Privy Council Appeal No. 80 *of* 1916.
Allahabad Appeal No. 32 *of* 1913.

Nawab Nazir Begam - - - - - - - *Appellant*

v.

Rao Raghunath Singh and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN PROVINCES, ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH FEBRUARY, 1919.

Present at the Hearing:

VISCOUNT HALDANE.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD PHILLIMORE.]

This suit was brought to enforce a mortgage made on the 7th November, 1884, by the ancestor of the defendants and respondents Nos. 1 to 8, in favour of the ancestor of defendants and respondents Nos. 13 to 15, which mortgage was transferred on the 4th January, 1910, to the plaintiff appellant; defendants and respondents Nos. 9 to 12, claim title to certain of the lands in mortgage.

The mortgage recites that the mortgagor had borrowed Rs. 398, in order to pay the Government revenue, and the covenant is in the following terms:—

> "I will repay the aforesaid sum together with interest at the rate of Rs. 2-8-0 per cent. per mensem, in the month of Aghan, Sambat 1942, without any plea or excuse, and I will continue to pay the interest every six months. If I fail to pay interest at the end of any six months, I will pay interest at the rate of Rs. 3-2-0 per cent. per mensem from the date of the execution of this bond, and that amount of interest shall be added to the principal."

As at the date of the suit no payment had been made in respect of interest or principal, the total debt had swollen with compound interest to more than 3 lacs of rupees.

The plaintiff purchased the mortgage for Rs. 6,500. In the deed of transfer the transferor covenanted that in case the transferee did not realize Rs. 6,500 upon the mortgage he would make up the difference. When the plaintiff brought her suit she reduced her claim to the principal, Rs. 398, and Rs. 19,602 interest, making a total of Rs. 20,000.

Various defences were set up by the defendants 1 to 12, but they were all rejected by the Subordinate Judge, who made a decree in favour of the plaintiff for Rs. 20,000, with interest from the date of suit, and costs. Thereupon the defendants 1 to 12 appealed to the High Court of Judicature for the North-Western Provinces, which Court affirmed in most respects the decree of the Subordinate Judge, but reduced the amount decreed upon the mortgage to Rs. 1,778-4-0, a sum arrived at by adding to the principal simple interest at the rate of 12 per cent.

In the written statement filed on behalf of the defendants, one of the points taken was that the property mortgaged was ancestral property, and that there was no legal necessity to execute the document sued upon.

In the view which the High Court took of this plea, a view from which their Lordships see no reason to differ, it made it open for the defendants to contend that though the necessity for borrowing the principal sum was accepted there was no necessity to borrow on the very onerous terms of this mortgage.

This line of defence being thus open to the defendants, the principles laid down by this Board in *Rajah Hurronath Roy Bahadoor* v. *Rundhir Singh*, 18 I.A.1, and in *Nand Ram* v. *Bhupal Singh*, 34 I.L.R. All. 126 apply.

It is incumbent on those who support a mortgage made by the manager of a joint Hindu family to show not only that there was necessity to borrow, but that it was not unreasonable to borrow at some such high rate and upon some such terms, and if it is not shown that there was necessity to borrow at the rate and upon the terms contained in the mortgage that rate and those terms cannot stand.

This principle being established, the High Court was justified in finding that a mortgage upon such terms as those contained in the document sued upon, the lands charged being of such value as to make the security ample, was an unnecessary extravagance.

No evidence, it is true, was given on either side, but the thing spoke for itself.

It remains, therefore, that there was necessity and, in virtue of that necessity, authority to borrow upon reasonable commercial terms, and that the mortgage stands as good security to that extent, but that all terms of the mortgage in excess of this necessity are outside the scope of the authority.

What the particular rate of interest should be, and whether the money could have been borrowed at simple, instead of compound, interest are matters of detail upon which the High Court with its local knowledge can well be left to decide, and their Lordships are not disposed to interfere with the decision upon points such as these. There is, however, a passage in the judgment of the High Court upon which they desire to offer some observation. The learned Judges say :—

> " We have a discretion in the matter and we think we should be justified in reducing the rate of interest to a reasonable figure. In view of the security given to the mortgagee, and also of the fact that unusually long

> delay has been made in bringing the suit, we think that simple interest at the rate of 12 per cent. per annum, would be amply sufficient to compensate the mortgagee or his representative for the interest which he should get on the principal amount of the loan."

This may have some relation to the following allegation in the defendants' pleading. "The condition relating to interest was very hard, unconscionable and inequitable." But that allegation does not seem to have been intended as a substantive plea in itself, but rather as introductory to a plea of undue influence which failed. However this may be, their Lordships do not think it safe to rest their decision upon a supposed discretion in the Court or an inference by the Judges as to the sum which would be sufficient to compensate the mortgagee. In their view, as already stated, the question is one of the authority of a manager of a joint Hindu family and it is because their Lordships agree with the High Court that this authority was exceeded to the extent already stated that they concur in the conclusion at which that Court arrived.

The appeal accordingly fails, and should be dismissed as against the defendants respondents Nos. 1 to 12.

As regards the original defendants Nos. 13 to 15, or their present representatives, it seems that they were at one time represented by the solicitors who have appeared for the other respondents, but that this appearance has been withdrawn, and the appeal so far as they are concerned has been heard *ex parte*.

If the decision of the Subordinate Judge had not been varied there would have been no ground for asking for any relief against them. If the variance had not been so great, if the judgment had been allowed to stand for any sum not less than Rs. 6,500, there would still have been no ground for seeking relief from them. It was only after the decree of the High Court reducing the sum due on the judgment below Rs. 6,500, that any question arose. It would appear that by the terms of the sale deed this difference would have to be made up by the defendants Nos. 13 to 15. Whether any application was made to the High Court after the delivery of its judgment for consequential relief against these defendants, whether there was any opportunity for making an application, and why, if so, no application was made there is nothing in the record to show. *Prima facie* it would appear that there could be no answer to such an application; but upon the whole their Lordships think that it will be safer to remit this matter to the High Court and to give the plaintiff an opportunity of making the proper application there.

Their Lordships will therefore humbly advise His Majesty that this appeal be dismissed as against the respondents, 1 to 12 with costs, and that as between the appellant and the other respondents, the cause be remitted to the High Court with liberty to the appellant to make such application to the High Court as she may be advised.

In the Privy Council.

NAWAB NAZIR BEGAM

v.

RAO RAGHUNATH SINGH, AND OTHERS.

[DELIVERED BY LORD PHILLIMORE.]

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