(1939) 09 PAT CK 0032

In the Patna High Court

Babulal Marwari and Others APPELLANT

Vs

Tulsi Singh and Others RESPONDENT

Date of Decision : 01-09-1939

Acts Referred:
Contract Act, 1872 — Section 39, 62
Evidence Act, 1872 — Section 92

Citation : AIR 1940 Patna 121

Hon'ble Judges : Varma, J;Manohar Lall, J

Bench : Full Bench

Judgement

Manohar Lall, J.—This is an appeal by the plaintiffs against the decision of the learned Subordinate Judge of Bhagalpur by which he dismissed the suit of the plaintiffs which was instituted to recover a sum of Rs. 12,646 due on a rokka on the ground that there has been a novation of the contract sued upon and that the suit was, therefore, not maintainable. The facts may be briefly stated. On 30th April 1929 the defendants executed a registered handnote in favour of the plaintiffs for a sum of Rs. 9000 promising to pay interest at 12 annas per cent, per mensem. Two payments were made by the defendants, one Rs. 600 on 16th June 1931 and the other Rs. 368 on 9th June 1932.

2. In or about April 1935 the plaintiffs were ready to institute a suit to recover their dues on the rokka when, the case of the defendants, is they implored and entreated the plaintiffs and made them agree to an adjustment of account by arriving at a figure of Rs. 13,300 in full discharge of the remaining liability under the rokka of April 1929. The agreement was that Rs. 500 should be paid in cash on 27th April 1935 by tendering it on that very date and that a mortgage instalment bond for Rs. 12,800 should be executed and registered on that very day, the interest to run at 11 annas per mensem. The bond also provided for default clauses in case the instalments fixed thereby were not paid within time. Certain property was given in security for the payment of the debt as stated in para. 8 of the mortgage bond. There was a covenant of title with these terms added:

Having given assurances on these points the said creditor consented to have this bond executed by us. If anything to the contrary comes to light, we the executants Nos. 1 and 2 shall be severally and jointly liable to criminal prosecution for cheating and fraud and in that case the said creditor shall be competent to cancel the instalments and institute a suit for this entire amount without paying any regard to the instalments.

3. The plaintiff gives details in the plaint that defendant 1 acted fraudulently and made a number of misrepresentations with a view to induce the plaintiffs to enter into the agreement and take the mortgage bond from which quotations have been given above. In particular they asserted that the mortgagors had no title to give the property in security and that the defendants did not pay Rs. 500 in cash to the plaintiff which was a condition precedent for entering into the new agreement. In other words they repudiated that there was a novation of the original contract of rokka by the execution of the mortgage bond in question and instituted the present suit within two months of the date of the execution of the mortgage bond. The defendants admitted the passing of consideration of the rokka and that the loan was for legal necessity. The amount claimed in the suit was also admitted to be due, if the suit could be maintainable upon the rokka.

4. But the chief contention put forward by the defendants was that the suit was not maintainable inasmuch as the plaintiffs agreed to give up their rights under the rokka in substitution for the rights which accrued to them as mortgagees under the bond already referred to. They pleaded that the amount of Rs. 500 was paid in part in cash and the balance offered to be paid in kind as agreed to by the plaintiffs; but owing to the latter''s default in not supplying bullock carts the grains of the value of Rs. 400 remained undelivered. But they pleaded that the non-payment of Rs. 500 or any portion thereof cannot entitle the plaintiffs to ignore the mortgage bond and sue on the rokka. (See para. 19 of the written statement.)

5. It was denied that there was any defect in title or that any misrepresentation was made giving right to the plaintiffs to sue upon the rokka. To put it in other language the defendants contended that the plaintiffs could only sue to enforce the mortgage bond, and as admittedly the suit was instituted before the first instalment provided in the bond was due, they pleaded that the suit was premature. In view of the defence taken, the plaintiffs, on 22nd June 1936, prayed to the Court that the plaint may be amended and an alternative relief may be granted to the plaintiffs in this form:

If for any reason the Court holds that the plaintiffs are not entitled to a decree on the basis of the rokka, dated 80th April 1929, then a money decree for Rs. 12,646 may be passed on the basis of the mortgage bond, dated 27th April 1935 treating the same as a simple money bond.

