

(1870) 06 CAL CK 0002
In the Calcutta High Court
Case No : Appeal No. 3 of 1869

Bipinbehari Chowdhry

APPELLANT

Vs

Ramchandra Roy and Others

RESPONDENT

Date of Decision : 02-06-1870

Acts Referred:

Citation : (1870) 06 CAL CK 0002

Judgement

Norman, J.—The first question we have to consider is what is the effect as between the plaintiff and the defendants of the lease taken by Chandra Prasad. It may be quite true that as between Chandra Prasad and the defendants, or some of them, Chandra Prasad may have no interest, and his name may have been used merely for the convenience of the persons really interested. But as between the plaintiff and Chandra Prasad the question is totally different. The person to whom the lessor granted the lease was Chandra Prasad. Chandra Prasad, and Chandra Prasad alone, agreed for the payment, and bound himself by the stipulations in the lease. The defendants did not enter into any contract with the lessor. They did not choose to bind themselves. The sureties do not bind themselves for the payment of rent and performance of the covenants by the defendants, but only for the acts of Chandra Prasad, and would apparently be discharged from liability by such a dealing by the lessor with Chandra Prasad as the principal, as would, according to the ordinary rules of law, discharge the surety of any other principal. Whatever may be the case upon the question of property as between the defendants and Chandra Prasad, or the defendants and third persons, as between the lessor and Chandra Prasad, the contract is a reality. The Advocate-General argued that the Chief Justice was in error in saying that the land was demised to Chandra Prasad, and that he covenanted to pay the rent. The argument comes to this, that the potta and kabuliat, by which that demise was created, might be contradicted by oral testimony as to what the real contract was. Now this cannot be done. It is a well established principle of law, which has been recognized in this Court, that evidence is never admissible to show that a person who appears on the face of a written contract to be

personally a contracting party is not really a contracting party, and, therefore, not liable as such upon the contract. It is quite another matter whether evidence may be admitted to charge another person as the principal.

2. The contention that the defendants, in the name of Chandra Prasad Bose, stipulated to pay the rent now sought to be recovered, being for the excess land on certain conditions, is in my opinion wholly untenable.

3. I think, that under the potta and kabuliat as they stand, Pryanath and Mathuranath acquired nothing, and did not render themselves liable to pay rent to the lessor.

4. If the rent had not been paid to the lessor by Chandra Prasad or his heirs, the lessor might have had a right to resort to the defendants, and to hold them liable. But that is a right arising out of the peculiar relations of the several parties to each other, not a right which can be enforced under Act X of 1859. Under the 23rd section of that Act, clause 4, suits for arrears of rent due on account of land are made cognizable by the Collector alone. That section does not empower the Collector to try any question except between a landlord and his tenant. He is not empowered to entertain suits, nor is the jurisdiction of the ordinary Civil Courts taken away, in respect of any collateral contracts, or the obligations arising out of any relation that may exist between the parties beyond that of tenancy in respect of which rent is claimed.

5. In the present case, I think that Pryanath and Mathuranath could not have been sued in the Collector's Court for rent by the lessor, unless some thing occurred subsequent to the potta and kabuliat to create the relation of landlord and tenant between themselves and the lessor.

6. If, after the grant of the potta, the lessor discovered that Chandra Pershad was merely in name the lessee; that he was an agent by a contract in whose name the defendants had obtained possession of the property demised to him; if Chandra Prasad or Chandra Prasad's heirs, as appears to have been the case here, had disclaimed all interest in the property; if the defendants had paid their rent to the lessor, and the lessor had accepted the same from them as his tenants, the defendants might have rendered themselves directly liable for rent; but if so, so far as that liability would be one enforceable by ordinary suit for rent in the Collector's Court, it would only be upon a new contract to be implied from their acts and those of the lessor. If, in the present case, any new contract could be implied from the conduct of the parties in paying and receiving rent, or otherwise, I think the action might be maintained. But it is plain that the parties are not agreed as to the terms of any new contract.

7. In the former suit for the rents of 1270 and 1271 (1863-64), the plaintiff joined in one comprehensive plaint Saroda Prasad, the heir of Chandra Prasad, the defendants Mathuranath and Pryanath, and the sureties. Down to the date of that suit, it is evident that there was no new contract in which Pryanath and Mathuranath were treated as the contracting parties liable for the rent, Baroda

Prasad disclaimed all interest, and was released. There was a decree against Pryanath and Mathuranath, and if the matter had rested there, and Pryanath and Mathuranath had paid subsequent rents on the footing of that decree, it may well be that they or their representatives might have been sued at the present day as tenants. But the plaintiff appealed, and the ladies, Jaggat Tara and Padma Kumari, put in a petition alleging that they also were tenants, and should be made liable jointly with Pryanath and Mathuranath. A Division Bench of this Court made the ladies jointly liable as to part of the rent with Pryanath and Mathuranath, but to that Pryanath and Mathuranath have never assented, either directly or indirectly. In the present suit, the plaintiff seeks to charge the representatives of Pryanath, the representatives of Mathuranath, and the two ladies, Jaggat Tara and Padma Kumari Chowdrain, as jointly liable.

