

(1905) 04 CAL CK 0004
In the Calcutta High Court
Case No : Appeal No. 112 of 1902

Raja Gour Chandra Gajapati Narayan Deb	APPELLANT
Vs	
Raja Makunda Deb and Others	RESPONDENT

Date of Decision : 18-04-1905

Acts Referred:

Citation : (1905) 04 CAL CK 0004

Judgement

Pargiter, J.—This appeal arises out of a suit on a mortgage bond which the Raja of Puri, the first Defendant, executed on the 14th of August 1899 in favour of the Plaintiff, Raja Gour Chandra Gajapati Narayan Deb, who is a neighbouring Raja residing in the Ganjam District. The loan was of a lakh and a half of rupees and the Raja of Puri secured it upon his taluk Delang and some other lands. The list of mouzahs comprising the taluk was set out in the deed. Afterwards, the Raja of Puri, on the 26th of May 1900, borrowed Rs. 20,000 from the second Defendant, Chintamoni Patnaik, and executed a usufructuary mortgage in his favour, putting him into possession of the sarbarakari tenure of a group of 15 villages known as Garh Ghoradiha and some other properties. The Raja of Puri had borrowed Rs. 25,000 from the third Defendant Biswa Nath Satpathi in 1898; and, to secure that principal plus the interest that had accrued, he executed a mortgage-deed in Biswa Nath's favour on the 13th of August 1900, hypothecating the same sarbarakari tenure Garh Ghoradiha and sarbarakari tenure in 39 other villages known as Garh Kalapara as well as some other properties. The Raja of Puri defaulted to pay the Government revenue due on taluk Delang, and the Plaintiff instituted this suit before the due date in order to recover the mortgage-debt which now amounts to more than two lakhs of rupees. The second and third Defendants are joined, because the two Garhs Ghoradiha and Kalapara are comprised within and form part of taluk Delang; and the Plaintiff contends that the Raja of Puri has diminished his (the Plaintiff's) mortgage-security by mortgaging the sarabakari tenures ill those two Garhs to the second and third Defendants.

2. In the lower Court issues were framed whether the Plaintiff's bond is a

genuine one, and whether the mortgages in favour of the second and third Defendants were collusive. All the deeds were found to be bond fide deeds, and there has been no further dispute on those issues. It is the second issue framed by the lower Court that has constituted the main contention here, and it consisted of two parts, namely, first, whether the Raja of Puri possessed sarbarakari rights in the two Garhs Ghoradiha and Kalapara at the time of the mortgage to the Plaintiff, and, secondly, whether, if he did possess them, those rights are included in the mortgage to the Plaintiff. These are the points for decision.

3. The taluk comprises a large number of villages held by raiyats whose rents were fixed in the settlement proceedings shortly before these mortgages were executed. It will be convenient to explain clearly the nature of the sarbarakari rights involved in this suit. In some villages the raiyats pay their rents to a middle-man who is called a sarbarakar who, after retaining a portion of the rents as his profit, pays the balance to the zemindar. The middle-man's rights and interest constitute the sarbarakari tenure, and such villages are called sarbarakari villages. In other villages no such middleman exists, and the raiyats pay their rents directly to the zemindar. Such villages are called hastobudi. Whether then a village is of one kind or the other is of importance; for the zemindar's net profits are less in a sarbarakari village than in a hastobudi, and therefore the value of his proprietary right is smaller. This is an important consideration when his rights are mortgaged, and if villages which are mortgaged as hastobudi should prove to be sarbarakari, the difference would materially reduce the value of the mortgagee's security.

4. The Plaintiff's deed does not mention whether the villages composing the taluk Delang are sarbarakari or hastobudi, and he says that he was given to understand that all these villages are hastobudi, but that afterwards the Raja of Puri obtained an order from the Settlement officer recording that he, the Raja, possessed a sarbarakari right in the villages of both the Garhs. A sarbarakari right may be owned by a middle-man, or the zemindar himself may have acquired it. But the two rights the zamindari and the sarbarakari, are distinct things, and have been separately recorded in the settlement proceedings. After he had established his sarbarakari right in these two Garhs, the Raja gave the subsequent mortgages of those rights, to the second and third Defendants.

