

(1874) 03 CAL CK 0001

Calcutta High Court

Case No: None

Gopalnarain
Mozoomdar and
Another

APPELLANT

Vs

Muddomutty Guptee
and Shosheebhoosun
Mozoomdar

Muddomutty Guptee Vs
Bamasoondery Dossee

 Shosheebhoosun
Mozoomdar Vs
Muddomutty Guptee
and Bamasoondery
Dossee

RESPONDENT

Date of Decision: March 17, 1874

Judgement

Sir Richard Couch, Kt., C.J.

These were appeals from a decision of Markby J., in a suit brought by Sreemutty Muddomutty Guptee against Gopalnarain Mozoomdar, the appellant in the first of the appeals, and three others. By the decree made by Markby, J., it was ordered and decreed that the Bait should be dismissed as against the defendant Bamasoondery Dossee with costs; and it was declared that the indenture of mortgage, dated the 24th of March 1865, is a valid security for the sum of Rs. 6,847-3-3, with interest thereon at the rate of twelve per cent. per annum from the 4th day of February 1865, as against the shares of the defendants Gopalnarain Mozoomdar, Ramnarain Mozoomdar, and Shosheebhoosun Mozoomdar, in the property comprised in the said mortgage; and it was ordered that it should be referred to the Taxing Officer to tax the costs of the suit; and upon the three defendants, Gopalnarain Mozoomdar, Ramnarain Mozoomdar, and Shosheebhoosun Mozoomdar, or any or either of them, paying to the plaintiff the said sum of Rs. 6,847-3-3, with interest thereon at the rate and from the time aforesaid, and her costs, other than the costs payable to the defendant Bamasoondery Dossee, with

interest thereon, it was ordered that the plaintiff should reconvey the premises comprised in the mortgage to the defendants, or such of them as should pay such principal interest, and costs; and in default of their paying the money at the time appointed, it was ordered and decreed that their shares in the mortgaged premises should be sold, with the directions usual upon such sales; and that, if the money to arise by such sale should not be sufficient to pay the said principal, interest, and costs, with interest thereon in fall, the three defendants, Gopalnarain Mozoomdar, Ramnarain Mozoomdar, and Shosheebhoosun Mozoomdar, should pay to the plaintiff the amount of the deficiency; and it was declared that, as between the defendant Shosheebhoosun Mozoomdar on the one part and the defendants Gopalnarain Mozoomdar and Ramnarain Mozoomdar on the other part, the said sum of Rs. 6,847-3-3, with interest, was payable as follows, that is Rs. 5,847-3-3, with interest, was payable by all those three defendants, and Rs. 1,000 with, interest was payable by the defendant Shosheebhoosun Mozoomdar alone, and subject to any order that may be made in the suit No. 351 of 1868, which was a suit for partition.

2. The learned Chief Justice, after stating the substance of the pleadings and the issues, continued:--

3. Although the plaintiff stated, as the fact is, that the mortgage purported to be made by Gourinarain Mozoomdar as executor, yet the substantial question was whether this mortgage did create a valid charge upon the property which was professed to be mortgaged. The statement in the deed that it was made by Gourinarain as executor, and the allegation in the plaintiff, were not material to the substance of the claim; and this issue,--was the mortgage deed so executed as to constitute a valid and binding charge against the defendants or either of them?--raised the real question. The case is similar in this respect to *Arbuthnot v. Betts* 6 B.L.R., 273, in which case the decision of this Court has been affirmed by the Judicial Committee of the Privy Council. There the plaintiffs brought a suit for the recovery of damages for a breach of contract. They alleged that the defendant Mr. Betts, for himself and his partners, entered into a contract with them for the purchase of 1,012 maunds of indigo, and that they were ready to deliver the seed, but the defendants refused to take delivery. The defence was that the defendants had given an order to the plaintiffs for the purchase of 1,000 maund of fresh and superior kind of seed, and that the plaintiff had purchased seed of an inferior sort, and the defendants had, on inspection, refused to take the seed. The District Judge framed an issue of a somewhat technical character, namely, "whether as two of the plaintiffs have stated that they acted as agents for the defendants in the purchase of indigo seed, the suit can proceed in its present form or not?" And he held that the plaintiffs were bound to prove the case which they had stated in the plaintiff, and that their denial of the existence of the relation of vendor and purchaser between themselves and the defendants was fatal to their claim. Upon an appeal to this Court, there being amongst the issues which had been framed by the Judge, one (the 3rd)--"what were the exact terms of the contract entered into between the plaintiffs and the defendants?" and another (the 4th) "have the plaintiffs fulfilled their part of the said contract?"--we were of opinion that the substance of the case ought to be

