(1935) 02 PAT CK 0016

In the Patna High Court

Case No : Appeal No. 71 of 1931

Dwarka Ram and others — APPELLANT

Vs

Bakshi Parnaw Prasad Singh and others — RESPONDENT

Date of Decision : 12-02-1935

Acts Referred:

Citation : (1935) 02 PAT CK 0016

Judgement

Rowland, J.—This is an appeal by the plaintiff in a suit founded on three mortgage bonds. The defendants are Bakshi Parnaw, Prasad Singh and Bakshi Onkar Prasad, sons of Bakshi Ram Pragas Singh, deceased. Parnaw was major and Onkar was minor at the time of the execution of the bonds. The first bond was executed by the father and Parnaw and the other two were executed by Parnaw only. The suit was contested by defendant 2 only who challenged execution, passing of consideration and necessity for the bonds. He also raised a plea that his father Bakshi Ram Pragas Singh was of unsound mind on the date of the execution of the bonds.

2. The Subordinate Judge has found that all three bonds were duly executed and that the consideration was paid. He has found that Bakshi Parnaw Singh was the karta when the bonds in the suit were executed and that Bakshi Ram Pragas Singh was not in a sound state of mind when he joined in the execution of the first bond in suit. His finding as regards necessity was that the plaintiff had not proved either necessity or proper enquiry and as a result he dismissed the suit holding the debts to be not binding on the estate. Those findings which are in favour of the plaintiff have not been challenged by the respondents and the points for determination in the appeal are whether the consideration money of the bonds was advanced for necessity or after proper enquiry as to necessity and whether Bakshi Ram Pragas Singh was of unsound mind at the time of the first bond. The first bond Ex. 1 was dated 30th October 1917; it is for a consideration of Rs. 1,400 and stipulates for interest at 12 per cent per annum. The executants are Ram Pragas Singh and Parnaw Prasad Singh as kartas of their joint family. The bond recites six items of necessity for which the loans were taken. I shall

deal with them in order but should first state that the original bond is not in evidence. The order-sheet dated 28th July 1930 shows that the entire record was missing in consequence of a theft having taken place in the office. Accordingly parties filed copies of the plaint; written statement and documents which were used at the trial. During the trial the plaintiff obtained certified copies of the three bonds from the registration office which he filed on 28th August 1930, but by oversight they were not marked as exhibits. At the hearing of the appeal the plaintiff tendered them in evidence and the other side not having raised any objection they have been marked as exhibits in this Court.

3. The plain copies of the three bonds were Ex. 1, 1 (a) and 1 (b), and we have marked the certified copies as 1/1, 1 (a)/1 and 1 (b)/l. I may conveniently refer here to the plain copies of hand-notes used by the plaintiff in supports of some of the necessities. The defendants on 25th August 1930 filed a petition stating that the hand notes of which copies have been filed by the plaintiff were not filed before and that the plaintiff by filing these copies wanted to take undue advantage of the loss of the record. Defendant supported this petition by an affidavit dated 26th August 1930. Defendant prayed that the copies might not be taken in evidence. To this petition the plaintiff filed a rejoinder supported by an affidavit traversing the above allegation. At the trial the plaintiff examined as a witness Mahabir Prasad, the registered clerk of his pleader who deposed that both bonds and handnotes had been filed in the suit and that he had made the copies from the originals. The contesting defendant though he entered the witness box did not depose anything in support of his allegation that no such handnotes had been filed. The Subordinate Judge was therefore right in accepting the evidence and admitting the copies of handnotes.

4. The first item of necessity recited in the bond Ex. 1 is payment of Rupees 916-13-3 to the Maharaja of Dumraon on account of a rent decree in respect of Pandepur which was advertised for sale in execution case No. 269 of 1917. The plaintiff deposes that Bakshi Ram Pragas and Parnaw Prasad assured him that they had to pay the sum of Rs. 916-13-3 to the malik on account of the rent decree. He says that they showed him the sale proclamation which he got Dwarka Lal to read and thus learnt that Rs. 916-13-3 was due to the Raj. He says that he went to Buxar and inquired of the sheristadar who confirmed this after referring to a paper and he says that the decretal dues were deposited in Buxar Munsiff. Against this evidence of the plaintiff is the bare statement of defendant 2 Bakshi Onkar Prasad Singh "Maharaja had no decree for arrears of rent against us and no decree was ever paid." This witness having been a minor and a student of a school at the time of the bond is manifestly incompetent to speak from first hand knowledge. He says that he learnt the fact that there was no decree for arrears of rent on inquiry from the law agent at Buxar which inquiry he made after the institution of the suit. He cannot name the law agent at Buxar though he says that he is alive. He has not cited the law agent as a witness. He says that the information was given to him after referring to the registers of the Dumraon Raj and he has not called for the registers. That is to

say there is no real rebutting evidence. The Subordinate Judge''s comment on this alleged necessity is:

It cannot be doubted for a moment that he is simply talking lies in Court.

