1890

BUDHA MAL v. BHAGWAN DAS.

Thus, upon the question which was the real issue between the parties, whether there had been a partition of the family property there are the findings of three Courts, all of which appear to have looked very carefully into the evidence. The judgments are very full, and nothing has been urged before their Lordships by the learned counsel for the appellant which in any way shows that the conclusion which they came to was not a fair inference from the evidence in the case. It does appear that more than 40 years ago—although there might not have been any formal document drawn up between these persons—there was a partition of the family property.

The Additional Commissioner dismissed the plaintiff's suit entirely, but on the appeal to the Chief Court it appeared that there was a small portion of the property of which there had been no partition; and on that ground the Chief Court modified the decree of the Additional Commissioner by excepting that portion from the decree dismissing the suit. That decision has not been appealed from by the respondent.

The result, therefore, is that their Lordships will humbly advise Her Majesty to affirm the decree of the Chief Court, and to dismiss this appeal, and the appellant will pay the costs.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent Bhugwan Das: Messrs. *Speechly, Mumford, Landon, & Rogers.*

C. B.

HURRO NATH RAI CHOWDHRI (PLAINTIFF) *v.* RANDHIR SINGH AND OTHERS (DEFENDANTS).

*P. C.** 1890 *Nov.* 19, 20.

[On appeal from the High Court at Calcutta.]

Hindu law—Widow—Power of Hindu widow to alienate—Qualified title to alienate in contracting debt by manager of estate charging it in the hands of heir—Responsibility of lender—Rate of interest, as regards necessity, distinguishable.

A suit was brought by a creditor who had advanced money for the payment of Government revenue upon an estate under the management of

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, SIR B. PEACOCK, SIR R. COUCH, and MR. SHAND (LORD SHAND).

1890

HURRO NATH RAI CHOWDHRI v. RANDHIR SINGH.

a Hindu widow. The plaintiff's agent had received rents to a certain amount from part of the estate. *Held*, that the plaintiff ought to have taken care that this sum was applied in part reduction of the debt to him, and that it must be deducted from the amount chargeable to the estate in the hands of the reversionary heir. *Hunooman Persad Panday* v. *Munraj Koonweree* (1) followed.

The widow was borrowing in a case where it was for the plaintiff to see whether there was actually a ground of necessity for the loan. Though the loan was necessary, for her to borrow at the high rate of interest charged, considering the security which she gave, was not necessary. The rate of interest had therefore been rightly reduced to twelve per cent.

Appeal from a decree (24th March 1886) varying a decree (28th August 1882) of the Subordinate Judge of Rajshahi.

The suit out of which this appeal arose was brought by the appellant to recover Rs. 28,837, for money advanced by him to Shamasunderi Bai, the first defendant. She was the widow of Gobind Persad, and purporting to act under his authority, had adopted to him Radhika Persad, the second defendant. The claim was secured by mortgages upon the family estate, executed by Shamasunderi for herself, and as guardian of the adopted son who was a minor. The question now raised was whether the transactions between the plaintiff and the first defendant were binding on the estate in the hands of the reversionary heirs.

Shamasunderi commenced to borrow in 1877 and continued till 1880, the loans amounting to Rs. 17,650, secured by eight mortgages upon the property left by Gobind Persad.

The first defendant admitted the execution of the bonds, but asserted that they were not intended to bind the estate or herself, having been merely part of an arrangement whereby the plaintiff had undertaken to incur all the expense of a suit that had been going on in the family to set aside a compromise, it having been agreed that the plaintiff should receive a six-annas share of all the property recovered. She had another defence upon the bonds, which was that the consideration had not been received on her account, but for the use and benefit of the minor defendant as heir. Another defence, upon failure to establish either of the above, was that a sum of Rs. 10,000 had been received by the plaintiff's agent, Shamacharan Rai, which was part of the rents of

(1) 6 Moore's I. A., 393.

the estate, and should have been allowed in account with the widow as manager. The Court did allow the deduction of Rs. 7,700, part of this sum, there having been an admission of Rs. 2,239 by the widow, and the suit was decreed against her for Rs. 21,076, with interest and costs. But as against the minor defendant, the Court dismissed the suit, holding that the plaintiff had not made out that the loans, as against him, were binding.

The plaintiff appealed to the High Court, and, while his appeal was pending, a decision was given in another suit, to which Shamasunderi Bai was a party, that the adoption by her of Radhika Persad was invalid. Also she died pending the appeal, and by order of the Court Randhir Singh, claiming as the next reversionary heir to the estate, and Romanath Sein, as purchaser of part of it from him, were substituted as respondents in the appeal.

The High Court (McDONELL and GHOSE, JJ.), in part disagreeing with the Subordinate Judge, held that about half the claim was binding on the estate, and in part agreeing with him, held that this amount must be reduced by the sum received by the plaintiff's agent. Deducting this Rs. 10,000, for the balance the High Court decreed in the plaintiff's favour, reducing the interest claimed down to suit brought, from 18 per cent. to 12 per cent.

The plaintiff having appealed,

Mr. *C. W. Arathoon*, for the appellant, argued that the whole amount claimed should have been decreed against the estate. He relied on the finding that the widow had borrowed for necessary purposes, the consideration money stated in the bonds having been advanced. It had been for the respondents to show that the advances had not been made for the benefit of the estate, and citing *Hunooman Persad Panday* v. *Munraj Koonweree* (1), he argued that the appellant had done all that had been required of him in advancing to a person whose powers to charge the estate were limited. He had inquired, and had acted *bonâ fide* with due caution, so that he was not bound to see to the application of the Rs. 10,000.

