an ancestral business but it has been conceded at the Bar that there is no evidence to show that this business was ancestral business. If it was ancestral business, then it would have been possible to show that by reference to the partition which took place in the year 1932. But no evidence in that sense has been pointed out to show that the business was an ancestral business. The evidence shows that this cloth business was carried on during the time defendant No. 3 was a minor and the business was handed over to defendant No. 3 after he attained the age of majority in the year 1934. It is clear, therefore, that this business was started as a new busi-

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ness after the partition of 1932 and it is relevant to consider the extent of the property which defendant No. 3 got at the partition of 1932. At this partition defendant No. 3 got the house in suit. He also got gold ornaments weighing 250 tolas. The learned trial Judge put the value at Rs. 10,000. He put the value of the house at Rs. 13,000. Defendant No. 3 also got shares and securities of the value of Rs. 4,000. It is clear, therefore, that at the time when defendant No. 3 obtained possession of his property he was possessed of substantial means and apart from the business which he carried on, there was no necessity whatever for entering into the several transactions which I am about to mention.

In the first place, there is the simple mortgage of December 2, 1935. The consideration of the mortgage is said to be Rs. 5,000. The mortgage deed mentions two years as the period of repayment. The consideration mentioned in the mortgage deed consists of two items of Rs. 2,500 and Rs. 2,500 and it is recited in the mortgage deed that the first sum of Rs. 2,500 was for the purpose of making payment of a debt due to Sheshmal Balmukund, a shop at Bombay. In the concluding part of the mortgage deed it is recited that the aforesaid sum was taken by the third defendant for his business purposes. The next mortgage is of the date January 21, 1936. It was to secure a sum of Rs. 2,000. The period of repayment is the same and the mortgage deed recites that Rs. 2,000 were taken by defendant No. 3 for his business purposes. The last mortgage is of the date March 3, 1936. The period of repayment was two years. The amount secured was Rs. 3,000 and the mortgage deed recites that the sum was taken by defendant No. 3 for his business purposes. Then I come to the important alienation of May 26, 1936. That deed was executed by defendant No. 3 and the consideration was a sum of Rs. 15,000 composed of three items: (1) Rs. 10,285-4-0 due upon the three mortgages, (2) Rs. 500 which defendant No. 3 took by way of earnest in pursuance of an agreement of sale and (3) Rs. 4,214-12-0 which defendant No. 3 received from defendants Nos. 1 and 2 under a cheque. Substantially, therefore, the sale deed was executed for consideration consisting of two parts: (1) a sum of Rs. 10,285-4-0 due in respect of the previous mortgages and (2) a cash advance of a sum of Rs. 4,714-12-0. The learned trial Judge said that the mortgages did not mention the purpose of the loan. It seems to me that that statement is not correct. In the first mortgage the purpose is mentioned

which is the payment of a debt due to Sheshmal Balmukund a shop at Bombay and the other purpose is that the money was required for the business of defendant No. 3. This last purpose is common in all the three documents. The learned trial Judge came to the conclusion that the alienation cannot be supported on the ground of legal necessity and that view was concurred in by the lower appellate Court. Now, the business which defendant No. 3 started was not an ancestral business. That business was not joint family business either. It was a business started by the trustees and which was taken over by defendant No. 3 after he attained the age of majority. The Courts below have come to the conclusion that the alienation cannot be supported on the ground of legal necessity and it seems to me that apart from the finding which is a finding of fact, the conclusion is correct. The moneys were borrowed obviously for the purpose of extending the business newly started by defendant No. 3. Such a purpose would not constitute a justifying purpose so as to be binding upon the first plaintiff. It is to be noted that the third defendant had obtained at the partition property worth Rs. 40,000 and there could be no necessity for the purpose of entering into these alienations because defendant No. 3 had obviously been possessed of means sufficient to meet the expenses of his family. His family then consisted of himself, his wife and a child. It seems to me, therefore, that the Courts below were right in coming to the conclusion that the alienation of May 26, 1936, was not supported by legal necessity.

But it is argued that the alienation can be supported on the ground of payment of antecedent debts. The law bearing upon the point has been laid down by their Lordships of the Privy Council in the case of *Brij Narain* v. *Mangala Prasad*[2] The law has been stated in five propositions, four of which may be set out here:

"(1) The managing member of a joint undivided estate cannot alienate or burden the estate qua manager except for purposes of necessity; but

(2) If he is the father and the other members 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.