8. As it cannot be shown that the parties agreed to the same terms, there is no contract, and therefore I must say that no new contract has been substituted for the original one; nothing has taken place to alter the relation of the parties, according to which cant liable for the rent, and the defendants or some of them being the persons who had used his name, were bound to indemnify him, and liable in equity to answer for the payment of the rent by Chandra Prasad to the plaintiff.

9. Under Act X of 1859, a Collector has no jurisdiction to adjudicate upon the rights and liabilities arising out of such relations. The extent of the liability of the several defendants depends on the extent of their interest in the tenure. For the determination of the question whether either, and which of them, is liable, and if so, to what extent, according to the decision in the Full Bench case already quoted, recourse must be had to the ordinary civil tribunals which have cognizance of all civil cases in which their jurisdiction is not expressly taken away.

10. I may add that it is a general rule that Courts of Law will not take cognizance of distinct and separate liabilities in one suit, and neither in the Civil Court, u/s 8 of Act VIII of 1859, nor in the Collector's Court, under any law that I ever heard of, can a cause of action against A. and B. for one demand be joined with a cause of action against A., B., and C., or a cause of action against C. alone. They are not causes of action against the same parties. In my opinion the claim against Jaggat Tara and Padma Kumari for the rent of a portion of the tenure cannot be joined in the same suit with the cause of action against Pryanath and Mathuranath or their representatives.

11. I think it clear that Pryanath had a right to insist that he and Mathuranath were alone liable for the rent, and that he is not liable as to any part of the rent jointly with Jaggat Tara and Padma Kumari. If these ladies are his tenants, it is clearly prejudicial to him that they should be permitted to pay rent directly to the superior holder. It would tend to nothing but confusion of rights if any thing of the sort could be allowed. It would materially affect the value of Pryanath's tenure if he were going to sell it, if it were found that another person was paying rent for a portion of it. Mr. Justice Mitter says: "Rightly or wrongly, the Deputy

Collector has passed a decree against those two ladies, and as they are satisfied with it, the appellant Pryanath ought not to be allowed to complain, when it is clear that the effect of that decree has been to reduce his liability." But, I think that a man, who, if liable at all, is liable solely, has a right to insist that he shall not be made liable jointly with a stranger. He has a right to say, "I do not choose to run the risk of the costs of an action for contribution to which I shall be exposed if a joint decree passes against myself and another, if that other chooses to pay the whole debt."

12. In English Courts of Justice, it has long been settled that if an action is brought against two persons on a contract alleged to be joint, if one allows judgment to go by default, or expressly admits the debt, and the case goes on against the other, whose liability to the entire debt is proved on the trial, but it is shown that the party against whom judgment has gone by default, and who has admitted the debt, is not jointly liable, judgment cannot be given as against the defendant who has appeared and defended, jointly with the one who has no defence, but the suit must be dismissed altogether--see *Shirreff v. Wilks* 1 East, 52 and *Gray v. Palmers* 1 Esp. Rep., 135--unless the plaintiff is allowed to amend by abandoning his suit against the other defendant as was the case in *Greaves v. Humfries* 4 E., & B., 851.

13. I think that as regards the surety defendants the Deputy Collector had no jurisdiction. I may add that they are sureties for Chandra Prasad and his heir, and that by the discharge of Chandra Prasad's heir, Baroda Prasad, all remedy against them is gone.

14. I, therefore, think that the Chief Justice was right in holding that the suit must be dismissed, and I would affirm his judgment with costs.

Jackson, J.

15. In determining this appeal, it is necessary first to consider whether the Full Bench Ruling Case No. 236 of 1866; 23rd September 1867 cited governs the case; and, second, whether the suit was in fact beyond the competence of the Collector's Court.