looked at, and that, if it had been necessary, the Judge ought to have amended the issues so as to raise the real question in controversy between the parties; but, in fact, no amendment was necessary, and we heard the case on the merits, and gave a decree for the plaintiffs on the ground that the case ought to be treated as one in which they sued to recover money due to them as agents, they having supplied seed to the defendants according to the order which was given to them to execute. This decree was affirmed on appeal by the Judicial Committee. The case shows that what is to be looked at is, not the precise form of the plaint, but what is the real question in the case; or, to use the language of the Judicial Committee in 6 M.I.A. 393 (Privy Council) , "the substance and merits of the case are to be kept constantly in view; the substance, and not the mere literal wording of the issues, is to be regarded."

4. The question, then, which we have to determine is, was this mortgage a valid charge upon the property? The debts of Hurrynarain Mozoomdar were by the Hindu law a charge upon his estate in the hands of the person to whom the estate came upon his death. It is not necessary to refer to any authority for this? it is a well known rule of Hindu law. And whether Hurrynarain Mozoomdar made a will, and in that gave any direction or power to sell or mortgage his property for payment of his debts, the sons to whom the estate came on his death,--or, if the family was in such a state that there was a manager for the joint family, the manager,--could mortgage or sell the property. The law gave him authority to do so for the payment of the debts. The sons appear to have continued, and it appears to have been the intention of the testator Hurrynarain Mozoomdar, that they should for a time continue, to be a joint family. There had been no separation before the mortgage was made--no separation in estate. Gopalnarain had attained his majority, but nothing appears to have been done to effect a separation in estate in consequence of it. That it was the intention of the testator that the family should continue for a time joint appears from the direction contained in the will that the two minor sons and the widow were to be maintained out of the joint estate, and also from the direction that the marriage expenses of any of the SONS were to be paid out of that estate. We think we must treat this family as continuing to be a joint family, so that the son who was acting as a manager for it, and was indicated by the deceased as the person who should manage, had the authority which is given by the Hindu law to sell or mortgage the property in order to pay off debts due by the deceased. That being so, this clause in the will has no operation as a trust or as a charge upon the property. It did nothing which the law had not already done, and which it would not do if there had been no such clause in the will. It is like the case in the English law of a trust or a charge by will upon personal estate for the payment of debts, the personal estate being vested in the executor or administrator as a fund for the payment of debts. This has been decided by the House of Lords in *Scott v. Jones* 4 Cl. & Fin., 382 in which the judgment of Sir John Leach was affirmed, and the judgment of Lord Brougham reversed. And in two cases subsequently decided, *Freak v. Cranefeldt* 3 Myl. & C., 499, and *Evans v. Tweedy* 1 Beav., 55, the doctrine has been acted upon. It appears to as that the case of the Hindu family with the power--and not only the power, but the obligation--to pay the debts by means of the property left by the deceased, is

precisely analogous to this case.

5. The eldest son, or the manager of the family, having power to raise money to pay the debts and to make the mortgage, can it be said that the charge which he made under the power which he possessed by the Hindu law is invalid, because he professed to do it as executor and by virtue of the power in the will, and not by virtue of his general power? Having the power to do it, we think that although the mortgage was not executed strictly in accordance with the clause in the will, still it can be supported, and should be supported, as having been done by virtue of the power conferred on him by law independently of the will, and that the parties interested in the property cannot be allowed to say that it should be treated as a void charge although the amount raised by the mortgage may have been properly applied, and that their shares in the estate are to be freed from liability. I shall come presently to the question of the validity of the mortgage, with reference to the purposes for which it was made. At present, I am speaking of the form in which it was made, and the power which the mortgagor professed to exercise.

6. Another question, which is important in this case, is with reference to the operation of the law of limitation. For the same reason as makes the form of the mortgage immaterial--that this clause in the will had not any legal operation as a trust or a charge,--it does not prevent the operation of the law of limitation. A trust or a charge in a will, if it takes effect and has a legal operation, would do so; but this simply had no effect, and according to the case to which I have referred, it would not prevent the operation of the law of limitation.

