

Privy Council Appeal No. 125 of 1924.

Patna Appeal No. 44 of 1923.

Dwarka Nath Singh and others - - - - - *Appellants*

v.

Keshri Mall and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 4TH MARCH, 1927

Present at the Hearing :

LORD PHILLIMORE.

LORD CARSON.

LORD DARLING.

MR. AMEER ALI.

[*Delivered by* LORD CARSON.]

The plaintiffs (respondents) who carry on the business of cloth merchants and money-lending at Gaya, brought the action against the defendants to enforce three mortgage bonds dated the 11th April, 1911, the 13th July, 1912, and the 5th November, 1914 respectively. The plaintiffs claimed a decree for the payment of the principal and interest due under the bonds in suit, and in default of payment thereof for the sale of the mortgaged properties belonging to the defendants, who are members of a joint and undivided Hindu family governed by the Mitakshara law. The defendants Nos. 1, 2 and 3, are brothers, and it appears that on the 7th January, 1899, Dwarka Nath Singh, defendant No. 1, and Kishun Prasad Singh, defendant No. 3, executed a power of attorney in favour of Brijnath Singh, defendant No. 2, which provided as follows :—
“ If in any civil or criminal Court subordinate to the Calcutta High Court it be necessary for us, the executants, to appear personally and to make defence there the said Am-Mokhtar himself

shall appear and make defence in the cases in behalf of us, the executants, and in case of necessity shall depose on solemn affirmation, or in respect of any Mauza or share of land owned and possessed by us, the executants, the said Mokhtar-Am shall grant simple or Zarpeshgi-Thika or make mortgage with possession, or in times of necessity after borrowing up to Rs. 4,000 from any one for expenses of cases, purchase of Milkiat and Mokarrari payment of public demands and other necessary and incumbent work relating to us, the executants, the Mokhtar-Am may execute mortgage deeds jointly with himself or in case of necessity may make our signatures upon the aforesaid bonds." In April, 1911, the sum of Rs. 2,837.12.0 was found due from the defendants 1 to 3 to the plaintiffs after settlement of the account (Bahi Khata) and on the 11th April, 1911, the said Brijnath Singh (defendant No. 2), acting under the said power of attorney, executed a deed of mortgage purporting to be for himself and on behalf of his brothers, defendants Nos. 1 and 3, in favour of the plaintiffs, and hypothecated certain joint family properties. It was for the sum of Rs. 3,300, which was made up of two items, viz., alleged antecedent debts due from the said defendants amounting to Rs. 2,837.12.0 and cash lent to defendant No. 2 at the time of the execution of the mortgage, Rs. 462.4.0. The said defendant No. 2 similarly executed a second mortgage in favour of the plaintiffs on the 13th July, 1912, for Rs. 1,400, which was made up of three items alleged antecedent debts due from the defendants 1 to 3—Rs. 505.13.0, Rs. 620, borrowed by defendant No. 2 in order to discharge a decretal debt due from the defendants to Promotho Nath Mitter, and cash lent to the defendant No. 2 at the time of the execution of the bond, amounting to the sum of Rs. 274.3.0. The third mortgage bond was similarly executed by the defendant No. 2 on the 5th November, 1914, in favour of the plaintiffs for Rs. 2,000, which consisted of two items viz., alleged antecedent debt due from the same defendants, Rs. 1,173.4.3, and cash lent to defendant No. 2 for defraying the necessary household expenses at the time of the execution of the bond, Rs. 826.11.9.

The defendant No. 2, who signed and executed the mortgage bonds sued upon, did not appear or contest the plaintiffs' claim, but the other contesting defendants, who are now the appellants, denied the genuineness and validity of the power of attorney or that the defendants Nos. 1 and 3 had power to execute it, and also pleaded that the said mortgage bonds were beyond the authority vested in the Moktarnama—defendant No. 2. They also alleged that the necessities indicated in the said mortgage bonds were wrong and false.