6. The learned Subordinate Judge rejected the prayer of the plaintiffs by order No. 39 because in his opinion the proposed amendment, if allowed, would

change the scope of the suit ''altogether. The learned Subordinate Judge held that the defendants did not make any fraudulent misrepresentation in bringing about the execution of the mortgage bond. He repelled the plea of the defendants that Rs. 500 or any part thereof was paid, but held that the non-payment of Rs. 500 was no bar to defendants succeeding in their contention. Lastly, he held that even if it is assumed that the recital in the bond that the properties are the exclusive properties of the executants is false, it would give no right to the plaintiffs to sue on the rokka, as the plaintiffs have taken no steps up till now to cancel the mortgage bond and so long as the bond is not declared to be fraudulent and inoperative by a competent Court, the plaintiffs have no right to fall back on the rokka and bring a suit on the basis thereof.

7. This reasoning of the learned Subordinate Judge is not understood. The plaintiffs had made the necessary allegations in the plaint that in the circumstances alleged by them the mortgage bond stood inoperative and the defendants had made counter-allegations to prove that the mortgage bond was as effective as ever. In these circumstances the Court was bound to adjudicate upon the matter in controversy and I do not see what the learned Subordinate Judge means by saying that the plaintiffs have no right to ask for the relief unless they brought another suit before another Court to declare the mortgage bond fraudulent and inoperative. Mr. De appearing on behalf of the respondents has strenuously argued that the plaintiffs have no right to maintain the suit on the basis of the rokka in the circumstances in which it must be held that there was a novation of contract.

8. He resisted the appeal of the plaintiffs wherein they pray that the order of the Court refusing amendment of the plaint should be set aside by relying upon the case in Ma Shwe Mya v. Maung Mo Hnaung AIR (1922) PC 249. The first question which arises for consideration is whether in the circumstances there was a novation of contract. The evidence of the plaintiffs was clear that the defendants agreed to pay Rs. 500 in cash, and for the balance offered to execute a registered instalment mortgage bond. They are supported in this by the evidence of Banarsi Chaudhuri and by the recitals in the mortgage bond. The plaintiff at p. 15 states:

He also told me that I should be at liberty to sue on the rokka if there be any trouble regarding the lands and his representation be found to be false in any respect and if he did not pay Rs. 500 in cash. On these conditions, I eventually agreed to take a mortgage bond from him.

9. The plaintiff''s case that he never received Rs. 500 in cash has been accepted by the learned Subordinate Judge but the plaintiff further stated that he never got the registration receipt of the mortgage bond. The learned Subordinate Judge took the view that there is evidence in this case that the registration receipt was in fact offered to the plaintiff 1. He refers to para. 9 of the plaint where it is stated that the plaintiffs did not take registration receipt nor was any endorsement of satisfaction made on the original rokka. I do not see how the

learned Subordinate Judge infers from this recital that the registration receipt was in fact offered to the first plaintiff. He nowhere discusses the evidence of the plaintiff where he says at p. 15, line 30, that the defendant did not give him the registration receipt of the mortgage bond.

10. It is significant that there was no cross-examination of the plaintiff on this point. The defendant in para. 10 of the written statement did not make out any case that the receipt was offered to the plaintiff as inferred by the learned Subordinate Judge. His case is that the registration receipt was made over by defendant 1 to plaintiff 1 with an endorsement to take back the document from the registration office. The evidence on this point may now be considered. Witness 1 for the defendants is a deed-writer who says that after the registration of the bond Tulsi, namely defendant 1, made over the registration receipt to Babulal, who is plaintiff, P.W. 1, in the case. The second witness for the defendants is Palakdhari Singh.

11. He also says that Tulsi Singh signed the registration receipt and made it over to Babulal at the bistara of Ramadhin. Tulsi Singh, himself a defendant, was the third witness for the defendants. He says at p. 24 that after registration he made over the registration receipt to Babulal at Ramadhin''s bistara. This is all the evidence on this point. It seems to me that the learned Subordinate Judge was not impressed with the evidence of the defendants'' witnesses because he gives the finding, already referred to, that the registration receipt was in fact offered to plaintiff 1 and not that the registration receipt was delivered to plaintiff 1. I myself have examined the evidence of the witnesses for the defendants and I am unable to place any reliance upon their evidence, on this point. The deed-writer has made many discrepant statements in the cross-examination. He is also a witness to prove the payment of Rs. 100 to Babulal which has not been accepted by the learned Subordinate Judge. He also supports the defendant in full that the balance of Rs. 400 was to be paid in the shape of grains and that all these terms were settled before the bond was commenced to. be written.

