APPELLATE CIVIL.

Before Jwala Prasad and Ross, J.J.

MAHADEO PRASAD

1923.

Feb., 27.

v.

BISSESSAR PRASAD.*

Hindu Law—Joint family—karta, *mortgage by—interest, whether members liable for exorbitant.*

When a contract entered into by the *karta* of a joint Hindu family is sought to be enforced against the other members of the family on the ground of legal necessity it must be shewn not only that there was legal necessity for borrowing the principal sum but also that the rate of interest agreed upon was also a necessity, that is to say, that it was impossible for the *karta* to obtain the loan except at the rate of interest agreed upon.

Unless this is shewn the contract with respect to the interest is enforceable only at the current market rate.

Ram Bhujhawan Prasad Singh v. *Nathoo Ram*(1), followed.

Hurro Nath Rai Chowdhuri v. *Randhir Singh*(2), *Nand Ram* v. *Bhupal Singh*(3), *Dhanipal Das* v. *Maneshar Baksh Singh*(4), *Nawab Nazir Begam* v. *Rao Raghunath Singh*(5), *Kamla Prasad* v. *Pandey Ram Chandra Prasad Narain Singh*(6), *Manna Lal* v. *Karu Singh*(7), *Aziz Khan* v. *Duni Chand*(8) and *Lala Balla Mal* v. *Ahad Shah*(9) referred to.

---

*Appeal from Original Decree No. 95 of 1920, from a decision of Lala Damodar Prasad, Subordinate Judge of Muzaffarpur, dated the 28th November, 1920.

(1) (1923) I. L. R. 2 Pat. 285; L. R. 50 I, A, 14,

(2) (1891) I. L. R. 18 Cal. 311; L. R. 18 I. A. 1.

(3) (1912) I. L. R. 34 All. 126.

(4) (1906) I. L. R. 28 All. 570; L. R. 33 I. A. 118.

(5) (1919) I. L. R. 41 All. 571; L. R. 46 I. A. 145.

(6) (1919) 4 Pat. L. J. 565.

(7) (1921) 1 Pat. L. T. 6; 56 Ind. Cas. 766, P. C.

(8) (1918-19) 23 Cal. W. N. 130, P. C.

(9) (1918-19) 23 Cal. W. N. 233, P. C.

1923.

MAHADEO PRASAD v. BISSESSAR PRASAD.

Appeal by defendants 1, 2 and 3.

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

The mortgage in suit was executed on the 11th September, 1911, by defendant No. 1 in favour of plaintiff No. 1. The other plaintiffs were members of a joint *Mitakshara* family and claimed the bond in suit as belonging to the family.

Defendants Nos. 2 and 3 were the minor sons of defendant No. 1 and were joint with him; defendant No. 1 was the *karta* of the family. The other defendants were interested in the mortgaged property and were therefore impleaded as such in the suit. They did not appear in the suit; defendant No. 4 filed a written statement, but he did not appear at the trial.

The claim of the plaintiff was resisted only by defendants Nos. 1, 2 and 3. Defendant No. 1 filed a separate written statement and defendants Nos. 2 and 3 another. The case of defendant No. 1 was that the bond was taken from him under undue influence; that he was under the pressing necessity of borrowing Rs. 2,400 to deposit the same in the Civil Court in order to have an execution sale of a valuable property of his, namely, *Mauza* Bahersi, set aside; that the creditor agreed to lend the said sum to the defendant but at the last moment refused to lend the sum of Rs. 2,400 unless the defendant borrowed from him Rs. 19,000 and paid off all the defendant's debts standing on the date of bond; that the defendant could not obtain a loan elsewhere and as the time for depositing the amount necessary to set aside the sale of Bahersi was about to expire, the defendant was forced to borrow Rs. 19,000 and to agree to pay the high rate of interest and compound interest stated in the bond, the terms of which were penal and unconscionable. He further contended that he sold *Mauza* Muhammadpur, *Tauzi* No. 14632, to defendant No. 4 for Rs. 8,000, who tendered this amount to the plaintiffs in part satisfaction of the mortgage debt; but the plaintiffs refused to accept this amount and

1925.

