Privy Council Appeal No. 13 *of* 1942
Allahabad Appeal No. 24 *of* 1939

Shri 108 Puja Pad Udit Panch Parmeshwar Panchaiti Akhara Udasi Nirwani - - - - *Appellant*

v.

Surajpal Singh *alias* Chhedi Singh and others - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JULY, 1944

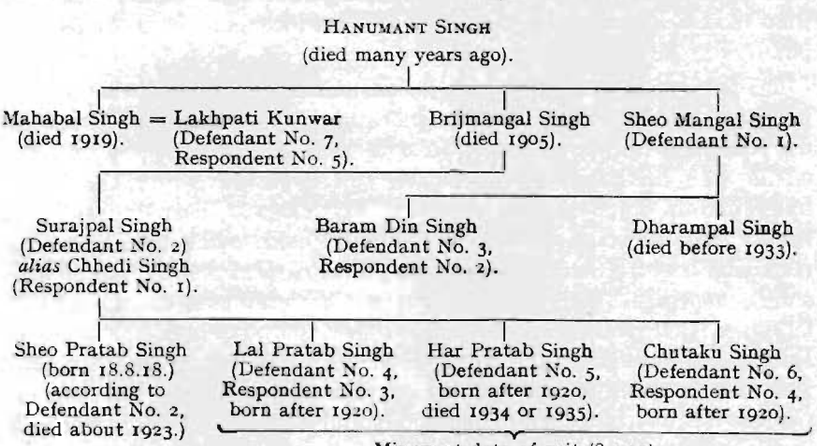
Present at the Hearing:

LORD PORTER
LORD GODDARD
SIR MADHAVAN NAIR

[*Delivered by* LORD PORTER]

The appellant in this case is a registered Society which carries on the business of moneylending. It appeals from a decree of the High Court at Allahabad, dated the 8th February, 1939, which varied the decree of the Subordinate Judge.

The respondents are members of a joint undivided Hindu family governed by the Mitakshara School. The decree of which complaint is made was pronounced in an action brought by the appellant upon a simple mortgage dated the 22nd September, 1920. The family tree of the Hindu family and the members sued appear from the table following:



By the mortgage of the 22nd September, 1920, Sheo Mangal Singh who was then Karta of the family, Surajpal Singh, his nephew and Lakhpati Kunwar his sister-in-law mortgaged certain family property in favour of the appellant.

This mortgage was given in consideration of a sum of Rs.35,542-1-0 made up as follows:—

Item		Rs. A. P.	Rs. A. P.
1.	Promissory Note dated the 30th October, 1917, executed by Mahabal Singh	—	4,153 0 0
2.	" Due under the account book " ... ... [According to Plaintiff's cash book, borrowed by Sheo Mangal Singh on the 22nd December, 1918, for purchasing linseed.]	—	461 0 0
	Interest on the above two items	—	517 13 0
3.	Due to the Plaintiff under a mortgage dated the 26th September, 1916, subject to which Sheo Mangal Singh had purchased the mortgaged property on the 3rd September, 1917... ...	—	2,756 5 9
	Amounts borrowed on promissory notes, in order to pay off debts due by Rudra Pratab Singh (a son of a sister of Sheo Mangal Singh), as under :—		
4.	Promissory Note dated the 14th March, 1919 ...	8,500 0 0	
5.	Promissory Note dated the 20th March, 1919 ...	2,500 0 0	
6.	Promissory Note dated the 24th March, 1919 ...	500 0 0	
7.	Promissory Note dated the 15th April, 1919 ...	2,000 0 0	
8.	Promissory Note dated the 12th June, 1919 ...	10,000 0 0	
	Interest on the above	2,575 9 3	
			26,075 9 3
	[N.B.—The Promissory Notes for Rs. 8,500 and Rs. 2,500 were executed by both Mahabal Singh and Sheo Mangal Singh, that for Rs. 500 by Mahabal Singh and the remaining two by Sheo Mangal Singh.]		
9.	Amount borrowed by Sheo Mangal Singh on a Promissory Note in order to pay Government Revenue : Promissory Note dated 2nd February, 1920, signed by Sheo Mangal Singh	1,000 0 0	
	Interest	55 13 0	
			1,055 13 0
10.	Loan taken on the 9th October, 1920, for completion of the deed and for other expenses ...	—	522 8 0
			35,542 1 0

The principal sum and interest was payable after six years and interest was to run at 10 annas per cent. per month with yearly rests. The mortgage deed was executed by Lakhpati as a nominal party only because her name appears to have been inserted in the register as an owner in the case of some of the properties. The question which their Lordships have to determine is the extent to which the joint family property is bound.

