

**Ramdayal and ors. Vs. Bhanwarlal and ors.**

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**Court :** Rajasthan

**Decided On :** Feb-02-1971

**Reported in :** AIR1973Raj173; 1972()WLN476

**Judge :** Jagat Narayan, C.J.,; L.N. Chhangani and; J.P. Jain, JJ.

**Acts :** [Registration Act, 1908](#) - Sections 35 and 61; [Evidence Act, 1872](#) - Sections 114; Hindu Law; [Transfer of Property Act, 1882](#) - Sections 58, 67 and 98; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 34, Rule 4

**Appeal No. :** First Appeal No. 109 of 1958

**Appellant :** Ramdayal and ors.

**Respondent :** Bhanwarlal and ors.

**Advocate for Def. :** M.M. Vyas, Adv.

**Advocate for Pet/Ap. :** H.M. Parakh, Adv.

**Judgement :**

**Chhangani, J.**

1. This is plaintiff's first appeal from the judgment and decree of the District Judge, Balotra dated 28/8/5S dismissing the plaintiff-appellants' suit for the enforcement of a mortgage. The appeal came up for hearing before a Division Bench of this

Court. One of the questions raised before the Division Bench related to the invalidity of the registration on account of the non-compliance with the provisions of Sections 35 and 61 of the Marwar Registration Act which are similar to the provisions of the Indian Registration Act except for some changes in Section 35 of the Marwar Registration Act. A question relating to the validity of the registration deed on account of the non-presentation of the deed and non-admission made by some of the executants of a deed arose before a Division Bench in Civil First Appeal No. 30 of 1957 (Raj): Bhaniram v. Mukandass and was referred to the Full Bench. Having regard to this reference, the present appeal was also directed to be heard by a Full Bench by the order of the Chief Justice dated 6-10-70. This is how, the appeal has come before the Full Bench.

2. The facts leading to the appeal are briefly these--

The plaintiff-appellants instituted a suit in the Court of District Judge, Balotra on 29-1-57 and set out their case as follows:--

That defendants Mohan Lal, Bhanwar Lal and Champa Lal were members of a Joint Hindu Family. Mohan Lal being the Karta. The plaintiffs however added in the plaint that they received information that after the execution of the mortgage deed dated 9-5-47 defendant No. 2 Bhanwarlal was adopted by Balkishan son of Lichmandass Maheshwari and that defendant No. 3 Champalal was adopted by Hazarimal son of Faujmal Maheshwari. The plaintiffs served notices on them requiring them to reply whether they admit or not their adoption but they gave no reply. Consequently, the plaintiffs impleaded them as defendants in the suit.

3. That on 9-5-47; defendant No. 1 Mohanlal in his capacity as a karta of the Joint Hindu Family took a loan of Rupees 25,000/- from the plaintiffs for their joint family business and mortgaged joint family properties consisting of two houses and one shop as described in Para 4 (A) to (C) of the plaint. Defendant No. 2 Bhanwarlal who was an adult joined in the transaction and signed the mortgage deed Ex. 1. Defendant No. 3 Champalal' was a minor and, therefore, could not sign the mortgage deed. According to the plaintiffs, the defendant No. 1 as a karta of the Joint Hindu Family presented the mortgage deed for registration and got it registered. The defendants agreed to pay interest on the mortgage-money at Re.

0/7/-% per month, the annual interest amounting to Rs. 1,312/8/-. The defendants obtained a lease of the mortgaged property and the defendants Nos. 1 and 2 executed a rent note Ex. 2 on 9-5-47 fixing annual rental of Rs. 1,312/8/- equivalent to the amount of annual interest. The plaintiffs alleged to have received an amount of Rs. 3,658/8/- till Asoj Bad 2 Samvat 2009 towards interest due under the mortgage deed. They received no payment thereafter. The interest from the date of the mortgage deed upto 5-2-57 was calculated at Rs. 14,922/ 8/- and giving a credit of Rs. 3658/8/- the plaintiffs claimed an amount of Rs. 36,264/- due under the mortgage upto 5-2-57. On the alleged adoption by Balkishan and Hazarimal of defendants Nos. 2 and 3 and their ceasing to have any interest in the mortgaged properties, the plaintiffs treating the defendant No. 1 Mohanlal responsible for the liability under the mortgage and finding him also in possession of the mortgaged properties, demanded possession of the mortgaged properties, from him and also demanded interest. He refused to hand over the possession. On the refusal of the defendant No. 1, the plaintiffs also approached the defendants Nos. 2 and 3 but they replied that they having gone in adoption had nothing to do with the mortgaged properties. The plaintiffs also alleged in the plaint that after the execution of the mortgage deed the market value of the mortgaged properties began declining and the security became inadequate and, therefore, on 10-7-56, they served separate notices on the defendants demanding possession of the mortgaged properties and requiring them to repay the mortgage money or to mortgage additional properties to secure the loan. The defendants however, gave no written reply but verbally informed the plaintiffs to do whatever they considered necessary. The plaintiffs thereupon filed a suit claiming the following reliefs--

In Clauses 'A' and 'B' of the relief clause they in substance, claimed a decree for the recovery of Rs. 36,264/- by sale of the mortgaged properties and also other properties if the sale proceeds of the mortgaged properties were not found sufficient.

In clause 'C' they prayed that in case the defendants are prepared to hand over the possession of the mortgaged properties and also to mortgage additional properties to ensure the payment of the mortgage amount together with interest, a decree to that effect may be passed in favour of the plaintiffs against the

defendants.

In clause 'D' of the relief clause, it was stated that in case the defendants desire to continue the usufructuary mortgage they should pay the entire amount of interest due and mortgage additional properties so that the valuation of the mortgaged properties might be double the amount of the mortgage money, and on doing so, the mortgaged properties need not be sold and the right of the mortgagors to redeem the properties be maintained.

In clause 'E' of the relief clause it was averred that if the defendants Nos. 2 and 3 agree to the fact of their adoptions to Balkishan and Hazarimal respectively and of having no concern with the mortgaged property as entered into mortgage deed and if the defendant No. 1 agrees to it and accepts to have his possession over the mortgaged-properties and agrees to his responsibility for all the terms embodied in the mortgage deed then the names of the defendants Nos. 2 and 3 be deleted from the plaint.

In clause 'F' the plaintiffs added the usual prayer for any relief which may be legally available to them.

4. A detailed reference to the relief clauses has been made as they assumed importance in connection with the controversy relating to the maintainability of the suit.

