

(1928) 03 PRI CK 0002

In the Privy Council

Case No : Privy Council Appeal Nos. 2 and 3 of 1927

Ramkissen Singh and others

APPELLANT

Vs

Mohammad Abdul Sattar and others

RESPONDENT

Date of Decision : 15-03-1928

Acts Referred:

Citation : (1928) AIR(PC) 165

Hon'ble Judges : Lancelot Sanderson, Carson, Phillimore, JJ.

Advocate : Francis and Harkar, Hy. S.L. Polak, Peckhan and Chaplin, Valpy, J.M. Parikh, L.De Gruyther, M.R. Jardine, G.R. Lowness, for the Appearing Parties.

Judgement

The appellants, who were the first four defendants in a mortgage suit in the lower Court, are two brothers, Baliram Singh and Ramakrishna Singh, and the two sons of the former. This joint Hindu family, of which the

Manager, Baliram Singh, is an Honorary Magistrate, owns the whole of thirteen villages and shares in three others in the Wardha district and also the whole of a village in the Chanda district. Persons in their position might have been expected to feel at least some hesitation about taking pleas which have no pretence of being anything but unrighteous, but they have done this as if it were the natural and proper thing to do ; it is certainly not unnatural, if what is done with such lamentable frequency is to be considered natural. We have, however, only to examine the legal validity of the pleas taken and not their moral rectitude.

In 1908 a decree for the payment of money was passed against the two brothers Baliram Singh and Ramakrishna Singh. It is as well to make it plain at once that even if this money was not recoverable from the whole of the joint family, the decree has been executed as if it were, without any objection on the part of any member of the family, and it is too late now for the sons of Baliram Singh to base any claim or argument on the fact that the decree was passed against their father and uncle only, at any rate in this suit, where we are concerned with money borrowed for satisfaction of the decree by the whole joint family. It has been urged here that the two sons of Baliram Singh were not " judgment-debtors

" under that decree for the purposes of para. 11, Sch. 3, Civil P. C. But as the decree was one against the whole family, represented by the two senior members mentioned in it, all the members of the family were judgment-debtors under it.

This decree was put into execution in 1913, and eight of the villages belonging to the family were attached. The proceedings were then transferred to the Collector, to be carried on under the provisions of Sch. 3, Civil P. C. Baliram Singh openly admitted towards the end of those proceedings that the various promises he had made to pay if time were given were all subterfuges for the purpose of delaying matters and avoiding, not making, payment. By those and similar means, which are no more to his credit than his defense to the present suit, he managed to drag out the proceedings for nearly three years.

During the whole of this time the Collector was acting only under para. 1, Sch. 3 of the Code, and dealt with none of the property of the family but the eight attached villages. At one stage lists were prepared of the total assets and liabilities of the appellants, but that was in connation with a proposal to take their estate under the superintendence of the Court of Wards, and no action was ever taken under para 2 and the following seven paras, of the schedule. The last of many proclamations of sale was ordered to issue on 3rd July 1916, and on 8th August, 1916 three of the eight attached villages were sold by public auction. The proceedings were then adjourned to 11th September, 1916 for confirmation of the sale.

Before, however, the sales were confirmed application was made to set them aside under R. 89, O. 21. On 5th September 1916 the first three appellants, without the fourth who was then a minor, executed in favor of the plaintiff-respondent, Muhammad Abdul Sattar a mortgage by conditional sale for Rs. 33,300, and two days later the judgment-debtors paid Rs. 26,845 into the Treasury. The property mortgaged consisted of four out of the eight attached villages, including two of those that had been put to auction, and three others that were not under attachment, and also a house in Nagpur. On the application accompanying this payment the sales were set aside on 11th September 1916, a sum of Rs. 239-8-0 being returned to the judgment-debtors as in excess of the amount required to satisfy the decree and pay the other connected charges. The purposes for which the sum of Rs. 6,674-8-0 in excess of that required to pay off the decree in execution was borrowed and sued have been held in the lower Court to be such as would make that sum, as well as; he amount paid into Court, recoverable from the whole of the joint family, and this finding is not questioned in appeal.

