

*Privy Council Appeal No. 52 of 1918.  
Bengal Appeals Nos. 32 and 33 of 1915.*

Manna Lal - - - - - *Appellant*

*v.*

Karu Singh and others - - - - - *Respondents*

Manna Lal - - - - - *Appellant*

*v.*

Karu Singh and others - - - - - *Respondents*

*(Consolidated Appeals)*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 29TH JULY, 1919.

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*Present at the Hearing :*

LORD ATKINSON.  
LORD PHILLIMORE.  
SIR JOHN EDGE.  
MR. AMEER ALI.

*[Delivered by LORD PHILLIMORE.]*

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These are consolidated appeals from two decrees of the High Court of Calcutta dated the 18th May, 1915, varying two decrees of the Additional Subordinate Judge of Patna dated the 27th June, 1912.

The suits were brought to enforce two mortgages, the earlier one which was, however, put secondly in suit, dated June, 1896, and the later one July, 1897. The appellant and plaintiff is the representative of the original mortgagee. The defendants and respondents are the mortgagor Karu Singh and his two sons, one of whom was an infant at the date of the suits.

The first mortgage, which was for a sum of Rs. 2,122, was expressed to be made for repayment of the third part of some antecedent mortgage debts created by Karu Singh and his brothers, which debts it was now proposed to apportion and divide so that each of the three should be severally liable for his share.

The second mortgage, which was for Rs. 1,000, was expressed to be for payment of "zerpeshgi" [*i.e.*, "premium on a lease"] due in respect of a certain mouzah, "and for the cultivation and improvement of my mouzahs, and for meeting household expenses."

At the time that the mortgages in suit were executed the elder of the two sons was born, though the younger was not; and Karu Singh must, therefore, be treated as the manager of a joint Hindu family, and his mortgages will only be good so as to bind family property if they were effected to meet necessary expenses, or as it is otherwise expressed for joint family purposes.

Karu Singh put in a defence raising objections to the rate of interest and denying the title of the plaintiff to represent the original mortgagee. No importance is to be attached to this defence. The serious defence is that put in on behalf of the two sons. They set up the case that their father was a man of loose character and a licentious person, that the sums had really been borrowed to spend on his mistress, that the necessities mentioned in the bonds were totally false, got up and concocted, and that they were not benefited by the money claimed and not bound by the mortgages. Issues were accordingly framed in each case in which the important one was "Whether the bond-debt was contracted for joint family purposes? Whether the bond-debt was contracted for and spent in immoral purposes?"

When the case was ready to come on for trial several applications were made on behalf of the defendants for postponement. At last the Subordinate Judge came to the conclusion that the applications for postponement were not genuine, and that no further time ought to be granted. Thereupon the pleaders for the defence declared that they could take no further part in the proceedings, and the Judge heard the case *ex parte* and thought that the evidence adduced by the plaintiff was sufficient to prove his case. He accordingly made decrees for the enforcement of the mortgages with costs and interest at a certain rate as provided in the bond.

From the decrees in the two suits the defendants appealed to the High Court of Calcutta, and the learned Judges in this Court being of opinion that the plaintiff had not proved that the moneys were borrowed for necessary purposes dismissed the suit as against the two sons, but made a decree against the father to the following effect:—

"The result is that there will be a decree against the father Karu Singh, defendant No. 1, for the principal of the two bonds—Rs. 2,122 and Rs. 1,000, with interest at 18 per cent. per annum from the dates of the bonds till the date of suit. If the amount found due on account is not paid within three months of the receipt of the decree in the Lower Court, the father's share in the mortgaged properties will be liable to be sold on partition."

Upon the findings of the High Court this decree was too favourable to the plaintiff and incorrect. The law was finally established no doubt since that decision by this Board in the case of *Narain Prasad v. Sarnam Singh* (44 I. A., 163), which determined that "A mortgage of the joint family property of a Mitakshara family by its karta (or manager) unless necessity or an antecedent debt is proved, is void; the transaction itself gives to the mortgagee no rights against the karta's interest in the joint family property."

Their Lordships, however, have now to examine whether the findings of the High Court were justified. Dealing first with the mortgage of 1896, the recital in it is that it is for the mortgagor's third part in the repayment of two antecedent bonds for family necessities for which two earlier bonds of 1890 and 1892 had been given. There is no apparent attack on the bond which the High Court describes as the bond of 1890 but which, if the Hindu chronology is properly translated, seems to be of October 1889, and which was for Rs. 2,000. But there is an attack upon the bond of 1892 as having a false recital, because it says that the money was borrowed to purchase a village called Naya Hajipur. The High Court says that this recital must be false as in 1889 the defendant had mortgaged two annas of that village with only one of his brothers. The family were, therefore, the Judges say, already in possession of that village.

