

(1919) 08 PAT CK 0016

In the Patna High Court

Prem Sukh Das and Others

APPELLANT

Vs

Ram Bujhawan Mahto and Others

RESPONDENT

Date of Decision : 08-08-1919

Acts Referred:

Contract Act, 1872 — Section 16

Citation : 52 Ind. Cas. 964

Hon'ble Judges : Das, J; Coutts, J

Bench : Division Bench

Judgement

Das, J.—This appeal arises but of a suit" brought by the appellants to enforce a mortgage-bond executed by one Haricharan Mahto. Haricharan is now dead, and is represented in this action by defendants Nos. 1 and 2. Defendants Nos. 3,4,5, 6 and 8 are the sons of one Cheddami Lal, and they hold a mortgage on some of the properties included in the plaintiffs" mortgage, and the question between the plaintiffs and these defendants is whether the plaintiffs" document is entitled to priority over the document of these defend ants. A similar question arises between the plaintiffs and defendant No. 9.

2. The plaintiffs" case is that Haricharan was the karta of the joint family and, as such, karta, he borrowed from the plaintiffs Rs 1,000 on the 16th July 1903 for the necessary expenses of the joint family, agreeing to pay interest thereon at 36 per cent per annum with quarterly rests, and giving as security for the loan five specific items of properties. On the date on which they commenced the action, Rs. 50,158-12 7 had become due to them on the mortgage-bond. They, however, relinquished their claim to Rs. 18,158-12-7, and sought to recover Rs. 32,000 by the suit which they instituted on the 6th of October 1913.

3. Defendants Nos. 1 and 2 defended the suit on various grounds, but the substantial defences which they put forward were two in number, namely, first, that there was no legal necessity for the loan and that, therefore, the joint family property was not liable for it, and, secondly, that the contract as to interest and compound interest was hard and unconscionable and could not be given effect to

by any Court.

4. Defendants Nos. 3 to 9 also entered appearance and they claimed to be prior mortgagees.

5. The learned Subordinate Judge who tried the case came to the conclusion that there was a legal necessity for the loan but that the stipulation as to interest was "penal." In the result, he gave a mortgage decree to the plaintiffs for Rs. 1,000 with simple interest at 12 per cent, per annum from 16th July 1903 up to the date of suit. He further gave the plaintiffs "further interest" at fix per cent, per annum. So far as defendants Nos. 3 to 8 are concerned, he held that they were prior mortgagees and he directed that properties Nos. 3 and 4, which were the subject matter of the mortgage in favour of defendants Nos. 3 to 8, should be sold subject to that mortgage. So far as defendant No. 9 is concerned, he came to the conclusion that the plaintiffs must satisfy his claim before they can be allowed to sell property No. 2, which was mortgaged to defendant No. 9 and which defendant No. 9 has purchased in execution of his mortgage decree.

6. The plaintiffs appeal, and the substantial points that have been argued on their behalf are:

First, that, so far as defendants Nos. 1 and 2 are concerned, the Court below had no power to make a new contract for the parties and reduce the rate of interest from thirty six per cent., with quarterly rests to twelve per cent secondly, that, so far as defendant Nos. 3 to 8 are concerned, these defendants are not entitled to priority over them, and thirdly, that so far as defendant No. 9 is concerned, that defendant is not entitled to priority over them and that, in any event, if they have to satisfy the claim of defendant No. 9, they are entitled to add that to their claim against defendants Nos. 1 and 2.

7. Defendants Nos. 1 and 2 have filed a cross* objection to the decree passed by the Court below, and the point that has been argued on their behalf at great length by Mr. Manuk is that the plaintiffs have not proved any legal necessity for the loan and that, therefore, the Court below should have dismissed the suit altogether,

8. Defendants Nos. 3 to 6 and 8 also object to the decree in so far as it has not awarded them costs against the plaintiffs.

9. Lastly, defendant No. 9 objects to the decree in so far as it has given an opportunity to the plaintiffs to redeem his mortgage.

