Privy Council Appeal No. 15 *of* 1924.
Oudh Appeal No. 6 *of* 1923.

Lal Bahadur and others - - - - - - *Appellants*

v.

Ambika Prasad and another - - - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD JULY, 1925.

Present at the Hearing:

LORD SUMNER.
LORD BLANESBURGH.
SIR JOHN EDGE.
MR. AMEER ALI.
LORD SALVESEN.

[*Delivered by* LORD BLANESBURGH.]

Two only of the questions which in this case were dealt with by the Trial Judge remain for consideration by their Lordships, and the facts which raise or surround them can be shortly stated.

The respondents are members of a joint Hindu family governed by the Mitakshara law. Ram Din, their grandfather, and his brother Pateshwari were in 1895 the managers of the joint family property, and on the 6th August in that year they executed in favour of one Chote Lal, a predecessor in interest of the present appellants, two mortgages—the first, a simple mortgage of a portion of the ancestral family property to secure an advance of Rs. 2,000 and interest; the second, a usufructuary mortgage for Rs. 8,000 upon another portion of the family property, namely, a 4-anna share in the village of Tendwa Takya.

Ram Din, one of these joint managers, had two sons, Awadh Behari and Jantri Prasad. In 1895 Awadh Behari was about 13 years old, Jantri Prasad about 3. The respondents, plaintiffs in the suit, are sons of Awadh Behari. In 1895 they were still

unborn. This, as will later appear, is one of the most important facts in the case. It follows from it that these two mortgage deeds have always been binding on the respondents. The only joint family estate to an interest in which they succeeded was an estate which to the extent of these two mortgages had already been alienated.

On the 12th September, 1904, Pateshwari Din and Ram Din carried out the transaction which it is sought in this suit to impeach, that is to say, a sale by registered deed of the 4-anna share in the village of Tendwa Takya, already the subject of the usufructuary mortgage in favour of Chote Lal and in his possession as such mortgagee. The purchasers under the deed are by name Ragho, Bindra and Asharfi Lal. It would appear, however, that they were one or some or all of them nominees of Chote Lal, whose interest in the purchase was throughout his life dominant. The sale is expressed to be a sale to the purchasers of the property in suit for Rs. 14,000 free from encumbrances. Of the purchase money Rs. 2,105.3.9 are in the deed stated to have been paid to the vendors on its execution, while Rs. 11,894.12.3 are stated to have been left with the purchasers for the purpose of making the payments, of which the following is a compendious statement :—

(1) Rs. 1,633.12.3 in satisfaction of three decretal amounts recovered against the vendors, and as to one for Rs. 290 by Chote Lal.

(2) Rs. 2,261 in payment of interest then accrued on the simple mortgage of the 6th August, 1895, held by Chote Lal on other family property.

(3) Rs. 8,000 in satisfaction of the usufructuary mortgage held by Chote Lal on the property sold.

The result, it will be seen, was that of the Rs. 14,000 purchase money, Rs. 10,551 was retained by or paid to Chote Lal, the mortgagee in possession of the property purchased.

It is now common ground that these sums were, in fact, retained or applied in the manner prescribed. As to the sum of Rs. 2,105.5.9 paid in cash to the vendors, it was given in evidence by the appellants at the trial that it was at the time represented by the vendors to the purchasers, and it was said, truly represented that the money was required by the vendors for payment of Government revenue, under-proprietary rent, the purchase of bullocks and household expenses, and that it was, in fact, so applied.

Now, their Lordships are not insensible that this bare statement of the transaction suggests possibilities which invite inquiry. If, in fact, it was really one under which a mortgagee and decree holder in possession had obtained for himself in satisfaction of his decree and mortgage debts a valuable ancestral property in consideration of a relatively trifling sum in cash paid to its joint managers, the transaction would not have belied its appearance as so stated.

But there is no suspicion that the three decrees were not all of them valid and enforceable against the vendors. The respon-

dents cannot be heard to say that the two mortgages were not valid and subsisting. It is nowhere suggested in the evidence that the sale was disadvantageous in the sense that the purchase price did not represent the full value of the property sold; still less that it was an inadequate price. Their Lordships on the evidence must take it that the price paid was a full price. Indeed, the only ground on which, in evidence, the sale was challenged by the respondents was that the transaction was induced by no family necessity, and was, for that reason, not binding upon them, and they analysed the manner in which the purchase money was applied for the purpose of making good that position.

Of the answers made by the appellants to this attack of the respondents two only, as has been said, remain for consideration by their Lordships. The first answer puts in issue the competency of the respondents to maintain the action at all. So far as Ambika Prasad is concerned the suit, the appellants contend, is barred by lapse of time; so far as Adita Prasad is concerned the suit is not maintainable at his instance for the reason, so it is said, that he was not in existence at the date of the sale deed—he had not then been born. The second answer of the appellants goes to the substance of the matter. The sale deed, they say, was, in fact, executed for the benefit and needs of the family and for the payment of antecedent debts, or, at any rate, so far as these were mortgage debts, for the satisfaction of secured debts by which, as such, the respondents were bound.

Both of these contentions of the appellants were upheld by the Trial Judge, the Subordinate Judge of Gonda, who, on the 30th June, 1921, dismissed the respondents' suit with costs. On appeal both were rejected by the Court of the Judicial Commissioner of Oudh, which by a decree of the 20th February, 1923, set aside the impugned deed on terms which their Lordships need not at the moment pause to particularise. Against that decree the defendants appeal.

Their Lordships will deal first with the answer of substance which the appellants make to the suit. If this answer be well founded, the other issue, more technical in character and one upon which the Courts in India were acutely divided, becomes academic.

