LETTERS PATENT.

Before Dawson Miller, C. J. and Adami, J.

1922.

April, 28.

AINTHU GOPE

v.

KHAKHAR SAHU.*

Hindu Law—Joint family—mortgage by karta—suit against sons and grandsons—legal necessity denied—whether plea covers an issue as to necessity for borrowing at the bond rate of interest.

A plea by the sons and grandsons of a Hindu mortgagor, in a suit on a mortgage executed by the latter as *karta*, that there was no legal necessity to borrow money at compound interest, must be specifically pleaded. It is not covered by a general plea that there was no legal necessity for the mortgage.

Jag Sahu v. *Rai Radha Kishun*(1), approved.

Hurro Nath Rai Chowdhri v. *Randhir Singh*(2) and *Nawab Nazir Begam* v. *Rao Raghunath Singh*(3), referred to.

The facts of the case material to this report are stated in the judgment appealed from, which was as follows :—

This is an appeal by the plaintiffs in a suit brought on a mortgage. The only question is whether the plaintiffs are entitled to recover interest at the rate stipulated in the mortgage bond, namely, compound interest at Re. 1/9/- *per cent. per mensem* with yearly rests. The Munsif decreed the suit in full, but the District Judge reduced the rate of interest to simple interest on the ground that on the pleadings it was for the plaintiffs to prove that there was legal necessity not only for the loan but for the rate of interest stipulated in the bond and that they failed to do so. The defence on this point was contained in paragraph 6 of the written statement where it was pleaded that the plaintiffs' claim for interest was invalid and useless and by way of penalty and that the plaintiffs were not entitled to get compound interest. The only reference to legal necessity in the defence is in paragraph 10 where it is stated that the debt was not applied to legal necessities and the plaintiffs were not entitled to a decree nor could a mortgage decree be passed. The learned District Judge has not quoted the case to which he refers as "the latest decision", but presumably he relies on *Nawab Nazir Begam* v. *Rao Raghunath Singh*(3). In that

* Letters Patent Appeal No. 97 of 1921.

(1) (1920) 5 Pat. L. J. 287. (2) (1891) I L. R. 18 Cal. 311; L. R. 18 I. A. 1.
(3) (1919) I. L. R. 41 All. 571; L. R. 46 I. A. 145.

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case their Lordships of the Judicial Committee referred to the defence which, it was held, made it open to the defendants to contend that though necessity for borrowing the principal sum was accepted, there was no necessity to borrow on the onerous terms of the mortgage. From the report of the case in the High Court at Allahabad [*Rao Raghunath Singh* v. *Nasir Begam*(1)] it will appear that the defence was that there was no legal necessity either for the loan or for the exorbitant rate of interest agreed to be paid, such as would render the family property liable for it. The effect of this decision was considered in this Court in *Jag Sahu* v. *Rai Radha Kishun*(2) where Das J. said "I take it as settled by the Judicial Committee in this case that the plaintiff is not called upon to prove the necessity for the rate of interest unless he is required to do so by the defendant. On this case I am bound to hold that if the defendant does specifically deny the necessity for the rate of interest, but not otherwise, the Court is entitled to and even bound to investigate into the necessity for the rate of interest and to reduce the interest if it is not satisfied that there was a necessity for the rate of interest." In *Prem Sukh Das* v. *Ram Bhujawan Mahto*(3) it was held that the pleading in that case did not entitle the defendants to raise this contention. The pleading there on the subject of interest was that it was by way of penalty. The manner in which the pleading in the present case was understood is shown by the issue that was framed. "Is the rate of interest hard and unconscionable and by way of penalty?" As was pointed out by Das J. in *Jag Sahu's* case(2), one principle on which the Court relieves by reducing the rate of interest is that the bargain was unconscionable within section 16 of the Contract Act, and the other principle is that the necessity for the rate of interest has not been established. Now, the issue in this case shows that the reference was to section 16 of the Contract Act and to the question whether the interest was penal or not. The pleading was not understood by the parties as raising the question whether there was any necessity for borrowing money at this rate and in my opinion it is impossible to read this plea into the written statement. Consequently the question which the learned District Judge has opened up and on the basis of which he has reduced the rate of interest, does not arise. On the merits of the case I see no reason to hold that the rate of interest is excessively high. The principal amount borrowed was Rs. 147. It was borrowed on the 7th of January 1907, and the suit was brought on the 26th of August, 1918. The amount claimed was Rs. 997. There is nothing in this which shocks the conscience in any way and there is no reason why the rate of interest should be reduced.

The result is that the appeal must be decreed with costs and the decree of the District Judge set aside and the suit decreed with costs in the lower courts.

The defendants appealed under the Letters Patent.

Siva Narain Bose, for the appellants.