MAHADEO PRASAD v. BISSESSAR PRASAD.

hence the plaintiffs were not entitled to interest and compound interest on Rs. 8,000 from the date of tender.

Defendants Nos. 2 and 3 contended that the defendant No. 2 was born on the 21st of June, 1910, that is, some fifteen months before the bond in suit. They denied the execution of the bond, the passing of any consideration, the existence of family necessity to execute the bond, or the benefit of the loan to the family. They also denied their liability to pay prior debts mentioned in the mortgage bond in suit, to pay off which the loan from the plaintiff was said to have been taken. They also contended that the clause as to interest was extortionate and unenforcible as there was ample security for the money said to have been advanced. There was also a dispute between the parties as to the correct description of some of the mortgaged properties and as to whether some of them were really mortgaged or not.

The mortgage was executed to enforce a loan of Rs. 19,000, which with interest and compound interest, swelled to Rs. 50,486, the amount of claim laid in the suit.

Upon the pleadings the following issues were raised in the Court below :

Issues Nos. (*1*) and (*2*) were not pressed either in the Court below or in the High Court and therefore are not set out.

" (*3*) Is the bond in suit genuine and for consideration, was it executed for the benefit of the estate and for legal necessity? "

" (*4*) Was the bond in suit executed by defendant No. 1 under undue influence? "

" (*5*) Is the contract for payment of interest and compound interest penal and unconscionable? "

" (*6*) Can the interest of defendants 2 and 3 in the joint property be made liable? "

" (*7*) Which of the mortgaged properties are liable for plaintiff's claim? "

" (*8*) Did plaintiff refuse to accept Rs. 8,000 offered in part satisfaction of the debt by Anrudh Chaudhury? If so, what is its effect? "

" (*9*) To what amount and relief, if any, are the plaintiffs entitled? "

" (*10*) Was defendant No. 2 born before the execution of the bond? "

The Court below decided all these issues against the defendants and gave a full decree to the plaintiffs. Defendants Nos. 1 to 3 therefore appealed to the High Court.

Noresh Chandra Sinha, *Guru Saran Prasad* and *Raghunandan Prasad*, for the appellants.

Lachmi Narain Sinha and *Tribhuan Nath Sahay*, for the respondents.

JWALA PRASAD, J. (after stating the facts of the case as set out above, proceeded as follows) :—

The learned Vakil on behalf of the appellants has not seriously disputed the findings of the Court below as to the genuineness of the bond in question or as to its being for consideration. He, however, contends that the bond in question was executed in such circumstances as made the defendant No. 1 altogether helpless and placed him at the mercy of the creditor so as to agree to the terms of the bond in question. He says that the plaintiff No. 1 took advantage of the situation in which the defendant No. 1 was placed at the time and contrived to put off the advance of the loan to a time when the defendant was unable to go out of his clutches in order to seek relief somewhere else and to secure an advance which at that moment he so urgently wanted. In this way the learned Vakil for the appellants contends that the borrower, defendant No 1, was under the influence of the creditor who dominated over his will and made the defendant to agree to the terms that he proposed, and consequently the bond in question is affected by the rule of undue influence described in section 16 of the Contract Act.

The above contention requires some statement of facts in order to elucidate and comprehend the direct necessity that impelled the defendant No. 1 to place himself at the mercy of the creditor—the necessity being to raise a loan of Rs. 2,400 in order to deposit the same in the Civil Court to have the sale of his village Bahersi set aside. The sale had taken place on

1923.

MAHADEO PRASAD v. BISSESSAR PRASAD.

