Rash Mohan Saha and Another Vs Kristo Das Roy and Others

Court: Calcutta High Court

Date of Decision: June 4, 1918

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 34 Rule 6

Citation: 47 Ind. Cas. 412

Hon'ble Judges: Teunon, J; Richardson, J

Bench: Division Bench

Judgement

1. This appeal arises out of a suit brought on a mortgage-bond. The mortgage-bond was executed by defendants Nos. 1 to 3 in favour of the

plaintiff on the 16th Falgoon 1318, to secure the payment of a sum of Rs. 16,000. The defendants Nos. 4 to 6 in the suit were the purchasers of

the mortgaged properties in execution of a money-decree obtained by them against the mortgagors subsequent to the execution of the mortgage-

bond. The learned Subordinate Judge has found that in fact defendants Nos. 1 to 3 owed to the plaintiff on the date of the bond the amount

secured thereby, and he has made against them a money-decree for the amount claimed in the suit, a sum of Rs. 6,000. He has dismissed the suit

as against defendants Nos. 4 to 6 on the ground that the bond in fact represents a fraudulent preference given by defendants Nos. 1 to 3 to one

creditor, namely, the plaintiff, over others, or in other words, that the bond was executed not so much to secure re-payment to the plaintiff as to

protect the defendants Nos. 1 to 3 and to enable them to retain their properties against the claims of other creditors.

2. In appeal, it is contended before us that even on his own findings the learned Subordinate Judge"s decision cannot be upheld. On the other hand

the respondents seek to support his decision by contending, firstly, that in fact on the day on which the bond was executed there was nothing due

by defendants Nos. 1 to 3 to the plaintiff, and secondly, by contending that even if there was such a debt due yet by the bond a benefit was

reserved to the debtor, it representing or concealing merely a secret trust in favour of the mortgagors.

3. As to the question of the debt it is not disputed that as a matter of fact defendants Nos. 1 to 3 had transactions with the plaintiff for a series of

years extending from 1307 to 1318. But it is contended that there was no arrangement made that; interest should be charged by the plaintiff or

paid by the defendants. We have been referred to many passages of the evidence in support of that contention, but we find there is ample oral

evidence in support of the agreement to pay interest. No doubt there are some discrepancies in that evidence as to the existence of what is spoken

of as Falat books, and no doubt it is the case that the Falats spoken of as kept by the firm of Pitamber and Nilamber from which the moneys were

actually taken for the benefit of the defendants have not been produced. Bat simply because the plaintiff and the defendants are relations, we see

no improbability in the plaintiff''s claiming and requiring them to pay interest on advances made to them. The oral evidence on the point is

supported by many entries in the plaintiff''s books of account, and is also further supported by the fact that the plaintiff himself had apparently to

pay interest to the firm from which the money was actually taken. It has been suggested that that firm and the plaintiffs firm are really one and the

same. But no doubt though there is a ""close relationship -between the partners, it cannot be said, and in fact there is no evidence to show, that the

businesses are not separate and independent, for these reasons we agree with the learned Subordinate Judge in holding that on the day the bond

was executed there was a sum of Rs. 18,000 and odd due by the defendants Nos. 1 to 3 to the plaintiff and that after granting a remission of a sum

of Rs. 2,000 the plaintiff obtained the bond in question for the sum of Rs. 16,000 due and owing to him.

4. In support of their second contention the respondents point to the following facts, that the defendant No. 2 is the plaintiff''s sister''s husband, that

though the transactions had extended over a period of some ten years, yet until the day in question resort to a mortgage-bond had not been had,

and that this mortgage-bond was taken after the plaintiff had knowledge of the debt due to, defendant No. 4 and of the pressure exercised by

defendant No. 4 on defendants Nos. 1 to 3, that the bond was in fact taken or at least registered a few days after the institution of the suit brought

by defendant No. 4 against defendant No. 1 and further that the bond provides for payment by instalments extending up to the year 1332. These

considerations, however, do not to our minds outweigh, the facts, namely, that there was in reality a genuine debt of some Rs. 16,000 due by

defendants Nos. 1 to 3 to the plaintiff, that there has been no exaggeration or overstatement of that consideration and there is in fact no'' suggestion

that the properties mortgaged exceeded in value the amount which they were intended to secure. Because the plaintiff is related to defendant No. 2

and was aware of the fact that defendant No. 4 was demanding his dues from defendants Nos. 1 to 3 and was bringing pressure to bear upon

them, are no reasons why the plaintiff should not require the defendants to secure the repayment of the money which was honestly due to him. In

fact we are of opinion that the Subordinate Judge has been misled by his misapplication of the case reported as Chidambaram. Chettiar v.

Srinivasa Sastrial 23 Ind. Cas. 714 : 18 C.W.N. 841 : 26 M.L.J. 473 : 36 M. 227 : 16 M.L.T. 286 : (1914) M.W.N. 754 : 16 Bom. L.R. 783 : 1

L.W. 963 : 20 C.L.J. 571 (P.C.). In that case it was found as a fact that of the consideration money only half was in fact due from the assignor and

the other half was not due from him but merely represented a benefit reserved for him. There is nothing of that nature in the present case, and the

principles applicable to the present case are to be found in the case reported as Musahar Sahu v. Hakim Lal 32 Ind. Cas. 343 43 I.A. 104 : 23

C.L.J. 406 : 30 M.L.J. 116 : 3 L.W. 207 : 20 C.W.N. 393 : 14 A.L.J. 198 : (1916) 1 M.W.N. 198 : 19 M.L.T. 203 : 18 Bom. L.R. 378 : 43 C.

521 (P.C.) and in the case reported as Mina Kumari Bibi v. Bijoy Singh 40 Ind. Cas. 242 : 21 C.W.N. 585 : 32 M.L.J. 425 : 1 P.L.W. 425 : 5

L.W. 711 : 21 M.L.T. 344 : 15 A.L.J. 382 : 25 C.L.J. 508 : 19 Bom. L.R. 424 : (1917) M.W.N. 473 : 44 C. 662 : 44 I.A. 72 (P.C.).

5. For these reasons we set aside the decree of the Subordinate Judge and decree the suit as a suit on a mortgage-bond against defendants Nos. 4

to 6 and as against defendants Nos. 1 to 3. If the money be not paid within three months from this date the mortgaged properties will be sold. The

issue as to the personal liability of defendants Nos. 4 to 6 will be decided should the plaintiff hereafter find it necessary to apply for a decree under

the provisions of Order XXXIV, Rule 6, Civil Procedure Code. This appeal is, therefore, decreed with costs against the contending defendant No.

4 throughout and with costs on the ex parte scale throughout against the other defendants.

Richardson, J.

6. I agree.