

**Peare Lal and ors. Vs. Sunder Singh and ors.**

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**SooperKanoon Citation :** [sooperkanoon.com/484792](http://sooperkanoon.com/484792)

**Court :** Allahabad

**Decided On :** Jun-14-1922

**Reported in :** AIR1922All436; 68Ind.Cas.805

**Judge :** Walsh and ;Ryves, JJ.

**Appellant :** Peare Lal and ors.

**Respondent :** Sunder Singh and ors.

**Judgement :**

1. In our view this appeal fails. It raises in form a nice question of onus in a case where the law has uncontrovertibly placed the onus of proof to support a mortgage of family property upon the shoulders of the creditor. It is sufficient, for the purpose of the preceding statement, to refer to the judgment of Sir John Stanley in the case of Chandradeo Singh v. Mata Prasad 1 Ind. Cas. 479 : 31 A. 176 : 6 A. L. J. 263 (F. B.) which has received the expressed approval and adoption, if one may use the term, of the Privy Council, more than once and particularly in the case of Sahu Earn Chandra v. Bhup Singh 39 Ind. Cas. 280 : 39 A. 437 : 21 C. W. N. 698 : 1 P. L. W. 557 : 5 A. L. J. 437 : 19 Bom. L. Rule 498 : 26 C. L. J. 1: 3 M. L. J. 14 : 19(sic)7, M. W. N. 439 : 22 M. L. T. 22, 6 L. W. 213 : 44 I. A. 126 (P. C.), and we, of course, faithfully adhere to that decision which may be said to have a force in India equivalent to Statute Law.

2. We adopt also the principle laid down by the Privy Council, as expressed in the concluding words of the opinion of their Lordships delivered by Lord Shaw in the case of *Sohu Ram Chandra v. Bhup Singh* 39 Ind. Cas. 280 : 39 A. 437 : 21 C. W. N. 698 : 1 P. L. W. 557 : 5 A. L. J. 437 : 19 Bom. L. Rule 498 : 26 C. L. J. 1: 3 M. L. J. 14 : 19(sic)7, M. W. N. 439 : 22 M. L. T. 22, 6 L. W. 213 : 44 I. A. 126 (P. C.), where he says that in order to validate a transaction of mortgage of family property by the father or mar agar there must be not only formal antecedency, but antecedency in date combined with real dissociation in fact. The Courts in India are warned not to give effect to mortgages brought into existence merely to cover a breach of trust and what is called an unreal antecedency.

3. But the question of onus is not a mere question of law. Once the principle of onus has been settled, the question still remains in the decision of each particular case, as to whether, having regard to the transactions which have been established by evidence, the onus still remains where it was, or whether, on the other hand, it has been made to shift, and one might cite, if any useful purpose would be served by citing them, cases in which the onus has been shifted several times during the process of elucidating a case in consonance throughout with the general principle of law governing the question of onus in such circumstances. So that in each particular case, whether the onus has been shifted or not, it becomes a mixed question of fact and law, or rather a question of the due application of a recognized principle to the shifting scenes and circumstances of the countless varieties of human life in business. An illustration of the way in which the onus may be totally shifted without any express evidence beyond what may be afforded by the documents or the admitted circumstances of the case, which are common ground to both parties, is to be found in the case of *Nanda Lal Dhur Biswas v. Jag(sic) Kishore Acharjya* 36 Ind. Cas. 420 : 43 I. A. 249 : 20 M. L. T. 335 : 31 M. L. J. 563 : (1916) 2 M. W. N. 336 : 4 L. W. 458 : 18 Bom. L. Rule 868 : 14 A. L. J. 1108 : 24 C. L. J. 487 : 1 P. L. W. 1 : 21 C. W. N. 226 : 44 C. 186 : 10 Bur, L. T. 177 (P. C.) where ancient documents effecting an alienation by Hindu widows, which would a priori be totally contrary to law and which contain mere recitals of necessity which prove nothing except that the parties to the deeds were anxious to make other people believe that there had been necessity, and the admitted circumstances in which such deeds had been entered into, were held sufficient as

