(1878) 03 PRI CK 0001

Privy Council

Case No: None

Seth Gokuldass Gopuldass		APPELLANT
	Vs	
Murli and Zalim (Heirs of Tarapat)		RESPONDENT

Date of Decision: March 12, 1878

Citation: (1878) 5 IndApp 78

Hon'ble Judges: James W. Colvile, Barnes Peacock, Montague E. Smith, Robert P. Collier, JJ.

Judgement

Barnes Peacock, J.

1. This is an appeal from a decree of the Judicial Commissioner of the Central Provinces of India, in a suit instituted by the Appellant against the Respondents in the Court of the Deputy Commissioner of Jubbulpore, for the foreclosure of a mortgage.

2. The following are the circumstances under which the mortgage was executed:--On the 27th of June, 1859, the Appellant obtained a decree in the Court of the Sudder Ameen of Jubbulpore against Tarapat Patel, Malguzar of Khairi, the father of the Defendants, for the sum of Rs. 9,413. 15a.3p., being the balance of principal and interest duo upon a bond executed by Tarapat and the costs of suit. The decree was silent as to the payment of future interest on the amount decreed. By the bond upon which the decree was obtained, it was expressly stipulated that interest should be paid at the rate of 1 per cent, a month.

3. Between the date of the decree and the 27th of June, 1865, the Plaintiff'' endeavored on several occasions to obtain payment of the amount decreed, and did in fact realize portions of the amount under two several executions. It is unnecessary to enter into any details of the proceedings adopted by the Plaintiff, or of the litigation which ensued upon them. It is sufficient to state that in their Lordships'' opinion no laches can be imputed to the Plaintiff in endeavoring to

enforce the decree.

4. In February, 1805, the Plaintiff applied to the Court of the Deputy Commissioner of Jubbulpore, against the Defendants and their father, Tarcupat, for an attachment and sale of their rights in the village of Khairi in execution for the sum of Rs. 13,498.9a.9p. claimed to be due under the decree.

5. That sum included interest on the amount of the decree calculated up to the 14th of October, 1863, after giving credit for payments made on account. Upon that application the Defendants and their father were ordered to be summoned, and upon their non-appearance an order was made on the 25th of July, 1865, for the attachment of their proprietary rights in the village, and for the Sale thereof by public auction, after due notice, according to Sections 248 and 249 of Act VIII. of 1859.

6. On the 3rd of August in the same year orders were issued that the requisite notifications, according to Section 249, be issued, and that, the sale of the right and interest of Defendants in the village of Khairi should take place on the fortieth day from that date.

7. On the 4th the present Defendants presented a petition to the Deputy Commissioner praying to be relieved from liability for the Plaintiff''s claim, and that the attachment might be removed from the, village. Upon that petition an order was passed refusing to alter the order already made, and stating that as the Defendants had failed to appear on the date appointed for hearing, the case had been disposed of in their absence, the reason why they had absented themselves not having been explained. From that order they appealed to the Commissioner, and their appeal was rejected.

8. On the 18th of September, 1865, the mortgage upon which the suit was brought was executed. It was by conditional sale in the following words:

Seth Khusalchand and Gokuldass, of Jubbulpore, Plaintiffs; v. (1.) Tarapat, (2.) Murlidbar, (3.) Zalim Singh, Patel, residents and malguzars of the village Khairi, perganna Patan, Defendants.

Claim Execution of Decree for Rs. 13,498. 9a. 9p We, Tarapat, Murlidbar, and Zalim Singh, patels and residents of Mouzah Khairi, defendants, are the writers of this agreement.

The Plaintiffs above-named having taken out execution of a decree for the sum above-mentioned, and applied for attachment and sale of the village Khairi, the 13th of September, 1865, was first appointed as the date for the sale of the village in accordance with orders from the Judicial Commissioner. Subsequently the 18th of the said month had been fixed as the date for sale, in liquidation of a sum of Rs. 16,498 9a, 9p.

We have now brought the Plaintiffs to terms, and having gone into the accounts, we agree to pay Plaintiffs as principal, interest, costs, and future interest on the decree, in all 19,000 Government Sicca rupees.

