

## PRIVY COUNCIL

Gajadhar Mahton

Vs.

Ambika Prasad Tewari

Privy Council Appeal No. 17 of 1924  
(Lords Shaw Carson, Sir John Edge and Mr. Ameer Ali JJ.)

13.03.1925

### JUDGMENT

#### MR. AMEER ALI J.

1. This is an appeal from a judgment and the decree of the High Court of Allahabad dismissing a suit brought by the appellant for the enforcement of a mortgage executed in his favor by one *Jai Gobind Tewari* on the 28th of August, 1907. Jai Gobind Tewari was a member of a joint Hindu family subject to the Mitakshara and apparently managed the family business.
2. The suit was brought before the Sub ordinate Judge of Basti against all the members of the joint family ; and some transferees of part of the property were joined as defendants.
3. The plaintiff who is a money-lender alleges that Jai Gobind Tewari had borrowed from him two sums of money which in the aggregate amounted to Rs. 2,715 on two bonds, for legal family necessity, and for this amount he passed the mortgage bond in suit.
4. The defendants 3 to 6, who alone contested the suit, urged it was not for legal necessity or family benefit as the plaintiff alleged.
5. The Subordinate Judge decreed the plaintiff's claim for sale of the mortgaged property under Rule 4, C. 34 of the Civil Procedure Code.
6. The High Court on appeal came to the conclusion that the onus was on the plaintiff to establish legal necessity in order to bind the joint family by the acts of Jai Gobind and that he had failed to prove such necessity. They accordingly dismissed the claim.

The plaintiff has appealed to His Majesty in Council from this order of dismissal.

7. Their Lordships have heard learned Counsel for the appellant at considerable length and they find themselves in agreement with the High Court in holding that no legal necessity is established. The principle applicable to a case where it is sought to bind the joint family by the acts of the managing member has been clearly enunciated by Lord Justice Knight Bruce in the case of *Hunoomanpersaud Pandey v. Mt. Babooee Munraj Koonweree*, 8. Their Lordships think that the decree of the High Court is right and that the appeal should be dismissed.

9. But it has been contended that even if the joint family is not bound by the mortgage created by Jai Gobind Tewari, he is liable on the personal covenant for the debt contracted by him. No such case was made in the plaint or urged before the High Court, nor is any such case made in the grounds of appeal before their Lordships or in the case as originally lodged by the appellant. The claim was for a mortgage decree. According to Counsel's statement it was only when the appeal came into his hands that the idea of a decree on the personal covenant occurred to the plaintiff's advisers. Their Lordships are of opinion that having regard to the circumstances of the case the claim for a simple money decree against Jai Gobind urged before the Board can not be entertained. No such decree could be made without an amendment of the plaint ; and although it is in their Lord ships' discretion to allow an amendment even at the last stage, they do not think that this is a case in which that discretion should be exercised.

10. As regards the respondents' costs they appear to have lodged a case but did not appear at the hearing. They are clearly entitled to their costs up to that stage. The rule in such circumstances is stated in Mr. Norman Bentwich's "Practice of the Privy Council in Judicial Matters" on page 337 as follows :-

"When respondents lodged a case, but did not appear at the hearing, the appeal was dismissed with costs to be paid to respondents down to the lodging of the case, and ordered to be paid out of the deposit placed in the registry as security."

Their Lordships will humbly advise His Majesty to dismiss the appeal with costs to the respondents up to the lodging of the case.

Appeal dismissed.

Cases Referred.

(1854-57) 6 MIA 393 : 18 WR 81 : 2 Suther 29 : 1 Sar 552 (PC).