JWALA PRASAD, J.

the 15th of August, 1911, in execution case No. 98 of 1911 at the instance of one Paramhans Narain, decree-holder. In that case the defendant No. 1 and others were judgment-debtors. The deposit had to be made by the 15th of September, that is, within thirty days of the sale. At that time there was another decree pending against the defendant. That decree was passed on the 13th of December, 1909, in suit No. 54/81 of 1909 in favour of one Gur Prasad Sahu, decree-holder. It was executed (Execution case No. 41 of 1910) and some of the properties of the defendant were attached and a notice under Order XXI, rule 66, of the Civil Procedure Code, for settling the valuation of the properties to be sold was issued. The defendant had objected to the valuation of the properties stated by the decree-holder and that objection was disallowed. He filed an appeal against the decision of the Subordinate Judge and that appeal was pending in the High Court at Calcutta. There was also a dispute with the decree-holder with respect to a sum of Rs. 3,400 which the defendant claimed as having been paid by him to the decree-holder out of Court. The appeal in the High Court was pending at the time when the bond in suit was executed. The defendant was also indebted to Babu Jogendra Chandra Mukharji, a pleader of Muzaffarpur, under a hand-note, dated the 28th November, 1909, to the extent of Rs. 2,431 which was taken by him to meet the expenses of his cases, and to plaintiff, Babu Bissesar Prasad Marwari, in respect of Rs. 1,034-3-6 payable under a hand-note, dated the 20th June, 1911. The defendant says that he expected to deposit the sum required to set aside the sale of *Mauza* Bahersi from the fund of the *ijmali kothi* belonging to himself and others and in respect of which a Receiver was appointed by the District Judge of Muzaffarpur. He states that the District Judge sanctioned the payment of the said sum and the Receiver gave an order for the payment of a sum of Rs. 2,400 on a debtor of the joint *kothi*, the *mahant* of Pattepur. But unfortunately, on the 6th of September, 1911, the debt of Pattepur was

allotted to the share of one Babu Gajadhar by the Commissioner appointed to effect partition, and not to the defendant; and Gajadhar Babu objected to the payment of this sum and consequently the *mahant's* manager refused to pay the said sum to the defendant. When the defendant's *amla* was returned from the *mahant's* manager thus disappointed, he met the plaintiff Bissesar on the way and proposed to take a loan of the aforesaid sum from him. Bissesar then is said to have come to the defendant at Mahadeo Babu's place that very day when it was settled that he would advance this loan and that Mahadeo should have to execute a hand-note for Rs. 3,500, Rs. 2,400 being the aforesaid sum and Rs. 1,100 being due with interest on a previous hand-note executed by the defendant in favour of Bissesar. On the 8th of September the plaintiff again came and stated that the defendant should have to execute a hand-note for Rs. 6,000 as the debt due from the defendant to Jogendra Babu must also be paid. Then, it is said, the plaintiff came again on the 9th September and on that day said that the debt of Gur Prasad Sahu, who had a decree of Rs. 11,000 against the defendant, should also be paid; and that the defendant should have to execute a mortgage bond of Rs. 17,000 so that the aforesaid debts of Jogendra Babu, Gur Prasad's decretal amount and the plaintiff's debt under a previous hand-note might be paid off and Rs. 2,400 be given to the defendant to deposit in Court in order to have the sale of Bahersi set aside.

The defendant says that the interest payable under the decree of Gur Prasad Sahu was at the rate of 6 *per cent. per annum*, that payable to Jogendra Babu was at the rate of 12 *per cent. per annum* and that payable to the plaintiff under the previous hand-note was at the rate of Re. 1-4-0 *per mensem, i.e.*, 15 *per cent. per annum*, but on the 10th of September the plaintiff proposed that he should take interest at the rate of 24 *per cent. per annum*. To this the defendant objected and said that he would pay only at the rate

1923.

MAHADEO PRASAD v. BISSESSAR PRASAD.