Of this we have caused Rs. 5000 to be paid by Naraindas and liaghoonaih. This leaves a balance of 14,000 Government rupees, which we agree to liquidate, paying no interest, by yearly installments as detailed below, and until the liquidation of the whole amount due we hereby mortgage or conditionally sell the village in question, the condition being that in the event of our failing to pay any one of the installments agreed upon the sale of the village shall become absolute; we and our heirs would then forfeit all proprietary rights in the village, and such rights would be transferred to Plaintiffs, to be thenceforward enjoyed by them and their descendants. Should, however, the failure on our part to pay the instalments in arrears be attributable to unfavourable seasons, &c., the said instalments will be payable next year, and will bear interest at 1 percent.

Should the payment in arrears be not made in the next year, along with the one due for that year, the sale of the village will be considered absolute. The terms of this deed of sale would be binding on our heirs and representatives also, and so long as the money due to Plaintiffs remains unpaid, the village shall not be transferred by us to any one else; any such transfer, if made, shall be held to be illegal.

We relinquish all claims to any money which the Plaintiffs may have recovered at the time of the sale becoming absolute.

9. The details of the instalments were for the payment on the 15th Aghan-Sambat, 1922, corresponding with the year 1865, of the sum of Rs. 2000., and on Jeth 15 in each of the following twenty years, of the sum of Rs. 600., making a total of Rs. 14,000.

10. On the same 18th of September, 1865, Tarapat, the father, each of the Defendants and the Plaintiff respectively, made the following statements, viz.:

Tarapat, .Defendant, son of Mahadeo, caste Koormee, aged fifty years, nialgular, resident of Khairi, states on solemn affirmation:

''We have effected a settlement of his claim with the Plaintiff by hypothecating our village, and fixing instalments for the liquidation of the same, and beg that our village be released from attachment.'' 18th September, 1865.

Murli, Defendant, sou of Tarapat, caste Koormee, aged twenty-eight years, resident of Khairi, malguzar, states on solemn affirmation:

''Having effected a settlement of his claim with the Plaintiff by fixing instalments for its liquidation, I beg that the village be released from attachment. We have hypothecated our village as it guarantee for the liquidation of Plaintiff''s claim.'' 18th of September, 1865.

Zalim, Defendant, son of Tarapat, caste Koormee, aged twenty-one years, resident of Khairi, mulguzar, states on solemn affirmation:

''We have fixed instalments for the payment of the Plaintiffs claim, and beg that our village be released from attachment. We have mortgaged our village to Plaintiff.'' 18th of September, 1865.

Seth Khusalchand, son of Sawaram, aged sixty-two years, caste Maheshree, resident of Jubbul, and a mahajun by profession, states on solemn affirmation:

''I have taken out execution of a decree against Tnrapat Murli, and Zalim, and their village was about to be sold. The Defendants have, however, made an amicable arrangement for the liquidation of my claim by agreeing to pay instalments, which I have approved. I have no objections whatever, and I beg that the arrangements be sanctioned by the Court, and the village released from attachment. The Defendants have hypothecated the village, and I wish that it should remain so hypothecated, and the case be struck off the file.'' 18th September, 1865.

11. The mortgage was on the same day presented by the Defendants to the Extra Assistant Commissioner, who forwarded the case to the Court of the Deputy Commissioner, who thereupon, on the 19th of September, 1865, ordered that the kistbandi be sanctioned and the case struck off the file as completely disposed of.

12. The Defendants continued to pay the instalments under the mortgage up to 15th Jeth, 1929, but failed to pay the instalments which fell due in Sumbat 1930 and 1931, whereupon the Plaintiff on the 24th of October, 1874, filed his plaint and prayed for a decree for Rs. 7800, the amount of the instalments remaining unpaid, with a proviso that in the event of the same not being paid up within one year, the rights and interests of the Defendants and their deceased father in the village in question be transferred to Plaintiff, the transaction being then considered as one of an absolute sale.

