

Privy Council Appeal No. 117 of 1922.

Patna Appeal No. 15 of 1921.

Raghunath Prasad Sahu - - - - - *Appellants*

Sarju Prasad Sahu 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 18TH DECEMBER, 1923.

Present at the Hearing :

LORD SHAW.

LORD CARSON.

SIR JOHN EDGE.

MR. AMEER ALI.

SIR LAWRENCE JENKINS.

[Delivered by LORD SHAW.]

This is an appeal from a decree, dated the 9th November, 1920, of the High Court of Judicature at Patna, which varied a decree, dated the 25th September, 1917, of the Subordinate Judge of Arrah.

The suit is for recovery of the amount of principal and interest due by the appellant to the respondents (the plaintiffs) under a mortgage of date the 27th May, 1910. The Subordinate Judge gave decree in the mortgage suit but only allowed simple interest. The High Court allowed compound interest.

The substantial question raised on the appeal is whether the appellant, in the circumstances proved in the case, fell within the protective provisions of Section 2 of the Indian Contract (Amendment) Act, 1899. It may be convenient to set that section out in full :—

“ 2. Section 16 of the Indian Contract Act, 1872, is hereby repealed, and the following is substituted therefor, namely :—

“ 16.—(1) A contract is said to be induced by ‘ undue influence ’ where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

“ (2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

- (a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other ; or
- (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

“ (3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

“ Nothing in this sub-section shall affect the provisions of Section III of the Indian Evidence Act, 1872.”

It is in the view of the Board by that section that the question arising between these parties falls to be settled, and not by reference to the legislation of other countries, *e.g.*, the English Moneylenders Act. The statute to be here construed is the Indian Contract Act as amended. It is accompanied with danger to invoke as authority in an Indian case expressions which merely connote the principles which underlie a particular English statute, and form a guide to its interpretation. As will be seen this general observation is required by reason of the citation of certain authorities alluded to in the judgment of the Subordinate Judge and referred to in the argument before their Lordships' Board.

The appellant is a member of a joint undivided family owning a property of considerable value, including *inter alia* 186 villages, assessed to revenue for about Rs. 17,000 annum.

The mortgage is dated the 27th May, 1910. It is for the sum of Rs. 9,999 borrowed from the plaintiffs. The rate of interest is covered by the following provision :—

“ I, the declarant, do promise that I shall pay interest on the said debt at the rate of 2 per cent. per mensem on the 30th Jeth of each year. In case of non-payment of the annual interest, the interest will be taken as principal and interest will run thereon at the rate of 2 per cent. per mensem, that is, interest will be calculated on the principle of compound interest.”

There can be no question that these terms were high : if payment was not made the sum due on the mortgage would speedily mount

up. By the decree of the High Court which was pronounced on the 9th November, 1920, it is seen that the original debt of Rs. 10,000 had reached, with interest and costs calculated up to the 8th May, 1921, more than a lac of rupees, viz., Rs. 112,885. In eleven years the stipulation for interest at 24 per cent. compound had magnified the sum covered by the mortgage more than elevenfold. It is upon these facts, coupled with one other about to be mentioned, that the appellant takes his stand.

The statement in the defence admits that at the time of the execution of the mortgage the defendant was owner of one half of a valuable joint family property. The owner of the other half was his father. Father and son had quarrelled. Serious allegations are made by the son against the father; whereas it appears that the father had instituted criminal proceedings against the son. Shortly before the date of the mortgage the defendant had borrowed Rs. 1,000 from the plaintiffs so as to enable him to defend himself in these criminal proceedings. It is alleged that they caused him great mental distress, and that he required more money to conduct his litigations. That is the story.

Evidence was taken in the case. It is sufficient to say that the defendant gave no evidence at all. It is quite plain that no Court can accept a story thus unproved by its author as establishing a case either of mental distress or of undue influence under the Indian Contract Act. The only case which the appellant has is the case derived from the contents of the mortgage itself.

It is argued with force that these are unconscionable, and that it is the duty of the Court in India to step in either to rescind the contract or to rectify the bargain. It was the latter course which was argued for in the present case. In support of this argument much reliance was placed upon the judgment pronounced by Lord Davey in *Dhanipal Das v. Raja Maneshwar Bakhsh Singh* (33 I.A., 118.)

Before, however, addressing themselves to the authorities cited their Lordships think it desirable to make clear their views upon, in particular, Sub-section 3 of Section 16 of the Contract Act as amended. By this sub-section three matters are dealt with. In the first place the relations between the parties to each other must be such that one is in a position to dominate the will of the other. Once that position is substantiated the second stage has been reached, viz., the issue whether the contract has been induced by undue influence. Upon the determination of this issue a third point emerges, which is that of the *onus probandi*. The burden of proving that the contract was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other.

Error is almost sure to arise if the order of these propositions be changed. The unconscionableness of the bargain is not the first thing to be considered. The first thing to be considered is the relations of these parties. Where they such as to put one in a position to dominate the will of the other? Having this dis-

tion and order in view the authorities appear to their Lordships to be easily properly interpreted.

