Privy Council Appeal No. 95 *of* 1921.

Patna Appeal No. 40 *of* 1919.

Ram Bujhawan Prosad Singh and another - - - *Appellants*

v.

Nathu Ram and others - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH DECEMBER, 1922.

Present at the Hearing:

LORD ATKINSON.
LORD SUMNER.
LORD PARMOOR.
LORD CARSON.
MR. AMEER ALI.

[*Delivered by* LORD PARMOOR.]

This is an appeal from a decree of the High Court of Judicature at Patna which varied a decree of the Judge of the Subordinate Court. Hari Charan Mahto, the father of the first of the defendants (appellants), was head, and karta, of a Hindu joint family, governed by Mitakshara law. He borrowed a sum of Rs. 1,000, secured with interest at 36 per cent. per annum with quarterly rests, by hypothecation, of certain immovable properties of the joint family, and executed a deed of mortgage on the 16th July, 1903, the rights in which are now vested in the plaintiffs (respondents). Hari Charan Mahto died on the 18th January, 1911, without redeeming the deed of mortgage. At the time of the institution of the present suit to enforce the mortgage bond, it was claimed that there was a sum due on the mortgage for principal and interest of more than Rs. 50,000, after making an allowance for payments which had been made during the lifetime of the mortgagor. The actual claim in the suit was for Rs. 32,000, the

plaintiffs stating that they had reduced the amount of their claim on the ground that the mortgaged property was not worth the whole sum due for principal and interest.

In their plaint the plaintiffs (respondents) pleaded that Hari Charan Mahto had borrowed the sum of Rs. 1,000, at the above rate of interest, in order to defray some necessary household expenses of the joint family, and that as security for the bond money, principal, with interest and compound interest, he had mortgaged, hypothecated and made liable his milkiat right in certain scheduled properties, which it is not necessary especially to designate. In answer to this claim the first of the defendants (appellants) pleaded, among other things :—

> " That the necessities mentioned in the bond in suit are wrong and baseless. This defendant's father never took a shell from the plaintiffs for the requirements and the benefit of the family, nor was there any necessity for the same.
>
> " That the mortgaged property is the ancestral property of the joint family, and is not at all liable for the payment of the amount claimed. Nor can the property be sold for the payment of the same.
>
> " That the rate of interest and compound interest and the period for payment of compound interest are altogether invalid and are by way of penalty. Such an invalid contract and such severe terms, which are by way of unconscionable bargain, cannot be given effect to or put into operation. The account of compound interest and the manner it has been calculated are also wrong. The plaintiffs are not, in any case, entitled to compound interest on the interest."

It has been necessary to set out these pleas at length, since the judgment of the High Court has largely turned on a point of pleading. In the written statements, filed on behalf of the other defendants (appellants) the same defences are raised, and in the issues filed before trial, in accordance with Indian practice, 3 and 5 are relevant to the questions argued on the appeal before their Lordships. The third issue raises the question whether the defendants (appellants) are bound to pay the debt. Were they benefited by the loan ? Can the defendant raise his objection ? The fifth issue raises the question whether the stipulation in the bond for payment of compound interest is penal and unconscionable.

The Judge of the Subordinate Court found that the bond in suit was genuine and for consideration, and that the amount of Rs. 1,000 had been borrowed for family necessity to enable Hari Charan Mahto to defend himself against a criminal charge of rioting. On a cross appeal filed on behalf of the defendants (appellants) to the High Court, it was argued that a karta was not entitled to defend himself against a criminal charge, at the cost of a joint family, and that there was no proof that the joint family property had been hypothecated for any legal necessity of the joint family. The High Court, however, confirmed in this respect the judgment of the Subordinate Court, and the counsel for the defendants (appellants) did not ask their Lordships to review the concurrent findings of the two Courts, or to reverse this portion of the decree of the Subordinate Court.