10. It will be convenient first to deal with the cross-objection filed on behalf of defendants Nos. 1 and 2. The learned Subordinate Judge has come to the conclusion that there was legal necessity for the loan. His finding on this issue is as follows: "it appears that there was a criminal case of rioting against the executant and others and the case lasted from 29th June 1903 to 14th December 1903, The executant had to borrow this money to defend himself. I consider that this was a debt for legal necessity." The first point taken on behalf of defendants

Nos. 1 and 2 by Mr. Manuk, but not very strenuously pressed, is that a person is not entitled to defend himself at the cost of the joint family property. I do not think that it is possible to lay down a rule which would apply to all cases, but I am of opinion that a member of a joint Mitakshara family is entitled to use the family funds for the purpose of repelling a false criminal charge against him. It must be remembered that a member of a joint Mitakshara family has no separate funds of his own, and if it were the law that he is not entitled to defend himself against a false criminal charge, it would be impossible for him to defend himself at all. In this case, as a result of his defence, Haricharan was acquitted by the Criminal Court. I hold, therefore, that in this case Haricharan was entitled to raise a loan for the purpose of defending himself.

11. Mr. Manuk next contends that there is no evidence that the loan was raised for the purpose of the criminal case, and he relies first, on the mortgage bond itself, secondly, on the averment of legal necessity in the plaint, and thirdly, on the evidence in the case.

12. So far as the bond is concerned, Mr. Manuk's argument is that there is no recital that the money was required for, the criminal case. The actual recital in the bond is, At present I, the executant, badly require Rs. 1,000 more for impending necessary house-keeping expenses, etc", and the criticism directed against this recital is that he does not say that he requires the money for meeting a criminal - charge against him. In my view, legal necessity must in each case be established by evidence, and it is not necessary that the bond should contain a recital of the legal necessity. See *Womesh Chunder Sircar v. Digumburee Dossee* 3 W.R. 151. But in this case there is a recital of legal necessity and, in my opinion, the recital amply covers the legal necessity sought to be proved. ,

13. Mr. Marjuk's criticism regarding the averment in the plaint is equally unsubstantial. The translation of" the fourth paragraph of the plaint is not quite accurate. It should run as follows: "That in this capacity as head and karta of the joint family, Haricharan Mahto borrowed from plaintiff Not 1 and Babu Ghansayam Das Rs. 1,000 of the Emperor's coins, bearing interest at Rs. 3 per cent per mensem, under a registered bond, dated 16th July 1903 the basis of" the suit, executed and delivered by him,, for the necessary expenses of the joint family, and, taking the amount, he spent, it in meeting the requirements of his joint family." Mr. Manuk says that the, averment should have been more precise and, should have given him. notice as to the exact necessity for which the money was borrowed. Order VI, Rule 2, of the Code lays down what every pleading shall contain. "Every pleading shall contain, and contain only, a statement in a concise form of the material facts, on which the party pleading relies for his claim or defence as the case may be, but not the evidence by which they are to be proved." The "material fact" in this case, upon which the plaintiffs rely for their claim is that the money was borrowed for the necessary expenses of the joint family. That material fact is pleaded. The evidence of the legal necessity is, of

course, the criminal case against the karta of the family for which money was required. That is not pleaded; and Me. Manuk's criticism is that the evidence in this case should have been pleaded. I do not agree with this contention at all. If indeed the defendants were embarrassed by the form of the averment of legal necessity in the, plaint, it was open to them to apply for particulars under Order V, Rule 5, of the Code. That application was not made by " them, and, in my view, they cannot be permitted now to argue that legal necessity has not been pleaded in this case with sufficient clearness.

14. I now come to the actual evidence of legal necessity. Exhibit 7 is the order sheet of the criminal case, and it shows that a warrant was issued on, amongst others, Haricharan on the 19th June 1903 and that Haricharan was acquitted on. the 9th December 1903. The mortgage-bond in suit was executed on the 16th July 1903. The account book produced by the plaintiffs shows that Rs 684 out of the money borrowed was actually paid in Court. There is, therefore, an inherent probability in the story set up by the defendants, especially when it is remembered that Haricharan was always in need of money. Mr. Manuk has critically examined the evidence of the witnesses examined on behalf of the plaintiffs, and has invited us to reject their evidence. In order to test the evidence which has been adduced in this case, we are bound to take into consideration the undoubted fact that Hari-charan was always in need of money, as the several bonds admittedly executed by Haricharan and produced in this case amply prove, Secondly, we are bound to take into consideration the fact that at that time a criminal case was pending against Haricharan. Lastly, there is a clear admission by defendant No. 1 in Exhibits 5 and 6 that he is liable in respect of the mortgage-bond executed by his father on the 16th July 1903. Having anxiously considered all the evidence in this case, I am of opinion that the learned Subordinate Judge correctly decided this issue in favour of the plaintiffs. I would, therefore, dismiss the cross-objection filed on behalf of defendants Nos. 1 and 2.

