PRIVY COUNCIL.

J.C.*
1927.

Dec., 6.

SUNDER MULL

v.

SATYA KINKER SAHANA.

Hindu Law—Joint Family Property—Mortgage by Karta —Compound Interest—Necessity for Onerous Terms—Evidence—Previous borrowings on equally onerous terms.

A suit was brought to enforce a mortgage of joint family property by the kartas of its branches to secure a loan and compound interest at $1\frac{1}{4}$ per cent. per mensem with yearly rests. Both Courts in India found that there was necessity for the loan. There was unchallenged evidence that mortgages of the joint property made to a local bank during the previous two or three years had been at a higher rate of interest with half-yearly rests. The trial judge held that the terms stipulated were not harsh and unconscionable within s. 16 of the Indian Contract Act, 1872, and made a mortgage decree which was affirmed by the High Court.

Held, that the onus upon the mortgagee of proving that there was necessity for the terms stipulated, and that they were consequently within the authority of the kartas, was satisfied by the evidence above mentioned.

Nazir Begam v. Rao Raghunath Singh (1), *Ram Bujhawan Prosad Singh* v. *Nathu Ram* (2) and *Radha Kishun* v. *Jag Sahu* (3), explained and followed.

The expression " reasonable commercial terms " used in the first of the above cases (and adopted in the last), as to the terms upon which a karta has authority to borrow, means such terms as can be arranged freely between borrower and lender in the circumstances of the particular case; no reference to the current rate of interest upon mercantile transactions is to be understood.

In India compound interest is common and often may be necessary and proper upon a borrowing for necessity.

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* PRESENT Viscount Summer, Lord Atkins, Lord Sinha, Sir John Wallis, and Sir Lancelot Sanderson.

(1) (1919) I. L. R. 41 All. 571, L. R. 46 I. A. 145.
(2) (1922) I. L. R. 2 Pat. 585; L. R. 50 I. A. 14.
(3) (1924) I. L. R. 4 Pat. 19; L. R. 51 I. A. 278.

The second of the above decisions does not lay down as a rule that a previous borrowing upon terms as onerous as those in question in the suit cannot be evidence that those terms are reasonable and proper.

The judgments in the above cases show that in default of evidence the Judicial Committee will accept the decision of the local Court as to what terms are proper in the particular case, that Court being better informed on the subject than the Board can be.

Decree of the High Court affirmed.

Appeal (no. 80 of 1925), by special leave, from a decree of the High Court affirming, with variations not material to the present appeal, a decree of the Additional Subordinate Judge of Hazaribagh.

The suit was brought to enforce a mortgage of joint family property made on December 5, 1097, by the kartas of the five branches of the joint family to secure a loan of Rs. 12,000 with compound interest at $1\frac{1}{4}$ per cent. per mensem on yearly rests.

By the terms of the special leave the appeal was confined to the question whether there was necessity for the money being borrowed at the rate of interest and upon the terms contained in the mortgage bond.

The trial judge had found that the loan was contracted for legal necessity, and that the rate of interest was not hard, unconscionable or penal. He made a mortgage decree.

The High Court on appeal varied the decree merely by holding that certain property was not excluded from the mortgage as the trial judge had held; the judgment did not mention any question as to the rate of interest, though the memorandum of appeal had submitted that there was not necessity for the high rate stipulated.

1927. Dec. 5, 6.—*Upjohn K. C.* and *Macaskie*, for the appellants.

DeGruyther, K. C. and *E. B. Raikes*, for the respondents.

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Dec. 6. The judgment of their Lordships was delivered by—

VISCOUNT SUMNER.—This case comes before their Lordships upon special leave to appeal, by which the question to be discussed was very carefully limited. In December, 1907, the kartas of the six branches of a Hindu joint family, of which the present defendants were members, executed a mortgage bond in favour of the present respondents for a principal sum of 12,000 rupees, with interest at $1\frac{1}{4}$ per cent. per mensem, that is, 15 per cent. per annum. with the provision that if the interest was not paid year by year it should be treated as principal, and compound interest at the same rate should be charged up to the date of payment.

The suit was commenced in 1919, when a large sum had accumulated due, since no interest had been paid at all; 37,000 rupees were then outstanding. It was for the purpose of realising the security, and the answer made by the members of the joint family, who defended it, was both that the money was not borrowed for necessity; that the terms, namely, the rate of interest and the rests and the compound interest were not justified by necessity; and therefore that it was not within the authority of the kartas to impose this burden upon the property, in which they were interested.

By the terms of the leave given, the argument is confined to the latter point, that is, whether the terms as to rate of interest, rests, and simple or compound interest were in excess of the kartas' authority or not.