The Judge of the Subordinate Court further found that the stipulation in the bond for payment of interest at 3 per cent. per month, and to pay compound interest with three monthly rests, was penal, and he allowed simple interest at 1 per cent. per month. This finding appears to have been based, not on the conditions which attach when a security is given which purports to hypothecate joint family property, but on the provisions of Section 16 of the Indian Contract Act, 1872. It was set aside by the High Court, which held that Section 16 of the Contract Act did not relieve the debtor by reducing the rate of interest, except when the Court had been satisfied that the lender was in a position to dominate the will of the borrower, and that the bargain was unconscionable within the meaning of the section. It is not necessary on the present appeal that their Lordships should express any opinion on the respective judgments of the Subordinate Court and of the High Court on this issue. The case of the defendants (appellants) was not argued before their Lordships on the terms of Section 16 of the Contract Act, but on the nature of the obligations created where money has been borrowed by a karta on the security of the joint family property. If, however, it is permissible to accept the finding of the Judge of the Subordinate Court that simple interest at the rate of 1 per cent. per mensem is a fair commercial rate in the absence of special circumstances justifying a higher rate, and to calculate the interest on the loan of Rs. 1,000 at this rate, then, after allowing for payments made, a decree in favour of the plaintiffs (respondents) would, as ascertained on this basis, amount to the sum of Rs. 236-5-6, the decretal amount inserted in the decree of the Subordinate Court.

It will be convenient, in the first instance, to consider the nature of the right which a mortgagee of an ancestral joint family property is entitled to enforce against such property where he has proved that there was legal necessity for borrowing the principal sum, but it is not proved that there was necessity to borrow at the rate of interest contained in the mortgage deed. The question whether the defendants (appellants) are entitled to raise this question in the present instance will be considered at a later stage. This Board in the recent case of *Nazir Begam* v. *Rao Raghunath Singh* (L.R. 46, I.A. 145) determined the principles applicable in a case of this character, and it is not permissible for any Court to restrict or curtail the principles affirmed in that case. After referring to the earlier cases of *Rajah Hurronath Roy Bahadoor* v. *Rundhir Singh* (L.R. 18, I.A. 1) and *Nand Ram* v. *Bhupal Singh* (L.R. 34, I.A. 126) the judgment proceeds :—

> "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."

In this case the defendants pleaded that the condition relating to interest was very hard, unconscionable and inequitable, but it is stated in the judgment that this allegation did not seem to have been intended as a substantive plea in itself, but rather as introducing a plea of undue influence which failed, and then the judgment proceeds :—

"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."

This decision was applied by the Board in the later case of *Manna Lai* v. *Karu Singh and others*, in which judgment was delivered on the 29th July, 1919.

Applying this principle to the present case, the consideration arises whether the authority of Hari Charan Mahto, being an authority to borrow on reasonable commercial terms, was exceeded in the promise to pay interest at the rate of 3 per cent. per month with three monthly rests. Assuming that this question is raised in the pleadings, a matter considered later, the onus of establishing that there was a necessity to pay a rate of interest in excess of the ordinary commercial terms is on the plaintiff, and no proof of this necessity appears to have been given at the trial. The first defendant (appellant) does state in his evidence that there was no necessity to borrow money at such interest. There is some evidence that the property mortgaged provided ample security for a loan of Rs. 1,000, but, in their Lordships' opinion, if there was absence of evidence on either side, the case speaks for itself, and it has not been proved that it was within the scope of the authority of the karta to borrow on the terms fixed in the mortgage deed. Their Lordships have the assistance of the Judge of the Subordinate Court in determining the reduction which should be made in the rate of interest, and are of opinion that the rate of interest adopted by him may be safely followed. Indeed it was not argued before their Lordships that this rate should not be applied if it was held that the rate fixed in the mortgage deed cannot be allowed to stand.

The High Court of Patna decided in favour of the plaintiffs (respondents) that they were entitled to recover the amount of

interest fixed in the mortgage bond, on the security of the joint family property, on two grounds :—

(1) That the question of excessive interest had not been sufficiently raised in the defence of the defendants (appellants).

(2) That, even assuming this question was sufficiently raised in the defence, the plaintiffs (respondents) were entitled to succeed owing to an admission made in the terms of a compromise of the 10th February, 1911, referred to in the decree of the 12th February, 1911.

The defence that there was no legal necessity for the loan on the security of the joint family property was raised and determined in favour of the plaintiffs (respondents), but the High Court held that this defence did not sufficiently raise the further question, that the rate of interest was excessive and to this extent was outside the authority of the karta. The High Court based their decision partly on the terms in which the plea of the defendants (appellants), that there was no legal necessity for the loan at all, was raised and stated in the written statement of the defendants (appellants), and partly on the ground that the written statement contains a special plea as to interest, contained in para. 10 of the defence and in para. 5 of the written statement. It is not possible to say, after the decision of the Board in the case of *Nazir Begam* v. *Rao Raghunath Singh* (L.R. 46, I.A. 145), already referred to, that a plea of no legal necessity for a loan, and that the property is not at all liable for the payment of the amount claimed, does not open the door for a defendant to say that the rate of interest is excessive, and place on the plaintiff the onus of proving that the rate of interest is not excessive, having regard to all the circumstances which prevailed when the loan was made. The defendant in such a case does not lose his right to raise this defence by adding the additional plea that, apart from the conditions which attach when a karta mortgages the joint property, the stipulation in the bond for payment of interest, and compound interest, is in itself penal and unconscionable. In view, however, of the recent decision of this Board, the matter is concluded and no longer open to question.