Was, then, this deed binding on the respondents as having been made for the benefit of the family and for payment of antecedent debts? Was it any the less binding upon them even if the mortgages were not antecedent debts, seeing that these mortgages were both of them unchallengeable by the respondents? The proper answer to these questions, the price obtained for the property sold not being attacked as inadequate, depends upon the propriety of the purposes to which the whole purchase money was here applied. Upon this the points at issue before their Lordships were few. Mr. de Gruyther for the respondents agreed that the Rs. 1,633.12.3 applied in satisfaction of the decrees against the vendors constituted an item of disbursement to which, in view

of concurrent findings against him, he could now take no exception. As to the cash sum of Rs. 2,105.3.9 paid to the vendors, if the money was required and applied for the purposes indicated, it was not suggested that a sale so far as necessary therefor was open to objection. It was contended, however, that there was no sufficient evidence that the money had been so applied, and apparently the Appellate Judges so thought. Their Lordships, however, are not disposed on this point to interfere with the finding of fact of the learned Subordinate Judge in the appellants' favour, more especially because the learned Judges of the Appellate Court, while not prepared to accept the learned Judge's conclusions, did not base their judgment appealed from upon their own view of this part of the case.

Their Lordships agree that the evidence is somewhat vague, perhaps necessarily so after this lapse of time and after the deaths of the parties principally concerned. But the evidence is not, they think, insufficient to support the learned Judge's finding, and it is also, in their judgment, while considering its weight, proper to bear in mind that all the circumstances in connection with the sale were throughout known to the father and uncle of the respondents, who neither of them at any time, although now supporting the respondents in these proceedings, themselves took any steps to impeach the sale on this or any other ground—a reserve all the more striking when accompanied, as it is, by the admission made by the respondents' father in evidence that his inaction was at all events partly attributable to the fact that he could at no time prove that his father, a vendor, had spent the sale consideration after receiving it " in bad company or for illegal purposes."

In the result, if the sale is to be impeached at all by the respondents it must be on the ground that the payment of Rs. 2,261 and Rs. 8,000 out of the purchase money, the one sum in discharge of accrued interest on the simple mortgage of the 6th August, 1895, and the other in discharge of the principal secured by the usufructuary mortgage of the same date, cannot as against the respondents be justified, and the learned Judges of the Court of the Judicial Commissioner have so held on the ground that these mortgage debts, incurred as they were by the grandfather of the respondents, were not " antecedent debts " justifying a subsequent sale of family property for their liquidation. In the language of the judgment in *Bahu Ram Chandra* v. *Bhup Singh*, 44 I.A. 126, these debts had not been " incurred irrespective of the credit obtainable from immoveable assets which [did] not personally belong to him, but [were] joint family property." Nor, in the opinion of the learned Judges, was the position affected by the fact that the mortgage debts in question were both of them, as such, binding on the respondents. Now their judgment was pronounced on the 20th February, 1923, and the learned Judges had not the advantage of having before them, as their Lordships now have, the explanation of the case of *Bahu Ram Chandra* v. *Bhup Singh*,

given by the Board on 14th November, 1923, in the case of *Brij Narain* v. *Mangla Prasad*, 51 I.A. 129. The effect of that explanation, in their Lordships' judgment, is to show that in the circumstances of this case both of the mortgages of 1895 were " antecedent debts " which would justify for their liquidation a sale of family property not otherwise improper. In the present case, however, it is not, in their Lordships' judgment, necessary to invoke any such doctrine in order to counter the objection to the sale now being dealt with. Both mortgages, as their Lordships observe once more, were binding upon the respondents. A sale of family property otherwise unobjectionable, which resulted in the removal from what remained of it of the burden *pro tanto* of these encumbrances, cannot be successfully attacked by those so bound. It follows that, in their Lordships' judgment the sale in question is valid as against the respondents.

In these circumstances the other question, so fully dealt with in both of the lower Courts, need not now be discussed at length. The position with reference to it is that if the respondent Ambika Prasad was 21 years old or more at the commencement of this action, the suit, so far as he is concerned, is barred by lapse of time, and if the respondent Adita Prasad was not born at the date of the sale deed, that deed is binding upon him, and the suit impeaching it, so far as he is concerned, cannot be maintained. In other words, in order to enable the respondent Ambika Prasad to maintain this suit he must not have been over, say, 21 at its commencement, and in order to enable the respondent Adita Pasad to maintain it, he must not at the same date have been under, say, $14\frac{1}{2}$. What, then, were the respective ages of the two respondents at that date. On this point their Lordships are inclined to agree with the learned Subordinate Judge that it is not proved separately that Ambika Prasad was not over 21 ; nor is it proved separately that Adita Prasad was over $14\frac{1}{2}$. But there is strong ground for affirming that if Ambika was over 21, then Adita was over $14\frac{1}{2}$, and that if Adita was under $14\frac{1}{2}$ then Ambika was also under 21. In other words, there was not between the two brothers an interval of so many as $6\frac{1}{2}$ years. While, therefore, it may not be possible to say on the evidence with judicial certainty by which of the respondents the action is maintainable, the evidence does show that one of them is in that fortunate position.

Their Lordships, however, refrain from pursuing this matter further. They will, in agreement with the judgment appealed from, assume, without deciding, that the suit was maintainable by both respondents. Even so, for the reasons already given, it fails.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be allowed and the judgment of the learned Subordinate Judge restored.

The respondents must pay to the appellants their costs here and below ; but the costs of adding Asharfi Lal as an appellant must in accordance with the order of the 25th July, 1924, be paid by the appellants, and there will be a set-off as regards these costs.

In the Privy Council.

LAL BAHADUR AND OTHERS

v.

AMBIKA PRASAD AND ANOTHER.

DELIVERED BY LORD BLANESBURGH.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C. 2.

1925.