S. K. Mitter, for the respondents.

(1) (1913) 19 Ind. Cas. 639. (2) (1920) 5 Pat. L. J. 287.
(3) (1919) Pat. 451.

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DAWSON MILLER, C. J.—In this case the defendants have appealed under the Letters Patent from a decision of Mr. Justice Ross, dated the 26th July last year, in which he set aside the decree of the District Judge and restored that of the Munsif.

The only question for our decision in this case is whether the learned District Judge was right or not in refusing the interest payable under the mortgage bond at the compound rate, and in order to determine that question it becomes necessary to consider whether or not the plea was taken in the written statements of the defendants to the effect that the interest prescribed by the mortgage bond was not justified by legal necessity.

The defendants were the sons and grandsons of the mortgagor who had executed a mortgage bond in favour of the plaintiff at a rate of interest of Re. 1-9-0 per month compounded with yearly rests. The defendants raised various pleas by their written statements, amongst others that the mortgage bond was not executed for legal necessity and did not benefit the defendants. They further contended that the interest was excessive and by way of penalty. But assuming that the issue as to legal necessity for the execution of the bond was decided against them, they nowhere in their written statements took the specific plea that the rate of interest was not justified by legal necessity.

There were two written statements delivered in this case, the first on behalf of Ainthu Gope, the defendant No. 2, and the second on behalf of Ramrup Gope, the defendant No. 3, who appeared through his guardian, Babu Makund Krishna Das, a pleader. In the first written statement the plea with regard to interest was in these terms:

"That a reference to the plaint will show that the plaintiff's claim for mesne-profits is quite invalid and useless and it is by way of penalty. The plaintiff is not entitled to get compound interest".

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That plea is set out in paragraph 6 of the written statement of the defendant No. 2. Then the plea with regard to legal necessity is in these terms:

"That even if it be proved that this defendant's father took the loan and executed the bond, as is falsely alleged by plaintiffs and totally denied by the defendant, then as the debt was not applied to legal necessities, and it did not benefit this defendant or any other defendant the plaintiffs are not entitled to a decree, nor can a mortgage decree be passed (Para. 10)".

The written statement of the defendant, Ramrup Gope, denied that the bond was genuine and in paragraph 2, pleaded:

"That even if the bound be genuine, it cannot be binding upon this defendant as it did not benefit the joint-family, either the executant of the bond or this defendant."

In paragraph 3 he pleaded that the stipulation for compound interest is by way of penalty and the plaintiffs are not entitled to get it. He further raised a somewhat extraordinary plea that he, the defendant No. 3, being the grandson of the executant of the bond was not liable on that account to pay interest. These are the only pleas raised material for the present purpose. The learned Munsif came to the conclusion that the bond was justified by legal necessity, that the money raised thereunder was required for the purpose of paying rent, purchasing bullocks for the family cultivation and some paddy for the use of the family, and he decreed the suit as prayed, coming to the conclusion that there was nothing unreasonable or unusual, certainly not unconscionable, in the rate of interest stipulated in the bond.

When the matter came before the District Judge, that learned Judge accepted the findings of the Munsif on the question of legal necessity for the raising of money, but arrived at a conclusion that although the rate of interest was not unusual as found by the Munsif, nevertheless there was no legal necessity proved by the plaintiffs for borrowing money at compound interest. He therefore reduced the interest awarded, allowing only simple interest at the bond rate and not compound interest.

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On appeal to this Court, the learned Judge before whom the appeal came, after considering the authorities which were referred to him on the point, dissented from the view taken by the District Judge and restored the decree of the Munsif, and the conclusion he came to was that although the onus is undoubtedly upon the plaintiff suing under the mortgage bond executed by the *karta* of the family, where the interest of minor members are concerned, to prove not only the necessity for the loan but the necessity for the interest at the rate stipulated, still the onus thus arising in the plaintiff was discharged if the defendant did not raise specifically the plea, and that unless it was specifically pleaded that the interest was not justified by legal necessity, there was no burden upon the plaintiff to prove by evidence that issue. In the present case I have referred to the issues which were raised by the defendants, and it seems to me that although it may be said that the issue of legal necessity for the execution of the bond was raised there was clearly no issue raised in the pleadings as to the necessity for the onerous interest stipulated in the bond. The facts necessary to prove legal necessity for the execution of the bond may be entirely different from those which are necessary to prove that there was necessity for borrowing money at a particular rate of interest or compound interest, and unless the plea is taken by the defendants it seems to me that the only onus which remains upon the plaintiff is that of proving that the bond itself was justified by legal necessity, that is to say, that the borrowing of the money was justified by legal necessity. That fact in the present case has been found by all the Courts in favour of the plaintiff and I think it would be creating an altogether unjust burden upon the plaintiff, where the question has not been specifically raised, if we were to allow the defendant in appeal to raise the point that the plaintiff had failed to discharge the burden of proof upon an issue which was never in fact raised.

