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the same time we hold that the accused has entirely failed to explain his failure to credit Government with this sum either on the date of its receipt or when he gave over his balance. It is possible that the accused borrowed this money on the 16th of April intending to replace it, but that he was not in a position to do so until after the 15th of June, with the consequence that the embezzlement was discovered. It does not appear that he embezzled any other amount.

For the above reasons, we allow this appeal and restore the judgement of the first court. We find the accused guilty of an offence under section 409 of the Indian Penal Code and sentence him to six months' rigorous imprisonment. The accused will surrender himself to the District Magistrate of Unao for serving this sentence.

*Appeal allowed.*

### APPELLATE CIVIL.

*Before Mr. Justice Muhammad Raza.*

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RAM PRASAD, MINOR, UNDER THE GUARDIANSHIP OF JAI JAI RAM (DEFENDANT-APPELLANT) v. KHUSAL SINGH (PLAINTIFF-RESPONDENT).\*

*Contract Act (IX of 1872), section 16—Mortgage—Interest, court's power to reduce—Undue influence—Dominate the will of another, position of a party to.*

*Held*, that a court has no power to reduce the contracted rate of interest solely on the ground that it is hard, excessive, extortionate and unconscionable apart from any question of undue influence or fraud. A party to a contract cannot avoid it on the ground of undue influence unless he proves that the other party was in a position to dominate his will.

\* Second Civil Appeal No. 373 of 1925, against the decree, dated the 28th of April, 1925, of Saiyid Khurshed Husain, Subordinate Judge of Hardoi, affirming the decree, dated the 30th of April, 1924, of Saiyid Abid Raza, Munsif of Sandila, decreeing the plaintiff's suit for redemption.

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*Held further*, that urgent need of money on the part of the borrower or the mere fact that a party to a contract was, at the time of the contract, indebted to the other party does not of itself place the vendor in a position to dominate his will within the meaning of section 16 of the Contract Act. [34 Calc., 150 (P.C.); 1 O.W.N., 210; 12 O.L.J., 279; 3 O.W.N., 248, relied upon. 7 O.L.J., 389 and 12 O.L.J., 222, referred to.]

Mr. *H. K. Ghosh*, for the appellant.

Mr. *Nimatullah*, for the respondent.

RAZA, J.:—This is a defendant's appeal arising out of a suit brought by the plaintiff for redemption of a  $3\frac{3}{4}$  pies share in village Jugrajpur, tahsil Sandila, district Hardoi.

The facts of the case, so far as it is necessary to state them for the purpose of disposing of this appeal, are as follows:—

Kalika Singh obtained a decree of the property in suit by right of pre-emption, against Bhagwandin, grandfather of the defendant, on the 16th of December, 1910. He had to pay Rs. 321 under the decree up to the 16th of February, 1911. He raised the money by executing the mortgage-deed in suit in favour of the defendant's father, Mathura Prasad (since deceased), on the 7th of February, 1911. The mortgage was executed for Rs. 450. The mortgagee was to remain in possession of the mortgaged property (i.e. the  $3\frac{3}{4}$  pies share in suit) in lieu of Rs. 321 for 12 years and the remaining sum of Rs. 129 was to bear interest at Re. 1 per cent. per mensem. It was provided by the mortgage that the interest should be paid six monthly and should, if not so paid, be added to the principal and bear interest at the same rate. The mortgagor was to pay interest on Rs. 129 at the stipulated rate, so long as the amount was not paid off. Kalika Singh sold the property in suit, together with some other

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properties, to the plaintiff by a deed, dated the 23rd of October, 1918. The plaintiff deposited Rs. 321 only in court under section 83, Act IV of 1882, on the 30th of May, 1923. The defendant refused to take the money deposited by the plaintiff and the latter then instituted the present suit on the 29th of October, 1923. The plaintiff alleged that Rs. 129 were entered in the deed fictitiously, that the terms of the mortgage were hard and unreasonable and constituted a clog on redemption, that the mortgagor had accepted the terms in question under undue influence and that he (plaintiff) was entitled to redeem the property in suit on payment of Rs. 321 only.

The suit was contested by the defendant. He denied all the allegations which were made in the *plaint* to show that the mortgage was executed under undue influence and the terms were hard and unconscionable and the mortgagor had not received part of the consideration money entered in the deed. He contended that the transaction was not open to any objection and that he was entitled to the whole amount due on the mortgage. He thus claimed Rs. 900 (principal and interest).

The learned Munsif held that the sum of Rs. 129 was not fictitious, that the mortgage was not executed under any undue influence, that the provision as to interest was a clog on redemption and that the plaintiff was entitled to redeem the mortgage on payment of Rs. 450, principal money only.

The parties filed appeals challenging the finding on the points decided against them respectively. The learned Subordinate Judge dismissed both the appeals agreeing with the findings of the learned Munsif on all the points.

The defendant has now come to this Court in second appeal. I think this appeal should be allowed.

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It has been found that no part of the consideration money is fictitious. It has also been found that the mortgage was not executed by the mortgagor under any undue influence. It appears that the annual profits of the property in suit did not exceed Rs. 20. Under these circumstances I see no reason why the mortgagee should not be allowed the interest claimed. The conditions of the mortgage were not hard and unreasonable under the circumstances of the case, and the mortgagor accepted them with his eyes wide open. It may be that the mortgagor was in urgent need of money at the time he executed the mortgage; but urgent need of money on the part of the borrower does not of itself place the vendor in a position to dominate his will within the meaning of section 16 of the Contract Act—*Sunder Koer v. Rai Sham Krishen* (1). In the case of *Raghunath Prasad v. Sarju Prasad and others* (2), their Lordships of the Privy Council had to consider a mortgage which provided that interest was to run at the rate of Rs. 2 per cent. per mensem payable annually. In case of non-payment the interest was to be taken as principal and the interest at the same rate of Rs. 2 per cent. per mensem was to run on the principal and interest so due. The trial Judge allowed simple interest at the rate of Rs. 2 per cent. per mensem only, but the High Court, on appeal, allowed compound interest at the rate of Rs. 2 per cent. per mensem as provided in the deed. Their Lordships held, affirming the decree of the High Court, that the case should be decided in accordance with the provisions of the Indian Contract Act, 1872, as amended by the Act of 1899 and not by reference to the English Money Lenders Act. It was held further that although the interest provided in the deed was high, yet under the

(1) (1907) 34 Cal., 150, P.C.