JWALA PRASAD, J.

of 6 *per cent. per annum* which was the rate mentioned in Gur Prasad's decree; but the plaintiff said that he would not advance at a lesser rate than Re. 1-4-0 *per cent. per mensem, i.e.*, 15 *per cent. per annum* and compound interest at that rate and then he would agree to pay Rs. 2,400 to the defendant. The plaintiff is further said to have told the defendant that he must mortgage all his properties. The defendant thus takes us to the incidents up to the 10th of September, 1911. The defendant says that he was under a wrong impression that the sale of Bahersi had taken place on the 12th of August, 1911, and hence the money was to be deposited on the 12th of September, 1911; and, consequently, there was no time left to him to find out any other creditor, and he had to agree to the terms dictated by the plaintiff for, if he had not done that, his valuable property, *Mauza* Bahersi, would have been lost to him irretrievably. On the 11th of September, 1911, the defendant says that shortly before office hours the plaintiff brought to him the bond fair copied and when the defendant wanted to have the document read, the plaintiff said that there was not much time left and that the terms were the ordinary terms of a mortgage bond and that if it were read, hair splitting objections would be raised; consequently, the document was not read over. Further the defendant states that he insisted that a clause may be inserted in the bond that he may repay the money within four months. This clause was added in the margin of the bond.

The learned Subordinate Judge has examined the incidents related by the defendant in the light of the evidence adduced before him and has held that the defendant has failed to substantiate them. We have carefully considered the arguments advanced and the evidence in the case, and we fully agree with the view taken by the learned Subordinate Judge. We may mention here only the salient points to show that the view taken by the learned Subordinate Judge is correct.

Now, the defendant says that he was under the impression that the sale had taken place on the 12th

of August and hence the money was to be deposited by the 11th of September. There is no room for such an impression, inasmuch as in the letter (*Exhibit H*), dated the 23rd of August, 1911, sent by the defendant and his co-sharers to the Receiver, and in *Exhibit L* the letter, dated 26th August, 1911, sent by the Receiver to the District Judge, it was stated that the sale had taken place on the 15th of August, 1911. Again, his case is that the plaintiff insisted upon his taking loan in order to pay off the decree of Gur Prasad Sahu and that there was no necessity for the defendant at that time to pay off that decree inasmuch as it carried only interest at 6 *per cent. per annum* and that the dispute with him was then pending in the High Court of Calcutta and involved a sum of Rs. 3,400 which the defendant had claimed as having been paid out of Court. In other words, the defendant wants to make out that there was no urgency to pay off the decree of Gur Prasad Sahu and that he could wait to pay it at his convenience. This is entirely wrong, inasmuch as there was no dispute as to the liability of the defendant to pay the decree of Gur Prasad Sahu. His properties were already attached and valuation for sale proclamation was ascertained by the Subordinate Judge. The dispute in the High Court related only to the valuation and the defendant further claimed a remission of Rs. 3,400 out of a large sum of over Rs. 11,000 as having been paid out of Court. After the disposal of the matter in the High Court, which would not have taken long, the properties attached would inevitably have been sold unless the full decretal amount was paid. It appears that the dispute was settled out of Court about the time the mortgage bond in question was executed and the claim of Rs. 11,749 was reduced to Rs. 10,632 odd, allowing a remission of Rs. 999 odd to the defendant. After this settlement, the defendant was bound to pay up, otherwise his properties would have been sold after service of sale proclamation, which would not have taken long for the law prescribes sale to take place after

1923.

MAHADEO PRASAD v. BISSESSAR PRASAD.

JWALA PRASAD, J.

thirty days of the service of sale proclamation, *vide* Order XXI, rule 68. That the settlement of the dispute with Gur Prasad Sahu was already arrived at when the bond in question was executed, is clear from the recital in the bond itself, wherein the exact sum of Rs. 10,850 is stated to be the sum settled "in satisfaction of the entire decree" which was "calculated to be beneficial" to the defendant (the quotations are from the bond *Exhibit 2*). This sum was left with the plaintiff to be paid to Gur Prasad Sahu as settled which he did pay and had a certificate of satisfaction recorded in Court on 14th September, 1911, *vide Exhibit 5* which sets forth in detail the terms of settlement with Gur Prasad Sahu and the defendant, the amount of the claim and the amount remitted: *vide* also *Exhibit J*.