5. Defendant Mohanlal did not appear and contest the suit and the suit proceeded ex parte against him. Defendant No. 3 Champalal filed his written statement on 19-3-57. The defendant No. 2 Bhanwarlal filed his written statement on 19-4-57. They took more or less identical pleas. They denied their adoptions by Bal Kislian and Hazarimal respectively. Their case was that sometime prior to the year 1947 defendant No. 1 wound up the family business and started dealing in wagering contacts in bullion and did not pay any heed to the persuasions of the relations to the contrary. Thereupon Champalal was taken by Hazarimal and Bhanwarlal by Balkishan's widow and they started living with them. Since then they have been separate. They, however, averred that there was no actual partition of the joint family properties by metes and bounds and that the family properties continued to

be joint. They, however, denied that defendant No, 1 was the Karta of the family. Although they did not specifically admit the execution of the deed by the defendant Mohanlal they do not appear to have seriously challenged the execution of the deed by Mohanlal: their main challenge being to his capacity as the karta of the family and his competence to alienate the undivided properties. In para 25 of the written statement the defendant No. 2 specifically pleaded that 'the defendant No. 1 sustained heavy losses in wagering contracts of gold and silver in the year 1947. Hence in order to defraud the creditors of that wagering business if at all any mortgage deed was executed by the defendant No. 1 and the plaintiffs together for the property of the defendants it is collusive, without any consideration and incorrect. Such a mortgage deed cannot produce any effect on my rights.' Defendant No. 2 Bhanwarlal denied the execution of the mortgage deed and particularly emphasised that he did not present the deed for registration nor he appeared before the Sub-Registrar to admit the execution and thus hinted want of proper registration of the document. Both the defendants pleaded want of consideration and bar of limitation. They denied the allegations regarding the decline in the market value of the properties mortgaged but admitted receipt of notices and pleaded that they verbally informed the plaintiffs that there was no real mortgage transaction and they could file a false suit on their own responsibility.

6. On the basis of these pleadings, the trial Court framed the following issues:

1. Whether the defendants 2 and 3 constituted a joint Hindu family on 9-5-47 with defendant No. 1 as its Karta? Ps.
2. (a) Was the mortgage deed Exhibit 1 executed by defendant No. 2? Ps,  
(b) If so, was it without consideration? D-2.
3. (a) Whether defendant No. 1 Mohan-lal borrowed from the plaintiffs a sum of Rs. 25,000 on 9-5-1947 as Karta of the family for legal necessity and mortgaged the suit property with the plaintiffs? Ps.  
(b) If so, whether the mortgage deed Exhibit 1 is collusive and without consideration and therefore not binding on the defendants 2 and 3? D-2 and 3.

4. If it is proved that defendant No. 1 Mohanlal executed the mortgage deed in question, he being a coparcener only, is the whole of the mortgage deed invalid?
  5. Whether after the execution of the mortgage deed the price of the mortgage property went on falling and therefore the plaintiffs are entitled to bring the present suit? Ps.
  6. Is the plaint not properly stamped? If so, what is its effect on the suit? D-2 and 3.
  7. Whether the relief for the mortgage money and sale of property under the mortgage deed Exhibit 1 in suit is within limitation? Ps.
  8. Is the registration of the mortgage deed not invalid against defendant No. 2 because he had neither presented it nor admitted its execution before registering authority? Ps.
  8. (a) Whether the present suit is not maintainable in view of the nature of the mortgage deed on which it is based? D-2 and 3.
  9. To what relief the parties are entitled?
7. The plaintiffs examined 12 witnesses and relied upon 19 documents in support of their case. The defendants examined 14 witnesses and relied upon 107 documents to rebut the plaintiffs claim. The trial Court, after review of the entire evidence, oral and documentary, recorded findings on the various issues which may be detailed below.
8. On issue No. 1 relating to the Joint Hindu family of the defendants, the trial Court held that defendants Mohanlal, Bhanwarlal and Champalal constituted a joint Hindu family on the date of the execution of the mortgage deed and that Mohanlal, defendant, being the eldest member of the family was its Karta. The issue was decided in favour of the plaintiffs.
9. Issue No. 2 (a) was decided in favour, of the plaintiffs and it was held that the execution of the mortgage deed Exhibit 1 by defendant No. 2 Bhanwarlal had been amply proved.

10. The trial Court discussed issues Nos. 2 (b), 3 (a) and 3 (b) together and held that the mortgage transaction was not collusive between the plaintiffs and the defendant Mohanlal. As to the consideration for the mortgage, the trial Court held that a sum of Rs. 10,963 was due to the plaintiffs under the khatas Exhibits 14 and 15 against the defendants and the discharge of the liability of the defendants under the khata was a part of the consideration of the mortgage deed in question. The trial Court, however, held that the plaintiffs failed to prove that the amount of Rs. 14,037 was paid in cash to the defendants on 15-5-1947. The trial Court thus held that the plaintiffs failed to prove consideration to the extent of Rs. 14,037.

11. Considering the question of legal necessity for the mortgage as embodied in issue No. 3 (a), the trial Court held that the plaintiffs failed to prove the legal necessity of the mortgage in question in order to bind the defendant Champalal.

12. Under issue No. 4 the trial Court held that a coparcener cannot alienate even his own interest in the coparcenary property without the consent of the other coparceners and the alienation being not for legal necessity, was void in its entirety.

13. Issue No. 5 was not pressed by the plaintiffs and it was, therefore, decided against the plaintiffs.

14. Issue No. 6 was decided for the plaintiffs.

15. On the question of limitation, the trial Court held that the suit for sale of the mortgaged properties was within limitation but the prayer for a personal decree was barred.

16. On the controversy relating to the invalidity of the registration, the trial Court, having regard to the facts and the circumstances of the case, took the view that the registering officer registered the deed in question as regards defendant No. 1 Mohanlal alone on 19-5-1947 and did not proceed to complete the registration of the deed as required by Section 61 of the Registration Act, because there was time left for other executant, viz., Bhanwarlal to make appearance before him for registration purposes. Consequently, it held the deed as registered in respect of

Mohanlal alone. It, however, observed that had the deed been registered qua Bhanwarlal also, then the registration would have been valid, the non-appearance of Bhanwarlal to admit execution being a defect of procedural nature. In holding that the mortgage deed was not registered qua Bhanwarlal, the trial Court emphasised that the endorsement and certificate were not proved to have been copied in the margin of the register book as required by Section 61 of the Registration Act.

17. As regards issue No. 8 (a), the trial Court held that the mortgagors having failed to deliver the possession of the mortgaged property back to the plaintiffs-mortgagees on the expiry of the lease period, the mortgagees were competent to sue for the mortgage money under Section 68(1)(c), (d) of the Transfer of Property Act.

