PRIVY COUNCIL.

GANGAPERSHAD SAHU (PLAINTIFF) *v.* MAHARANI BIBI (DEFENDANT.)

P. C.*
1884
December 11.

[On appeal from the High Court at Fort William in Bengal.]

Act XL of 1858, s. 18—*Power of guardian of minor to mortgage minor's property—Rate of interest.*

A guardian to whom a certificate had been granted under Act XL of 1858, (relating to minors) having obtained, under s. 18, an order of a Court authorising the raising of money by mortgage of the minor's immoveables, mortgaged accordingly. In the order so obtained, the rate of interest at which the money was to be raised was not specified. On a question whether, there being no proof of the necessity or expediency of agreeing to pay interest at a rate so high as eighteen per cent, the agreement to pay at this rate was rightly set aside by the High Court, which decreed interest at twelve per cent., *held*, that the proper construction of the order, and the one most favorable to the lender regarding the rate of interest was, that the guardian was authorized to borrow only at a reasonable rate of interest; and that consequently the decree of the High Court was *right*.

APPEAL from a decree (20th January 1882) of the High Court, reversing a decree (21st April 1880) of the Subordinate Judge of Tirhoot.

The question raised by this appeal related to the effect of s. 18 of Act XL of 1858 (an Act for making better provision for the care of the persons and property of minors in the presidency of Fort William in Bengal). Section 18 enacts that every person to whom a certificate shall have been granted under the provisions of this Act may exercise the same powers in the management of the estate as might have been exercised by the proprietor if not a minor, and may collect and pay all just claims, debts, and liabilities due to or by the estate of the minor; but no such person shall have power to sell or mortgage any immoveable property, or to grant a lease thereof for any period exceeding five years, without an order of the Civil Court previously obtained.

During the respondent's minority, Parbutti Koer, the mother of the minor's deceased husband, having obtained a certificate

* *Present:* LORD FITZGERALD, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

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authorising her to represent the minor under s. 7 of the above Act, acted as her guardian, and as such obtained, under s. 18 of the above Act, an order of the Judge of Tirhoot, authorising her to raise Rs. 8,000 by mortgage of the minor's property. Parbutti accordingly mortgaged, on the 25th March 1869, mouzah Sahu, part of the minor's estate, for Rs. 8,000. Part only of this sum having been repaid, and the minor having now attained full age, the present suit was brought against her by the mortgagee to recover the balance Rs. 6,703 principal, together with Rs. 4,570 interest, at the rate of one rupee eight annas per cent per mensem.

The plaintiff's claim having been decreed in the Court of first instance, with interest from the date of the institution of the suit down to realization of the decree, the High Court (*Mitter* and *Maclean*, JJ.) on appeal reversed so much of this decision as related to the question as to the respondent's liability to pay the stipulated rate of interest. *Mitter*, J., said: "The next question is, whether she is bound to pay interest at the rate of 18 per cent. as stipulated in the bond;" and then added: "Having regard to the facts proved in this case, it seems to us that the appellant ought not to be held liable to pay interest at the rate of 18 per cent. per annum, and that the stipulation to pay interest at a higher rate should not be enforced. The debts which have been paid bore interest at the rate of 12 per cent. per annum. Consequently it cannot be said that the agreement to pay interest at a higher rate was in any way beneficial to the appellant's interests. There is nothing in the evidence which would warrant the finding that the transaction was one which a prudent owner would enter into to benefit the estate. Nor is it shown that there was any such pressure on the estate which would justify a manager in raising money at 18 per cent. interest on the hypothecation of immoveable property. It was recited in the petition of the guardian praying for permission to raise a loan of Rs. 8,000 on the mortgage of mouzah Sahu, that some property of the minor had been attached and advertised to be sold in execution of a decree; but of this fact no evidence has been given in this case. Before the plaintiff can recover interest at the rate of

18 per cent., he is bound to prove some circumstance which rendered it necessary to raise a loan immediately at such a high rate of interest. It has been urged before us that, as the loan was sanctioned by the District Judge under s. 18 of Act XL of 1858, the transaction must be considered to be binding upon the appellant. Giving to this argument its utmost stretch, it can only render the mortgage valid; but there is no sanction by the Judge for the agreement to pay interest at the rate of 18 per cent. per annum. On the whole we are of opinion that the plaintiff should recover interest at the rate of 12 per cent. per annum."

The account having been made up in pursuance of this direction, it was found that the appellant's claim had been satisfied before the date of suit, and, therefore, by a decree of the High Court, the appellant's suit was dismissed with costs.

On this appeal,—

Mr. *J. F. Leith, Q.C.*, and Mr. *C. W. Arathoon*, appeared for the appellant.

Mr. *H. Cowell* for the respondent.

For the appellant it was argued that the High Court ought to have decreed that the interest was payable at the rate specified in the mortgage deed, *viz.*, eighteen per cent. per annum. There was no evidence showing that this was not for the benefit of the minor at the time, when it was necessary to raise the money. The objection that the rate of interest was excessive had not been taken in the defence made in the Court of first instance. Reference was made to part of the judgment in *Orde* v. *Skinner* (1).

