Alikjan Bibi Vs Rambaran Shah

Court: Calcutta High Court

Date of Decision: July 7, 1910

Citation: 7 Ind. Cas. 166

Hon'ble Judges: Mookerjee, J; Carnduff, J

Bench: Division Bench

Judgement

1. This is an appeal on behalf of mortgagor defendant in a suit to enforce a mortgage security. The case for the plaintiff is that on the 11th October,

1893, the appellant Alikjan Bibi bororwed Rs. 4,900 from Gopal Chand Agarwala, and executed in his favour the mortgage bond in suit. The

plaintiff further alleges that no payments have been made towards the satisfaction of the bond, and that the second defendant, who was indebted to

him for a large amount of money for the recovery of which he has obtained a decree against him on the original side of this Court, executed in his

favour a trust deed on the 7th September, 1908. On the 15th September, 1906, the plaintiff commenced the present action for recovery of the

sum due under the mortgage bond, and he joined as defendants, the mortgagor as well as the representative of the mortgagee whose interest he

claims to have acquired under the trust deed. The defendant resisted the claim substantially on three grounds, namely, first, that the plaintiff was not

entitled to maintain the action as he had not acquired any valid interest in the alleged mortgage-debt: secondly, that she had neither executed the

bond nor received the consideration mentioned therein: and, thirdly, that she was at the time of the execution of the mortgage-deed, an infant, and

consequently, even if she executed the deed, it was not binding upon her. The learned Subordinate Judge has overruled all these contentions, and

has held that there is really no defence to the claim. In this view, he has made the usual decree for sale, in favour of the plaintiff. The mortgagor

defendant has now appealed to this Court, and on her behalf, the decree of the Subordinate Judge has been assailed on the three grounds

unsuccessfully urged in the Court below. It has further been contended that the plaintiff is not entitled to succeed, inasmuch as he has not

established that the deed was executed under circumstances which would make it binding upon a pardanashin lady: in other words, it has been

suggested that the deed was not explained to her, and she had no independent advice in the matter of the transaction. In answer to this last

contention, it has been argued on behalf of the respondent that the defendant cannot be permitted to set up two inconsistent defences, that is, to

plead that the document was a forgery and was never executed by her, and in the alternative, that it was executed by her, but under circumstances

which do not make it binding upon her. In support of this position reliance has been placed upon the observation of the Judicial Committee in the

case of Mahommed Buksh Khan v. Hosseini Bibi 15 I.A. 81 : 15 C. 684. The first point, therefore, which requires consideration is, whether it is

open to the defendant to take inconsistent defences of this character.

2. In the case of Mahomed Buksh Khan v. Hosseini Bibi 15 I.A. 81 : 15 C. 684. the suit was brought by a lady to set aside a hibanama on the

ground that it had never been executed by her and had been fabricated. The issue raised, however, was in more comprehensive terms: ""Whether

the Hibanama on behalf of Sahjadi is genuine and valid, and executed with her knowledge and consent, or whether it was manufactured without

her knowledge and consent, or whether it was executed under undue influence."" It was on this issue that the Judicial Committee remarked as

follows:

In their Lordships'' opinion, the latter part of the issue ought not to have been admitted; it was absolutely inconsistent with the case made by the

plaintiff; it only becomes possible on the assumption that the alleged cause of action is unfounded.

3. The ground on which it was held that the question of undue influence should not have formed part of the issue, was that it was not only not part

of the plaintiff''s case, but actually inconsistent with the case set up by her. The head-note to the report, however, is very comprehensive and goes

beyond the actual decision of the Judicial Committee, inasmuch as it lays down that, where a'' plaintiff sets up forgery and undue influence, both

these questions cannot be tried in the same suit. The decision of the Judicial Committee, therefore, cannot be treated as an authority for an

inflexible rule of law that, inconsistent claims or defences cannot be set up by the same party in the same litigation. In fact, there is a considerable

body of authority for the contrary proposition, amongst ""which reference may be made to the cases of Ameeroonissa Bibi v. Woomarooddeen

Mahomed Chowdhry 14 W.R. 49 Lahshmi Bai v. Hari 9 B.H.C.R. 1 Ningappa v. Shivappa 19 B. 323 and Narayana Sami v. Rama Sami 14 M.