12. Palakdhari Singh himself deposed to the payment of Rs. 100 in cash and to the alleged arrangement to deliver Rs. 400 worth of wheat. The last witness is Tulsi himself who says that he paid Rs. 100 in cash and proposed to pay the balance of Rs. 400 in the shape of wheat on his sending a cart. In all these matters the learned Subordinate Judge has disbelieved the story of the defendants. In my opinion therefore there is no evidence of reliable character to show that the registration receipt of the mortgage bond was either delivered to or offered to the plaintiff. The result then is that neither part of the new contract which was to be in sub-stituiton of the original liability was carried out by the defendants. In such circumstances the provisions of Section 39, Contract Act, apply. It provides:

When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promise may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

13. I have held that defendant 1 refused to perform his promise in its entirety. He neither paid any part of Rs. 500 nor did he deliver the registration receipt to the plaintiff. If he had offered to deliver that receipt or had delivered it to the plaintiff, the plaintiff would, in all probability, have refused to accept it without payment of Rs. 500 as was distinctly agreed upon. Let me assume however that the registration receipt was offered to the plaintiff and he refused to accept it. The result still is that the plaintiff has not signified by words or conduct his acquiescence in the continuance of the substituted contract. The mortgage bond was never taken delivery of by the plaintiff from the registration office. It having been found by the learned Subordinate Judge that Rs. 500 was not paid, it follows that the agreement to substitute Rs. 13,300 in place of the old dues on the rokka has never been carried through by the defendants so far as the payment of Rs. 500 is concerned, nor by the plaintiff in accepting the mortgage bond the execution whereof was a unilateral act of the defendant.

14. It is to be noticed that this is not a case where the mortgage bond was for Rupees 13,300, the amount remaining due on the rokka, but a mortgage bond was to be executed for the balance of Rs. 12,800 after payment of Rs. 500. In other words the mortgage bond assumed, as the recitals show, that Rs. 500 was being paid in cash before or with the execution and registration of the bond. In face of this difficulty the learned advocate for the respondents contended that the remedy of the plaintiff was. to sue for recovery of Rs. 500, as het was in law bound to accept his position as a mortgagee under the mortgage bond, as, in his submission, the registration of the mortgage bond transferred title to the mortgagee. I do not agree with this contention. The agreement between the parties was not that the plaintiffs should sue for recovery of Rs. 500 and become a mortgagee for the balance, but the agreement was that Rs. 500 would be paid in cash immediately as a part of the agreement of passing the liability for Rs. 12,800 on the mortgage bond.

15. As the defendant refused to perform his part of the contract in its entirety, the plaintiff was at liberty to resile from his part of the contract in its entirety with the result that the parties were relegated to their own position under the rokka.

The present case is similar to the case reported in Manohar Koyal v. Thakur Das Naskar (1888) 15 Cal 319 and I do not see how it can be distinguished from the facts of the present case as was sought to be done by the learned Subordinate Judge. Section 62, Contract Act, does not deal with a, case of part performance as the learned Subordinate Judge seems to think. Section 62 deals with a case of novation, that is where the parties to a contract agree to substitute a new contract for it, or to rescind or alter it and enacts that the original contract need not be performed. Here the parties had agreed that the old contract should be substituted by a new contract, namely by payment cash down of Rs. 500 and by execution and registration of a mortgage bond for the balance. Rs. 500 never having been paid and the plaintiff not accepting by words or conduct the position as a mortgagee, there was no novation in the eye of the law.

16. The learned advocate for the respondents argued that where a mortgage bond was expressly executed to secure a sum stated in the mortgage bond but it turned out that the amount actually advanced was less, various High Courts have held that the mortgage bond is valid to the extent of the amount advanced and he sought to apply the principle to the facts of the present case. In my opinion, this contention is fallacious. It is obvious that in these circumstances the mortgage bond would be valid for the amount actually advanced because the mortgagor has actually accepted a portion of the money which was contracted to be advanced. He never refused to accept the money offered but he retained it and therefore it is not surprising that the Courts have held that the mortgage bond is valid to the extent the mortgagor has kept a portion of the consideration advanced to him.