7. Taking these two matters as settled,--that the form of the mortgage, and its not being executed strictly in accordance with the will, does not affect its validity, and that the law of limitation might apply to the debts for which the mortgage was given as a security,--we have to consider whether this was a mortgage of such a description as would be a valid charge upon the property. Now the general rule is--and I here adopt the language of the Judicial Committee of the Privy Council in *Chetty Culum Comara Venkatachella Reddyer vs. Rajah*--that the money must be advanced to pay subsisting charges on the estate or otherwise for its advantage. There are cases in which a mortgage may be established, although the money may not have been actually so applied, but these are cases in which the person advancing the money, the mortgagee, has acted *bona fide*, and, after making due enquiry, has believed that this was the purpose of the mortgage.

8. We have then to see what part of the money for which the mortgage was made as a security was a subsisting charge on the property of the deceased, or was advanced to pay off a subsisting charge. We agree with Markby, J.; that the charge of fraud against the plaintiff has not been proved. It is not necessary to go particularly into that matter. Upon the evidence, the proof of that charge certainly failed, and this will be important upon the question of costs when I come to speak of that.

9. There were some objections taken on behalf of the appellants Gopalnarain and Ramnarain, which had better now be disposed of. It was objected that evidence had been improperly rejected by the learned Judge. It was said that a witness, Mohesh Chunder Banerjee, had not been allowed to depose to a fact which was stated in a memorandum produced by him, because he said he had no independent recollection of the matter. It appears to us, that the learned Judge was wrong there.

10. There was another objection; that an entry by Grish Chunder Banerjee as to business done in the office of the attorney connected with the preparation of the mortgage deed, was rejected. The object of this evidence appears to have been to show that Gourinarain, the mortgagor, gave the instructions for the preparation of the mortgage, and, in fact, acted as the real party in the matter,--acted on behalf of the plaintiff, the mortgagee, as well as on his own account,--and from this the Court would have been asked to infer that he was, as the defendants alleged, the real party, and that the name of the plaintiff was only put forward for him. Looking at what this evidence which was rejected would prove, namely, that he did give instructions for the deed, he being the son-in-law of the plaintiff, we do not think that the inference should be drawn which the defendants ask to have drawn. And it appears to us that, if this evidence had been received, it would not have varied the decision of the Court on the question of fraud. If that evidence had been admitted there would not have been evidence that the Court could come to the conclusion upon that the charge of fraud was proved. Therefore not only under s. 167 of the Evidence Act, but according to the well known rule which would be acted upon without any such provision in the Evidence Act, this would not be a ground for our reversing the decision of Markby, J.

11. It was said that not only do the instructions for the mortgage to which I have referred, show fraud, but that the recitals in the deed were untrue. There is some foundation for saying this but we do not think much importance should be given to those erroneous recitals, or to the non-payment of interest which was also relied upon; because the interest was, in fact, paid for some time, and it is not unlikely that the dissensions which arose in the family would put a stop to the payment of the interest. The great fact in support of the bona fides of the mortgage transaction on the part of the plaintiff is, that before the preparation of the English mortgage to which the instructions given by Gourinarain apply, there was the Bengali mortgage of the 4th of February 1865, and it appears from evidence, of the trustworthiness of which there does not appear to be any reasonable doubt, that the plaintiff's son had advised her not to advance any more money without getting a mortgage.

12. Another objection was taken to the evidence in the case, namely, to the admission of a copy of an ikrar. As to this, it does not appear to us that the evidence was of any consequence, and, therefore, that the admission of the copy instead of the original ikrar is an objection which an Appellate Court ought not to give effect to.

13. Another objection was that certain entries had been tendered by the defendants, and were rejected by the learned Judge. According to the rules and practice of this Court, the learned Judge was not bound to allow these entries to be used in evidence, and we cannot say that he was wrong. It appeared subsequently on the hearing of the cross appeal that the appellant Gopalnarain was not then prepared with translations of these entries. What he seems to have wished for was to have a kind of roving inquiry amongst the books in order to find out if there was anything in them which would be of use to him. That cannot be allowed at the hearing of the suit. The entries which were sought to be used ought to have been translated that the Court might peruse them. Great inconvenience would follow from any other course being adopted.

14. Having disposed of these minor objections, we come to consider whether any of the debts intended to be secured by the mortgage were at that time barred by the law of limitation. This objection arises on the plaintiff's case; it is not an objection which the defendants had to take in their written statements, or by way of defence to the suit. The onus was on the plaintiff to prove that the mortgage was a valid one: and if it appeared upon evidence that some of the debts were barred the case would not come within the requirement that the mortgage should be made to pay off a subsisting charge upon the estate.