Two things are well settled: that the authority of a karta to borrow on the security of family property is a limited one, and that, in the case of a loan to them, the burden of proof in the first instance rests upon the lender to show that both the borrowing and the terms were within the authority which a karta can exercise.

What is said here is first of all that the lenders made no serious or successful attempt to discharge that onus of proof, and, secondly, that such evidence as they gave, even if a prima facie discharge, ought to be disregarded in view of three previous decisions of their Lordships' Board.

There can be no doubt that when a case does not rest upon burden of proof alone, that is to say, where evidence has actually been given, attention must be paid in the first instance to what the witnesses have said and what evidence has been adduced. If that is credible and acceptable, further questions may never arise, for it may establish the necessary proposition that the transaction in the form which it took was not in excess of the kartas' authority.

In this case, evidence was given of this character. The vakil, who negotiated the loan, was called and gave evidence of the purpose or one of the purposes for which it was wanted, which was to clear off prior mortgages which had been entered into in the previous two or three years with a local Bank on even more onerous terms.

This witness, Mr. Banarji, says,

> " The interest which they were to pay at the Bank " means which they had to pay to the Bank, " was higher than 15 per cent. At that time the Bank used to charge compound interest with six-monthly rests."

This was not qualified in any way. The instruments themselves were proved. The comment on the fact that, when those instruments were proved by officials from the Bank, they were not asked to give any general opinion about the prevailing rate of interest or the terms current in the district, appears to be an unnecessary criticism, because the evidence of Mr. Banarji upon the point is uncontradicted, and it was accepted by the learned Subordinate Judge. It is true that he found the issue in question not with reference to an excess of the karta's authority but with reference to the defence pleaded under section 16 of

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the Indian Contract Act, which is often raised in these cases. He disposed of it by saying

"there is nothing in the evidence to show that the rate of interest stipulated in the bond in suit is hard and unconscionable, nor can it be said that it is penal."

There was nothing to bring the present contract within the purview of section 16 of the Indian Contract Act, and their Lordships are of opinion that, upon the evidence given at the trial and already quoted, the plaintiffs would be entitled to the rate and terms of interest claimed by them.

In the High Court this question does not appear to have been even argued, so that their Lordships have no assistance from the learned judges upon the point, but there is no trace of any dissent. Unless the decisions that have been cited produce a contrary result, their Lordships think that the mortgagees discharged the burden of proof; that the evidence was such as it was proper for the Court to accept as credible evidence; and that it is not open to criticism merely because it did not go further. Upon that the case is proved, and the interest and the terms of the loan have been brought within the kartas' authority as being such terms as it was reasonable and proper for them to incur at the time and under the circumstances, for the purpose of obtaining this loan, which it has now to be accepted was borrowed for necessity.

Their Lordships, however, must deal with the three cases cited, which require close examination. They are binding upon their Lordships and, of course, must be loyally followed in their application.

The first is *Nazir Begam* v. *Rao Raghunath Singh* (1). In that case, upon a challenge of the reasonableness and propriety of the rate of interest and the terms, viz., 37½ per cent. interest and compound interest, Lord Phillimore reasoned as follows. First he lays down the principle above stated as to the authority of the kartas. Next he says that the High Court was justified in finding that a mortgage upon such terms

(1) (1919) I. L. R. 41 All. 571; L. R. 46 I. A. 145.

as those contained in the document sued on was an unnecessary extravagance, the lands charged being of such value as to make the security ample. Then he proceeds: "It remains, therefore, that there was necessity, and in virtue of that necessity, authority to borrow upon reasonable commercial terms, and that the mortgage stands as good security to that extent, but that all terms of the mortgage in excess of this necessity are outside the scope of the authority. What the particular rate of interest should be and whether the money could have been borrowed at simple instead of compound interest are matters of detail upon which the High Court, with its local knowledge, can well be left to decide, and their Lordships are not disposed to interefere with the decision upon points such as these." He then passes to a sentence in the judgment under appeal, in which the High Court, in fixing simple interest at 12 per cent. per annum as the proper rate, appear to have been guided by the view that the matter was entirely in the discretion of the Court, and, having negatived that, says: "Their Lordships do not think it safe to rest their decision upon the supposed discretion in the Court or an inference by the judges as to the sum which would be sufficient to compensate the mortgagee. In their view, as already stated, the question is one of the authority of a manager of a joint Hindu family, and it is because their Lordships agree with the High Court that this authority was exceeded to the extent already stated, that they concur in the conclusion at which that Court arrived."

Their Lordships would observe upon this opinion, that, no evidence being called on either side, instead of sending the case back to India, a dilatory and expensive course, or dismissing the suit so far as regarded the interest upon the ground that the party, who had to prove that part of his case, had failed to prove it at all, the Board adopted the figure which had been arrived at by the High Court and the decision as to simple or compound interest, not because they rested on evidence, for there was none, but because, in spite

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of the misapprehension as to the powers of the High Court, it established the reasonable rate and terms in the view of judges better acquainted with the locality, its usages, its necessities and facilities, than their Lordships could be.