17. I put a question to the learned advocate in argument that supposing the money actually advanced was nil, although it was stated in the mortgage bond, which had been registered, that Rs. 2000 had been advanced, can it be seriously contended that there had been a transfer of property in favour of the mortgagee? The answer obviously was, no, because when the Transfer of Property Act speaks of mortgage as a transfer of interest in the property, it is always with the qualification that the right of the mortgagee is simply to enforce the security to get back the advance which he has actually made; in other words to recoup himself for the advance to the extent he has carried out his contract, if accepted by the mortgagor.

18. I have therefore no hesitation in holding, in the circumstances of the present case, that there was no novation of contract within the meaning of Section 62, Contract Act, and that the plaintiff can always sue upon the original rokka as he has actually done in this case.

The learned advocate for the respondents relied upon the case in Radhamohan Thakur v. Bepin Behari AIR (1988) Pat 505 but that case was a case of a sale deed where the consideration was paid in part and the terms of the contract were clear that title was to pass with the registration of the document. He also referred to the case in Har Chandi Lal v. Sheoraj Singh AIR (1916) PC 68, but I do not see how this case helps him. In that case their Lordships held that the

mortgagee''s intention at the time when the two deeds of 1887 were executed was to accept a new security, extending to the whole mauza, for the indebtedness both of Jai Chand and Phul Singh in lieu of the security of 13th November 1876. But the original intention of the mortgagee was entirely frustrated by the fact that the two deeds were held not to be binding on Mt. Nandan, and it does not appear to their Lordships to be consistent with equity or good conscience that the first three defendants, having successfully maintained that the transaction embodied in the two deeds of 1887 was not binding on Mt.

Nandan, and consequently did not bind them as heirs of Jai Chand, should now claim the benefit of the transaction as a release of the mortgage of 13th November 1876.

19. Their Lordships held therefore in the end that in the circumstances "the mortgage of 1876 was in the events which happened wholly unaffected by the mortgages of 1887." I think this case rather helps the appellant that in the circumstances of this case the mortgage bond of 27th April 1935, in the events which happened did not have the slightest effect upon the rokka of Payana Reena Saminathan v. Pana Lana Palaniappa Chetty (1913) 41 IA 142 illustrates the case of accord and satisfaction by substituted agreement. In that case the receipt, as construed by their Lordships, was given by the appellants, and accepted by the respondent, and acted on by both parties and therefore it was held that this proved conclusively that all the parties agreed to a settlement of all their existing disputes by the arrangement formulated in the receipt; and this was held to be a clear example of what used to be well-known in Common law pleadings as "accord and satisfaction by a substituted agreement." Their Lordships observed:

No matter what were the respective rights of the parties inter se they are abandoned in consideration of the acceptance by all of a new agreement. The consequence is that when such an accord and satisfaction take place, the prior rights of the parties are extinguished. They have in fact been exchanged for the new rights: and the new agreement becomes a new departure, and the rights of all the parties are fully represented by it.

Upon the findings which I have arrived at in this case I hold that there has been no accord and satisfaction by substituted agreement, the defendants did not pay Rs. 500 to the plaintiff as agreed upon; and the mere registration of the mortgage bond without the plaintiff accepting it by words or by conduct expressly or impliedly does not operate to relieve the defendants from meeting their obligation under the rokka. Lastly, the learned advocate strongly relied upon the case in AIR 1938 198 (Privy Council) in support of his contention that no evidence is admissible to prove an agreement in defeasance of the contract, but evidence was admissible only to prove an agreement suspending the coming into force of the contract within the meaning of Section 92, Evidence Act.

20. With respect I think there is a misunderstanding of the decision in the case. In the case before their Lordships the promissory note sued upon was by its express terms payable on demand with the result that the obligation under the note attached immediately; an agreement was sought to be proved as a condition precedent to the execution of the promissory note that no liability was to attach thereto until the executants received certain assets to which the promise agreed. Their Lordships at p. 755 while dealing with the arguments advanced pointed out the distinction which must always be borne in mind between a collateral agreement which alters the legal effect of the instrument and an agreement that the instrument should not be an effective instrument until some condition is fulfilled, or to put it in another form:

It is necessary to distinguish an agreement in defeasance of the contract from an agreement suspending the coming into force of the contract contained in the promissory note.