a matter of fact and common sense to shift the onus, and in the absence of anything to the contrary, to justify the findings of fact sufficient to support the documents. In this case we have (we do not propose to enter into a detailed history of the transaction), broadly speaking, a document which is sued upon in 1918 dated 1906 in respect of which the creditor has succeeded in showing a sum roughly of Rs. 3,071 to have been made up of various liabilities, not in themselves open to objection, except two earlier mortgage-bond liabilities dated respectively 1898 and 1899. It is in respect of these two mortgage-bond liabilities that Dr. Sen in his able argument has seriously challenged the view taken by the learned Judge, On the question of legal necessity these two documents are silent. They do no more than re-open previous liabilities traceable to four prior transactions, two of which had occurred in 1892 and two in 1897, which are brought forward, and re-affirmed as existing liabilities and discharged by the fresh contracts made in 1897 and 1899. These prior transactions are not on the record. Both parties were either content, or compelled, to rest upon the state of the evidence without the assistance of these documents, and to rely upon such inferences as the Court could legitimately draw from the evidence in such condition. There is nothing to show up, and it by no means follows from one's experience of these and other instances, that, if these documents had been brought upon the record, they would not again have opened out a fresh vista of prior transactions of business loans brought forward, and re affirmed by them, and throwing the parties back another stage in the history of this family's borrowings. As a matter of business and common sense, which are really matters of fact, we decline to take judicial notice of the fact that fathers of joint Hindu families, or managers or kartas, as the case may be, where the father is dead, are necessarily and chiefly occupied in going out of their way to borrow money for purposes which they know to be unlawful and which can confer no benefit upon the general body of the family to which they belong and of which they are the respected heads. On the contrary, the presumption must be in their favour, viz., that inasmuch as their own interests are indissolubly interwoven with the interests, and, one may say, also the affections of the other members of the family, it is after all not paying a very high compliment to their character and natural inclination to presume, unless there is something to arouse suspicion in the evidence of the case, that the object of going through all

this trouble of raising loans is to assist and benefit the joint family. The learned Judge in this case has contented himself with finding that, the Rs. 3,000 was borrowed for legal necessity to pay antecedent debts and for family expenses and that, therefore, to that extent the sons were bound by the mortgage, and nobody can doubt, to apply Lord Shaw's language, that the transactions of 1898 and 1899 were really antecedent and dissociated in fact. The opinion of the Privy Council, as expressed by Lord Buckmaster in the case of *Nandta Lal Dhur Biswas v. Jagat Kishore Acharya* (3), seems to us to be peculiarly appropriate. To hold otherwise, that is to say, to hold in cases of transactions which go back beyond the stage at which direct evidence can possibly be expected from the creditor, and to destroy the liability if such evidence is not forthcoming, would result in deciding that a title becomes weaker as it grows older, so that a transaction perfectly honest and legitimate when it took place, would ultimately be incapable of justification merely owing to the passage of time.

4. We are prepared to hold in this and similar cases that, in the absence of evidence tending to shake confidence in the transactions themselves, or in the conduct and care of the manager, or of the creditor, the onus is shifted back on to the sons or members of the family who desire to repudiate the transactions. We might add to the observations of Lord Buckmaster that to hold otherwise is to hold out to litigants the deliberate invitation, one might use the word temptation, to attempt to conform to an impossible standard of evidence by calling direct testimony which must of necessity be valueless and frequently deliberately perjured. There is enough of this sort of thing in the Trial Courts as it is without any further encouragement being given to it by us. Taking a broad view, although there are exceptions to every rule, we ourselves are not prepared to call upon the creditor to trace every rupee in a transaction which, broadly speaking, is obviously honest and properly entered into. We think that the creditor has done all that he was required to do by the decisions of the Privy Council in this matter, that the learned Judge has come to a right conclusion and that this appeal must be dismissed with costs.