5. It is no longer disputed before us that the Raja of Puri owns the sarbarakari tenures in these two Garhs. The Plaintiff's mortgage deed does not make any mention of the sarbarakaries, but only of taluk Delang, and the tenures would not be included within his mortgage, unless it were held that they were comprised within the name "taluk Delang". The Plaintiff contends that he is entitled to have under his mortgage all the rights that appertained to the taluk on the supposition that the villages were hastobudi; in other words, that his mortgage includes the full taluki rights inclusive of the sarbarakari rights.

6. Now, ordinarily under the description of "taluk," "sarbarakari" would not pass

for several reasons; first, because the sarbarakaries are separate and distinct from the taluk; secondly, the sarbarakaries have constituted a well-known tenure dating back to the year 1837 and even long earlier; thirdly, since the taluk might contain both hastobudi and sarbarakari villages, and it could not be said off-hand which villages were hastobudi and which sarbarakari, therefore, the mere description of "taluk" could not have the effect of placing both kinds of villages in the same position, even if the sarbarakaries were owned by the owner of the taluk.

7. The Plaintiff, however, has put forward three contentions, first, that the sarbarakaries in these two Garhs did not really exist at the time of his mortgage; secondly, that the Raja treated them as non-existent then; and thirdly that, as the second and third Defendants have derived their rights through the Raja of Puri, they are estopped now from disputing what the Raja admitted then.

8. Now, as regards the first ground, there can be no doubt that the sarbarakaries did exist in the villages composing these two Garhs. They were recorded in the 1837 settlement. They were again recorded at the recent settlement in 1899. The Raja had acquired them during the interval, though there is no evidence how or when he acquired them. It is not contended that the sarbarakaries merged into the taluk when they were acquired by the Raja of Puri, nor is it contended that he ever definitely put an end to them. Hence the only inference can be that they have existed continuously.

9. What happened, however, was this: After the Raja acquired the sarbarakari rights, the management of those villages became practically the same as the management of hastobudi villages, because the Raja collected the rents as sarbarakar directly from the raiyats, and after retaining his profits as sarbarakar and as zemindar paid the balance as the revenue due to the Government. It appears then that in consequence of this stage of the zamindari management, the fact that these villages were sarbarakari passed out of recollection, and while the Raja of Puri knew that he had the sarbarakari tenures named after the two Garhs, it had ceased to be known really which villages composed the two Garhs and which of these groups of villages were sarbarakari. Accordingly it appears from the evidence that in 1897, the Raja had his sarbarakari rights in the two Garhs recorded by the Settlement officer but could give no information, which villages (with the exception of one village) composed the two Garhs. Consequently, none of the villages composing the two Garhs were then recorded as sarbarakari; and it was not until the 13th of December 1899 that the Raja furnished the Settlement officer with the necessary information and that the villages composing the Garhs were definitely ascertained and recorded as sarbarakari.

10. The mortgage to the Plaintiff took place on the 14th of August 1899 before, apparently, it was known which villages composed the two Garhs and which were sarbarakari. In the negotiations that preceded his mortgage a list of all the villages comprised in the taluk was given to him by the Raja's manager Mr.

Price, and in that list it was definitely stated that all these villages were hastobudi : Mr. Price also says so definitely in his deposition. It is clear then that at the time of the mortgage, the Raja and the Plaintiff both understood that all the villages named as belonging to taluk Delang in the Plaintiff's mortgage were hastobudi villages and not sarbarakari, that is, both parties understood that there were no sarbarakari rights in those villages and that the portion of rights which would constitute the sarbarakari rights was vested in the landlord. There can be no doubt that both parties entered into this contract of mortgage on the understanding that the Raja was hypothecating the entire taluki rights inclusive of what would constitute the sarbarakaries. Upon the second contention, therefore, I am of opinion that the Raja treated the sarbarakaries in these two Garhs as non-existent.

