

(1916) 11 PRI CK 0016

In the Privy Council

Case No : Privy Council Appeal No. 82 of 1915

(Maharaja) Ramnarain Singh

APPELLANT

Vs

Adhindra Nath Mukherji and others

RESPONDENT

Date of Decision : 16-11-1916

Acts Referred:

Citation : (1916) AIR(PC) 119

Hon'ble Judges : Lords Parker of Waddington and Sumner and Lawrence Jenkins, JJ.

Advocate : De Gruyther and B. Dube, for Appellant; Robert Finlay and J.M. Parikh, for Respondents. Solicitors for Appellant; Barrow, Rogers and Nevill, Solicitors for Respondents, E. Dalgado.

Judgement

Lord Parker -This is the rehearing of an appeal from the High Court at Calcutta, dated the 30th August 1911, which set aside a preliminary decree of the Subordinate Judge and remitted the case to the Court of the Subordinate Judge to be dealt with in accordance with certain directions contained in the judgment of the High Court. At the original hearing the, present respondents did not appear and the appellant obtained an order setting aside the decree of the High Court at Calcutta and dismissing the action in which the appeal arose. Subsequently the respondents obtained an order of His Majesty discharging the order thus made on the ground that it was by the fraud of his agent that he was not represented by counsel at the hearing, and directing the appeal to be reheard, the costs thrown away to be dealt with upon such rehearing. The appeal has accordingly been reheard before their Lordships, who have had the advantage of hearing counsel on both sides, The facts out of which this action arose may be stated as follows : In 1896, Maharajah Shri Ramnarayan Singh Bahadur (whom their Lordships will hereafter refer to as the mortgagor) executed in favour of Rai Jadunath Mukerji Bahadur (whom their Lordships will hereafter refer to as the mortgagee) a deed dated the 14th April in that year. This deed recites that the mortgagor had borrowed from the mortgagee a sum of 1,30,000 rupees, and for the repayment of the loan with interest as therein

mentioned, had given in Zarbharna the rents and cesses of the Mokurari villages therein described. The villages are divided into groups, the distinguishing mark of each group being the date at which the mortgagee is to take possession. The possession of all the villages is to be redelivered to the mortgagor on the 14th January 1903 it being calculated that by that date the amount due to the mortgagee for principal and interest will have been satisfied out of the rents of the several villages. The deed contains an elaborate schedule showing the details of this calculation. It also expressly precludes the mortgagor collecting any of the rents during the term of the Zarbharna. It also contains the following clause :-

"If by mistake I" (the 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 Zarbharnadar has and shall have any claim whatever against me or my heirs and representatives on the ground of realisation and non-realisation. If a claim is made, it is and shall be totally null and void."

It is common ground that the mortgagee obtained possession of the several groups of villages at the respective days in that behalf specified in the deed, and retained possession thereof for the term of the Zarbharna, and at the expiration of such terms redelivered the villages to the mortgagor. The mortgagee, however, did not in fact receive by the collection of the rents sufficient money to discharge the principal of the loan with interest as mentioned in the deed.

On the 13th January 1909, within 6 years from the expiration of the term of the Zarbharna the respondents, who represent the mortgagee, instituted the present action. By their plaint they asked relief either (1) in accordance with Order XXXIV, Rule 4, of the Civil Procedure Code, on the footing of an existing mortgage of the villages described in the deed; or (2) on the footing of a personal liability on the part of the mortgagor. They claimed to realise what was due to them, in the first alternative, out of the mortgaged villages and, in the second out of the estate of the mortgagor who was then dead.

In the course of the action it appeared that the deed of the 14th April 1896, was unattested, and it was accordingly held by the Subordinate Judge that it could not, having regard to the Transfer of Property Act, 1882, section 59, be enforced as a mortgage. The respondents did not appeal from and are bound by this decision. The sole question which remained therefore was whether there was any personal liability on the part of the mortgagor for payment of that portion of the loan and interest which remained unsatisfied out of the rents of the villages. In considering this 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. It must also be borne in mind that if the mortgagor be in the first instance under no personal liability, such liability may arise under section 68 (b) or (c) of the Transfer of Property Act. From the argument

advanced by the respondents it now appears that paragraphs 6 and 7 of the plaint were intended to show that the object of the allegations made therein was to raise a case under this section. The truth of these allegations was not investigated at the trial, so that the Subordinate Judge could not have relied on them. He held that although the document of the 14th April 1896, was, according to its true construction, merely a usufructuary mortgage non-enforceable for want of attestation, the mortgagor came under personal liability for payment and that this liability was not statute-barred, and by preliminary decree he referred to a commissioner to take an account of what had been received by the mortgagee under such mortgage. His reasons for holding that there was such personal liability are somewhat obscure.

Against this decision the present appellant appealed to the High Court, and on the hearing of the appeal the High Court upheld the decision of the Subordinate Judge so far as it determined the existence on the part of the mortgagor of a personal liability not barred by statute, but discharged the reference to a commissioner on the ground that such a reference would involve the trial of the issues raised in paragraphs 6 and 7 of the plaint, which issues could not be properly referred to a commissioner but ought to be determined by the Subordinate Judge himself. The action, was, therefore, remitted to the Subordinate Judge to be disposed of in accordance with this decision. The High Court held that the deed of the 14th April 1896, according to its true construction, imposed on the mortgagor a personal liability, or at any rate did not negative the personal liability incident to a transaction of loan.

The appellant further appealed to His Majesty in Council, and as before mentioned the case came before the Board in the absence of the respondents. The Board were of opinion that having regard to the nature of the deed of the 14th April 1896, which was a usufructuary mortgage only, and to its terms, any personal liability on the part of the mortgagor was excluded; and that though the allegations of paragraphs 6 and 7 of the plaint might, if established, give rise to other rights of action such rights could not be enforced in an action based substantially on a personal liability arising by implication from the terms of the deed itself. In the absence of the respondents the attention of the Board does not seem to have been directed to section 68 of the Transfer of Property Act, 1882, or to the effect of that section if the allegations of paragraphs 6 and 7 of the plaint were established.

Their Lordships, after hearing the respondents, see no reason to differ from the conclusion arrived at upon the first hearing of this appeal, to the effect that the nature and terms of the deed of the 14th April 1896, are such as to show that it was not originally intended that the mortgagor should be personally liable. They think, however, that the respondents ought to be given an opportunity of proving the allegations of paragraphs 6 and 7 of their plaint and of establishing that those facts are sufficient to bring the 68th section of the Transfer of Property Act into operation. It is to be observed that the position of the mortgagor under this

section cannot, by reason of the non-attestation of the deed, be better than it would have been if the mortgage had been duly attested. Their Lordships express no opinion with regard to the question of limitation. This must largely depend upon facts, which have not as yet been investigated. For example, the plaint contains a statement of account which contains items of rents collected up to 1908, and the circumstances under which these rents were received may be material in considering whether the mortgagees' right, if any, is statute-barred. In their Lordships' opinion, the proper course is to discharge the orders made by the Subordinate Judge and the High Court respectively, and to remit the action to the Subordinate Judge for further trial. The appeal having succeeded in part only, there will be no costs of this hearing, but the respondents ought to pay the costs of the previous hearing which have been thrown away. Their Lordships think the costs incurred before the High Court and Subordinate Judge should abide the result of the further hearing. Their Lordships will humbly advise His Majesty accordingly.