

(1875) 03 PRI CK 0003

In the Privy Council

Gajadhur Pershad

APPELLANT

Vs

The Two Widows of Emam Ali Beg and others

RESPONDENT

Date of Decision : 18-03-1875

Acts Referred:

Citation : (1875) 2 IndApp 205

Hon'ble Judges : James W. Colville, Barnes Peacock, Montague E. Smith, Robert P. Collier, JJ.

Judgement

Montague E. Smith, J. 1. This case comes before their Lordships under circumstances of great irregularity in the proceedings. The leave to appeal granted by the judicial commissioner, Mr. Currie, is clearly ultra vires, and therefore the appeal is now before them without any proper authority. Mr. Doyne has taken the objection that the Appellant is in that position. He was met by a counter objection on the part of Mr. Leith that the Respondents could not now be heard to object, inasmuch as they had not done so at an earlier period when they first became aware that the irregular petition of appeal had been lodged. Their Lordships think that the right practice is to take objections of this kind at the earliest moment, for the obvious reason that the great expense of preparing for the hearing is thereby saved, which is uselessly incurred if, when the objection is ultimately taken, their Lordships feel obliged to yield to it. But although their Lordships think that the objection should be taken at an early period, it is clearly competent to them to hear it at any stage of the appeal; and it has not been unusual to entertain it when the appeal is called on, and before the argument upon the merits has been commenced. Mr. Doyne has taken it at that time, and their Lordships think his objection ought to prevail. Mr. Leith then suggested that he desired to apply to this board for special leave to appeal; and no doubt there have been cases where, upon the appeal being called on and the objection discussed, their Lordships have given special leave to appeal, nunc pro tune, directing that the petition to appeal should go to Her Majesty with the report upon the appeal itself. An Appellant, however, cannot be in a better position with regard to the application than that in which he would have stood if

he had made it at an earlier period; and their Lordships have had to consider whether or no this is a case in which they ought to grant special leave to appeal; and they have come very clearly to the conclusion that it is not. 2. It seems that the Plaintiff is mortgagee, and the original Defendant, Emam Ali Beg, was mortgagor. Emam Ali Beg is dead; his two widows are on the record, and there is a third party now on the record as an intervenor, the Rajah of Bhinga, the Respondent, who became a purchaser of the estate from Emam Ali Beg, or of some interest in it. The original suit was for foreclosure of the mortgage, in which various questions as to the right to tack and other matters arose; and it seems that before a decree of foreclosure was finally obtained, a compromise was entered into between the Plaintiff and Emam Ali Beg. The compromise contained the following terms : "That the Plaintiff is to get Rs. 10,000, the balance remaining after remission of a certain sum on account of interest recently accruing out of the aggregate amount of the principal, costs, and interest accruing up to the month of November, 1868. That from the 1st of December, 1868, the Defendant is to be liable for interest at the rate of Rs. 1.8a. per cent, per mensem. That the Defendant's rights and interests in the village are to remain as before hypothecated to Plaintiff, mortgagee. That defendant is to put the Plaintiff in possession of the estate, and to have the mutation of names effected in the Collector's Register of Proprietors, before Bysakh 1276 P. Plaintiff is to appropriate the proceeds towards payment of the interest due. Defendant is to pay to Plaintiff the whole amount in cash due to him within two years from this day, in the case of the mutation of names having boon effected in favour of and possession given to Plaintiff." 3. It seems that the Defendant did pay into Court a sum of about Rs. 10,700, the Rs. 700 being for interest, in pursuance of this compromise, and that the Plaintiff refused to accept it or to take it out of Court, upon the ground that by the terms of this compromise he was entitled to have the possession of the estate for two years, and a mutation of names, and afterwards to get this money. Ho petitioned the Court to give effect to this contention; but the deputy commissioner rejected the application, and stated that the Petitioner refused the money at his own risk, and would receive no interest from the time it had been paid into Court. This rejection was confirmed on appeal. The money having been thus refused, it appears that an order (dated 26th April, 1869) was made by the deputy commissioner for the repayment of the deposit of Emam Ali Beg. That was an irregular proceeding. The money ought not to have been paid out without notice. However, that was done. Thereupon began a set of proceedings on the part of the Plaintiff, the mortgagee, to have the compromise carried into effect, which has led to the present appeal. It seems that the Plaintiff contended that he was entitled to have a decree of foreclosure in consequence of the withdrawal of the money. It is sufficient to say that the deputy commissioner held that he was entitled to the money, but not to a decree of foreclosure. The officiating commissioner reversed that decision, and held that he was entitled to foreclose. The case then came before Mr. Capper, the judicial commissioner, and, on the 28th of June, 1870, he made a decree reversing the decree of the officiating commissioner, setting up