21. The learned advocate relies upon the words "in defeasance of the contract" in the quotation just given. The present case is entirely different. No agreement is being proved to alter the legal effect of the instrument which is admitted to be a mortgage all the time. What is contended and what Section 92, Evidence Act, allows, is to prove a condition precedent preventing the attachment of any obligation to the agreement or from accepting the rights given by the mortgage bond of 1935. Upon a careful consideration of all the arguments advanced, I am of opinion that the plaintiffs'' suit ought to have been decreed for recovery of the amount due under the rokka sued upon. The plaintiffs have not charged any interest from the date of the suit. The plaintiffs will however be entitled to interest at the rate of 6 per cent, from the date of the decree of this Court. We have been asked to fix instalments under the provisions of the Bihar Money-lenders Act. I think this is a fit case in which the Court should fix instalments. Accordingly I fix the instalments at Rs. 5000 a year in this way, that the defendants should pay to the plaintiffs Rs. 5000 together with interest at the rate of 6 per cent, per annum from this date on or before 31st August 1940, thereafter another sum of Rs. 5000 together with interest at the same rate on or before 31st August 1941 and the balance with interest will be paid on or before 31s6 August 1942.

22. In the circumstances it is unnecessary to consider whether the plaint ought to have been allowed to be amended. But I am of opinion that upon the facts which have been dealt with in the judgment of my learned brother with which I agree it must be held that the plaintiffs had an immediate right on the date of the suit to institute a suit for the entire amount without paying any regard to the instalments. I am satisfied that the property which was given in mortgage was not free from defects of title and that the assurances given by defendant 1 to the plaintiffs were all erroneous, if not deliberately false. In that view I would have allowed the amendment of the plaint. But as I have stated, it is unnecessary to consider this point at length, because in my view even if there are no defects of title in the mortgaged properties nor any false assurances as detailed in para. 8 of the mortgage bond, in the circumstances of this case there has been no substitution in fact and in law of the agreement entered in lieu of the rights of the plaintiffs on the rokka.

23. I would therefore allow this appeal and grant the plaintiffs a decree for the amount as claimed with costs of the trial Court and of this Court.

Varma, J.

I have had the advantage of reading the judgment of my learned brother and I agree with the conclusions arrived at therein. But I would like to add a few words, especially with regard to the argument of Mr. Sushil Madhab Mullick that the mortgage bond was never acted upon and contained misrepresentations which made it impossible for the plaintiffs to accept the mortgage. Mr. B.C. De has argued that once the mortgage bond had been executed by the defendants the only remedy left to the plaintiffs was to sue for a breach of any contract. Now let us see whether the allegations of the plaintiffs contained in the plaint that there were misrepresentations in the mortgage bond are correct.

24. The plaintiffs complained that the following properties were represented by defendant 1 to be his self-acquired properties: half of 76.33 acres, i.e., 38.165 acres of jote lands situated in Mauza Bikrampur Dhanra, Tauzi No. 316 in the zamindari of Mr. Davis, 11.84 acres of jote land situated in Mauza Bikrampur Dhanaura, Tauzi No. 273 in the zamindari of Lachmi Prasad Chowdhri,

Defendant 1 further represented to plaintiff 1 that his surviving nephews of the other branches of the common ancestor Dina Singh had been separate from him in mess, estate and worship and had no interest in the properties proposed to be mortgaged by him and his sons and grandsons. In order to understand the allegations made in para. 10 of the plaint, it is necessary first to look into the genealogy. The common ancestor Dina Singh had five sons Kanhaiya Singh, Gurdeyal Singh. Tulsi Singh, Bhagu Singh and Bhikari Singh; Kanhaiya Singh had three sons, Nathuni, Banwari and Raghoo; Gurdeyal Singh died issueless;

Tulsi Singh had three sons, Rampearay, Ramdhari and Sahdeo; Rampearay had three sons, Ramlakhan alias Lakhan, Ramratan alias Ratan and Ramcharan alias Noonoo; Bhagu had two sons, Arjun and Bhim; Bhikari Singh had a son Teku Singh; and Teku Singh had three sons, Karu Singh, Misri Singh and Tadhey Singh. In para. 10 of the plaint the plaintiffs allege the following misrepresentations: (a) that Ramdhari Singh, defendant 3, had been adopted by the said Bhaggu Singh and was no longer defendant l''s son and had no interest in the properties of his own branch; (b) that the mortgaged properties were his self-acquired and exclusive properties; (c) that his nephews were separated members and had no interest in the mortgaged properties; (d) that the defendants would pay Rs. 500 cash to the plaintiffs at the time of the execution of the mortgage bond.

