

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Gharib-ul-lah v. Khalak Singh and Others, from the Court of the Judicial Commissioner of Oudh; delivered the 7th May 1903.*

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Present at the Hearing :

LORD DAVEY.

LORD ROBERTSON.

SIR ANDREW SCOBLE.

SIR ARTHUR WILSON.

[*Delivered by Sir Arthur Wilson.*]

This is an Appeal against a Decree of the Court of the Judicial Commissioner of Oudh, which varied the Decree of the Subordinate Judge of Unao.

The three Defendants (Respondents) are brothers forming a joint Hindu family governed by the Mitacshara law, and as such they are the proprietors of a four annas or five biswas share in the village of Rookarna.

On the 6th February 1889 a deed was executed which purported to mortgage the family share in the village to Amin-ul-lah to secure a loan of Rs. 10,000 and interest; and on the 19th September 1890 a second deed was executed which purported to charge the same property in favour of the same mortgagee with a further sum of Rs. 1,000 advanced by him, with interest. The Appellant is the representative of Amin-ul-lah, who brought the present suit in the Court of the Subordinate Judge of Unao to enforce the two mortgage deeds.

The material parts of the first deed are as follows:—"We are Khalak Singh and Jangli Singh, sons of Chet Singh, and Jai Singh, son of Chet Singh, under the guardianship of Musammat Lachmin, wife of Chet Singh, represented by Khalak Singh as her agent." The title of the three brothers is recited, and then follows "We have mortgaged the same," and the conditions are then stated. The deed was executed by "Khalak Singh with his own pen," "Jangli Singh with his own pen," "Musammat Lachmin with the pen of Mewa Ram, Karinda," and "Jai Singh with his own pen." The acknowledgment for the purpose of registration was signed by "Khalak Singh with his own pen," "Khalak Singh, General Agent, on behalf of Musammat Lachmin, guardian of Jai Singh, minor," and "Jangli Singh with his own pen." It states that "Khalak Singh is the General Agent of Musammat Lachmin, under power of attorney registered on 18th November 1884, and has authority to mortgage, &c." The forms used in the second deed, that of the 19th September 1890, are substantially the same, except that as to Jai Singh the execution is "Jai Singh, minor, under guardianship of Musammat Lachmin and the agency of Khalak Singh," Lachmin's name not otherwise appearing, and the registration corresponds.

At the times when the two deeds were executed the first Respondent, Khalak Singh, was undoubtedly a man of full age, and was the karta of the family. Jangli Singh, the second Respondent, appears to have been between eighteen and twenty-one, and therefore of full age if the general rule of Hindu law was applicable to his case. The third brother, Jai Singh, was admittedly a minor.

With regard to the object for which the first and principal loan was raised, it is clear that

almost the whole of it was borrowed to pay off, and was employed in paying off, pressing claims against the family property, so that to this extent necessity is clearly shown. And both Courts in India have so found. As to two small sums, however, of Rs. 90. 4 and Rs. 215. 8, the Appellate Court in India held that there was no evidence of necessity or of inquiry on behalf of the lender. And this view appears to be correct. The Appellate Court in India thus reduced the amount advanced under the first and principal mortgage deed for which necessity was established to Rs. 9,690. 7. 6, a figure which their Lordships accept as correct.

As to the second mortgage, that for Rs. 1,000, the case is not so clear. There is evidence to show that the family had long been in a somewhat embarrassed condition, and had difficulty in meeting the necessary family expenses. There is evidence too that this difficulty was in some years aggravated by floods and drought. And there is the evidence of the witness Durga, who speaks no doubt in very general terms, but who says what, if true, to a large extent covers the case, that the Rs. 1,000 was borrowed, "of which Rs. 500 or 600 was paid in Government revenue and other due expenses" were met by it. Out of that Rs. 150 were "spent in contracting a marriage for Jai Singh. Of the same money a pair of bullocks was bought for Rs. 128." As to the Rs. 150 for the marriage this witness is confirmed by the next. The first Court accepted this evidence, the Appellate Court was not satisfied with it. Their Lordships agree with the first Court to the extent of Rs. 778, the sums specifically mentioned, but they think the reference to other expenses too vague for them to place any reliance upon it. The witness Durga, though cross-examined about many things, was not cross-

examined upon this point. And the Respondent Khalak, the karta of the family and the actual borrower of the money, though he was in Court during the trial, was not called to contradict Durga. Their Lordships therefore think it has been sufficiently proved that the Rs. 778 above-mentioned, part of the loans, was borrowed for family purposes and in case of necessity.