11. It has been further contended that evidence to this effect is not admissible, because it varies the terms of the mortgage-deed contrary to sec. 92 of the Evidence Act. But, the evidence appears to me to be admissible under secs. 92 (b) and 98 of that Act, because it shows how the document was related to existing facts and because the nature of these landed tenures is a special matter which cannot be staled off hand but requires to be elucidated by a reference to the particular facts.

12. In support of this conclusion much argument has been addressed to us regarding the mortgage which the Raja gave of the Prodhani sarbarakari in Garh Ghoradiha within this taluk to one Bhikari Missra, to secure a debt of Rs. 17,000 on the 22nd of September 1898, and which the Raja paid off about the time of this mortgage to the Plaintiff, so as to give the Plaintiff unencumbered security. The Raja says in para. 8 of the Plaintiff's mortgage-deed that Bhikari Missra's mortgage included part of the property to be mortgaged to the Plaintiff; and it is clear from this that the Raja declared that that sarbarakari was included in the Plaintiff's mortgage. Now, at that time, as already mentioned, the sarbarakari in Garh Ghoradiha was a name to which the Raja could not assign any particular villages, yet the very indefiniteness of such an encumbered tenure within the taluk mortgaged was a source of distrust and it can well be understood that the parties thought it advisable to remove that encumbrance before the taluk was mortgaged to the Plaintiff.

13. It appears, therefore, that as regards Garb Ghoradiha whether the sarbarakari be considered or the villages composing the Garh be considered, the Plaintiff's mortgage included the sarbarakari right. It included the sarbarakari (whatever that might be), by the express statement in para. 8 of the deed, and it included all those rights in the villages mentioned in the deed, because they were declared to be hastobudi and not sarbarakari. As regards Garh Kalapara, the Plaintiff's mortgage included the villages as hastobudi, because they were declared to be such and not to be sarbarakari.

14. The third contention which has been raised is whether, if the contract between the Raj and the Plaintiff was such, the Plaintiff can have a decree to this

effect so as to have a claim over the sarbarakaries prior to the second and third Defendants. It is urged that they are bond fule mortgagees for value, but no law or decision has been put before us to support this proposition. The Raja cannot now dispute that he mortgaged these villages as hastobudi : and the second and third Defendants who have derived their rights from him cannot be in a better position nor dispute that they may have their relief against the Raja for any damage which they may have sustained.

15. The result is that the Plaintiff's mortgage right over the sarbarakari rights in the two Garhs is declared and that the second and third Defendants become puisne mortgagees of those rights. The Subordinate Judge's decree will, therefore, be varied by declaring that the sarbarakari rights in the two Garbs will be sold as having been included within the mortgage to the Plaintiff.

16. The appeal is therefore allowed and the Plaintiff will have his costs in this Court.

Woodroffe, J.

17. The Plaintiff is a mortgagee seeking to realise his security which he claims to be all the interest whether as zemindar or as subordinate tenure-holder of the first Defendant the Raja of Puri in a piece of lakheraj land (as to which there is no dispute) and in a taluk named Delang. The first Defendant is his mortgagor who does not appear. The second and third Defendants claim to be subsequent mortgagees of the interest of the Raja as a tenure holder in respect of two Garhs or collection of villages in the taluk subordinate to himself as zemindar and allege that the tenure right of the Raja in respect of these two Garbs was not mortgaged to the Plaintiff and should be excepted from the sale sought in these proceedings.

18. The Subordinate Judge has given effect to these Defendants' contention and while he has decreed the suit in respect of the properties in suit other than these two Garhs, has directed that the tenures, or as they are called sarbarakari rights in the two Garhs called Ghoradiha and Kalapara, should not be sold on the ground that they were not mortgaged to the Plaintiff but to the Defendants.