Thus it is clear that the defendant's village Bahersi was already sold off and his other properties also were in danger of being sold in execution of Gur Prasad Sahu's decree. When he was raising a loan to deposit the sum of Rs. 2,400 to save his village Bahersi it is natural that he would take a further loan to save his other properties in danger of being sold by Gur Prasad Sahu. It is immaterial that the sum decreed in Gur Prasad Sahu's case carried interest at 6 *per cent. per annum*. The defendant could only raise a loan at the market rate of interest and the amount decreed was arrived at after calculating interest at 12 *per cent. per annum*: *vide Exhibit Q*. The plaintiff's own debt, under a previous hand-note, executed by the defendant was naturally to be included in the loan, so also the debt due to Jogendra Babu. Thus the defendant must have been himself anxious to raise the sum of Rs. 19,000 from the plaintiff to pay up all his outstanding debts, and not that he was pressed by the plaintiff to take the said loan of Rs. 19,000 instead of Rs. 2,400 only to deposit it in the Civil Court to have the sale of Bahersi set aside. The defendant's case is improbable and not borne out by the evidence or the circumstances in the record.

Now, as to the incidents related by the defendant which brought him under the clutches of the creditor. His case is that he came to know on the 7th of September, 1911, that the *mahant* of Pattepur had refused to pay to him the sum of Rs. 2,400 ordered by the District Judge in order to have the sale of Bahersi set aside and thus he became in need of raising money elsewhere and his agent mentioned it to the plaintiff who thereafter became anxious and began to come to the defendant day after day in order to ensnare him and induce him to take a loan of much larger sum of money and to execute the mortgage bond in dispute. He wants us to believe that he did not settle the terms either on the 7th and 8th September or on the 9th and did not know what interest was going to be charged by Bissesar until at the eleventh hour. This is an unnatural story. On the other hand, the plaintiff states that the negotiation took place and was settled on the 9th of September. The stamp purchased on the 9th corroborates the statement of the plaintiff, inasmuch as unless the amount, the rate of interest and other terms were fully settled, no stamp would be purchased. At any rate, the defendant came to know on the 11th according to his own showing that the terms demanded by the plaintiff were unconscionable. Why not then from that date up to the 15th did he try to obtain a loan from elsewhere. He is a man of substance and his properties were worth at least Rs. 50,000. If the terms demanded by the plaintiff were hard and unconscionable, it was not difficult for him to secure a small loan of Rs. 2,400 required to set aside the sale of Bahersi. That he did not do so is an ample proof of the fact that he did not want only Rs. 2,400, but that he wanted a much larger sum, namely, Rs. 19,000, in order to discharge all the debts mentioned in the mortgage bond in suit, the largest of which was that of Gur Prasad Sahu (Rs. 11,000) and which had to be paid in order to obtain the benefit of a remission and of saving the property from sale. It may be said that if the defendant could invent stories of negotiations being carried on by the plaintiff in an indefinite and

1923.

MAHADEO PRASAD v. BISSESSAR PRASAD.

JWALA PRASAD, J.

unsettled manner so as to drive the defendant from day to day to the ultimate helpless condition stated by him, why is it that the defendant did not invent a further story bringing him nearer to the date when the money was to be deposited, that is, the 15th of September, 1911. The answer is to be found in the date when the bond was executed, namely, the 11th of September. Therefore it was impossible for him to carry his invention further than the 11th of September and hence he alleged that he was under the wrong impression that the sale had taken place on the 12th of August and the deposit had to be made on the 11th of September. It has already been shown that the defendant must have known that the sale had taken place on the 15th of August, 1911, inasmuch as he himself, with his co-sharers, had written a letter (*Exhibit H*), dated the 23rd August, 1911, to the Receiver that the sale of Bahersi had taken place on the 15th of August. The Receiver dealing with this letter states in his letter to the District Judge (*Exhibit I*) that the defendant had stated that the sale had taken place on the 15th August, 1911.

