as to costs. I should have mentioned that the plaintiff originally filed cross-objections against the decree of the trial Court, claiming that the amount due to him under the decree should be increased by a sum of Rs. 215. The learned District Judge in appeal, having held that appellants were entitled to withdraw the appeal, disposed of the cross-objections which he allowed, and in the result he made an order that the amount originally found due by the trial Court should be increased by the sum of Rs. 215, and he directed the defendants to pay the costs of the appeal including the costs of both the Appellate Courts, together with the costs of the remand and the commissioner's fees. Against that order the plaintiff comes in revision. His contention is that the appellants were not entitled to withdraw the appeal either with or without the leave of the Court, and that the Court was bound to grant a decree in favour of the plaintiff holding that the amount found due by the commissioner was the correct amount.

The question we have to consider is, whether it was open to the appellants to withdraw their appeal either with or without the leave of the Court. If the Court had power to grant leave, it is not open to us in revision to consider whether the Judge exercised his discretion rightly, though I see no reason for doubting that he did. There is no provision in the Civil Procedure Code dealing with the right to withdraw an appeal. Under O. 23, R. 1, a plaintiff may withdraw a suit at any time. But if he does so without obtaining the permission of the Court to file a fresh suit under sub-rule (2), then he is precluded from instituting a fresh suit in respect of the subject-matter of the original suit. That rule does not in terms apply to an appeal, and clearly the provision of sub-r. (2) as to withdrawal with leave to file a fresh suit would be inapplicable to an appeal. Nor is the case of the applicant improved in any way by S. 107, Civil P. C., which merely confers upon an Appellate Court powers and duties similar to those possessed by Courts of original jurisdiction but does not confer upon the parties to an appeal all the rights which the parties to a suit may enjoy. There being no express provision in the Code as to the withdrawal of an appeal, in my opinion, the correct rule is that the appellant is entitled as of right to withdraw his appeal, provided that the respondent has not acquired any interest thereunder. That rule was laid down in 23 All 130,[1] though it was there held that an appeal could not be withdrawn if there were cross-objections. But the objection as to cross-objections is now removed by the terms of O. 41, R. 22 (4). But in my opinion, if the respondent has obtained any rights under the appeal, it is not open to the appellant to withdraw his appeal without permission.

In this case, I think that the interlocutory order made by the Appellate Court directing accounts under the Dekkhan Agriculturists' Relief Act did confer a right upon the respondent, and I think that after that order was made, it was not open to the appellants to withdraw their appeal without leave. But, in my opinion, it was open to the Court to grant leave. It is difficult to see what an Appellate Court can do, if the appellant desires to withdraw, and the Court has no jurisdiction to allow him to do so. It is suggested that the proper course in such a case is to transpose the parties, making the respondent appellant, and the appellant respondent. It may be that in a proper case the Court might adopt that course, but it seems to me impossible to hold that the Court is bound to adopt that course in every case where the appellant withdraws. Here the learned Judge did not think fit to adopt that course. The respondent could have claimed in his cross-objections a greater amount as due than the amount which he did claim, but, in my opinion, he was not entitled to insist upon the appeal being prosecuted. The learned Judge had jurisdiction to allow the appeal to be withdrawn and in so allowing was guilty of no irregularity. In my opinion, therefore this revisional application must be dismissed with costs.

Wassoodew J.—I agree.

N.S.D./R.K. *Application dismissed.*

1. Kalyan Singh v. Rahmu, (1901) 23 All 130.

A. I. R. 1938 Bombay 443

BROOMFIELD AND MACKLIN JJ.

Asman Vaman Yadav and others — *Plaintiffs* — Appellants.

v.

Ganpat Tukaram and another — *Defendants* — Respondents.

Cross First Appeals Nos. 303 of 1935 and 69 of 1936, Decided on 10th March 1938, against decision of the Joint First Class Sub-Judge, Jalgaon, in Special Regular Civil Suit No. 314 of 1933.