Of the items claimed: Nos. 1 and 2 have been disallowed by the High Court against all the respondents and the appellants do not now dispute this decision. Both Courts allowed item 9 as against the respondents and no appeal has been taken against this decision.

Accordingly the right of the appellant to recover in respect of items 3 to 8 alone is in dispute but as the questions arising under item 3 differ somewhat from those arising under items 4 to 8 and the facts must be separately set out.

Before September, 1916, Raghubar and Ram Adhin, who appear to have been its then owners, mortgaged the village of Jitpur to the plaintiff to secure a loan of Rs.1950 with interest at 1 per cent. per month with half-yearly rests. On the 3rd September, 1917, Raghubar transferred an 8 annas share in most of the village to Sheo Mangal Singh for Rs.2600, of which 400 Rs. were handed over to the vendor and the remaining 2200 retained to answer the principal sum and interest to date on the mortgage. This last sum was not however used to pay off that mortgage. It was used for some other purpose and the sum of Rs.2756-5-9 included in the mortgage in suit under item 3 was borrowed and used in order to free the village from that liability. The land so purchased is undoubtedly family property and itself subject to the mortgage in suit to the extent of the principal sum of Rs.2756-5-9 with interest at the contractual rate, but the appellant claims that the whole of the rest of the family estate is likewise bound as security for this debt.

The paying off of the old mortgage and inclusion of the debt so incurred in the new is in the first place said to be beneficial to the family and therefore properly imposed as a liability upon the whole of the family property. Secondly it was said that in any case the debt was incurred by Sheo Mangal Singh in payment of an antecedent debt owing by him and there-

fore that it was the duty of his son Baram Din to answer his father's debt, whether the father was alive or dead. If there had been an antecedent debt owing to the appellant which Sheo Mangal Singh was legally obliged to pay, Baram Din might be liable under the well-known doctrine the principles of which are set out by their Lordships' judgment in *Brij Narain* v. *Mangla Prasad* 51 I.A. 129 at p. 135.

But Mangal Singh in fact was not previously indebted to the appellant. Rs.2200 had, it is true, been left with him by Raghubar that he might pay it to the appellant but Mangal Singh was under no liability to the appellant in respect of this sum.

There was, therefore, no antecedent debt and the appellant is thrown back upon the argument that the inclusion of the sum of Rs.2756-5-9 on the mortgage sued upon was for the benefit of the family. Undoubtedly the 8 annas share in the village became joint family property and was subject to the original mortgage until it was paid off. Accordingly it is urged, that it was beneficial to reduce the interest by redeeming the earlier mortgage and transferring the liability to the later even though the joint family property as a whole thereby became mortgaged instead of, as formerly, only the particular village of Jitpur. Their Lordships are not persuaded that this is so. No evidence of the value of the encumbered village has been given, and in the embarrassed state of the family it almost certainly would have had to be sold to answer the principal and interest secured by the one mortgage or the other. Instead of imposing a liability upon the family Sheo Mangal Singh might well have allowed the property to be sold. It is true that by so doing he would have deprived the family of an asset which otherwise would be theirs, but it is by no means clear that having regard to the mortgage with which it was burdened the asset was a valuable one or that to preserve it even at the lower rate of 10 annas per month in the place of a rupee a month as provided by the earlier mortgage was beneficial to the family. Even at the reduced rate it might well have been wiser to sacrifice the village rather than to burden the entire family estate with the additional sum. This is the view of the High Court and their Lordships see no reason for differing from it.

Items 4 to 8 were borrowed in order to pay the debts and preserve the estate of one Rudra Pratab Singh, a son of a sister of Mahabal Singh.

It is not now contended that this borrowing was either for necessity or beneficial to the family. Two defences, however, are set up—firstly, that the infant sons of Surajpal Singh are not entitled to contest the liability of the family estate as security for the mortgage debt and secondly, that in any case the liability was incurred in order to repay their father's antecedent debt. In support of the former proposition it is asserted that a member of a joint family must be content with the family estate as he finds it at his birth or at any rate he cannot complain of anything done before the period of gestation. Upon this rule, it is admitted, there is engrafted an exception to the effect that if the child who objects to the alienation of the property comes into existence or is conceived after the alienation, but during the life of a child born or conceived before the alienation, then that overlapping of the two lives enables the later-born child to contest the validity of the father's act.

