
(1881) 08 CAL CK 0006
In the Calcutta High Court

Soodist Lall

APPELLANT

Vs

Bungsee Singh and Others

RESPONDENT

Date of Decision : 05-08-1881

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 28

Citation : (1881) ILR (Cal) 739

Hon'ble Judges : Prinsep, J;Field, J

Bench : Division Bench

Judgement

Prinsep, J.—The facts of this case are somewhat complicated; but when these facts are understood, no real difficulty arises in dealing with the case. Four persons, who are in the suit termed the third party defendants, viz., Dukharun Lall Dobay, Baiju Lall Dobay, Gopal Dobay, and Lalji Dobay, were the proprietors of a 2a. 13g. 1c. 1cr. share out of 10 annas out of the entire 16 annas of Mouza Shazadpore Dumduma, alias Rohimpore, and also of 2a. 13g. 2c. 1cr. of Mozufferpore Thatha. Both these properties are wholly situate in the district of Bhagalpore. There were four mortgages affecting this property. The first mortgage was by Dukharun alone in favour of Rughoonath Prosad. This mortgage is dated the 19th September 1872, and it was a mortgage of 1a. 4p. share of Shahzadpore Dumduma. The second mortgage is dated the 20th September 1872. It was executed by Dukharun Lall, Baiju Lall, Gopal Dobay and Lalji Dobay in favour of the plaintiff in the present suit, Soodist Lall, and the property covered thereby, consisted of the whole of the two shares above set forth, as also of other property which was situate in the district of Tirhoot, the two properties Shazadpore Dumduma and Muzufferpore Thatha being, as already stated, wholly situate in the district of Bhagalpore. The third mortgage is dated the 24th March, and was created by two deeds dated respectively the 24th March and 23rd April 1873. It was in favour of Rughoonath Sahoy, and the property mortgaged was the whole of the two shares already mentioned. The fourth mortgage is dated the 13th November 1874. It was executed by Dukhrarun Lall and Baiju Lall in favour of Deep Narain, and the property mortgaged was the

whole of the above share in Mozufferpore, together with some other property. Upon these mortgage-bonds there were four suits. The first suit in point of time was brought by the third mortgagee, Rughoonath Saboy, who, on the 25th March 1874, obtained a decree, and sought to enforce his lien against the property mortgaged to him. In execution of this decree he brought to sale the interest of Dukharun Lall and Baiju Lall, and these interests were purchased on the 5th January 1875 by Chowdhry Bungsee Singh and others, who are the first party defendants in the present case, and are now the appellants before us. The second suit in point of time was brought by Gobind Lall, the assignee of the first mortgagee Rughoonath Prosad, and he obtained a decree on the 17th April 1874. In execution of this decree, he attached the 1a. 4p. share which was mortgaged by the first mortgage-deed on the 19th September 1872. An objection was there upon raised by the present appellants, to the effect that they had already purchased the interests of Dukharun Lall, and that objection was successful. Whereupon Gobind Lall instituted a suit against the appellants for the purpose of having the priority of his mortgage declared, and he obtained a decree on the 9th August 1876. In execution of this decree the 1a. 4p. share, which was the subject of the first mortgage-bond, was brought to sale, and was sold on the 4th March 1878 for Rs. 11,400. The first mortgage was satisfied out of these sale-proceeds, and there remained a surplus of Rs. 7,664-6-1. These surplus sale-proceeds may be taken as representing the value of the equity of redemption of the 1a. 4p. share of Shazadpore Dumduma, which was the subject of the first mortgage. The third suit was instituted by the present plaintiff after the institution of the first suit and before the present appellants had become purchasers. It will be remembered that the present plaintiff Soodist Lall was the mortgagee not only of the two shares, but of the other property situate in the district of Tirhoot. The third suit was instituted under the old Code of Civil Procedure, and it was instituted in the district of Tirhoot. In that suit Soodist Lall sought to enforce his mortgage lien not only against the property situate in Tirhoot, but also against the property situated in the district of Bhagalpore. Now, according to the old Code of Civil Procedure, Act VIII of 1859 (Section 12[In like manner, if the property be situate within the limits of different districts, the suit may be brought in any Court, otherwise competent to try it within the jurisdiction of which any portions of the land or other Immovable property in suit is situate, but in such case the Court in which the suit is brought shall apply to the Sudder Court for authority to proceed with the same; if the suit is brought in any Court,---subordinate to a District Court,---the application shall be submitted through the District Court to which such Court is subordinate. Suits for Immovable property situate in different districts.]), it was necessary to have obtained the sanction of the High Court in order that the property situated in the district of Bhagalpore might be made liable under the decree which would be passed in the suit. No such sanction was obtained, and on the 17th July 1874, a decree was passed in favour of Soodist Lall. The fourth suit was brought by the fourth mortgagee, and he obtained a decree on the 17th January 1877. In execution of this decree, he attached a 2a. 13g. 2c. 1cr. share in Mozufferpore