15. It was argued that there was an acknowledgment of a debt by Gourinarain which was sufficient to prevent the operation of the law of limitation. But the manager of a joint Hindu family has no power to revive a debt by an acknowledgment, except as against himself. I am speaking of what the law was at the time of this transaction, s. 4 of Act XIV of 1859 being then applicable. It would not, we think, be right to apply in India the decisions of the English Courts as to executors in England being at liberty not to avail themselves of the law of limitation; because those decisions probably rest upon the peculiar position of an executor in England, and the rights which he may have from his having been considered originally to be the representative of the Ordinary, and to have entire power over the estate. They would not be a safe guide in this country, where amongst Hindus an executor really is not recognized. The probate of a will by a Hindu does not have the same effect as probate of a will in England, nor does the calling the man to whom the property is left executor put him in exactly the same position as an English executor. We, therefore, cannot apply those cases here, and there is no ground here for saying that any acknowledgment of Gourinarain would prevent the operation of the law of limitation.

16. It appears when we look into the evidence relating to the different sums for which the mortgage was given as a security, that only one debt, of Rs. 100 was not, at the time of the mortgage, barred by the law of limitation. All the other debts were of a date which made the law of limitation applicable. This debt of Rs. 100 appears to be satisfactorily proved. The plaintiff's evidence about it is corroborated by entries in the books which have been produced. There is an entry on one side at page 79, and the corresponding debt entry is given at page 78, of the additional paper book. It also appears that Rs. 947-3-3 were advanced to Gourinarain at the time of the mortgage. The evidence to

prove this, besides the plaintiff's evidence; is the recital in the Bengali mortgage, where the manner in which the money was advanced is stated, namely, by two Government promissory notes of which the dates and amounts are given, and they are valued. Then there was put in evidence a receipt for these very notes showing that they were applied for the benefit of the estate of Hurrynarain Mozoomdar, and there is the evidence of Baneemadhub Bhattacharjee to the same effect. This, we think, sufficiently shows that this sum of Rs. 947-3-3 was really advanced to Gourinarain at the time of the mortgage was made, and that it was applied in such a way, that it would be a proper subject for a mortgage of the property of the deceased Hurrynarain. Therefore, the result of an examination into the case is that the mortgage is valid for these two sums of Rs. 100 and Rs. 947-3-3. It is a valid mortgage of the four shares of the whole of the property which is comprised in it.

17. This leads us to the grounds of the plaintiff's appeal. The learned Judge, as it appeared when I read the decree, dismissed the suit against Bamasoondery Dossee, the owner of one share of the property. In the principle appeal, namely, that of Gopalnarain and Ramnarain against the plaintiff, she was unable to take this objection, and we allowed her to bring an appeal making Bamasoondery Dossee a respondent. It follows from what I have already stated that the plaintiff must succeed in this, and that the decree instead of being, as it is, a decree dismissing the suit against Bamasoondery Dossee, ought to be a decree establishing the mortgage, for the two sums I have mentioned, against her share of the property, as well as the shares of the other three defendants.

18. There is another question as to the Rs. 1,000 which was borrowed, and applied for the discharge, not of the debts due by Hurrynarain or for which his estate was liable, but for the debts of Lukhinarain. As to that sum the mortgage cannot be good. Gourinarain was not in a position to make a valid mortgage of the share of Lukhinarain separately from the shares of the others. The power which he had as manager of the family to make a mortgage of the shares of the whole would not extend to his making a mortgage of Lukhinarain's share to pay off the liabilities of Lukhinarain. The Rs. 1,000 appear to have been applied for the benefit of the estate of Lukhinarain. Shosheebhoosun Mozoomdar, who is the representative of Gourinarain, will be liable to pay that sum to the plaintiff, but will be entitled to claim it out of the estate of Lukhinarain. The person liable to the plaintiff is the representative of Gourinarain, the person who is possessed of his estate. Although the mortgage did not operate upon the four shares beyond the two sums I have mentioned, namely, Rs. 1,000 and Rs. 947-3-3 as against Gourinarain, who executed it, it was a good mortgage for the whole amount which was borrowed, or acknowledged to be due, by him; and the share of Gourinarain is liable for the whole Rs. 6,847-3-3: Shosheebhoosun. Mozoomdar, as representing him, and to the extent of the property of Gourinarain, which he is possessed of, is also liable for it.