The action was tried in the Court of the Subordinate Judge of Gaya, who after hearing the evidence gave judgment on the 23rd March, 1920. On the question of the genuineness and validity of the mortgage bonds and the passing of the consideration money,

he stated as follows : " From the deposition of P. W. 1, P. W. 2, P. W. 3, P. W. 4, and P. W. 7, I am perfectly satisfied, and I hold it as a fact that the bonds in suit were duly executed and properly attested, and that defendant No. 2 executed them for self and for his brothers, defendants Nos. 1 and 3, in consideration of their previous debts due to the plaintiffs under Bahi Khatas, as also in consideration of cash loans advanced on the occasions of each bond. There is no reason whatever why the aforesaid witnesses should not be relied upon. Previous debts have been satisfactorily proved by the voluminous account books and also by the Hath Chithas written and signed mostly by the defendant No. 2 and partly by the defendant No. 1."

The learned Subordinate Judge, however, held that upon the construction of the said power of attorney the defendant No. 2 had no power to borrow more than Rs. 4,000, and that the terms of the power of attorney did not authorise the defendant No. 2 to execute bonds for the price of cloths, etc., and the debts due under Bahi Khata, etc. In the result he dismissed the plaintiffs' claim for a mortgage decree against the defendants, but granted a simple money decree against the defendant No. 2 only for the amount claimed, with costs and further interest at the rate of 6 per cent. per annum until realisation.

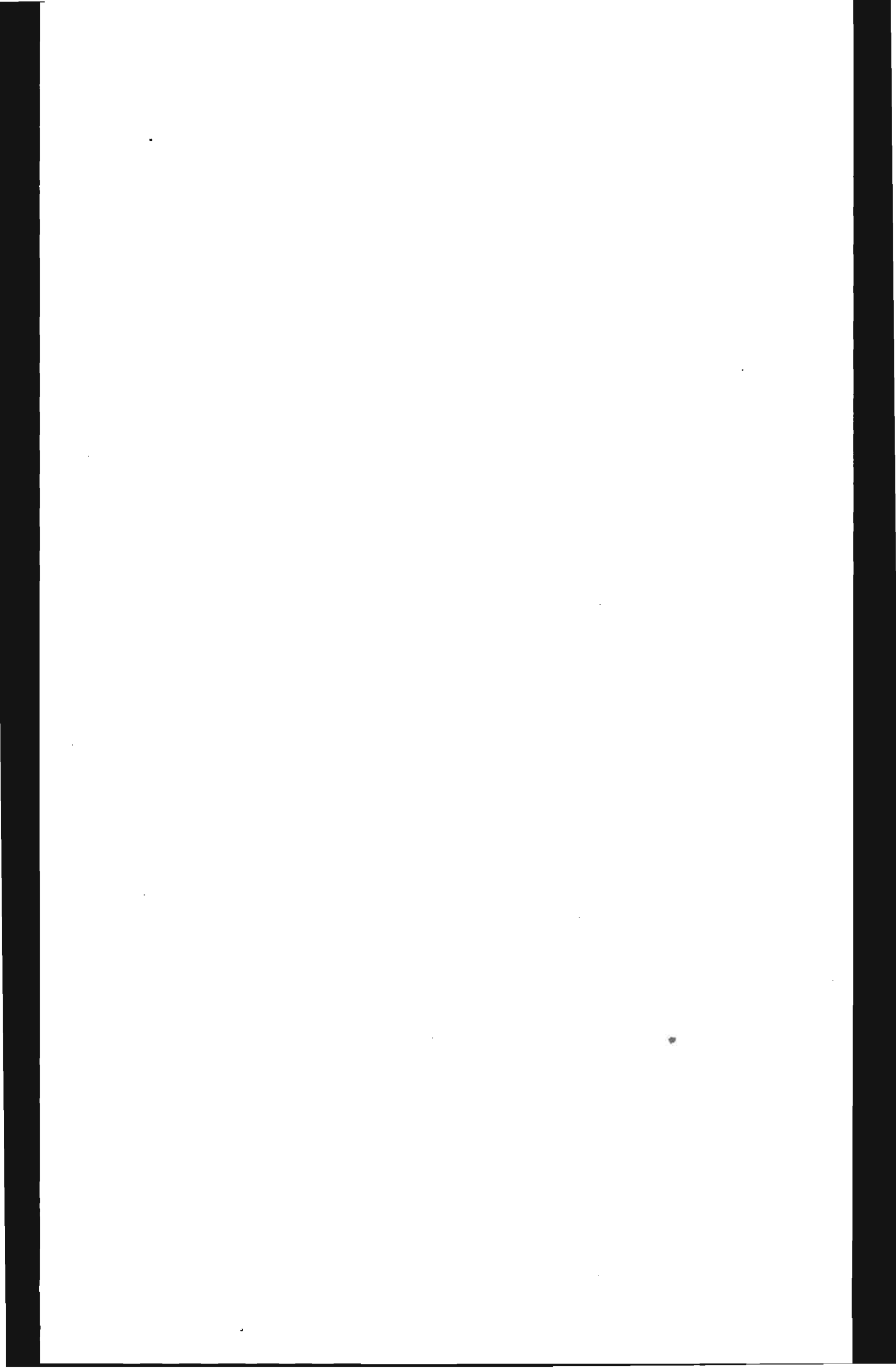
Upon appeal by the present plaintiffs (respondents) to the High Court of Judicature at Patna (Civil Appellate Jurisdiction), that Court decided that upon the true construction of the power of attorney there was complete power in Brijnath Singh to borrow money on behalf of the joint family and for the purposes of the joint family, and to execute mortgage bonds on behalf of his brothers and himself jointly, and the learned Judges held that they were not prepared to agree with the argument that defendant No. 2 had no power to enter into different mortgage transactions, each transaction being for a sum not exceeding Rs. 4,000, if it was necessary for him to do so on behalf of the joint family.