Hindu Law—Alienation—Father— Mortgage not for antecedent debt does not bind son's interest even if debt is not proved to be for immoral purpose.

A mortgage by a father which is not for necessity and not for an antecedent debt does not bind the sons' interests in the property, whether or not the debt was contracted for an immoral purpose : *A I R 1924 P C 50, Rel. on ; A I R 1928 All 596 (F B), Approved ; A I R 1926 Oudh 321, Not foll.* [P 446 C 1]

P. B. Gajendragadkar (in No. 303), Dr. B. R. Ambedkar and Ramnath Shivlal for A. S. Asyekar (in No. 69) — *for Appellants.*

Dr. B. R. Ambedkar and Ramnath Shivlal for A. S. Asyekar (in No. 303) — *for Respondent 1.*

P. B. Gajendragadkar (in No. 69) — *for Respondents 1 to 3.*

Broomfield J.—These are cross-appeals arising in a suit brought by the plaintiffs for a declaration that certain mortgage deeds executed by their father, defendant 2, in favour of defendant 1 on 22nd December 1913, 2nd February 1915, 3rd February 1915 and 9th February 1920, and a decree obtained in a suit of 1924 on the strength of these mortgages are not binding on the plaintiffs' share in the properties mortgaged, and also for an injunction restraining defendant 1 from executing the decree. Defendant 2, who, as I say, is the father of the plaintiffs, was apparently in the days of his youth an extravagant man addicted to drinking and other vicious practices. The mortgage deeds were in the form of sale-deeds, but when the creditor, defendant 1 sued for possession of the lands covered by them, defendant 2 contended that they were really mortgages. That contention was accepted and he was allowed to redeem. On 21st October 1925, a decree was made against him for the payment of Rs. 10,000 in instalments, and in execution of this decree defendant 1 applied to recover the amount of the debt by sale of the mortgaged properties. It has been found that plaintiffs 2 and 3 were not born at the time of the transactions in question. Plaintiff 1 though not born was already conceived at the date of the first transaction, namely 22nd December 1913. It is open to him therefore to challenge the alienations.

The findings of the trial Court are that the mortgages of 22nd December 1913, and 3rd February 1915, Exs. 61 and 63, were effected in respect of antecedent debts incurred by defendant 2. The learned Judge has also found that there is no proof that these particular debts had been incurred for an immoral purpose. So far as these two transactions covered by Exs. 61 and 63 are concerned therefore the plaintiffs' claim was dismissed, and in the first of these appeals, they have appealed against that decision. In the case of the other two transactions dated 2nd February 1915, and 9th February 1920, Exs. 62 and 64, the trial Judge found that there were no antecedent debts but that the debts in each case were incurred for an immoral purpose. Accordingly as regards these transactions he allowed the plaintiffs' suit giving a declaration in favour of plaintiff 1 that his joint one-half share in the properties is not liable to be sold under the decree. The cross-appeal by the mortgagee, defendant 1, is against that part of the decision.

In the plaintiffs' appeal (F. A. No. 303 of 1935) the only question is whether the lower Court was right in holding that there were antecedent debts. Defendant 1 was examined, and he has deposed that the consideration for the mortgage, Ex. 61, which was ostensibly Rs. 2000 in cash really consisted of the amount of two money bonds previously executed by defendant 2 for Rs. 800 each and the interest on these bonds. As regards the mortgage, Ex. 63, the consideration for which is stated in the deed to be Rs. 4000 cash, defendant 1 deposed that this amount really consisted of amounts owed by defendant 2 to a number of other creditors. He has mentioned the names of these creditors and the amounts which he paid to them. The trial Judge believed the evidence of defendant 1. He appears also to have relied on the judgment in a previous suit between defendant 1 and defendant 2 in which the history of the transactions were gone into and in which it was held that there were antecedent debts in the case of these particular mortgages. It is not quite clear how that judgment came to be admitted on the record. There is no provision of the Evidence Act which makes it admissible in evidence, and we therefore ignore it. At the same time we are impressed by the evidence of defendant 1. It is clear and circumstantial, and as far as one can see, he has given an honest account of the facts. In the case of each transaction he has given the fullest details. He has quite candidly given the facts about the other two transactions, Exs. 62 and 64, which make it clear that in those cases the debts were contracted for an immoral purpose. It