172 The decisions, however, are, by no means, uniform, and, although it has never been seriously disputed that on the same basis of facts two

distinct and inconsistent titles may be put forth [Chova v. Isabin 1 B. 209, it has been sometimes denied that inconsistent assertions of fact can be

permitted either in the plaint or in the written statement [Iyyappa v. Rama Lukshmamma 13 M. 549]. The question was considered recently by a

Full Bench of this Court in the case of Narendra Nath v. Abhaya Charan 4 C.L.J. 43 : 34 C. 51 : 11 C.W.N. 20 : 1 M.L.T. 364 where it was

ruled that inconsistent claims, for instance, a right of ownership, and in the alternative a right of easement can be set up by the plaintiff. Sir Francis

Maclean, C.J., observed that the rule thus laid down was in accordance with that of the Courts in England. The rule, as applied in the English

Courts, is to the effect that either party may, in a proper case, include in his pleading two or more inconsistent sets of material facts, and claim relief

thereunder in the alternative. Thus a plaintiff may rely upon several different rights alternatively, although they may be inconsistent [Phillips v. Phillips

4 Q.B.D. 127 at p. 134. and Child v Stenning 5 Ch. D. 695 : 46 L.J. Ch. 523 : 36 L.T. 426 : 25 W.R. 519]. Similarly it was ruled by Thesigor

L.J., in Berdan v. Greenwood 3 Ex. D. 251 : 47 L.J. Ex. 628 : 39 L.T. 223 : 26 W.R. 902 that a defendant may raise, by his statement of

defence, without leave, as many distinct and separate, and, therefore, inconsistent defences as he may think proper [see also Hawhesley v.

Bradshaw 5 Q.B.D. 302 : 49 L.J.Q. B. 333 : 42 L.T. 285 : 28 W.R. 557 : 44 J.P. 473.]. In the case of In re Morgan 35 Ch. D. 492 : 56 L.J. Ch.

603 : 56 L.T. 503 : 35 W.R. 705 it was further ruled that a pleading is not embarrassing merely because it contains inconsistent averments, though

whenever such alternative oases are alleged, the facts belonging to them respectively ought not to be mixed up, but should be stated separately so

as to show on what facts each alternative relief is claimed [Dauy v. Garrett 7 Ch. D. 473 at p. 489]. As Lord Justice Lindley puts it: ""a person may

rely upon one set of facts if he can succeed in proving them, and he may rely upon another set of facts if he can succeed in proving them;"" and it

appears to me to be far strict a construction of the order, (Order XIX, Rule 4 of the Rules of the English Supreme Court, which corresponds to

Order VI, Rule 2 of our Code of 1908), to say that he must make up his mind on which particular line he will put his case. One of two inconsistent

defences may be struck out as embarrassing or oppressive to the other side, though the statement that no inconsistent pleading can be pleaded was

not warranted by the rules, and was contrary to the established practice of the Courts. [See also observations of Lord Cranworth in Hickson v.

Lonbard L.B. 1 H.L. 324 at p. 336 referred to with approval by the Judicial Committee in Guthrie v. Abool Mozuffer 14 M.I.A. 53 at p. 66 : 7

B.L.R. 630 : 15 W.R. (P.C.) 50]. As an illustration of the Rule, it may be pointed out that a plaintiff has been allowed to sue for the cancellation of

a bond on the ground that it was a forgery, or in the alternative, that it was void for want of consideration [Jino v. Manon 18 A. 125]. Similarly, a

plaintiff has been allowed in the same suit to prefer a claim to have a partnership agreement with the defendant cancelled on the ground that he was

induced to enter into it by the fraud of the latter, or in the alternative, for dissolution of partnership and accounts [Bagot v. Easton 7 Ch. D. 1 : 47

L.J. Ch. 225 : 37 L.T. 369 : 26 W.R. 66]. In view, therefore, of the authorities mentioned and specially of the decision of the Full Bench in the

case of Narendra Nath v. Abhaya Charan 4 C.L.J. 43 : 34 C. 51 : 11 C.W.N. 20 : 1 M.L.T. 364, we are constrained to adopt the rule that it is

open to a defendant to raise by his written statement as many distinct and separate, and therefore, inconsistent defences as he may think proper,

subject only to the qualification that if the defence is embarrassing, the Court may, under Order VI, Rule 16, direct one of two inconsistent

defences to be struck out and the pleading amended. In the case before us, there was in the written statement of the defendant a denial of

execution of the bond. The language was not free from ambiguity, and there might be room for discussion whether the defence was intended to be

merely a denial of execution or in addition thereto a denial of intelligent execution without adequate independent advice. When the evidence came

to be adduced, the defendant was allowed, without any objection on the part of the plaintiff, to go into both these matters; she and her witnesses

were examined and cross-examined, not merely upon the question whether she had executed the document, but also upon the question of the

surrounding circumstances at the time of the alleged execution. Under these circumstances, it is too late for the plaintiff to raise any objection on the

ground that the defences put forward were inconsistent and on this ground to seek to oblige her to make an election at this stage of the case.