18. On issue No. 9, the finding of the trial Court is that Section 93 of the Transfer of Property Act cannot be read as if it were absolutely independent of Section 67 and that Sections 67 and 98 had to be read together and that Section 98 does not bar a suit for the recovery of the money by sale of the mortgaged property.

19. In view of the findings of the trial Court on issues Nos. 3, 4 and 7, the trial Court dismissed the plaintiffs' suit with costs.

20. Aggrieved by this decree, the plaintiffs have filed the present appeal. The defendant Mohanlal did not appear and contest the appeal. Mr. M. M. Vyas, however, appeared on behalf of the defendant-respondents Bhanwarlal and Champalal.

21. We have heard Mr. Hastimal for the appellants and Mr. M. M. Vyas for the respondents. Mr. Hastimal made submissions assailing the findings of the trial Court while Mr. Vyas not only supported the findings recorded in his favour but farther assailed those findings of the trial Court recorded against him and supported the dismissal of the suit--even in case of the reversal of the findings in his favour. We consider it convenient to address to the various questions arising for the determination on the respective submissions made at the Bar and to refer to the arguments at appropriate stages while determining the questions.

22. The first contention relates to the validity of the registration and the consequent inadmissibility of the deed in evidence. Issue No. S framed by the trial Court contemplated a controversy over the proper presentation of the document and the non-appearance and non-admission of the defendant Bhanwarlal and the consequent non-compliance with the provisions of Sections 32 and 35. The documents having been presented by Mohanlal, there was a valid presentation of the deed before the Sub-Registrar and there has been no non-compliance of Section 32. There has, of course, been a non-compliance with the provisions of Section 35 inasmuch as (ho defendant Bhanwarlal did not appear before the Sub-Registrar and admit the execution. The question as to proper effect of non-compliance with the provisions of Section 35 was considered in detail in Civil First Appeal No. 30 of 1957 (Raj.) and it was held that the non-compliance is a defect of a procedural nature and does not invalidate registration. For the reasons given in that judgment, which we need not repeat, we hold in the present appeal also that the registration of the document could not be invalid or ineffective against Bhanwaihil on this ground. Even the trial Court was not prepared to hold the registration defective on mere non-compliance with the provisions of Section 35. The trial Court held that the mortgage deed in question was not registered qua Bhanwarlal for the reasons reproduced below:--

'In the present case before me as already stated, it appears neither from the mortgage deed nor from any evidence on record that the endorsement and certificate mentioned in Sections 59 and 60 were copied into the margin of the relevant register book and therefore it cannot be said in the instant case that the registration of the mortgage deed should be deemed complete within the meaning of Clause (2) of Section 61 of the Registration Act.'

The learned counsel for the respondents in supporting the finding of the trial Judge emphasised the provisions of Section 61 and referred to a few cases to establish that the registration can be considered complete only when the endorsement and certificate referred to and mentioned in Sections 59 and 60 are copied into the margin of the register book. After going through the pleadings of the parties and the issue No. 8, we are clearly of the opinion that the trial Court clearly went wrong in entering into the controversy whether the registration was not complete on

account of the non-compliance with the provisions of Section 61 of the Registration Act. The defendants did not take any plea that the endorsement and certificate were not copied in the margin of the register book. The Sub-Registrar endorsed on the mortgage deed a certificate as required by Section 60 (1) containing the word 'Register' together with the number and page of the book in which the document stands copied and this certificate is clearly admissible for proving that the document has been duly registered in the manner provided in the Act and that the facts mentioned in the endorsement referred to in Section 59 have occurred as therein mentioned. Having regard to the provisions of Section 114 of the Evidence Act it will be proper to infer that in the ordinary course of business the certificate and the endorsement must have been copied in the margin of the register-book and in the absence of any controversy raised by the defendants on facts, the trial Court was not justified in insisting that the plaintiffs ought to have led evidence to prove that the certificate and endorsement were copied in the margin of the register book for proving a completed registration, specially when the defendants raised no controversy on facts and there was no issue envisaging a controversy as to the absence of the copies of the endorsement and certificate in the register book. We must mention in this connection that having regard to the provisions of Section 60 (2) of the Registration Act and Section 114 of the Evidence Act, the completion of the document in the manner provided by the Act has to be held established. In this view of the matter, it is unnecessary to enter into a detailed examination of the contention of the defendant-respondents based upon the consideration of the stage of the completion of the registration and the various cases in that behalf. In the result, we hold that the registration of the document was not invalid against Bhanwarlal.

23. The next question relates to the execution of the deed by Bhanwarlal. In order to prove execution by Bhanwarlal, the plaintiffs examined Purshottam, P.W. 1, Nathrai, P.W. 2, Megharaj, P.W. 4, Prabhoo-lal, P.W. 5, Tarachand, P.W. 7 and Ran-chhordass, P.W. 8. The defendant Bhan-warlal examined himself as D.W. 2 and produced his brothers Champalal, D.W. 3 and Mohanlal, D.W. 14. Tarachand, P.W. 7 is the scribe of the mortgage deed. He has clearly stated that the defendant Bhanwarlal signed the mortgage deed in his presence. There was no cross-examination to discredit his testimony. Purshottam, P.W. 1 and

Ranehhordass, P.W, 8, are the attesting witnesses. It is true that Purshottam stated that Bhanwarlal did not sign the deed in his presence. Ignoring his evidence, the evidence of other witnesses fully establishes the execution of the deed by Bhanwarlal. The defence evidence is wholly inadequate to rebut the evidence led by the plaintiffs. Mohanlal, D.W. 14, admits that when he produced the mortgage deed along with the rent note in the office of the Sub-Registrar, Bhanwarlal's signatures were there on the deed and Motilal had told him that he had obtained his signatures. He made a statement to the effect that the mortgage deed did not bear Bhanwarlal's signatures on the basis of information which was given to him by Bhanwarlal after the institution of the suit. It is inconceivable that Mohanlal could have kept quiet and not disputed the genuineness of Bhanwarlal's signatures at the time he produced the mortgage deed before the Sub-Registrar for registration if the deed really contained the forged signatures of Bhanwarlal. It may also be mentioned that the defendant Bhanwarlal did not come forward to challenge the execution of the deed even when in the year 1956 he was served with a notice. He omitted to give any written reply to the notice. The execution of the mortgage deed, it may be significantly pointed out, was not sought to be disproved by the defendants by the evidence of the expert. Even though the expert was examined to disprove Bhanwarlal's signatures on some other documents but the expert was not called upon by the defendants to state his opinion with regard to the defendant Bhanwarlal's signatures on the mortgage deed. The execution of the mortgage deed by the defendants has been satisfactorily proved and the conclusion of the trial Court warrants no interference.