19. But the decree made by Markby, J., provides that the three defendants, whose shares he held to be properly mortgaged, were to pay any deficiency arising after the sale. Now

with respect to Gopalnarain, and Ramnarain, and Lukhinarain, all the authority or power which Gourinarain had was to mortgage their shares of the property. He had no power as manager of the joint family to pledge their personal credit, and to make them personally responsible for the money which he was borrowing. The direction to pay the deficiency, resting upon the pledge of their personal Credit or on the agreement binding them personally, cannot be supported. And that part of the decree must be omitted.

20. Therefore the decree we propose to make in order to carry out what in our opinion, is the right determination of the questions between the parties, is this. We declare that the mortgage of the 24th March 1865 is a valid and effectual mortgage with respect to the whole of the property comprised therein, for the principal sum of Rs. 1,047-3-3 only, representing the sum of Rs. 100 and Rs. 947-3-3. We declare that the said mortgage is a valid and effectual mortgage with respect to the one-fourth share of Gourinarain Mozoomdar, and on the whole of the property comprised in such mortgage, for the whole of the principal monies purporting to be secured thereby. We direct an account to be taken of what is due for principal and interest in respect of the Rs. 1,047-3-3; and in the event of none of the parties interested in the equity of redemption paying off inch amount, to be certified within six months from the date of this decree with interest up to payment, the property is to be sold, with the usual consequential directions. In case of payment, the plaintiff is to reconvey according to the rights of the partial for which purpose all parties are to be at liberty to apply to the Court. This direction will only operate as regards Gourinarain's share in the event of his paying the whole amount which is due. If Rs. 1,047-3-3, and the interest upon it only should be paid, then the plaintiff will only be bound to reconvey the other three persons their shares, because Gourinarain's share will remain liable until the whole of the sum is paid off. We declare that as between the owners of the equity of redemption, the share of each, except that of Shosheebhoosun, is only liable to provide for a proportionate part of the soma to be paid for redemption. Take an account of what is due for principal and interest in respect of the entire amount purporting to be secured by the mortgage, and in the event of such amount not being paid off by Shosheebhoosun, or any other person, sell the one-fourth share of Gourinarain, and declare that the share of Gourinarain is in the first instance liable to pay the Rs. 1,000 which was advanced on behalf of the estate of Lukhinarain, but without prejudice to the right of Shosheebhoosun to prove or claim against the share of Lukhinarain for the amount of principal and interest which he shall have paid to the mortgagee in respect of snob sum.

21. To sum it up,--if Rs. 1,047-3-3 only should be paid, then the three sharers other than Gourinarain, or Shosheebhoosun representing Gourinarain will be entitled to have their shares reconveyed to them; and as between themselves each of them will be declared to be only liable to one-fourth of that sum, Gourinarain's share is subject to the whole sum secured by the mortgage, and is liable to be sold if the whole of that sum is not paid off.

22. It only remains to be determined what should be done as to the costs of the suit. It is true that the plaintiff has only partially succeeded in the suit. As to three of the

defendants, the mortgage has been established for only a comparatively small, part of sum which the plaintiff claimed: but in considering whether, on that account, we ought to deprive her of any part of the costs of the suit, we must take into consideration that these three defendants made charges of fraud against her which they have failed to establish. Looking at that fact, it seems proper that all the defendants should be made to pay the costs of the suit in the original Court, and we shall direct this to be done. As to the costs of the appeals, there has been a partial success in the appeal by Gopalnarain. He has succeeded in reversing the decree of the learned Judge as to a considerable part of the claim against some of the defendants; but he has succeeded in that by an objection which was taken for the first time in this Court. The objection that the debts were barred by the law of limitation was in fact not taken until the learned Counsel for the appellant was replying. A success of that kind does not entitle Gopalnarain to the costs of the appeal.

23. In the appeal of Shosheebhoosun he has been only partially successful. He has succeeded as to Bamasoondery; but he put forward a claim in respect of the Rs. 1,000 in which he has not succeeded. It seems to us proper that in that appeal no costs should be given.

24. The appeal by the plaintiff against Bamasoondery has been successful: but considering that it was not brought forward until the last moment, and looking at the nature of case, it appears to us that it would not be right to allow the costs of that appeal. The parties in all three appeals will bear their own costs of the appeals on scale No. 2.