
(1919) 07 AHC CK 0052
In the Allahabad High Court

Rani Barkat-Un-Nissa Begam

APPELLANT

Vs

Mahboob Ali Mian and Others

RESPONDENT

Date of Decision : 28-07-1919

Acts Referred:

Contract Act, 1872 — Section 126

Citation : AIR 1919 All 56 : 52 Ind. Cas. 684

Hon'ble Judges : Stuart, J; Ryves, J

Bench : Division Bench

Final Decision : Partly Allowed

Judgement

1. Khurshed Ali Mian and his wife Musammat Latifunnissa executed the two mortgages, the subject of this appeal:

(1) dated the 14th June 1899, in favour of Darbari Lal for Rs. 3,000, and

(2) dated 27th July 1900, for the same amount in favour of Darbari Lal and Lalta Pershad.

2. They had also executed two other mortgages, dated 20th November 1897 and 10th August 1899, in favour of Lalta Pershad alone. Those two mortgages formed the subject of the connected suit, and are disposed of by our judgment in First Appeal No. 264.

3. The only reason for mentioning this fact is because the two suits were tried together, and the evidence was recorded in one only and in order to appreciate (correctly) the evidence in this case, it is necessary to remember the circumstances of the other case as well.

4. Khurshed Ail died in 1905 and in 1906 the creditors, that is Lalta Parshad and Darbari Lal, demanded payment. Musammat Latifunnissa asked for time, which the creditors agreed to give her, provided they got security for their debts. Latifunnissa appealed to her sister, Rani Barkatunnissa, (plaintiff-appellant), who was a wealthy woman, and she agreed to secure all the four mortgage-debts. On

their side the creditors agreed to reduce the rate of interest. All four mortgages were paid off by Barkatunnissa, according to the plaint, and these suits were brought by her to recover the amounts so paid from the sons and daughters of Khurshed Ali and Latifunnissa, who also is now dead. This suit was filed on the 7th June 1915.

5. The defendants are three adult sons, three adult daughters and some minors under the guardianship of Musammam Hasina Begam. One of the adult sons, Mahbub Ali, admitted the claim and is the chief witness in the case, The two other adult sons and one of the adult daughters did not appear to contest the suit. Two adult daughters only, Musammam Hasina Begam and Anwari Begam, opposed the claim.

6. It is, we think, necessary to bear this circumstance in mind in judging the value to be assigned to the evidence in the case.

7. The contesting defendants in this case admitted the execution of the mortgages but pleaded that the mortgages had been paid off by Musammam Latifunnissa herself out of her own funds, and that Musammam Barkatunnissa, in fact, paid nothing. But they go on to say that if the Court holds that Barkatunnissa made any or all of the payments she cannot recover them from the defendants, as the payments were merely voluntary, and, therefore, gave her no lien over the defendants' property.

8. The Court framed two main issues:

(1) Whether the plaintiff stood surety for payment of the money due under the two bonds in suit; and made payments as surety?

(2) Whether she can obtain a decree for sale?

9. The Court held that the plaintiff paid off the mortgage of 27th July 1900 on the 12th October 1906 by a payment of Rs. 6,300 but that she did not do so as a surety, and, therefore, cannot get a decree for this amount.

10. With regard to the second mortgage, the plaintiff claimed to recover 7 items:

Rs. a. p. 1. 628 15 0 on 25th March 1908. 2. 606 7. 0 on 17th March 1909. 3. 1,204 13 0 on 24th September 1910. 4. 2,441 0 0 on 17th June 1911. 5. 2,426 6 9 on 25th June 1912. 6. 1,376 0 0 on 15th January 1913. 7. 1,500 0 0 on 17th January 1913.

11. The Court below has held that all these payments were made (though it has not discussed item No. 7 in its judgment), and apparently were made by money advanced by the plaintiff, but it held that, although there was no reason to suppose that Barkatunnissa advanced the money voluntarily, still as "there was no privity of contract between the plaintiff and Darbari Lal and as she gave no guarantee to the latter, she did not become invested with the rights of Darbari Lal against the mortgaged property, and, therefore, she could not get a decree for sale." It seems to have come to the conclusion that item No. 7 had not been

proved, and held that inasmuch as item No. 5 could not be traced in the account books of the plaintiff, it could not be held with certainty that the plaintiff had paid it. In the result it gave plaintiff a simple money-decree for item No. 6, for Rs. 1,376 with future interest, and held that the rest of the payments having been made more than 3 years before suit were irrecoverable, being barred by limitation.