25. In para. 12 of their written statement, the defendant asserted that the statements made in sub-para. 10 of the plaint were true. In the written statement of Ramdhari Singh also we find that in para. 5 he stated he was living separately from his father and that he had been adopted by his uncle Bhaggu Singh, and he also asserted that defendant 1 was not the manager or the karta of the family of Ramdhari Singh. As against this Mr. Mullick has drawn our attention to the terms of the mortgage bond:

We, the executants, are members of a joint Hindu family governed by the Mitakshara school of law. The karta of the joint family is executant No. 1 (Tulsi Singh) and executants Nos. 2 and 3 and executants Nos. 4, 5 and 6 are the sons and grandsons of executant No. 1. In this joint family the executants Nos. 1 and

2 are the only persons who are majors. Save and except us, the executants, there is no other male person either major or minor in this joint family. This bond is executed by executant No. 1 in his own behalf and as karta of the joint family of us (the other) executant.

As regards the properties mortgaged, it was alleged that

the said mortgaged properties are owned and possessed exclusively by executant No. 1 who has purchased them from his own funds under a sale deed dated 12th May 1916, executed by Babu Bansidhar Marwari, under another sale deed, dated 7th June 1920, executed by Kurman Manjhi, under the third sale deed, dated 20th April 1921, executed by Jokhri Mal. The mortgaged properties are not burdened with any encumbrance or rehan and charge and belong exclusively to executant No. 1 and are free from all defects of title and mortgage.

Further on it is said:

If anything to the contrary comes to light, we the executants Nos. 1 and 2 shall be severally and jointly liable to criminal prosecution for cheating and fraud, and in that case, the said creditor shall be competent to cancel the instalments and institute a suit for this entire amount without paying any regard to the instalments.

Now the properties mortgaged are stated in para. 12 of the bond as follows:

The 8 annas pokhta share being 38.16 1/2 acres out of the 16 annas share which is 76.33 acres of land purchased by (me the executant No. 1) and Kartik Singh in equal shares, which is in the possession and occupation of us, the executants and which lie in Mauaza Bikrampur Dhanaura, Tauzi No. 316, Thana No. 344, pargana thana, and sub-registry Colgong, District Bhagalpur, within the zamindari of Mr. P.C. Davis and others, paying an annual rental of Rs. 250 12-0 besides cess in respect of the entire lands (and then the boundaries are given.)

The 16 annas interest being 7.70 acres of nakdi jote lands situate in Mauza Bikrampur Dhanaura Mahal Maksuspur Khurd, Tauzi No. 273, Thana No. 844, Pargana, Thana and Sub-Registry Office Colgong, District Bhagalpur, paying an annual rental of Rs. 28-10-17 1/2 with cess within the zamindari of Babu Lachhmi Prasad Chaudhry and the suabharnadar Rai Bahadur Sukhraj Rai.

Mr. Mullick contends that this document was executed on 27th April 1935, but on 27th September 1934, in a partition suit in the family, which was partition suit No. 60 of 1932, a compromise petition was filed with a prayer that a decree should be passed in terms of the compromise. Now Kara Singh and others were the plaintiffs and Tulsi Singh and other were the defendants in that suit. The compromise begins by saying that:

According to the partition the plaintiffs got the properties mentioned in Schedule 1 of this petition by consent of the parties. The remaining joint family properties of the parties which are specified in Schedule 2 of this petition fell to the defendants by consent of the parties.

In para. 11 it is mentioned that:

Besides the properties which have fallen to the plaintiff''s share according to private partition and which have been specified in Schedule 1, the remaining properties whether immovable or moveable ''have all fallen to the share of the defendants and ''remained with them.

Now, Schedule 2 properties include item 9:

The 23 bighas 10 kathas 10 dhurs of nakdi jote lands situate in mauza Bikrampur Dhanaura, pargana and thana Colgong, District Bhagalpur, teuzi No. 273,

and item 12 is:

The 68 bighas of nakdi jote land situate in Mauza Amanat Sarkar within mauza Bikrampur Dhanaura, pargana, and thana Colgong, district Bhagalpur, tauzi No. 316.

26. In this partition suit Tulsi Singh, Pearay ''Singh and Ramdhari Singh under the guardianship of his father and guardian ad litem Tulsi Singh, Lakhan Singh, Ratan Singh, and Noonoo Singh were described as minor sons of Pearay Singh under the guardianship of Pearay Sinh, their father and guardian ad litem, Arjun Singh and Bhim Singh were described as minor sons of Bhagu Singh under the guardianship of Tulsi Singh, their uncle and guardian ad litem, by caste Rajputs, by occupation zamindars, residents of Mauza Sobhnathpur, pargana and thana Colgong, District Bhagalpur. Mr. Miullick argues that by this decree all the defendants including Ramdhari became entitled to the properties mentioned in Schedule 2 of the compromise petition, and the two properties (items 9 and 12) are the same that have been mortgaged.

