
(1921) 01 PAT CK 0009
In the Patna High Court

Michu Missir and Others

APPELLANT

Vs

Balbhadra Prasti and Others

RESPONDENT

Date of Decision : 13-01-1921

Acts Referred:

Citation : AIR 1921 Patna 367 : 62 Ind. Cas. 116

Hon'ble Judges : Ross, J;Jwala Prasad, J

Bench : Division Bench

Judgement

Ross, J.—This is an appeal by the plaintiff from the decree of the learned Subordinate Judge in a mortgage suit.

2. The mortgage, Exhibit 1, was executed on the 1st of February 1915, by defendants Nos. 1, 2, 3, 5 for themselves and for defendant No. 4, an infant, and defendants Nos. 6, 7, and 8, the principal members of the Prasti family. Defendants Nos. 9 to 23 are junior members of the family and defendant No. 24 is a trustee appointed by the senior members of the family to take charge of the estate and to manage it with the object of paying off the debts. Defendants Nos. 25 to 27 are sub-sequent alienees.

3. The bond in suit, after setting out the properties to which the mortgagors are entitled, recited certain debts. These debts were as follows:—(1) a mortgage of 1910, Exhibit 2, for Rs. 7,000, which with interest amounted to Rs. 11,106-10 6, executed in favour of the mortgagees for the expenses of the family; (2) two mortgage-decrees of 1913, Exhibits 10 and 11, for Rs. 747-9-0 and for Rs. 263-10-8 in favour of the mortgagees; (3) a mortgage of 1913 for Rs. 500, which with interest amounted to Rs. 660, executed by defendant No. 8 in favour of the mortgagees, (4) a mortgage of 1914 for Rs. 1,500, amounting with interest to Rs. 1,655-8-0. The total of these debts was Rs. 14,483-7-6. Apart from this, there were also other debts: (1) a debt of Rs. 1,500 due under a rent-decree, Exhibit 8, to the Superintendent of Jagarnath Jee; (2) a debt of Rs. 1,500 due under a mortgage-bond, Exhibit 9, executed in favour of Behari Ota in 1907; and (3) a debt of Rs. 500 due under a decree of 1913, to Jogendra

Chandra Mitter, Exhibit 12.

4. In the bond it was recited that, in order to pay off these debts and being in urgent need of money for necessary household expenses, the executants mortgaged the aforesaid properties for Rs. 18,000, of which Rs. 14,433-7 6 was credited to the debts of the mortgagors. The claim based on these bonds was Rs. 24, 66. The defendants Nos. 24 to 27 did not appear. Various defences were raised by the other defendants, but abandoned at the trial, the only plea left for trial being concerned with the question whether the mortgage was a valid charge on the family property. The learned Subordinate Judge applied three tests which the appellants accept as sound: the first is the test of legal necessity; the second is the test of honest enquiry, and the third is the test of antecedent debt. One or other of these tests must be satisfied before the joint family property can be held to be charged. The different debts above referred to were then dealt with, with the following results. Of the debts mentioned in Exhibit 2, he allowed the debts of Bhikari and Surendra and disallowed the other debts, for want of sufficient proof. The debts under Exhibits 10 and 11 and 8 and 12 were allowed. The debt under Exhibit 3 was disallowed for having been incurred by one of the defendants only, defendant No. 8, and also on the ground that it was a secured and, therefore, not an antecedent debt. The debts under Exhibits 4 and 13 were disallowed for want of proof of necessity or of enquiry. The evidence as to enquiry was disbelieved. In the result, the Subordinate Judge gave a mortgage decree for Rs. 6,000 with interest at the bond rate up to the expiry of the period of grace and a money decree for the balance.

5. The plaintiffs have appealed against this decree and there is no cross-appeal. We are, therefore, concerned with four items of Exhibit 2 and with the entirety of Exhibits 3, 4 and 9.

6. [His Lordships than discusses the evidence in the case.--Ed.]

7. In general, it is to be observed that these bands were executed by the senior members of the family, and there is no allegation at, all of mismanagement or waste, nor is any evidence offered in that direction.

8. On the whole evidence, therefore, it must be held that all these debts are proved to have been incurred for legal necessity.

9. On the point of enquiry there is the plaintiffs' evidence, which has been corroborated by Jadumani, plaintiffs' witness No. 5, Banchanidhi, plaintiffs' witness No. 3, and the Gomasta, plaintiffs' witness No. 1, No passage in the plaintiff's cross examination was pointed out to us as a ground for disbelieving his evidence on this point. The learned Subordinate Judge has disbelieved it, but his reasons for doing so can hardly be said to be cogent. The residence of the plaintiffs is at Pari, where the defendants also live at a distance of one and a half mile from them, and the defendants' creditors, except Behari, are also residents of Pari. It would be a most natural thing for the plaintiffs in these circumstances to make enquiries, which presented no difficulties, and it is unlikely that so large

sums would have been advanced on the security of joint family property without proper enquiry being made.

