

Privy Council Appeal No. 14 of 1938

Sardar Surendar Singh and another - - - - *Appellants*

v.

Chaudhri Ghulam Mohammad - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 28TH MARCH, 1939

Present at the Hearing :

LORD MACMILLAN

LORD ROMER

SIR GEORGE RANKIN

[*Delivered by* LORD ROMER]

This is an appeal by the plaintiffs in the suit from a decree dated the 7th October, 1936, of the High Court of Judicature at Lahore, which set aside a decree dated the 4th December, 1935, of the Court of the Senior Subordinate Judge, Sheikhpura.

The plaintiffs, who are the sons of Sardar Balwant Singh, deceased, a Sikh Jat, brought their suit to obtain possession of ancestral lands which had been mortgaged by their father in their lifetime by way of usufructuary mortgage in favour of the respondent (defendant) Chaudhri Ghulam Mohammad. They alleged in their plaint that according to the customary law of the agriculturists of the Punjab, which admittedly governs the transaction, their father was not competent to mortgage the ancestral lands without legal necessity and that there was no such necessity for the mortgage in the present case. They accordingly prayed for a decree that the mortgage was ineffectual to bind their reversionary rights in the land and for possession.

The mortgage deed is dated the 10th September, 1928, and was given for the purpose of securing the sum of Rs.14,000. Of this sum Rs.11,000 was paid to Balwant Singh in cash and the balance of Rs.3,000 was retained by the respondent in satisfaction of a like sum then remaining due to him from Balwant Singh under an earlier mortgage of other land dated the 16th August, 1927.

It is a well-established rule that in such circumstances the onus lies on the mortgagee of proving either that there was legal necessity in fact which would justify the mortgage,

or that he made a proper and bonâ fide enquiry into the alleged necessity and satisfied himself as to the existence of such necessity. See *Lala Atma Ram v. Thakur Sadee Singh*, A.I.R. 1938 P.C. 77. But it also appears from the same case, and the authority there cited, that if he discharges this burden he is not bound to see that the money paid by him is actually applied by the mortgagor to meet the necessity.

The legal necessity that is said to have existed in the present case was the existence of a number of debts owing by Balwant Singh, and it is plain that the payment of the debts of a mortgagor is a legal necessity, if such debts can be described as "just debts". The question of what is a just debt for this purpose has been authoritatively answered by this Board in the case of *Kirpal Singh v. Balwant Singh*, I.L.R. 40 Cal., p. 288. It was there held, approving the definition given by a Full Bench of the Chief Court of the Punjab in an earlier case, that a just debt means a debt which is actually due and is not immoral, illegal, or opposed to public policy, and has not been contracted as an act of reckless extravagance or of wanton waste, or with the intention of destroying the interests of the reversioners.

In the present case the plaintiffs made no attempt to show that their father lived an immoral life or was recklessly extravagant or wantonly wasteful. Nor did they suggest that he executed the mortgage with the intention of damaging the reversioners. All that could be said against him was that he drank to excess. This was probably true, seeing that his death, which occurred in the month of January, 1934, was due to cirrhosis of the liver. But apart from this failing, he seems to have borne a good character and was treated as a respectable member of society. There was not, therefore, any prima facie reason for supposing that the debts which had been incurred by Balwant Singh were not "just debts". The onus nevertheless lay upon the defendant mortgagee of proving that the debts could properly be so described.

On the 4th December, 1935, the Senior Subordinate Judge pronounced judgment. He held that the Rs.3,000 owing under the mortgage of 1927 was a just debt. He also allowed the respondent another Rs.3,000 in respect of money said to have been spent by Balwant Singh on the education and marriage of his son, the appellant Surendar Singh, though he would appear to have been mistaken as to this, seeing that the marriage of Surendar Singh did not take place until about two years after the date of the mortgage. He also allowed Rs.100 on account of the cost of the mortgage or Rs.6,100 in all and decreed in favour of the plaintiffs' possession of the mortgaged land upon payment of that sum.

