*Judgment of the Lords of the Judicial Committee of the Privy Council on the appeal of Lala Amarnath Sah and others* v. *Rani Achan Kuar and another, from the High Court of Judicature for the North-Western Provinces at Allahabad; delivered* 14*th May* 1892.

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Present:
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD HANNEN.
SIR RICHARD COUCH.
LORD SHAND.

[*Delivered by Lord Hobhouse.*]

The Plaintiffs, who are now Appellants, brought a suit against the present Respondents and two other Defendants to enforce a mortgage bond executed to one Moti Ram, the ancestor of the Plaintiffs, for the purpose of securing an advance of Rs. 32,000, with interest thereon.

The bond sued upon is dated the 23rd March 1873, and it commences in this way:—

"I, Raja Lalji, for self, and as guardian of Kuar Enayet Singh and Kuar Shamshere Bahadur, mukhtar of Rani Hulas Kuar wife, and manager of Rani Achan Kuar daughter, of Raja Khyrati Lal, caste Kayesth, resident of Lucknow, now residing at Bareilly, do declare that I have, under the power given to me by registered general power of attorney, dated 4th April 1866, executed by Rani Hulas Kuar under the power of the certificate of guardianship, dated 18th July 1866, and under the power which I have to make management in general, borrowed Rs. 32,000 of the Company's coin, half of which is Rs. 16,000, for the payment of the debt taken to meet the marriage expenses of Kuar Enayet Singh and the expenses of the case pending at Lucknow from before."

Raja Lalji then agrees to pay the money in

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five years, and hypothecates and pledges certain mouzas belonging to Rani Hulas Kuar.

Khyrati Lal, who died in 1866, was the zemindar of the mouzas in question, and was also a dealer in money and in hundis. Hulas was his widow and heir. Achan was his only child, and she married Raja Lalji. Enayet and Shamshere were the children of that marriage, both being minors at the date of the bond. Very shortly after Khyrati's death, Hulas executed a mukhtarnama giving to Lalji very large powers of management and disposition over her property. She died on the 22nd June 1878. Shamshere and Lalji were the two Defendants below who are not now Respondents. They are both dead.

The plaint, which was filed in February 1885, states that the four Defendants borrowed the money, and that Hulas hypothecated the estate; and it prays such relief as is usual in the case of mortgage bonds. Lalji did not put in any written defence; indeed he cannot have had any defence. The other three Defendants all set up the defence (among others) that Hulas had only a widow's estate, and was under no necessity to borrow money. The Plaintiffs replied by a written statement in which they alleged that on the 5th March 1877 another deed was executed by Hulas, Achan, and Enayet, to Lalji, by which they admitted and recognized the deed of 23rd March 1873. But the reply is quite silent, as was the plaint, upon the point whether the loan was necessary or not.

When the issues were settled, this point was treated as belonging to the defence, and was raised in the form of a question, how far the objections resting on the absence of necessity were tenable. It is obvious that such a mode of raising the question is incorrect, because it appears to assume that it was for the Defendants

to show absence of necessity; whereas the rule is that a mortgagee olaiming title under a Hindoo widow as against her husband's heirs should prove the validity of his mortgage; and this case presents no ground of exception to the rule. Neither party adduced any evidence bearing on the point.

The Sub-Judge gave the Plaintiffs a decree for an amount something less than the amount claimed by them; and ordered that the hypothecation should be enforced. He was of opinion that the plea of non-necessity was not made out, apparently on the ground of the recital in the mortgage bond; and he also thought that the Defendants Achan and Enayet had confirmed the bond.

The Defendants other than Lalji appealed to the High Court. During the argument for the Plaintiffs certain observations were made by their Counsel which induced the Court to make an order enabling them to produce further evidence. The order is not in the Record, but probably it was framed so as to allow the Plaintiffs to prove the necessity for the loan raised by Hulas. For that purpose the Plaintiffs called as a witness one Hira Lal, who entered Khyrati's service in the year 1864, and managed or assisted in managing the monetary business up to the year 1880. He was the only witness called. Lalji, who must have known the facts better than anybody else, died shortly before the hearing of the appeal.

After hearing the further evidence the High Court decided that there was no proof of any necessity for the loan, and that no act had been done by Achan or Enayet which had the effect of making them liable for it. They therefore dismissed the suit with costs. From this decree the Plaintiffs appeal, and it has been strongly urged at the bar that they are entitled

to succeed, both on the ground of the propriety and validity of the mortgage by Hulas, and on the ground that Achan and Enayet have validated it if originally invalid.

As regards Enayet, he has never had any present interest in the estate. He is only heir apparent now; and on the 5th March 1877, the date of the deed relied on for the validation of the mortgage, he was not even so much as that; his mother Achan was then heir apparent. It is not contended that he ever took upon himself any personal responsibility for the loan, and it is clear that he has never been in a position to confirm the mortgage.