24. We now take up the controversy relating to consideration. The consideration relating to mortgage deed consists of two items:

(1) Rupees 10,963 on account of the previous khatas marked Exhibits 14 and 15 bearing Mohanlal's signatures.

(2) Rupees 14,037 paid in cash on 15-5-1947 after the registration of the mortgage deed.

The trial Court held the first item of consideration proved. With regard to the second item, the trial Court held that the plaintiffs failed to prove the payment of

Rs. 14,037 in cash to the defendant Mohanlal,

The defendants-respondents have challenged the findings of the trial Court with regard to the item of Rs. 10,963 and made two submissions--

(1) that there is no proof of the execution of the Khatas by Mohanlal; and

(2) that even the proof of these khatas is not sufficient to warrant a conclusion that the consideration has been, proved qua Bhanwarlal.

The trial Court considered the statements of Meghraj, P.W. 4 and Prabhoolal, P.W. 5, examined by the plaintiffs and the statement of Mohanlal, D.W. 14, examined in rebuttal, and came to a conclusion that Rs. 10,963 were due to the plaintiffs under the Khatas Exhibit 14 and Exhibit 15. We have gone through the evidence and are in entire agreement with the finding arrived at by the trial Judge. The discharge of these Khatas by the plaintiffs constituted a valid consideration for the execution of the mortgage not only against Mohanlal but also against Bhanwarlal, for it is well settled that the consideration need not be received directly by the party executing the deed.

25. As regards the cash payment of Rs. 14,037, the plaintiffs relied upon the recitals in the mortgage deed Ex. 1, relating to the admission of receipt of consideration, the execution of the rent deed, Exhibit 2 and the receipt, Exhibit 3 and the oral evidence of Prabhoolal, P.W. 5, Ramdhan, P.W. 9 who attested the receipt, Exhibit 3 and Lalchand, P.W. 11, the scribe of the receipt. The defendants examined Shri M.K. Mehta, D.W. 1, a handwriting expert, Chaturbhuj, D.W. 10 and Mohanlal, D.W. 14, to prove that the receipt Exhibit 32 was a forged document and that no payment was made. The trial Court rejected the evidence of Lalchand, P.W. 11 as--

1. The witness could not say from memory whether Mohanlal subscribed his signatures A to B in Exhibit 3 in his presence.

2. Where it was written,

3. Who besides Mohanlal were present, and

4. At what time it was written, etc. The evidence of Ramdhan, P.W. 9, was rejected as the trial judge considered him a casual witness. The trial Judge rejected the evidence of the plaintiffs for the following reasons:--

1. That Prabhooolal stated that at the time of payment of Rs. 14,037 Lalchand Saraf and four-five persons including Likh-maram and Ramdhan and the plaintiff Meghraj were present. Meghraj and Likhma-ram did not, however, make any statement in connection with the payment.

2. The trial Judge emphasised the circumstance that while signing the receipt Mohanlal defendant made an addition to the signatures that he was signing in his own capacity and as manager of the joint Hindu family. Mohanlal, however, made no such addition while signing the mortgage deed. From this circumstance, the learned trial Judge inferred that the 'recital' (about his having signed in his individual capacity and as manager) could not have been written in the receipt, Exhibit 3 on the date the mortgage deed was registered. It was observed by him, 'this expression appears to me a clear matter of afterthought and as a result of mature deliberation when the plaintiffs probably became aware of the law in respect of an alienation made by a coparcener of a joint Hindu family'. The trial Judge reviewed the defendant's evidence and placed reliance upon it. The eventual conclusion reached by the trial Judge is that the plaintiffs have failed to prove that Rs. 14,037 were paid in cash to the defendant Mohanlal on 15-5-1947.

26. We have very carefully gone through the evidence on record and considered the facts and the circumstances of the case and are unable to agree with the conclusion of the trial Judge. We must observe at once that the defendants Mohanlal and Bhanwarlal executed the mortgage deed in the year 1947. They never repudiated these two documents. Even when the plaintiffs served notices upon them on 10-7-1956, they did not care to send any reply in writing repudiating the documents or the receipt of consideration. No explanation has been given as to how Mohanlal and Bhanwarlal executed the documents on 9-5-1947 and how Mohanlal got the document registered on 15-5-1947 without getting consideration. The evidence of the parties has to be properly appraised in the light of these important circumstances. The evidence of Lalchand, P.W. 11, has been rejected

on wholly inadequate grounds by the trial Judge. The receipt was executed in the year 1947. Lalchand was examined in the year 1957, that is, after lapse of 10 years. Lalchand's statement that he could not remember some particulars appears to us to be natural when it is realised that he was examined ten years after the execution of the receipt. After going through his statement and considering the reasons given by the District Judge for rejecting his evidence we have reached a conclusion in disagreement with the trial Judge that the evidence of Lalchand deserves to be accepted. Ramdhan's evidence has also been rejected on grounds not tenable in law, The plaintiffs' evidence has also been discarded on grounds which have not appealed to us, Simply because Meghraj and Likhmaram made some omissions while making their statements about the payment of consideration, is no ground for rejecting his statement. Out of the three defence witnesses Mohanlal is the defendant himself. He did not appear to contest the suit and allowed the suit to proceed ex parte against him. He had not the courage to file written statement denying the receipt of consideration. He was examined by other defendants and as a witness on their behalf, he denied his signatures on the receipt. The evidence of Mohanlal does not appear to be reliable. It is true that Mohanlal was literate and could have scribed the receipt himself but from the mere fact that Mohanlal himself did not scribe the receipt and that Lalchand was called to scribe it, is hardly a good reason to accept the statement of Mohanlal that he did not execute the receipt. The emphasis by the trial Judge on this circumstance is hardly proper and justified. The opinion evidence of Shri M.K. Mehta, D.W. 1, handwriting expert, also, has not appealed to us. We have ourselves compared the handwriting of Mohanlal on the receipt with the signatures of Mohanlal on other documents and are impressed by the similarities in the two. Having regard to all these circumstances, we are unable to maintain the finding of the trial Judge on this aspect of the case and reverse it and hold that the plaintiffs have proved the cash payment of Rs. 14,037 to the defendants and that the mortgage deed was for consideration,

27. We now proceed to consider the question whether the defendants constituted a joint Hindu family and whether defendant No. 1 Mohanlal was the Karta. This is a subject-matter of issue No. 1. The plaintiffs clearly came forward with such a case at least in the alternative. The defendants' stand in this behalf deserves

specific mention. The defendant No. 1 admitted--

1. 'That no partition of our ancestral and joint property has so far been effected amongst the defendants upto this time;
2. Since then the defendants are separate but since no partition had taken place, their rights pertaining to that still stand;
3. On 9-5-1947 the defendants were of course coparceners but the defendant No. 1 was not the karta of the family.'