Their Lordships in the High Court examined each of the mortgage bonds in detail, and in each case held as regards the moneys which have been already referred to as antecedent debts on accounts stated (Bahi Khata) the same were moneys due for the joint family for which the defendant No. 2 was entitled under the power of attorney to bind himself as well as his brothers by the execution of the mortgages to the extent of such debts. They, however, disallowed the " present advance " in each case on the grounds that there was no evidence that such advances were borrowed for joint family necessity.

The High Court, therefore, on the 1st August, 1923, allowed the appeal and set aside the judgment and decree passed by the Subordinate Judge and gave a decree to enforce the mortgage bonds on the terms and for the amounts already indicated. From that judgment the present appeal has been presented to His Majesty in Council.

It is to be observed that both the Courts below have held that the sums of money in respect of which the decree appealed from has been made constituted antecedent debts due by the defendants Nos. 1 to 3 to the plaintiffs under Bahi Khata, and it was necessary for the said defendants to pay off such sums to the plaintiffs. Under the circumstances their Lordships see no reason for differing from the conclusions arrived at by the Appellate Court. Their Lordships think it unnecessary to decide, as the High Court did, whether the power of attorney authorised the defendant No. 2 to borrow in excess of Rs. 4,000 by different mortgage transactions, as, having regard to the findings referred to that the sums mentioned in the respective mortgages and for which the decree has been given in the High Court were debts for which the joint family was liable, their Lordships consider that under the earlier words in the power of attorney, throughout relied on in the High Court, viz., "or in respect of any mauza or share of land owned and possessed by us, the executants, the said Mokhtar-Am shall grant simple or Zarpesghi-Thika or make mortgage with possession," are quite sufficient to confer upon the defendant No. 2 the power to execute the several mortgage bonds for the amounts specified by the High Court.

Their Lordships are therefore of opinion that this appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.



In the Privy Council.

DWARKA NATH SINGH AND OTHERS

vs.

KESHRI MALL AND OTHERS.

DELIVERED BY LORD CARSON.

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