## APPELLATE CIVIL.

*Before Sir John Beaumont, Chief Justice, and Mr. Justice N. J. Wadia.*

1939
*February* 16

PURSHOTTAM DAMODAR RAICHURKAR AND OTHERS (ORIGINAL PLAINTIFF), APPELLANTS *v.* GANGADHAR KASHINATH SAKHARE AND ANOTHER (ORIGINAL DEFENDANT), RESPONDENTS.*

*Hindu law—Mortgage—Suit by mortgagee—Legal necessity—Mortgage can be held good only for that part of the mortgage debt which is required for legal necessity.*

Property in suit was mortgaged by the adoptive mother of defendant No. 1 to the plaintiff for the sum of Rs. 4,000 advanced. The plaintiff filed a suit to recover the mortgage debt by sale of the mortgaged property. The Subordinate Judge held that in respect of Rs. 3,200, the mortgage was for necessity, but the remaining amount of Rs. 800 was not for necessity and passed a decree accordingly. On appeal to the High Court it was contended relying on the Privy Council decision in *Krishn Das* v. *Nathu Ram*[1] that the mortgage should have been held good for the full amount purported to be secured.

*Held*, that it was open to the defendant to contend that Rs. 800 were not borrowed for legal necessity and that part of the mortgage debt was not binding upon him or upon his share of the mortgaged property.

*Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree*[2] and *Krishn Das* v. *Nathu Ram*,[1] discussed.

*Dwarka Ram* v. *Bakshi Parnaw Prasad Singh*,[3] referred to.

FIRST APPEAL against the decision of R. G. Karkhanis, First Class Subordinate Judge at Sholapur.

Suit to recover mortgage amount.

The facts material for the purposes of this report are stated in the judgment of the Chief Justice.

*S. Y. Abhyankar*, for the appellants.

*T. N. Walavalkar*, for respondent No. 1.

*First Appeal No. 259 of 1937.

(1) (1926) L.R. 54 I. A. 79, s. c. 49 All. 149.
(2) (1856) 6 Moo. I. A. 393.
(3) (1935) 14 Pat. 595.

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BEAUMONT C. J. This is an appeal against a judgment of the First Class Subordinate Judge of Sholapur. The plaintiffs are suing to enforce a mortgage passed on September 10, 1924, by the adoptive mother of defendant No. 1. Defendant No. 1 contends that the mortgage is not for legal necessity and therefore is not binding upon his interest in the mortgaged property. The learned Judge held that in respect of Rs. 3,200 out of the total sum of Rs. 4,000 advanced, the mortgage was for necessity, but he held that the remaining Rs. 800 was not for necessity, and he passed an order on defendant No. 1 to pay out of the mortgaged property the sum of Rs. 6,400 which was based on the view that the total principal sum secured was Rs. 3,200.

On the facts I think, there is no reason for challenging the learned Judge's finding. Rs. 3,000 was required by the adoptive mother of defendant No. 1 to pay off subsisting mortgages on the property, and the learned Judge held that a further Rs. 200 was also required for purposes of necessity. The balance, according to the allegation of the mortgagee, was required to pay off miscellaneous debts, and for the maintenance of the minor mortgagor. Admittedly, there was no evidence whatever that the adoptive mother had incurred any debt. The mortgagee merely took her word for it without any inquiry. I think, therefore, the learned Judge was right in holding that the mortgagee had not established that more than Rs. 3,200 was borrowed for legal necessity.

On those facts Mr. Abhyankar for the appellants contends that the mortgage is good for the full amount purported to be secured, and for that he relies on the decision of the Privy Council in *Krishn Das* v. *Nathu Ram*.[1] In that case the Privy Council were dealing with a sale by a manager

[1] (1926) L. R. 54 I. A. 79, s. c. 49 All. 149.

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for Rs. 3,500, and it was proved that out of that sum Rs. 3,000 was required for legal necessity. The Privy Council held that in the circumstances the sale was for necessity and that it was not essential for the purchaser to prove that the whole of the purchase money had been applied for necessity. The particular passage on which Mr. Abhyankar relies for his contention that the principle of that case applies to the present case, which is one of mortgage, is at page 84. Their Lordships say:

"The learned Judges seem to have lost sight of the true question which falls to be answered in such cases—namely, whether the sale itself was one which was justified by legal necessity. This is the point of view from which the matter is approached in the earliest case cited at the Bar of *Hunoomanpersaud Panday* v. *Munraj Koonweree*,[1] decided by the Board in 1856. The case related to a charge upon property by way of mortgage, and not to a sale, but the principles to be applied appear to their Lordships to be the same as in the case of a sale of property."