15. I now come to the plaintiffs' appeal. The first point taken on behalf of the appellants is that the learned Subordinate Judge should not have rejected the plaintiffs' claim for interest. The learned Subordinate Judge considered that the agreement to pay interest at 3 per cent, per month with quarterly rests was "penal" and, being of opinion that he was at liberty to make a new contract between the parties, he allowed simple interest at one per cent per annum. I am of opinion that the view expressed by the learned Subordinate Judge cannot be supported at all. It will be noticed that the learned Subordinate Judge does not come to the conclusion that the lenders were in a position to dominate the will of Haricharan; in fact, it would not be open to him to consider a case of undue influence since none was pleaded. When all the oases relating to money lending transactions are examined, it will appear that the Court has relieved the debtor by reducing the rate of interest only when it has 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 Section 16 of the Contract Act. It is only

the concurrence of these two elements that can justify the Court in granting relief to the borrower. One of the elements necessary to bring the case within Section 16 of the Indian Contract Act was not pleaded in this case, nor has it been found in favour of the defendants by the learned Subordinate Judge. In my view, therefore, it was not open to him to give relief to the defendants on the ground assigned by him.

16. Mr. Mariuk, however, contends that the matter is really concluded by the latest decision of the Judicial Committee in the case of *Nawab Nazir Begam v. Rao Raghunath* 50 Ind. Cas. 434 : 23 C.W.N. 700 : 36 M.L.J. 521 : 17 A.L.T. 591 : 21 Bom. L.R. 484 : 26 M.L.T. 40 : 30 C.L.T. 86 : (1919) M.W.N. 498 : 1 U.P.L.R. 49 (P.C.). In that case it was held by the Judicial Committee that it is incumbent on those who support a mortgage to show not only that there was necessity to borrow but that it was not unreasonable to borrow at a high rate of interest and, if it is not shown that there was necessity to borrow at that high rate of interest, that rate cannot stand. Mr. Manuk argues that, assuming the plaintiffs have shown that there was necessity to borrow the money, they have not shown that there was any necessity to borrow the money at the rate of 3 per cent. per month with quarterly rests and that, therefore, he is entitled to ask the Court to reduce the rate of interest.

17. In the case cited by Mr. Manuk, the defendants by their written statement" specifically denied that there was any necessity to borrow the money at the rate of interest mentioned in the bond. This will appear from the judgment of the Allahabad High Court reported as *Rao Raghunath Singh v. Nazir Begam* 19 Ind. Cas. 639 With reference to this issue, specifically raised by the defendants, the High Court said as follows: "No evidence has been given on the point on behalf of the plaintiff, and it has not been shown, that Raonarain Singh could not raise a loan of Rs. 398 at a lower rate of interest."

18. Mr. Manuk, however, argues that what ever issue the defendants in that case may have raised by their written statement, the Judicial Committee proceeded on the document itself apart from any, special plea put forward on behalf of the defendants. With this contention I do not agree. In the course of their judgment, the Judicial Committee said as follows: "in the written statement filed on behalf of the defendants, one of the points taken was that the property mortgaged was ancestral property, and that there was no legal necessity to execute the document sued upon" Stopping here for a moment, it is quite clear that the Judicial Committee did consider the written statement filed on behalf of the defendants. It could only be for the purpose of considering whether it was open to the defendants to argue that there, was no legal necessity to borrow the money at the rate of interest mentioned in the bond. The Judicial Committee proceeded to say as follows: " In the view which the High Court took of this plea, a view from which their Lordships see no reason to differ, it made it open for the defendants to contend that though the necessity for borrowing the principal sum was accepted, there was no necessity to borrow on the very onerous terms of

this mortgage."