The present suit was filed in April 1921 for foreclosure on the mortgage, four subsequent transferees of portions of the mortgaged property being impleaded along with the appellants as defendants with a right of redemption. The only plea in defense taken by the four appellants and the other defendants together with which we are now concerned was to the effect that the whole mortgage was void

in that the appellants were incompetent under para. 11 (1), Sch. 3, Civil P. C., to mortgage any part of their property on 5th September 1916, because on that date the Collector could exercise all the powers conferred on him by the first ten paragraphs of that schedule in respect of the whole of their property. We have also to examine the plea taken by the appellants alone that, for various entirely technical reasons, no decree could be passed against them even for the payment of the money lent to them for the preservation of their property at their own earnest entreaty and on their solemn promise to repay it, a plea which is perhaps even less to their credit, otherwise than monetarily, than that of the void nature of the mortgage. In his written statement Baliram Singh went even a step further and said:

Plaintiff has an equity in his favor so as to enable him to recover the advance amount. If such a decree be passed the agriculturist defendants would be deprived of their property by an indirect method and not by one of the mortgage.

The issues are by no means clearly and systematically framed. They are numbered as seventeen, though with the sub-divisions just twice that number of issues are stated. The judgment and decree of the learned Additional District Judge are as a natural consequence not without inconsistencies. The judgment may be summarized as follows. The due execution and attestation of the mortgage and the payment of the full consideration have been proved. The money as advanced for the most part for the payment of decial and other debts and arrears of land revenue and for a small part for agricultural expenses, and was so applied. The rate of interest charged was light, it being agreed that no interest at all should be paid if the principal money were repaid within six months and that otherwise interest at 1 per cent, per menses, should be paid from the date of the bond. No question can, therefore, arise of allowing any less rate of interest under S. 74, Contract Act. A mortgage made in contravention of para. 11, Sch. 3, Civil P. C., is absolutely void as was laid down by the Privy Council in *Gaurishankar Balmukund v. Chinumiya* AIR 1918 PC 168: 46 Cal. 183 : 45 IA. 219 : 14 N.L.R. 181 (P.C.). The Collector could exercise and was in fact exercising powers under Sch. 3 of the Code on the date of the mortgage in respect of the property, and he certainly never permitted the mortgage even by implication and still less did he give written permission for it.

The judgment then goes on to "the main plea in this suit," taken on behalf of the plaintiff, which is that the Collector could not and did not exercise any powers in respect of the three villages which were mortgaged but got attached, and that the mortgage in respect of them is, therefore, not void. The learned Judge states it as his personal opinion that the Collector always can exercise powers under the first ten paragraphs of Sch. 3, against the whole of any property of which a part is attached and ordered to be sold by him, and that, therefore, the mortgage of even the unattached villages (and he might have added the house) is prohibited by para. 11. He finds himself, however, constrained to follow the ruling of the Privy Council in *Gaurishankar Balmukund v. Chinnumiya* AIR 1918 PC 168: 46

Cal. 183 : 45 IA. 219 : 14 N.L.R. 181 (P.C.) and of this Court in Sonba v. Ganesha 1912 8 N. L. R. 182 : 17 I. C. 887 and Motiram v. Ramgopal 1920 16 N. L. R. 64 : 53 I. C. 776, and two unreported cases, which are all to the contrary effect, and to hold that the appellants were incompetent to mortgage the four attached villages but not incompetent to deal with the three that were not under attachment.

It is next held that as the decree which the Collector was executing was against the first two appellants only, the incompetency created by para. 11, Sch. 3, extended to them only and did not extend to the other two appellants or their shares in the property, and further the whole contract, so far as the first two appellants are concerned, being forbidden by law and having an unlawful object, they cannot be ordered to repay the money advanced to them. The learned Judge then states that he is unable to find any covenant to repay the debt in the mortgage bond, which, as he reads it, contains only an agreement that there shall be foreclosure in default of payment, and he is, therefore, of opinion that no decree for the payment of money can be passed.

After stating findings on a few matters which are now of no importance the learned Judge thus summarizes his own judgment :

The result of the findings aforesaid is that the mortgage is void as against the attached property only belonging to defendants 1 and 2 who were incompetent to contract about it, that they cannot be made liable to refund the amount to plaintiff, that as the void part of the agreement can be separated from the other part defendants 3 and 4 are liable to plaintiff to the extent of their share in the mortgaged property which share could not be under the regime of the Collector, and that plaintiff is therefore entitled to get a decree with respect to the share of defendants 3 and 4 only in the mortgaged property for proportionate amount of the mortgage debt. For the remainder of the mortgage debt, plaintiff is not entitled to a money decree against any of the defendants.