We have been referred to certain cases, some of them decisions of the Judicial Committee, in order to

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support the contention that in cases of a suit by a mortgagee against the members of a joint family it is not necessary in the pleadings for the defendants to raise the specific plea that the rate of interest stipulated in the bond was not justified by legal necessity and that it is sufficient merely to raise the general question as to whether the loan itself was justified by legal necessity. In the first case, that of *Hurro Nath Rai Chowdhri* v. *Randhir Singh* (1), the interest was reduced by the High Court at Calcutta from 18 *per cent.* to 12 *per cent.* and this decision was affirmed by their Lordships of the Privy Council. But in that case no question at all was raised that the pleadings and issues did not permit of such a course, and even if it is left in doubt, as it certainly is, as to what the exact form of the plea taken by the defendant was, as the point was never raised before their Lordships, it is certainly no authority in favour of the view now put forward by the defendant, and one must assume that the point decided both by the High Court of Calcutta and by their Lordships of the Judicial Committee was a point which it was competent for them to decide upon the pleadings as originally framed or at all events upon the issues framed in the suit. The next case was that of *Nawab Nazir Begam* v. *Rao Raghunath Singh* (2). The passage relied upon in that case in which the interest was refused is a passage in the judgment of Lord Phillimore. It is in these terms: "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

(1) (1819) I. L. R. 18 Cal. 311; L. R. 18 I. A. 1.
(2) (1919) I. L. R. 41 All. 571; L. R. 46 I. A. 145.

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of this mortgage ". The plea taken in that particular case is merely referred to in general terms by Lord Phillimore in his judgment and it must be presumed that their Lordships had before them in that case the actual words of the plea as they appeared in the pleadings, and on referring to the decision of the High Court [*Rao Raghunath Singh* v. *Nazir Begam* (1)], one finds the defence of the defendants referred to on page 640: It is there stated " the defence of the sons and grandsons was that there was no legal necessity either for the loan or for the exorbitant rate of interest agreed to be paid such as would render the family property liable for it ". It appears therefore quite clear on a closer reference to the actual document in the case that the plea as to the necessity for the rate of interest was specifically taken; and the decision of the Judicial Committee in *Nawab Nazir Begam* (2) is certainly no authority for the contention put forward before us in this appeal. But the whole question was carefully considered in a recent judgment of this Court in the case of *Jag Sahu* v. *Rai Radha Kishun* (3), where the cases I have referred to and several others were considered and the learned Judges, of whom my learned Brother sitting with me to-day was one, came to the conclusion that before the defendants can raise the point that the plaintiff had failed to satisfy the burden of proof as to the rate of interest being justified by legal necessity, there must be a specific plea to that effect in the written statement. If in fact no plea of that sort was taken then it must be assumed that the defendants did not intend to raise the plea and no proof is required from the plaintiffs: in other words, the burden of proof which is originally on the plaintiff is either waived or satisfied by reason of the absence of any plea requiring him to discharge that burden. Indeed it would be most unjust and unfair upon the plaintiff where no issue has been raised in the case to

(1) (1913) 19 Ind. Cas. 639.
(2) (1919) I. L. R. 41 All. 571; L. R. 46 I. A. 145.
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turn round afterwards and say, there is no evidence in support of the issue, the initial burden of proving it was upon you and therefore your case must fail, if in fact the point has never been taken from the beginning and no issue has been raised upon it. In my opinion the learned Judge of this Court was quite right in the decision which he arrived at and this appeal should be dismissed with costs.

DAWSON MILLER, C. J.

ADAMI, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Jwala Prasad and Bucknill, J.J.

LACHMAN LAL PATHAK

v.

BALDEO LAL THATWARI.*

1922.

May, 2.

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 60(*f*)—jatri bahi, *whether attachable or saleable.*

The *jatri bahi* of a Gayawal is not liable to attachment or sale in execution of a decree.

Lachman Lal Pathak v. *Baldeo Lal Thathwari*(1), referred to.

Appeal by the decree-holder.

The facts of the case material to this report are stated in the judgment of Jwala Prasad, J.

Kailaspati for the appellant.

Hari Bhushan Mukerjee, for the respondent.

JWALA PRASAD, J.—There does not seem to be any substance in this appeal. The *jatri bahis* of the

* Appeal from Appellate Order No. 146 of 1921, from an order of J. A. Sweeney, Esq., District Judge of Gaya, dated the 8th April, 1921, confirming an order of Babu Jatindra Chandra Basu, Subordinate Judge of Gaya, dated the 10th September, 1920.

(1) (1917) 42 Ind. Cas. 478.