5. These words are said by the Subordinate Judge not of the defendant but of the plaintiff. The reason given by him is that there is no document on record to show the existence of the decree; that the plaintiff has not produced the sale proclamation or the copy of the chalan and cannot name the Court or the date fixed for sale in the execution case or the sheristadar from whom he inquired about necessity. The Subordinate Judge has not referred to the fact that the bond Ex. 1 itself recites this necessity with particulars of the number of the execution case and the property and establishes an admission by the executants of the existence of that necessity. It certainly corroborates the statement of the plaintiff that he was assured of the existence of this necessity by the executants themselves and to my mind there is no good reason why the plaintiff''s statement regarding inquiry on this point should not be accepted.

6. The plaintiff has asked us in appeal to admit in evidence a certified copy of list of records disposed of and deposited in the record room to prove the existence of execution case No. 269?decree-holder Maharaja of Dumraon and judgment-debtor Bakshi Ram Pragas Singh. This was filed by him in the lower Court on 3rd September 1930 with a petition praying for it to be admitted in evidence and stating that he had been asked by the Court to produce it. This was after the close of argument and the Subordinate Judge declined to admin it in evidence. We have been asked to admit this document in evidence on appeal but in my opinion it is not necessary to do so. An appellate Court invited to admit additional evidence on appeal under O. 41 R. 27 should do so with great caution as was strongly emphasised by their Lordships of the Privy Council in Parsotim Thakur v. Lal Mohar Thakur, 1931 PC 143 = 132 IC 721 = 58 IA 254 = 10 Pat 654 (PC) and it is difficult to bring the introduction of this document in evidence at this stage under either the first or the second sub-rule of O. 41, R. 27. Such additional evidence may be admitted if the Court finds it necessary to enable it to pronounce judgment. But in the present case it seems very clear that the evidence of the plaintiff that after proper inquiry he was satisfied of the existence of this necessity ought to be accepted and it is not therefore necessary to admit further corroborating evidence on this point. The Subordinate Judge was not justified in calling the plaintiff a liar merely because of the absence of some possible items of corroborative documentary evidence with regard to a transaction 12 years old in respect of which the defendant if he chose could have adduced reliable rebutting evidence. Parnaw, the brother of the contesting defendant, is alive and defendant 2 has admitted

he is Honorary Magistrate at Buxar, he is my well-wisher, he is competent to manage and understand his business; I believe him to ha faithful.

7. There cannot in the circumstances of the present case be any suggestion that

defendant 1 has been or is colluding with the plaintiff. I am clearly of opinion that Rs. 916-13-3 was in fact borrowed to save the family property from sale in execution of a rent decree. (After examining the remaining items His Lordship considered the evidence regarding insanity and the judgment proceeded). I now turn to the question of onus of proof. The leading case of course is Hanuman Prasad Pande v. Mt. Babui Mconraj Koonwaree, (1854) 6 MIA 393 = 18 WR, 81n = 2 Suther 29 = 1 Sar 552 (PC). That was a suit to recover possession of property in the possession of a usufructuary mortgagee and their Lordships observed that

the question on whom does the onus of proof lie in such suits as the present is one not capable of any general and inflexible answer, the presumption proper to be made will vary with circumstances and must be regulated by and dependent upon them.

8. This case has been applied and followed in almost all the many succeeding decisions. It was further observed that the representations made by the manager accompanying the loan had been held to be evidence against the heir and that such prima facie proof was reasonable and rightly to be required where the lender seeks to enforce his security against the heir. In Banga Chandra Dhur v. Jagat Kishore, 1916 PC 110 = 36 IC 420 = 43 IA 249 = 44 Cal 186 (PC), it was stated rather more definitely that the burden of proving that the dispositions were lawful rests on the lender and this dictum was repeated in Anand Ram v. Collector of Etah, 1917 PC 188 = 44 IC 290 = 40 All 171 (PC). In the former of these decisions it was stated that recitals by themselves cannot be relied on for proving the assertion of fact which they contain but the recitals, their Lordships thought,

cannot be disregarded nor on the other hand can any fixed and inflexible rule be laid down as to the proper weight which they are entitled to receive.

