

Privy Council Appeal No. 85 of 1918.

Bengal Appeal No. 17 of 1915.

Pokhar Singh, since deceased (now represented by Musammat
Premdai Koer and another), and others - - - *Appellants*

v.

Jagu Singh and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 9TH DECEMBER, 1920.

Present at the Hearing:

VISCOUNT CAVE.

LORD MOULTON.

LORD SUMNER.

SIR JOHN EDGE.

[*Delivered by VISCOUNT CAVE.*]

This is an appeal by the plaintiffs from a judgment and decree of the High Court of Calcutta, setting aside a judgment and decree of the Subordinate Judge of Patna and dismissing the plaintiffs' suit.

The appellants and respondents are members of a joint Mitakshara family of which until the year 1893, one Meherban Singh was also a member. In that year Meherban Singh separated from the others and set up a claim to the greater part of the family property; and litigation ensued which, on the 13th August, 1897, was compromised on terms agreed between the parties. In the course of the dispute and of the ensuing litigation, the first and principal appellant Pokhar Singh acted as manager for himself and the respondents and in so doing incurred debts for which he and they were jointly liable, and on the compromise of the litigation an *ekramama* (or agreement) was executed providing for the discharge of these liabilities. It is out of this agreement that the present suit arises.

By the *ekrarnama*, which was dated the 13th August, 1897, and was executed by the respondents Jagu Singh, Pearay Singh and Somar Singh (therein called the declarants), after recitals to the effect that for the expenses of the suits between Meherban Singh and the other members of the family the appellant Pokhar Singh had borrowed money by executing and delivering registered bonds on mortgage of some of the joint properties standing in his name and the entire money due under the aforesaid bonds, principal with interest, was then payable, and that according to the compromise the payment of half the amount covered by the aforesaid bonds and rokas besides interest thereon should be made by the declarants, and out of Rs. 18,000, principal amount covered by the bonds and rokas executed by Pokhar Singh, and about Rs. 1,000 interest thereon, in all Rs. 19,000, which was payable, Rs. 9,000, principal amount, and about Rs. 500, interest thereon, in all Rs. 9,500 were due by the declarants. Therefore the declarants declared that they would jointly with Pokhar Singh or severally pay to the *mahajans* Rs. 9,000, principal amount covered by the bonds and rokas executed by Pokhar Singh besides interest on the said amounts of loan up to the date of payment. And they further declared that if Pokhar Singh or his heirs or representatives should have to pay the whole or a portion of the said amount of loans, principal with interest, on account of the quota of the declarants to the extent of one-half, or if for non-payment on the part of the declarants of half the loan and interest any portion of the property of Pokhar Singh should be sold by auction, then Pokhar Singh and his heirs and representatives should have the power to realise from the persons of the declarants and the properties standing in their names such amount of money in cash as well as damages on account of sale, &c., as might be paid by Pokhar Singh, principal with interest, together with future interest from the date of the accrual of the cause of action at the rate of Re. 1 per cent. per mensem. And it was declared that Pokhar Singh should have nothing to do with the payment of the loan contracted by Punit Singh (a deceased member of the family) alone.

No schedule was annexed to the *ekrarnama* saying how the sum of Rs. 18,000 was made up, and although it was stated in the course of the present suit that a list of the bonds and rokas making up the Rs. 18,000 was entered on a *chitta* which was delivered to the respondent Pearay Singh, no such *chitta* is now forthcoming.

In the year 1904 or thereabouts, the appellant, Pokhar and the other appellants (who had become interested jointly with him) brought a suit against the respondents in which they alleged that certain bonds and rokas amounting together to Rs. 2,510 formed part of the Rs. 18,000 referred to in the *ekrarnama* and that Pokhar had been compelled to pay the amount of such bonds and rokas with interest, and they claimed judgment against the respondents under the *ekrarnama* for one-half of the sums so

paid. In the course of these proceedings the appellants put forward a list of the bonds and rokas which (as they alleged) made up the Rs. 18,000 referred to in the *ekrarnama*, such list including, with the bonds and rokas then sued upon, a further bond for Rs. 2,000, which is not now in question, and two bonds for Rs. 10,995 and Rs. 2,495, given by him to Ganga Prashad and dated respectively the 23rd May, 1896, and the 8th December, 1896. The respondents did not then dispute the list, but raised various objections as to the validity of the *ekrarnama*. Their objections were overruled and judgment was given for the appellants.