Mr. *J. D. Mayne*, for the respondents, was not called upon.

Their Lordships' judgment was delivered by

(1) 6 Moore's I. A., 393.

1890

HURRO NATH RAI CHOWDHRI v. RANDHIR SINGH.

SIR B. PEACOCK.—Their Lordships are of opinion that the judgment of the High Court is correct, and that it ought to be affirmed.

The learned Judges of the High Court in delivering their judgment say:—"The question arises, what are the particular sums of money in respect to which the plaintiff is entitled to any charge upon the estate? It is alleged, and the recitals in the bonds are to the effect, that the moneys were borrowed for three purposes—first, litigation expenses; second, maintenance of the widow and deb-sheba; and third, Government revenue." With regard to the litigation expenses, the learned Judges disallow the amount claimed, upon the ground that the plaintiff has not proved what those litigation expenses were; that he has not properly rendered any accounts of them, and that under those circumstances he is not entitled to a decree in respect of them. As regards the maintenance of the widow and deb-sheba they say:—"We cannot say that the plaintiff was entitled to a decree as against the estate for the sums of money said to have been advanced for maintenance and deb-sheba except as regards the sum of Rs. 2,239, which is admitted by the lady in her deposition to have been received by her, and which is proved by Srinath Dobey to have been paid for maintenance and deb-sheba expenses. To this extent we think the plaintiff is entitled to charge the estate." As regards the payment of Government revenue the learned Judges allow Rs. 12,418-10-6, which is proved in the judgment of the Court to have been paid by the plaintiff as Government revenue. They thus hold the plaintiff to be entitled to Rs. 14,657-12-6, as money which had been paid by him for maintenance and deb-sheba and for Government revenue, the litigation expenses having been disallowed, and their Lordships are of opinion that the High Court rightly so held.

A question then arises whether a sum of Rs. 10,000, which has been found by the Courts below to have been received by the plaintiff's principal man of business on account of the *ijara* rent, ought to be deducted from the sum of Rs. 14,657-13-6.

Their Lordships think that the plaintiff ought to have seen that this sum was applied in reduction of the debt for which the estate was liable, and that the judgment of the High Court was right in deducting the whole of that sum, leaving Rs. 4,657-13-6 as the

proper sum to be allowed to him. It is contended for the plaintiff that he was not bound to see to the application of the money. The rule laid down in *Hunooman Persad Panday* v. *Munraj Koonweree* (1) is this:—"Their Lordships think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think under such circumstances he is bound to see to the application of the money." But then their Lordships proceed further and give the reason why he is not bound to see to the application of the money. They say:—"The purposes for which a loan is wanted are often future, as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application." In this case the plaintiff did have the control and actual application of the money, and having that control and application he was bound to see that the money was properly applied.

There was also a further question relating to interest. The learned Judges of the High Court say:—"The bonds stipulate payment of interest at the rate of 18 per cent. per annum. We do not think that the plaintiff is entitled to this high rate of interest as a charge upon the estate. But we are of opinion that the ends of justice would be quite met by allowing him interest at the rate of 12 per cent. per annum, which is to be calculated upon the several sums of money as they were advanced from time to time up to the date of the decree," and they allow the plaintiff a total sum of Rs. 6,194, the sum which they give for interest being the difference between this sum and the above-mentioned sum of Rs. 4,057-13-6. It has been said that there is a miscalculation of the interest at the rate of 12 per cent. If there is, the plaintiff ought to have applied to the High Court to set the figures right, and no doubt they would have been set right. No such application having been made, the decree ought not to be reversed upon this ground.

Then comes the question, was 12 per cent. a sufficient rate of interest? The widow was borrowing in a case of necessity. It was for the plaintiff to see whether there was really and fairly a

(1) 6 Moore's I. A., 393, at p. 424.

1890

HURRO NATH RAI CHOWDHRI v. RANDHIR SINGH.

ground of necessity. Was there a necessity to borrow at the rate of 18 per cent.? That is a question to which he ought to have applied his mind; and if it were unreasonable to suppose that the widow could not borrow the money at a less amount than 18 per cent., he ought not to have charged her that rate.

Their Lordships think therefore that the High Court were right in not allowing interest as against the estate at a higher rate than 12 per cent.

For these reasons their Lordships think that the decree of the High Court ought to be affirmed; and they will humbly advise Her Majesty to that effect. The appellant must pay the costs of this appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Wentmore & Swinhoe.*

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

1891
March 2.

SRIRAM SAMANTA (PLAINTIFF) *v.* KALIDAS DEY AND OTHERS (DEFENDANTS).*

Second Appeal—Small Cause Court cases—Suit for mesne profits—Provincial Small Cause Court Act (IX of 1887), Sch. II, Act 31.

Where the plaintiff, after obtaining a decree in a suit for possession of certain land of which he had been dispossessed by the defendants, brought a suit in the Munsiff's Court for mesne profits for the period during which he had been kept out of possession, and the suit, though partly decreed by the Munsiff, was dismissed by the District Judge, *held*, that such a suit was not cognizable by a Small Cause Court, and therefore a second appeal in the suit would lie to the High Court.

The facts of this case were as follows:—

The defendant No. 3 was the owner of certain lands. The defendant No. 2 had obtained a decree against the defendant

* Appeal from Appellate Decree No. 666 of 1890, against the decree of R. F. Rampini, Esq., Judge of Burdwan, dated the 5th of March 1890, reversing the decree of Baboo Raj Narain Chuckerbutty, Munsiff of Kutwa, dated the 15th of August 1889.