Indeed, it is worthy of note that in the case of Mahomed Bukhsh Khan v. Hosseini Bibi 15 I.A. 81 : 15 C. 684, their Lordships of the Judicial

Committee, examined the question, not merely of the genuineness of the document, but also of its alleged execution under undue influence. We

must, therefore, consider the present case from the point of view of both the objections urged by the appellant.

4. In so far as the first ground urged on behalf of the appellant is concerned, there is obviously no substance in it. It was contended in the Court

below that the effect of the trust-deed was not to transfer to the plaintiff the entire interest of the second defendant in the mortgage debt, but merely

to place him in the position of a sub-mortgagee. On this basis, it was argued that the plaintiff was not entitled to maintain the action. This contention

was overruled by the learned Subordinate Judge on the ground that, even if the plaintiff was treated as a sub-mortgagee, it was competent to him

to maintain the action, inasmuch as a sub-mortgagee of a right in immovable property, is entitled to a decree for sale of the mortgagee-rights of his

mortgagor. In support of this view, the learned Judge relied upon the case of Muthu v. Vehkatachallam 20 M. 35 which has recently been followed

by this Court in Zaki Hasan v. Deo Nath Sahai 4 Ind. Cas. 433 : 10 C.L.J. 470. The position, therefore, cannot be disputed that the plaintiff, as a

sub-mortgagee, is competent to maintain the suit. In this Court, however, an alternative ground has been put forward that the plaintiff is a mere

benamdar for the second defendant, and is incompetent to sue. This contention is clearly opposed to a series of decisions of this Court, amongst

which it is sufficient to mention Sreenath Nag v. Chunder Nath Ghose 17 W.R. 192 and Sachitananda v. Balaram 24 C. 644. The same view has

been taken by the Allahabad High Court [Yad Bam v. Umrao Singh 21 A. 380, though that Court has not adopted the view of this Court upon the

question of the right of a benamdar to maintain a suit for recovery of possession of immovable property. [Nand Kishore v. Ahmad Ata 18 A. 69.

and Mohendra Nath v. Kali Proshad Jahuri 30 C. 265 : 7 C.W.N. 229 the view taken in this latter case has been adopted in Madras

Koothuperumal v. Secretary of State 30 M. 245 : 17 M.L.J. 174]. But whatever divergence of judicial opinion there may be upon the question of

the right of a benamdar to maintain an action in ejectment, there is none as to his right to maintain a suit to enforce a mortgage security which stands

in his name, or has been assigned in his favour. .From this point of view, the plaintiff is clearly competent to maintain this suit. We are not satisfied,

however, that the plaintiff is either a sub-mortgagee or a benamdar for the second defendant. He is unquestionably a creditor of his, and has

obtained a decree against him: and at his instance and for the satisfaction of this decree, the second defendant has transferred to him, his mortgage-

rights and has authorised him to sue upon the mortgage, the sale-proceeds to be applied first is satisfaction of his own dues, and the balance, if any,

to be refunded to him. There is obviously nothing unlawful in this transaction. The plaintiff occupies the same position as the second defendant did,

and the latter, who is a party to the suit, has supported his claim. The suit is, therefore, maintainable, and the first ground urged by the appellant

must be overruled.

5. The second ground urged on behalf of the appellant raises a question of fact, namely, whether the defendant mortgagor executed the deed and

received the consideration. The Subordinate Judge has found upon this point in favour of the plaintiff. In our opinion, his view is manifestly right.