19. The question, therefore, arises, what is the plea of the defendants in this case, and is it open to them to argue on their written statement that there was no necessity to borrow money on the very onerous terms of this mortgage? In the sixth paragraph of the written statement, defendant No. 1 says: "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." I am clearly of opinion that in this paragraph the defendant is putting in issue the question whether there was any necessity for the loan at all, and not the question whether there was any necessity to raise the loan on such onerous terms. Any doubt that there might be, as to the precise meaning of this paragraph, is removed as soon as we come to the tenth paragraph of the written statement; which contains the defendant's special plea as to interest. He objects to the rate of interest mentioned in the bond as it is by way of penalty, and it is this plea which the learned Subordinate Judge has tried. I am of opinion that it is not open to the defendants to argue on their written statement that, assuming there was legal necessity for the loan itself, there was no legal necessity for raising the loan on such onerous terms. The question of necessity is essentially a question of fact. That question was not raised by the defendants in their written statement. It was not put forward before the learned Subordinate Judge and was not considered by him. I hold, therefore, that this question does not arise before us for our consideration.

20. If, however, the question is open to us for our consideration, I am of opinion that the subsequent consent of defendant No. 1 is sufficient "to validate the transaction so as to bind both defendants Nos. 1 and 2. I have already referred to the consent of defendant No. 1 as contained in Exhibits 5 and (5, but it is necessary to deal with this matter a little more. in detail. It appears that on the 19th December 1903, Haricharan executed another mortgage bond, in favour of the plaintiffs and that the plaintiffs instituted a suit against Haricharn and his son, defendant No. 1, to enforce that mortgage bond against them. The sura claimed in that suit wan Rs. 12,771.9-6 Haricharan died soon after the institution of the suit, and his son, who is defendant No. 1 in this suit, promptly settled the matter with the plaintiffs. The terms of settlement were as follows: the plaintiffs would give, up, Rs. 3,596-9. 6 and the costs of the suit, the defendant would sell to the plaintiffs a property of the value of Rs. 800 and pay in cash to the plaintiffs Rs. 1,175, for which time was given to the defendant till Baikh 1318, This arrangement was embodied in a consent decree passed by the Court on the 12th February 1911 (Exhibit 6), and was partly carried out by the execution of a sale-deed dated the 10th February 1911 (Exhibit 5).

21. The consent decree upon which reliance is placed by Mr. Kulwant Sahay on behalf of the appellants provides as follow: ""It is prayed that a decree may be a varied for Rs. 1,175 with interest thereon at 1 per cent, per mensem till the date

of realization. Besides the amount claimed, Rs. 1,000, as principal, and interest and compound interest due under the mortgage-bond, dated 16th July 1903, executed by Haricharan Mahto is due from me under the bond. Only Rs. 1,437, put of interest and compound interest entered on the back of the bond, has been realized. The bond is allowed to stand good as before, i. c, the principal, interest and compound interest will remain due from me." In the sale deed, there is a passage upon which Mr. Kulwant Sabay relies and which runs as follows: "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."

22. There is a clear admission of liability on the part of defendant No. 1 in respect not only of the principal sum covered by the bond of 16th July 1803 but in respect also of the interest and compound interest, and Mr. Kulwant Sahay strongly argues that the subsequent assent on the part of defendant No. 1 validates the transaction so far as interest is concerned. Mr. Manuk contests this proposition of law and he relies upon the case of *Kandasami Asari v. Somaskunta Ela Nidhi Ltd* 5 Ind. Cas. 922 : 35 M. 177 : 7 M.L.T. 165 : 20 M.L.J. 371 : (1910) M.W.N. 580 for the proposition that the manager of a joint family is not in any sense the agent of the family and that consequently no ratification of his act by the other members of the co parcenary is possible. His argument is that an alienation by the karta of the joint family without necessity is void in its inception and that consequently no amount of ratification will validate that which is void from the beginning.

