

the trial by the Civil Court of the question whether the property in suit is or is not evacuee property is barred. That being the position of matters, the proper order to be passed by the Court of first instance was to direct the adjudication of the question specified in section 46 (a) of Act No. XXXI of 1950 by the Custodian and to order the stay of the disposal of the suit pending the adjudication of that question by the Custodian.

Mohd. Saddiq
Barry
v.
Mohd. Ashfaq
and others
—
Harnam Singh,
J.

For the foregoing reasons, I set aside the judgments and the decrees passed by the subordinate Courts and remand the case to the Court of first instance under Order XLI, rule 23 of the Code of Civil Procedure.

In deciding the suit the Court will remit for adjudication to the Custodian the question whether the property in suit is or is not evacuee property. On the adjudication of that question by the Custodian, the Court will proceed with the trial of the suit on the basis that the decision given by the Custodian is binding upon the Court.

Parties are directed to appear before the Court of first instance on the 5th of October, 1953.

APPELLATE CIVIL

Before Kapur, J.

PURAN SINGH—*Plaintiff-Appellant*

versus

UDHAM SINGH AND ANOTHER,—*Defendants-Respondents.*

Regular Second Appeal No. 586 of 1949

Punjab Custom—Alienation—Necessity—Sale for payment of the mortgage debt, whether for necessity.

B.S. sold the land in dispute for Rs. 2,290. Out of this amount Rs. 1,520 was payable on two previous mortgages, one being for Rs. 1,400 with possession, and the interest was equalized by rents and profits. The other mortgage carried interest. A third degree collateral of the vendor brought a suit challenging the sale on the ground that it was without

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consideration and necessity. The D.J. pointing the sale to be for necessity to the extent of Rs. 1,520 upheld the same. On second appeal to the High Court it was contended that the sale for the payment of the mortgage money cannot be upheld as being for necessity.

Held, that if the meaning of just debt is the existence of a previous debt which is due, is not immoral, illegal or opposed to public policy, then it cannot be said that the amounts due on the mortgages were not just debts particularly when one of the mortgages was on interest carrying debt and the sale to pay the mortgage debts was therefore for necessity.

Hakam Ali v. Milkhi Ram (1), and Samund Singh v. Rakha Ram (2), distinguished.

Regular Second Appeal from the decree of Shri M. R. Bhatia, District Judge, Ludhiana, dated the 6th day of April 1949, reversing that of Shri Pritam Singh Subordinate Judge, 1st Class, Samrala, dated the 9th August 1948, and dismissing the plaintiff's suit and leaving the parties to bear their own costs throughout.

MELA RAM AGGARWAL, for Appellant.

K. S. THAPAR, for Respondents.

JUDGMENT

Kapur, J.

KAPUR, J. This appeal is brought by the plaintiff Puran Singh against an appellate decree of District Judge M. R. Bhatia dated the 6th April 1949, reversing the decree of the trial Court and thus dismissing the plaintiff's suit.

The facts of the case are that Bishan Singh, defendant No. 2, sold the land in dispute which was 6 *bighas* 12 *biswas* and 5 *biswansis* for a sum of Rs. 2,290 by a deed of sale, dated the 1st July 1940. Out of this consideration money Rs. 1,520 was payable on two previous mortgages—one, a mortgage of the land in dispute for Rs. 1,400 and the other a mortgage of the house for Rs. 120. The former was a mortgage with possession where the interest equalled the produce and the latter was an interest carrying mortgage. There was

(1) A.I.R. 1932 Lah. 193.

(2) A.I.R. 1943 Lah. 22

also Rs. 70 for payment of registration expenses. Puran Singh
 A suit was brought by a third degree collateral to v.
 challenge the sale on the ground of its being with- Udham Singh
 out consideration and necessity. The District and another
 Judge has found Rs. 1,520 for necessity and the
 question that has been raised in this second Kapur, J.
 appeal before me is whether this is sufficient to
 support the sale.

