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v.  
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KALIA  
NAND  
SINGH.

It is clear that he has not established his claim for a declaration that Nityanand Singh was not entitled to mortgage the one-third share, and the claim was rightly dismissed by the trial court.

The court below was also wrong, in our view, in granting the plaintiff a declaration that the defendants respondents were not entitled to dispossess him, or to have one-third share of the house in dispute sold in execution of their decree. A declaration in these terms could only have been given on the view that Nityanand Singh was proved to have no title to the property. We may note in passing that a decree for a declaration that the defendants were not entitled to dispossess the plaintiff was not asked for in the plaint.

We therefore allow the appeal and dismiss the plaintiff's suit with costs in all courts.

*Appeal allowed.*

*Before Mr. Justice Daniels and Mr. Justice King.*

MAHMUD-UN-NISSA AND OTHERS (PLAINTIFFS) v.

BARKAT-ULLAH AND OTHERS (DEFENDANTS).\*

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May, 21.

Act No. IX of 1872 (*Indian Contract Act*), section 16—*Unconscionable bargain—Burden of proof.*

Where section 16 of the *Indian Contract Act*, 1872, is pleaded in defence to a suit on a bond, before the burden can be laid on the creditor, not one element but two elements must be established. It must first be shown that the creditor was in a position to dominate the will of the borrower. It must also be shown that the transaction appears, either on the face of it or on the evidence adduced, to be unconscionable. *Raghunath Prasad v. Sarju Prasad* (1) and *Balla Mal v. Ahad Shah* (2), referred to.

\* Second Appeal No. 1571 of 1923, from a decree of E. Thurston, District Judge of Budaun, dated the 10th of August, 1923, reversing a decree of Rup Kishan Agha, Subordinate Judge of Budaun, dated the 22nd of December, 1922.

(1) (1923) I.L.R., 3 Pat., 279; L.R., 51 I.A., 101.

(2) (1918) 16 A.L.J., 905.

THE facts of this case are fully set forth in the judgement of the Court.

Dr. *M. L. Agarwala* and Mr. *Muhammad-ullah*, for the appellants.

Maulvi *Mukhtar Ahmad* (for Maulvi *Iqbal Ahmad*) and Maulvi *Mushtaq Ahmad*, for the respondents.

DANIELS and KING, JJ. :—This is an appeal by the plaintiffs arising out of a suit for enforcement of a hypothecation bond of the year 1910 for a sum of Rs. 1,500 with compound interest at twelve per cent. per annum. The property hypothecated consisted of two groves and the house of the executants. The appeal raised two questions, one of the application of section 16 of the Indian Contract Act, and the other of the application of section 60 (c) of the Code of Civil Procedure. The trial court decreed the suit. The District Judge has dismissed it on the ground that the bargain was procured by undue influence within the meaning of section 16 of the Contract Act, and has further held that in any case a decree for sale of the house could not have been granted in view of section 60 (c) of the Code of Civil Procedure. For the latter proposition he has relied on the decision in *Ram Dial v. Narpal Singh* (1). That decision has since been overruled by the Full Bench case of *Mubarak Husain v. Ahmad* (2). In view of the Full Bench decision it is impossible to support the District Judge's finding on this point.

The bond in suit was executed in lieu of two earlier mortgage bonds of the years 1898 and 1899. The principal of these two bonds was Rs. 100 and Rs. 99 respectively and the property mortgaged by them consisted of the two groves also mortgaged under the bond in suit. One of these two earlier bonds

(1) (1909) I.L.R., 33 All., 136.

(2) (1924) I.L.R., 46 All., 489.

