

## APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan and Mr. Justice  
E. M. Nanavutty.

1928  
March, 15.

RAM KISHORE (DEFENDANT-APPELLANT) v. BAIJ NATH  
(PLAINTIFF-RESPONDENT).\*

*Hindu law—Joint Hindu family property—Mortgage of joint Hindu family property—Purchaser of equity of redemption, whether can attack the mortgage on the ground of legal necessity—Borrowing to redeem a prior mortgage not matured for redemption, whether a good ground to bind joint family—Onus of proof of pressure to borrow—Clog on the equity of redemption—Term postponing redemption for 30 years and authorizing mortgagee to spend money on new constructions and claim interest on it at 24 per cent. per annum, whether hard and unconscionable.*

*Held*, that where joint Hindu family property is mortgaged by a member of the family, it is open to the purchaser of the equity of redemption to attack the mortgage on the ground that the mortgagor was not justified in borrowing money on the conditions he did.

Where a prior mortgage, for the redemption of which a certain amount is left with the mortgagee of joint Hindu family property, had not matured for redemption, and had a period of seven years to run before a claim for redemption could be made, obviously the pressure to borrow could not be attributed to the fact that a prior mortgage was an incumbrance which the mortgagors reasonably intended to wipe off by borrowing afresh.

The covenants in a mortgage of joint Hindu family property postponing redemption for a period of 30 years certain and authorizing the mortgagee to spend as much money as he chose over new constructions of the mortgaged premises, which money may far exceed the value of the mortgaged property, and entitling the mortgagee to claim interest on the money so spent at the rate of 24 per cent. per annum with the

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\*Second Civil Appeal No. 289 of 1927, against the decree of Shambhu Dayal, District Judge of Rae Bareilly, dated the 1st of June, 1927, confirming the decree of Damodar Rao Kelkar, Subordinate Judge of Rae Bareilly, dated the 6th of December, 1926, decreeing the plaintiff's claim.

compelling obligation on the mortgagor to keep the interest running for a period of thirty years are, on the face of them, hard and unconscionable and in these circumstances it is the obvious duty of the mortgagee to satisfy the court by the proof of the fact that the mortgagors were pressed by some necessity justifiable in the eyes of the Hindu law to borrow money on such terms. *Nazir Begam v. Rao Raghunath Singh* (1), and *Ram Bujhawan Prosad Singh v. Nathu Ram* (2), relied upon.

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Mr. *Haider Husain* for Mr. *Niamatullah* and Mr. *Naimullah*, for the appellant.

Mr. *Bisheshwar Nath Srivastava*, for the respondent.

HASAN and NANAVUTTY, JJ.:—This is the defendant's appeal from the decree of the District Judge of Rae Bareilly, dated the 1st of June, 1927, affirming the decree of the Subordinate Judge of the same place, dated the 8th of December, 1926.

The appeal arises out of a suit brought by the plaintiff-respondent for redemption of a mortgage, dated the 22nd of December, 1917, executed by one Lallu and his son, Mahabir, in favour of the defendant-appellant. The consideration for the transaction of the mortgage was a sum of Rs. 2,500 and the property mortgaged was a shop No. 37 situate in Bazar Lalganj, hamlet of Datauli, par-gana Dalmau, in the district of Rae Bareilly. It is now agreed that the property in suit was the ancestral joint property of a Hindu family of which the members were Lallu, his son, Mahabir, and Mahabir's son, Mahadeo. Mahabir has since died. On the 31st of August, 1925, Lallu sold the premises mortgaged to the plaintiff-respondent under a deed of sale of that date. The deed was executed by Lallu on his own behalf and also in the capacity of a guardian of his minor grandson, Mahadeo.

The courts below have decreed redemption on payment of a sum of Rs. 1,090. As to the rest of the mortgage money, the same courts have held that it was not

(1) (1919) L.R., 46 I.A., 145.

(2) (1923) L.R., 50 I.A., 14.

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proved by the defendant that it was borrowed by the mortgagors for any legal necessity which could have the effect of validating the alienation of joint family property.