There is nothing to show that the family, which was a joint family, had possession of the whole village. They apparently had then only a 2 annas share. On the occasion of the mortgage of 1892 they are found in possession of a three-annas share, from which one might conjecture that the money was borrowed to buy the additional anna share. The Judges apparently lay some stress upon the fact that there were only two mortgagors instead of three when the two annas share was mortgaged. They do not say in terms that, because on the first occasion two brothers joined in the mortgage and two annas were mortgaged and on the second occasion the three brothers joined in the mortgage and three annas were mortgaged, therefore it must be taken that each brother had an anna share. But unless this construction were to be put upon the transaction, it would appear that the joint family property had been increased by the purchase of the one-anna share. The statement in the judgment that the recital must be false is certainly unwarranted.

With regard to the second mortgage, the High Court took the recital as being that the money was borrowed for re-payment of *zerpeshgi*, laying a stress on the syllable "re." They proceeded to state that as the mortgagors were in possession of the Thika property there seemed no necessity for redemption. No doubt the translation did give the word as "repayment." But upon this point being taken the plaintiff challenged the accuracy of the translation from the original, and he applied for permission to send to this country as part of the record another sworn translation which rendered the word as "payment" instead of

“repayment.” The High Court did not think itself warranted in authorising this, but it directed that the original mortgage should be sent to this country. This has been done and a member of their Lordships’ Board, who can read the vernacular, has read it and says that the word is “payment,” not “re-payment.” The superstructure, in any case a somewhat fanciful one, which the High Court based upon the syllable “re” falls to the ground.

These being the only objections raised in the judgment of the High Court, and these failing, their Lordships are remitted to the question whether the Subordinate Judge was right in holding that sufficient proof had been given before him. The allegations made in the defence that the father was of immoral life, and borrowed the money for the expenses incident thereto, are of the class of allegation which is only too frequently made when a mortgage suit is contested. No evidence was given in support of them. The burden of proof lay upon the defendants and was not discharged, so these allegations fall to the ground. Upon the plaintiff lay the burden of proving necessity in each case. He called evidence and produced documents, not all that could have been called or produced, but enough to satisfy the Subordinate Judge; and there is material on the record to show that he had armed himself with further proof of witnesses who might be in attendance with documents if it were required.

Their Lordships, having examined into the whole matter, see no reason to differ from the conclusions of the Subordinate Judge now that the criticisms of the High Court have been removed, and they think that his judgment upon the main point in the cases should be restored.

There is, however, a question as to interest as to which their Lordships are inclined to agree with the view taken by the High Court. The covenant in the bonds was to pay interest at the rate of Rs. 1·8 per cent. per mensem, with provision for half-yearly rests, and a further penalty in the event of default. When the suit came on the plaintiff did not claim the penalty, and indeed he remitted a large amount of the interest and compound interest; but even so, judgment was given for sums of money fixed as Rs. 32,000 and Rs. 8,000 respectively, with further interest from the date of suit.

When the High Court arrived at the sum for which the Judges thought the father’s share would be liable, they fixed it by taking the two original principal sums and allowing simple interest at the rate stipulated which is equivalent to 18 per cent. per annum. It has been argued on behalf of the appellant that this is too little and is not right. Their Lordships have recently had occasion to consider this matter in the case of *Nawab Nazir Begam v. Rao Raghunath Singh*, decided on the 18th February, 1919, and reported in 46 I.A., 145. In that case they laid it down that:—

“It is incumbent on those who support a mortgage made by the manager of a joint Hindu family to show not only that there was necessity to borrow, but that it was not unreasonable to borrow at some such high rate

and upon some such terms, and if it is not shown that there was necessity to borrow at the rate and upon the terms contained in the mortgage that rate and those terms cannot stand."

They proceeded to observe as follows :—

"It remains, therefore, that there was necessity and, in virtue of that necessity, authority to borrow upon reasonable commercial terms, and that the mortgage stands as good security to that extent, but that all terms of the mortgage in excess of this necessity are outside the scope of the authority."

These principles must be applied to the present case. In conformity therewith, the necessity for the high rate of interest secured by these bonds must be proved, if it is to stand. And in this matter their Lordships are not disposed to interfere with the view taken by the High Court. In the result the appeal will be allowed and the decrees of the Subordinate Judge will be restored, but with the respective variations that the sums found due and owing to the plaintiff will be those found due by the High Court instead of those found due by the Subordinate Judge. The appellant will have his costs here and in the Courts below. Their Lordships will humbly recommend His Majesty accordingly.

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In the Privy Council.

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