NAZIR BEGAM (PLAINTIFF) v. RAO RAGHUNATH SINGH AND OTHERS (DEFENDANTS).

[On appeal from the High Court of Judicature at Allahabad.]

P. C.*
1919
January 24,
February, 18.

Hindu law—Mortgage of joint family property by manager—Proof of legal necessity—Exorbitant rate of interest—Onus of showing it was a reasonable rate—Power of High Court to reduce rate.

It is incumbent on those who support a mortgage made by the manager of a joint Hindu family to show not only that there was necessity to borrow but that it was not unreasonable to borrow at some such high rate, and upon some such terms; and if it is not shown that there was necessity to borrow at the rate and upon the terms contained in the mortgage, that rate and those terms cannot stand.

A plea taken in the written statement filed on behalf of the defendants that the property mortgaged was ancestral property, and that there was no legal necessity to execute the document sued on was *held* to make it open to the defendants to contend that, though the necessity for borrowing the principal sum was accepted, there was no necessity to borrow on the very onerous terms of this mortgage.

Hurro Nath Rai Chowdhri v. *Randhir Singh* (1) and *Nand Ram* v. *Bhupat Singh* (2) referred to.

Held also that on the above principle the High Court was justified in finding that a mortgage upon such terms as those contained in the document sued on, the lands being of such value as to make the security ample, was an unnecessary extravagance.

APPEAL No. 80 of 1916, from a judgment and decree (dated the 23rd of April, 1913), of the High Court of Allahabad, which varied a judgment and decree, (dated the 30th of June, 1911), of the Subordinate Judge of Agra.

The facts shortly stated were that the respondent Rao Raghunath Singh, and the father of Bhairon Singh, respondent, were sons of one Rao Narain Singh, and formed with him a joint Hindu family governed by the Mitakshara law. Rao Narain Singh, on the 7th of November, 1884, mortgaged some shares in certain villages belonging to the joint family to one Mulchand to obtain an advance of Rs. 398, with interest thereon at the rate of Rs. 2-8 per mensem, with half yearly rests, and an increased rate of interest being provided for if the principal and interest were not repaid within a year from the date of the mortgage. The mortgage deed recited that the money was

* *Present:*— Viscount HALDANE, Lord PHILLIMORE, Sir JOHN EDGE, and Mr. AMEER ALI.

(1) (1890) I.L.R., 18 Calc., 311: L.R., 18 I.A., 1.

(2) (1911) I.L.R., 34 All., 126

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borrowed for the payment of Government Revenue due upon the family properties, and it was in fact so applied.

No part of the principal or interest due on the mortgage was ever paid, and on the 4th of January, 1910, the mortgage was assigned by the respondents 13 to 15, the heirs of Mulchand (who was then dead) to the present appellant for the sum of Rs. 6,500 it being (among other things) provided in the deed of assignment that if the property should be found insufficient to pay the mortgage debt, or the Court should pass a decree against the mortgagor's representatives for an amount less than the consideration for the assignment, the assignors and their properties should be liable to pay the balance with interest and costs to the appellant.

The present suit was brought by the appellant on the mortgage against the respondents 1 to 5, as being the representatives of the joint family of the mortgagor (then deceased), and he joined respondents 6 to 12 for various reasons, not now material, and respondents 13 to 15 as the assignors of the mortgage. The appellant claimed the usual mortgage decree for the sum of Rs. 20,000 principal, giving up the remainder of the interest due, and further prayed that if there were any bar to the suit being decreed on account of the mortgage money having been already paid or for some other reason, a decree to the extent of the consideration money together with interest and costs may be passed as against the respondents 13 to 15 as assignors of the mortgage.

The defence of the answering respondents 1 to 5 was (*a*) that the property claimed was the ancestral property of the contesting respondents: Rao Narain Singh had no legal necessity for executing the mortgage and (*b*) that the condition relating to interest was hard, unconscionable, and inequitable, and had been procured by undue influence, and that compound interest could not be charged on the property.

The respondents 13 to 15 did not appear, and the suit as against them was therefore undefended.