10. The last Question is as to antecedent debt. Two objections were raised by the respondents on this head: The first was that the sons of defendants concerned in this litigation are not all sons of the executants of the different bonds. A sufficient answer to that argument is to be found in the fact that by Exhibit 1 the debts were all adopted by the heads of the family as joint family debts. The second objection was that some of those debt?, namely, those concerned with Exhibits 3, 4 and 9, are secured debts and, therefore, cannot be antecedent, according to the decision of the Privy Council in *Sahu Ram Chandra v. Bhup Singh* 39 Ind. Cas. 280 : 39 A. 437 : 21 C.W.N. 698 : 1 P.L.W. 557 : 15 A.L.J. 437 : 19 Bom. L.R. 498 : 26 C.L.J. 1 : 33 M.L.J. 14 : (1917) M.W.N. 498 : 22 M.L.T. 22 : 6 L.W. 213 : 41 I.A. 126 , It is not necessary in this case to express any opinion on this point, as the decision does not turn on it, in view of the preceding findings as to legal necessity and honest enquiry. But whatever the true interpretation of the decision in *Sahu Ram Chandra v. Bhup Singh* 39 Ind. Cas. 280 : 39 A. 437 : 21 C.W.N. 698 : 1 P.L.W. 557 : 15 A.L.J. 437 : 19 Bom. L.R. 498 : 26 C.L.J. 1 : 33 M.L.J. 14 : (1917) M.W.N. 498 : 22 M.L.T. 22 : 6 L.W. 213 : 41 I.A. 126 may be, whether their Lordships were considering the question of secured as against unsecured debts, whether there is any reason in principle or authority for making between these two classes of debts the distinction contended for by the respondents, and whether the test of antecedent debt laid down by the Judicial Committee was not simply that a debt to be an antecedent debt must not only be really anterior in time to, but also independent of, the security sued upon, there is in each of these bonds a personal covenant, and this would be sufficient to take the case out of the suggested rule, the time of payment having expired.

11. There remain two minor matters, the first is that interest has been miscalculated on the debts of Bhikari and Surendra and should be increased by Rs. 763, and the second is that interest has not been allowed subsequent to the period of grace. No answer is made to the first objection, which must be allowed. As to the second, it appears to be a simple omission; and although it is within the discretion of the Court to give interest or not, that discretion must be reasonably exercised, and I can see no reason why interest should not be allowed subsequently to the expiry of the period of grace.

12. The result is that the appeal must be decreed with costs. There will be a mortgage decree against all the defendants for the sum claimed, less the sum of Rs. 200 and interest accrued thereon from the 12th of March 1910. The amount decreed will carry interest at the rate expressed in the bond until the expiry of the period of grace, and thereafter at 6 per cent, per annum until payment. The costs will be proportionate and will be paid by the contesting defendants and will carry interest at 6 per cent, per annum. There will be a money decree for the aforesaid sum of Rs. 200 and the interest thereon at the bond rate with costs

against defendants Nos. 1 to 3 and 5 to 8 only, and this amount will carry interest at 6 per cent, per annum from the date of the decree.

Jwala Prasad, J.

13. I entirely agree with the judgment just now delivered by my learned brother.

14. The plaintiffs have brought this present suit to enforce their mortgage on the basis of a bond executed by the head members of the Prasti family, defendants Nos. 1 to 8, on the 1st of February 1915, Exhibit 1. The other defendants, namely, from 9 to 23, are the sons of the executants of the bond. It was admitted by witness No. 1 for the defendant, who is himself defendant No. 9 in the case and son of defendant No. 1 (Balbhadra), that Balbhadra was the karta or head member of the entire joint family.

15. All the previous mortgage bonds as well as the bond in suit were executed, among other head members, by Balbhadra, the karta of the family, except the bond Exhibit 3, dated the 1st of October 1913. All that the plaintiffs, therefore, needed to prove in this case was that the bond in suit was executed for family necessity. The recital in the bond in question will show that the head members of the family, defendants Nos. 1 to 8, admitted that the previous debts incurred by them by means of several bonds were for "ijmali expenses." This recital is also with respect to the bond, Exhibit 3, executed by Chaturbhuj Prasty, defendant No. 8, The plaintiffs have given evidence in this case to show that all the previous debts were referable to particular necessities of the family, He has supported his evidence by all available evidence of competent witnesses and also by filing documentary evidence. It has been proved that the plaintiffs are close neighbours of the defendants, living only at a distance of two and a half miles, and that there existed good feeling and amity between the parties; and that for some time past, the plaintiffs have been advancing money to the defendants in times of need, such as litigation and other family necessities. Apart from the evidence of Jadumani Das, witness No. 10, the judgment, Exhibit 14, shows beyond doubt that the defendants had been involved in very expensive litigation from the year 1901, which lasted upto 1915. They had besides a shop to carry on, The family is a very large one, consisting of at least 50 members. They had, therefore, to meet their necessities by borrowing. There is absolutely no reason why the plaintiff. will perjure himself. The evidence given in this case to prove the legal necessity was almost in the nature of ex parte evidence on behalf of the plaintiffs, their being no rebutting evidence on behalf of the defendants.

