Privy Council Appeal No. 44 *of* 1923.

Adappa and others - - - - - - - - *Appellants*

v.

Gundappa Bharmagouda Desai, since deceased, and another - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD FEBRUARY, 1925.

Present at the Hearing :

LORD SHAW.
LORD CARSON.
LORD BLANESBURGH.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* MR. AMEER ALI.]

This is an appeal from a decree of the High Court of Bombay dated the 2nd July, 1917, made in a suit brought by the plaintiffs to enforce a mortgage made in their favour by the defendants on the 17th September, 1905.

The suit was brought on the 29th August, 1911, in the Court of the First Class Sub-Judge of Belgaum in the Central Provinces, who dismissed it on the ground that the plaintiffs had failed to prove consideration for the mortgage ; his order was reversed by the High Court and the claim was decreed. The present appeal by the defendants to His Majesty in Council is from the decree of the High Court.

Mr. Justice Shah of the Bombay High Court has examined the facts with such scrupulous and minute care that their Lordships are relieved from the necessity of dealing with them at any length ; they desire accordingly to confine their attention to the prominent features of the case.

The mortgage bond, for the enforcement of which the suit was brought, was admittedly executed by the three adult members of the defendants' joint family alive at the time. These three persons named respectively, Adappa, Bhau and Ganapati, purported to sign the document on behalf of the joint family. Adappa alone is now alive and has given evidence in this case. Bhau died in 1909 and his widow is one of the defendants in the suit. The plaintiffs are Desais and hold deshgat land by virtue of their office as Desai under the Government, which appears to yield them an income of Rs. 6 to 8,000 a year. The father of the plaintiff No. 1 named Appaji died, it is said, in 1868 leaving him surviving four minor sons and daughters under the guardianship of his widow Amabai. Amabai appears to have continued to manage the property even after her eldest son, Baba Sahib, attained majority. Her daughter, who is now the second defendant, was married to Bhau, the brother of Adappa.

It is established in this case that Bhau was the most intelligent among the members of his family, and he not only carried on the affairs of his own family, but was also entrusted with the conduct of the money-lending business of the plaintiffs' family, which was under the management of Amabai. It is abundantly proved that Bhau carried on all the businesses in the city of Belgaum, where the defendants resided. The plaintiffs' family, with Amabai as head, lived in the neighbouring township of Shahapur. It is also proved in the case that, in carrying on the money-lending business of Amabai, Bhau had in the usual way, opened in his account books, what is called in the vernacular, khatas, in other words, "separate accounts" in the names of Amabai and her sons. These khatas are the credit and debit accounts of the particular person in whose name they stand. Apparently—for the sake of convenience in the money-lending transactions—Amabai had a separate account from her sons, but there is absolutely nothing to show that the moneys lent on the khata belonged exclusively to her. All the circumstances show that the moneys on these accounts belonged to the joint family.

The khata in the name of Amabai was opened in 1899–1900 and was carried on up to 1905. The khata in the name of Baba Sahib, plaintiff No. 1, commenced in 1894 or 1895 and was carried on up to 1905. It is not necessary to refer to the khatas of the minors, as they do not come into the controversy at all.

Bhau not only opened an account in respect of the money-dealings of Amabai and Baba Sahib in his own books, but he appears to have opened in the books of another neighbouring money-lender named Ranojimane an account in the name of Amabai, sometime in January, 1903.

There can be little doubt, as the learned Judges of the High Court point out, that even if the onus of proving consideration for the mortgage lay on the plaintiffs, in the face of the fact that

they hold a regularly executed mortgage bond, the fact appears to be clear that the plaintiffs had ample means, both from their ancestral properties and their monetary dealings, to advance the money to the defendants, as they allege. The only question is, whether the money was in fact lent. The defendants contend that, although they executed the mortgage no consideration passed.

The Sub-Judge threw the onus on the plaintiffs, and as already stated, came to the conclusion that no consideration ever passed. The High Court, assuming that, as the defendants came under the purview of the Deccan Agriculturists Act, the onus was on the plaintiffs to establish clearly that they paid any consideration for the mortgage, have held that they have discharged that onus. On appeal before the Board, it has been contended at considerable length, that the learned Judges of the High Court took a wrong view of the facts.

Their Lordships have given their best attention to the arguments put forward on behalf of the defendants, and have come to the conclusion that the view expressed by the High Court is well founded.

It appears that the defendants were indebted to another family of money-lenders called Sakhtankar. The Sakhtankars held from the defendants a mortgage executed in 1886 in respect of the properties of the defendants. It was an usufructuary mortgage for ten years and the defendants were in possession of the mortgaged premises under a lease or rent-note. The defendants were wholly unable to discharge the debt or even to pay the rent to the Sakhtankars. The ten years of the lease were expiring and the period for the repayment of the loan had approached.

In these circumstances, Bhau, who was the chief agent of the defendants in all the transactions relating to their estate and business, sought the assistance of a pleader of the name of Chatre to induce the Sakhtankars to come to an arrangement by which the mortgagees would accept a smaller amount in full discharge of the debt and mortgage.