It becomes necessary, therefore, to consider the second question on which the judgment of the High Court was founded, namely, whether the plaintiffs (respondents) were entitled to succeed, owing to the admissions made in the terms of the compromise of the 10th February, 1911. It is necessary to state shortly the relevant factors. On the 19th December, 1903, Hari Charan Mahto executed a further mortgage bond in favour of the plaintiffs (respondents), who instituted a suit against him and his son, defendant No. 1, to enforce this mortgage bond. Hari Charan Mahto died after the institution of this suit, and his son, defendant No. 1 in the present suit, settled the matter. The arrangement was embodied in a consent decree of the 12th February, 1911, and was in part carried out by the execution

of a sale deed of the 10th February, 1911, in which sale deed there is a passage, " Be it known that the bond dated 16th July, 1903, stands good as before, after payment of Rs. 1,000 as principal, besides interest and compound interest." The consent decree provides as follows: " Besides the amount claimed, Rs. 1,000, as principal and interest and compound interest due under the mortgage bond dated the 16th July, 1903, executed by Hari Charan Mahto, is due from me under the bond. Only Rs. 1,487 out of interest and compound interest entered on the back of the bond has been realised. The bond is allowed to stand good as before—*i.e.*, the principal interest and compound interest will remain due from me." The High Court of Patna held that this was a clear admission of liability on the part of defendant No. 1 in respect of both principal and interest and compound interest, and that though it was not in any sense a ratification of what was done by Hari Charan Mahto, it was presumptive proof of a justifying family necessity, and that hence, if it is necessary to come to a conclusion on the question whether there was any necessity to raise the loan on such onerous terms, it would be sufficient to say that the subsequent consent of defendant No. 1 to the transaction was evidence of such necessity which, had not been rebutted, and that so far as defendant No. 2 is concerned the question did not arise as he was not in existence either at the date of the original transaction or at the date when the compromise was made.

On the construction of the words " the bond is allowed to stand good as before, *i.e.*, the principal interest and compound interest will remain due from me," their Lordships are of opinion that they constitute no more than a reservation of the rights, whatever they may be, under the mortgage bond of the 16th July, 1903, and that they do not constitute an admission of a legal necessity either to the principal amount or of the rate of interest or compound interest. The mortgage bond which it was sought to enforce in the suit was executed subsequently to the mortgage bond on which the present action is founded, and it would be a reasonable precaution to insert words of reservation in order to ensure that there was no interference with the security of the prior bond. In the present suit the question of legal necessity for the principal of the loan was considered in both Courts, quite apart from the terms of the compromise, although if the terms of the compromise are proof as to the necessity of the rate of interest they would be proof to the same extent of the necessity of the principal of the loan. This is sufficient to determine the matter in favour of the defendants (appellants). Assuming, however, that the construction adopted by the High Court is correct, and accepting the view expressed in the judgment of the High Court that there was not in any sense a ratification of what was done by the father of defendant No. 1, their Lordships are unable to accept the conclusion that the compromise terms would constitute such proof of a justifying family necessity as would be sufficient to discharge the plaintiffs (respondents) from

the onus of proving that there were special circumstances which entitled Hari Charan Mahto to pledge the family joint property on excessive terms of interest, or compound interest. The passage is, in any case, nothing more than an admission, for what it is worth, made by defendant No. 1, and if it were necessary to draw a conclusion of fact their Lordships could not agree in the conclusion of the High Court.

Their Lordships will humbly advise His Majesty that the appeal succeeds on the question of interest or compound interest, that the decree of the High Court be set aside and the case be remitted, with a direction that the rate of interest be reduced to simple interest at 1 per cent. per mensem and that the plaintiffs (respondents) pay the costs of this appeal and in the High Court.

In the Privy Council.

RAM BUJHAWAN PROSAD SINGH AND ANOTHER

v.

NATHU RAM AND OTHERS.

DELIVERED BY LORD PARMOOR.

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