(2) 11 C.L.J., 122 and 1 O.W.N..

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terms of section 16 of the Contract Act, as amended by the Act of 1899, the mortgagor could not avoid the deed on the ground of undue influence unless he proved that the mortgagee was in a position to dominate his will. It was only when it had been so proved that the question arose whether that position had been used to obtain an unfair advantage, the onus being then on the mortgagee, if the terms of the deed appeared to be unconscionable, to prove that the contract had not been induced by undue influence.

As pointed out in the case of *Bibi Batul v. Debi Prasad* (1) a court has no power to reduce the contracted rate of interest solely on the ground that it is hard, excessive, extortionate and unconscionable apart from any question of undue influence or fraud. A party to a contract cannot avoid it on the ground of undue influence, unless he proves that the other party was in a position to dominate his will. The mere fact that a party to a contract was, at the time of the contract, intended to the other party's brother, does not put the latter party in a position to dominate the will of the former party. As pointed out recently in the case of *Sukh Lal v. Murari Lal* (2), if the consent given by a mortgagor to the rate of interest stipulated in the deed of mortgage is free and no undue influence or coercion is exercised, no relief by way of reduction in the interest agreed upon can be allowed merely on the ground that the rate is excessive. If the rate stipulated in the deed is not hard and unconscionable, the mortgagor is bound to pay.

I have already observed that both the lower courts have held in the present case that the mortgage was not executed under any undue influence. In the absence of undue influence or unfair dealing no case of clog can be put forward merely upon the ground

(1) (1925) 12 O.L.J., 279.

(2) (1926) 3 O.W.N., 248.

that a high rate of interest has been stipulated for in the mortgage deed—see *Sahab Bakhsh Singh v. The Hon'ble Sir Raja Mohammad Ali Mohammad Khan* (1). I do not think that the rate of interest was hard, excessive or extortionate in this case.

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The learned Subordinate Judge has referred to the ruling in the case of *Raza Mohammad Khan and another v. Ram Lal Kulwar* (2). It was held in that case that a postponement of the right of redemption for a long period (25 years) when coupled with such other provisions in the mortgage-deed as are wholly advantageous to the mortgagee and do not confer any corresponding advantages in favour of the mortgagor, operates as a clog on the equity of redemption and the mortgagor is entitled to be relieved of it. In that case the mortgagor was held to be entitled to redeem before the expiry of the period of 25 years. That was the point which was decided in that case. No question of postponement of the right of redemption for a long period is to be considered or decided in this case. I think that ruling does not help the plaintiff in this case.

It may be that interest has accumulated in this case, but who is to blame. The mortgagor could have easily stopped the running of interest by making payments at the proper time. He failed to do so and now he (or his representative) has himself to thank for the consequences. It is said that Bhagwandin was anxious to keep the property in his possession and so he had got the mortgage in question executed in favour of his son, Mathura Prasad. I am not prepared to accept this suggestion. Had Bhagwandin been really anxious to keep the property as alleged, he would surely have managed that Kalika Singh should not get the money to deposit the same in court

(1) (1920) 7 O.L.J., 389.

(2) (1925) 12 O.L.J., 222.

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within the time fixed by the court. In that case the decree, which Kalika Singh had obtained in the pre-emption suit, would have become void and he would have lost the right of pre-emption over the property to which the decree related. In my opinion the lower courts were wrong in not allowing interest to the defendant in this case.

Hence I allow the appeal and setting aside the decrees of the lower courts pass the following decree. Plaintiff to pay into court Rs. 900, together with the defendant's costs of the suit in all the three courts, on or before the 13th of August, 1926. If such payment is not made on or before that date, the mortgaged property in suit shall be sold. Let a preliminary decree for redemption be prepared under order XXXIV, rule 7, schedule I of the Code of Civil Procedure.

*Appeal allowed.*

*Before Mr. Justice Wazir Husain and Mr. Justice  
Muhammad Raza.*

NAND LAL AND ANOTHERS (PLAINTIFFS-RESPONDENTS) v.  
UMRAI AND OTHERS (PLAINTIFFS-RESPONDENTS).\*

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*Hindu law—Joint ancestral property—Mortgage of ancestral property by father to save self-acquired property—Family necessity—Antecedent debt—Mortgage-debt not contracted for immoral or illegal purposes—Decree against father on mortgage, sons and grandsons, liability of.*

Where a Hindu father in order to save his self-acquired property, which he had obtained by inheritance from his cousin, mortgaged the joint ancestral property of the family, held, that the mortgage in question was not effected for any family necessity or for antecedent debt and his sons and grandsons were not liable to pay that debt under the Hindu law.

\* Second Civil Appeal No. 356 of 1925, against the decree, dated the 9th of April, 1925, of Saivid Khur hed Husain, Subordinate Judge of Hardoi, affirming the decree, dated the 8th of May, 1924, of Krishna Nand Pandaya, Munsif of Hardoi, decreeing the plaintiffs' claim for declaration of right.