This would seem to indicate a decree against all the defendants, or possibly the third and fourth only, ordering foreclosure in respect of a third share in all the seven mortgaged villages in default of payment of one third of the whole mortgage-debt. The judgment, however, goes on to order that the decree to issue shall be for foreclosure and the whole of the three unattached villages in default of payment of the full mortgage debt and also of a third share in all seven in default of the same amount. The decree itself is not quite in accordance with either of these two sets of directions. Foreclosure is ordered in default of payment of the full mortgage-debt in respect of a third share in each of the four attached villages and of the whole of each of the three unattached villages and the house.

Against this decree the family of the mortgagors has appealed, urging that the whole transaction was void under para 11, Sch. 3. The plaintiff also filed a cross-objection to the effect that inasmuch as in the Collector's proceedings the

judgment debtors were ordered to make satisfactory arrangement to raise money for paying off their debts by selling part of the property the lower Court should have held that the judgment-debtors had the requisite written permission of the Collector.

What might perhaps be construed into such a permission was given three times during 1914, but the period of the last of them, given on 1st December 1914, expired on 9th of the same month. That permission was further definitely cancelled by an order for the sale of the property on 27th of the following month, to say nothing of several other orders to the same effect, culminating in that of the 3rd July 1916, under which three villages were actually sold.

At the hearing of the appeal the learned counsel for the plaintiff respondent asked permission to urge as a further ground of objection of the decree of the lower Court that he was at least entitled to a decree for the repayment of the money he had lent. As will be shown later, the judgment of the lower Court on this point is wrong, and it is clear that this relief could be granted under the provisions of R. 33, O. 41, Civil P. C. But it is equally clear that the plaintiff is entitled to a decree for foreclosure in respect of a part at least of the mortgaged property and he cannot get a simple money decree along with one for foreclosure. It was open to him to abandon his mortgage lien and ask for a simple money decree, but that he did not do at the hearing.

That the judgment of the lower Court is wrong in this respect is beyond doubt. It is, in the first place, hard to imagine a more distinct covenant to repay the money lent than that in the mortgage bond (Ex. P. 1) which the learned Judge was unable to find. It is at the beginning of the bond, which starts by reciting the names of the parties to the transaction and then runs as follows:

We have this day borrowed from you a sum of Rs. 33,300, carrying no interest, and we agree to repay the amount within six months from this date, in default of which we will pay interest at 1 per cent per menses from the date of the bond until satisfaction. We will obtain a receipt for any payment that we may make and will not claim credit for a payment without a receipt. The mortgage then follows.

But it is made clear in the judgment of the Privy Council in *Ram Narayan Singh v. Adhindra Nath Mukerji* AIR 1916 P. C. 119 : 44 Cal. 388 : 44 I. A. 87 (P. C.), followed by a Bench of this Court in *Jiwandas v. Mt. Janki* AIR 1922 Nag. 98 : 18 N. L. R. 145, that a covenant for personal repayment of the money lent exists in every mortgage transaction, even though it is not expressly mentioned in the mortgage bond, unless it is negatives expressly or by necessary implication, by the terms of the bond or the circumstances of the case. The ruling in *Kundanmal v. Wasudeo* AIR 1922 Nag. 119 : 19 N. L. R. 67 is not an authority for the contrary view. There is no doubt about the claim for a money decree being laid within the time allowed. The bond was executed and registered in September 1916 and the suit was filed in April 1921.

The matter of the competency of the appellants to alienate their property at the time the mortgage was executed has next to be considered. The rulings, quoted in the judgment of the lower Court, which the learned Judge seems to have felt reluctance in following, are hardly required as authority for the proposition that, if the Collector deals with the attached property only under para. 1, Sch. 3, and takes no action and begins no proceedings under para. 2, he can exercise or perform any of the powers or duties conferred or imposed on him by that schedule only in respect of that part of the judgment-debtor's property that is under attachment. To give the more extended meaning to the word "can" which the learned Judge thinks it ought to bear, would result in every person whose estate includes any revenue paying land being incompetent to transfer any portion of his whole estate without the written permission of the Collector, if there happened to be a decree outstanding against him. The Collector could in that sense exercise the powers conferred by Sch. 3 against him, if proceedings for that purpose were properly instituted. But he cannot exercise even the powers he is given by para. 1 till proper proceedings have been instituted before him by a civil Court, and similarly he cannot exercise the powers conferred by para. 2 till he has instituted proper proceedings for that purpose himself. If there were any room for doubt on this point it would be set at rest by the mention of a part of the property in para. 11 (1), which would be futile and meaningless if that paragraph meant what the learned Additional District Judge thinks it does, and the appellants ask this Court to hold it does.