The debt had mounted up to something like Rs. 45,000 and Chatre appears to have induced the Sakhtankars to agree to accept Rs. 35,000 in full discharge. In order to obtain the remission, it was necessary for Bhau to show that the money he was paying came from himself. The plaintiffs state that he was Rs. 24,000 short and that he took that amount from Amabai's account to pay the debt to Sakhtankar. The defendants allege on the other hand that the whole of the amount paid to the Sakhtankars belonged to their joint family. There is no entry in their books with regard to this payment.

Mr. Justice Shah, in his careful examination of the account books, shows that Bhau had, at the time when the transaction

relating to the payment of Sakhtankar's debt took place, something like Rs. 24,000 belonging to Amabai in his hands. The plaintiffs have produced a memorandum in Bhau's handwriting, Exhibit 65, which conclusively establishes this fact. There is absolutely no evidence to contradict this part of the case. From whatever source the balance of the Rs. 35,000 might have come it is established beyond doubt that Bhau had money in his hands at that time belonging to the plaintiffs' joint family, and that he utilised the same for the purpose of paying Sakhtankar.

The Sub-Judge's judgment has proceeded entirely on suspicion; he thought that because Bhau told Chatre at the time when he was inducing Chatre to obtain a remission from the Sakhtankars, that the money something like Rs. 20,000 belonged to him, that Bhau was playing a trick upon his brothers and that the money really belonged to the joint family. With that view their Lordships emphatically differ.

It was the interest of Bhau, as well as the other members of his family, to get a remission, and that remission they could only get if they represented that the whole of the money came from themselves without any help from outside; and the statement which Chatre says was made to him by Bhau does not appear to their Lordships to be of any value. The oral evidence produced on behalf of the defendants is wholly unworthy of credit. In a case like this, it would be enough to say that to proceed on the divergent statements of the witnesses on either side would be most unsafe.

The facts are quite clear. On the 23rd December, 1904, payment was made of Rs. 35,000 to the Sakhtankars. A week previous to that Bhau executed a promissory note for Rs. 23,219 in favour of Amabai. The document is in the following terms :—

> *Receipt.*—Receipt is given in writing by Bhawoo Balappa Shetti residing at Belgaum is as follows :—
>
> "I having passed a promissory note in writing this day in your favour for Rs. 23,219 (twenty-three thousand two hundred and nineteen) have received the amount in cash. Nothing is due from you in respect of that promissory note. I have received the whole of the amount in full. The receipt is duly given in writing as above."
>
> Dated the 16th of the month of December, 1904 A.D.
>
> Signature of Bhawoo Balappa Shetti. My own handwriting.

The connection between the promissory note and the payment to Sakhtankar on the 23rd December is obvious. Their Lordships are not prepared to accept the contention that it was not given on the date it bears. By this promissory note it will be seen that Bhau makes himself responsible for the amount he borrowed from Amabai, and if the proceeds were applied, as their Lordships agree with the High Court in thinking they were applied, in the discharge of the Sakhtankar mortgage, what more natural than that Bhau should be anxious to get his brothers to undertake along

with him the responsibility of the burden so contracted, in favour of Amabai, and he accordingly went on pressing them to execute a bond? He not only pressed them himself, but invoked the assistance of Chatre in that matter.

On the 17th September, 1905, the brothers agreed to join with him in the execution of the mortgage bond, and the bond was executed and signed by the three brothers, Adappa, Bhau and Ganapati. It appears to have been executed at Shahapur at the residence of the plaintiffs, as would naturally be the case. This mortgage is on the same lines as the one to the Sakhtankars. They, at the same time, executed a rent note as they were allowed to remain in possession of the properties mortgaged on payment of the usual rent. It is contended on behalf of the defendants that they paid no rent, and that this is evidence of the fact that no money was paid for the mortgage. The non-payment of rent may be explained, as the learned Judges of the High Court point out, by the relationship of the parties.

It is quite true that some two years after the execution of the mortgage, Bhau—in order to evade the liability of the joint family—began to allege that it was only a nominal transaction. But he was alive until 1909 when Baba Sahib, plaintiff No. 1, was pressing for payment, but neither Bhau nor his brothers took any action to get rid of what they called a "nominal" mortgage.

One other fact is most significant in the case, and that is, that in the record of rights, the names of the plaintiffs were entered as persons entitled to possession, apparently on the basis of the mortgage.

The defendants have not chosen to get printed the copies of the extracts from the record of rights register "C," nor their Lordships gather from Counsel in the case, has he been shown any copy of the same.

Their Lordships consider that the defence cannot be accepted, and that the judgment of the High Court is right, and they will, therefore, humbly report to His Majesty that the appeal should be dismissed with costs.

In the Privy Council.

ADAPPA AND OTHERS

v.

GUNDAPPA BHARMAGOUDA DESAI, SINCE DECEASED, AND ANOTHER.

DELIVERED BY MR. AMEER ALI.

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