From this judgment both parties appealed to the High Court. In the result the plaintiffs' appeal was dismissed; but the defendant's appeal was allowed, the decree of the Subordinate Judge was set aside, and the plaintiffs' suit was dismissed. The High Court agreed with the Subordinate

Judge as regards the Rs.3,000 owing under the earlier mortgage, and then, after alluding to various debts and necessities of Balwant Singh, alleged by the respondent to have been existing at the date of the mortgage in suit, said this:—

“ But even if all these various debts and necessities relied on by the mortgagee are ignored, the fact remains that, at the time of the mortgage, Balwant Singh had to discharge decrees of the value of over Rs.20,000 at least and in these circumstances, if a man who knew Balwant Singh and also knew his obligations, advanced a sum of Rs.11,000 to relieve him of his anxieties and worries, he cannot be said to have conducted himself in a dishonest manner or helped Balwant Singh in his career of reckless extravagance or wanton waste and be thus deprived of his money. A male proprietor does not suffer under the same disabilities as a widow and he is bound to pay off his decretal debts at least.”

If and so far as this passage indicates that the mere existence of decretal debts is sufficient proof of there being legal necessity on the part of an alienor of ancestral lands governed by the customary law of the Punjab, their Lordships respectfully differ from the High Court. The alienor must go further and show that the debts which were decreed were just debts. Whether or not this can be said of all the decretal debts of Balwant Singh to which the High Court referred in their judgment is a question upon which their Lordships do not find it necessary to express an opinion. For in their Lordships' opinion it can certainly be said of one of them, viz., a debt of Rs.11,000 owing by Balwant Singh at the date of the mortgage: and this sum added to the Rs.3,000 owing under the previous mortgage, which both Courts below agreed, and in their Lordships' opinion rightly agreed, in treating as a just debt, together make up the Rs.14,000 for which the mortgage in suit was given.

The history of this Rs.11,000 begins in the year 1913. On the 31st July in that year Balwant Singh executed a mortgage of ancestral land in favour of one Seth Mehal Singh to secure the sum of Rs.7,000. On the 22nd May, 1926, the present appellant Surendar Singh and his brothers instituted a suit for the purpose of impeaching the validity of the mortgage on grounds similar to those upon which the present suit is founded. The Subordinate Judge before whom the matter came on the 28th July, 1927, dismissed the suit. He held that the transaction was for consideration and legal necessity. In the meantime Seth Mehal Singh had brought a suit against Balwant Singh for recovery of the money due on the mortgage, and on the 30th August, 1927 obtained a preliminary decree for Rs.27,199.8.6 and costs which amounted to Rs.2,000 odd. On the 14th November, 1927, Seth Mehal Singh and Balwant Singh entered into a compromise under which Balwant Singh agreed to discharge this decretal debt by an immediate cash payment of Rs.18,000 and as to Rs.11,000 within two years. It was in order to put Balwant Singh in funds with which to pay this decretal debt that the earlier mortgage of the 16th August, 1927, had been executed. The money advanced by the respondent on that occasion was the sum of Rs.23,000, of

which sum only Rs.20,000 was secured on the land mortgaged, the balance of Rs.3,000 being unsecured. The validity of that mortgage has never been challenged; nor could it have been challenged successfully. For the decretal debt, agreed by the compromise at Rs.29,000, was in the circumstances a just debt without any question. The Rs.23,000 that he borrowed from the respondent on the 16th August, 1927, should no doubt have been applied by Balwant Singh in discharge not only of the Rs.18,000 that was immediately payable in cash under the compromise, but also in reducing the deferred payment of Rs.11,000 to Rs.6,000. But for some reason unknown to their Lordships, no part of the Rs.11,000 was in fact paid by Balwant Singh and it remained owing at the time when the mortgage now in question was executed. The respondent, however, had been under no obligation to see that any portion of the Rs.23,000 borrowed in August, 1927, was applied by Balwant Singh in part discharge of the Rs.11,000. He was entitled to assume without further enquiry that the Rs.23,000 had all been expended in discharge of other legal necessities of Balwant Singh and to treat the Rs.11,000 in September, 1928, as being a just debt. It was a just debt in August, 1927, and did not cease to be so at the later date, merely by reason of the failure of Balwant Singh to discharge it out of the Rs.23,000. The High Court after an examination of the facts relating to the sum of Rs.11,000 have treated it as a just debt owing by Balwant Singh at the date of the mortgage in suit, and in their Lordships' opinion have rightly so treated it.

The Rs.3,000 remaining due under the mortgage deed of the 16th August, 1927, has been found by both Courts below to have been a just debt, and in their Lordships' opinion, it plainly was so.

For these reasons their Lordships are of opinion and will humbly advise His Majesty that the appeal should be dismissed.

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