9. In Dharam Chand Lal v. Bhawani Misrain, (1898) 25 Cal 189 = 24 IA 183 = 1 C W N 697 (PC) apparently it was sought to support the alleged necessity for a mortgage by the recitals only without evidence of representation having been made to the lender that there was necessity and in the circumstances of that case it was held that necessity was not established and the transaction was had. Another circumstance which was considered was that Saraswati, the borrower, had admittedly received a large sum on the death of her husband, a circumstance which suggested an inference that there was no necessity. On the other hand in Benares Bank, Ltd. v. Hari Narain, 1932 PC 182 = 137 IC 781 = 59 IA 200 = 54 All 564 (PC) where the necessity for some items of advance had been fully established and as to 1 item the the proof rested on the recital coupled with a representation as to a necessity by one of the borrowers the High Court thought that necessity for this item was not established but the Judicial Committee were unable to agree. They attached importance to the representation as corroborating the recital and gave the plaintiff a decree for the disputed amount.

10. For the respondents in the appeal before us great stress has been laid on the burden of proof and it has been argued with special reference to Dharam Chand Lal v. Bhawani Misrain, (1898) 25 Cal 189 = 24 IA 188 = 1 CWN 697 (PC) that the plaintiff was bound to show not only that the antecedent debts were due but that they could not be paid without entering into a mortgage. That extreme position would place on the lender an impossible burden of proving facts not within his knowledge and not accessible to him without pursuing his enquiry to a length which the borrower might have resented as being in the nature of an inquisition and the argument is not supported by the decision relied on. In the decision the facts indicated prima facie that there was no pressure on the estate and no necessity to borrow because the widow had recently received a very large sum of money. In the present case the defendant Onkar has indeed sought to show that there was no necessity by stating in his evidence that the family were well off, that they had an income of Rs. 4,000 from the zamindari and kast lands, but he has produced no papers to support this bare assertion and there are some circumstances in this case rendering it far from improbable that the family were in difficulties at the time of the transaction we are discussing. There had been disputes with the tenantry so acute that the raiyats of Gaighat in or about 1910 beat Pragas inflicting injuries to which his insanity has been attributed. Onkar''s own statement is that thereafter he could not properly understand his business and the management devolved on Parnaw and Onkar under the direction of their grandmother, their mother being dead.

11. That is itself a state of things in which it is likely that the management might be more or less inefficient. If the shikmi pattas put in evidence by defendants are genuine, portions of the family holding, about 14 bighas in extent, were let out on somewhat unusual terms. Settlements were made for one year at a time and all the rent was taken in advance. Without laying to much stress on the the matter it may he said that this method of settlement indicated a need of realising ready cash and a difficulty in carrying on the cultivation of the holding at the expense of the family. Then there are successive borrowings by Parnaw under Exs. 3 (d) dated 10th January 1917, 3 (b) dated 31st May 1917 and 3 (c) dated 6th June 1017. The repeated borrowing of small amounts was referred to in Banga Chandra Dhur v. Jagat Kishore, 1916 PC 110 = 36 IC 420 = 43 IA 249 = 44 Cal 186 (PC) as a circumstance supporting the inference that there was necessity for borrowing. In my opinion the evidence adduced by the plain tiff should have been accepted as proving necessity respecting all the items of Rs. 916-13-3, Rs. 61-3-0, Rs. 200, Rs. 107-8-0, Rs. 65 and Rs. 49-7-9. This last item was taken according to the recital for "road cess and expenses of a suit and execution and registration of bond:" for this small amount the lender was I think entitled to rely on the assurance of necessity given by the borrowers, and I would accept the enquiry made from them as sufficient.