cannot be said that his evidence has been in any way shaken in cross-examination. It is true that the mortgage deeds themselves contain no reference to the fact that there were antecedent debts. But as against that it may be noted that the deeds are all registered, and if the consideration had in fact been paid in cash, one would have expected that in the ordinary way it would have been paid before the Sub-Registrar, and we should have his endorsements to prove the fact. But there is no endorsement of the kind.

The plaintiffs have produced no evidence which can be said to be inconsistent with that of defendant 1. Their maternal uncle, Ex. 53, has given evidence, and no doubt he says that defendant 2 had no antecedent debts. He also says that the income from the family fields was Rs. 1000 to Rs. 1500 per annum, and the agricultural expenses Rs. 700 to Rs. 800 per annum. The object of this evidence presumably was to show that there was no necessity for defendant 2 to incur debts. Even on that point it is not very convincing, and as a matter of fact this witness was only about 19 years old at the time of the first alienation, and it is doubtful whether he really has any knowledge of the circumstances of the family at that time. Apart from that however the question whether there was any necessity for the debt is not material for our present purpose. The question is whether defendant 2 had incurred debts prior to the dates of these mortgages, and having regard to his proved character it cannot be said that the evidence of the plaintiffs' maternal uncle makes that in the least unlikely. On the whole, we think that the trial Court was justified in accepting the evidence of defendant 1 and holding that there were antecedent debts in the case of both the transactions Exs. 61 and 63. That being so, the trial Judge is obviously right as regards this part of the case. The law is perfectly clear that an alienation by a father for an antecedent debt binds the interests of his sons in the property alienated if it is not proved that the debt was immoral.

Coming to the case of the cross appeal by defendant 1, the finding that there was no antecedent debt in the case of the mortgages, Exs. 62 and 64, is not challenged. So that we start with the position that there were no antecedent debts. The lower Court has held that in both cases the debts were contracted for an immoral purpose. As to the mortgage, Ex. 64, I think that the trial Judge is obviously right. The money borrowed on that occasion was required as to Rs. 1000 for the expenses of a mistress who was being kept by defendant 2 and as to Rs. 400 for the expenses of the marriage of a tamasha boy who was kept by him. Dr. Ambedkar who appears for the appellant in this case has conceded that Rs. 1000 must be regarded as an immoral debt. He says however that there is nothing necessarily immoral in keeping a tamasha boy and points out that there is some evidence to show that in the part of the country where these parties live troupes of tamasha boys who give dancing parties are maintained by some people as an ordinary business proposition. But this money was required for the purpose of the marriage of one of these boys, and I think that the special interest which defendant 2 seems to have shown in this youth indicates that it was probably something other than a purely business concern.

As to the mortgage, Ex. 62, which was for Rs. 800, I think there may be a reasonable doubt as to whether the purpose really was immoral. It seems that at that time, in 1915, the defendant had been keeping a Bhil mistress, which was against the rules of the caste, and to expiate this offence it was necessary for him to give a caste dinner at the cost of Rs. 800. It is argued for the appellant that as defendant 2 had been excommunicated and as it was necessary to incur this expenditure to get rid of the stigma and the social consequences of this ex-communication and as it was presumably for the benefit of the whole family that he should do this, the expenditure cannot properly be regarded as immoral. I think that there is something in this reasoning, and I doubt whether the finding of the trial Judge in this respect can be upheld. The question however is not really material. In 51 I A 129[1] their Lordships of the Privy Council have laid down five propositions which must be regarded as the foundation of the Hindu law to be applied in cases of this kind. We are concerned only with the first three (page 139):

(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

1. Brij Narain v. Mangla Prasad, (1924) 11 A I R P C 50=77 I C 689=51 I A 129=46 All 95 (P C).

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.