The karta of an undivided Mitacschara family, with the concurrence of the adult members of the family, can mortgage family property for family purposes in case of necessity, so as to charge the property as against all the members of the family. At first sight, therefore, it would seem that the Appellant is clearly entitled to the usual mortgage decree against all the Respondents in respect of all the amounts which, as already stated, their Lordships hold to have been borrowed on grounds of necessity. But a difficulty was raised in India on the ground that on the face of the mortgage deeds it is shown that one at least of the three brothers constituting the family was a minor, that the mother had obtained a certificate of guardianship (presumably of property), that one at least of the mortgage deeds was executed in her name with others, and that she as guardian could not (by reason of Act XL. of 1858, Section 18, and Act VIII. of 1890, Sections 29 and 30) make a mortgage of her ward's property without the sanction of the Court, which admittedly was not obtained. The Appellate Court in India gave effect to this objection, considering that the mortgages were mortgages of a guardian and were invalid for want of the sanction of the Court.

Their Lordships are unable to concur in this view. It has been well settled by a long series of decisions in India that a guardian of the property of an infant cannot properly be appointed in respect of the infant's interest in

the property of an undivided Mitacshara family. And in their Lordships' opinion those decisions are clearly right, on the plain ground that the interest of a member of such a family is not individual property at all, and that therefore a guardian, if appointed, would have nothing to do with the family property. And applying these observations to the present case their Lordships think that the mortgages under consideration were not mortgages by the guardian, assuming the mother to have been a guardian, but mortgages by the family, entered into by the karta of the family with the concurrence of Jangli, the only other adult member of the family, if indeed he was an adult. And this leads up to the only remaining question in the case. If it be true that the Respondents' mother was appointed guardian of the second Respondent as well as of the third (as seems to have been assumed in India), that appointment might under Act IX. of 1875, Section 3, have the effect of prolonging the minority of that Respondent until he attained twenty-one. The effect of this, if it were accepted, would be very trifling; it would only affect that Respondent's liability to a personal decree for the two small sums of Rs. 90. 4 and Rs. 215. 8 advanced under the first and principal mortgage, and for Rs. 222 under the second mortgage, but as to which necessity has not been established. As to this it seems sufficient to say that the second Respondent is now of full age and able to bring his case before the Court; that at the time of the mortgages in question he was of full age according to the general Hindu law; that he executed the mortgages himself as a person of full age; and that if there were any grounds for exempting him from liability, it was for him to show them, which he has failed to do. It follows that the Appellant is entitled

to a mortgage decree against the property under the first mortgage, and to similar relief under the second mortgage, to the extent above indicated as to each. He is further entitled to a money decree against the first two Respondents personally in respect of the two sums of Rs. 90. 4 and Rs. 215. 8 excluded from the security of the first deed, and Rs. 222 under the second deed.

Their Lordships will therefore humbly advise His Majesty that this Appeal ought to be allowed; that the Decree of the Court of the Judicial Commissioner ought to be discharged with costs; that the Decree of the Court of the Subordinate Judge ought to be varied by substituting for the sum therein declared to be due to the Plaintiff a sum made up of Rs. 10,468. 7. 6 principal, and interest in accordance with the two mortgages respectively and the costs throughout; that the period of redemption ought to be extended to six months from the date of His Majesty's Order on the Appeal; that there ought to be an Order against the first two Respondents personally for Rs. 527. 12 and interest; and that the case ought to be remitted to the Judicial Commissioner to ascertain the precise amount payable on the above footing.

The Respondents must pay the Appellant's costs of this Appeal, exclusive of the costs of restoring the same, and in view of the great delay which took place in the prosecution of the Appeal their Lordships direct that the Appellant only be allowed such costs as he would have incurred if he had prosecuted his Appeal with due diligence.

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