With regard to the expression " to borrow upon reasonable commercial terms," those words are simply used in contradistinction to such terms as would be in excess of the necessity and therefore in excess of the authority. Excess of the necessity of course relates to terms that are available, because, if you must borrow (which is assumed on this appeal) and therefore must pay interest, it cannot be in excess of the authority on that occasion to pay the terms that are necessary, when more moderate terms are not available. " Commercial terms " is obviously a relative expression. They are relative to the time and the place, the country and the part of the country, where the money is borrowed, the kind of security that is offered for the loan, the possibilities of realising such security, the supply of capital and the opportunities of finding persons willing to lend for possibly a considerable time. They cannot be confined, as in this country they might be confined, to something connected with a publicly announced and official rate of interest for loans generally, or to a current rate generally allowed upon the highest security in financial transactions, such as an issue of debentures, or to something regulated by the day to day supply of money and by facilities for short loans. Their Lordships think that the word " commercial " must be understood, in a case like this, of a community, which is not a commercial community, and of transactions which no one would call mercantile, as a comprehensive but convenient term for such terms as can be arranged freely between borrower and lender under the circumstances of the particular case.

The same expression was used by Lord Dunedin in the subsequent case of *Radha Kishun* v. *Jag Sahu* (1), in a slightly different connection. He speaks of

(1) (1924) I. L. R. 4 Pat. 19, 22; L. R. 51 I. A. 278, 281.

the interest charged as being " far in excess of commercial rates," but their Lordships, taking these two passages together, and having regard also to the fact that such experience as their Lordships may have of this country and its business cannot be assumed to apply equally in India, are of opinion that no more is meant by Lord Dunedin's phrase than was meant by Lord Phillimore's.

The next case cited was *Ram Bujhawan Prosad Singh* v. *Nathu Ram*(1). In that case again there was no evidence on the point in question. The trial judge had found that simple interest at the rate of 1 per cent. per mensem was a fair commercial rate in the absence of special circumstances justifying a higher rate—whether that is a quotation from the judgment of the Subordinate Judge or whether it is a summary of it does not appear from the report—and thereupon, considering that the lender had not proved that there was any necessity to borrow at the rate of interest stated in the mortgage deed, the Board was content once more to adopt the conclusion of the Indian Court as an authority better qualified to know what was proper in India than their Lordships themselves, in spite of the fact that in that case also the Subordinate Judge had had before his mind section 16 of the Contract Act and not the question of the kartas' authority, which had been basis of the argument at their Lordships' Bar.

Up to that point no attempt was made in these cases to discriminate between rate of interest, simple or compound interest, and rests. The decision of the Indian Court had been in favour of simple interest and it was adopted without comment by their Lordships.

A slightly different point has been made upon the third case *Radha Kishun* v. *Jag Sahu* (2). Here the mortgagor was a Hindu widow. The mortgage stipulated for 34 per cent. compound interest with half-yearly rests, and when Lord Dunedin deals with this

(1) (1922) I. L. R. 2 Pat. 285; L. R. 50 I. A. 14.
(2) (1924) I. L. R. 4 Pat. 19; L. R. 51 I. A. 278.

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he says at page 281, in the passage already shortly referred to:—"But, when there is no evidence and it is evident on the face of the document that the interest charged is far in excess of commercial rates, then undoubtedly the lender has not discharged his task. For these reasons their Lordships are of opinion that the judgment of the High Court cannot be supported on the grounds given." Pausing there, one must remember that the question of compound interest cannot be regarded as entirely separable from the rate of interest. Compound interest at a moderate rate may not necessarily be oppressive and similarly compound interest with infrequent rests may not be oppressive, where compound interest coupled with a high rate of interest and with frequent rests might be in excess of any authority which the kartas could have. The whole conditions and terms of the lending have to be regarded together. When Lord Dunedin proceeds to say: "It is evident on the face of the document that the interest charged is far in excess of commercial rates," this is a decision, which applies to the particular borrowing which was before the Board in that case and does not lay down a general rule with regard to all instruments or in particular with regard to the present one. Then he goes on: "The plaintiffs' Counsel urged that if this view should prevail the judgment of the Subordinate Judge should not be restored simpliciter, but the case should be remitted for further enquiry, and he called attention to the fact that certain evidence proffered was refused by the Subordinate Judge as unnecessary, and that a petition of the High Court for allowance of this evidence was not dealt with, as in view of the finding of the High Court it became unnecessary to deal with it. Now the evidence in question consisted of the production of two bonds granted by the same widow borrowing at a high rate of interest and decree obtained on one of the bonds and the tender of a witness to speak to the execution of one of the bonds. Their Lordships do not think that a remit is necessary. Evidence simply that on one other occasion the widow had borrowed at high interest is not in any way conclusive as to what she