Now according to the construction which has been placed upon this Privy Council case by a Full Bench of the Allahabad High Court in 51 All 136,[2] a mortgage by a father which is not for necessity and not for an antecedent debt does not bind the sons' interests in the property whether or not the debt was contracted for an immoral purpose. The facts in that case were essentially the same as here. There was a joint Hindu family governed by the Mitakshara consisting of a father and his sons. The father made a mortgage of joint family property. The mortgagee sued on the mortgage, without impleading the sons as here, and obtained a decree for sale. After the decree, but before the sale could take place, the sons brought a suit against the mortgagee, challenging the validity of the mortgage. The sons failed to establish that the debt was tainted with immorality and the mortgagee failed to establish legal necessity. There was no question of an antecedent debt. It was held by all the Judges constituting the Full Bench that as the mortgagee failed to establish legal necessity for the loan, the sons' suit must succeed although they had failed to prove that the debt was of an immoral character.

Two of the Judges took the view that the second of the propositions laid down by the Privy Council in 51 I A 129[1] did not apply because the word "debt" there did not contemplate a mortgage debt but only an unsecured debt. Sulaiman Ag. C. J. differed on that point. He took the view that the word "debt" in the second proposition did include a mortgage debt, but he arrived at the same result as his learned brothers because he interpreted the expression "lay the estate open to be taken in execution proceedings upon a decree for payment of that debt" as the equivalent of "make it liable to be sold at auction in execution of the decree," the meaning being according to him that as soon as the property has been sold at auction the transaction cannot be impeached without showing immorality. So that though he differed as to the meaning of the word "debt," he agreed with the other Judges that the second proposition does not imply that after the decree and before the sale the sons cannot, by obtaining a declaratory decree in a separate suit, say that the transaction is not binding on them, and thus prevent the sale.

A different view has been taken by the Chief Court in Oudh and that view has recently been confirmed by the High Court in 1 Luck 360.[3] The point is undoubtedly not free from difficulty, because, as their Lordships of the Privy Council have pointed out in 51 I A 129,[1] the principles of Hindu law in this matter are themselves somewhat illogical and difficult to reconcile. But, with respect, we prefer the reasoning in 51 All 136.[2] The other view which has been urged by Dr. Ambedkar for the appellant seems to render the third proposition laid down by their Lordships in 51 I A 129[1] practically meaningless. According to this view it means that a mortgage by a father, if there is no antecedent debt, is not effective and does not bind the estate of the sons qua mortgage. But if one can bring a suit on the basis of the transaction and obtain a decree upon it and sell the estate in execution of the decree, it is difficult to see what is the practical effect of the third proposition, and it may well be doubted whether their Lordships of the Privy Council would have thought it worth while to lay down a proposition so purely technical and academic in its application. Accepting the view of the Allahabad High Court in 51 All 136,[2] we hold that the cross appeal fails, even though it has not been satisfactorily shown that the consideration for Ex. 62 was an immoral debt. We are not concerned in this case with the position where the property has actually been sold, or where the creditor has obtained a money decree against the father. In the circumstances as they exist here, plaintiff 1 is entitled to the relief which has been granted to him. The result is that both the appeals are dismissed with costs.

D.S./R.K. *Appeals dismissed.*

2. Jagdish Prasad v. Hoshyar Singh, (1928) 15 A I R All 596=115 I C 775=51 All 136=26 A L J 1289 (F B).

3. Nand Lal v. Umrai, (1926) 13 A I R Oudh 321=93 I C 655=1 Luck 360=29 O C 260=3 O W N 359.