23. it is, in my opinion, always dangerous to employ technical terms of English Law in dealing with cases under the Hindu Law. The question is not whether the karta of a joint family is the agent of the family, but what are his powers. He has undoubtd power to alienate joint family property for a justifying family necessity and the law will presume that there was a justifying family necessity, if the other members of the co-parcenary have assented to the transaction. In my opinion the subsequent "assent" of defendant No. 1 is not in any sense a ratification of what was done by his father involving a discussion of *Keighley, Maxsted & Co. v. Durant* (1901) A.C. 240 : 70 L.J.K.B. 662 : 84 L.T. 777 : 17 T.L.R. 527, but is presumptive proof of a justifying family necessity. It is, of course, open to defendant No. 1 to show that his consent was not a free consent, or that he did not give his consent with knowledge of actual facts, but, in the absence of such evidence, his assent is proof of a family necessity justifying the raising of the loan on such onerous terms.

24. Defendant No. 1 was aware of the difficulty in his way created" by Exhibits 4 and 5, and, therefore, in the eleventh paragraph of his written statement he pleaded that he was only 16 years of age when his signature to the two documents, was taken, and that his signature was in fact procured by the deception practised on him by his uncle who acted in collusion with the plaintiffs. As regards his plea of minority, this is obviously false, as he entered appearance in the previous litigation and never suggested that he was a minor and could only

be sued as such. As regards his plea of fraud, there is no evidence in support of it, except his own evidence which I am wholly unable to accept.

25. Mr. Manuk, however, strongly relies upon certain admitted facts. He says that Haricharan died on the 19th January, and Exhibits 4 and 5 are dated the 10th and 11th February respectively. The argument is that defendant No. 1, who, whether he was a minor or not, was undoubtedly of a tender age, was incapable so soon after his father's death of transacting a business of this nature, and Mr. Manuk points out that his assent to the transaction of the 16th July 1903, is wholly out of place in a transaction connected with a subsequent mortgage bond. The argument is not without force, but, having considered the evidence very carefully, I am unable to accept it. It seems to me that it is quite possible that the plaintiffs made a concession to the defendant in order to procure his assent to the earlier transaction, but, without speculating in the matter at all, it is sufficient to say that a plea of undue influence must be supported by evidence which has not been produced in this case. If it were necessary, therefore, 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 assent of defendant No. 1 to the transaction is evidence of such necessity, which evidence has not been rebutted in any way by defendant No. 1. So far as defendant No. 2 is concerned, he was not in existence either on the date when the transaction took place or on the date when his father, defendant No. 1, assented to that transaction. Therefore, the question does not arise so far as he is concerned.

26. I am of opinion, therefore, that the plaintiffs are entitled to interest at 3 per cent, per mensem with quarterly rests from the date of the execution of the bond up to the date which we shall fix for payment. They are also entitled to interest at 6 per cent, per annum on the decretal amount from the date fixed for payment up to the date of realization.

27. The next question is whether the plaintiffs are entitled to sell properties Nos. 3 and 4 mentioned in the mortgage bond free from the mortgage of defendants Nos. 3 to 6 and 8. These defendants are the heirs of one Chedami, who advanced Rs. 8,000 to Haricharan on the 29th July 1904 on the security of properties Nos. 3 and 4. Their case is that this money went to pay off Ghanshyam whose mortgage was dated the 12th January 1903. They say that they are entitled to be subrogated to the securities held by Ghanshyam and that, therefore, so far as these properties are concerned, they are entitled to priority over the plaintiffs.

28. There is no doubt that the intention of the parties was that the security created in favour of Ghansyam Das on the 12th January 1903 should be kept alive and not extinguished by the transaction of the 29th July 1904. This is conceded by Mr. Kulwant Sahay, but he argues that subrogation could only be by redemption, and that in this case the money found by Chedami Lal did not completely pay off Ghansyam Das and that consequently Chedami Lal was not entitled to be subrogated to the securities held by Ghansyam Das. This argument

