(1920) 03 PRI CK 0005

In the Privy Council

B.L. Rai and others APPELLANT

Vs

Bhaiyalal and another RESPONDENT

Date of Decision : 03-03-1920

Acts Referred:

Citation : (1920) AIR(PC) 8

Hon'ble Judges : Ameer Ali, John Edge, Lord Moulton, Viscount Cave, JJ.

Advocate : E. Dalgado, J.M. Parikh, DeGruyther, for the Appearing Parties.

Judgement

Sir John Edge, J.

These are two consolidated appeals from a decree, dated the 19th April, 1910 of the Court of the Judicial Commissioner of the Central Provinces, which reversed two decrees dated the 8th and 22nd June, 1908, of the District Judge of Saugor, and dismissed two suits for sale which were tried together. The plaintiffs are the appellants.

The suits, No. 1 of 1905, and No. 2 of 1905, in which these appeals have arisen were respectively brought on the 7th January, 1905, in the Court of the District Judge. Suit No. 1 of 1905 was brought on a mortgage of the 2nd July, 1893, by mortgagees or their respresentatives against Bhaiyalal Dube, the mortgagor, and his son Murlidhar Dube to recover Rs. 59,999 including principal, interest and compound interest by the sale of six villages to which the mortgage applied. The principal sum of that mortgage was Rs. 30,000. The particulars of the account as given in the plaint showed Rs. 30,000 as the principal sum, interest and compound interest to the 3rd January, 1905, amounting to Rs. 28,190-5-0 and Rs. 1,462-4-0 charged as having been paid by the mortgagees as Government revenue on the 29th August, 1902, and Rs. 411-14-0 interest on that sum of Rs. 1,462-4-0. By the particulars Rs. 65-7-0 of the total of Rs. 64,064-7-0 was relinquished, leaving as a result the Rs. 59,999 in respect of which a decree for sale was sought. In the particulars no moneys were credited as having been received by the mortgagees.

Suit No. 2 of 1905 was brought on a mortgage of the 30th June, 1892, by the same plaintiffs against Bhaiyalal Dube the mortgagor, his son, Murlidhar Dube, and Bhaiyalal Dube''s wife, Latkari Bahu to recover Rs. 59,887-3-6 by sale of five other villages to which that mortgage applied. The principal sum of the mortgage was Rs. 40,000. The particulars of the account as given in the plaint showed Rs. 40,000 as the principal sum, interest and compound interest to the 3rd January, 1905 Rs. 15,101-9-0 and Rs. 3,734-12-6 charged as having been paid by the mortgagees as Government revenue and Rs. 1,050-14-0 interest on that sum of Rs. 3,734-12-6 making a total of Rs. 59,887-3-6 in respect of which a decree for sale was sought. In the particulars no moneys were credited as having been received by the mortgagees.

The principal defence in each suit was substantially that the mortgage had been satisfied, and that there was nothing due.

The defendant Murlidhar Dube was born on the 16th July, 1894, and on his birth he and his father Bhaiyalal Dube constituted, until they separated, a joint Hindu family governed by the law of Mitakshara. The property mortgaged was ancestral property. Bhaiyalal Dube was a young man of defective education and of vicious and immoral habits. He was not a man of business, and he was incompetent to manage the family property which consisted of the villages mortgaged and of several other villages.

The history of the case may be divided into three periods in relation to the rights, powers and liabilities of Bhaiyalal and his son Murlidhar. The periods were from the 30th June, 1892, to the birth of Murlidhar on the 16th July, 1894; from the 16th July, 1894, to January 1895, when Bhaiyalal''s wife and her son Murlidhar were obliged to leave his house, and to live separately from him in consequence of the profligate misconduct of Bhaiyalal; and from January, 1895, to the filing of the suits.

The original mortgagees consisted of a joint Hindu family of which Nandkishore, now dead, was the managing member and in the transaction between the parties to which reference will be made he represented the family, and the other members of that family need not be specifically referred to.

On the 1st July, 1892, Bhaiyalal Dube executed an agreement by which he appointed Nandkishore manager and receiver of all his property movable and immovable for 10 years, and put Nandkishore in possession. Under that agreement Nandkishore was to keep accounts and to explain them to Bhaiyalal Dube in July of each year, and was to receive certain remuneration for his work. Nandkishore as the managing member of his joint Hindu family continued in possession of the property until about April, 1894, when Bhaiyalal Dube determined the agreement on the 1st July, 1892; but it is not clear that the determination of that agreement involved the resumption by Bhaiyalal of the control of his property and there appears to be some ground for saying that Nandkishore''s management continued until the execution of the agreement next referred to. It has been alleged by the plaintiffs that on the determination of the agreement of 1892, Nandkishore handed over to Bhaiyalal Dube all the account books which had come into his possession. On behalf of the defendants it has been denied that any account books were handed over by Nandkishore to Bhaiyalal. The presumption is that Nandkishore must have kept accounts showing what he had received and what he had expended while the property was in his possession. No such accounts have been produced.