The defendant was in need of money to pay off his debts. He approached the plaintiff and negotiated with him for the same and agreed to the terms mentioned in the bond. The negotiation was settled on the 9th of September, 1911, and stamp was purchased on that date and the bond was executed and duly registered on the 11th of September, 1911. The plaintiff, out of the consideration money, satisfied Gur Prasad Sahu's decree by paying Rs. 10,632-12-0 (*Exhibits 5* and *J-1*); Rs. 2,431 was paid to Jogendra Babu on the 15th September, 1911, due under a hand-note (*Exhibit 4*); Rs. 1,068-7-0 to the plaintiff due under a hand-note and the defendant took in cash Rs. 4,684 per receipt (*Exhibit I*), out of which Rs. 2,400 was deposited to set aside the sale of Bahersi (*Exhibit S*) on the 12th of September, 1911. Thus, the defendant received the full consideration money of the bond. The finding of the Subordinate Judge that the

mortgage was executed for consideration is, therefore, unchallengeable.

We, therefore, agree with the view taken by the learned Subordinate Judge that the defendant has failed to prove that he was ensnared by the plaintiff to take a loan of Rs. 19,000, instead of Rs. 2,400, or that the bond was executed under undue influence or on account of pressure brought to bear upon him by the plaintiff. The defendant never before this suit complained that he executed the bond under the pressure exercised by the plaintiff. Five years after the execution of the bond in question, he instituted suits against his co-sharers for contribution with respect to the decree of Paramhans. In those suits he based his claim upon the bond in question and did not state that he was in any way coerced to execute it.

The defendants did not in the appeal question the passing of consideration, and in fact the payment of the debts mentioned in the bond has been amply proved as already shown. The learned Subordinate Judge has held that defendants Nos. 2 and 3, the minor sons of defendant No. 1, are bound by the mortgage executed by defendant No. 1 and that the family properties were validly mortgaged. This part of the finding of the learned Subordinate Judge is not seriously disputed by the learned Vakil on behalf of the appellants and in fact the finding is not open to challenge.

The defendant No. 2 was born fifteen months before the date of the bond in suit and defendant No. 3 was admittedly born after the execution of the bond. The decree of Gur Prasad Sahu was passed on the 13th of December, 1909, upon hand-notes two years before the birth of defendants Nos. 2 and 3 and some two years before the execution of the mortgage bond in suit. The decree was based upon the hand-notes of 1907 (*vide Exhibits O* and *P*). It is not impeached as being an immoral debt of the father. It was a personal debt of the father incurred much prior in point of time to the mortgage bond in suit and

1923.

MAHADEO PRASAD v. BISSESSAR PRASAD.

JWALA PRASAD, J.

independent of any security in immovable property. Therefore it was an antecedent debt, and the father was justified to raise a loan to pay it off and his minor sons are bound by it though they were not parties to the suit. Out of the balance Rs. 4,684-12-6, Rs. 2,400 was clearly for family necessity inasmuch as it went to have the sale of the family property *Mauza* Bahersi set aside, and the remainder was borrowed for family necessity and to look after an appeal against one Gouri Dutt which has been proved as pending at that time. Therefore the family properties in suit have been validly mortgaged to secure the loan of Rs. 19,000 mentioned in the mortgage bond in suit and all the defendants are bound to pay the loan.

The appellant defendants, however, contend that the rate of interest of 15 *per cent. per annum* and compound interest is not enforceable. It is urged that, though the borrowing by the father in order to pay off the antecedent debts as well as for other family purposes might be a valid necessity, yet the borrowing at the rate mentioned in the bond was not a family necessity and the mortgaged properties being the joint family properties of all the defendant, the father, defendant No. 1, had no specified share therein and therefore he was not justified in pledging the family properties to pay interest at the rate mentioned in the bond. On the other hand, on behalf of the plaintiffs respondents it has been contended that the contract, voluntarily made by defendant No. 1 for valid debt binds the defendants Nos. 2 and 3 and the family properties were validly mortgaged; that the rate of interest, howsoever exorbitant, cannot be abrogated unless the agreement was tainted by undue influence, fraud or misrepresentations such as are mentioned in the Contract Act, and that the plaintiffs are entitled to recover the loan at the rate of interest and compound interest mentioned in the bond by sale of the mortgaged properties. At the Bar the following authorities were cited in support of the aforesaid respective contentions of the parties: *Hurro Nath Rai Chowdhri* v. *Randhir*