(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.

[1] (1923) 26 Bom. L. R. 500, P. C.

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(4) Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached."

When analysed, the legal position stands in this way. Proposition No. 1 defines the power of a managing member of a joint Hindu family, the power being limited to make an alienation or to create security only for the purposes of necessity. Proposition No. 2 is concerned with the liability of a son and that liability can be enforced against the estate upon a decree obtained by the creditor upon a loan incurred by the father. Propositions Nos. 3 and 4 are to be read together. Proposition No. 3 is concerned with the power of a father to create a mortgage and the mortgage would be valid where the mortgage is executed for the payment of an antecedent debt and proposition No. 4 defines what an antecedent debt means and the debt to be antecedent must be antecedent in fact as well as in time. In other words, to make a debt antecedent it must be truly independent of the transaction impeached. The total consideration under the three mortgages was a sum of Rs. 10,285-4-0. This would be an antecedent debt within the meaning of proposition Nos. 3 and 4. The alienation took place on May 26, 1936, and the amounts secured by the mortgages were borrowed on December 2, 1935, January 21, 1936 and March 3, 1936. These debts were antecedent in time and they were antecedent in fact also. Mr. Nijsure seemed to suggest that a previous mortgage cannot constitute an antecedent debt in respect of a subsequent mortgage executed by the father. It seems to me that *Brij Narain's* case is a complete answer to this contention. In *Brij Narain's* case there were two mortgages executed respectively on December 12, 1905 and June 19, 1907, and the father executed a third mortgage on March 4, 1908, to pay off the two earlier mortgages and it was held that the first two mortgages constituted antecedent debts. With respect, I follow this principle and hold that the first part of the consideration constituted an antecedent debt, so that the alienation would be binding upon the sons, if the alienation had taken place only for the purpose of payment of the antecedent debt. But in this case there is a difficulty in the way of defendants Nos. 1 and 2. By the sale deed of May 26, 1936, the hird defendant received a sum of Rs. 4,714-12-0 from defendants Nos. 1 and 2. In the sale deed the purpose respecting the sum of Rs. 500 and the purpose about the sum of Rs. 4,214-12-0 are not mentioned. It is obvious that these two amounts were received for the

personal benefit of defendant No. 3. The transaction cannot be one for the payment of antecedent debts in regard to these two items because the two amounts were received on the date of the sale deed. There was, therefore, no antecedence in fact as well as in time. It is not suggested, nor indeed is there any evidence upon the point, that these two sums were for a justifying necessity. On the footing, therefore, that the sale deed was executed for consideration composing of two parts, the question arises whether the sale in favour of defendants Nos. 1 and 2 is justified. The learned appellate Judge relied upon a passage as now set out in s. 297 of Mulla's Principles of Hindu Law, 11th edition, page 394. That passage is in the following terms:

"It sometimes happens that joint family property is sold by the father of a joint family for the payment of an antecedent debt, but the whole of the price is not proved to have been applied in payment of such debt, and the sale is challenged by the sons on that ground. In such a case, if the sale was necessary to discharge the debt, and the purchaser pays a fair price for the property sold, and acts in good faith and after due inquiry as to the necessity for the sale, the mere fact that part of the price is not proved to have been applied in payment of the debt does not invalidate the sale, the reason being that the purchaser is not bound to see to the application of the price. If the above conditions are satisfied, the sale must be upheld unconditionally, whether the part not proved to have been applied in payment of the debt is considerable or small".

This passage shows that the property sold by the father must be for the payment of an antecedent debt. In this case the house in suit has not been sold by the father only for the purpose of payment of an antecedent debt. It is true that nearly two-thirds of the consideration have gone to discharge the indebtedness of the father and nearly a one-third of the consideration of the sale deed was a cash advance which was taken by defendant No. 3 for his personal benefit and in such a case the question arises whether the sale was justified. Now, the case of an antecedent debt stands on the same footing as legal necessity and the principle as regards the question of the justifying nature of an alienation for a legal necessity has been considered in the case of *Raghunath* v. *Ramchandra*[1]. A part of the head-note is in the following terms:

"If the alienation challenged is a sale, it would not be set aside if a substantial portion of its consideration was required for a legal necessity, or for the benefit of the family, or to pay off an antecedent debt which was not immoral or illegal, although the remaining portion was not so required. The material question in such cases is whether the sale itself was justified, and, if so, the sale will be upheld as a whole".