Their Lordships do not think it necessary to determine whether this limitation upon the right of an after-born child to resist the claim of an encumbrance upon the family estate correctly expresses the law in all respects. They are content to assume its accuracy since they agree with the High Court in thinking it sufficiently established by the evidence that there was overlapping of lives in the present case. The matter stands thus:—Surajpal Singh stated that his first son was born on the 18th August, 1918 (*i.e.*, two years before the mortgage in question) and produced the birth register in support of his statement. He did not, however, produce the death certificate of that son nor the birth certificates or horoscopes of his younger sons. He did, however, say that his second son was seven months old when his eldest son died and in cross-examination that horoscopes of his sons had been prepared and were at his house, and that he kept accounts of income. The learned Subordinate Judge did not accept his evidence on the ground (1) that he had not produced the horoscopes, whereas he would in the

learned Judge's view have done so if they had supported his evidence, (2) that he had not produced the death certificate of the eldest son and (3) that if accounts of income were kept accounts of expenditure must also have been kept and would show the date on which money had been expended for the funeral ceremonies. It is to be observed however, that no question as to the time at which the eldest son died or his brothers were born was expressly raised in the pleadings nor did it form one of the issues. Consequently Surajpal may well be excused for not coming to Court armed with the death certificates or horoscopes: the birth certificate was of course essential to show that a son was alive at the date of the mortgage. It was for the appellant who raised the point to challenge Surajpal's evidence by cross-examination, and he did not do so. The actual questions asked were most perfunctory—the production either of the death certificates, the horoscopes or the accounts was not asked for. Nor do their Lordships consider that Surajpal's evidence is weakened by his statement that he did not know the date of his birth or of the birth of any of his sons. He might well have forgotten the exact dates and yet remember that one son died after another was born. Their Lordships agree with the High Court in thinking that there is no sufficient reason for rejecting the evidence of Surajpal upon this point which could have been challenged quite easily by the appellant in cross-examination or by the production of the death certificate of the eldest son.

In default of any serious challenge their Lordships, like the High Court, think it sufficiently established that the first born son did not die until after the birth of a younger brother, and hold that the minor sons are entitled to challenge the validity of the mortgage.

There remains the question whether the borrowing was undertaken in order to discharge the antecedent debt of a father. The answer depends on whether the sums set out under items 4, 5, 7 and 8 were first borrowed without any promise of future security or whether from the first there was an undertaking to secure them by mortgage, so that the whole matter was one transaction, not first a lending and at a later stage a consolidation of the sums lent and a separate transaction whereby they were secured on the mortgaged property. The appellant's witness, Bharam Das denied that there " was any agreement for a mortgage when the money was lent and the promissory notes given and the learned Subordinate Judge thought the transactions separate ones. He points out that the promissory notes are dated from March to June, 1919, whereas the mortgage did not take place until the 22nd September, 1920, more than a year later, and that if the giving of a mortgage was part of the original transaction, the bargain would most naturally have been proved by Sheo Mangal Singh who with his deceased brother Mahabal Singh had been a party to it. No doubt Sheo Mangal Singh might have given this evidence, but it has to be remembered that he was himself personally liable and did not even think fit to defend this action. In his absence the respondents called Suraj Din, a friend of Mahabal and Sheo Mangal Singh, who said he was present when the loan of Rs.8500 was made and that a mortgage was then promised. In this conflict of evidence their Lordships agree with the High Court that the appellant is most unlikely to have been willing to lend so large a sum to an indigent family except on the security of their property. The view of the High Court on this point is expressed in the words: " It seems to us impossible that the plaintiff did not intend there should be a mortgage for these loans and we consider that from the beginning the appellant intended that there should be such a mortgage." Their Lordships find themselves in agreement with this view and like the High Court are of opinion that the debts were not antecedent but that the whole transaction was conceived and carried out as part of the same bargain .

In accordance with these views they would dismiss the appeal and confirm the decree of the High Court and will humbly advise His Majesty accordingly.

As the respondents have not appeared there will be no order as to costs.

(35956) Wt. 8060 160 8/44 D.L. G. 38

In the Privy Council

SHRI 108 PUJA PAD UDIT PANCH PARMESHWAR PANCHAITI AKHARA UDASI NIRWANI

v.

SURAJPAL SINGH *alias* CHHEDI SINGH AND OTHERS

DELIVERED BY LORD PORTER

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1944