Their Lordships of the Privy Council in *Sri Krishan Das's case* (1), held that a sale of joint family property where the consideration was Rs. 3,500 and necessity proved was for Rs. 3,000, was a good sale because the real question to be considered in that case was whether the sale itself was justified by necessity. At page 160 their Lordships said :—

“In any case where the sale has been held to be justified, but there is no evidence as to the application of a portion of the consideration, a presumption arises that it has been expended for proper purposes, and for the benefit of the family. This is in line with the series of decisions already referred to, in which it was held that where the purchaser acts in good faith and after due inquiry, and is able to show that the sale itself was justified by legal necessity, he is under no obligation to enquire into the application of any surplus and is, therefore, not bound to make repayment of such surplus to the members of the family challenging the sale.”

The same rule has been stated by Mulla in his *Hindu Law* at page 295. This Privy Council case was considered by a Division Bench of the Lahore High Court in *Hakam Ali v. Milkhi Ram* (2), where it was held that sale could not be deemed

(1) I.L.R. 49 All. 149
 (2) A.I.R. 1932 Lah. 193.

Puran Singh for legal necessity where it was effected to pay off
 v. the amount of mortgage on the property. Addi-
 Udham Singh son, J., there said:—
 and another

—
 Kapur, J.

“It cannot therefore be held that there was any necessity to effect the sale of the property merely to pay off the amount for which the property was mortgaged.”

and he referred to *Sri Krishan Das's case* (1). No case has been cited where Hakim Ali's case was followed though it was referred to by Munir, J., in *Samund Singh v. Rakha Ram* (2), but there the learned Judge went on the question of actual pressure on the estate, and if I may say with great respect the meaning of the phrase “actual pressure on the estate” is not what the learned Judge thought it to be.

I need not go very much to anything very ancient but I will refer to a judgment of the Lahore High Court in *Iqbal Singh v. Jasmer Singh* (3), where at page 723 Sir Shadi Lal, C.J., reiterated the definition of the word ‘just debt’ as follows:—

“But it has been repeatedly held that an alienation can be validly made for the payment of a just debt which means a debt which is actually due, 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 interest of the reversioners. This was the rule enunciated in the leading case of *Devi Ditta v. Saudagar Singh* (4) and has been approved by the Privy Council in *Kirpal Singh v. Balwant Singh* (2).”

(1) I.L.R. 49 All. 149 (P.C.)
 (2) A.I.R. 1943 Lah. 22
 (3) I.L.R. 15 Lah. 715
 (4) 65 P.R. 1900
 (5) 26 P.R. 1913 (P.C.)

If the meaning of just debt is the existence of a previous debt which is due, is not immoral, illegal or opposed to public policy, etc., then it cannot be said that the amounts due on the mortgages in the present case were not just debts particularly when one of the mortgages was an interest carrying debt. This definition which was given as long ago as 1900 by Chatterjee, J., has more recently been re-stated by Mehr Chand Mahajan, J., in *Karnail Singh v. Naunihal Singh* (1). I am in respectful agreement with these judgments as indeed I am bound by them particularly when they have the imprint of very high authority. In this Court Harnam Singh, J., in *Mohindar Singh v. Joginder Singh* (2), upheld the sale which was made to pay off two mortgages, the rest of the consideration not being proved.

Puran Singh
v.
Udham Singh
and another
—
Kapur, J.

I would hold that the debts in the present case were just antecedent debts and, therefore, form a binding consideration for the sale which was effected by Bishan Singh. I would, therefore, dismiss this appeal, but the parties will bear their own costs in this Court.

APPELLATE CIVIL

Before Harnam Singh, J.

TEK CHAND, ETC.,—*Defendants-Appellants*

versus

JATI RAM, ETC.,—*Plaintiffs-Respondents*

Civil Regular Second Appeal No. 638 of 1949

1953

Sept. 16th.

Abandonment—Loss of right by—Whether a question of fact—If open to challenge in second appeal—Co-sharers—Adverse possession—Requisites of.

Held, that the question whether proprietary rights in suit land had been lost by abandonment is a question of fact and is not open to examination in second appeal unless it is shown that the finding does not proceed upon the consideration of the entire evidence on the record.

(1) I.L.R. 1945 Lah. 434 (F.B.)
(2) A.I.R. 1950 E.P. 79