is based on the following facts which are admitted. The money actually due to Ghansyam Das on the foot of the mortgage dated the 12th January 1903 was Rs. 9,430. Chedami Lal actually paid Rs. 7,830 to Ghanshyam Das towards the satisfaction of the mortgage, and, for the balance due under the bond, Haricharan executed a hundi in favour of Ghansyam Das. Mr. Kulwant "Sahay"s argument is that at the time when Chedami Lal actually paid the money to Ghansyam Das, the mortgage security in favour of Ghansyam Das still remained in force and that Chedami Lal cannot get the benefit of a payment subsequently made by Haricharan. With this argument I do not agree. The transaction is one and entire and whether the money found by Chedami was paid to Ghanshyam Das before the hundi was executed by Haricharan or not, the result" of the transaction was that the debt due to Ghansyam Das was completely wiped out. The bond was made over by Ghansyam Das to Chedami Lal and has "been" produced in the case by defendants Nos. 3 to 6 and 8. The case reported as Swaminatha Pillai v. Krishna Iyer 28 Ind. Cas. 966 : 38 M. 548 : 28 M.L.J. 484 is directly in point. I hold that the learned Subordinate Judge rightly decided this issue in favour of defendants Nos. 3 to 6 and 8.

29. These defendants have filed a cross-objection on the question of costs. Costs are entirely at the discretion of the Court, and I am unable to say that the learned Subordinate Judge has exercised his discretion unreasonably. I would dismiss the cross objection filed on behalf of defendants Nos. 3 to 6 and 8.

30. There only remains the question as between the plaintiffs and defendant No. 9. The learned Subordinate Judge " has allowed the plaintiffs to redeem the mortgage in favour of defendant No. 9. Both parties are dissatisfied with this portion of the decree. The plaintiffs contend that they are entitled to priority over defendant No. 9 and that, in any case, if they are compelled to redeem defendant No. 9, they are entitled to add what they have to pay to defendant No "9 to their claim against defendants Nos. 1 and 2. It appears that the plaintiffs were parties to the suit in stetted by defendant No. 9 against defendant No. 1. It was established in that litigation that so far as plaintiff No. 2 is concerned, defendant No. 9's security was prior to that of the plaintiffs. The plaintiffs bad an opportunity in that litigation to redeem defendant No. 9, but they did Dot avail themselves of that opportunity. The property was put up for sale and was purchased by defendant No. 9. It seems to me that the plaintiffs have lost their right of redemption for ever and that the purchase made by defendant No. 9 cannot now be disturbed. The plaintiffs" contention on this point must accordingly be overruled and the cross-objection filed by defendant No. 9 must be allowed".

31. I would accordingly allow this appeal, set aside the decree passed by the learned Subordinate Judge and, in lieu thereof, pass the following decree. Let an accent be taken of what will be due to the plaintiffs under and by virtue of the mortgage dated the 16th July 1903 in the fourth paragraph of the plaint mentioned and for their costs in this Court and in the Court below six months

from the date hereof; and it is ordered that upon the defendants Nos. 1 and 2 or either of them paying into Court what shall be found to be due to them on such account within six months from the date hereof, the plaintiffs do deliver up to defendants Nos. 1 and 2 or to such person as they appoint all documents in their possession or power relating to the mortgaged properties and do, if so required, retransfer the properties to the defendants Nos. 1 and 2 free from the mortgage and from all encumbrances created by the plaintiffs or any persons claiming under them, but that in default of the defendants Nos. 1 and 2 or any of them paying the plaintiffs what shall be found due to them as aforesaid by the time aforesaid, the properties mortgaged to the plaintiffs and specified in the mortgage bond, save and except property No. 2, namely, Chainpur, Sheikpur, Brohmpur being Touzi No. 28/5 or sufficient portion thereof to be sold, but that the properties Nos. 3 and 4, namely, Mouza, Kantichak, Pargana Haveli Azimabad, being Touzi No. 151/1 and Mouza Sobolpur Chipura, Pergana Fulwari, being Tonzi No. 251, be sold subject to the mortgage dated the 29th July 1904 in favour of Chedami La], and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is due to the plaintiffs as aforesaid together with subsequent interest at six per cent per annum and subsequent costs, and that the balance, if any, be" paid to defendants Nos. 1 and 2. It is further ordered that defendant No. 9 do get his costs of this appeal from the appellants.

Coutts, J.

32. I agree.