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carried compound interest at Rs.  $3/2$  per cent. per month with annual rests. The other carried simple interest at Rs. 3 per cent. per month. At the time of execution of the bond in suit the amount due under these two earlier bonds had admittedly amounted to a sum in excess of Rs. 5,000, namely, Rs. 4,515 under the bond bearing compound interest and Rs. 504 under the bond bearing simple interest, no payment at all towards interest or principal having apparently been made under either bond. At the time of execution of the bond in suit the creditor remitted a sum of approximately Rs. 3,500 due under the bond bearing compound interest and took a fresh mortgage for a sum of Rs. 1,500, Rs. 1,000 of which was treated as being due under the bond bearing compound interest and Rs. 500 under the bond bearing simple interest. No further advance was taken. The learned District Judge in dealing with the case has first held that owing to the previous loans and the huge amount which had become due under them the defendants were in the clutches of the money-lender. Having held this, he goes on to say that it was incumbent on the plaintiffs to establish that the new contract was not unconscionable and was not induced by undue influence. In thus laying the burden the learned District Judge was in error. The law as laid down in section 16 of the Contract Act has been explained by the Privy Council in a number of cases and nowhere more clearly than in the recent case of *Raghunath Prasad v. Sarju Prasad* (1). Before the burden can be laid on the creditor not one element but two elements must be established. It must first be shown that the creditor was in a position to dominate the will of the borrower. It must also be shown that the transaction appears either on the face

(1) (1923) I.L.R., 3 Pat., 279; L.R., 51 I.A., 101.

of it or on evidence adduced to be unconscionable. Here the learned District Judge has laid the burden upon the creditor on finding the first of these two elements only.

The question whether the creditor was in a position to dominate the will of the borrower is largely a question of fact, and in view of illustration (c) to section 16 of the Contract Act we are not prepared to dissent from the finding of the learned District Judge on this point. We are, however, unable to hold that the transaction in suit was unconscionable. On the contrary, the creditor appears to have acted with considerable moderation. He remitted more than two-thirds of the amount due to him and the rate of interest which he charged was a rate commonly prevailing in similar transactions, and it has not been possible even for the respondents' learned counsel to urge that it was such as to render the transaction unconscionable. The respondents' learned counsel has relied largely on the transactions of 1888 and 1899. Those transactions are not, however, in suit, and even if the interest under them was high, this would not in itself have been sufficient under the rulings of their Lordships of the Privy Council in *Balla Mal v. Ahad Shah* (1) and other well known cases to have entitled the borrower to set them aside. In our opinion we are not entitled to treat the transaction in suit as unconscionable merely because it was in lieu of earlier loans which carried a very high rate of interest. We hold, therefore, that the respondents have failed to establish the elements necessary to throw on the creditor the burden of proving that the transaction was not procured by undue influence.

We, therefore, set aside the decree of the learned District Judge and restore the decree of the learned

(1) (1918) 16 A.L.J., 905.

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Subordinate Judge but extend the time of payment to two months from this date.

In view of the fact that the amount for which the creditor has obtained a decree exceeds by many times the principal originally advanced, we direct that the parties bear their own costs both in this Court and in the court below.

*Appeal allowed.*

*Before Mr. Justice Walsh and Mr. Justice Pullan.*

1926  
May, 25.

MUNNI LAL (PLAINTIFF) v. SHIAMA SONARIN AND OTHERS (DEFENDANTS).\*

*Hindu law—Marriage—Illegality of, between distinct castes.*

Although a marriage between persons belonging to different subdivisions of one large caste may be permissible, a marriage between members of two totally different castes, such as a Sudra and a Vaish, is totally illegal. *Padam Kumari v. Suraj Kumari* (1) and *Sespuri v. Dwarka Prasad* (2), followed.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Babu *Saila Nath Mukerji*, for the appellant.

Munshi *Kailas Chandra Mital*, for the respondents.

WALSH and PULLAN, JJ. :—The plaintiff in this case is the illegitimate son of a Sonar father and a Mallahin woman. He claims restitution of conjugal rights with a woman who is now admitted to be the legitimate daughter of Kasarwani Baniya parents. The only question which we have to decide is whether such a marriage can, under Hindu law, be considered legal. We have been shown several authorities in support of the view that marriages between different sub-castes of Sudras have been held to be legal, but we have seen no case in which it has been held that

\* Second Appeal No. 1662 of 1923, from a decree of K. G. Harper, District Judge of Benares, dated the 17th of July, 1923, reversing a decree of S. M. Munir, Additional Munsif of Benares, dated the 16th of May, 1923.

(1) (1906) I.L.R., 28 All., 458.

(2) (1912) 10 A.L.J., 181.