Shortly after the last-mentioned date, the representatives of Ganga Prashad, the holder of the above-mentioned two bonds for Rs. 10,995 and Rs. 2,495, sued the appellant Pokhar Singh upon those bonds and recovered judgment for principal, interest and costs, and Pokhar was compelled to pay and in fact paid the amount for which judgment was so recovered against him in three sums, of which the first two, aggregating Rs. 4,400, were paid on the 23rd May and 11th July, 1905, and the third, amounting to Rs. 23,500, was paid on the 7th March, 1906. The appellants allowed the period of limitation to elapse before suing the respondents for their share of the Rs. 4,400, but on the 5th March, 1909, they brought the present suit claiming payment by the respondents of one-half of the Rs. 23,500, in accordance with the *ekrarnama*. The list of bonds and rokas put forward by the appellants in their plaint in this suit as making up the Rs. 18,000 was the same as that put forward in the suit of 1904, and included the two bonds for Rs. 10,995 and Rs. 2,495. The respondents in their written statement raised a number of objections, but did not in terms deny that these two bonds formed part of the Rs. 18,000.

The Subordinate Judge of Patna, by whom the suit was heard, found on the evidence that the two bonds given to Ganga Prashad were included in the Rs. 18,000. But he also held that of the amount borrowed on the first bond, viz., Rs. 10,995, a part only, Rs. 7,822, had been applied by the appellant Pokhar in paying off a debt to one Mahendra Singh, which had been incurred by him for joint family purposes, the remainder of the Rs. 10,995, viz., Rs. 3,173, being used by Pokhar for his own purposes; and that of the amount secured by the second bond, viz., Rs. 2,495, a part, viz., Rs. 1,300, had been applied in paying a debt of Punit Singh, for which the family was not liable, and the remainder only, viz., Rs. 1,195, had been applied for family purposes. He, therefore, held the respondents liable only for their quota, viz., one-half, of the sums of Rs. 7,822 and Rs. 1,195 with interest thereon, and on this footing granted a decree for a proportionate part of the sum of Rs. 23,500 in respect of which the suit was brought. The amount of the decree, including interest to its date, was 11,776 rupees 15 annas.

Both parties having appealed to the High Court, the learned Judges of that Court disapproved of the course adopted by the Subordinate Judge. They expressed the opinion that the sole

question to be determined in the case was whether the plaintiffs had succeeded in proving that the two bonds given to Ganga Prashad formed part of the consideration for the *ekrarnama*, that if it were proved that the defendants contracted to be liable for those two loans the plaintiffs were entitled to a full half of the amounts paid in respect of them, but that otherwise they could recover nothing in the suit. They held it clear that Rs. 7,822 part of the sum borrowed from Ganga Prashad on the first bond had been borrowed for the purpose of liquidating the family debt of Mahendra and had in fact been applied for that purpose before the date of the *ekrarnama*; but they nevertheless held that the *ekrarnama* included the debt of Mahendra and that it had not been shown that it included the debts of Ganga Prashad. The High Court accordingly allowed the respondents' appeal and dismissed the appellants' appeal and the suit; but as the respondents' defence had been found to be false, they directed that both parties should bear their own costs in both Courts. Against this decree the present appeal is brought.

