

(1913) 03 BOM CK 0010
In the Bombay High Court

Richard Ross Skinner

APPELLANT

Vs

Kunwar Naunihal Singh

RESPONDENT

Date of Decision : 04-03-1913

Acts Referred:

Citation : (1913) 15 BOMLR 502

Hon'ble Judges : Shaw, J;Moulton, J;John Edge, J;Ameer Ali, J

Bench : Full Bench

Final Decision : Allowed

Judgement

Shaw, J.—These are consolidated appeals from eleven judgments and decrees of the High Court of Judicature for the North-Western Provinces, Allahabad. The suits were for ejectment and were brought by the present appellant, Richard Ross Skinner. The Subordinate Judge of Meerut passed ejectment decrees and the appellant was granted absolute proprietary possession, with mesne profits, of certain villages situated in the District of Bulandshahr in the United Provinces. These judgments and decrees of the Subordinate Judge were reversed by the High Court.

2. In the proceedings before the Subordinate Judge many issues were taken and questions investigated and discussed.

3. With the exception of those to be hereafter referred to, it is unnecessary to enter upon these questions. For as the result of the discussion before the Board, the appellant made a concession, which was (whatever may have been the nature of the other discussions before the Courts below) no part of his original pleadings or case. In the plaint he prayed " that a decree for full proprietary possession of the entire villages ... be granted to the plaintiff." He further prayed for mesne profits and for costs of the suit, with interest upon these mesne profits up to the date of realisation. It is true that the plaint also concluded " that any further relief which may be considered desirable and necessary be granted to the plaintiff," but, in their Lordships' opinion, this conclusion was treated by the

plaintiff himself throughout the proceedings v as merely ancillary to or consequential upon the radical demand he made for " full proprietary possession." The case in the Courts of India was throughout conducted upon the footing that he was entitled to this proprietary possession in a full and unconditional sense, that is to say, that any mortgages or duly constituted burdens granted even by Thomas Skinner over the properties were to be treated as wholly unavailing against him. Under the decree obtained no such rights were recognised. His position, in short, was that the whole of these burdens and mortgages might be ignored.

4. When, however, the case for the appellant to this Board was drawn, an alternative view was submitted, which is contained in the seventh Reason. That Reason was in this form:-" In any event the High Court of Judicature, Allahabad, should not have dismissed the suits, but should have passed Decrees for possession conditional upon the payment of the debts binding on the estate of Thomas Skinner." Their Lordships are of opinion that this case was never either openly or fully set up by the appellant before the Indian Courts, and that great embarrassment to the learned Judges therein, and great delay and loss, have ensued to the respondents by reason of the appellant's action in this regard. The Board has experienced considerable difficulty in permitting the alternative to be the ground of judgment now; and it is only because, in their view, it may be possible, out of a large wreckage of procedure, to construct the material for a just decision of the true rights of parties, and because upon the whole this may be in the parties' own best interests, that their Lordships refrain from simpliciter sustaining the appeals and dismissing the suits.

5. The villages were the property of one Thomas Skinner, a member of a family not unknown in the history of the North. Western Provinces. In 1863 Thomas Skinner mortgaged inter alia these villages for a sum of Rs. 50,000, with interest.

6. It is unnecessary to refer to other mortgages than that of the year 1863 which has just been mentioned, for the principles of the judgment which is to follow are meant to apply comprehensively to the mortgages granted by Thomas Skinner. Detailed reference need not, therefore, be made, for instance, to the mortgage of 1861 granted by him over the village of Ainchar to secure a sum of Rs. 4,000. On the 7th September of that year this village was mortgaged to the Collector of Bulandshahr. The plaintiff's claim to this village, as to the other villages, has been dismissed. But although this procedure is to be corrected as the result of the judgment of this Board, their Lordships are entirely of the opinion expressed in the judgment of the High Court of date the 2nd March 1909, to the effect that " the plaintiff is not entitled to oust the appellant without payment of the amount which the predecessors in title of the appellant paid in discharge of the mortgage in favour of the Collector."

7. The mortgage deed of 1863 above mentioned provided that the mortgagees should be put in possession if principal and interest were not paid in accordance with its terms. On the 22nd October 1864 Thomas Skinner executed a will. In the

next month, namely, November 1864, he died. Under his will an important question to be immediately referred to arises as to what was the nature of the right conferred in the villages upon his son.