16. It must be borne in mind that the case was before this Court in regular appeal; that, for this reason, all questions of fact, no less than of law, were open to consideration by the Division Court, and consequently by us, on the appeal; and especially that the contract between, and the liabilities and remedies of, the parties must be viewed and considered in accordance with the principles and practice administered by the Courts in Bengal. I think there is a clear distinction between the present case and that decided by the Full Bench. In the latter case, the plaintiff having granted a potta to Gopal Chandra Mookerjee, and having treated him as the tenant, having also made a petition to the Collector to sell the patni for rent due from Gopal Chandra, afterwards brought a suit for subsequent arrears against Gopal and Paran Chandra Pal Chowdhry and his wife, alleging these two persons to have beneficial interest in the lease. The wife denied having

any interest at all, the plaintiff proposed to abandon his claim against her, but the husband insisted that the liability of both should be tried. There was thus a real contest for the purpose of establishing a liability on the part of a defendant, who denied it, and who was not prima facie liable for the rent; and evidence was, consequently, gone into, to show from what sources the purchase-money came, and upon a question whether the wife had independent means, or had a joint treasury with her husband. The Full Bench was then asked to decide, among other things, whether the Collector was "competent to try whether Paran Chandra Pal Chowdhry alone was beneficially interested in the patni; upon the ground that whatever interest his wife might have had in it was benami for him; or whether Paran Chandra and his wife were jointly beneficially interested, or, if not jointly, what was their respective interest therein, for the purpose of ascertaining whether Paran Chandra and his wife were jointly liable for this rent, or whether they were to be rendered liable according to their respective beneficial interest in it." This question was answered in the negative, after some debate whether it really arose in the case. I was one of the Judges who gave that answer, and I said: "It seems to me to be such a case as is not within the jurisdiction of the Collector, who is restricted to try questions between a landlord and his actual tenants, persons between whom, directly or indirectly, some engagement has been entered into. But where the landlord seeks to make other persons liable by reason of their having a beneficial interest in tenure, he must resort to the assistance of the regular Civil Courts, which take cognizance of all causes of action of which their cognizance is not expressly taken away;"--and I think that is also the effect of the answer as given by the other Judges.

17. In the present case the facts are very different; not only does no one defendant repudiate liability (on the contrary, as remarked by the Chief Justice, liability is eagerly claimed by all the defendants), but the liability of each defendant has been affirmed in previous decisions between the parties, the only dispute being not between the plaintiff and the defendants or any of them, but between one of the defendants who claims for himself and a co-defendant (who has not appeared) the exclusive liability and of course exclusive beneficial interest under the lease, and the two female defendants who claim interest and admit liability, but allege their liability to be limited and separate, though they do not set up any legal foundation for that part of their allegation.

18. There is not, therefore, as it seems to me, the least necessity, in this case, for dealing with any such question as was held by the Full Bench in the case cited to be beyond the cognizance of a Court of Revenue.

19. It is necessary now to enquire whether, on any other ground, there was defect of jurisdiction in the Collector; and I must observe that none of the parties having objected to the jurisdiction, but the suit having gone on trial, it seems to me very doubtful whether it would be just to dismiss the suit with costs of both Courts, even if the want of jurisdiction were manifest. In my opinion, the Collector was fully competent to hear and determine the suit, and I apprehend

that the Revenue Courts have tried by thousands, and are every day trying, suits where, either landlord or tenant is a benami holder; in other words, where on one side or the other of the contract, the name used is not that of the real contracting party. In this very large class of cases, it seems to me that the rule in regard to the admission of parol evidence to vary written contracts will not apply; and I conceive that the decisions refusing to allow an agent, who enters into a written contract, in which he appears as principal, to offer parol evidence for the purpose of exonerating himself, are wholly wide of the case before us. There is, in my opinion, no question here of surrender, nor of substituting one contract for another. The principle of one of the common forms of benami contract in this country is that A. contracts with B., though by the desire and for the convenience of one or other of those parties the name of C. is used instead of the name of that party(1). It is clear that, in such a case, C. did not contract at all. He was not the agent for either, but was, and is, a stranger to the whole business. And that this was so as to Chandra Prasad, the Furzi (ostensible principal) in the present case, is clear not only from his own statement and that of his personal representative after his death, in a former suit for rent of the same lands, but from the allegations of all the parties to this suit; and from the history of the tenancy, there can be no doubt whatever that Chandra Prasad never had and never claimed the slightest interest in the lease. Nor, as I think, was he in any sense an agent for the lessees; in truth he did not act in the matter at all for himself or for others, but the real principals, with his permission, used his name.