Thatha. It was sold on the 3rd September 1877, and purchased by the second party defendants, Tribani Persad Singh and others. The remaining facts of the case are as follows:--- Soodist Lall had his decree transferred for execution with a certificate from the district of Tirhoot to the district of Bhagalpore, and in this latter district he attached in execution the surplus sale-proceeds, Rs. 7,864-6-1, and also the 1a. 9g. 2c. 1cr. share of Mouza Shazadpore Dumduma. The present appellants came forward and made a claim (i) as to the surplus proceeds, and (ii) as to the share of Baiju Lall,---that is, 17g. 3c. 1d. share. In consequence of this claim, the attachment was withdrawn both as to the surplus sale-proceeds, and as to the 17g. 3c. 1d. share just mentioned; and the present appellants, on the 24th August 1878, drew out the surplus sale-proceeds already mentioned. Tribani Persad Singh and others, second party defendants, also made a claim in respect of 2a. 13g. 2c. 1d. share which they had purchased; and on the 21st January 1879, an order was made releasing this share from attachment. The present suit had now been instituted by Soodist Lall, and he asks (i) that the decree of the 17th July 1874 obtained by him in the Tirhoot Court may be declared valid to affect the 17g. 3c. 1d. share of Shazadpore Dumduma, and also the whole share of Mozufferpore; (ii) that he may recover the surplus sale-proceeds, Rs. 7,664-6-1, together with interest, from Bungsee and others, the present appellants; and (iii) that, if the decree of the 17th July 1874 be not held valid so as to affect the properties abovementioned, then a decree may now be given to him declaring his prior lien upon the 17g. 3c. 1d. share of Mouza Shazadpore Dumduma, and upon the 2a. 13g. 2c. 1cr. share of Mouza Mozufferpore Thatha. Now, it is to be borne in mind that Bungsee purchased the interests of Dukharun and Baiju Lall at a sale under a decree obtained upon the third mortgage. The plaintiff, who is the second mortgagee, has, therefore, in respect of the surplus sale-proceeds, and also in respect of Baiju's share, a prior lien to that of Bungsee, who claims only in right of the third mortgagee. Then, as to the share in Mozufferpore Thatha, Tribani Persad and others, second defendants, are purchasers under a decree obtained upon the fourth mortgage, and as regards this share also, the plaintiff, being the second mortgagee, has a prior lien.

2. Four points have been argued before us upon this appeal. The first point is, that the Tirhoot Court had no jurisdiction in respect of the property situate in Bhagalpore, and therefore the decree of the 17th July 1874 is not valid so as to affect the Bhagalpore property.

3. The second point is, that the suit is bad for multifariousness, inasmuch as the first set of defendants and the second set of defendants are interested not jointly, but severally, and in respect of separate portions of the property. The third point is, that the plaintiff is not entitled to sue alone, because there are four other persons,---viz., Mohesh Lall, Chutoorbhooj Lall, Gopal Lall, and Ram Lall (one of whom, viz., Chutoorbhooj, is a minor), who are members of a joint Hindu family,---co-sharers with the plaintiff. It is, therefore, contended, that the plaintiff Soodist Lall is not alone interested in the subject-matters of the suit, and

is not competent to sue alone. The fourth point is, that this suit is not maintainable, because it is a suit brought after splitting a cause of action; in other words, as the plaintiff had already brought a suit in the Tirhoot Court, and did not, in order to make the decree in that suit effectual as against the whole of the mortgaged property, obtained the sanction of the High Court, he is now precluded from bringing this second suit in respect of the Bhagalpore property.

4. As to the first point it is conceded on behalf of the plaintiff, respondent, that the decree of the Tirhoot Court is not valid to affect the property in the Bhagalpore Court, and it is not necessary for us to say anything further upon this point. The second point is concerned with multifariousness, and in order to understand how far this objection can be sustained in connection with the present case, we must bear distinctly in mind what are the exact facts.

