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Then it is urged that the defendants by acquiescing in the payment of rent at the rate of 20 *maunds* 19 *seers per annum* for the years 1316 to 1322 have precluded themselves from raising any objection under section 29 of the Act. There is no justification for this contention. A claim for rent is a recurring claim and it is open to the tenant at any time to take an objection on the ground that the claim contravenes the provisions of the law.

It is also suggested, though somewhat faintly, that although the tenant may not surrender his occupancy right he may agree with his landlord that he will not object to pay a rent which is contrary to the provisions of the law. For this proposition also there is no foundation.

The result is that the judgments of the Courts below must be affirmed and the appeal dismissed with costs.

DAWSON MILLER, C.J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Jwala Prasad and Kulwant Sahay, J. J.

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April, 11.

PARMESHWAR PANDEY

v.

RAJ KISHORE PRASAD NARAYAN SINGH.*

Civil Procedure Code, 1908, (*Act V of* 1908), *Order XXXIV, rule* 2—*Transfer of Property Act*, 1882, (*Act IV of* 1882), *section* 61—*Two mortgages with respect to certain property and third mortgage with respect to same property and additional property—decree for consolidated amount of the three mortgages illegal—Hindu Law—Joint family*—karta, *execution of mortgage by—suit on mortgage—parties—legal necessity—high rate of interest.*

* Appeal from Original Decree no. 317 of 1921, from a decision of B. Raj Narayan, Additional Subordinate Judge of Gaya, dated the 10th August, 1921.

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Where a mortgage entered into by a *karta* of a joint family is sought to be enforced against the other members on the ground of legal necessity, it must be shown not only that there was necessity to borrow the principal sum but also that it was necessary to agree to pay interest at the rate charged, that is to say, that it was impossible for the *karta* to obtain a loan for legal necessity at a rate of interest lower than that agreed upon.

Mahadeo Prasad v. *Bissessar Prasad*(1), followed.

Ram Bujhawan Prasad Singh v. *Nath Ram*(2), *Sinnachami* v. *U. A. R. Ramasamy Chettiar*(3), *Nawab Nazir Begum* v. *Rao Raghunath Singh*(4), *Biswanath Prasad Mahta* v. *Jagdip Narain Singh*(5), *Maharaja Sree Rao Sir Venkata Swetachelapathi Ranga Rao Bahadur Garu* v. *Raja Kaminayani Bangaru Kumara Ankoppa Nayanim Garu*(6), referred to

Where two mortgages were executed with respect to six items of property and a third mortgage was executed with respect to the same six items and also two other items, *held*, that a decree which consolidated the amounts due under all the three bonds, and made all the mortgaged properties liable for the consolidated amount, was contrary to the provisions of Order XXXIV, rule 2, Civil Procedure Code, and to section 61 of the Transfer of Property Act, 1882.

Jennings v. *Edwin Jordan and John Price*(7), referred to.

Where a mortgage bond is executed by the *karta* and other members of a joint Hindu family, a suit to enforce the bond is not liable to be defeated merely on the ground that some of the members of the family, of whose existence the plaintiff was not aware, have not been impleaded as defendants, if the Court in their absence can deal with the matters in controversy so far as regards the rights and interests of the parties actually before it.

Sital Prasad Ray v. *Asho Singh*(8), followed.

(1) (1923) I. L. R. 2 Pat. 488.
(2) (1923) I. L. R. 2 Pat. 285; L. R. 50 I. A. 14.
(3) (1912) 13 Ind. Cas. 7.
(4) (1918-19) 23 Cal. W. N. 700.
(5) (1913) I. L. R. 40 Cal. 342.
(6) (1912) I. L. R. 35 Mad. 108, P. C.
(7) (1881) 6 A. C. 698.
(8) (1923) I. L. R. 2 Pat. 175.

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A mortgage bond executed by the *karta* of a joint Hindu family for legal necessity is binding on all members of the family who were alive at the time when the bond was executed.

Appeal by the defendants nos. 4 and 5.

This was an appeal against a decree passed by the Subordinate Judge of Gaya, dated the 10th August, 1921, in a mortgage suit. That decree was based upon three mortgages :

(*1*) dated the 20th July, 1914, for Rs. 1,500;

(*2*) dated the 24th March, 1917, for Rs. 33,000; and

(*3*) dated the 12th November, 1917, for Rs. 8,000.

