

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sham Sunder Lal and others v. Achhan Kunwar and another, from the High Court of Judicature for the North-Western Provinces, Allahabad; delivered 27th July 1898.

Present:

LORD WATSON.

LORD HOBHOUSE.

LORD DAVEY.

SIR RICHARD COUCH.

[*Delivered by Lord Davey.*]

On the 2nd June 1890 the present Appellants brought their suit in the Court of the Subordinate Judge of Bareilly against the present Respondents for Rs. 32,858. 8. 6 on account of a bond dated 2nd December 1877 and Rs. 53,485. 4. 6 on account of a subsequent bond dated 1st April 1881 in all Rs. 86,338. 13 and to enforce payment by sale of the property purporting to be hypothecated by the two bonds. The First Court found that the personal remedy upon the bonds was barred by limitation but that the bonds were effectual against the property. The High Court held that the property was not bound and dismissed the suit.

The property sought to be sold for payment of the bond debts was formerly the estate of Rajah Khairati Lal who died in 1866. He seems to have carried on during his lifetime a business of money lender and dealer in hundis. He left no sons and his widow Rani Hulas Kuar on his death succeeded to a widow's estate in his property. He left one daughter the Respondent Mussamat Achhan Kunwar who was married to

Raja Lalji and had two sons Enayet Singh the other Respondent and Shumster who died some time after the 1st April 1881 the date of the second bond. Hulas Kuar died on the 22nd January 1878 and Lalji died about 1888. Lalji during his lifetime seems to have managed the property for Hulas Kuar and after her death for his wife Achhan Kunwar who on the death of her mother succeeded to her father's property for a daughter's estate. Enayet Singh though named as a Respondent did not appear on this appeal.

On the 5th March 1877 Hulas Kuar and the two Respondents executed a mukhtarnama of that date whereby they purported to appoint Lalji as the Mukhtar-Am and to empower him on their behalf (amongst other things) to borrow money and execute documents or hypothecate mortgage sell or otherwise transfer moveable and immoveable property.

The bond of 2nd December 1877 purports to be made by Raja Lalji son-in-law Hulas Kuar wife and Achhan Kunwar daughter and Enayet Singh grandson and heirs of Raja Khairati Lal and contains an hypothecation of certain property formerly of Khairati Lal and described as "in our possession and enjoyment as proprietors" for Rs. 10,000 of which Rs. 7,683. 3 is deducted on account of debts previously due to the creditors and Rs. 2,311. 13 is said to be paid in cash. It is signed by Lalji alone and it is at least doubtful whether such an execution would be a valid exercise of the power of attorney but the Counsel for Achhan Kunwar declined very properly to insist upon this point.

The second bond of 1st April 1881 purports to be made by the same parties other than Hulas Kuar (who was then dead) under the same description as in the previous bond. It commences with a declaration that Rs. 20,000 have

been found payable by them to the creditors on account of prior debt and interest on two bonds for Rs. 30,000 as detailed below in addition to the principal amount of the two bonds aforesaid and contains a statement that "the creditors have no deed of any sort other than the bond dated 25th May 1877 and the bond dated 2nd December 1877 which are payable and this bond." The zemindari property hypothecated is admittedly part of the estate of Khairati Lal. The mortgagors profess to bind "all rights which we possess or may possess in future." The Rs. 20,000 acknowledged to be owing is thus made up:—

	R.	A.	P.
Interest on two bonds less previous payments - - -	8,100	0	0
In respect of the Rukka dated 1st December 1880:—			
Principal - - -	10,475	0	0
In respect of the interest on the amount of the Rukka - - -	1,300	14	0
In cash - - -	124	2	0
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	20,000	0	0

And in a note to the Record (p. 38) the sum of Rs. 10,475 is explained to be made up as follows:—

	R.	A.	P.
On 22nd June 1879 for revenue	2,000	0	0
On 5th November 1879 to pay interest to Intzam Begam -	1,575	0	0
On 17th May 1880 to defray expenses of daughter's marriage - - -	2,000	0	0
On 2nd August 1880 to pay interest to Moti Ram Sah -	4,000	0	0
On 9th October 1880 to pay interest to Intzam Begam -	900	0	0

This bond is executed by Raja Lalji by the affixing of the seal of Achhan Kunwar and by Enayet Singh then of age. It should be mentioned that by a previous power of attorney dated 1st August 1878 Enayet Singh Achhan Kunwar and Lalji in his own right and as father and guardian of Kunwar Shumster Bahadur appointed Lala Shanker Sahai their general attorney and agent with power (amongst other things) to have documents executed by them registered. The bond of 1881 was registered on the admission by this person of the execution completion and receipt of Rs. 124. 2 in cash on behalf of the executants.