8. That son, Thomas Brown Skinner, had possession delivered to him in the year 1867 by the Court of Wards. At that time the Board were informed that there" was due on the mortgage for Rs. 50,000, granted by his father, Thomas Skinner, a sum of Rs. 43,000. The mortgagees were placed in possession by him and he also himself borrowed further sums in that year, in 1869 and in 1872, and granted mortgages over the properties there for. In 1872, Lachman Das purchased at a sale, in execution of decrees obtained against Thomas Brown Skinner, the rights under the mortgages both of the father, Thomas Skinner, in 1863, and of the son, Thomas Brown Skinner, in 1869 and 1872. Other transactions and some transmissions took place with regard to the villages, but these need not be entered upon. From this main sketch it is to be observed generally that Thomas Brown Skinner had in point of fact acted, as all parties to the transactions appear to have acted, on the footing that he was the owner of his father Thomas Skinner's estate in the villages, and was the absolute owner. If this was the true view, all questions in the case are at an end, and the suit for possession must entirely fail. How does this question stand ?

9. This depends upon the construction to be given to two clauses of destination occurring in Thomas Skinner's will of 1864. They are in these terms :-

(4) That my private zamindari presented to me by Government as a reward for services rendered during the rebellion of 1857, as well as all villages, houses and other property added by me from time to time x to the original grant may, at my demise, descend to my eldest son, Thomas Brown Skinner, and to his lawful male children according to the Law of Inheritance.

(5) In the event of my eldest son, Thomas Brown Skinner, dying without lawful male children, the above-mentioned private zamindari, #0., shall descend to my next male heir, and should all my sons die without lawful male children, the zamindari, &c. shall descend to my female children, or, in the event of their death, to the female children born in wedlock of my sons in succession.

10. It is strenuously contended that under this destination Thomas Brown Skinner (who, it may be mentioned, was an illegitimate child, and who was, at the date of his father's death, about fourteen years of age) took an absolute estate as contradistinguished from an estate for his life. Reference is made to the Succession Act, Section 84, which provides that" where property is bequeathed to a person, and words are added which describe a class of persons, but do not denote them as direct objects of a distinct and independent gift, such person is entitled to the whole interest of the testator therein, unless a for contrary intention appears by the will"; and one of the 1st-rations in the section is specially founded upon, namely, " to A and the heirs male of his body." The Act was passed in the year 1865. By Section 331 of the Act it is enacted that "the

provisions of this Act shall not apply ... to any will made or any intestacy occurring before the first day of January, 1866." But, as stated, Thomas Skinner the testator died in 1864. It is contended, however, that, although this may be so, yet, according to the law of India, prior to the enactment of that Act, a destination to " Thomas Brown Skinner and to his lawful male children according to the law of inheritance" was, in point of fact, an effective form of conveyance of no less than absolute ownership.

11. In determining this question it is the opinion of their Lordships that the destination must be read in its entirety and together. Following the words quoted there occur these : " In the event of my eldest son, Thomas Brown Skinner, dying without lawful male children, the above-mentioned private zamindari, &c, shall descend to my next male heir." The argument of Richard Ross Skinner, who, in point of fact, was the next male heir, is that his brother, Thomas Brown Skinner, had only the interest of a tenant for life. On reading still further on in the destination it is found that the appellant is not entitled himself, if his own argument be sound, to the position of absolute owner, for the destination continues : "And should all my sons die without lawful male children, the zamindari, &c, shall descend to my female children, or, in the event of their death, to the female children born in wedlock of my sons in succession." His learned counsel accordingly conceded that the appellant is, as was his brother before him, only a tenant for life. The event has not yet been ascertained whether the appellant shall or shall not die without lawful male children. If there should be such children, no doubt they would be the absolute owners of the properties, but if he should die childless, then the destination over to female children will, it is argued, take place.

12. The question is full of embarrassment and difficulty. It is no doubt a temptation to be rid of the troublesome issues, with consequent accountings, by holding that the absolute ownership was in Thomas Brown Skinner ; but-for this temptation must be put aside-the only question that their Lordships have to consider is whether it was the testamentary intention of Thomas Skinner, under the form of language adopted, to create by his will an absolute ownership in Thomas Brown Skinner. From the case of *Barlow v. Order* (1870) L.R. 3 P.C. 164, (in which, it may be observed, the history of the Skinner family is referred to in a judgment of Lord Westbury) it is plain that English rules of interpretation-in so far at least as these are artificial rules of construction which have arisen in the administration of English Courts of Equity-must not be allowed to govern the interpretation of Thomas Skinner's will. Questions affecting the construction of such a settlement as the present, or the regulation of a succession under it, must be determined by the principles of natural justice, or, to use the familiar language, according to " justice, equity and good conscience."