16. The learned Subordinate Judge has, to my mind, dealt with the case most superficially. He has not carefully gone into the evidence, either oral or documentary, nor has he scrutinised it in order to get at the truth. I have no hesitation in upsetting the view of the Subordinate Judge and agreeing with that of my learned brother, which has been arrived at upon a careful analysis and consideration of the evidence in the case. It has been, therefore, fully established that the mortgage-bond in question was executed for the legal

necessity of the family and that the family property was validly hypothecated therein. This finding relieves us from the consideration of the question as to whether the prior mortgages (Exhibits 3, 4 and 9), to satisfy which the mortgage bond in question was executed, would come within the meaning of antecedent debts of defendants Nos. 1 to 8, for which the ancestral property belonging to them and their sons could be validly pledged as security in the mortgage bond in question. This question has arisen in a very acute form since the pronouncement "of the well-known decision of their Lordships of the Judicial Committee in the case of *Sahu Ram Chandra v. Bhup Singh* 39 Ind. Cas. 280 : 39 A. 437 : 21 C.W.N. 698 : 1 P.L.W. 557 : 15 A.L.J. 437 : 19 Bom. L.R. 498 : 26 C.L.J. 1 : 33 M.L.J. 14 : (1917) M.W.N. 498 : 22 M.L.T. 22 : 6 L.W. 213 : 41 I.A. 126. There the plaintiff brought his suit to enforce the security on the basis of a mortgage-bond, dated the 6th January 1893. The mortgage-bond in that case was executed in respect of the loan taken by the father at the time of executing the bond in question. No family necessity for the debt in question was established and it was not a debt antecedent to that for which the mortgage-bond was executed. Their Lordships held that the debt in question could not be said to be an antecedent debt so as to validate the transaction of the mortgage in question, Technically speaking, there may have been antecedency in time, in the sense that the loan might have been before the execution of the bond, but in reality the borrowing was made on question (sic) of the grant of the mortgage and there was no real dissociation in fact. Their Lordships further observe that the joint family estate cannot be effectively sold or charged in such a manner as to bind the issue of the father, "except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be afforded by such joint estate."

17. Interpreting this passage, the Full Bench of the Allahabad High Court in the case of *Brij Narain Rai v. Mangla Prasad* 50 Ind. Cas. 101 : 41 A. 235 : 17 A.L.J. 249 : 1 U.P.L.R. (A.). 49 held that "Where a mortgage in suit had been executed to pay off two earlier mortgages of joint family property also executed by the father, it was for the defendant mortgagee to show that the earlier mortgages fell within the exception recognized by the Judicial Committee of the Privy Council in the case of *Sahu Ram Chandra v. Bhup Singh* 39 Ind. Cas. 280 : 39 A. 437 : 21 C.W.N. 698 : 1 P.L.W. 557 : 15 A.L.J. 437 : 19 Bom. L.R. 498 : 26 C.L.J. 1 : 33 M.L.J. 14 : (1917) M.W.N. 498 : 22 M.L.T. 22 : 6 L.W. 213 : 41 I.A. 126 ."

18. The view of the Allahabad High Court, was not accepted by the Full Bench of the Madras High Court, where the learned Judges observed that "The interpretation put by the Allahabad Court upon the decision of the Privy Council relating to the meaning of antecedent debts was repugnant to the Hindu Law, and their Lordships of the Judicial Committee could not have intended to exclude the prior mortgages from the category of antecedent debts." Vide *Arumugham Chetty v. Muthu Koundan* 62 Ind. Cas. 525 : 42 M. 711 : 3 L.W. 565 : (1919) M.W.N. 409 : 37 M.L.J. 166 : 26 M.L.T. 96, Recently two learned Judges of our

Court (Coutts and Sultan Ahmed, JJ.,) in the case of Sukhdeo Jha v. Jhapat Kamat 64 Ind. Cas. 946 : 1 P.L.T. 49 : (1920) Pat. 67 : 2 U.P.L.R. (Pat.) 39 : 5 P.L.J. 120 differed from the view taken by the Madras Court and agreed with that taken by the Allahabad Court.