20. But it seems to me the case does not rest merely on the contract. The plaintiff alleged, and the defendants admitted, that they had got the land, and surely the holding of the land admittedly under the plaintiff entitled the plaintiff to the rent. There is a case, *Judoonath Paul v. Prosunnuth Dutt* 9 W.R., 71, where, under a benami contract, the landlord recovered rent from the parties in possession, although no previous realization of rent from them was proved. The case before us is a great deal stronger, for the plaintiff has got previous decrees against all the defendants, and it is noticeable that, in the case I have just referred to the Full Bench decision, which is supposed to be an authority for the judgment now under appeal, is cited and declared to be in accordance with the principles on which the learned Judges there proceeded. And where the admitted occupancy of the lands indicates the real tenancy, and corroborates the statements of the parties as to the true contract, I cannot conceive any reason why the plaintiff should be debarred from recovering his rent in the Collector's Court.

21. This, be it remembered, was not a mere suit for arrears of rent as originally reserved, nor a suit for the purpose of establishing the liability of the defendants, for that had been determined in the previous suit. It was occasioned by the defendants setting up a recent settlement, which, according to their contention, entitled them to a lower rate; and also partly, no doubt, by the reluctance of Pryanath Chowdhry to admit that he held jointly with the two ladies. I conceive that the plaintiff's right to recover rent from the defendants was based upon

their occupation of the land, their acceptance of the covenants and liabilities of tenancy, and the previous decisions on that point; and that the production of the kabuliat was only necessary for the purpose of showing what the terms of the agreement were. Indeed, regard being had to the facts, and to the previous decisions between the parties, I imagine that the plaintiff might very well have dispensed with the production of the kabuliat altogether.

22. It seems to me, therefore, that the main question in this case was a question of fact, namely, whether there was evidence of the joint liability, alleged by the plaintiff, on the part of all the defendants.

23. In my opinion, there was such evidence in the admissions of the defendants themselves, in the sworn statements of the agents who were examined, and in the previous judgments; nor do I think that, if we got over the first difficulty of making a decree at all in this case, there can be any question of what the decree should be. The defendant Pryanath, no doubt, repudiates any joint liability with the two ladies, but I conceive that he has no grievance in the terms of a judgment which, while it tends to lessen his liability for the particular rent sued for, decides nothing as between himself and the co-defendants so as to prejudice him in any future litigation regarding the interests claimed by them respectively. As to the two ladies, they expressly admitted a joint liability in the first instance, though they set up a subsequent partition, to which the assent of the landlord was not alleged, as far as they were concerned; therefore I conceive there was nothing in the way of making a decree against them on their Own admissions; and if it had not been for the plaintiff's consent, I should have thought that a decree against the defendants jointly would have been the proper termination of the suit. It is not, indeed, very easy to account for the form of the previous decree of this Court between the parties, dated the 12th March 1866, nor is it precisely apparent in what position as to execution the parties were left by that decree. We may assume, however, that for some reason or other the parties there acquiesced in a decree so worded, and probably the rent was paid without further objection. It is not, perhaps, necessary to decide here what decree could have been made if it had been quite clear that the two ladies were not tenants, and could not, therefore, be jointly liable for the rent. But I think, that the procedure of our Courts quite admits of such a result as a judgment against one or more of several parties charged as jointly liable, the suit as against the rest being dismissed in consequence of their liability not being made out. And in the particular case before us I think it would have been obvious that the plaintiff was compelled, by what had previously occurred, to sue all the defendants.

24. I, therefore, think the decision complained of must be reversed, and the judgment of the Deputy Collector restored (the plaintiff having expressly consented to the decree being given in that form, see the last sentence but one of his examination Ante., p. 237, and not now offering any objection to the decision that Jaggat Tara and Padma Kumari do pay a certain part and the other defendants the rest), the only exception being as to the amount alleged to have

been paid to the plaintiff's agent as to which, as suggested by Mr. Justice Mitter, there must be further inquiry. Of course in the view which I have taken of the case, the parties sued being held to be (with the knowledge of the sureties) the real contending parties, it follows that the sureties really made themselves responsible for these parties, and not for Chandra Prasad.

Kemp, J.

I concur in this judgment.

(1) See the case of Sheik Bahadoor Ali v. Sheikh Dhomun, 1 Sel. Rep., 250, and Mussamut Hyatun v. Mohummed Hussun Khan, 4 Sel. Rep., 134, and see the repealed Regulation XVII of 1793, sec. 27; see also the observations of L.J. Knight Bruce, at pages 72-3 of the judgment in Gopee Krist Gosain v. Gunga Persaud Gosain, 6 Moo. I.A., 53; Note by L.S. Jackson, J.

2 A potta at a fixed rent and hereditary tenure.

3 An occupant of lands at a fixed rent and by heritable tenure.