27. He urges, therefore, that it is clear from this that Ramdhari, though represented to have been adopted by Bhagu Singh, got an interest in the properties which had been partitioned and in which all the defendants in that suit acquired an interest including Ramdhari. Therefore when the mortgage bond represented that Ramdhari had no interest in the property, it was a case of misrepresentation. Therefore the present plaintiffs were not bound by the terms of the mortgage bond because it contained this important misrepresentation.

There is one other point that has struck me with regard to the terms of the mortgage bond which entitles the plaintiffs to urge that the terms of the mortgage bond were not acted upon. From the terms of the mortgage bond it appears that after accounting Rs. 13,300 was found due from the defendants to the plaintiffs and that the mortgage bond itself is for a sum of Rs. 12,800 payable in instalments of Rupees 800 each year from Jeth 1343 to Jeth 1358. The mortgage bond itself is not for the sum of Rs. 500, which is the difference between Rs. 13,300 and Rs. 12,800. Evidently therefore the sum of Rs. 500 was to be paid at the time of the execution of the bond. This is apparent from the recital contained in para. 3 of the bond:

Hence we, the executants Nos. 1 and 2, implored and entreated Babu Babulal Marwari, the eldest son of Babu Mukti Ram Marwari (who is dead now) and made him agree to accept Rs. 500 in cash which we tender to day out of Rs. 13,300 which has justly become payable now after adjustment of accounts and setting off the payments (already) made under the aforesaid handnote and to get a registered mortgage instalment bond executed by us for the remaining amount of Rupees 12,800. So that his said debt may be paid with facility by us, the executants.

28. If this sum of Rs. 500 were not taken out of the actual amount due, there could not have been instalments of Rs. 800 to make up the total sum of Rs. 12,800 and the lower Court has held as follows:

as regards the sum of Rs. 500 there is no reliable evidence that any part of it was paid by the defendants.

So it appears that one of the important conditions of the bond was not fulfilled by the defendants. The registration receipt of the bond remained with the defendants. It was an unilateral transaction and therefore it cannot be said that the mortgage bond was in any way acted upon. This state of affairs comes well within the principles laid down in 44 IA 604 where the owners of a five-sixths and one-sixth share in a mauza separately mortgaged their shares to the same mortgagee to secure Rs. 5500, and Rs. 4000, respectively.

29. Subsequently, two new mortgages were executed by the persons liable as mortgagors for the amounts due under the respective mortgages, but making the whole property liable for each debt. The mortgagee obtained a decree against the owner of the one-sixth share upon his new mortgage, but the new mortgage by the owner of the five-sixths share was held to be invalid. The decree was executed, but only against a one-sixth share of the mauza. In a suit by the mortgagee upon the original mortgage of the five-sixths share it was held that the mortgage was more discharged and that the mortgagee was entitled to a decree. In the course of the judgment their Lordships observed:

It is, of course, true that the mortgagee''s intention at the time when the two deeds of 1887 were executed was to accept a new security, extending ''to the whole mouza, for the indebtedness both of Jaichand and Phul Singh in lieu (inter alia) of the security of 13th November 1876. Pursuant to this intention, he appears to have handed over the mortgage of 13th November 1876 to Phul Singh. ''But the original intention of the mortgagee was entirely frustrated by the fact that the two deeds were held not to be binding on Mt. Nandan, and it does not appear to their Lordships to be consistent with equity or good conscience that the first three defendants having successfully maintained that the transaction embodied in the two deeds, of 1887 was not binding on Mt. Nandan, and consequently did not bind them as heirs of Jaichand, should now claim the benefit of the transaction as a release of the mortgage of 13th November 1876.

30. In this case after looking at the facts it is clear that although the mortgage bond was executed, it contained serious misrepresentations and one of the important terms upon which the mortgage bond was executed was not fulfilled, and the registration receipt remained with the defendants. In these circumstances I am of opinion that the mortgage bond was never acted upon and the plaintiffs were entitled to sue on the rokka. I therefore agree with the order passed by my learned brother.