The defendant No. 2 also admitted--

1. 'Their rights are still intact over the joint ancestral property upto this time as no partition of the same has taken place,
2. On 9-5-1947 the defendant No. 1 was not the karta of the family.' It must be observed that the defendants did not deny the case that they were members of a joint Hindu family. They of course denied that Mohanlal was the Karta and was, therefore, competent to alienate the properties. During the course of hearing, neither the plaintiffs' counsel nor the defendants counsel challenged the finding of the trial Court that the defendants constituted a joint family on 9-5-1947.

28. As to the capacity of Mohanlal, defendant No. 1 as karta, we must observe that it is well settled law that ordinarily a father or other senior coparcener for the time being, is entitled to be the manager of the joint Hindu family. The statements of the defendants themselves indicate that defendant No. 1 Mohanlal acted as a karta. Defendant No. 2 as D.W. 2 stated that 'after the death of Hastimalji our family ancestral business of grocery was carried on by Mohanlal. Our business was being carried on in the name of (firm) Fojmal Hastimal when Hastimalij was alive. ... I do not remember as to where the Bahis of our business are now. They might be with Mohanlal.' D.W. 3 Champalal stated that 'when the shop was running, Mohanlal and Bau-warlal used to sit on it. Prior to the close of the shop, Mohanlal was carrying on the business of waging transactions and it was purposely closed for doing the same (for waging transactions). Up to this time I have not enquired about the Bahis of our shop nor I told Mohanlal for the partition.'

29. Having regard to the settled principle and the absence of any indication in the statements of the defendants that Mohanlal ceased to be a manager, we accept the finding of the trial Judge that Mohanlal was the manager of the joint Hindu family. The decision of the trial Court on this issue is affirmed in entirety.

30. The next controversy is whether the alienation was made for legal necessity. In dealing with this issue, the trial Court emphasised that it was not stated in the mortgage deed--

1. that a sum of Rs. 25,000 was taken for the joint family business,
2. that the plaintiffs improved their case in the plaint by stating that the defendant No. 1 in his capacity as a karta, took the loan for the joint Hindu family business, and
3. that the plaintiffs further improved their case in evidence by giving particulars of the purposes for which the various items entered in the Khata Exhibit 14 and Exhibit 15 were advanced and also by stating that a sum of Rs. 14,037 was paid in cash because the defendants had received certain invoices of Tel, Mirach and Methi.' From these, it concluded 'that the plaintiff's case in this respect about the existence of legal necessity is not only discrepant and inconsistent but is also shifting gradually at different stages'. Addressing to the evidence, the trial Court first considered the evidence of Mangilal, P.W. 6 and Likhamaram, P.W. 10 and did not think it proper to place reliance on them. Considering the evidence of the plaintiffs themselves, Meghraj, P.W. 4 and Prabhooolal, P.W. 5, the trial Court emphasised the following discrepancy in their statements:--

'That while Meghraj stated that a sum of Rs. 5,000 was paid to the defendants for the purchase of the house Prabhooolal deposed that out of the sum of Rs. 5,000 paid to the defendants, a sum of Rs. 4,400 was utilised for the purchase of the house and the remaining sum of Rs. 600 was spent by the defendants in their business.' This was considered a material contradiction by the trial Court. The trial Court also noted that the amount of Rs. 25,000 lent to the joint family firm of the defendants Fojmal Hastimal was not debited to the account of that firm. On these premises, the trial Court concluded: 'that there is little truth in the case now set up

by the plaintiffs that the sum of Rs. 25,000 was paid under the mortgage deed to the defendants for the purposes of their joint family firm Fojmal Hastimal.' Further, the trial Court also proceeded to examine the case on the assumption or truth of the plaintiffs' statements and held that in the absence of any independent evidence their evidence cannot be considered sufficient to prove the legal necessity for the loan advanced by them. It also observed that except for the last item (Rs. 14,037), the evidence on record did not show the exact purpose for which the amounts were paid and considering the evidence as too vague, held it insufficient to prove the legal necessity. The trial Court also held that the purchase of the house did not per se amount to legal necessity. As for the item of Rs. 14,037, the trial Court observed that the plaintiffs made no inquiries about the invoices of Tel, Methi and Mirach nor noted anywhere that the amount was paid in connection with the invoices, and reached a conclusion that they made no reasonable inquiry in this regard but took as correct; what the defendant Mohanlal told them about the necessity of the loan. In the light of these findings, the trial Court eventually held 'that the plaintiff utterly failed to prove the legal necessity of the mortgage in question in order to bind defendant Champalal thereof.'

31. Now, the principles of law which should govern the present case are well settled and may be briefly summarised as follows:--

1. The Manager of a joint Hindu family has power to alienate for value joint family property so as to bind the interests of both adult and minor coparceners in the property, provided that the alienation is made for legal necessity or for the benefit of the estate. That the payment of debts incurred for family business or other necessary purpose constitute a legal necessity.
2. That the burden of proving legal necessity to support alienation is upon the alienee.
3. That the alienee can succeed not only on proof of legal necessity but also on proof that the alienee made reasonable enquiries and was satisfied as to the existence of the legal necessity.

Considering the evidence and materials on record in the light of the above principles, we have found it difficult to agree with the trial Court as to the manner of approach, appraisal of evidence, the findings and the reasons for those findings. We must at once observe that the recitals of purposes for the loan in the deed and the statement of the case in the plaint and the evidence led to prove the existence of legal necessity, cannot be considered as statements of cases at various stages and the trial Court was hardly justified in overemphasising the absence of detailed particulars in the deed or in the plaint and concluding that the plaintiffs' case was not only discrepant and inconsistent but also shifting gradually at different stages. This approach of the trial Court has adversely influenced the trial Court's appraisal of the evidence.