It is clear then that the appellants were not incompetent to mortgage the three villages which were not under attachment. And from what has been said in para. 2 of this judgment it is also clear that such competency or incompetency as there was covered the whole of each village mortgaged and was not confined to the share of the two appellants whose names appear in the decree then in execution as judgment debtors or of the two whose names are not there.

In regard to the four attached villages it has been suggested that the defect of title might be cured by the application of S. 115, Evidence Act, or S. 43, T. P. Act, *Gauri Shankar v. Chinumia* AIR 1918 PC 168: 46 Cal. 183 : 45 IA. 219 : 14 N.L.R. 181 (P.C.) in which their Lordships of the Privy Council approved the decisions in *Murray v. Murat Singh* 1907 3 N. L. R. 171 and *Mt. Salu Bai v. Bajat Khan* 1917 13 N. L. R. 130 : 42 I. C. 200 (F. B.) is directly against this view, as are also the judgment of the Madras High Court in the *Madras Hindu Mutual Benefit Permanent Fund v. Raghava Chetti* 1896 19 Mad. 200 and that of the Allahabad High Court in *Radha Bai v. Kamod Singh* 1907 30 All. 38 : 4 A. L. J. :696 :(1907) A, W. N. 276. It may perhaps be doubted whether their Lordship's remarks in the Privy Council case exclude the operation of one or both of these sections in all cases of transfers of property while it is in the hands of the Collector. In the present case, for instance, if the mortgagors had represented that they had the written permission of the Collector to make the transfer, which apparently they would have had no difficulty in obtaining, both the sections mentioned might have operated to validate the transaction.

But neither of the two sections mentioned can possibly apply here, for the mortgages himself admitted that no erroneous representation was made to him as to the mortgagors' authority to transfer, nor was he caused or permitted by them to believe anything at all in the matter but what was true. In his deposition, after Stating that he paid the full consideration in the presence of the Registering Officer, he said:

Baliram Singh had already said before that he wanted that amount for payment of some decretal amount, for payment of creditors and for payment of land revenue. Ibrahimmiya and Azim Miya also told me that what Baliram Singh said was quite correct. The decretal debt was due to Bhawaniram Chunuilal as stated by Baliram Singh. The name of the Court which passed the decree was not told to me. I was not at all made aware that the Collector's proceedings were pending then with respect to his property. I had no knowledge about the attachment.

The last two sentences are probably untrue, but they are a statement of his case by the plaintiff himself.

The mortgage is for all these reasons valid only in respect of the three villages of Ganeshpur, Chicholi and Khapri which were not under attachment when it was made, but in respect of the whole of each of them, and also, of course, in respect of the whole of the house. If, therefore, the mortgages sticks to what was said at the bearing of the appeal and elects to take a decree for foreclosure, he can have one in respect of that part of the mortgaged property only. After the hearing, however, he has put in an application withdrawing his refusal to abandon his mortgage lien in favor of a decree for money only, and stating that he wishes to have a plain money decree, which he can execute against all the property still in the hands of the mortgagors. It has already been found that he is entitled to such a decree, provided only he gives up his right to a decree for foreclosure, he can have one or the other at his option, but not both.

The mortgage's application stipulates that his right to a decree for foreclosure should be reserved in case it is held by the Privy Council in appeal that he is not entitled to a money decree. It is, of course, beyond the power of this Court to make any such reservation or promise, though, if it is held in appeal that he is entitled to a foreclosure decree but not to a money decree, there would probably be little difficulty about allowing him to withdraw his conditional abandonment of his claim to foreclosure. This matter has been brought to the notice of counsel for the appellants and the remaining respondents. Of the latter only defendant 8, who purchased the house in Nagpur after the execution of the mortgage, is interested in this matter, and he naturally has no objection to the lifting of the burden on his property ; the rest are transferees of villages which were under attachment when the mortgage was executed and have already been held not liable to foreclosure. The learned counsel for the appellants has stated that he has already put forward all he has to say on this point at the hearing of the appeal.

The decree of the lower Court will accordingly be set aside. In lieu thereof a decree will issue ordering the appellants to pay to the plaintiff respondent, the sum of Rs. 51,613, together with interest thereon at 1 per cent, per menses from the 15th April 1921, when this suit was instituted, till the whole debt is cleared off. The appellants must pay all the costs incurred by the plaintiff respondent in both Courts, and the latter will pay all the costs of the remaining respondents. A separate pleader's fee will be allowed for each party that was separately represented.