might have done on the occasion in question, and as no other evidence was tendered their Lordships think that the Subordinate Judge was justified in saying as he did that 'there is no evidence adduced by the plaintiffs to show that pressure for repayment of the amounts due on them was so great as to compel Bachu Kuar to agree to pay compound interest at 24 per cent. with a six-monthly rest'." That passage has been relied upon for the purpose of making out the contention that as the evidence here consists of other borrowings by the same kartas a year or two previously, with proof of the execution of the bonds non constat that these kartas in the previous cases may not have acted as much in excess of their authority as in the present case. Non constat also that the same rate of interest obtained on another bond by the same party and even though judicially decreed would apply, to bind others. It might be evidence of the pressure of necessity on the actual borrower herself, but it would not also be evidence to show that in another transaction it was a proper rate and terms binding upon other parties. Their Lordships do not consider this to be the meaning of Lord Dunedin's judgment. The application made was that the Board should not either adopt the conclusion of the Indian Court or treat the case as one in which no evidence had been given, but should send it back in order that evidence might be given which had been, as it was said, wrongly left out of account. The Board considered that the Subordinate Judge was justified in treating the evidence as such that, if given, it would not have influenced his mind, but this depended on what the evidence was and who gave it, and could not be a guide in future cases. They declined, indeed, to give the lender a further opportunity of getting the same or another judge to accept it, but they did not lay down the rule that, where a borrower has previously borrowed under other instruments, but on similar onerous terms, this cannot be evidence that the borrowing on the occasion in question was a reasonable and proper transaction. Their Lordships therefore think that the argument fails in so far as it is

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directed to show that on that authority the evidence given in this case was not sufficient.

The remaining observation is this. In all the cases cited the Board, instead of presuming in default of evidence to lay down for itself that judicial notice should be taken of terms of borrowing and rates of interest, which would be within the authority of a particular karta somewhere in India, was content, in each case, to accept the decision of the local Court as being at any rate better informed on such a subject than their Lordships can be. In the present case, their Lordships have a decision of the local Court. It is quite true that the decision on this occasion is the other way. The local Court has given its decision upon the evidence, and has not reduced either the terms or the rate, but their Lordships can see no reason why the importance of the experience of the Indian Court in supplying their Lordships' lack of knowledge is not equally great in the one case as in the other. There is no rule, which their Lordships can discover, which binds them, when the terms of a loan are challenged, to lean to their reduction, or to presume that simple interest must always be judicially preferable to compound interest, or that rates, because they might seem high here, must be unreasonable in India. Compound interest is common and may often be necessary and proper in India under the circumstances of that country. The matter is not one upon which, one way or the other, their Lordships' Board has ever decided that there is a presumption one way. Accordingly, their Lordships think that, even if evidence had not been given, they would be acting strictly in accordance with the previous cases in declining to take it upon themselves to decide the rate and terms of interest, and in holding that they should accept the decision of the Subordinate Judge.

For the purposes of the point in question there is no substantial difference between his finding—that the terms are not hard, unconscionable or penal—and a finding that they were reasonable commercial terms,

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as their Lordships understand the expression, but they hold further, in view of the evidence that was given, which they can see no reason for disregarding, that enough was proved to discharge the onus of proof, and to justify a decree in favour of the mortgagees when no evidence in answer was given.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants: *Nicholson, Graham and Jones.*

Solicitors for respondents: *Watkins and Hunter.*

PRIVY COUNCIL.

JEWAN LAL DAGA

v.

NILMANI CHAUDHURI.

J.C.*
1927.

Dec., 12.

Specific Performance—Agreement to Mortgage—Debt of Unascertained Amount—Evidence—Witness refreshing memory—Document excluded from Evidence—Indian Evidence Act, 1872 (*I of* 1872) *section* 159.

If a debtor has agreed to mortgage specified property on specified terms to secure a debt of unascertained amount, without any condition that the amount is first to be ascertained, the creditor is entitled to have the agreement specifically performed, unless there are circumstances which the Court considers sufficient to justify an unqualified refusal to carry out the agreement. The fact that the amount of the debt has been overstated in the agreement, and in a mortgage-deed tendered for execution, does not deprive the creditor of his right to relief. The Court should order an account of the sum due, and the execution of a proper mortgage to secure that sum; the terms of the mortgage should be settled under the direction of the Court.

* PRESENT: Lord Buckmaster, Lord Carson, Lord Darling, Lord Warrington of Clyffe and Sir Lancelot Sanderson.