

## APPELLATE CIVIL.

Before Das and Adami, J.J.

CHINTAMANI MAHAPATRA

v.

SATYABADI KAR.\*

1921.

Nov., 29.

*Hindu Law—Joint family—mortgage by member—legal necessity, proof of.*

A person who lends money to a member of a joint Hindu family is entitled to enforce the debt against the joint property of the family, even in the absence of actual proof of legal necessity, if he shews that there was a representation made to him as to the existence of legal necessity and that, after honest inquiry, he was satisfied that there was such a necessity.

The suit of a person who has lent money to a member of a joint Hindu family for the purpose of paying off other creditors should not be dismissed merely because he is unable to produce the account books of such creditors for the purpose of proving that money was actually due to them from the family.

The facts of the case material to this report were as follows :—

A Hindu family consisted of Narayan Kar and Satyabadi, the minor son of the former's nephew. Narayan executed a simple mortgage in favour of the plaintiffs, purporting to act on his own behalf and as guardian of the minor Satyabadi. Narayan having died the plaintiffs instituted a suit on the mortgage against Satyabadi, who was still a minor, and the widow of Narayan. The plaintiffs alleged that Narayan and Satyabadi were joint and that the loan was required for repaying certain *mahajans* who had advanced money to the family. This was denied by the defendant who also denied that he was bound by

\* Circuit Court, Cuttack. Appeal from Appellate Decree No. 4 of 1921, from a decision of F. F. Madan, Esq., District Judge of Cuttack, dated the 31st August, 1920, affirming a decision of Babu Raj Narain, Munsif of Puri, dated the 16th September, 1919.

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the mortgage, or that Narayan was his guardian. The trial court found that Narayan and Satyabadi were not joint, that the former was not the latter's guardian; and that there was no legal necessity for the loan. The suit was decreed *ex parte* against defendant No. 2, the widow of Narayan. The plaintiffs appealed to the District Judge who held that Narayan and Satyabadi were joint but that inasmuch as the plaintiffs had not produced the *mahajans'* account books he was not satisfied as to the existence of the debts alleged to be due to them. The appeal was dismissed.

The plaintiffs appealed to the High Court.

*Damodar Kar*, for the appellants.

*Bichitranand Das*, for the respondents.

DAS, J.—This case must go back. The learned Judge has decided the first issue in favour of the appellants. He has come to the conclusion that Narayan, who executed the document, and Satyabadi were joint. On this finding the plaintiff is entitled to a decree as against the entire joint family if he can establish that there was legal necessity for the loan. The learned Judge in discussing the question of legal necessity records a finding that the minor respondent is not bound; but his judgment is very unsatisfactory on this point. He says that the case of the plaintiff is that Rs. 190 was required for paying off the debts of three *mahajans*. He apparently declines to consider this question because the *khatas* kept by the *mahajans* have not been produced. But surely it was unnecessary for the plaintiff, and it may have been impracticable for him, to compel the *mahajans* to produce the account books. The onus is undoubtedly on the plaintiff to prove that there was legal necessity for the loan. But if he is unable to establish legal necessity, he is still entitled to succeed if he shows that there was a representation made to him as to the existence of a legal necessity and that he made an honest enquiry and that he was satisfied that there was such a necessity. That is the question which the learned Judge should have

decided. It is very often impossible for the creditor to compel third parties to produce their account books and the plaintiff's suit cannot fail because the third parties did not produce the account books.

The Court to which we propose to send back the case must determine, first, whether there was a legal necessity; and, secondly, if there was not, whether a representation was made to the plaintiff that there was a legal necessity and whether he made an honest enquiry about the existence of the legal necessity and was satisfied that it did exist.

We allow this appeal, set aside the judgment and decree of the Court below and send the case to the lower appellate Court for decision according to law. The costs will abide the result.

ADAMI, J.—I agree.

*Appeal remanded.*

## LETTERS PATENT.

*Before Dawson Miller, G. J. and Mullick, J.*

SIR L. E. RALLI

v.

A. H. FORBES.\*

1922.

May, 17.

*Lease—construction of—lease for building purposes from year to year, whether passes permanent interest—ambiguity in terms of lease—lessor bound by his representations as to lessee's rights—Evidence Act, 1872 (Act 1 of 1872), section 115.*

Even if a building lease granted for the purpose of building permanent structures on it may be presumed to pass a permanent interest, such a presumption cannot outweigh the actual terms of the lease. Therefore where such a lease

\* Letters Patent Appeal No. 75 of 1921, from a decision passed in Second Appeal No. 17 of 1920, reversing the decisions of Jadunandan Prasad, Esq., Officiating District Judge of Purnea, dated the 8th of September, 1919, and of Babu Rajnarain, Munsif of Araria, dated the 16th of September 1918.

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