Nawab Nazir Begam Vs Raghunath Singh

Court: Bombay High Court

Date of Decision: Feb. 18, 1919

Citation: (1919) 21 BOMLR 484

Hon'ble Judges: Viscount Haldane, J; Phillimore, J; John Edge, J; Ameer Ali, J

Bench: Full Bench

Final Decision: Dismissed

Judgement

Phillimore, J.
This suit was brought to enforce a mortgage made on the 7th November, 1884, by the ancestor of the defendants and

respondents Nos. 1 to 8, in favour of the ancestor of defendants and respondents Nos. 13 to 15, which mortgage was transferred on the 4th

January, 1910, to the plaintiff appellant; defendants and respondents Nos. 9 to 12, claim title to certain of the lands in mortgage.

2. The mortgage recites that the mortgagor had borrowed Rs. 398, in order to pay the Government revenue, and the covenant is in the following

terms:

I will repay the aforesaid sum together with interest at the rate of Rs. 2-8-0 per cent per mensem, in the month of Aghan, Sambat 1942, without

any plea or excuse, and I will continue to pay the interest every six months. If fail to pay interest at the and of any six months, I will pay interest at

the rate of Rs 3-2-0 per cent, per mensem from the date of the execution of this bond and that amount of interest shall be added to the principal.

3. As at the date of the suit no payment had been made in respect of interest or principal, the total debt had swollen with compound interest to

more than 3 lacs of rupees.

4. The plaintiff purchased the mortgage for Rs. 6,500. In the deed oil transfer the transferor covenanted that in case the transferee did not realize

Rs. 6,500 upon the mortgage he would make up the difference. When the plaintiff brought her suit she reduced her claim to the principal, Rs. 398,

and. Rs. 19,602 interest, making a total of Rs. 20,000.

5. Various defences were set up by the defendants 1 to 12, but they were all rejected by the Subordinate Judge, who made a decree in favour of

the plaintiff for Rs. 20,000, with interest From the date of suit, and costs. Thereupon the defendants to 12 appealed to the High Court of

Judicature for the North-Western Provinces, which Court affirmed in most respects the decree of the Subordinate Judge, but reduced the amount

decreed upon the mortgage to Rs 1,778-4, a sum arrived at by adding to the principal simple interest at the rate of 12 per cent.

6. 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.

7. 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.

8. This line of defence being thus open to the defendants, the principles laid down by this Board in (1890) L.R. 18 I.A. 1 (Privy Council) and in

Nand Ram v. Bhupal Singh ILR (1911) All. 126 apply.

9. 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.

10. This principle being established, the High Court was justified in finding that a mortgage upon such terms as these contained in the document

sued upon, the lands charged being of such value as to make the security ample, was an unnecessary extravagance.

11. No evidence, it is true, was given on either wide, but the thing spoke for itself.

12. 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.

13. What the particular rate of interest should be, and whether the money could have been borrowed at simple, instead of compound, interest are

matters of detail upon which the High Court with its local knowledge can well be left to decide, and their Lordships are not disposed to interfere

with the decision upon points such as these. There is, however, a passage in the judgment of the High Court upon which they desire to offer some

observation. The learned Judges say:-

We have a discretion in the matter and we think we should be justified in reducing the rate of interest to a reasonable figure. In view of the security

given to the mortgagee, and also of the fact that unusually long delay has been made in bringing the suit we think that simple interest at the rate of

12 per cent per annum would be amply sufficient to compensate the mortgagee or his representative for the interest which he should get on the

principal amount of the loan.

14. This may have some relation to the following allegation in the defendants" pleading. ""The condition relating to interest was very hard,

unconscionable and inequitable."" But that allegation does not seem to have been intended as a substantive plea in itself, but rather as introductory

to a plea of undue influence which failed. However this may be, their Lordships do not think it safe to rest their decision upon a supposed

discretion in the Court or an inference by the Judges as to the sum which would be sufficient to compensate the mortgagee. In their view, as

already stated, the question is one of the authority of a manager of a joint Hindu family and it is because their Lordships agree with the High Court

that this authority was exceeded to the extent already stated that they concur in the conclusion at which that Court arrived.

15. The appeal accordingly fails, and should be dismissed as against the defendants respondents Nos. 1 to 12.

16. As regards the original defendants Nos. 13 to 15, or their present representatives, it seems that they were at one time represented by the

solicitors who have appeared for the other respondents, but that this appearance has been withdrawn, and the appeal so far as they are concerned

has been heard ex parte.

17. If the decision of the Subordinate Judge had not been varied there would have been no ground for asking for any relief against them. If the

variance had not been so great, if the judgment had been allowed to stand for any sum not less than Rs. 6,500, there would still have been no

ground for seeking relief from them. It was only after the decree of the High Court reducing the sum due on the judgment below Rs. 6,500, that

any question arose. It would appear that by the terms of the sale deed this difference would have to be made up by the defendants Nos. 13 to 15.

Whether any application was made to the High Court after the delivery of its judgment for consequential relief against these defendants, whether

there was any opportunity for making an application, and why, iÃ¯Â¿Â½ so, no application was made there is nothing in the record to show. Prima facie

it would appear that there could be no answer to such an application: but upon the whole their Lordships think that it will be safer to remit this

matter to the High Court and to give the plaintiff an opportunity of making the proper application there.

18. Their Lordships will therefore humbly advise his Majesty that this appeal be dismissed as against the respondents, 1 to 12 with costs, and that

as between the appellant and the other respondents, the cause be remitted to the High Court with liberty to the appellant to make such application

to the High Court as she may be advised.