Their Lordships entirely agree with the High Court in holding that the first question to be determined is whether the bonds for Rs. 10,995 and Rs. 2,495 in favour of Ganga Prashad were or were not intended to be included in the bonds for Rs. 18,000 mentioned in the *ekrarnama*; and that, if that question is determined in the negative, the appellants can recover nothing in this suit. But their Lordships, having carefully considered the evidence, have come to the conclusion that those bonds were intended to be so included. The appellant Pokhar at the hearing swore that they were so included; and although his statement that the whole of the sums borrowed from Ganga Prashad were expended on family purposes was not accepted by the Subordinate Judge, yet his evidence as to the composition of the Rs. 18,000, which is consistent with the evidence given by him and accepted by the Court in the litigation of 1904, cannot be wholly put out of account. On the other hand the respondent Jagu Singh, who was the only witness called for the respondents on this point, stated generally that the two bonds were not included in the Rs. 18,000; but his evidence contained a number of statements which directly contradicted the recitals in the *ekrarnama* executed by him and were palpably false, and he made no suggestion as to the manner in which the sum of Rs. 18,000 was in fact made up. Having regard to the nature of the oral evidence, the documents are of importance; and they support the evidence of Pokhar. The bond for Rs. 10,995 which was dated the 23rd May, 1896, recited that the amount was required partly in order to enable Pokhar Singh jointly with others to obtain a certain *thika* settlement on payment of *zerpeshgi* which was calculated to benefit the joint family, and partly to meet the expenses of the suits pending in the Courts for the benefit of the joint family; and this recital supports the appellants' case as to that bond. Accounts of the receipts and expenses for joint family purposes were kept by

Gajadhar Prashad on behalf both of the appellants and of the respondents ; and from these accounts it appears that both the sums borrowed from Ganga Prashad, as well as the other sums mentioned in the appellants' list of bonds and rokas, were entered at the time as having been received on account of the joint family. It is not suggested that these entries were fictitious ; and if not they are almost conclusive in favour of the appellants. Further it was stated by the learned Judges of the High Court to be " the case of both parties " that the sum of Rs. 7,822 due to Mahendra on joint account was paid by Pokhar out of Ganga Prashad's loan, and if so, it is hardly credible that Pokhar intended to include in the agreement for contribution the loan from Mahendra which had been paid off more than a year before its date and to omit from it the loan from Ganga Prashad out of which Mahendra's loan had been discharged. Upon the whole their Lordships are satisfied that these two bonds formed part of the Rs. 18,000 referred to in the *ekrarnama*.

But this does not end the matter. The learned Subordinate Judge held on the evidence that Rs. 3,173, part of the loan secured by the bond for Rs. 10,995, had been applied by Pokhar in taking up a share of the *zerpeshgi* lease mentioned in that bond, and that this share was taken up, not (as contemplated by the bond) for the benefit of the joint family, but for the benefit of Pokhar himself. He also held that Rs. 1,300, part of the loan secured by the bond for Rs. 2,495, had been applied to the payment of the separate debt of Punit Singh, for which the family were not liable. The conclusions of the Subordinate Judge on these questions of fact were apparently confirmed by the High Court, and their Lordships accordingly accept them ; and it remains to consider what effect should be given to these findings. Although under the terms of the *ekrarnama* the appellants are entitled to recover from the respondents one-half of the full amount paid by Pokhar under the two bonds, it would (as the learned Subordinate Judge pointed out) be unjust and inequitable to give them a decree for that sum without regard to the fact that a part of the sums borrowed was applied by Pokhar not (as provided by the agreement) for family purposes but either for his own benefit or for a purpose outside the agreement ; and it appears to their Lordships that he should be treated as having forfeited his claim to the extent of the sums misapplied with the interest thereon, leaving the balance of his claim standing. This was the effect of the decree of the Subordinate Judge, and accordingly that decree should be restored ; but as in the appeals to the High Court and to this Board both parties have made claims which cannot be sustained, there should be no costs of those appeals.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

POKHAR SINGH, SINCE DECEASED (NOW REPRESENTED BY MUSAMMAT PREMDAI KOER AND ANOTHER), AND OTHERS

9.

JAGU SINGH AND OTHERS.

DELIVERED BY VISCOUNT CAVE.

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