19. In this state of divergence of opinion it is difficult to give with confidence one's own view as to the true meaning and scope of antecedent debt as defined by their Lordships of the Judicial Committee, so far as the prior secured mortgage-debts for the consideration of a subsequent mortgage-bond are concerned. The matter is, therefore, one for the consideration of a Full Bench of this Court, and I have no doubt the question will sooner or later be considered by such a Bench. According to the text in the Mitakshara (1, 1, 27) the father is "subject to the control of his sons and the rest in regard to the Immovable estate, whether acquired by himself or inherited from his father or other predecessors; since it is ordained, though immovables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons."

20. The father as head and manager of the family has certain powers with respect to the joint family property. He is at liberty to dispose of the joint family property in respect of the estate or family necessity, and where such necessity arises the co-parceners as a whole are bound by an alienation such as the mortgage or sale of the family property effected by the father. According to the Mitakshara Law, the sons are further under the pious obligation to pay the debt of their father, whether it is incurred for family necessity or not, but this obligation according to the view of their Lordships of the Judicial Committee arises only after the death of the father, so that during the lifetime of the father the sons are liable only for such debts" as are incurred by the father for the family or estate necessity, and the joint family property can be mortgaged or sold to satisfy such debts only. A debt, however, incurred prior to the transaction resulting in the mortgage or sale is said to be an antecedent debt, as an exception to the principle that the father has no power either of mortgage or sale except for debts incurred for family or estate necessity. He is, according to the judicial interpretation upon the Hindu Law, further empowered to mortgage or sell the family property in consideration of an antecedent debt. Such an antecedent debt may be either a personal debt or a secured debt. It is impossible to make a real distinction between a secured and unsecured debt for the purpose of its being an antecedent debt. The security of the family property in a mortgage may not itself be capable of enforcement by reason of there being no family necessity, yet the debt incurred by the father remains and may become antecedent for the purpose of being a valid consideration for a subsequent mortgage of the family property executed by the father. Therefore, if it is established that there was a real antecedent mortgage independent of and unconnected with the subsequent mortgage, there is no reason why the family property cannot be validly mortgaged subsequently for such a debt, just as in the case of a personal debt. The principle appears to be that in order to be

antecedent debts, for which the father can validly, mortgage the family property, both the secured and the unsecured debts must have been incurred not only antecedently to the mortgage sought to be enforced, but also independently of it. In this view the debt in question in the case before their Lordships, as having been incurred on the occasion of the mortgage bond sought to be enforced, was held not to be an antecedent debt. Their Lordships had not before them the effect of a prior secured debt as being the consideration of a subsequent mortgage-bond sought to be enforced. The meaning of antecedent debt in the aforesaid decision was made clear in the ease of Jogi Das v. Ganga Ram 42 Ind. Cas. 791 : 21 C.W.N. 957 : (1917) M.W.N. 739 , wherein Viscount Haldane interprets the decision in the following words:

21. In "that case it was laid down in effect that joint property could not be alienated as against co sharers by way of mortgage or otherwise, except for necessity or for payment of an actual antecedent debt, quite distinct from the debt incurred in the mortgage itself, and that in consequence the transaction in that case could not stand, and it was added that the mere circumstance of a pious obligation does not validate the mortgage."

22. I am, therefore, inclined to agree with the view taken by the Madras Court and to hold that the prior mortgages in the present case, Exhibits 3, 4 and 9, were antecedent debts within the meaning of the word in that case Sahu Ram Chandra v. Bhup Singh 39 Ind. Cas. 280 : 39 A. 437 : 21 C.W.N. 698 : 1 P.L.W. 557 : 15 A.L.J. 437 : 19 Bom. L.R. 498 : 26 C.L.J. 1 : 33 M.L.J. 14 : (1917) M.W.N. 498 : 22 M.L.T. 22 : 6 L.W. 213 : 41 I.A. 126 . The same result is arrived at in another way. The prior mortgage-bonds, Exhibits 3, 4 and 9, contain a personal covenant in addition to the security of the family property offered therein. The due dates for the payment of those mortgage-bonds had expired. They had, therefore, become not only the secured debts, but personal debts of the defendants Nos. 1 to 8 and as such they were antecedent debts even in the restricted sense of the term, for which their sons, the other defendants, were liable. The defendants Nos. 1 to 8 were, therefore, entitled to give a valid mortgage of the family property by executing the band in suit (Exhibit 1).

23. Had the decision rested upon the determination whether the prior mortgage bonds (Exhibits 3, 4 and 9) were antecedent debts or not, we would have liked to refer the case to a larger Bench, but in view of the finding arrived at by us that the debts were incurred by the defendants Nos. 1 to 8, the head members of the family, for family necessity, there is no necessity of any reference.

24. I would, therefore, in agreement with my learned brother decree the appeal on the terms set forth in his decision.