13. The Defendants in their written statement alleged, amongst other things, that in June, 1859, a money decree for Rs. 9413. 15a. 3p-was passed against Tarapat, their father, and that future interest on the decree was not allowed; that the Plaintiff, however, fraudulently went on executing the decree with interest, and eventually, in September, 1865, induced Tarapat and the Defendants to execute the deed sued on by dishonestly concealing the fact that future interest had not been decreed.

14. They also stated that they were ignorant people, arid that they executed the deed under a mistake of fact, i.e., under the impression that future interest had been decreed as represented by the Plaintiff; that at the time when the deed was executed only J Rs. 3798. 4a. 9p. were due under the decree, and that the Defendants were minors at the time of the execution of the deed.

15. The plea of minority was found against the Defendants, but the Deputy Commissioner dismissed the Plaintiff''s suit with costs, upon the ground that the

claim was based on an illegal contract. He held that even if the Plaintiff had a right to demand the sum of Rs. 13,498, 9a. 9p. for which execution had been awarded, there was not sufficient explanation as to how that amount was increased to Rs. 16,498; and further, that even if, as the Plaintiffs counsel had suggested, the Plaintiff in making up the accounts with Defendants added interest for the period from October, 1863, to the day fixed for the sale of the village in execution, that alone was sufficient to vitiate the contract, for, in the view of the Deputy Commissioner, it was evident that the Plaintiff was well aware that he had no real claim to interest. But he went further, and held that the Plaintiff was not entitled to any interest on the decree; that Rs. 4820 only were due; and that the Plaintiff, by concealment of facts regarding the amount duo, and by misrepresentation of facts, as shown by the proceedings in the original case, and the application for execution for Rs. 3000 in addition to the RS. 13,498 were sufficient grounds for considering that the transactions out of which the contract grew were unlawful.

16. Upon appeal, the Commissioner was of opinion that there was no sufficient evidence of concealment, but that there was misrepresentation with regard to Defendant''s liability to interest within the meaning of definition 1, Section 18, of the Indian Contract Act, No. 9, of 1872. He further held that the bond was nothing more than a kistbundi; that no new consideration for it was given; that if the parties had arranged that effect should be given to it by the executing Court, it would have been pronounced invalid, as it altered the terms of the decree by the addition of interest, which could not be done even with consent of the parties. He therefore held that the contract was illegal and void under Clause 2, Section 23, of the Indian Contract Act, and dismissed the appeal with costs.

17. A special appeal was preferred to the Judicial Commissioner, who dismissed it with costs, on the ground that the deed was void able under Section 20 of the Indian Contract Act, inasmuch as both parties were under a mistake of fact essential to the agreement expressed in it. Their Lordships are of opinion that there was no sufficient evidence to prove a fraudulent misrepresentation or concealment of facts on the part of the Plaintiff. There was, no doubt, a mistake of law on the part of the Defendants in supposing that execution could be issued for interest upon the amount decreed from the date of the decree to the date of realisation, no such interest having been awarded by the decree. But that mistake appears to have been common, not only to the Plaintiff and the Defendants, but also to the Assistant Commissioner, by whom the order of the 25th of July, 1865, was made for the attachment and sale of the village in execution for the sum of Rs. 13,498. 9a. 9p. Indeed, until the Full Bench ruling of the High Court of Bengal in September, 1866, in the case of Mosoodun Lall v. Bheekaree Singh 6 Suth. W.R. Mis. Rul. 109, the principle of which was upheld by the Judicial Committee in the case of Pillai v. Pillai Law Rep. 2 Ind. App. 228, there were conflicting rulings upon the point whether interest upon a decree could be levied in execution when the decree was silent as to subsequent interest on the amount decreed.