32. We now proceed to examine the evidence. Purshottam, P.W. 1, stated 'that the ancestral business of the defendants was of grocery'. P.W. 2 Nathraj also stated that 'the defendants were living together from Sumvat 2003 to 2005, There was a grocery shop of the defendants at Banner from Samvat 2003 to 2005. All the three defendants used to sit at the shop and carry on the business.' The defendant No. 2 Bhanwar-lal as D.W. 2 also admitted that 'after the death of Hastimalji our family ancestral business of grocery was carried on by Mohanlal. Our business was being carried on in the name of (firm) Fojmal Hastimal, when Hastimalji was alive. In those days our Bahis were being maintained by Mohanlal.' He further stated, 'During the days Mohanlal was carrying on wagering transactions, our grocery business was running in an ordinary manner in the name of Fojmal Hastimal. This was our ancestral business. It was a joint business of Mohanlal, myself and Champalal. By this business our household expenses were only met'. The conduct of the ancestral business by Mohanlal, therefore, stands clearly proved. Mangual, P.W. 6, who is the cousin and is also a relation of the plaintiffs stated that once in Baikh Sudi Samvat 2003 he went to Baramer, and stayed with the plaintiffs. During that visit, he went one day to the house of the defendant Mohanlal for meals at the invitation of Mohanlal's mother. There Mohanlal and Bhanwarlal informed him that they were in need of money as the railway receipt of Tel (oil), Mirach (pepper) and Methi (Buck-wheat) was to be received very shortly. They sought his help to secure a loan from the plaintiffs. He talked the matter with the plaintiff Prabhooolal who agreed to advance the loan on the security of houses. He

conveyed the information to the defendants and the defendants accompanied him to the plaintiff Prabhoolal and it was agreed that the defendants would be given a loan of Rs. 25,000 including the previous dues, by mortgaging two houses and one shop. The witness in cross-examination stated that he was on good terms with Mohanlal and had no bad terms. The trial Court did not believe this witness and gave the following reasons for disbelieving his evidence--

(1) because he is a resident of another village,

(2) because he could not tell the dates of his previous visits to the house of Mohanlal,

(3) because he could not state what business Mohanlal was doing,

(4) because he is admittedly a close relation of the plaintiffs and indebted to them; and

(5) because he stated that in his presence the final figure of the previous account was not disclosed. We have very carefully gone through his statement and have reached a conclusion that the reasons for disbelieving this witness are not sound or convincing. The witness no doubt belongs to a different village but he states that he went to Banner to submit a stock of the control-goods as he was dealing in control-goods. There was thus a proper occasion for him to visit Banner. The fact that he could not give the dates of his earlier visits, is no ground for discrediting the witness. He is more closely related to the defendants than to the plaintiffs. His mother and the defendants' mother are real sisters and the plaintiffs are the first cousins of their mother. The fact that he had dealings with the plaintiffs and was owing some money to the plaintiffs cannot warrant an inference that he would make a false statement to involve his first cousins for heavy pecuniary liability. In our opinion, the statement of the witness is quite natural and does not deserve to be rejected.

33. P.W. 10 Likhmaram deposed that he had deposited Rs. 1,000 with the defendants' firm in the month of second Chet Svt. 2001 and when he asked the defendants to repay the amount on Jet Bad 7 or 8 Svt. 2003 they gave it to him on

Jeth Badi 10, Svt. 2003 and he was told by the defendants that they brought the amount from the plaintiff Megharaj. The defendants did not produce the account books to rebut the evidence of his witness. The trial Court, however, rejected his evidence for two reasons:--

1. It emphasised the discrepancy in the plaintiffs' version that an amount of Rs. 14,037 was given in connection with the invoices of Tel, Methi and Mirach whereas, as per his statement, some amount out of the advance of Rs. 14,037 was utilised to repay the debt.

2. The trial Court also emphasised that the witness could not remember if he had noted whether the deposit was made with the defendants in the bahiana that he did not remember the names of other firms where he made deposits.

We have also considered the statement of this witness and are not prepared to reject his evidence.

34. Considering the evidence of the plaintiffs themselves, we must point out that the two reasons given by the Court for disbelieving their evidence are not good grounds. The difference in details about the use of Rs. 5,000/- obtained as loan from the plaintiffs by the defendants is not very material. Reference to the statements of the defendants in connection with the need of a debit entry of Rs. 25,000/- and the absence of the entry is hardly a good ground for ignoring the plaintiffs' evidence. In considering the plaintiffs' evidence, it is also necessary to note the following important circumstances--

1. That after the execution of the mortgage deed and the rent deed the defendants remained quiet for a period of ten years and even made payments on account of rents.

2. That the defendants came forward with a plea that the mortgage deed was collusive and was fraudulently executed in favour of the plaintiffs to defeat and delay other creditors but they led no evidence in support of this case. No evidence was led to prove the debts of other creditors of Mohanlal and the extent of his indebtedness.

3. The defendants made unsuccessful attempt to prove that a house was got purchased on Asad Badi 3, Svt. 2001 from the money received from their mother.

4. That the defendants failed to produce the account books relating to their business in Kirana.

5. That the plaintiffs were mere relations of the defendant's and could have knowledge about the condition of the defendants' family as also the existence of legal necessity.

6. That the only two adult members of the family joined in the transaction.

7. That the defendants in the first instance denied to have received. In the alternative, their suggestion was that the amount might have been utilised by the defendant Mohanlal in connection with the wagering transactions. Mohanlal, however, categorically states that the losses incurred by him in connection with speculative transactions were made good by selling his ornaments. The defendants thus failed in connection with the various alternative cases set up by them.

35. Having considered the rival versions of the parties and having matched the evidence of the parties, we have no hesitation in placing reliance upon the plaintiffs' evidence and accepting their version in general.

36. Even so, Mr. Vyas for the defendant-respondents contended that the amount of Rs. 5,000/- alleged to have been paid in connection with the purchase of a house cannot be said to have been for legal necessity. We find some force in this submission. The plaintiffs came forward with no case whether the purchase of the house in the year 1945 was a transaction which a prudent manager could have undertaken for the benefit of the State nor did the plaintiffs state that there was any need for additional house for the use of the family members. The plaintiffs also did not come forward with a case that the advance of Rs. 5,000/- was included in the consideration of the mortgage amount on account of any alleged pressure or the threat of the suit for the recovery of the same and thus for the benefit of the estate. A purchase of a house per se cannot be considered to be an act for legal

necessity.

37. However, in supporting the validity of the mortgage qua an advance of Rs. 5,000/- it was urged by Mr. Hastimal for the plaintiff-appellants that the bouses having been purchased with the help of the advance obtained by Mohanlal and the other defendants, the house should be treated as only the joint property of the defendants in case the advance of Rs. 5,000/-for the purchase of the house cannot be treated as a legal necessity justifying an alienation. This is altogether a new case and we cannot permit the plaintiff-appellants to make out a new case at this stage. In our opinion, the plaintiffs cannot be entitled to any relief in respect of this amount, the claim for the recovery of this advance as initially made, having become clearly time barred.