12. The next bond Ex. 1 (a) is dated 28th May 1919, which was executed by Parnaw at the plaintiff''s house at Nagwa being written out at Chandpali at the house of Dwarka Lal, the scribe. The amount borrowed is Rs. 600 with interest at

12 per cent per annum with annual rests. The necessity for the bond is said to be repayment of Rs. 320-8-0 due to the mortgagee himself under the handnotes Ex. 3 and 3 (a); the balance Rs. 279-8-0 was taken in cash "for Government revenue and family expenses." The handnote Ex. 3 was executed by Parnaw on 3rd November 1918, for Rs. 150 said to be required for cost of litigation and certain other necessities, interest payable at 1-1/2 per cent per month the scribe is Dwarka Lal. The mortgage bond does not allude to the necessity for this handnote. The other Ex. 3 (a), also for his. 150, is dated 15th December 1918, executed by Parnaw, written by Dwarka Lal. It is to bear interest at 1 1/4 per cent per month. The recital in the handnote is that it was borrowed for paying the decretal amount of Maharaja. The plaintiff says regarding these handnotes that the money was borrowed by Parnaw but does not say that he made enquiries as to the necessity for them. As regards the remainder of Rs. 279-8-0 it is not stated how much was required for Government revenue and how much for family expenses. With regard to the consideration of this bond I am of opinion that the plaintiff has not shown necessity or adequate enquiry as to necessity and therefore in my opinion the claim on this bond fails.

13. The third mortgage bond Ex. 1 (b) was executed on 4th August 1919, by Parnaw Prasad for a consideration of Rs. 500 bearing interest at 12 per cent per annum, the scribe was Dwarka Lal. Of the attesting witnesses Judgeyal Lube of Nagwa has been examined. The first item of consideration is Rs. 40 for payment of rent of a holding in Baida, The only evidence that plaintiff gives about this is that he was told by Parnaw that he required Rs. 40 for payment of malik''s rent. He did not go to Baida and did not apparently make any further enquiry. The next item is Rs. 80 for rent of land in Baijnathpur due to Kesath Babu. The plaintiff says that he went to Baijnathpur and went to the tahsildar of Kesath Babu and made enquiries. I think that in respect of this item sufficient enquiry is proved to show that the plaintiff fully satisfied himself as to the necessity. The next item is Rs. 105 for purchase of books for Bakshi Onkar Prasad defendant 2. We know that Bakshi Onkar Prasad was a student at school at the time and the plaintiff says that Parnaw Prasad told him that Rs. 105 was required for purchase of books for defendant 2. I would accept the evidence as showing that sufficient enquiry was made to the necessity of this item of advance. The third item is Rs. 125 for repayment of verbal loan taken from Debi Dutt. Debi Dutt is dead. No handnote is of course forthcoming in support of this and there is no receipt. It is not known for what purpose Parnaw Prasad borrowed this sum (if he did borrow it) from Debi Dutt. The last item is Rs. 150 for cultivation, litigation and domestic needs. Beyond the plaintiff''s statement that he was told by Parnaw that he required money for household expenses and that Dwarka and Saligram told him of this necessity there is no evidence in support of it. The plaintiff never went to village Baida, the residence of the defendants. In respect of this item, I think that he has not made out proof either of necessity or of adequate enquiry.

14. It has been argued for the plaintiff-that when the necessity for an alienation has been established, when it is found that the bulk of the consideration money

was taken for family purposes binding on the estate, the entire transaction should be upheld. For this contention reliance is place on the doctrine laid down by the Privy Council in Sri Krishn Das v. Nathu Ram, 1927 PC 37 = 100 IC 130 = 54 IA 79 = 49 All 149 (PC) as applied in Hitendra Narayan Singh v. Sukhdeo Prasad Jha, 1929 Pat 360 = 115 IC 886 = 8 Pat 558. In the Privy Council decision which arose out of a suit to set aside a sale of joint family property for Rupees 3,500 it was proved that out of the purchase price Rs. 3,000 had been taken for purposes of necessity but as to the balance of Rs. 500 necessity was not proved. The Privy Council held that the entire transaction should be affirmed quoting with approval an observation of the Allahabad High Court in another case that

it is not always possible for the father of a family to sell just that share of the property which will bring in the precise sum which is wanted to clear the debts which are binding.

15. In the Patna case Das, J., said

the case of a mortgage stands exactly on the same footing as a case at sale.

