

1907

BALKISHAN
DAS
v.
MADAN
LAL.

he would still have to pay for the Rs. 500 thus borrowed the sum of Rs. 562 odd, it was admitted that this was the case. These terms speak for themselves. They are *prima facie* oppressive and extortionate, and such as a man of ordinary sense and judgment cannot be supposed likely to give his free consent to. Where both these conditions exist, even if it be not shown that the lender went out of his way to bring any active influence upon the borrower, still the bargain entered into may be an unconscionable one. Such a bargain seems to me to be similar to the bargain in the case of *Madho Singh v. Kashi Ram* (1). I find considerable difficulty in distinguishing this case from that case if it can at all be distinguished. I therefore fully agree.

By THE COURT.

This appeal is dismissed with costs.

Appeal dismissed.

1907

January 23.

Before Mr. Justice Sir George Knox and Mr. Justice Richards.

HASHMAT ALI (PLAINTIFF) v. MUHAMMAD UMAR (DEFENDANT).^{*}
Act No. IV of 1893 (Partition Act), section 4—“ Dwelling-house belonging to an undivided family ”—Muhammadans.

Held that the expression “ a dwelling house belonging to an undivided family ” as used in section 4 of the Partition Act, 1893, is not applicable to a house belonging to a Muhammadan family. *Ammo Raham v. Zia Ahmad* (2) referred to.

THE plaintiff in this case sued for partition of a one-fifth share in a house belonging to a Muhammadan family, having acquired the share by purchase. The defendant objected that inasmuch as the plaintiff was not “ a member of the defendant’s undivided family ” and the value of the share claimed by him was small, actual partition ought not to be granted, but the plaintiff might receive the value of his share in money. The Court of first instance (Munsif of Nagina) rejected this plea upon the ground that section 4 of the Partition Act was not applicable, and directed a partition. The defendant appealed. The lower appellate Court (Additional District Judge of Moradabad) held that section 4 of the Act in question did apply, and, setting aside the Munsif’s

^{*} First Appeal No. 71 of 1906 from an order of W. F. Kirton, Esq., District Judge of Moradabad, dated the 3rd of May 1906.

(1) (1887) I. L. R., 9 All., 228. (2) (1890) I. L. R., 13 All., 232.

decision, remanded the case under section 562 of the Code of Civil Procedure. From this order of remand the plaintiff appealed to the High Court.

Babu *Surendra Nath Sen*, for the appellant.

The respondent was not represented.

KNOX and RICHARDS, JJ.—This appeal arises out of an order passed by the lower appellate Court remanding the case under section 562 of the Code of Civil Procedure for further trial. The suit was brought by the plaintiff, who had acquired a one-fifth share in a house, for partition of the share which he had acquired. Both the plaintiff and the defendants (who are admittedly the owners of the remaining four-fifths of the house), are Muhammadans. The Court of first instance granted the plaintiff the relief prayed for, and held that the defendants were not entitled to the benefit given by section 4 of the Partition Act, 1893, inasmuch as the property to be partitioned was not “a dwellinghouse belonging to an undivided family.” The lower appellate Court held that section 4 did apply in the case of Muhammadans, and overruling the Court of first instance upon the preliminary point, sent the case back for trial as already stated. It is here contended that section 4 cannot apply except in the case of an undivided Hindu family, and our attention was called to the Full Bench decision of this Court in *Amme Raham v. Zia Ahmad* (1). The respondent is not represented, but on the analogy of the Full Bench ruling we hold with some regret that section 4 does not apply. We decree the appeal, set aside the order of the lower appellate Court and restore the decree of the Court of first instance. The appellant will get his costs.

Appeal decreed.

(1) (1890) I. L. R., 13 ALL., 282.

1907

HASHMAT
ALI
v.
MUHAMMAD
UMAR.