that of the deputy commissioner, and holding that the Plaintiff could not have that relief. In the course of his judgment Mr. Capper says : "It is not denied that this was a full payment of the sum due under the compromise, and, consequently, on that date all the conditions and stipulations of the mortgage contract, and all rights accruing under it to the mortgagees, actually ceased and were at an end." He also says the Rajah, the intervenor, "has agreed in Court to repay the Rs. 10,725 withdrawn, and it is asserted that this amount is actually in deposit in the treasury of the deputy commissioner." It appears Mr. Capper was not rightly informed, and that this money had not been so deposited, although it had been agreed that it should be. It is against this order that their Lordships are now for the first time, in March, 1875, asked to grant special leave to appeal. 4. Several subsequent proceedings have taken place. There was a petition for review, heard by Mr. Capper himself, who rejected it; and then the Plaintiff filed proceedings which it is difficult to characterize. There is a claim or petition to revive the decree of foreclosure, which had been reversed on appeal, another petition to review Mr. Capper's decision, and to revive the decree of the 5th of January, 1869, upon the ground that this money having been taken out after it was deposited the Plaintiff ought to be restored to the former state of things. But matters had greatly changed. The Rajah of Bhinga had come in as purchaser, and his rights as purchaser have never been tried. There are, it appears, conflicting contentions on the part of the Rajah and the representatives of Emam Ali Beg which have not been determined. These petitions came on before Mr. Ouseley, the then officiating commissioner, and he, it appears, felt some difficulty in dealing with them. He says in his judgment : "It seems to me that at this stage of the proceedings the only thing that can be done is to call on the Kajah of Bhinga to shew cause why he should not pay the money which he agreed in Court to pay." The counsel for the Rajah apparently objected to that on the ground that the case was not heard in review of judgment, and that the Court could not call on his client to shew cause why he should not pay the money. It does not appear what was done before Mr. Ouseley upon that objection. 5. Then the case comes before Mr. Currie, who, apparently feeling the same difficulty, declined to admit a review of the order. He says this : "As Mr. Capper has already declined to admit a review of this order, and as the entire facts of the case as above detailed were before him at the time he passed his order, I do not feel justified in admitting his order to review; but taking the entire circumstances into consideration, and being of opinion that the Plaintiff was justified in urging his claim to possession under the deed of compromise, and that the Defendant fraudulently withdrew the money out of deposit before that point was determined, I am of opinion that the case is one which may properly be appealed to Her Majesty's Privy Council." 6. The judicial commissioner, therefore, feeling unable to give any relief himself, without any application apparently on the part of the Plaintiff, grants leave to him to appeal to Her Majesty in Council, which, as already observed, it was beyond his power to do. 7. Under these circumstances, their Lordships think it would be a wrong exercise of their judicial discretion to grant the special leave now applied for. There are only two grounds on which it is

suggested that the appeal ought to be heard. The first is, that Emam Ali Beg did not pay the proper amount into Court under the compromise. It seems to have been suggested in the course of the proceedings that a small sum of Rs. 7 had not been paid in. Whatever may be the case in a proceeding where the party is entitled to avail himself of the strict law, it is obvious their Lordships would not give special leave to appeal upon any question of that kind. The other and substantial ground upon which alone leave could be granted, if at all, is that there is a large sum of money, to which the Plaintiff is clearly entitled, withdrawn under the circumstances already alluded to. How that sum is to be recovered, and what are the rights of the Plaintiff, arising from its withdrawal, and against whom, it is not for their Lordships, in dealing simply with the preliminary question of leave to appeal, to determine. It is enough to say that they think those rights may be ascertained more satisfactorily in some other proceedings than by this tribunal under the irregular appeal which has been sent up. 8. Their decision dismissing the appeal being upon the ground that the appeal is not properly before them will not, of course, prejudice any rights the Plaintiff may have either against the representatives of Emam Ali Beg or the Rajah of Bhinga. 9. Under these circumstances, their Lordships will humbly advise Her Majesty to dismiss the appeal. But this being upon a preliminary objection, only taken when the appeal was called on to be heard upon the merits, their Lordships think that there should be no order as to costs.