The first bond was executed by defendants nos. 1 to 3; the second was executed by defendants nos. 1 to 4, the defendant no. 4 being son of defendant no. 2; and the third was executed by defendants nos. 1 to 5, defendant no. 5 being son of defendant no. 1. Defendants nos. 6 to 8 were subsequent mortgagees. Defendants 4 and 5 were minors. Defendant no. 1 was the *karta* of the joint family of defendants 1 to 5, defendants 1 to 3 being brothers. In all the three bonds the properties described in Schedules I to VI attached to the decree were mortgaged and properties VII and VIII were mortgaged only in the third bond. The defendants 1 to 3 did not enter appearance. The suit was resisted by defendants 4 and 5 only, and upon the pleas taken by them in their written statement the following issues were framed in the Court below :

" *1.* Is the suit as framed maintainable?"

" *2.* Is the suit bad for defect of party?"

" *3.* Are the bonds in suit genuine, valid and for consideration?"

" *4.* Was the money under the bonds in suit advanced for legal necessity and for the benefit of the family?"

" *5.* Were the defendants 4 and 5 born at the time of the execution of the bonds, dated 20th July, 1916? Was defendant no. 5 born at the time of the execution of the bond, dated 24th March, 1917?"

" *6.* Are the rates of interest high and unconscionable? Was there any necessity for such rates of interest?"

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"7. Had the defendants 1 to 3 authority to mortgage the properties covered by the bond in suit?"

"8. To what relief, if any, are the plaintiffs entitled?"

All these issues were decided in favour of the plaintiffs and against the defendants, with the result that the entire claim of the plaintiffs was decreed. Defendants nos. 4 and 5 appealed to the High Court.

Sultan Ahmed (with him *Susil Madhab Mullick* and *Kailas Pati*), for the appellants.

P. K. Sen (with him *Ram Chandra Bhaduri*, *Guru Saran Prasad*, *A. Prasad* and *Raghunandan Prasad*), for the respondents.

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

The appeal is directed against bond no. 2 only. It is urged that the suit is bad on account of two members of the defendants' family, Bootan Pandey and Rambilas Pandey, sons of defendant no. 2 Madho Pandey not having been impleaded in the suit. Their existence came to light in the evidence of Jadu Singh, the last witness on behalf of the defendants, who stated towards the end of his examination-in-chief that Madho Pandey has got three sons Parmeshwar, Bootan and Rambilas. No doubt, in the written statement it was alleged that the suit was bad for defect of parties, but in what manner this was so was not disclosed. There is no reason why the plaintiffs would not have impleaded the said persons as parties if they had knowledge of their existence. It is, however, immaterial for the purpose of this case whether they were made parties or not, for the suit cannot be dismissed on that ground alone. The bond was executed by the *kartas* of the family and the suit was obviously for enforcement of the mortgage against the joint family impleading the *kartas* of the family and other members whose existence was known to the plaintiffs. No doubt, all persons whose rights and interest may be adjudicated upon and determined in the suit ought to be added as parties under Order I, rule 9, read with Order XXXIV, rule 1, of the Civil Procedure Code, but failure to add one or two persons

should not have the effect of defeating the suit if the Court, in their absence, can deal with the matters in controversy so far as regards the rights and interests of the parties actually before it. Such was the view taken by this Court in the case of *Sital Prasad Ray* v. *Asho Singh* (1).

It is then said that the defendant no. 4 was in existence at the time when the first bond was executed and that he should have joined in that bond. Similarly, it is said that defendant no. 5 was in existence at the time when the second bond was executed and he ought to have been joined in the execution of that bond. The bonds were executed by the *kartas* of the family and were for family necessities, such as, for payment of antecedent debts, *etc.* It was not necessary to join all the members of the family in the execution of the bonds in question. It is not very clear either upon the finding of the Court below or upon evidence as to whether defendant no. 5 was born before the second bond was executed. The learned Subordinate Judge having seen the boy is of opinion that he was not more than four years of age. If his estimate is correct, then he was born subsequent to the execution of the second bond. He has, however, not referred to any evidence in the case. The evidence that has been placed upon the point is not convincing. The horoscope of the boy has not been produced. The witnesses on behalf of the defendants are not quite competent to depose to the date of the birth or the exact age of the boy. It is, therefore, difficult to fix the age of defendant no. 5, and I would leave the matter as it is for, as observed above, nothing hinges upon that matter.

Next it is contended that the rate of interest mentioned in the bond is high and unconscionable, and that there was no necessity for agreeing to such a high rate of interest. Defendants nos. 1 to 5 being the executants of the bond cannot question the rate of interest voluntarily agreed to by them and inserted

(1) (1923) I. L. R. 2 Pat. 175.