In the judgment of this Board in *Dhanipal Das v. Raja Maneshar Bakhsh Singh* (33 I.A. 118), the outstanding effect was that the borrower who mortgaged the estate was actually, at the date of the transaction, under the control of the Court of Wards. He was treated, to use the language of Lord Davey, as "under a peculiar disability" and placed in a position of helplessness, and the lender was proved to have been aware of that and, therefore, in a position to dominate the borrower's will. On page 126 Lord Davey thus expressed the Boards' view:—

"Their Lordships are of opinion that although the respondent was left free to contract debt, yet he was under a peculiar disability and placed in a position of helplessness by the fact of his estate being under the control of the Court of Wards, and they must assume that Auseri Lal, who had known the respondent for some fifty years, was aware of it. They are therefore of opinion that the position of the parties was such that Auseri Lal was 'in a position to dominate the will' of the respondent within the meaning of the amended s. 16 of the Indian Contract Act. It remains to be seen whether Auseri Lal used that position to obtain an unfair advantage over the respondent."

This case was followed in terms in the case of *Raja Maneshar Bakhsh Singh v. Shadi Lal* (36 I.A. 96), in which the bond in suit was given by a talukdar in Oudh without the knowledge and consent of the Court of Wards after his estate had been placed under it. In these circumstances the former case was followed, and Lord Collins expressed the opinion of the Board to be that they

"are satisfied that in this case also the borrower was placed in such a condition of helplessness that the lender was in a position to dominate his will and that he used that position to obtain an unfair advantage over the appellant."

It is sufficient to say that the borrower in the present case was *sui juris*; had the full power of bargaining and of burdening his estate, that his estate was not under the Court of Wards and that he lay under no disability. With regard to his helplessness nothing whatsoever is proved in the case except the bare fact that he being a man of wealth as owner of one-half of certain joint family property wished to obtain and did obtain certain monies on loan. The only relation between the parties that was proved was simply that they were lender and borrower.

It is an entire mistake to represent the decisions of this Board as being wanting in light upon the last mentioned case. For in *Sundar Koer v. Sham Krishan* (34 I.A. 9), the exact point was referred to by Lord Davey in the course of the judgment read by him:—

"There is no evidence of any actual exercise of undue influence by the mortgagees or of any special circumstances from which an inference of undue influence could be legitimately drawn, except that the mortgagor was in urgent need of money. The learned Counsel for the appellant argued that the mortgagees were thereby placed in a position 'to dominate the will' of the mortgagor, and cited a recent decision of this Board—

Dhanipal Das v. Raja Maneshar Baksh Singh. In that case, however, the borrower was 'a disqualified proprietor' under the Oudh Land Revenue Act, 1876, and his estate was under the management of the Court of Wards, and it was on that ground that their Lordships held that the borrower was under a peculiar disability and the position of the parties was such that the lender was 'in a position to dominate his will.' There is nothing of that kind in the present case, and their Lordships are not prepared to hold that urgent need of money on the part of the borrower will of itself place the parties in that position.

This precisely fits the situation of these parties. It has not been proved,—it might be said that it has not even been attempted to be proved,—that the lender was in a position to dominate the will of the borrower.

In these circumstances, even though the bargain had been unconscionable (and it has the appearance of being so) a remedy under the Indian Contract Act does not come into view until the initial fact of a position to dominate the will has been established. Once that fact is established, then the unconscionable nature of the bargain and the burden of proof on the issue of undue influence come into operation. In the present case, for the reasons stated, these stages are not reached.

Their Lordships think it right to observe that the judgment now pronounced is not in accord with the principles laid down by the Appellate Civil Court of Calcutta in *Abdul Majeed v. Khirode Chandra Pal* (42 I.L.R. (Calcutta Series) 690), that "where there is ample security, the exaction of excessive and usurious interest in itself raises a presumption of undue influence which it requires very little evidence to substantiate." Their Lordships think this decision to be wrong. There is no such presumption until the question has first been settled as to the lender being in a position to dominate the borrower's will. Their Lordships are further of opinion with reference to the citation of *Samuel v. Newbold* (1906 A.C. 461), that that case does not form any authority in the construction of the Indian Contract Act. The case was determined under the Moneylenders Act, 1900, as it expressly bears. The issue was thus stated by Lord Macnaghten:—

"It seems to me that the construction of the Moneylenders Act, 1900, is plain enough, and that the evidence before their Lordships is more than sufficient to show that this case is within the mischief which the Act was designed to remedy."

In the view of the Board cases of that character form no precedent for a decision of the present appeal which is rested on another and very differently worded statute.

Their Lordships are of opinion that the decree of the High Court should be varied by allowing compound interest on the principal at the rate of 4 per cent. per mensem from the date of the execution of the bond until 25th September, 1917, and thereafter simple interest at the rate of 6 per cent. per annum up to the date of realization, and that in other respects the decree of the High Court should be affirmed, and they will humbly advise His Majesty accordingly.

The appellants will pay the costs of the appeal.

In the Privy Council.

RAGHUNATH PRASAD SAHU

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SARJU PRASAD SAHU AND OTHERS

DELIVERED BY LORD SHAW.

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