38. For these reasons, while maintaining the finding of the trial Court with regard to the item of Rs. 5,000/- and differing from the trial Court's finding in respect of the other amounts, we hold that the plaintiffs have succeeded in proving that the advance of Rs. 20,000/- in connection with the mortgage of the defendants properties was for ancestral business and that the mortgage deed was valid. We accordingly hold that the alienation is valid only for the recovery of Rs. 20,000/- and the defendants will not be held liable as mortgagors in respect of the amount of Rupees 5,000/-.

39. The only controversy which now remains to be resolved is about the maintainability of the present suit? The defendant-respondents contend that the mortgage deed Ex. 1 results in the creation of a pure usufructuary mortgage and, therefore, the plaintiff-appellants cannot bring a suit for sale of the mortgaged properties. Reliance has been placed by the defendant-respondents on Mst. Sanjya v. Uhauthmal, 1963 Raj LW 147 = (AIR 1963 Raj 129) and Eamnarain Singh v. Adhindia Nach Mukherji, AIR 1916 PC 119. In 1063 Raj LW 147 = (AIR 1963 Raj 129) a learned single Judge of this Court laid down that 'the proper approach for resolving the problem whether a document amounts to au usufructuary or an anomalous mortgage is to see whether there is undertaking on the part of the mortgagor to pay the amount borrowed by him on the security of the mortgaged property. In that case, an obligation not to claim the property until the

debt was satisfied, was not taken as equivalent to a promise to pay the mortgage money. The learned Judge, however, emphasised that the crux of the problem is, whatever there is anything in the document from which it can be inferred that the mortgagor had taken upon himself to do anything else than leave the property untouched by him till the amount with or without interest is paid off. If it can be spelt out from the document that the mortgagors had undertaken any personal obligation in the matter of payment of the mortgage money, the document would be an anomalous mortgage and will not remain merely an usufructuary mortgage.'

40. In AIR 1916 PC 119, a deed of usufructuary mortgage contains inter alia the following clause--

'If by mistake I (mortgagor) or my heirs make any collection, then I or my heirs shall be liable to pay the amount collected with interest at the above rate..... Except in such a case, for no other reason and on no other account the Zarbarnadar has and shall have any claim whatever against me ..... on ground or realization and non-realisation. If a claim is made, it is and shall be totally null and void.'

The Privy Council, having regard to the nature of the document and the terms excluded the personal liability on the part of the mortgagor. In the course of Judgment their Lordships observed that in considering the question, it must be borne in mind--

1. that a loan prima facie involves such, a personal liability;
2. that such a liability is not displaced by the mere fact that security is given for the repayment of the loan with interest; but
3. that the nature and terms of such security may negative any personal liability on the part of the borrower. In both these cases, the personal liability was excluded on the facts of those cases, of course with reference to principles with which there need not be any quarrel.

41. Now, the chief requirement of a pure usufructuary mortgage is that the mortgagor must deliver or bind himself to deliver possession to the mortgagee and

that the the mortgage money, including interest, should be realised out of the usufruct of the mortgaged property and the mortgagee should have no remedy except to enjoy the usufruct of the mortgaged property. If the mortgagee is entitled to re-cover any part of the mortgage-money, which in general includes the interest on the principal sum secured by the mortgage, it cannot be a pure usufructuary mortgage and will amount to an anomalous mortgage. In this view, we are supported by the principle laid down in *Rysani Madliava Chettiar Charity Fund v. G.R. Krishnasamrny*, AIR 1923 Mad 71. In that case under a mortgage, possession of the mortgaged property was given to the mortgagee but rents and profits were not given in lieu of interest. There was a separate provision fixing the rate of interest and the method by which it was recovered, namely, that the rents and profits were to be set off, as far as available, towards the payment of interest. The contingency of an excess of rents and profits over interest or vice versa was specifically contemplated, and for the case of deficit, where the whole of the interest was not met from rents and profits, it was provided that the mortgagee may recover from the mortgagors month after month. The sum to be repaid prior to redemption and for the purpose of redemption was merely the original principal sum. It was held, 'that the document meant that interest was not to be charged on the mortgaged property but was left to be recovered under the personal covenant of the mortgagors.' A similar view was also taken in *Subramonia Sastrigal v. Sankara Rama Iyer*, AIR 1952 Trav Co 391, In that case the rents and profits accruing from the property were not even sufficient to cover the interest on the mortgage amount. It was expressly stated in the document that such income was sufficient only to cover the interest due on Rs. 680/- representing only a portion of the mortgage amount. For the balance of the mortgage amount of Rs. 300/- the mortgagor was to pay interest out of his own pocket. These facts were held sufficient to take the document out of the definition of the 'usufructuary mortgage'.

42. We now turn to the mortgage deed to ascertain whether the document negatives a personal covenant and restricts the remedy of the mortgagee only to the mortgaged properties.

'The mortgage deed contains a clear recital that an amount of Rs. 23,000/- will carry interest at Re. 0-7-0% per month and that the monthly interest will amount to

Rs. 109-6-0. It was further provided that the rent of the mortgaged properties would be appropriated towards interest and if they exceed the amount of interest, the balance would be appropriated towards the principal. It was further agreed that in case the rents and profits were less than the mortgagors would be liable to pay the balance every year, and would be liable for compound interest if the amount is not deposited in time. There was also a stipulation that the properties shall remain mortgaged until the principal amount together with interest is repaid.'

43. From the above analysis of the document, it is clear that both the principal and the interest were secured by the mortgage of the properties and that the mortgagors took personal liability for the payment of the interest which is a part of the mortgage money and which was also secured by the mortgage of the properties. We have no doubt that having regard to the nature of the document cannot be considered as a pure usufructuary deed. In our opinion, the mortgage is an anomalous one.

44. It was however, argued by Mr. Vyas for the defendant-respondents that even if the mortgage is an anomalous one yet the plaintiffs cannot claim a relief for the sale of the mortgaged properties. He relied upon Section 98 of the Transfer of Property Act which provided that 'in case of an anomalous mortgage the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage,' The learned counsel also cited *Kashiram v. Sardar Singh*, (3906) ILR 28 All 157 and *Hakim Kanhaiya Prasad v. Mt. Hamidan*, AIR 1938 All 418 (FB). *Kashiram's* case, (1900) ILR 28 All 157, was under the law as it stood before the amendment in Sections 58 and 98 of the Transfer of Property Act. The principle laid down in the case was.

'Where a mortgage is in other respects a usufructuary mortgage, the insertion therein of a personal covenant to pay the mortgage-debt on demand unaccompanied by any hypothecation of the property the subject of the mortgage cannot alter the character of the mortgage and give the mortgagee a right to sell the mortgaged property in the event of non-payment of the mortgage debt.'