19. Against this decision the Plaintiff has appealed and the main question in this appeal has been whether these sarbarakari rights existed at the date of the mortgage and if so whether they were passed by it to the Plaintiff. If they were, then the Plaintiff is first mortgagee and will sell the properties in suit free of the Defendants' charge. If they were not, then the sarbarakari right claimed by the Defendants must be excepted from the sale.

20. In order to determine this it is first necessary to look at the mortgage-deed. It is dated 17th August 1899. The first clause recites "Being sorely in need of money in order to pay off the debts due to my creditors, I mortgage with you by this bond the properties belonging to me, as mentioned below and on the security of those properties I borrow from you this day Rs. 1,50,000." The 8th

clause runs : " That I do hereby declare that on paying without fail, the debt due to Bhikari Missra and Balmakunda upon the mortgage of Ghurdia and Karakhi in pergunnah Lembai which are mortgaged to them out of the properties mortgaged (in the bond) and on taking back from them the mortgage bonds and getting registered deeds of release executed by them, I make them over to your agent."

21. Then follows schedule of mortgaged properties, viz. (a) "Lakheraj homestead" (b) "Taluk Delang, Pergunnah Lembai, Towzi No. 257, situate within the jurisdiction of the Pipli Sub-Registry Office, revenue Rs. 43,564-15-10." After this a list is given of the mouzahs comprised in the taluk which is mortgaged.

22. There are 384 villages and 3 fisheries in all. Of these mouzahs admittedly some are hastobudi villages, that is villages the rents of which are collected directly from the raiyats by the Raja as zemindar. Others are admittedly sarbarakari villages or villages the rents of which are collected by the Raja through middle-men who are tenure-holders getting a percentage of the collection by way of remuneration.

23. As regards the first class of villages the mortgage admittedly passed full rights and as regards the second class only the right in the Raja as zemindar to receive the rent from the subordinate tenure-holders the sarbarakars, the sarbarakari right not being in the Raja to mortgage but in third parties. Then there is a third class of villages which are comprised in the list annexed to the mortgage, viz., some 50 or 60, portion of which form the collection of villages called Ghar Ghoradiha the sarbarakari rights in which are said to have been mortgaged to the first Defendants on 26th May 1900, and the other portion of which form the collection of villages called Garh Kalapara the sarbarakari rights in which are said to have been mortgaged to the second Defendant on 13th August 1900, who also took a second mortgage of the sarbarakari rights in Garh Ghoradiha. It is with regard to these the dispute arises. The Defendants-Respondents say that though at the time of the Plaintiff's mortgage both zamindari and sarbarakari rights were united in the Raja in respect of these two Garhs Ghoradiha and Kalapara, yet all that the Raja mortgaged to the Plaintiff was his zamindari as distinguished from his sarbarakari right in these Garhs and that the sarbarakari rights were reserved by the Raja and subsequently mortgaged to them.

24. The Appellant alleges that what he contracted to take and was promised as security for his money was the whole right, title and interest of the Raja in the mortgaged properties and that there was no question of reserving anything and in fact nothing was reserved, It is contended on his behalf that if it be shown that, as the Respondents allege, at the time of his mortgage these two rights which are said to have vested in the Raja had not coalesced but existed separately, then as the terms of the mortgage are wide enough to pass all the interest of the mortgagor and no rights were reserved, both the zamindari and sarbarakari rights passed to the Plaintiff as sole mortgagee of the one and as

first mortgagee of the other. If on the other hand and this is the Appellant's case the sarbarakari rights had merged in the superior title then they equally passed with that title.