I think Mr. Abhyankar's contention illustrates the danger of wresting a dictum from its context. All that their Lordships mean in the passage which I have read is that the principles to be applied in considering whether a sale is for legal necessity are the same as the principles to be applied in considering whether a mortgage is for legal necessity. But they do not, in my opinion, mean to suggest that the effect of a sale for a larger sum than immediate necessity requires is necessarily the same as the effect of a mortgage for a larger sum than is required. As their Lordships point out in that case "it is not always possible for the father of a family to sell just that share of the property which will bring in the precise sum which is wanted to clear the debts which are binding;" and what the Court has to consider in the case of a sale is whether the sale should be set aside or not. The sale is either valid or invalid. In the case of a mortgage the position of course is entirely different. A mortgage may be valid for less than the whole amount advanced, or it may be valid for the whole amount against one defendant, and for part of the

[1] (1856) 6 Moo. I. A. 393.

amount only against another defendant. In enforcing a mortgage the Court takes an account of what is due, and on the taking of such account I see no reason why a reversioner, against whom the mortgage is sought to be enforced, should not take the point that, as against his interest in the mortgaged property, the mortgage is good only for that part of the mortgage debt which was required for legal necessity. Certainly the case of *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonwree*,(1) on which their Lordships relied in *Krishn Das* v. *Nathu Ram*,(2) is not an authority against the view which I have expressed, because in the actual report which their Lordships made to Her Majesty they say (p. 425):

"And their Lordships are of opinion that the validity, force, and effect of the bond, as to all and each of the sums, of which the sums of Rs. 15,000, thereby purporting to be secured, is composed, depend on the circumstances under which the sums, or such of them as were advanced by the appellant, were respectively so advanced by him."

This question was also considered by a Bench of the Patna High Court in *Dwarka Ram* v. *Bakshi Parmaw Prasad Singh*.(3) In that case the Bench came to the conclusion that it was always open, in a suit to enforce a mortgage, for the defendant to contend that a part of the mortgage debt was not binding upon him or upon his share of the mortgaged property on the ground that it was not borrowed for legal necessity. I think that is the correct view.

I have dealt with this point, which seems to me to be free from difficulty, rather more fully than I should normally have thought necessary, because I have had several cases recently in which the point has been raised.

In my view, therefore, the decree which the learned Judge made allowing to the plaintiff only that portion of the principal which was advanced for legal necessity is correct.

(1) (1856) 6 Moo. I. A. 393. (2) (1926) L. R. 54 I. A. 79, s. c. 49 All. 149.
(3) (1935) 14 Pat. 595.

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The appellant has also contended that the learned Judge was wrong in holding that defendant No. 1 is an agriculturist. But, as the defendant himself and one of his witnesses gave evidence that he lived by cultivating lands and there was no evidence to the contrary, I think the learned Judge was right in holding that the defendant was personally an agriculturist, and in directing accounts to be taken on the basis on which he did direct them. In my opinion, therefore, the appeal fails and must be dismissed with costs.

N. J. WADIA J. I agree.

*Decree confirmed.*

J. G. R.

## APPELLATE CIVIL.

*Before Sir John Beaumont, Chief Justice, and Mr. Justice N. J. Wadia.*

1939
*March* 8

NARBHERAMJI GURU GYANIRAMJI RAMSNEHI SADHU (ORIGINAL DEFENDANT), APPELLANT *v.* VIVEKRAMJI GURU BHAGATRAMJI RAMSNEHI SADHU (ORIGINAL PLAINTIFF), RESPONDENT.*

*Indian Limitation Act (IX of 1908), Sch. I, Art. 14—Land Revenue Code (Bom. Act V of 1879), s. 133—Suit for possession based on title—Sanad issued in favour of defendant—No necessity to set aside Sanad—Sanad not a final determination of title between parties.*

In February 1934, the plaintiff sued to recover possession of a temple from the defendant. In the year 1922, there was an inquiry under the Land Revenue Code, 1879, to determine who was entitled to the possession of the temple in suit and on February 2, 1922, a finding was recorded by the inquiry officer, and a Sanad was issued on April 18, 1922, under s. 133 of the Land Revenue Code, 1879, in favour of the defendant. The Subordinate Judge held that the plaintiff had established his title as owner of property as Mahant and that the defendant was only his manager and accordingly ordered the defendant to hand over the possession of the suit property to the plaintiff. On appeal to the High Court, it was contended that the suit must fail under Art. 14 of the Indian Limitation Act, 1908, as any order for possession against the defendant involved setting aside the Sanad on which he relied and

*First Appeal No. 208 of 1927.