Singh (1), *Nand Ram* v. *Bhupal Singh* (2), *Dhanipal Das* v. *Maneshar Baksh Singh* (3), *Nawab Nazir Begam* v. *Rao Raghunath Singh* (4), *Ram Bhujhawan Prasad Singh* v. *Nathu Ram* (5), *Kamla Prasad* v. *Pandey Ram Chandra Prasad Narain Singh* (6), *Manna Lal* v. *Karu Singh* (7), *Aziz Khan* v. *Duni Chand* (8) and *Lala Balla Mal* v. *Ahad Shah* (9). We have carefully gone through those authorities. The principle seems to have been settled that a solemn agreement duly and freely entered into cannot be rescinded and the parties to the contract cannot be allowed to avoid the terms thereof which they agree to with their eyes open and with no restraint upon their freedom of will. Upon this principle, contracts for payment of exorbitant rates of interest, such as, 75 *per cent.* in some cases were upheld and were not allowed to be disturbed; but in those cases the contracts were upheld against the party to the contract on the ground that a party to the contract cannot be allowed to rip up the terms of the contract when he agreed to them voluntarily and with his eyes open. But when a contract entered into by a head member or *karta* of a joint Hindu family is sought to be enforced against the other members on the ground of necessity, it must be shown not only that there was the necessity to borrow the principal sum but that the rate of interest agreed upon was also a necessity: in other words, that it was impossible for the *karta* or the head member to obtain the loan for family necessity except at the rate of interest agreed upon. This seems to be the distinguishing feature in the authorities cited above. The creditor in such a case has not only to show that there was a family necessity so as to bind the members of the family on behalf of the parties to the contract with

(1) (1891) I. L. R. 18 Cal. 311; L. R. 18 I. A. 1.
(2) (1912) I. L. R. 34 All. 126.
(3) (1906) I. L. R. 28 All. 570; L. R. 33 I. A. 118.
(4) (1919) I. L. R. 41 All. 571; L. R. 46 I. A. 145.
(5) (1923) I. L. R. 2 Pat. 285; L. R. 50 I. A. 14.
(6) (1919) 4 Pat. L. J. 565.
(7) (1921) 1 Pat. L. T. 6; 56 Ind. Cas. 766, P. C.
(8) (1918-19) 23 Cal. W. N. 130, P.C.
(9) (1918-19) 23 Cal. W. N. 233, P. C.

1923.

MAHADEO PRASAD v. BISSESSAR PRASAD.

JWALA PRASAD, J.

respect to the loan advanced but that the rate of interest was the market or commercial rate. He will not be entitled to enforce a higher rate of interest against the other members and to make the joint family properties liable for interest higher than the current market rate of interest. In the present case the family was joint and the properties mortgaged are the joint family properties of all the defendants. The mortgage, therefore, cannot be validly enforced with respect to the rate of interest beyond the current market rate. The case seems to be governed by the recent decision of their Lordships of the Judicial Committee in the case of *Ram Bhujhawan Prasad Singh* v. *Nathu Ram* (1).

Now let us see what in this case has been proved to be the usual commercial rate of interest. The bond in question was executed amongst others to pay off the decree passed in favour of Gur Prasad Sahu in 1910 at the rate of 6 *per cent.* This is the rate of interest directed by the Court to be paid from the date of the decree upon the sum found due. This, of course, cannot be said to be the market rate of interest. The rate of interest mentioned in the hand-notes, on the basis of which the decree in question was passed, was 18 *per cent. per annum.* The Court, however, reduced it to 12 *per cent. per annum* (*Exhibit Q*) with the following observations: "As regards the rate of interest the onus to prove it was upon the plaintiff but he did not choose to adduce any evidence, both parties agreeing that the market rate is Rs. 12 *per cent. per annum* and that the plaintiff may be allowed interest at that rate. I have therefore no hesitation in holding that the plaintiff is entitled to get interest at the rate of Rs. 12 *per cent. per annum.*" This then was found by the Court to be the current market rate of interest. Another debt mentioned in the mortgage bond is a hand-note of Jogendra Babu, dated the 29th November, 1909. This carried interest at Rs. 12 *per cent. per annum* with yearly rests. The previous hand-note in favour of the plaintiff, dated the 20th

