

*Privy Council Appeal No. 24 of 1938*  
*Allahabad Appeal No. 15 of 1936*

Thakur Bhagwan Singh and others - - - *Appellants*

*v.*

Bishambhar Nath (minor) and others - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 2ND MAY, 1940.

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*Present at the Hearing:*

LORD THANKERTON

LORD JUSTICE GODDARD

MR. M. R. JAYAKAR

*[Delivered by LORD JUSTICE GODDARD]*

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This is an appeal from a judgment of the High Court of Allahabad dismissing an appeal by the present appellants and allowing an appeal by the first three respondents from a judgment of the Subordinate Judge of Agra. The action was brought to recover Rs.44,000 the principal sum secured by a mortgage dated 17th August, 1924, with interest thereon at 5½ per cent. This mortgage was in fact the last in a series by way of renewal of an original mortgage dated 22nd July, 1892, whereby Durjan Sal, the father of the first appellant and great grandfather of the 2nd and 3rd appellants, had mortgaged some of his ancestral lands to one Bhoraj the father of the 4th respondent, for Rs.25,000. The consideration for the mortgage is stated in the deed to be the discharge of two promissory notes with interest amounting to Rs.6,221-8-0 and Rs.18,778-8-0 cash, for payment of a debt due under a bond. On the same day the mortgagor executed a bond for Rs.2,000 payable in two years in favour of the mortgagee. This mortgage was renewed on 26th April, 1895, again on 29th July, 1910 and finally on 17th August, 1924 by the mortgagee which is the subject of the present suit. The execution and completion of the original mortgage and the receipt of Rs.6,221-8-0 were admitted by the mortgagor in the presence of the Sub-Registrar, who certified that the cash payment of Rs.18,778-8-0 and the two promissory notes were given to the mortgagor in his presence. Between August, 1912 and January, 1917, various payments, four in all, were made on account of interest due on the mortgage. On 30th September, 1932, the respondent Khetpal in whom the mortgage was then vested assigned all his rights therein to the father of the 1st and 3rd respondents.

Seven issues were framed, but for the purpose of the present appeal, only the first is material and was the only one argued, namely "Was the bond in suit executed for consideration and is it not binding on the defendants?" The case made for the defendants was that the original mortgage was not made for any legal necessity, but to procure money to enable the mortgagor to pursue a course of immoral living and debauchery, and that the true consideration was not Rs.25,000 in as much as the promissory notes were merely fictitious documents, the sum of Rs.6,200 never having been advanced at all, nor had the Rs.2,000 ever been paid to the mortgagor. The Subordinate Judge found against the defendants on their plea as to there being no legal necessity for the borrowing, and his finding on that point was upheld by the High Court and is not now the subject of appeal. But the Subordinate Judge held that the sum of Rs.6,221-8-0 never was advanced on the promissory notes and that there was no consideration for the bond for Rs.2,000, and there was thus a failure of consideration to the extent of those two sums. He accordingly granted a decree for the amount of the principal and interest less these two sums, and, having recalculated the interest, he deducted in all Rs.25,488. On this point the High Court reversed the learned Subordinate Judge and granted a decree for the full amount claimed.

Now there seems to have been some misunderstanding as to the onus of proof in this case. In their judgment the High Court said:—"We are of opinion that the burden of showing that consideration had passed under the mortgage of 1892 had been discharged by the plaintiffs and the defendants did not produce any satisfactory evidence to show that the money was returned to the mortgagee". But in the opinion of their Lordships the onus of proof on the question whether there was consideration, or whether the full consideration stated in the mortgage had in fact passed, is wholly on the defendants and it is not for the plaintiffs to prove this matter affirmatively; on the other hand when the question is whether there was legal necessity for the borrowing, the onus of proving that there was is on the plaintiffs. Now the only evidence that part of the consideration stated in the mortgage was not in fact paid, was that of a witness named Ganesh Prasad, a man, 73 years old, formerly in the service of the mortgagor, who stated that he had been present when the transaction was completed. In substance he deposed to three matters, firstly as to the immoral life of the mortgager; secondly that the money which the Sub-Registrar certified was paid over to the mortgagor in his presence was never paid at all and thirdly that the Rs.2,000 secured by the bond for that amount was produced in two bags and given by the Sub-Registrar to the mortgagor who did not keep it but returned it to the mortgagee. The learned Subordinate Judge rejected this witness's evidence on the first two matters to which he deposed and accepted it as to the Rs.2,000. The High Court rejected this witness's evidence entirely and their Lordships do not think it necessary to add anything to

the reasons they gave for so doing as it is obvious that no reliance could be placed upon it. So far as the fictitious character of the two promissory notes was concerned there was really no evidence of this at all, but the learned Subordinate Judge appears to have based his findings on certain circumstances which appeared to him suspicious and which need not be set out in detail because even if they gave rise to suspicion there was no evidence which would justify a finding that the sums secured by the notes had not in fact been paid. Ganesh Prasad's evidence having been rejected as untrustworthy there nothing was left in the case, and it was really unnecessary for the plaintiffs to have called any evidence on the issue as to consideration, for, as has already been pointed out, the burden of proof was entirely on the defendants. Not only did they wholly fail to discharge this onus, but the evidence which was called by the plaintiffs was indeed overwhelming. Had the defendants led any evidence sufficient to shift the onus of proof, that produced by the plaintiffs would, in their Lordships' opinion, have afforded a complete answer.

The 2nd appellant who was a minor when the suit was heard has presented a petition asking that the case might be remitted for rehearing. He bases his application on the ground that his guardian was negligent in failing to make proper inquiries into the facts of the case and to procure evidence to prove that a part of the money was borrowed for gambling in litigation, and for immoral purposes, in not taking steps in time to procure the examination of the 1st defendant and in failing to apply for a summons for the production of the mortgagee's account books. Both the petition and the affidavit in support are in the vaguest possible terms. There is not the smallest indication of the identity of the witnesses whom it is alleged might have been called, nor to what they could have deposed if they had been. The 1st defendant deliberately abstained from giving evidence and to pretend that it was the duty of the guardian to have forced him to testify is fantastic. Nor is there any substance in the complaint as to the mortgagee's account books more especially as during the case the defendant Khetpal who ought to have had them had there been any swore they were not in existence.

It is impossible to entertain an application for re-trial on such vague and unsubstantial grounds as these.

In the result their Lordships will humbly advise His Majesty that both the appeal and the petition should be dismissed. The appellants will pay the costs of the respondents Nos. 1 to 3 (plaintiffs), who alone appeared.

In the Privy Council

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THAKUR BHAGWAN SINGH  
AND OTHERS

v.

BISHAMBHAR NATH (MINOR)  
AND OTHERS

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DELIVERED BY  
LORD JUSTICE GODDARD

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