As regards Achan, the expressions relied on in the deed are as follows. After stating that the former power of attorney was given to Lalji by Hulas alone, the three parties, Hulas, Achan, and Enayet, appoint Lalji their general attorney. They then proceed :—

"We covenant and record that whatever proceeding has been or may be taken by the said mukhtar on our behalf, *i.e.*, if he, having borrowed money, executes bonds or sells pledges mortgages or alienates in some other way the moveable and immoveable properties, or gives in lease the whole or a portion of the villages at any jama he thinks proper, or gets the documents executed by us registered, or causes mutation of names to be effected in respect of villages, &c., owing to temporary or permanent alienations, all such proceedings taken by the said mukhtar shall be accepted and recognized by us as done by ourselves, and not ignored by us in any way."

The whole of these expressions except the three words "has been or," point to that which is the proper object of a power of attorney, viz., to give authority to the future acts of the attorney. Achan was a Purdanashin lady; she had no interest in the estate other than one in expectancy; she was not dealing with a stranger but with her own husband; she was not receiving any valuable consideration. It is true that she executed the deed after having it read over to her. But there is no evidence that she was told that amongst

the somewhat profuse heap of words conferring ordinary powers on a general attorney, there lurked just three words having a far different effect, the effect namely of subjecting her expectant estate to a burden which she was gratuitously undertaking. There is no evidence that at this time she knew anything about a prior mortgage. Indeed it is not shown that she received any advice or information beyond having the deed read to her word for word. It would be against all principle if a lady so situated were held bound by such a transaction.

Reliance was placed by Mr. Doyne on two subsequent mortgages executed by Achan after the death of Hulas, in which Moti Ram's debt is mentioned. In one of them it is stated that Rs. 30,000 is borrowed for payment of the debt due to Moti Ram and others; and it is shown that shortly afterwards the sum of Rs. 7,000 was paid to Moti Ram. But it does not appear that those deeds were so much as read over to Achan, to say nothing of the want of explanation.

The foregoing views render it unnecessary for their Lordships to enter on the question when Enayet attained his majority, or on the question how far the transactions of Achan could be of avail for the Plaintiffs who were not parties to them, both debated at the bar. Their Lordships are clear that nothing was done to give Moti Ram's security greater validity than it originally possessed.

That reduces the questions in the suit to one; viz., the validity of the mortgage by Hulas as against her successors. To prove its validity the Plaintiffs must show, either that there was legal necessity for raising the money by a charge on Khyrati's estate, or at least that in advancing his money Moti Ram gave credit on reasonable grounds to representations that the money was wanted for such necessity. It has been above shown that the Plaintiffs neither averred nor

attempted to prove necessity until their case was being argued in the High Court. They laid their claim under Hulas as if she were the absolute owner. On the appeal they were treated with great indulgence, being allowed in effect to amend their case. One effect of Hira Lal's evidence is to show the untrustworthiness of the statements in the mortgage bond on which the Sub-Judge relied to show that Moti Ram's advance was applied to defray the marriage expenses of Enayet and the costs of the Lucknow suit. Out of the Rs. 32,000 advanced nearly Rs. 26,000 were applied in paying off hundis, Rs. 12,400 being due to Moti Ram himself. We are told nothing of the amount of Enayet's expenses, nothing of any reason why they should be paid by his grandmother instead of his father, nothing of the nature of the Lucknow suit except that it was for ancestral property, nothing to show that in March 1873 any costs at all had been incurred by Hulas. So that the statements in the bond receive no effectual support and much contradiction from the new evidence.

But the Plaintiffs rely on an entirely new cause of necessity, viz., that Khyrati's money business, which had been carried on by Hulas under the management of Lalji, was in a critical state, and that it was necessary to borrow money in order to ward off total insolvency. On this point their Lordships agree with the High Court in thinking the effect of Hira Lal's evidence to be that at Khyrati's death the business was solvent on paper, but that there were bad debts the losses on which were never recovered, though the business struggled on for a good many years. The view of the High Court is that the widow ought to have wound up the business at once, and that not having done so, she could not allege necessity to mortgage the inheritance in order to keep the money business going. But they do not lay down any general rule for such cases,

and they feel the difficulty of a decision in the entire absence of authority. Their Lordships also feel great difficulty, and they would require to know much more about the nature of the business in question, and of the condition and fluctuations of this particular business before venturing to endorse the opinion of the High Court.

Their Lordships prefer to rest this part of the case on the entire failure of the Plaintiffs to discharge the burden of proof which lies upon them. It has been above stated, in accordance with the often-cited case of *Hunooman Persaud* v. *Munraj Koonweree* (6 Moore, I. A., 393), that, in order to sustain an alienation by a Hindoo widow of the *corpus* of her husband's estate, it must be shown, either that there was legal necessity for the alienation, or at least that the grantee was led on reasonable grounds to believe that there was. But the Plaintiffs have not proved, either actual necessity, even that Moti Ram believed that there was such necessity, or that he ever made any inquiry on the subject. He may have rested content with the vague and misleading statements in the deed. He may have considered, as the Plaintiffs have considered in this litigation, that the question of necessity did not concern him. He may have thought, as they apparently have thought, that he was taking title under an absolute owner. Anyhow, the Plaintiffs have not performed their legal obligation of proving that their ancestor performed his legal obligation, which was to inquire and satisfy himself that the widow from whom he was taking a charge upon her husband's inheritance had a proper justification for so charging it. That is sufficient to defeat the suit. Their Lordships will humbly advise Her Majesty to dismiss the appeal, and the Appellants must pay the costs.