18. In that uncertain state of the law, the Defendants not having appeared to show cause, an order was in fact made for the attachment and sale of the village in execution for the sum of Rs. 13,498. 9a. 9p., which included interest on the decree. No appeal was preferred against that order, nor were any other proceedings adopted to set it aside. It remained in force up to the time of the mortgage, and the village had been actually attached and was liable to be sold under it if the compromise had not been effected and the mortgage executed. Their Lordships are of opinion that the mortgage was not invalid either upon the grounds stated by the Commissioner or upon that stated by the Judicial Commissioner. It appears to have been executed by way of compromise, after an examination of the accounts at which the father Tarapat was present; and it does not appear to their Lordship that, subject to what will hereafter be said as to a sum of Rs. 3000, part of the money secured, the Plaintiff gained any unconscionable advantage by the transaction; for although he was not strictly entitled to an execution for interest calculated for a period subsequent to the date of the decree, there seems to be no reason why he should not have recovered interest as damages in an action upon the decree if he and the Court which issued the attachment had not mistaken his remedy. It is not necessary to refer to the English decisions bearing upon the subject of recovering by action interest upon a judgment which cannot be levied by execution. In the case; of Pillai v. Pillai Law Rep. 2 Ind. App. 219, to which reference has already been made, the Judicial Committee, in reference to the question of levying interest upon a decree where the decree was silent as to future interest, stated expressly that questions of that nature might be raised by separate suit.
19. It may be remarked that the rate at which interest was calculated for the period between the execution of the mortgage and the times fixed for the payment of the instalments was extremely low.

20. It appears, however, to have been assumed that the sum for which the village was liable to be sold in execution was not Rs. 13,498. 9a. 9p., but Rs. 16,498. 9a. 9p.

21. The recital in the mortgage is, "Subsequently the 18th of the said month had been fixed as the date for sale in liquidation of a sum of Rs. 16,498. 9a. 9p." As to this the Judicial Com-missioner says: "In the first Court''s judgment the larger sum of Rs. 16,498. 9a. 9p, is referred to as entered in one of the processes; of execution, viz. '' the notice of sale,'' but the extant record of proceedings nowhere mentions such a sum. If such a sum was over entered in such a process it must apparently have been only through a clerical error." Although there does not appear to have been any willful misrepresentation in this respect by the Plaintiff, their Lordships are of opinion that there was no authority under Section 249 of Act VIII. of 1859 for increasing the amount for which the village was ordered to be sold in execution from Rs. 13,498 to Rs. 16,498; that the addition has not been satisfactorily explained ; and that the deed ought to be reformed by disallowing the additional sum of Rs. 3000. This will reduce the sum secured by the mortgage by Rs. 3000, and a

proportionate part of the sum allowed for future interest during the period stipulated for payment by instalments, which may be taken in round numbers as together amounting to Rs. 3480. Deducting Rs. 3480, and the eight instalments of the Rs. 14,000 which have been paid, amounting to Rs. 6200, from the total amount of Rs. 14,000 secured, there remains the sum of Rs. 4320 to be paid by the Defendants to the Plaintiff in order to redeem the above-mentioned village.

22. Their Lordships will therefore humbly advise Her Majesty that the decrees of the three Lower Courts be reversed; that in the event of the Defendants paying to the Plaintiff the sum of Rs. 4320, together with the costs of the Plaintiff in the three Lower Courts, within one year from the time of the service upon them of notice of such order of Her Majesty in Council as shall be made in this appeal, or in the event of their paying into the Court of the deputy Commissioner of Jubbulpore within that period the said sum of Rs. 4320. together with such costs as aforesaid for the use of the Plaintiff, the said village shall be freed and discharged from the said mortgage; but that in the event of the said sum of Rs. 4320 together with such costs as aforesaid, not being paid to the Plaintiff by the Defendants, or paid by them into the said Court for the use of the Plaintiff within the period aforesaid, the said mortgage and conditional sale shall become absolute, and all the right, title, and interest of the Defendants in the said village shall be transferred to and vested in the Plaintiff; and in order that due notice of such Order in Council shall be given to the Defendants, their Lordships will further advise Her Majesty that the Plaintiff be ordered to lodge the said decree of Her Majesty in Council in the Court of the deputy Commissioner of Jubbulpore, in order that notice thereof may be given to the Defendants in due coarse, and that the Plaintiff do also deposit in the said Court such an amount as may be required to defray the costs of serving upon the Defendants notice of the said order.

23. Considering the peculiar circumstances of this case, and also the fact that the Plaintiff has not succeeded to the full extent of his claim, their Lordships are of opinion that the Respondents ought not to be ordered to pay the costs of this appeal.