[1] (1939) 41 Bom. L. R. 779.

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Applying this principle to the facts of the present case, can it be said that in this case the sale itself was justified? In this connection the facts are that the three mortgages were executed some six months prior to the date of the alienation which is May 26, 1936. Under the mortgages the period of repayment was a period of two years. Defendant No. 3 received a sum of Rs. 4,714-12-0 which is not suggested to have been raised for the purpose of legal necessity or for the payment of an antecedent debt. The lower appellate Court found that the price paid was a fair price. The lower appellate Court also found that there was no necessity whatever for defendant No. 3 to effect the sale. There was no pressure upon defendant No. 3 and indeed there could not be any. The amounts due under the three mortgages had not become due. Although, therefore, the three mortgages constituted antecedent debts, I am unable to hold that the sale itself was justified. Mr. Rege argues that the sale deed is good as regards the consideration of Rs. 10,285-4-0 which is the major part of the consideration of the sale deed. That, no doubt, is a circumstance in favour of defendants Nos. 1 and 2. On the other hand, there is a substantial sum of Rs. 4,714-12-0 which was taken by defendant No. 3 for his own personal benefit and if the question is whether the sale itself was justified, I am unable to hold that the sale could be justified because there was no pressure upon defendant No. 3 for the payment of the debts, the period of repayment had not expired and the mortgages had been executed shortly before six months from the date of the sale deed, dated May 26, 1936. It is for defendants Nos. 1 and 2 to show that the sale itself was justified and in view of the circumstances which I have mentioned above, I cannot hold that in this case the sale could be justified. Mr. Rele, supplementing the argument of Mr. Rege, relied upon the case of *Masit Ullah* v. *Damodar Prasad*[1] and he said that in this case the sale must be held to be a justified one. A part of the head-note in that case is in the following terms:

"The son of a Hindu governed by the Mitakshara sued to set aside a sale for Rs. 18,400, of joint family property by his father, who was made a defendant. It appeared that the whole of the consideration, except about Rs. 2,000, had been applied by the father to discharge mortgages made by his grandfather. There was no evidence that the balance had been used by the father for immoral or unauthorised purposes:—

Held, that the suit should be dismissed, as the plaintiff was liable for his great-grandfather's debt, and the father, who was in collusion with

[1] (1926) L. R. 53 I. A. 204.

his son, had deliberately withheld his evidence, which would have shown how the rest of the consideration had been applied".

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It appears from the facts of that case that the consideration was a sum of Rs. 18,400 and the evidence showed that a sum of Rs. 2,000 had not been shown to have been applied for payment of the debts. In this case the facts are different. The sale deed itself shows that the first item of Rs. 10,285-4-0 was the amount due in respect of the three earlier mortgages. The sale deed also shows that the sum of Rs. 4,714-12-0 was a cash advance. This is, therefore, a case where part of the consideration was for the payment of antecedent debts and part was for the personal benefit of defendant No. 3. If that is so, it seems to me that the principle laid down in *Masit Ullah's* case cannot apply to the facts of the present case. In conceivable circumstances it is possible to uphold a transaction where, for example, a substantial part of the consideration is either for the payment of antecedent debts or for a justifying necessity and only a small portion is not shown to have been expended for one or the other purpose. But where, as in this case, a sum of Rs. 4,714-12-0 was admittedly borrowed for the personal benefit of defendant No. 3, I am unable to hold that the sale itself could be justified. That was the view taken by the Court below and I think, that view is right.

For the above reasons, the decree appealed from is correct and this appeal will be dismissed with costs in one set.

Appeal dismissed.

K. B. S.

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Before Mr. Justice Gajendragadkar and Mr. Justice Vyas.

GANGADHAR BALKRISHNA DHARMADHIKARI (ORIGINAL DEFENDANT), APPELLANT *v.* DATTATRAYA BALIRAM KULKARNI (ORIGINAL PLAINTIFF), RESPONDENT.*

1952

Nov. 4

The Code of Civil Procedure (Act V of 1908) O. XXXII, r. 7—Agreement with reference to suit made by next friend or guardian of minor without leave of the Court—Whether void or voidable—Indian Limitation Act (IX of 1908), Art. 44.

A minor on attaining majority filed a suit for redemption of a mortgage on the ground that the sale of equity of redemption made by the guardian during the plaintiff's minority as a result of the compromise in a previous suit was not binding on the plaintiff as no leave of the Court

* Second Appeal No. 461 of 1949.