The Subordinate Judge found that the execution of the mortgage and the payment of the consideration were fully proved; that the money was borrowed for the payment of

arrears of Government Revenue due on the joint family property, and was in fact paid away for that purpose; that this constituted a clear legal necessity; and that the mortgagor as head and manager of the family was competent to mortgage the joint family property for this purpose, and he held therefore that the mortgage was binding on the answering defendants. He also held that in the matter of the rate of interest there was no evidence of undue influence; that the provision for the increase of interest was penal, but that the appellant had very properly given this up, and in fact had only claimed a small portion of the interest due on the mortgage, and he accordingly made the usual mortgage decree in favour of the appellant for the amount claimed.

The answering respondents appealed to the High Court (P. C. BANERJI, and A. E. RYVES, JJ.) and that Court agreed with the Subordinate Judge in the other points in the case, but on the question of interest, they held that there was no necessity for such a high rate of interest; that the *onus* was on the appellant to prove, not only the existence of necessity for the loan, but also that it was necessary to raise the money at the rate stated in the mortgage; that the security given for the loan was amply sufficient, and that the appellant had given no evidence to prove that the mortgagor could not have obtained the loan at a lower rate; that the Court had a discretion in the matter, and that under the circumstances they thought that simple interest at Rs. 12 per cent. per annum would be amply sufficient to compensate the mortgagee or her representative for interest on the principal amount of the loan. The High Court, therefore, varied the decree of the first Court by giving the appellant a mortgage decree against the answering respondents for the principal amount borrowed with simple interest thereon at Rs. 12 per cent. per annum from the date of the mortagage to the date fixed for repayments, and thereafter at a rate of Rs. 6 per cent. per annum; but they gave no relief as against the respondents 13 to 15.

On this appeal—

Sir *W. Garth*, for the appellant, contended that the High Court was wrong in holding that the *onus* of proving legal

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necessity for the loan, and of proving that the loan could not have been raised at a lower rate of interest lay upon the appellant. Both Courts in India concurrently found that legal necessity to borrow existed; and also that in the matter of interest charged there was no undue influence with reference to section 16, sub-section (3), of the Evidence Act. Under the circumstances the award of the High Court as to the rate of interest was insufficient, and the appellant's claim, it was submitted, should have been decreed in full against the mortgaged properties. In any case the appellant was entitled to a decree against respondents 13 to 15 for the difference between the amount decreed upon the mortgage, and the consideration paid for the assignment of it, with interest and costs. The Subordinate Judge's decree was right.

B. Dube, for the respondent was not called on.

1919, *February* 18*th*:—The judgment of their Lordships was delivered by Lord PHILLIMORE.

This suit was brought to enforce a mortgage made on the 7th of November, 1884, by the ancestor of the defendants and respondents Nos. 1 to 8, in favour of the ancestor of defendants and respondents nos. 13 to 15, which mortgage was transferred on the 4th of January, 1910, to the plaintiff appellant; defendants and respondents nos. 9 to 12, claim title to certain of the lands in mortgage.

The mortgage recites that the mortgagor had borrowed Rs. 398, in order to pay the Government revenue, and the covenant is in the following terms:—

"I will repay the aforesaid sum together with interest at the rate of Rs. 2-8-0 per cent. per mensem, in the month of Aghan, Sambat 1942, without any plea of excuse, and I will continue to pay the interest every six months. If I fail to pay interest at the end of any six months, I will pay interest at the rate of Rs. 3-2-0 per cent. per mensem from the date of the execution of this bond, and that amount of interest shall be added to the principal."

As at the date of this suit no payment had been made in respect of interest or principal, the total debt had swollen with compound interest to more than 3 lakhs of rupees.

The plaintiff purchased the mortgage for Rs. 6,500. In the deed of transfer the transferor covenanted that in case the transferee did not realize Rs. 6,500 upon the mortgage, he would

make up the difference. When the plaintiff brought her suit she reduced her claim to the principal, Rs. 398, and Rs. 19,602 interest, making a total of Rs. 20,000.

Various defences were set up by the defendents 1 to 12, but they were all rejected by the Subordinate Judge, who made a decree in favour of the plaintiff for Rs. 20,000, with interest from the date of suit, and costs. Thereupon the defendants 1 to 12 appealed to the High Court of Judicature for the North-Western Provinces, which Court affirmed in most respects the decree of the Subordinate Judge, but reduced the amount decreed upon the mortgage to Rs. 1,778-4-0, a sum arrived at by adding to the principal simple interest at the rate of 12 per cent.

In the written statement filed on behalf of the defendants, one of the points taken was that the property mortgaged was ancestral property, and that there was no legal necessity to execute the document sued upon.