25. The mortgage-deed shows that the Appellant has a mortgage on the Raja of Puri's zamindari and it is in my opinion incumbent on the Respondents to establish as against the Appellant who in respect of such mortgage stands in place of the zamindars that the subordinate tenures which they allege existed in the zamindari at the date of the mortgage. It is undoubted that prior to 1850 sarbarakari rights existed and were recognized by Government in the Gahrs Ghoradiha and Kalapara the subject of dispute and of the mortgages to the Respondents. Subsequently (when and in what manner, does not appear) both the zamindari and sarbarakari rights became vested in the Raja of Puri. This would not in itself effect a merger at law. But it was open to the Raja to keep them on foot or to allow them to lapse into his superior title as zamindar. The question is as to what he did in this respect. No hooks or papers are produced to show that these two rights were kept existing separately by the Raja. From some portions of the evidence of his manager and Dewan which however is somewhat vague and contradictory it would appear that the sarbarakari rights had lapsed. When in 1897 the Raja applied to have sarbarakari rights recorded in respect of these Garbs the Settlement officer found that the villages which constituted these Garbs could not be identified--which was not a possible state of affairs if the sarbarakari rights had been separately recorded in the zamindar's sherista. The settlement proceedings were then concluded and a kabuliyat was, on the 27th May 1898, taken from the Raja which did not state any sarbarakari right in these particular villages. Then on the 22nd September 1898 the Raja executed the mortgage to Bhikari Missra which is mentioned in the 8th clause of the mortgage in suit. It is clear from the terms of that mortgage that the Raja intended to mortgage all the rights which he then possessed. If then he mortgaged simply the zamindari right that would again tend to show that the sarbarakari rights which the Raja is said then to have possessed in the zamindari were not treated as separately existing rights. If on the other hand he mortgaged to Bhikari Missra as separately existing rights both the zamindari and sarbarakari rights then clause 8 of the mortgage in suit shows that the properties previously mortgaged to Bhikari Missra were treated as part of the properties mortgaged to the Appellant.

26. Subsequently during the negotiation for the mortgage in suit and in answer to requisitions by the intending mortgagee a list was given to him on behalf of the Raja in which it was expressly stated that the villages comprising these Garbs were hastobudi and not sarbarakari villages. Unless there was a deliberate misrepresentation this settlement shows that the Raja did not know of any sarbarakari rights in those villages in his favour which were capable of reservation from the mortgage. Lastly followed the mortgages in suit in which sarbarakari rights in these Garbs are neither expressly mentioned or reserved. As against these facts there is the circumstance that the Raja did apply in 1897

two years before the mortgage to have the sarbarakari rights recorded in these two Garbs. Apparently such rights were recorded though the Collector stated that the villages constituting those Garbs had not been identified. This order seems to have been of a provisional character in this way, that if (as afterwards happened) the villages were identified the recognition then provisionally given would be accorded full effect, while if on the other hand the villages were not identified before the conclusion of the settlement proceedings sarbarakari rights would not be recognised. After the mortgage in suit the Raja renewed his efforts to have these rights expressly recorded in the villages which had then been identified and succeeded in inducing the Collector to do so notwithstanding that the settlement proceedings upon the basis, apparently, of which the mortgage in suit had been executed had been concluded.

27. These proceedings taken at the instance of the Raja disclose a remarkable situation. A party who deals with another during the pendency of such proceedings may well be taken to be bound by their result. But it would destroy all security if after a mortgage of a zamindari had been effected upon the basis of a completed settlement the mortgagees were to have the value of the mortgage property liable to be diminished by proceedings taken at the instance of the mortgagor by the Settlement officer with the object of having subordinate tenures recorded in the mortgagor's favour in his zamindari which might then be withdrawn from the operation of the mortgage-deed and conveyed to others. It is however in the view I take of the case unnecessary to consider the position created by the irregular settlement proceedings of the Collector. While it was for the Respondents to establish the existence of these sarbarakari rights they must be taken to have done so having shown their admitted existence prior to 1850 and their recognition after the mortgage in suit. It is therefore for the Appellant to establish that meantime and before the date of the mortgage they had merged. It may be said that the recognition, for it was not a creation, of these rights in the settlement proceedings after the mortgage is inconsistent with their merger at any time. I am however inclined to think that the grounds which led to and were involved in such recognition, viz., that the rights had not lapsed, have not the same binding effect as the actual recognition of those rights. However this may be, I think that the action of the Raja in 1897 and the order of the Collector in that year, two years before the mortgage in suit, forbids a conclusion that there was any such actual merger as the Appellant contends for. I think however that while the Raja may have been aware that sarbarakari rights existed in these Garbs he did not know that they existed in the particular villages in dispute and in fact as appears from the order of the Settlement officer on 28th October 1892 he was not aware in what particular villages of these Garbs these rights did exist. On the contrary as shown by the document which his manager handed to the Appellant before the mortgage he believed, unless there was a fraudulent misrepresentation, that there were no sarbarakari rights in his favour in the villages in dispute of which he was also zemindar.