On the 2nd February, 1895, Bhaiyalal Dube executed another agreement by which Nandkishore was appointed manager of all Bhaiyalal''s property except certain bungalows and houses in Saugor, and Nandkishore was put in possession. That, agreement contained the following clauses amongst others :-

"So thinking the business to be your own, you will look after the management of the villages, grants, gardens, sir birs (grass reserves), and forests, of cash and grain debts, old and new, due to me, in Saugor District or elsewhere, and of the land revenue collections, grant leases up to three years without my permission, and for a longer period than three years with my permission, take Kabuliyats (counter parts), have them registered, have land prepared for cultivation, collect land revenue, credit Government dues and pay necessary village expenses. You have the power to do all these works for me and in my interests. You may with permission discontinue sir wherever you think fit, and give sir land for cultivation, and add more to the sir area where you may think proper to do so. Besides the debts due to you, I have also to pay other creditors. And in some instances, I have borrowed at a higher rate of interest. So, you will devise means to liquidate that debt first, from my profits and agreeably to my wishes. You will realise money from persons indebted to me in cash or in grain by mutual agreement or by suit, conducting it personally or through Pleader or Barrister or Agent appointed for the purpose or by attachment, etc., and receive money from the Treasury or Courts, passing a receipt therefor. Be paying to me for my expenses Rs. 250 (two hundred and fifty a month) at the beginning of each month, debitting the same to my account. In case I stand in need of some more money for some urgent personal business, such as marriage, etc. you will have to pay me to the extent of Rs. 1,000 a year. Take a receipt from me for whatever money you pay, and enter it in my account in my name. I will see and understand the accounts every half year.....This agreement will last till the liquidation of the whole debt due to you, which is based upon Bahikhatas (account books) and mortgage-deeds. In case I pay off your money with interest either by borrowing from others or by selling my property, if I like I will take back the said management from you. If at any time I were to sell the property mortgaged to you for repayment of the debts due to you, you will have to grant me permission and I will have this right also that I may take at any time I think fit the management of the estate other than that mortgaged to you. You have my permission to appoint a general agent, and to have the power-of-attorney registered."...

The Judicial Commissioner considered that the effect of that agreement was to place the mortgagees, on whose behalf Nandkishore acted in the position of mortgagees in possession, so far as the mortgaged property was concerned, and that it was his duty to account to the mortgagors. With that view of the situation their Lordships agree. While Nandkishore was in possession under the deed of 2nd February, 1895, some of the mortgaged villages and other villages of Bhaiyalal and Murlidhar were sold by Nandkishore; the sale proceeds of the villages so sold amounted to Rs. 94,208-14-0. Nandkishore''s management of the property continued until some time in 1897 or 1898, when apparently he ceased to have possession of any of the property then unsold.

Of the villages so sold some were purchased by Nandkishore.

On behalf of the plaintiffs it was alleged that Bhaiyalal Dube owed to the original mortgagees large sums (Khata debts) in addition to those secured by the two mortgages, and that moneys received by Nandkishore during his management were applied to the discharge of these debts and other liabilities of Bhaiyalal, leaving the mortgage debts due to the mortgagees unsatisfied, and reliance was placed in support of that contention on the fact that Bhaiyalal had signed some acknowledgments which were put in evidence. It was on behalf of the defendants alleged that Nandkishore had induced Bhaiyalal to sign papers which he did not understand. The Subordinate Judge stated in his judgment : "As for the question of undue influence, there is not the least doubt in ray mind. Bhaiyalal was completely under the dominating influence of the Lala Nandkishore." One of the documents which was relied upon as an acknowledgment was a paper, Exhibit P. 15, dated the 13th September, 1895, which Bhaiyalal alleged was extorted from him on the 10th December, 1898. As to that paper the Subordinate Judge stated in his judgment :-

"I have no hesitation whatever in holding that Exhibit P. 15 is not a genuine document, but that it was executed at the urging of Nandkishore long after the date it is made to bear."

The Judicial Commissioner gave no credence to any of the alleged acknowledgments signed by Bhaiyalal, nor do their Lordships. The alleged Khata debts were entered into the books of Nandkishore without a single item of credit being shown in respect of them in his books. Their Lordships are forced to regard those entries of Khata debts as fictitious, and as made with the object of accounting for some of the money which Nandkishore had received on account of Bhaiyalal and Murlidhar. The trial Judge found that the debts (Khata debts) other than the bond debts under the two mortgages were not proved.

"Owing to the absence of accounts of management, which I hold were suppressed and made away with by Nandkishore, or those acting under him."

The trial Judge, acting on evidence which was far from conclusive and was untrustworthy, found that for principal under the mortgage of the 30th June, 1892, there was due Rs. 4,785-10-6 and for principal under the mortgage of the

2nd July, 1893, there was due Rs. 15,129-0-5 which included a charge of Rs. 1,874-2-0 charged on the village Sahawan only, and adding some compound interest he found that the total amount due was Rs. 25,971-10-8, and made a decree for sale. From that decree there was an appeal by the plaintiff to the Judicial Commissioner, and objections to the decree were filed by the defendants.