In the view which the High Court took of this plea, a view from which their Lordships see no reason to differ, it made it open for the defendants to contend that, though the necessity for borrowing the principal sum was accepted, there was no necessity to borrow on the very onerous terms of this mortgage.

This line of defence being thus open to the defendants, the principles laid down by this Board in *Hurro Nath Rai Chowdhri* v. *Randhir Singh* (1) and in *Nand Ram* v. *Bhupat Singh* (2) apply.

It is incumbent on those who support a mortgage made by the manager of a joint Hindu family to show, not only that there was necessity to borrow, but that it was not unreasonable to borrow at some such high rate and upon some such terms, and if it is not shown that there was necessity to borrow at the rate and upon the terms contained in the mortgage, that rate and those terms cannot stand.

This principle being established, the High Court was justified in finding that a mortgage upon such terms as those contained in the document sued upon, the lands charged being of such value as to make the security ample, was an unnecessary extravagance.

(1) (1890) I.L.R., 18 Calc., 311: L.R., 18 I.A., 1. (2) (1911) I.L.R., 34 All., 126.

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No evidence, it is true, was given on either side, but the thing spoke for itself.

It remains, therefore, that there was necessity and, in virtue of that necessity, authority to borrow upon reasonable commercial terms, and that the mortgage stands as good security to that extent, but that all terms of the mortgage in excess of this necessity are outside the scope of the authority.

What the particular rate of interest should be, and whether the money could have been borrowed at simple, instead of compound, interest are matters of detail upon which the High Court with its local knowledge can well be left to decide, and their Lordships are not disposed to interfere with the decision upon points such as these. There is, however, a passage in the judgment of the High Court upon which they desire to offer some observation. The learned Judges say:—

"We have a discretion in the matter and we think we should be justified in reducing the rate of interest to a reasonable figure. In view of the security given to the mortgagee, and also of the fact that unusually long delay has been made in bringing the suit, we think that simple interest at the rate of 12 per cent. per annum, would be amply sufficient to compensate the mortgagee or his representative for the interest which he should get on the principal amount of the loan."

This may have some relation to the following allegation in the defendants' pleading:—"The condition relating to interest was very hard, unconscionable and inequitable." But that allegation does not seem to have been intended as a substantive plea in itself, but rather as introductory to a plea of undue influence which failed. However this may be, their Lordships do not think it safe to rest their decision upon a supposed discretion in the Court or an inference by the Judges as to the sum which would be sufficient to compensate the mortgagee. In their view, as already stated, the question is one of the authority of a manager of a joint Hindu family, and it is because their Lordships agree with the High Court that this authority was exceeded to the extent already stated that they concur in the conclusion at which that Court arrived.

The appeal accordingly fails, and should be dismissed as against the defendants respondents nos. 1 to 12.

As regards the original defendants nos. 13 to 15, or their present representatives, it seems that they were at one time

represented by the solicitors who have appeared for the other respondents, but that this appearance has been withdrawn, and the appeal, so far as they are concerned, has been heard *ex parte*.

If the decision of the Subordinate Judge had not been varied there would have been no ground for asking for any relief against them. If the variance had not been so great, if the judgment had been allowed to stand for any sum not less than Rs. 6,500, there would still have been no ground for seeking relief from them. It was only after the decree of the High Court reducing the sum due on the judgment below Rs. 6,500, that any question arose. It would appear that by the terms of the sale deed this difference would have to be made up by the defendants nos. 13 to 15. Whether any application was made to the High Court after the delivery of its judgment for consequential relief against these defendants, whether there was any opportunity for making an application, and why, if so, no application was made there is nothing in the record to show. *Primâ facie* it would appear that there could be no answer to such an application; but upon the whole their Lordships think that it will be safer to remit this matter to the High Court and to give the plaintiff an opportunity of making the proper application there.

Their Lordships will therefore humbly advise His Majesty that this appeal be dismissed as against the respondents 1 to 12 with costs, and that as between the appellant and the other respondents the cause be remitted to the High Court with liberty to the appellant to make such application to the High Court as she may be advised.

Appeal dismissed as against respondents 1 *to* 12.

J. V. W.

Solicitors for the appellant :—*Edward Dalgado.*

Solicitors for the respondents :—*Barrow, Rogers and Nevill.*