(1) (1923) I. L. R. 2 Pat. 285; L. R. 50 I. A. 14.

of June, 1911 (*Exhibit 3*), carries interest at the rate of Re. 1-4-0 *per cent. per mensem*. There is no mention of compound interest there. In the bond executed by the defendant in favour of Paltu Ram, dated the 13th of February, 1909, the rate of interest was As. 14 *per cent. per mensem* (*vide* plaintiff's evidence). The plaintiff further says that Mahadeo executed a bond in favour of Ganga Prasad at the rate of interest of 12 *per cent. per annum* and that he executed a bond in favour of Jogendra Babu at the rate of Rs. 10 *per cent. per annum*. The plaintiff, no doubt, says that the rate of interest on loans on hand-notes as well as mortgages is the same and that he charged interest at the rate of Re. 1-4-0, Re. 1-8-0, Re. 1-12-0 and Rs. 2 before. He does not give any evidence to show that these rates were on mortgages, nor does he make any mention of compound interest.

This is all the evidence as to the rate of interest. There is no evidence on the record that the rate of interest on a mortgage security is at the rate of Re. 1-4-0 *per mensem* and compound interest.

Now, the properties in this case were worth Rs. 50,000 and the amount secured was only Rs. 19,000. The creditor had ample security and there is no reason why he should be allowed a higher rate of interest than the usual commercial rate that was prevalent in the market at the time. It is conceded by the learned Vakil on behalf of the respondents that there is no evidence on the record to prove that Re. 1-4-0 compound interest was the market rate on mortgage securities. We, therefore, do not agree with the learned Subordinate Judge that the usual market rate of interest is that mentioned in the bond, namely Re. 1-4-0 *per cent. per mensem* with compound interest.

Defendant No. 1 was a young man when he executed the bond in question. He seems to have inherited a large property and he was anxious to save the same from being sold off in execution of the decrees of Gur Prasad Sahu and Paramhans. He, therefore, negotiated to take a large loan of Rs. 19,000 from the plaintiff. Although there was no fraud, mis-

1923.

MAHADEO PRASAD v. BISSESSAR PRASAD.

JWALA PRASAD, J.

representation or undue influence in the matter of borrowing the sum of Rs. 19,000, yet the plaintiff took advantage of the circumstances in which the defendant was placed and agreed to lend him the said sum at an unusual rate of interest, much higher than the commercial or market rate.

Considering all the circumstances of the case we hold that the plaintiff is not entitled to a mortgage decree at the rate mentioned in the bond. We disallow the compound interest, and direct that Re. 1-4-0 *per cent. per mensem* simple interest be allowed.

[The remainder of the judgment is not material for the purposes of this report.]

Ross, J.—I agree.

Decree modified.

REVISIONAL CIVIL.

Before Das and Kulwant Sahay, J.J.

RAMESHWERDHARI SINGH

v.

SADHU SARAN SINGH.*

1923.

March, 7.

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 151, *Order VII, rule* 11(c), *Order IX, rule* 9 *and Order XLVII, rule* 1—*failure to pay deficit court-fee—plaint rejected—restoration of suit, whether court has power to grant—Review.*

Where a plaintiff fails to make good a deficit in the court-fee due on the plaint and the plaint is rejected the court has no power to restore the suit either under section 151 or under Order IX, rule 9, of the Code of Civil Procedure, 1908.

An order rejecting a plaint under Order VII, rule 11(*c*), is open to review.

Application by the defendants.

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

The petitioners were the defendants in a suit filed against them by the opposite party in the Court below.

*Civil Revision No. 361 of 1922, from an Order of Babu Kamala Prasad, Subordinate Judge of Shahabad, dated the 28th October, 1922.