The evidence adduced on behalf of the plaintiff is conclusive, and we are not prepared to accept the denial of the defendant. The execution of the

bond has been satisfactorily proved by the second defendant, and there is good reason to believe that the husband of the lady, who had signed the

deed as an attesting witness, and had identified her before the Sub-Registrar, deliberately kept away lest he should be called upon to depose; in

our opinion, the assertion of the mortgagor that her husband had left the country on business and could not be cited as a witness, is not worthy of

credence. As regards the payment of the consideration money, the matter is equally beyond the possibility of dispute. The mortgage sets out the

serial numbers of the currency-notes given by the mortgagee to the mortgagor. An entry in the account-book of the latter, dated the 11th October,

1893, shows that four notes were made over to the mortgagor and one of these has been subsequently traced to her possession. The note in

question was received by her from the mortgagee, and made over by her to the parson from whom she purchased a property on the day following.

In other words, this currency-note was obtained by the mortgagor from the mortgagee, and was applied by her in the purchase of a property.

Under such circumstances, her denial of execution of the bond and receipt of the consideration money is obviously futile. The second ground

cannot possibly be sustained. The third ground raises the question whether at the time of the execution of the mortgage bond, the mortgagor was

an infant. The finding of the Court below upon this point has not been seriously contested. The learned Subordinate Judge has disbelieved the

evidence of the appellant on this point, and, in our opinion, very properly. The deposition of her mother, who might have given valuable evidence

on this matter, was never taken, and her husband also was not called. Even if it were true that he had temporarily left the country on business, it

should not, in ordinary course, have been difficult to communicate with him before the suit came on for trial. The, third ground cannot, therefore, be

sustained.

6. The fourth and last ground urged in support of the appeal, is that the plaintiff is not entitled to succeed without proof that the mortgage bond in

suit was executed under circumstances which make it binding upon the mortgagor, a pardanashin lady, as ruled by the Judicial Committee in the

case of Shambati Koeri v. Jago Bibi 29 I.A. 127 : 29 C. 749. It is not necessary for our present purposes to examine the decisions on this subject

as they were recently reviewed by this Court in the case of Bindu BashiniDasi v. Girdhari Lal Rai 3 Ind. Cas. 330. The principle is well-settled that

the Court, when called upon to deal with a deed alleged to have been executed by a pardanashin lady, must, before it gives effect to it, satisfy itself

upon the evidence, first, that the deed was actually executed by her or by some person duly authorised by her with a full understanding of what she

was about to do; secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered; and,

thirdly, that she had independent and disinterested advice in the matter. It must be remembered, however, that this doctrine applies only to the case

of execution of a document by a pardanashin lady properly so called. If a lady is not pardanashin, or, though pardanashin, is literate and of

considerable intellectual capacity, the Court will not be inclined to interfere with a deed which has been prima facie properly executed by her, or to

interfere with transactions to which her consent has been deliberately given. For instances of the application of this doctrine, it is sufficient to refer

to the cases of Badi Bibi v. Sami Pillai 18 M. 257 at p. 262, khatija v. Ismail 12 M. 380 at p. 381, Mahomad Bukhsh Khan v. Hosseini Bibi 15

I.A. 81 : 15 C. 684 and Ismail Mussajee v. Hafiz Boo 33 I.A. 86 : 3 C.L.J. 484 : 33 C. 773 : 10 C.W.N. 570 : 3 A.L.J. 353 : 8 Horn. L.R. 379 :

10 M.L.J. 106 : 1 M.L.T. 137. As Lord Hobhouse put it in the case of Hodger v. Delhi and London Bank 27 I.A. 108 : 23 A. 137, the principles,

which are applied to transactions of a certain well-known and easily ascertained class of women, cannot be extended, as a matter of course, to

those of women of another class who might be described by the term quasi pardanashin, that is, women who, though not strictly pardanashin, are

yet so close to them in kinship and habits, and so secluded from ordinary social intercourse, that a like amount of incapacity for business must be

ascribed and a similar amount of protection extended to them. Tested in the light of these principles, what is the position of the appellant? The

evidence makes it clear that she was not, at the time of the execution of the document, a strictly pardanashin lady. She was in no sense illiterate.