Mr. *H. Cowell*, for the respondent, was not called upon.

Their Lordships' judgment was delivered by

SIR A. HOBHOUSE.—The question in this case turns upon the amount recoverable on a mortgage bond which bears date the 25th March 1869. The bond was given by Parbutti Koer, who is the grandmother and guardian of the respondent Maharani Bibi. The effect of the bond is that security is given on a certain mouzah belonging to the Maharani Bibi for the

(1) I. L. R., 3 All., 91 (107); L. R., 7 I. A., 196.

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sum of Rs. 8,000, to be repayable in about a year's time with interest at the rate of 18 per cent. per annum. The plaintiff has received payment of an amount equal to the principal due upon the bond with simple interest at 12 per cent. per annum, and he had received that amount of payment before he commenced the suit in which this appeal is presented. If therefore 12 per cent. is all that he is entitled to, the suit must altogether fail. If 18 per cent. is what he is entitled to, then there is still a sum due, and he ought to get a decree for that sum.

The Judge of Tirhoot, who heard the case originally, was of opinion that, according to the contract, the plaintiff was entitled to 18 per cent. until the actual time of payment; but, in exercise of the power vested in the Court, he cut down the rate of interest to 3 per cent. from the date of the suit to the date of decree, and after decree he gave no interest at all. He therefore evidently thought that the transaction was an exorbitant one, and that, where the Court had discretion, it should lower the rate of interest. Up to the date of suit he had no discretion, and he construed the bond as has been stated.

The defendant in the suit appealed to the High Court, and that Court was of opinion that the plaintiff was entitled to interest only at the rate of 12 per cent., and inasmuch as, calculating at that rate, he had been wholly paid off, the suit was necessarily dismissed.

The sole question now is as to the additional 6 per cent. claimed by the plaintiff.

It has been stated that the bond was executed by the grandmother as guardian of the defendant, who was a minor at the time. The 18th section of Act XL of 1858 says that "no "such person shall have power to sell or mortgage any immove- "able property without an order of the Civil Court previously "obtained." The guardian obtained an order of the Court on the 5th of February 1869, on a petition in which she stated the necessity of taking a loan of Rs. 8,000 for the purpose of paying some pressing debts, which were then carrying interest at 12 per cent. The order runs in these terms: "That the "petitioner be permitted to take a loan of Rs. 8,000 by mort- "gage of mouzah Sahu, perguunah Ahalwara." That order says

nothing whatever about interest on the Rs. 8,000. It would certainly seem desirable that a Court which has thrown upon it the responsibility of authorising loans to be raised upon the security of infants' estates should, where possible, specify the rate of interest or the maximum rate of interest at which the loan should be raised, especially in India, where the rate of interest bears so very large a proportion to the principal advanced. There may sometimes be difficulties in doing so. There may have been a difficulty in this case for aught we know. At all events the Judge did not do it. Supposing the Judge does not do it, that cannot give to the guardian the power of raising the authorised loan at any rate of interest that the guardian thinks fit. It has been said the guardian might think fit to raise a loan at the rate of 100 per cent. If that were brought to the notice of the Judge, he would probably institute a very rigorous inquiry before authorising such a loan. On an order of this kind, which authorises the raising of a principal sum, but says nothing about the interest, their Lordships think that the proper construction, or at all events the most favourable construction to the lender, is that it authorises a loan at a reasonable rate of interest.

With respect to the judgment of the High Court their Lordships agree with Mr. Justice *Romesh Chunder Mitter* in his construction of the bond. It was made a question how far the bond, on the face of it, provided for the payment of interest—whether up to the date fixed for the payment of the principal, or up to the date of actual repayment? They agree with Mr. Justice *Mitter* in thinking that it provided for payment of interest up to the date of actual repayment.

Mr. Justice *Mitter* then goes on to say: "The plaintiff must "show that the transaction was beneficial to the interests of the "minor;" and then he examines the whole transaction, and finds that the raising of Rs. 8,000 at a reasonable rate of interest was beneficial to the interests of the minor, but that the raising at the rate of 18 per cent. was not beneficial. Their Lordships think that when an order of the Court has been made authorising the guardian of an infant to raise a loan on the security of the infant's estate, the lender of the money is entitled to trust to that order, and that he is not bound to inquire as to the

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expediency or necessity of the loan for the benefit of the infant's estate. If any fraud or underhand dealing is brought home to him that would be a different matter; but, apart from any charge of that kind, their Lordships think he is entitled to rest upon the order. Therefore, as regards the principal of this loan, it is sufficient for the plaintiff to say: "I have got the order of the Court." But when he comes to the rate of interest he has not got the order of the Court; and if he chooses to lend his money without an order that binds the infant's estate, then it is for him to show that the matter was one of necessity, or of clear expediency for the benefit of the infant's estate. In this case their Lordships fail to find any evidence showing any such necessity or expediency. They agree with the view taken by Mr. Justice *Mitter* that there is no case made on behalf of the lender to show that such a loan was for the benefit of the infant's estate. The result is, that the Court has recourse to the ordinary rate of interest ruling in that part of the country upon loans on good security, and finding that rate to be 12 per cent. it says that 12 per cent. is the reasonable rate to charge in the present instance.