28. It is clear therefore dealing with the matter as one of knowledge that he

could not have reserved any such rights.

29. It is necessary then to look at the mortgage to discover the intention and to see whether the words used are general enough to pass such rights whatever may have been the facts or the knowledge of such facts at the time. The rule of construction which is applicable is that embodied in sec. 8 of the Transfer of Property Act, namely, that a transfer of property passes to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof unless a different intention is expressed or necessarily implied.

30. Cl. 1 mortgages "the properties belonging to me as mentioned below." Certain of these properties are those in dispute. In those properties it is said both zamindari and sarbarakari rights existed. But assuming this to be so both rights belong to and were vested in the Raja and were thus mortgaged by him unless either of such rights was necessarily or impliedly reserved. Cl. 8 as I have already stated shows that the properties mortgaged to Bhikari Missra were treated as part of the properties the subject of the mortgage in suit. Lastly the schedule which is a description of the land and villages mortgaged and not of any specific right in them is wide enough to include all rights which the Raja may then have possessed. In many cases no doubt the use of these words would not pass interests subordinate to that of the zemindar, that is, not because the words are not wide enough but because in such cases the interests are vested in other parties and are not in the zemindar to convey.

31. Here however both the superior and subordinate rights were vested in one and the same person as zemindar and therefore the words being general enough to pass all rights, in the absence of reservation of either, both will pass. There is throughout this mortgage no indication that the Raja intended to reserve these rights in the particular villages in dispute and in fact he could not have intended to do so as he was not aware of them. It was in my opinion the clear intention of both parties that for the loan all the rights of the Raja whatever they were in the mortgaged properties should stand security. I hold therefore that it having been established that the Raja has sarbarakari rights in the villages in dispute these were mortgaged to the Appellant.

32. Having regard to this finding it is unnecessary to consider the further argument which has been addressed to us on the question whether the Raja was estopped by his representation and whether the Respondents can be said to be his representatives and bound by the estoppel and whether the Appellant was by his payment of Bhikari Missra's mortgage subrogated to his rights so as to gain thereby a priority over the Respondents. On the ground I have stated I would decree this appeal with costs and reversing that portion of the judgment of the Court below which excepts from sale the properties covered by the Respondents' mortgages and which orders the Appellant to pay the Respondents' costs declare that the Appellant as first mortgagee of such properties is entitled to bring the same to sale under Ins Mortgage. [REPORTERS NOTE. - The above judgments

were in fact delivered on the 16th May 1905, their Lordships having reserved judgment on the 18th April. It was however brought to their Lordships' notice, on the day that the judgments were delivered, that the Appellant had died on the 27th April, and an affidavit to that effect was filed some days later. On the 1st of June 1905 the following order was made :--

After judgment was delivered by us on the 16th May, we were informed by the learned pleader for the Appellant that the Appellant had died after the case had been heard and judgment reserved, that is, after the 18th April : and, we directed that an affidavit to this effect should be filed. This has been done, and from it, it appears that the Appellant died on the 27th April. This being so, we were asked to enter our judgment nunc pro tunc on the authority of the cases referred to, Chetan Charan v. Balbhadra I.L.R. 21 All. 314 (1899) and Rama Charya v. Ananta Charya ILR 21 Bom. 314 (1895)

We accordingly grant this application and date the judgment as on the date on which it was reserved and not on that on which it was pronounced.