12. The plaintiff has appealed and claimed to recover the whole amount.

13. Before discussing the law, it will be convenient to set out what we find to be the facts,

14. Khurshed Ali and his wife, though possessed of some property, made these four mortgages, between the years 1897 and 1900. They paid nothing towards either interest or capital. In 1906 the mortgagees began to press for their money, and then it was that Musammât Latifunnissa (her husband having died as said above") turned to her sister the plaintiff for help. The evidence of what then happened consists of the testimony of Mahbub Ali (defendant No. 1, son of Latifunnissa) and Darbari Lal, and three documents: (1) a security bond executed by the plaintiff, dated the 6th October 1906, (2) an agreement executed by Lalta Parshad, since deceased, dated 12th October 1906, and (3) a document executed by Darbari Lal, dated 12th October 1906. The only other parson who is said to have taken part in the negotiations was Har Dayal, the karinda of the plaintiff, but he is dead.

15. Mahbub Ali swears that after Khurshed Ali's death, Lalta Parshad and Darbari Lal (it will be remembered that two of these four mortgages were in favour of Lalta Parshad alone, one in favour of Lalta Parshad alone, one in favour of Darbari Lal alone, and the other in their favour jointly) pressed Musammât Latifunnissa for payment. Mahbub Ali stated: "My mother said, "give me time." Thereupon, the bankers said, if you give security for the money we will give you time and reduce interest as well." My mother said, "I will speak to my sister and if she accept it I will give the security." My mother sent me to the plaintiff. I went and mentioned full particulars. Thereupon the plaintiff consented and said, "go and bring from the bankers the conditions of the security bond." Thereupon, I came to Shahjahanpur and told the same to the bankers. They gave a draft of the conditions and I took it to the plaintiff, who accepted it and executed the security bond. When I brought the security bond and gave it to Lalta Parshad, he and Darbari Lal, having seen it, executed separate agreements with the stipulations that they would continue to charge interest in future, at the rate of 12 per cent. per mensem, on the amount that was due up to that day." Mahbub Ali has not been disbelieved by the Subordinate Judge, in fact his evidence has been accepted generally, he has not been in any way broken down in cross-examination and as his statement is against his own interest, we think it quite safe to act upon it. It will be remembered that his other two adult brothers and one adult sister have not contested the suit, and, therefore, tacitly accept the plaintiff's version.

16. Darbari Lal's version is not quite the same, but his evidence is not very satisfactory, because his memory seems to be defective. Thus, when shown the document executed by him on 12th October 1906 in which he agreed to reduce the rate of interest on the bond of the 14th June 1899, (the other one having been that day paid off) he admits that it bears his signature beyond any doubt, but he says he has no recollection of ever having executed it. His words are: I do not remember exactly if I executed such an agreement. I think there was a verbal agreement," but he admits that he accepted interest at the reduced rate from that date. He says he did not know Barkatunnissa, and never had any conversation with her, which is probably quite true as she is a pardanashin lady. He says he does not know her karinda, although he admits that he had dealings with her and that her servants used to come to his shop. As to the plaintiff standing security for the payment of his one remaining mortgage, he says she did not. He did not require security as apparently the property mortgaged was sufficient security in itself. He admits that Mahbub Ali from time to time made payments and that the mortgage was paid off by such payments.

17. Mahbub Ali says that Hardayal did enter into negotiations with Darbari Lal, but whether Darbari Lal has forgotten or whether Mahbub Ali is mistaken, is not very important. The fact remains that on the 12th October 1906 both Darbari Lal and Lalta Parshad agreed to reduce the rate of interest. Lalta Parshad alone required a security bond. Mahbub Ali says, in corroboration of Darbari Lal, that as a large amount of money (Rs. 6,300) was paid to Darbari Lal, and only one mortgage for Rs. 3,000 in his name remained due, he (Darbari Lal) did not think the execution of a security bond to be necessary. It may well be that while Lalta Parshad to whom the large sum of Rs. 23,000 was still due on two mortgages required a security bond from Barkatunnissa, Darbari Lal considered himself already sufficiently secured, as he says, by the property hypothecated in his bond.

