(1894) 12 PRI CK 0007

In the Privy Council

Kalka Singh and Another — APPELLANT

Vs

Parasram — RESPONDENT

Date of Decision : 08-12-1894

Acts Referred:

Citation : (1894) 22 IndApp 68

Hon'ble Judges : Hobhouse, Shand, Davey, Richard Couch, JJ.

Judgement

Davey, J. 1. It is not necessary to state the details of the earlier litigation out of which the present case has arisen. Suffice it to say that prior to and in the month of April, 1877, Kalka Singh and Chet Singh, the present Appellants, held a decree dated the 10th of October, 1866, for a recovery of a seven annas share of the Baniamau taluq, the remaining shares being held by Deli Singh and Daryao Singh in certain proportions. The decree of the 10th of October, 1866, did not contain any order or direction for payment of mesne profits. 2. The present Appellants, however, made an application in their suit for payment to them of mesne profits accrued during the time they were out of possession after the decree of the 10th of October, 1866. On the 3rd of April, 1877, the Deputy Commissioner made an order in assumed execution of the decree giving the decree-holders mesne profits. This order is said to have been affirmed by the Commissioner, and it is said that the Judicial Commissioner rejected a second appeal as inadmissible. The order of the 3rd of April, 1877, was not proceeded with for some reason; and on the 10th of August, 1883, an application to proceed upon it was dismissed by the District Judge on the ground that there was no decree giving mesne profits to the Applicants, and that decision was affirmed by the Judicial Commissioner on the 15th of February, 1884. Mr. Arathoon contended that the decision of the District Judge and Judicial Commissioner was beyond their jurisdiction and ought to be disregarded, on the technical ground that they were bound by the order of the 3rd of April, 1877. Their Lordships, however, cannot take this view. It is not disputed that the Court executing the decree of the 10th of October, 1866, had in fact no power to award mesne profits not mentioned in that decree, and their Lordships agree with the Judicial Commissioner that the order of the 3rd of April, 1877, was no decree and was made without jurisdiction, and the application to the District Judge was therefore properly dismissed. 3. In the meantime the bonds which have given rise to the questions in the present appeal had been executed. The present suit is brought by the minor son of one Munshi Salig Ram, deceased, against the Appellants upon a bond dated the 23rd of August, 1879. It will be convenient in the first instance to mention two earlier bonds. On the first of February, 1875, the Appellant Kalka Singh gave Salig Ram a bond for Rs. 2500 expressed to be due from Kalka Singh to Salig Ram, and on the 11th of December, 1877, the same Appellant executed a second bond to Salig Ram, who it should be mentioned was a pleader and had acted for the Appellants in the previous litigation. The material part of this bond is as follows:

Rupees 2000, on account of pleaders'' fee in the suit for mesne profits, are due from me to Salig Ram, pleader, son of Mithu Lal, caste Kayeth, resident of Tarimpur, and whereas a decree for mesne profits has already been passed and the amount thereof remains to be determined after examining the accounts, therefore I do hereby declare that when the mesne profits of 7 annas share in Ilaka Baniamau are realised, I shall pay Rs. 2000, a moiety of which is Rs. 1000, to the said Lola Salig Ram, without any objection and without interest, as soon as any amount is realised by me, and that, if when the mesne profits are realised, I do not pay the aforesaid amount, I shall pay interest thereon at the rate of 2 per cent, per mensem from the date of realisation. 4. The operative part of the bond of the 23rd of August, 1879, which is now in suit, is as follows: Whereas Rs. 5500 on account of bonds, dated 1st February, 1875, and 11th December, 1877, are due from me to Salig Ram, son of Mithu Lal, Kanungo, resident and zemindar of Sikandarpur, District Shahjahanpur, at present residing in Narainpur, District Sitapur, and we have borrowed Rs. 1500 in cash from the said Lola, the first condition is this that Rs. 5000 we shall pay without interest on the 15th of the month of Magh, 1287 Fasli, and Rs. 2000 we shall pay at the time of realization of mesne profits, for which a decree has already been passed in favour of us, the declarants, and in execution of which decree the property of Debi Singh and Daryao Singh, judgment debtors, has been attached. 5. The sixth and ninth conditions of the bond are as follows: The sixth condition is this that, if at the time of realization of : the aforesaid decreed mesne profits, (we) do not pay up the sum of Rs. 2000 to the mortgagee, interest at 2 per cent, or Rs. 2000 shall be due from us from the date of realization of the mesne profits, and the mortgagee shall have power to realise the sum of Rs. 2000 with interest at 2 per cent, per mensem from any of my moveable and immoveable property he please. The ninth condition is this that, if (we) notwithstanding the mesne profits being realized do not pay the sum of Rs. 2000 and interest at 2 per cent, from the date of realization of the mesne profits, the mortgaged share of the village shall not be deemed liable to redemption till the said amount with interest thereon has been paid up. 6. It will be observed that prior to the execution of either the bond of 1877 or that of 1879 the order of the 3rd of April, 1877, had been made and stood unreversed although nothing had been done in pursuance of it. 7. It is stated in the Record that after the order of the 15th of February, 1884, the present Appellants applied to the Judicial Commissioner for leave to appeal to Her Majesty in Council against that order, but the application was refused. They did not apply to Her Majesty in Council for special leave to appeal. But on the 22nd of July, 1884, Debi Singh and the Appellants signed a deed of release or compromise for settlement of the litigation between them. Thereby Debi Singh agreed to withdraw a petition he had presented for a revival of his appeal against the Appellants'' decree of the 10th of October, 1866, and to waive all further claim to the prosecution of such appeal. On the other hand, the Appellants renounced all claim to mesne profits on their decree of the 10th of October, 1866, and specially agreed not to prosecute any appeal to Her Majesty in Council against the Judicial Commissioner''s order of the 15th of February, 1884. And each party gave up all claims to costs against the other. 8. The present suit was commenced in November, 1887. By his plaint the Plaintiff and present Respondent sued on the bond of the 23rd of August, 1879, to recover the sum of Rs. 17,880, the whole amount claimed to be due for principal and interest, treating the bond as a subsisting continuing obligation for payment of the Rs. 2000 and interest, as well as for the larger sum. He also alleged that the Defendants had withdrawn from the decree for mesne profits against the judgment debtor by the deed of compromise. The Defendants and present Appellants pleaded misrepresentation, fraud, and want of consideration to the whole demand. They denied that they had waived their claim against the judgment debtor for mesne profits, and averred that there was no decree for mesne profits. 9. On the 12th of November, 1888, the District Judge gave judgment for the Respondent for the whole amount sought by the plaint, and his decree was confirmed by the Judicial Commissioner on the 16th of June, 1890, with a small variation as to rate of interest. The learned Commissioner held that the Appellants, by their own deliberate act, prevented the happening of the event on the occurrence of which the Rs. 2000 were to become payable to the Respondent, and he was therefore entitled to put an end to the contract and sue the Appellants for damages. 10. This is an appeal against the whole decree. A certificate was given in the presence of the parties that the value of the matter in dispute on appeal exceeded Rs. 10,000. The Appellants'' counsel, however, being satisfied that the appeal could not succeed as to the whole demand, has, by his printed case and at the Bar, confined his argument to the question of the Rs. 2000 and interest thereon. In these circumstances Mr. Arathoon, for the Respondent, made a preliminary objection to the hearing of this appeal on the ground that the subject-matter of it was now reduced below Rs. 10,000, and the appeal was therefore incompetent. Their Lordships cannot accede to this objection. On the one hand, there is no doubt that if a certificate be granted or leave to appeal given by the Court below in a matter in which they have no jurisdiction, it would be the right and in ordinary circumstances the duty of their Lordships to dismiss the appeal as incompetent. But, on the other hand, if an appeal is competently made, and it appears to their Lordships after argument, or is admitted at the Bar, that the greater part of it must fail, it is the constant practice of their Lordships to give relief in respect of the portion in which the appellant succeeds, notwithstanding that the subject-matter of that portion of the appeal may be less than the prescribed limit. Their Lordships see no reason to doubt the bond fide intention to appeal against the whole decree, and they regard this case in the same way as if Mr. Mayne had opened the whole case to their Lordships, and his client ought not to be in a worse position because in the exercise of his discretion and availing himself of his experience the learned Counsel determined not to waste the public time by doing so. 11. On the merits of the case their Lordships cannot agree with the learned Judicial Commissioner that the Appellants were under any obligation to apply to Her Majesty in Council for special leave to appeal against the order of the 15th of February, 1884, or that by their deliberate act in not doing so, or in executing the deed of compromise, they prevented mesne profits feeing recovered. The truth is, there was no decree for mesne profits, and the Court could not, under the guise of execution, either add words to the decree or give it a new and extended effect. There was no question of a fresh suit for the recovery of the mesne profits. And, indeed, it appears that such a suit would have been barred by the Limitation Act at the date of the deed of compromise, and could not therefore have been commenced with any prospect of success. It is plain, when the facts are looked at, that there was no real concession made by the Appellants in the deed of compromise, because the right purporting to be given up had no existence. Their Lordships are therefore of opinion that the obligation for payment of the Rs. 2000 and interest out of mesne profits never took effect or became enforceable, and that it is not proved that the nonoccurrence of the condition was due to the conduct or default of the Appellants. 12. It was suggested in the course of the argument that, although the payment of the debt in the mode and form agreed upon had become impossible, the obligation to pay the debt (the existence and amount of which is admitted in the bond) remained, and might be enforced against the Appellants. In the first place, their Lordships observe that no such case is raised in the pleadings or apparently was argued in the Courts below; and, further, that their Lordships have only a translation of the instrument; containing the admission. It is impossible to say that the case if put forward in the Courts below might not have been met by some evidence, or that the exact wording of the bond might not have been important from this point of view. In the next place, although an unqualified admission of a debt no doubt implies a promise to pay it, their Lordships are not prepared to hold that that is necessarily so where there is an express promise to pay in a particular manner. It must depend on the construction of the instrument in each case; and their Lordships think in the present case that the admission of the debt by which the obligation is prefaced in the bonds of 1877 and 1879 does not import an unqualified or unconditional promise to pay, but is referable to the particular obligation, or (in other words) is introduced for the purpose only of fixing the amount for which the obligation is given, and which the obligor agrees to pay in the stipulated manner and not otherwise. 13. Their Lordships, therefore, will humbly advise Her Majesty that the decree of the Judicial Commissioner be varied by omitting from the amount decreed to the Respondent the sum of Rs. 2000 and the interest on that sum, and the direction as to the costs of the appeal. This will not disturb the order for payment of costs in the decree of the District Judge. 14. With regard to the costs of the appeal to the Judicial Commissioner and of this appeal, their Lordships consider that, inasmuch as in the result the Appellants have partly succeeded and partly failed, the parties should bear their own costs, and they will so advise Her Majesty.