Lord Phillimore. - Their Lordships have given full consideration to the various points which have been raised in this case ; some of them are points of small importance; others are, no doubt, of considerable weight, having regard to the interest of the parties; but their Lordships are prepared to deal with them shortly as, indeed, the considerations which lead them to their conclusion are not many or very involved.

First of all, dealing with the respondents who are represented by Mr. Dunne the respondents Mathuradas and Gopaldas, they are, no doubt, made respondents by the appellants, the Singhs, in their appeal, because they were parties to the suit, having been made parties to the suit by the plaintiff, and, therefore, they had to be made parties to the appeal but they would obviously not have required to come here if it had not been for the application made in the cross appeal or for fear of some application. As against them there is no case.

It has been argued by the plaintiff, cross-appellant, that he could support the mortgage to him of the attached properties, though the properties were under attachment, because he could ask the Board to accept the view that there had been permission given by the Collector; but it is clear that there was no such permission and, indeed, it is a matter of fact which has been found by both Courts in India. Therefore, the mortgage being a mortgage of the attached properties, was a bad mortgage and the plaintiff's title cannot prevail against those respondents.

It was suggested, and the view was taken by the District Judge that the mortgage might still stand as regards the two sons, because they were not in form sued as defendants ; but the suit was against the whole family property and the whole family property was attached, the whole 16 annas, and the whole 16 annas, were, therefore, within the Code of Civil Procedure, para. 11, Sch. 3, and the mortgage was, therefore, bad and the subsequent transaction with Mathuradas and Gopaldas was a good one and must stand and they are entitled to be dismissed from the appeal with costs, and the costs must be paid by the plaintiff, the cross-appellant.

As regards the main appeal by the three Singhs, when the matter comes to be thrashed out there is no merit in the appeal quoad the father and the elder of the two sons. There was clearly a personal covenant to pay the debt and the judgment of the Court of the Judicial Commissioner in respect of the remedy was

one which the appellate Court could have given, and the only thing that the appellants can successfully maintain is that they should have the decree varied by limiting the liability of Lachman Singh, the younger son, who was a minor at the time of the mortgage, to his interest in the joint family property: so that neither will there be any personal liability against him nor will he be liable in respect of any property separately acquired, if any.

As to the cross-appeal, there really was nothing that could be supported in it until it came to the ingenious suggestion made late in the case that the appellant was entitled to an order for sale of the unattached villages under O. 34, R. 4 (2), Civil P. C. which is :

In a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may at the instance of the plaintiff, (or others) pass a like decree.

which is a decree for sale in lieu of a decree for foreclosure. It is suggested now that this mortgage was not a mortgage by conditional sale and that the plaintiff is entitled to have such a decree as he now asks for.

Their Lordships would hesitate a great deal before they determined that this was not a mortgage by conditional sale, because, whatever may be the appearance of the document, there have been a great number of authorities On mortgages by conditional sale and it would take a great deal of examination before it could be determined that this was not such a mortgage. The parties throughout the case have treated it as a mortgage by conditional sale ; it was so alleged by the defendants in their written statement ; no objection was taken by the plaintiff in reply ; no issue was stated about it ; the District Judge assumed it and their Lordships do not find that any complaint was made of his assumption in the Court of the Judicial Commissioner. Therefore, their Lordships would be very unwilling to decide, without a great deal of further examination, whether this was a mortgage by conditional sale or not; but, however that may be, to allow the plaintiff at this eleventh hour having never asked for this remedy either before the District Judge or in the appellate Court or by his case as originally printed, to get such a remedy, without very careful examination as to what the effect might be upon third parties who are not present here, would be contrary to all reasonable procedure. Their Lordships cannot, therefore, grant that application nor the other points made by the cross-appeal. The result is that the cross-appeal will be dismissed.

On the whole, as between the Singhs and the plaintiff, their Lordships think there ought to be no costs either of the appeal or of the cross appeal. The result will be that the only costs which have to be paid will be those of Mathuradas and Gopaldas in the two consolidated appeals, which will have to be paid by the plaintiff.

Their Lordships will humbly advise His Majesty accordingly, that the judgment of the Court of the Judicial Commissioner should be varied in favor of the appellant,

Lachman Singh, in the manner already indicated, and that the respondents, Mathuradas and Gopaldas be paid their costs by the cross-appellant, and that no further or other order need be made.