13. So looking at this settlement, their Lordships do not find themselves able to affirm that Thomas Skinner meant his son Thomas Brown Skinner to have an - absolute ownership of these villages. So to conclude would be to affirm that the

former a month .before his death set forth an elaborate scheme of destinations over, while all the time he was really meaning that the boy of fourteen was to take the absolute ownership if he survived him. If the son was to be a tenant for life merely, then the .detailed regulations for successive enjoyment and descent were entirely in place ; they were natural and necessary. There are considerations either way but it seems to their Lordships a more likely and more reasonable conclusion to come to, that Thomas Skinner did mean to regulate the succession after the death of his son, and addressed his mind to the consideration of what should be the steps and order of that subsequent enjoyment of his property. In their Lordships" opinion, accordingly, the possession of Thomas Brown Skinner of these villages was the possession of a tenant for life.

14. It follows that the mortgages granted by Thomas Brown Skinner were ineffectual to convey or give any rights over any estate exceeding the tenancy for life of which Thomas Brown Skinner was possessed. The appellant, accordingly, v as the next male heir, is entitled to the enjoyment of this estate for life, as of an estate out of the corpus of which no rights could issue which proceeded from Thomas Brown Skinner, and that the respondents, in so far as they represent such rights and the succession thereto, have no title to interfere with his entry into possession.

15. But the case, in their Lordships" view, stands in a very "" different position with regard to the rights of mortgagees and their successors under mortgages granted, not by the appellant's brother, but by the appellant's father, Thomas Skinner, With regard to the appellant's brother, it is decided by this judgment that the estate which he possessed was that of a tenant for life, and that mortgage proceeding in respect of debts incurred by him could not affect the estate be and his life. Even if it be supposed that after he, Thomas Brown Skinner, came into possession he granted mortgages in renewal of those granted by his father and then outstanding, the rights of the mortgagees could not in justice or equity be prejudiced thereby. To do so would be to operate a substantial defeat of the rights of those mortgagees and to imply, what certainly never was the intention of any of the parties to the transaction, that by the renewal of a mortgage by a person with a limited interest in the estate the intention was to operate a discharge of debts effectually secured upon the radical right.

16. Their Lordships, accordingly, have little difficulty in holding that such a result must be avoided, that full effect must be given to the mortgages granted by Thomas Skinner, and that the appellant can only enter upon possession of his rights qua tenant for life of these villages now after satisfying the mortgage debts of his father upon the estate. Their Lordships are glad to observe that the substance of this equity is fully recognised in the judgment appealed from. They express no surprise, looking to the state of the pleadings, and particularly to the unqualified nature of the demand made in the plaint, that these learned Judges

should have dismissed the same simpliciter, and they view the judgment of the High Court as meant to leave open the determination of the rights of the mortgagees of Thomas Skinner and their successors in some further suit or suits.

17. Upon the whole, however, it does not appear to their Lordships that justice will be done between these parties if the present suit be dismissed, with the prospect of further litigations to determine a matter now substantially ripe for settlement. They are further of opinion that the appellant is not entitled, even under the present suit, to enter into possession until full satisfaction is first made of the rights of all mortgagees and their successors under the mortgage deeds granted by Thomas Skinner. Should this condition be not, within what appears to the Court below to be a proper and sufficient time, satisfied, then in their Lordships' opinion a decree dismissing the suit in respect of this failure could then be pronounced.

18. Had the condition of a grant of possession which was conceded and there Lordships' Bar been made upon the plaint or the pleadings in the Court below, the whole of this protracted litigation would have been saved, except to the extent of a simple determination of the point of the construction of Thomas Skinner's will.

19. In their Lordships' opinion, accordingly, justice to the parties will be most nearly approached if the appellant make payment to the respondents of the cost of the proceedings in both Courts of India, and if, in regard to the appeal before this Board, neither party be found entitled to costs. Their Lordships will accordingly humbly advise His Majesty that the appeals should be allowed, that the causes should be remitted to the High Court to be dealt with upon the footing that the rights under mortgages granted by the late Thomas Skinner should be satisfied by payment being made to the mortgagees or their successors, that upon these payments being made and that within such reasonable time as shall be fixed in the Court below, a decree for possession shall be pronounced in favour of the appellant, and that, failing such payment within such time, the suits shall stand dismissed.