ORIGINAL CIVIL.

Before Panckridge J.

1936
July 28.

MAHA MAYA DASEE

v.

ABDUR RAHIM.*

Hindu Law—Damdupat, *Rule of—Loan by a Hindu to another Hindu and a non-Hindu jointly—Contribution, Claim to, of the non-Hindu borrower against the Hindu borrwer—Indian Contract Act (IX of 1872), s. 43.*

When a loan is made by a Hindu to another Hindu and a non-Hindu jointly, the rule of *damdupat* will apply to a claim by the lender against the Hindu borrower.

Obiter : It does not necessarily follow from this that the non-Hindu borrower's right to contribution against the Hindu borrower is affected by the rule.

APPLICATION to vary a Report of the Registrar.

Facts material for this report and arguments of counsel appear from the judgment.

J. N. Majumdar (with him *H. S. Suhrawardy*) for the applicant Renu Bala *alias* Etimunnessa.

F. R. Surita for defendant Kishori Mohan Datta.

P. C. Ghose for the plaintiff.

S. K. Basu for defendant Prasanna Kumar Das.

PANCKRIDGE J. This application to vary a Report of the Registrar, dated September 11, 1934, comes before me in the following circumstances :—

A Hindu woman, Kishori Bala Dasee, owned No. 38/3A, Nil Mani Mitra Street, and Jalilur Rahman, whose mistress Kishori Bala was, owned the adjoining premises No. 6A, Gouri Shankar Lane.

*Application in Original suit No. 1935 of 1932.

On January 27, 1927, Kishori Bala and Jalilur, to secure Rs. 4,000 borrowed by them jointly, mortgaged these premises to Kishori Mohan Datta.

On April 20, 1927, Kishori Bala and Jalilur further charged the premises, to secure Rs. 2,000 borrowed by them jointly, in favour of Baidya Nath Pal. The plaintiff Maha Maya Dasee is the assignee of this charge.

On June 8, 1927, Kishori Bala and Jalilur further charged the premises, to secure Rs. 800 borrowed by them jointly, in favour of Prasanna Kumar Das.

In para. 5 of the petition used in support of this application it is stated:—

> In all the Indentures of Mortgage and Further Charge although the consideration was paid to both the mortgagors each of them mortgaged her and his respective premises in favour of the respective mortgagee. Each of the indentures thus contained two distinct and separate contracts, one by which Kishori Bala mortgaged her premises in favour of the respective mortgagee for the amount advanced, and the other by which Jalilur mortgaged his premises in favour of the said mortgage of the said amount.

This analysis of the legal position is not challenged by the parties opposing this application.

Both mortgagors died before suit and their personal representatives were accordingly made defendants along with the first and third mortgagees, Datta and Das. The present applicant is the daughter and sole heiress of Kishori Bala. She is a minor and is being brought up as a Mahomedan.

A preliminary mortgage decree was passed on February 6, 1934, which provided *inter alia* that an account should be taken of what was due on the various encumbrances.

The Registrar has found Rs. 9,072-14-6 due on the Datta mortgage, Rs. 4,464-8 due on the Pal charge, and Rs. 3,783-1-10 due on the Das charge.

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All the original mortgagees and the assignee of the Pal charge are Hindus, and Kishori Bala was a Hindu.

The applicant submitted to the Registrar that on account of this her liability, as representing the estate of Kishori Bala, was limited by the Hindu law of *damdupat*, according to which no greater arrear of interest can be recovered at any one time than what will amount to the principal sum. The Registrar rejected this submission, and the present application seeks to substitute for the sums found due by him the sums of Rs. 8,000, Rs. 4,000, and Rs. 1,600.

That the rule will in proper circumstances be applied on the Original Side of this Court is unquestionable: *Nobin Chunder Bannerjee* v. *Romesh Chunder Ghose* (1).

Moreover, I do not understand it to be seriously argued that the position is affected by the fact that the applicant is now a member of the Mahomedan community. Her personal law is irrelevant, inasmuch as she is only before the Court in a representative capacity.

The question accordingly can be simply stated thus: Does the rule of *damdupat* apply to a loan by a Hindu lender made on joint account to a Hindu borrower and non-Hindu borrower, as far as the Hindu borrower is concerned?

Rather surprisingly the case appears to be one of first impression, for transactions such as those in suit must be very common.

It certainly appears to be the tendency of the Courts to keep the rule within narrow limits.

(1) (1887) I.L.R. 14 Cal. 781.

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For example, it does not apply after a suit has been filed to recover the debt, nor when the debt has been assigned by the Hindu lender to a non-Hindu.

Counsel for the mortgagees argued that s. 43 of the Indian Contract Act has the effect of making the rule inapplicable.

In my opinion, however, if the rule of *damdupat* applies as between lender and Hindu joint borrower, it does not follow that the non-Hindu joint borrower will not be entitled to claim contribution from the Hindu borrower on the basis of the sum he has actually paid, even though by reason of the rule that sum is in excess of what the lender could have recovered from the Hindu joint borrower.

Section 1 of the Act saves usages and incidents of contract not inconsistent with its provisions: and in my opinion, if before the passing of the Act the rule would have applied to the present case, there is nothing in the Act to render the rule inapplicable.

I asked learned counsel if they could enlighten me as to the general principles on which the rule is based, but I was unable to obtain any information on the point. It has I believe been suggested that, as there was nothing corresponding to limitation in Hindu law, loans would, but for the rule, in time increase to fantastic proportions.

I think this is really only another way of saying that the rule is based on the view that it would be unconscionable for a Hindu to recover more than twice the amount of his advance from a fellow Hindu.

If this is so, the fact that there is a joint promisor who is not entitled to the benefit of the rule appears irrelevant.

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As I have said, I do not think that the joint promisor's right to contribution is prejudiced. It may of course be that the existence of the rule is an inducement to the promisee to enforce his remedy against the non-Hindu rather than against the Hindu, but this is not a matter of which the law can take account.

On the whole I am of opinion that the Registrar was wrong in refusing the applicant the benefit of the rule.

The report is accordingly varied in terms of the notice of motion, and the applicant is entitled to her costs.

Application allowed.

Attorneys for applicant: *Mitter & Bural.*

Attorneys for different respondents: *S. K. Ganguli & Co., R. Sur, N. R. Banerjee.*

P. K. D.