The same view was followed in *Kanhaiya Prasad's* case AIR 1938 All 418 (FB).

45. The counsel for the plaintiff-appellants however, relied upon Smt. Savitri Devi v. Smt. Beni Devi, AIR 1908 Pat 222, in support of a proposition that in the absence of an agreement to the contrary in the deed an anomalous mortgagee cannot be debarred from availing the right of recovering the money by the sale of the mortgaged property.

46. We consider it proper to examine the statutory provisions to ascertain the precise implication of Sections 67 and 96. The main clause of Section 67 gives the mortgagee a right to obtain a decree that a mortgagor shall be absolutely debarred of his right to redeem the property or decree that the property be sold. The first is described as 'a right of foreclosure' and the second as 'a right of sale'. The expression 'mortgagee' in the clause appears to have been used in general and includes an anomalous mortgagee as well. Part 3 of Section 67 in four Sub-clauses (a), (b), (c) and (d) provides for some exceptions. This part debars a mortgagee under an anomalous mortgage by the terms of which he is not entitled to foreclosure but it places no such bar on the mortgagee in respect of instituting a suit for sale. The rights given under Section 67 may be curtailed by an agreement between the parties but these rights will have effect in the absence of the contract to the contrary. Section 98 of the Transfer of Property Act merely provides that 'the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage deed.' There is no apparent conflict between these two sections. If there is a contract in the mortgage deed negating the right of sale Section 98 can be given effect to as the rights will be determined in accordance with the contract. If there is no such agreement negating the right of sale, it will imply that the parties desire that the mortgagee will have the statutory right of the sale of the mortgaged property and the implementation of such an agreement will merely be a case of the determination of the rights as contemplated by Section 98. In this view of the matter, we are clearly of the opinion that the provisions of Section 67 of the Transfer of Property Act do not conflict with those of Section 98, particularly when there is nothing in Section 98 to indicate that it is not subject to other provisions of the Act. Provisions of one section cannot be used to defeat those of another unless it is impossible to effect a reconciliation between them. In our opinion, Section 98 cannot debar an anomalous mortgagee from instituting a suit for sale of mortgaged property on the ground that there is no agreement giving

a right to the mortgagee to have the mortgaged properties sold. We must also observe that the creation of a mortgage prima facie results in the creation of a loan and that as pointed out by the Privy Council in AIR 1916 PC 119, (i) a loan prima facie involves a personal liability and (ii) that the liability is not displaced by the mere fact that the security is given for the repayment of the loan with interest but (iii) that nature and terms of such security may negative any personal security on the part of the borrower. The presumption about personal liability is displaced only in the case of a usufructuary mortgage because the mortgagee is restricted to his remedies against the usufruct of the mortgaged properties. The personal liability is not displaced in other cases. The Patna High Court in AIR 1968 Pat 222, considered this question at length and reached a conclusion that an anomalous mortgage cannot be debarred from availing the right of sale under Section 67, in the absence of a specific contract to the contrary in the mortgage deed, and we are in complete agreement with the view taken in this case and the reasoning advanced in support of the conclusion and we respectfully differ from the view taken by the Allahabad High Court in the two cases viz., (1906) ILR 28 All 157 and AIR 1938 All 418. We may also point out that in the Allahabad cases, (1906) ILR 28 All 157 and AIR 1938 All 418, the learned Judges laid great emphasis upon the fact that there was no hypothecation of the property so as to give the right to the mortgagee to institute a suit for the sale of the mortgaged property. Even if the view taken in the Allahabad cases be taken to be correct one,, still it cannot have substantial bearing in the present case, because in both these cases the principle has been stated with reference to absence of any hypothecation of property whereas in the case before us there is clear hypothecation of properties as will appear from the term that the properties shall remain unredeemed until the repayment of both the principal and the interest. The contention of Mr. Vyas, therefore, cannot succeed and is negatived, and we hold that the plaintiffs are entitled to a decree for the sale of the mortgaged properties for the recovery of a sum of Rs. 20,000/- only advanced for legal necessity.

47. Mr. Hastimal during the course of arguments, invited our attention to the alternative prayers made in the plaint, including a personal decree on grounds of equity in case the mortgage-transaction is not considered a valid one but, having held the mortgage as a valid transaction, it is unnecessary to go into this

controversy. Differing from the trial Court, we are of the opinion that the plaintiff-appellants are entitled to a preliminary decree under Order 34, Rule 4, Civil Procedure Code, and we pass a decree in the following terms--

(i) That the amount due to the plaintiffs under the mortgage deed Ex. 1 calculated upto the date of the decree of this Court is as follows:--

A/Principal sum

Note: The suit with regard to the amount of Rs. 5,000/- is dismissed as the legal necessity in respect of that amount was not proved.

Rs. 20,000/-B/Interest on the said principal up to the date of the suit (from 9-5-47 to 29-1-57) Rs. 10,208.0

Less interest already paid Rs. 3,658.0 up to Asoj Badi 2 Sm. 2009

Rs. 6,549.8C/Interest on the said principal (Rs. 20,000/-) from the date of the suit, namely 29-1-57 upto the date of the preliminary decree of this Court, namely, 2/2/1971 at the rate of Re. 0-7-0% P.M. simple

14,700.0.0D/Proportionate costs of the trial Court of the part of the mortgage suit decreed.

1,904.12.0E/Proportionate costs of this Court1,847.0.0

Total45,001-4-0

As, however, under Section 27 of the Rajasthan Money Lenders' Act interest upto the date of the decree cannot exceed the principal sum, the total interest recoverable is limited to Rs. 20,000/- only. The plaintiffs shall be entitled to further interest at Re. 0/7/0 per cent per month on the principal sum from the date of the decree upto the date of payment.

(ii) that the defendants will pay into the Court not before 2nd August, 1971 the said sum of Rs. 43,751.12.0:

(iii) that on such payment together with the further interest on Rs. 20,000/- accruing due upto the date of payment at Re. 0/7/0 per cent, per month simple the plaintiffs shall bring into Court all documents in their possession or power relating to the mortgaged properties and all such documents shall be delivered to the defendants:

(iv) that in default of payment as aforesaid the plaintiffs may apply to the Court for a final decree for the sale of the mortgaged properties. The preliminary decree will be drawn up in accordance with Form 5-A given in Appendix IX of the First Schedule in the Code of Civil Procedure, 1908. But it shall follow the Judgment of this Court.

48. The appeal is allowed in part and the decree of the lower court is set aside and a decree as indicated above is hereby passed. The appellants shall be entitled to proportionate costs in this Court.

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