18. It seems quite clear that both Lalta Parshad and Darbari Lal were acting together in these negotiations, and we are satisfied that Barkatunnissa guaranteed the payments of all these mortgages. Whether Darbari Lal was or was not aware of this (though we are inclined to think he was) seems to us immaterial and even if there was no privity of contract between Barkatunnissa and Darbari Lal, that is no bar to Barkatunnissa recovering from the defendants what she paid on account of the defendants' parents' debt, if she is otherwise entitled to recover. It is admitted in argument that, at any rate, the bulk of the money was paid by Barkatunnissa.

19. We have now to discuss Barkatunnissa's legal position. We find, as the lower Court did, that there was an oral guarantee given by Barkatunnissa to Latifunnissa, and that it was not voluntary. Section 126 of the Indian Contract Act makes no difference between an oral and a written guarantee. See also Section 187 of the Act.

20. We have now to consider the effect of Sections 140 and 141 of the Act.

21. u/s 140 it seems to us that when the surety has paid off the whole debt, he is entitled to stand in the place of the creditor who has been so paid off, and u/s 141 the surety is entitled to the benefit of every security which the creditor has against the debtor at the time when the contract of surety is entered into. We have no doubt that Rani Barkatunnissa was fully informed about the mortgages, and that she agreed to pay up her sister's debts, and that the creditors for that reason agreed on a lower rate of interest being charged in the future. So far there is no difficulty. The appellants' Counsel claims that the plaintiff can take the benefit of both mortgages, and is entitled to a decree for sale of the properties hypothecated under both.

22. A difficulty at once arises with regard to the mortgage of the 27th July 1900. That was payable on demand, and time began to run from the date of its execution. Barkatunnissa (plaintiff) paid it up in full on October 12th, 1906. Her suit was brought in 1915, that is to say, within twelve years of her paying it off, but long after twelve years of its execution. On consideration, we hold that she should have brought her suit on the basis of this security within twelve years of its execution and not having done so, her claim under this head is barred by time. We cannot see how she as a transferee of the mortgagee rights can be put in a better position than the mortgagee. She had approximately six years within which to sue; as she did not sue in this interval, we must hold that her present claim is barred, and in so far we accept the decision of the lower Court.

23. The same difficulty is not present in regard to the second mortgage. Payments were made yearly in reduction of both principal and interest upto 1913. The suit was brought in 1915 within 3, years of the penultimate payment, and the suit is, therefore, clearly within time.

24. We have, therefore, only to satisfy our-selves that the seven items claimed by the plaintiff as having been paid by her were in fact so paid. The learned Counsel for the appellant plaintiff very frankly admitted that item No. 7 has not been brought home to the plaintiff as clearly as the others, and that, therefore, there may be a possible doubt whether in fact the plaintiff paid it. We, therefore, agree with the lower Court in not accepting this item.

25. The other items seem to us to be proved. The Subordinate Judge has not disbelieved Mahbub Ali, who said he paid them from the monies of Barkatunnissa. The sums were undoubtedly paid and there is no evidence that Musammat Latifunnissa paid them out of her own pocket. The learned Subordinate Judge, exercising perhaps undue caution, refused to credit Barkatunnissa with any item which was not clearly demonstrable from her books. We are, however, satisfied that all these items are shown in the plaintiffs' books. We took exception to one small item of about Rs. 125 in the other case, as not having been" necessarily paid in reduction of the mortgage-debt involved in that case, for the reasons given in our judgment in the connected appeal. On all the other disputed items we are satisfied that what happened was that a particular sum was paid to both creditors but entered in the plaintiff's books as a single

debit.

26. We, therefore, think that the appeal must be allowed in part, and the decree of the Court be amended. It is, therefore, ordered and decreed as follows:

That the decree of the Court below is modified to this extent that in addition the plaintiff shall get a decree for items Nos. 1 to 5 inclusive with future interest against all the defendants and is entitled to bring the property hypothecated to sale in satisfaction of her decree. The appellant will get her costs and pay them in proportion to her success or failure in both Courts; costs in this Court include fees on the higher scale.