What was the position of the parties at the respective dates of the execution of these two bonds? At the date of the bond of 1877 Hulas Kuar as the heir of Khairati Lal was the owner of his estate but with a restricted power of alienation. Achhan Kunwar was next in succession and would if she survived her mother become her father's heir and take the estate subject to the same restriction. Enayet Singh was one of the two male heirs next in succession to the restricted estates who would be full owners in the event of their surviving their grandmother and mother. Enayet was moreover a minor. At the date of the bond of 1881 Achhan Kunwar was owner of the property for a daughter's estate with restricted power of alienation and Enayet Singh was one of the heirs apparent. At both dates Enayet Singh was living in his father's house and dependent upon him. In 1877 neither Achhan Kunwar nor Enayet Singh (even if he had been of age) could by Hindu law make a disposition of or bind their expectant interests nor does the deed apply to any but rights in possession and in 1881 Enayet Singh was equally incompetent to do so though the deed purports to bind future rights.

To give validity to the bonds as against the estate of Khairati Lal the Plaintiffs and Appellants must show that there was legal necessity for raising the money by a charge on Khairati's estate or at least that in advancing their money the creditors gave credit on reasonable grounds to representations that the money was wanted for such necessity. It is not a case in which all the kindred of Khairati have assented or could assent to the bonds or either of them and the circumstances are not such as in the opinion of their Lordships to raise any presumption from such concurrence as there was of Achhan Kunwar and Enayet Singh in the first bond or of Enayet Singh in the second bond that the transaction was a fair one or one justified by Hindu law. In order to raise such a presumption the consent of the deceased's kindred to his widow's or daughter's alienation must be shown to be given with a knowledge of the effect of what they were doing and an intelligent intention to consent to such effect. There is a complete absence of any such evidence in the present case. Achhan Kunwar was a purdah nashin lady. In her evidence she states that she remembers having executed a mukhtarnama in Lalji's name with a view to manage the villages. She did not know her estate was encumbered and came to know of the existence of debt when the Paharwalas filed a suit. She does not know the mortgagees. She did not borrow any money from them and never heard of Lalji having borrowed money from them but since the filing of the present suit she came to know that a demand was made upon herself and her son. "Raja Lalji never consulted me in matters relating to the management of the estate. He was my elder and malik and out of respect for him I could not interfere." Enayet Singh admits the execution of the power of attorney in

1877 but says that at that time he had not sufficient maturity of understanding to judge of what he was writing. Indeed as already mentioned he was a minor at the time. He says he signed the document of 1881 because filial duty prevented him from disobeying his father's order. So long as Lalji was alive the income of the ilaka was brought to and spent by him. His parents and he lived together. There is no evidence that either Achhan Kunwar or Enayet Singh had any advice on the matter independent or otherwise. It is unnecessary to pursue this topic further.

Nor is there any proof of any legal necessity for borrowing on the credit of Khairati's estate or of any such representation made to the creditors as could give validity to either of the bonds sued on. It is unnecessary to discuss the evidence that was offered because the learned Counsel for the Appellants very properly admitted that if it was incumbent upon them to prove a legal necessity for the borrowing the Appellants had failed to do so but they contended 1st that the absence of necessity was not pleaded in the written statement of the Defendants and there was no issue raising the question and 2ndly that Khairati's estate included the business of a money lender or dealer in hundis which was carried on after his death for the benefit of his heir under the management of Lalji and that as such manager Lalji had by Hindu law a power to pledge any part of the estate for the purposes of the business.

As regards the bond of 1877 their Lordships think that paragraph 3 of the written statement of the Defendants sufficiently though not in such precise or accurate language as is desirable raises the absence of necessity for the borrowing as a defence and that the 3rd issue as settled by the Judge after presentation of the written

statement is directed to the same point. But their Lordships observe that in a suit like the present on a bond made by a person with restricted power of alienation the Defendants are not required to plead the absence of legal necessity for the borrowing. It is for the Plaintiffs to allege and prove the circumstances which alone will give validity to the mortgage and they repeat what was said in the judgment of this Board in an appeal arising out of a suit on another bond executed by Hulas Kuar (*Lala Amaranth Sah v. Rani Achan Kuar* 19 Ind. Ap. 196) :—

“ 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 claiming
 “ title under a Hindu widow as against her
 “ husband’s heirs should prove the validity of
 “ his mortgage.”

Moreover it appears from the Record that the question of necessity was explicitly raised in the first reason of the present respondents for their appeal to the High Court (Rec. p. 74) and the present Appellants so far from complaining that the question was not in issue on the trial before the Subordinate Judge accepted the issue and in their 3rd and 6th reasons (Rec. p. 95) contended that upon the evidence it had been established that the consideration of the bond of 1877 was advanced for legal necessity after due and proper inquiry and as regards the consideration of the bond of 1881 also that it was advanced for meeting family necessities and in any case under the *bona fide* belief that it was required for such

purposes and after due and reasonable inquiry. Another case was dealt with in the High Court upon this footing.

