(1878) 06 CAL CK 0014

Calcutta High Court

Case No: None

Mohesh Chunder Banerjee and Others		APPELLANT
	Vs	
Ram Pursono Chowdry and Others		RESPONDENT

Date of Decision: June 15, 1878

Citation: (1879) ILR (Cal) 539

Hon'ble Judges: Tottenham, J; Jackson, J

Bench: Division Bench

Judgement

Jackson, J.

The plaintiffs have brought the present suit to recover from the defendants Nos. 1 to 40, to whom were afterwards added certain persons passing under the name of Gisborne and Co., the sum of Rs. 6,901, due under two distinct accounts. The first part, or the sum of Rs. 1,200, is made up of the principal duo upon a bond, dated 11th Aughran 1281 (26th November 1874, viz., Rs. 645, and interest of a like amount due upon the same bond. The rest of the claim consisted of two amounts deposited in the Collectorate, respectively on the 13th May and 16th November 1875, to stay the sale of a patni taluk of which the bond previously mentioned purported to give the plaintiff a mortgage, and the interest upon those two payments. The bond, out of which the rest of his claim directly or indirectly arose, appears to have been executed by the defendants 1 and 17. These two persons are said to be the direct descendants or representatives of the persons originally registered in the zamindar''s sherista as owners of the patni, and in fact all the defendants who arc co-sharers in the patni may be said to fall under the category of Chowdrys or Boys descended from these two houses. The occasion of bringing in Messrs. Gisborne and Co. arises from the fact that that firm has acquired, either by purchase or by lease, the rights and interests of the defendants Nos. 3, 12, 13, 14, and 16, whom accordingly they claim to represent.

2. The judgment of the Court below after hearing the evidence was to this effect, that as to the principal and interest due upon the bond, the persons liable to the plaintiffs were those who signed and made the bond, and those who, being co-parceners in the property mortgaged, by their presence and acquiescence, were held to have taken part in the transaction,--that is to say, the defendants Nos. 1, 2, 4, 17, 18, 19, and 22. Against these defendants the Judge made a decree for the amount due on the bond, principal and interest. As to the moneys paid into the Collectorate, which formed the rest of the claim, the Judge held that those payments wore voluntary, and that the plaintiffs had no charge upon the patni taluk in respect of those sums.

3. The plaintiffs appeal both as to the dismissal of the latter part of their claim, and also as to that part of the decision which exempts the greater number of defendants from liability under their claim. It appears to us clear that, in the circumstances under which this bond was executed, it would be impossible to hold all the defendants, owners of this taluk, liable to the plaintiffs. There does not appear to have been any authority, either express or implied, on the part of any of the co-sharers, under which the defendants 1 and 17 could bind those persons, and therefore we think that the Judge is quite right in limiting the liability under the bond to the actual signatures and other defendants who were present and might be taken to have acquiesced in the execution of the bond and in the contracting of the loan, and for whose benefit in fact the loan was taken. It was suggested that even in this view of the case the number of defendants against whom the decree could be passed might have been extended. But it seems to us that the Judge has gone quite as far as ho could as to the number of such defendants. So far we think the decision of the Judge was correct.

4. The other and somewhat less simple part of the case is as to the character of the payments made by the plaintiffs on account of the Zamindar''s rent. It was contended on the part of two sets of respondents, and in particular on behalf of those defendants who are called Messrs, Gisborne and Co., that although it could not be denied, regard being had to the strong opinion expressed by the Judicial Committee of the Privy Council in the case of Nugender Chunder Ghosh v. Kaminee Dossee (11 Moore I.A. 258), that the payment of revenue due to the Government upon a taluk by the mortgagee, being a person having such an interest in the taluk as entitled him to pay the revenue due, entitles such mortgagee to a charge on the taluk as against all persons interested therein for the amount so paid; and further that a like principal or like considerations would apply to a case of payment of zamindar''s rent by a person having an interest in the patni, the old Sale Law, Act I of 1845, and Reg. VIII of 1819 being alike silent as regards any specific provision to this effect, yet that such principle would not apply to a case where the mortgagee was already protected in any manner so that in fact the omission to pay the Government revenue or the patni rent would not involve a loss of his advance; and it was suggested that in the present case such protection was in fact provided for the

mortgagee by a stipulation in the bond that, in the event of a sale for arrears of the zamindar''s rent, the lender, mortgagee, should be entitled to a first charge upon the surplus proceeds of the sale. Mr. Adkin, who laid this argument before us with much ability, was unable to refer to any authority on this question of principle; and in point of fact it does not appear to us that the circumstance of a mortgagee having provided or attempted to provide some protection to himself of the kind referred to in the suit would deprive him of the benefit of those equitable considerations for which authority is derived from the decision in the case of Nugender Chunder Ghosh v. Kaminee Dossee (11 Moores I.A. 258).

5. But further it appears pretty plainly on an examination of the case that in fact the so-called protection contained in this bond was really no protection at all, and placed the plaintiffs in no better position than they would have been in if no such condition had been inserted. It only purports to say, "if the aforesaid lot be sold at auction for arrears of rent, then you shall realize the amount with interest from the surplus sale proceeds of the aforesaid lot, and we shall have no objection against it." Whether or not such words could be considered as constituting a charge upon the property, it seems clear that, in the event of a sale, the surplus could only be dealt with in accordance with the terms of Clause 4, Section 17 of Regulation VIII of 1819, that is to say, "held in deposit to answer the claims of the talukdars of the second degree, or of others who, by assignment of the defaulter, may be at the time in possession of a valuable interest in the land composing the taluk sold or any part of it." We think, therefore, that the plaintiffs in this case had an interest to protect. They had not merely a right to recover the amount of their advance, but they held a mortgage to a certain extent over this property which, in the event of non-payment of the sum advanced, might have been sold for it. It appears to us, therefore, that the payments made by the plaintiffs to prevent the sale of this taluk, under the Putni Sale Law, were not voluntary payments, but Constituted a good charge on this property; and it makes no difference for this purpose whether the suit upon the bond is followed by a decree as against all the defendants sued or against a part of them. In the latter case, the plaintiffs will stand in the same position as if they had a mortgage of an undefined share of the property and that interest would authorize them to make the payment which they did. That part of the judgment, therefore, must be set aside. (Ultimately the case was remanded for trial of an issue irrelevant to the report.)