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in the bond in question; but the appellants, defendants 4 and 5, being minors can question the authority of the *karta* or head member of the family to enter into a contract with regard to the rate of interest so as to be binding upon them unless it was shown that the high rate of interest agreed upon was necessitated by the circumstances of the family. In other words, they can throw the onus upon the plaintiffs to prove that the rate of interest agreed to was the proper rate of interest chargeable in the market. There is no evidence on the record as to what was the commercial rate of interest and, therefore, it is contended on behalf of the appellants that the rate of interest mentioned in the bonds should not be allowed. The debts incurred by means of the bonds in question were for the purpose of paying off antecedent debts. Those debts have been detailed in the bonds in question. It would appear from an arithmetical calculation that the debts paid off by the second bond carried interest at the simple rate of interest, *viz.*, Re. 1-2-0 to Rs. 2 *per cent. per mensem*. It would seem that the rate was rising from 1911, and in or about the years in suit the rate of interest rose to 2 *per cent. per mensem*. The law on the subject was reviewed by me in the case of *Mahadeo Prasad* v. *Bissessar Prasad* (1). It will not be profitable to repeat the reasons advanced by me in that judgment. It will be sufficient to say that when a contract, entered into by a head member, is sought to be enforced against the other members on the ground of necessity, it must be shown not only that there was necessity to borrow the principal sum but also for the rate of interest agreed upon; in other words, that it was impossible for the *karta* or head member to obtain a loan for family necessity at a rate of interest lower than agreed upon. The question of necessity is one of fact, and as in the case of a principal debt so in the case of interest necessity has to be proved by evidence. In the circumstances of that case, and for the reasons given by me, I reduced the rate of interest from Re 1-4-0 *per cent. per mensem* with six monthly rests

(1) (1923) I. L. R. 2 Pat. 488.

to 1 *per cent. per mensem* simple rate of interest [*vide* also *Ram Bujhawan Prasad Singh* v. *Nathu Ram* (1)].

Therefore, if we were to apply the principle laid down by the Privy Council and referred to above to the facts of the present case, we can at best cut down the compound interest and allow only simple interest at the rate varying from Re. 1-2-0 to Rs. 2, probably the latter. But the rate of simple interest of Re. 1 *per cent. per mensem* even does not seem to appreciably relieve the defendants of the burden of the debt. The first bond carried interest at Re. 1 *per cent. per mensem* with six monthly rests; the second bond carried interest at 14 annas *per cent. per mensem* with eight monthly rests and the third bond carried interest at Re. 1-2-0 *per cent. per mensem* with three monthly rests. In this case we are concerned only with the second bond the rate of interest wherein is 14 annas *per cent. per mensem* with eight monthly rests. This loan of Rs. 33,000 was advanced on the 24th March, 1917, and on the date of the suit, the 28th November, 1919, the interest came to Rs. 10,165-6-5, and on the due date fixed for payment by the decree of the interest amounted to a further sum of Rs. 10,640-1-0 calculated from the date of suit up to the date fixed for payment in the decree. The interest allowed according to the bond rate has worked out at a little over 12 *per cent. per annum*. This is not a high rate of interest in consideration of what used to be the rate of interest on the previous loans mentioned in the bond. The rate of 14 annas *per cent. per mensem* with eight monthly rests does not appear to be excessive, and, therefore, no case is made out for reducing the rate of interest.

It is then contended that the plaintiffs have failed to show legal necessity for a portion of the loan advanced under the second bond. These sums are: (*1*) Rs. 2,130 said to have been paid in cash to the executants at the time the bond was executed; and

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

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(2) Rs. 713 received in cash also by the executants subsequently. Now, the bond was executed in order to pay off the debts amounting to Rs. 30,870, and Rs. 2,130 was taken in cash. The sum of Rs. 30,000 was left with the mortgagee to pay off the prior debts mentioned in the bond. However, in making actual payments the mortgagee had to pay something more than the sums stated in the bond. The total sum paid by the mortgagee to the creditors is Rs. 22,261 leaving a balance of Rs. 8,609 with him. Out of this he paid to creditor Khub Rai Rs. 700, Rs. 1,025-7-3 to the mortgagors for *tilak* ceremony in connection with the marriage of the daughter of defendant no. 1, and Rs. 93-7-8 was taken by them in cash for expenses, leaving a balance of Rs. 6,790, out of which the mortgagors paid Rs. 6,077 towards the decreed debt of Durga Prasad, and Rs. 713 was spent by them.