16. Actually the Patna case was one in which the suit had not been a suit by a mortgagee to enforce his security but .a suit by members of the family of the debtor to set aside an execution sale held in pursuance of a decree passed on a mortgage and the question therefore was whether the sale should be set aside or not. With great respect, it would have been more relevant in that case to compare a sale in execution of a mortgage decree with a sale by private treaty; but if the learned Judge intended to lay down that the case of a suit to enforce a mortgage stands on the same footing as a case for setting aside a sale, that is a question which did not arise in the appeal which was under consideration and was a mere obiter dictum, both for this reason and because the learned Judge had already held that in the case before him the plaintiffs were not entitled to raise the question of necessity on another ground namely that they were not alive at the date of the original transaction sought to be impugned. I think it necessary to refer to that case because in Mulla''s Principles of Hindu Law under para. 245 it is set down as being the view of the Patna High Court that the case of a mortgage stands on the same footing as the case of a sale and that mortgages as well as sales are governed by the rule that whore the transaction is justified by necessity the sale must he upheld unconditionally. The contrary view has been taken in Jai Indra Bahadur v. Khairati Lal, 1928 Oudh 465 = 113 IC 489 = 4 Luck 107 where the question arose directly. The suit was on a mortgage bond for Rupees 35,000 of which Rs. 34,000 were proved and Rs. 1,000 wore not proved to have been taken for purposes of necessity. It was pointed out that in Sri Krishn Das v. Nathu Ram, 1927 PC 37 = 100 IC 130 = 54 IA 79 = 49 All 149 (PC) the sale was upheld in its entirety on the express ground that

it is not always possible for the father (or manager) or a family to sell that share of the property which will bring in the precise sum which is wanted to clear the debts which are binding.

17. The case of a mortgage was distinguished in the Oudh case because "the father can borrow the precise amount required to meet the family necessity." The distinction is based on a sound principle and accords with the regular practice which is to inquire into the necessity of every item and to disallow everything for which necessity is not either proved or to be presumed on proof of inquiry. Beginning at the earliest case Hanuman Prasad Pande v. Mt. Babui Mconraj Koonwaree, (1854-57) 6 MIA 393 = 18 WR, 81n = 2 Suther 29 = 1 Sar 552 (PC) the directions in remand were that

the validity, force and effect of the bond as to all and each of the sums of which the sum of Rs. 15,000 thereby purporting to be secured is composed depended on the circumstances under which the sums or such of them as were advanced by the appellant were respectively so advanced by him.

and their Lordships directed accounts to be taken. In Anand Ram v. Collector of Etah, 1917 PC 188 = 44 IC 290 = 40 All 171 (PC) the money advanced was Rs. 3,000 out of which it was proved that necessity existed to the limited extent of Rs. 1,698 and the transaction was upheld to that extent only, the balance being disallowed. In Ganga Pershad v. Maharani Bibi, (1885) 11 Cal 379 = 12 IA 47 = 4 Sar 621 (PC) where the necessity for the loan was established but it was held unnecessary to have borrowed at such a high rate of interest, the principal sum was decreed, but interest was calculated at a reasonable rate and the suit was decided accordingly. The same course was followed in Ram Bujhawan Prasad Singh v. Nathu Sah, 1923 PC 87 = 71 IC 938 = 60 IA 14 = 2 Pat 285 (PC). Again in Benares Bank, Ltd. v. Hari Narain, 1932 PC 182 = 137 IC 781 - 9 IA 200 = 54 All 564 (PC) the total sum advanced had been Rs. 28,000 and the entire contest was to bow much of this amount had been taken for necessity. Eventually it was found that Rs. 3,658 had been borrowed for a thica business which was not ancestral and that the minor''s interest in the joint family property was not liable for this part of the debt. I need not multiply authorities; it is the universal practice in mortgage suits that every item of consideration has to be scrutinized. The essential difference between a suit to enforce a mortgage and a suit to set aside a sale is that in the former case the lender has to prove what amount is justly due to him and in the latter case the question is whether the sale should stand or not. It is because I find so well known a work as Mulla''s Principles of Hindu Law appearing to ignore this important distinction that I have thought it necessary to emphasise it.

18. Having regard to the above consideration, I would hold that of the consideration money of the bond Ex. 1 (b) the items of Rs. 80 and Rs. 105 were taken for necessary purposes and are binding on the estate; whereas the evidence fails to prove necessity or proper inquiry leading to presumption of necessity for the remaining items of advance. The rate of interest agreed on was a fair rate of interest. I would allow the appeal and give the plaintiff a decree to the extent indicated by the above findings, that is to say allowing the entire

claim on the first bond Ex. 1, disallowing the claim on the second bond Ex. 1 (a) and allowing the claim on the third bond Ex. 1 (b), so far as it refers to the items of advance of Rs. 80 and Rs. 105 with interest thereon. The portions of the claim allowed will bear interest at bond rate to the date of decree. Date of grace will be fixed six months hence. The plaintiff will get costs of both Courts proportionate to his success and the defendants will bear their own costs.

Fazl Ali, J.

19. I agree.