She was able to read Bengali, the language in which the document was drawn up, and she was certainly able also to write her name. Her

examination on commission leaves no doubt that she is a lady of considerable shrewdness and intelligence. The evidence is conclusive that the

deed, after it had been drawn up, was read over by herself, and she then voluntarily executed it. Under these circumstances, it would not be right

to hold that the deed deliberately executed by her is not binding upon her and may be successfully evaded. It cannot also be doubted upon the

evidence that the second defendant, whose father was the mortgagee, knew the lady at the time of the transaction. He was a lad of that part of the

town, and evidently mixed freely in the family circle of the mortgagor, who was his senior by about twelve years. The second defendant was

present at the execution, and we see no reason to doubt his testimony that she executed the document after she had read it over, and fully

understood its contents. In view of these facts, it would not be right to apply to this transaction the rule deducible from numerous decisions of the

Judicial Committee, of which one of the earliest is that of Buzloor Ruheem v. Shumsoonnissa 11 M.I.A. 551 at p. 585 : 8 W.R. (P.C.) 3 and one

of the most recent is that of Kishori Lal v. Chuni Lal 31 A. 116 : 9 C.L.J. 172 : 1 Ind. Cas. 128 : 13 C.W.N. 370 : 5 M.L.T. 58 : 11 Bom. L.R.

196 : 19 M.L.J. 186. It mute, further, be borne in mind that the lady had ample opportunity for independent advice, for her husband who appears

to have arranged the transaction was present on the occasion, attested the document, and identified her before the Sub-Registrar. Even, if,

therefore, the strictest tests were applied, we would be prepared to hold that the validity of the transaction has been amply established. The only

part of the case, which presents some apparent difficulty and demands scrutiny, is the provision for the payment of compound interest. The

covenant for the payment of interest provides that the rate is to be 12 per cent, per annum, and every four months the interest in arrears is to be

added to the principal sum. This, no doubt, is higher than the current rate of interest and some stress has been laid upon this circumstance by the

learned counsel for the appellant. After anxious consideration of the matter, however, we are satisfied that no just ground for our interference has

been established. All the provisions of the deed including the covenant for the payment of compound interest, are of the simplest character: the

language of the deed is plain and intelligible; the document was read over by the lady, and she was obviously satisfied with the terms, which had

been arranged before hand through her husband. There is no foundation for any possible theory that pressure was put upon the lady to induce her

to consent to a high rate of interest, although she was evidently in need of money. The parties knew each other well, and the transaction took place

at arm"s length. There is not the remotest suggestion of any misrepresentation on the part of the mortgagee, or of any undue influence exercised by

him over the mortgagor. Her act was prima facie a reasonable one, and she executed the bond with a free will and with intelligence. We are not

prepared to adopt the view that the transaction was of such an improvident nature as to indicate that she had no independent advice, or that

advantage was taken of any weakness or want of intelligence or business capacity on her part. We must, consequently, hold that the deed, in every

part of it, is binding upon her. We may add that the question of the interest payable on the mort-gage-debt appears, in the events which have

happened, to be one of purely academic interest. The suit was commenced at a time when the claim for a personal remedy against the mortgagor

had already become barred by limitation. The only decree, which was asked for and which could be made, was a decree for sale of the mortgage

property. That decree has been executed during the pendency of this appeal, because, although this Court directed a stay of sale if the judgment-

debtor furnished security to the satisfaction of the Court below, she failed to perform the condition. Although there is evidence of a somewhat

vague and loose character to show that the property might be worth Rs. 14,000 or Rs. 15,000, the mortgagee did no take any attempt to

purchase at the execution sale. The property, we are informed, has been sold for Rs. 9,200 and has been purchased by a stranger. Even, if,

therefore,"" we were induced to hold that the covenant for the payment of compound interest is not binding upon the mortgagor as its full effect was

not appreciated by her, and that the interest should, on this ground, be reduced to 9 per cent. per annum, the total amount due upon the mortgage

transaction would exceed Rs. 9,200. The mortgagee has not, therefore, realised more than what would be payable to him on an assumption most

favourable to the mor tgagor. Besides, as the property has passed into the hands of a stranger, even if the decree were modified, the sale would

not be affected [Mukhoda v. Gopal 26 C. 734, Shivlal v. Shambu 29 B. 435 : 7 Bom. L.R. 585 (P.B.), Janakdhari v. Gossain Lal 37 C. 107 : 1

Ind. Cas. 871 : 11 C.L.J. 254 : 13 C.W.N. 710], and, as the amount cannot, in any view, be reduced to a lower sum than what has been actually

realised by the decree-holder, any alteration in the decree would be of no practical benefit to the mortgagor. From this point of view, any further

examination of the question of the validity of the covenant for payment of compound interest must prove entirely fruitless. The fourth ground

consequently fails.

7. The result, therefore, is that the decree made by the Court below is affirmed, and this appeal dismissed with costs.