Another objection has been raised, which has nothing to do with the merits of the case, namely, that this point was not raised upon the pleadings. It certainly does not appear to have been raised on the written statement. It was put at the bar that the point was waived, but there is no trace of waiver; on the contrary, the defendant seems to have been desirous to raise every point that occurred to her advisers to defeat the claim of the plaintiff. It does not appear that there was any formal preliminary settlement of issues, but in the judgment it is stated what the points for consideration are; and Mr. *Leith* very fairly said that he would take those points as the issues in the suit. The second of those issues is: "Whether Parbutti Koer really executed the bond in suit." That puts into issue the execution of the bond; but then it goes on: "And whether the defendant is bound to pay off the debt." That puts in issue the validity of the bond, not only on account of non-execution by Parbutti, but its validity generally as against the defendant, and therefore suggests the question whether the

defendant was bound by the acts of Parbutti Koer? When we come to the appeal the sixth ground of appeal is somewhat more specific than that. The sixth ground is this: "That your petitioner is in no way bound by the acts or statements of Parbutti "Koer unless it is proved that those acts were done under neces- "sity and for the benefit of the estate." No doubt that does not distinguish between the principal of the bond, which was covered by the order, and the interest, which was not covered by the order, but it shows that the defendant was disputing all disputable acts of Parbutti. On that ground of appeal Mr. Justice *Mitter* addresses himself to the question of necessity, and decides in favour of the defendant. Now it would be a lamentable thing if an appeal in which their Lordships are clearly of opinion that the High Court were right on the merits of the case were to be determined the other way on the ground that there was some imperfection in the pleadings. It would be lamentable in any case, and especially in India, where we know the pleadings are prepared with a considerable amount of looseness. If it could be suggested on the part of the appellant that practical injustice had been done him by the want of particularity in the pleadings, and by their not having drawn a proper distinction between the principal due on the bond and the interest, however much their Lordships might lament it, they might be compelled to allow the appeal. But no such suggestion can be made. Their Lordships entirely disbelieve that more complete justice could be done in this case than has been done already.

There is another consideration. If this were really a point sprung upon the appellant by the judgment of Mr. Justice *Mitter* for the first time, it would have been good ground to apply to the Court for a review. But no such application was made; and their Lordships would be very loth to disturb the decree of the High Court upon a technical point of this kind, where the whole matter might have been set right if the High Court had been applied to. Even if the appellant were to succeed on this point, what could this Committee do? It could only advise Her Majesty to send back the case to be tried upon the question whether it was necessary or reasonable to raise this loan at the rate of 18 per cent. The High Court could have done that on

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review, and if they thought their decree really did injustice, no doubt they would have done so. Their Lordships do not feel justified in disturbing the judgment of the High Court under such circumstances.

The result is, that this appeal must be dismissed with costs, and their Lordships will humbly advise Her Majesty to that effect.

Appeal dismissed.

Solicitor for the appellant: Mr. *T. L. Wilson.*

Solicitors for the respondent: Messrs. *Barrow & Rogers.*

RANI BHAGOTI (DEFENDANT) *v.* RANI CHANDAN (PLAINTIFF.)

P. C.*
1885
February 7.

[On appeal from the Court of the Judicial Commissioner of the Central Provinces.]

Arbitration—Defence of submission to arbitration and award upon the matter in suit before suit brought.

An award upon a question referred to arbitrators, on whose part no misconduct or mistake appears, concludes the parties who have submitted to the reference from afterwards contesting in a suit the question so referred and disposed of by the award.

Two widows of a deceased Hindu referred generally to arbitrators the question of their rights, respectively, in the estate of their deceased husband, including the matter whether there was, or was not, any cause disentitling the widow, who afterwards brought this suit for her share in the estate against the other who had obtained possession of the whole.

The arbitrators declared her to be disentitled to succeed to any portion of the estate, and awarded her maintenance only.

Held, that, in the absence of mistake, or misconduct, on the part of the arbitrators, the award was binding on the parties.

APPEAL from a decree (22nd November 1880) of the Judicial Commissioner of the Central Provinces, reversing a decree (8th May 1880) of the Additional Commissioner, Jabbalpur and Nerbudda Divisions, and remanding an appeal to him for hearing on the merits.

The principal question in the suit out of which this appeal arose related to the title of one of two widows of Rao Dhiraj Singh, taluqdar of Bilehra in the Narsinghpur district, who died

* *Present:* LORD BLACKBURN, SIR B. PEACOCK, SIR R. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.