The learned Subordinate Judge says that the object for which the loan was taken was to pay off the antecedent debts specified in the bond, and the creditor is not required to prove that the money advanced was actually applied for those purposes. Therefore he holds that the appellants are not entitled to call upon the plaintiff to prove the necessity for Rs. 713.

As to the cash amount of Rs. 2,130 taken by the mortgagors at the time of the execution of the bond, the learned Subordinate Judge says that a portion of this money was spent for the price of stamp and scribe's fee. The details of these have not been given by the Subordinate Judge, but this would come to Rs. 300 to Rs. 400. There is certainly no proof of this sum having been taken for family necessity. Mr. *Sen* on behalf of the respondents relies upon the cases of *Sinnachami* v. *U. A. R. Ramasamy Chettiar* (1), *Nawab Nazir Begum* v. *Rao Raghunath Singh* (2), *Biswanath Pershad Mahta* v. *Jagdip Narain Singh* (3) and *Maharaja Sree Rao Sir Venkata Swetachelpathi Ranga Rao Bahadur Garu* v. *Raja Kaminayani*

(1) (1912) 18 Ind. Cas. 7. (2) (1918-19) 23 Cal. W. N. 700.
(3) (1913) I. L. R. 40 Cal. 342.

Bangaru Kumara Ankappa Nayanim Garu (1), and contends that the major portion of the debt has been proved to have been raised for the purpose of paying off antecedent debts and family necessity and the want of proof with respect to a small sum of about Rs. 2,000 will not invalidate the debt so as to exonerate the defendants from the liability of the same. We are, however, relieved from entering into that question, for it appears that the appellants are bound to pay the debts in question incurred by their respective fathers. The personal liability of the executants of the bond still subsists, inasmuch as the suit for personal liability is not barred by limitation. The learned Counsel, who appears on behalf of the respondents, concedes this point and says that practically there will be no gain to his clients even if it were held that the family necessity with regard to those sums has not been established by the plaintiff. The aforesaid points, although strenuously urged on behalf of the appellants, have towards the close of the case been wholly abandoned for they have seen that no practical good could accrue to them even if those points prevailed. We have, however, thought it desirable to go into those points to give our own decision instead of relying wholly upon the admission of the lawyers appearing on behalf of the appellants. We think that they are perfectly right in the circumstances of the case in having abandoned those points.

The last point urged by the appellants, however, appears to be substantial. This is as regards the frame of the decree. The decree in question has consolidated the amounts due under all the three bonds in suit and has made all the mortgaged properties liable for the same. It must be remembered, as observed above, at the outset, that the properties nos. 7 and 8 were not at all mortgaged in the first and the second bonds. The consolidation of all the debts in the manner that the learned Subordinate Judge has done impedes the right of redemption of the

(1) (1912) I. L. R. 35 Mad. 108, P. C.

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mortgagors. This is contrary to the provisions of Order XXXIV, rule 2, and is also contrary to section 61 of the Transfer of Property Act. There is no specific contract on behalf of the parties with regard to consolidation, and in the absence of such a contract the consolidation is illegal. Mr. *Sen* referred to certain English cases on the point, namely, *John Jennings* v. *Edwin Jordan and John Price* (1). This ruling has no application after the Conveyancing Act was passed in England. Section 17 of that Act purports to abolish the consolidation of mortgages. Similarly, section 61 of the Transfer of Property Act abolishes the consolidation of mortgages, and we are bound by the Transfer of Property Act in force in this country.

I therefore hold that the decree as framed is illegal and not capable of execution. The decree is accordingly set aside, and a fresh preliminary decree must be prepared in accordance with law. The rate of interest up to the date of grace fixed in the decree of the Court below will be at the bond rate, and the rate of interest after that will be 6 *per cent. per annum* on each bond up to the date of realization.

There should be a direction in the decree that the properties nos. 1 to 6 should be sold first in their serial order and the sale proceeds thereof should be utilized for satisfaction of the debts due under the several bonds in order of their priority, and that properties 7 and 8 along with the share of property 3 in excess of that covered by the first mortgage will be sold last of all, and the sale proceeds thereof should be utilized for payment of the debt, if any, due under the second and bonds in order of priority. If the sale proceeds of only a few of the aforesaid properties is found to be sufficient to pay off the debts due under the three bonds, the remaining properties will not be sold.

KULWANT SAHAY, J.—I agree.

Appeal allowed.

(1) (1881) 6 Ap. Cas. 698.