Their Lordships think that the second point made by the Appellants is unsupported either by reason or authority. The owner of the business at the time of the execution of the bond of 1877 was Hulas Kuar and Lalji was managing it as her agent only and for her benefit and she could not of course confer on her agent any larger power than she had herself, and there is no exception from the restriction on alienation by a Hindu widow when the estate consists of or includes a business. The authorities quoted by Mr. Cowell have no application to the case. They were cases of a family business being carried on by the manager of an undivided family estate. In that case the manager of a family business has a certain power of pledging assets for the requirements of the business. But the position of a Hindu widow or daughter is not by any means the same as that of the head of an undivided family and even in the latter case the validity of a mortgage by the manager of a family business without the concurrence of the other members of the family or when some of those members are minors depends on proof that the mortgage was necessarily entered into in order to pay the debts of the business. This is clear from the cases cited including that of *Doulut Ram v. Mehr Chand* 14 Ind. Ap. 187. To use the language of Mr. Justice Pontifex in a judgment quoted in that case the touchstone of the authority is necessity.

These considerations dispose of the appeal so far as it rests on the bond of 1877 alone. But the Appellants say that the earlier bond was confirmed by the bond of 1881. It remains to consider the validity of this bond as against Khairati's estate represented by the two Respondents. By the 5th paragraph of their written state-

ment the Defendants plead that they signed the bond at the earnest request of Lalji whose position in the family influenced them and that at the time of execution of the said bond they did not understand the nature of the document nor were they informed that the debt incurred or admitted under the bond in question was actually payable and was such as would create liability upon the estate of Khairati Lal. One of the issues upon which the case was tried was founded upon this paragraph of the defence. The evidence of the two Respondents has been already referred to.

The admission of the bond of 1877 is contained only in the statement that the auditors have no deed except the bonds of 25th May 1877 and 2nd December 1877 "which are payable" and this bond. The effect of these apparently innocent words was certainly not likely to attract the attention or arouse the suspicion of the executants of the bond unless it was specially explained to them.

The Subordinate Judge on this issue found in favour of the Appellants. The High Court reversed this finding and found that the bond of 1881 was not explained to Achhan Kunwar and that it is not proved that she understood that bond or the liabilities it purported to create or admit. The Court also found that it was not proved that there was any family necessity for the making of the bond of 1881 or that the mortgagees satisfied themselves upon any reasonable inquiry that there was any family necessity for the making of that bond.

It will be convenient to examine the nature of the consideration for the bond of 1881. The first item is made up of compound interest on a bond dated 25th May 1877 and the bond of 2nd December 1877. There is no evidence whatever that the bond of 25th May 1877 was binding upon Khairati's estate or upon either of the Defendants—and their Lordships have already

expressed their opinion that the bond of 2nd December was not binding on Khairati's estate. There is no proof that the sum of Rs. 2,000 was owing for revenue or if it were that it was necessary to borrow in order to pay it. Then come two items for interest to Intzgam Begam. The principal witness for the Appellants was Nand Kishore the father of Gobind Parshad one of the Appellants. He states that Lalji and Enayat Singh asked him to get some more money advanced to them and accordingly he got Rs. 30,000 advanced to them by Intzgam Begam wife of Asman Khan and that she had obtained a decree but against whom is not stated. Even assuming that Nand Kishore's statement may be relied on it does not prove that Intzgam Begam's debt bound the estate of Khairati Lal but their Lordships observe that no question on this point was addressed to Enayat Singh in cross-examination and Nand Kishore's statement is uncorroborated. There is no explanation why the expenses of "daughter's marriage" (which apparently means a daughter of Lalji and Achhan Kunwar) should be paid out of Khairati's estate instead of by her father Lalji. And lastly the payment to Moti Ram Sah was for interest on the bond which was decided not to constitute a charge on Khairati's estate in the case already referred to and reported in 19 Ind. Ap. 196. It does not appear whom the small balance of Rs. 124. 2 was paid to and it is conjectured that it was applied in paying the cost of the stamp. It is therefore not proved that any part of the debt which Achhan Kunwar purported to admit and which formed the consideration of the bond of 1881 was a debt for which Khairati's estate was liable, and as to the greater part of it there is proof that Khairati's estate was not liable for it.

The Respondents' admission could not make it a debt of Khairati or one for which his estate is

liable and that is the only question in this suit. It was not contended that the bond could be enforced against Achhan Kunwar's interest in the income of the estate during her lifetime, but their Lordships think it right to add that there is no proof, and having regard to the relation both of Achhan Kunwar and Enayet Singh to Lalji, and to her own evidence and that of Enayet Singh which has been quoted above the form of the professed admission of the bond of 1877 and to all the other circumstances of the case they do not believe that the nature and effect of the bond of 1881 or of the admission of liability for past debts contained in that bond was ever explained to or properly appreciated by either of the Respondents and they do not differ from the finding of the High Court on this issue.

Their Lordships will therefore humbly advise Her Majesty that the appeal be dismissed and the Appellants must pay the costs of the Respondent Achhan Kunwar who alone appears on this appeal.