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On the terms of the mortgage the mortgagors were deprived of their right to redeem for a period of thirty years and on the expiry of that period the right was let out for a term of one year only. In the event of default on the expiry of the thirty-first year the mortgagee had the right to foreclose. Further, the mortgagee obtained authority under the covenants contained in the deed of mortgage to spend money on new constructions of the mortgaged premises. The limits of the expenditure on the new constructions, if any, were not prescribed. The mortgagors undertook to repay the value of the new constructions with 2 per cent. per mensem interest at the time of redemption. In respect of these conditions of the mortgage the objection taken by the plaintiff-respondent was two-fold: (1) That they constitute a clog on the equity of redemption and (2) having regard to the mortgaged property being a joint Hindu family property the mortgagors were not justified in borrowing money on such conditions. The rejoinder by the defendant was that the plaintiff being merely a purchaser of the equity of redemption was not entitled to raise these grounds of attack against the mortgage in suit, and that in any case the terms of the mortgage do not amount to a fetter on the equity of redemption and that there was a presumption of the existence of legal necessity in the circumstances of this case.

Every one of the above points has been decided by the courts below in favour of the plaintiff-respondent, and in the appeal before us the judgment of the lower appellate court was challenged on three main grounds: (1) That the plaintiff was not entitled to raise the pleas on which he has succeeded in the courts below, (2) that

there was no clog on the equity of redemption in the covenants contained in the mortgage in suit, and (3) that legal necessity for the consideration of the mortgage as well as for its terms should be presumed in the circumstances of the case. We propose to dismiss this appeal by deciding the first and the third grounds against the appellants.

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As to the first ground, we have come to the conclusion that the covenants contained in the mortgage, on which the plaintiff relies in support of his case, are covenants running with the mortgaged property. Indeed they constitute the mortgagee's title to hold the land in possession in the character of a mortgagee. This being so, we see no ground why these pleas should not be open to the person such as the plaintiff who has lawfully acquired title by the conveyance in his favour to the mortgaged property.

As to the third ground, we are of opinion that there is no room left in the circumstances of the case for making any presumption in favour of the mortgagee as to the existence of legal necessity in respect of a portion of the mortgage money and in respect of the terms of the mortgage. It is true that the mortgage in suit was effected by the only two adult members of the family and if the matters had rested there, aid from presumption in favour of the mortgagee might have been invoked. But the mortgagee's positive case as disclosed in the evidence is that the sum of Rs. 1,400, which was paid in cash by the mortgagee to the mortgagors, was borrowed by the latter for the purpose of carrying on the business of selling grain. This case of the mortgagee has been negatived by the courts below as a false case, and we in second appeal have no power to decide otherwise.

As to the covenants in the deed of mortgage, it is impossible, again to raise any presumption of validity

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in respect of them. The prior mortgage, for the redemption of which over Rs. 1,000 was left with the mortgagee, had not matured for redemption. It had a period of seven years to run before a claim for redemption could be made. Obviously the pressure to borrow therefore could not be attributed to the fact that a prior mortgage was an incumbrance which the mortgagors reasonably intended to wipe off by borrowing afresh. The covenants in the mortgage in question postponing redemption for a period of thirty years certain and authorizing the mortgagee to spend as much money as he chose over new constructions of the mortgaged premises which money may far exceed the value of the mortgaged property and entitling the mortgagee to claim interest on the money so spent at the rate of 24 per cent. per annum with the compelling obligation on the mortgagor to keep the interest running for a period of 30 years are on the face of them hard and unconscionable. In these circumstances it was the obvious duty of the mortgagee to satisfy the court by the proof of the fact that the mortgagors were pressed by some necessity justifiable in the eyes of the Hindu law to borrow money on such terms. This rule of *onus* on a mortgagee is a settled rule of law. In this connection reference may be made to *Nazir Begam v. Rao Raghunath Singh* (1) and *Ram Bujhawan Prosad Singh v. Nathu Ram* (2). There is no such proof forthcoming in the present case. The lower appellate court very pertinently observes that the defendant mortgagee has not come into the witness box to support the case of legal necessity.

The result is that the appeal fails and is dismissed with costs.

*Appeal dismissed.*

(1) (1919) L.R., 46 I.A., 145.

(2) (1923) L.R., 50 I.A., 14.