5. The plaintiff sues in respect of a single transaction affecting several items of property. He sues upon a single contract as between himself and his mortgagor; and he is compelled to sue by reason of this fact, that subsequent to the execution of his mortgage, several other persons have become interested in different portions of the property which, as a whole, was the subject of his mortgage-bonds. Now it appears to us, that this is just the case which Section 28 of the present CPC was intended to meet and provide for. That section enacts, that "all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative, in respect of the same matter." The right to relief, so far as regards the first and second set of defendants, is, undoubtedly, a right to relief as against these sets of defendants severally, but the cause of action arises out of the single subject-matter which formed the subject of the plaintiff's original mortgage. We may also advert to Section 31 of the Code of Civil Procedure, which provides, that "no suit shall be defeated by reason of the misjoinder of parties, and the Court may, in every suit, deal with the matter in controversy so far as regards the rights and interests of the parties actually before it." We are of opinion, that the two sections which have just been quoted, are a sufficient answer to the objection of multifariousness raised upon this appeal.

6. Then, with reference to the third objection, the mortgage-bond was executed in favour of the plaintiff alone. If this were not the case, there would, undoubtedly, be much in the objection, that the plaintiff, whether regarded as a member of the partnership or as a member of a Hindu family, could not alone maintain this suit. But we think that the fact of the mortgage-bond having been executed in the name of the plaintiff alone entirely alters the case. The plaintiff may be regarded as contracting not only on behalf of himself, but on behalf of undisclosed principals---i.e., the other members of the family. The rule of law on this subject is to be found in the case of *Sims v. Bond* (5 B. & Ad. 393). The learned Chief Justice of England, in delivering the judgment of the Court, then said:---" It is a well established rule of law, that where a contract, not under seal, is made with an agent in his own name for an undisclosed principal, either

the agent or the principal may sue upon it; the defendant, in the latter case, being entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the contracting party. This rule is most frequently acted upon in sales by factors, agents, or parties, in which cases, either the nominal or real contractor may sue." The same principle is applicable to the case of partners contracting in their own names, but really on behalf of themselves and their unnamed partners---Bottomley v. Nuttall (5 C. B. N. S. 122), for, as Baron PARKE said in Beckham v. Drake (9 M. & W. 98), all questions of this sort between partners are mere illustrations of the same questions between principal and agent. In the case of Agacio v. Forbes (14 Moore P. C. 160) it was held by the Privy Council, that one partner, with whom personally a contract was made, was entitled to sue upon this contract in his own name without joining his co-partners as plaintiffs; see also Jones v. Robinson (1 Ex. 454).

7. The same principle of law is embodied in Section 230 of the Indian Contract Act, which enacts, that, "in the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them. Such a contract shall be presumed to exist in the following cases: (i) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad; (ii) where the agent does not disclose the name of his principal." Now, in the present case the contract was made with Soodist Lall, the plaintiff, alone. It has not been expressly pleaded, and there is no evidence upon the record to show, that Soodist Lall did, at the time of making the contract, disclose that he was contracting not only on behalf of himself, but also on behalf of the other members of the partnership. Under these circumstances, we think that this ground of appeal must also fail.

8. Then the fourth ground of appeal is, that the cause of action has been split. Now, the present case is on all fours with the case of Grish Chunder Mookerjee v. Ramessuree Dabee (22 W. R. 308), in which the case of Subba Rau v. Rama Rau (3 Mad. Rep. 376) is referred to. In the case of Grish Chander Mookerjee v. Rameessuree Dabee (22 W. E. 308) it was held, that the cause of action was not split, because the plaintiff did not, in the first case, either relinquish or omit to sue for any portion of his claim; but the necessity for the second suit arose out of the fact, that the decree in the first suit had become infructuous, so far as regarded a certain portion of the property, in consequence of its having been made without jurisdiction. We see no reason to dissent from the principle there laid down, and that principle must govern the present case. Were it otherwise, we think that there is another principle of law laid down by the Privy Council which would be applicable to the present case. We think that the cause of action in this second case is not the same cause of action upon which the plaintiff sued in the first suit. In the first suit the cause of action was the non-payment of the money secured by the mortgagee-bond, and the real contention was as between the mortgagee on the one hand and the mortgagors on the other hand. The

second suit is directed to enforce the plaintiff's prior mortgage lien against subsequent mortgagees, and the cause of action is, that the subsequent mortgagees have denied the plaintiff's right to a prior lien. The real contention is, not between the mortgagee and the mortgagors, but between the prior mortgagee and the subsequent mortgagees. We think, therefore, that this case falls within the principle explained in the case of *Rao Kuran Singh v. Nawab Mahomed Fyazali Khan* (14 Moore I. A. 188). The appellants thus fail upon all the grounds which have been taken and argued before us, and this appeal must be dismissed with costs.