On the appeal the Judicial Commissioner, as their Lordships construe his judgment, found that the plaintiffs had failed to prove that there was anything due under either of the mortgages and by his decree he dismissed the plaintiffs'' appeal and allowing the objections filed by the defendants he dismissed the two suits. He rightly, in their Lordships'' opinion, found that Bhaiyalal''s alleged acknowledgments were worthless. He found that Nandkishore was in a position to dominate Bhaiyalal''s will, and was also in a fiduciary relation to him. In his judgment he stated :-

"Under the first deed (that of 1st July, 1892) he (Nandkishore) was in my opinion a trustee. Under the second (that of 2nd February, 1895) he became a mortgagee in possession under a document which expressly provided for liquidation of his debts and that mortgaged property as well as other property of the mortgagor should remain in his possession till they were liquidated. This Court has repeatedly held that if a mortgagee not entitled to possession of the mortgaged property by the terms of his mortgage takes possession thereof, whilst his mortgage subsists, his possession is not adverse to the mortgagor, but is that of a mortgagee under Section 76 of the Transfer of Property Act the terms of which are very wide. See Prebhudan v. Bhikulal. 1906 2 N.L.R. 92, and Munji v. Kishen, 1908 S. A. No. 561 of 1908 (Unrep.). And this is a stronger case, possession having admittedly been taken under an express agreement between the parties providing for liquidation of the mortgage debt. In both capacities it was Nandkishore''s business to keep accounts, as a trustee under Section 19 of the Indian Trusts Act whilst as a mortgagee he was required by Section 76(g) of the Transfer of Property Act to keep them during the continuance of the mortgage. Whatever, therefore, became of the accounts, which Nandkishore kept as agent of Bhaiyalal, and which I am by no means satisfied that he ever made over to Bhaiyalal, he was bound, if he wished to enforce his mortgages, to keep in his own interest accounts showing how he had discharged his stewardship, that the alleged further advances to Bhaiyalal had been really necessary, that the income of Bhaiyalal''s property had been properly applied, and that it had not been possible to reduce the mortgages by more than the amount out of the sale proceeds of villages for which the plaintiffs have given the defendants credit. This the plaintiffs are admittedly now unable to do. The so-called Khata of Bhaiyalal consists of a succession of alleged advances to him from the 25th July, 1892, to the 31st May, 1894, the four largest of which form the consideration of the second mortgage of the 2nd July, 1893. There are no countervening credits, and no attempt has been made to show what has become of the numerous sums that Nandkishore must have received as manager of Bhaiyalal''s estate besides those obtained from the sale of villages. Bhaiyalal''s acknowledgments are in my opinion under these circumstances of no value, and cannot be made to supply the want of accounts though had accounts of Nandkishore''s stewardship been forthcoming, they might have been important admissions of their correctness. I need not therefore go at any length into the question of the genuineness of Exhibit P. 15, as to which I am, however, inclined to agree with the lower Court. The defendants cannot in my opinion re-open in these proceedings the sales of villages - not even of those purchased by Nandkishore which, as the suits have been framed, are not in question in them, though they might possibly have been entitled to do so in properly framed redemption suits. And they certainly cannot re-open the sales to persons who are not parties to this litigation. But the plaintiffs, for the reason I have indicated, cannot, in my opinion, enforce their mortgages."

Their Lordships do not assent to the statement that Nandkishore was by the first deed a trustee within the meaning of the Indian Trusts Act but on the evidence to which their attention has been directed they see no reason for dissenting from the conclusions as to facts of the Judicial Commissioner. In the view which they take of this case it is not necessary for them to consider whether any of the alleged acknowledgments of Bhaiyalal relied upon by the plaintiffs could if proved have been binding on his minor son Murlidhar. This is not an ordinary case of a suit for sale based on a mortgage in which it would be for the defendant, the mortgagor, to prove that nothing remained due under the mortgage if that was his defence. This is, as it is to be hoped it is, quite an exceptional case, in which it appears to their Lordships that it was for the plaintiffs to prove that the mortgages had not been satisfied and what if anything was due under each mortgage before they could get a decree for sale. Bhaiyalal, a very young man leading a most immoral life, mortgaged the ancestral property of his family to Nandkishore, and gave Nandkishore possession practically of all his property, which included other villages not mortgaged to Nandkishore. A considerable part of the property of which Nandkishore had obtained possession, including some of the mortgaged villages, was sold by Nandkishore, and some of the mortgaged villages were purchased by him. Nandkishore did not, nor did the plaintiffs, render accounts of what had been received by him from or in respect of any of the property, not even of that which had been mortgaged to Nandkishore''s family, on whose behalf he acted. Bhaiyalal was completely under the influence of Nandkishore, an unscrupulous man, who exercised that influence regardless of the interest of Bhaiyalal and his infant son. The plaintiffs are unable to prove that anything is due under either of the mortgages in suit.

Their Lordships will humbly advise His Majesty that these consolidated appeals should be dismissed. As the respondents have not appeared there will be no costs of these appeals.

