

(1873) 05 CAL CK 0005

Calcutta High Court

Case No: Regular Appeal No. 117 of 1872

Sreemutty Prosonno
Coomary Dabee and
Another

APPELLANT

Vs

Golab Chand Baboo

RESPONDENT

Date of Decision: May 22, 1873

Final Decision: Allowed

Judgement

Markby, J.

Now, before going to the judgment of the Court, I will state shortly what the two previous suits were, and what were the judgments passed in them. The first was a suit brought by Golab Chand Baboo, who is the defendant in this suit, against Rajah Baboo, who is described as an inhabitant of Lakhee Bazar, and Jotton Coomaree Dabee, mother and guardian of Gobordhun Baboo, a minor, and several other persons. We have not before us the record of that suit in the first Court, but only the judgment of the Appellate Court which however sets out pretty fully what the nature of the case was. It appears that the suit was brought upon what is called a kabinnama or deed of mortgage and a tamassuk on the allegation that a loan of Co."s Rs. 4,000 was taken for the purpose of repairing the dalan, &c. of the idol Luckhee Narain. The defence set up was in the first place that the money had been repaid. But it was stated that the main dispute between the parties was whether the money could be recovered from the property pledged or not. Now the question as to whether the money had been paid or not was fully decided by the Principal Sudder Ameen in favor of the plaintiff, but when he came to decide the other question as to whether the money could be recovered from the property mortgaged or not, he said that this point could be settled in the execution department. The plaintiff Golab Chand, who is now defendant in the present suit, was naturally dissatisfied with that decision, and preferred an appeal to the Judge complaining that the decision of the Principal Sudder Ameen had left the main question between the parties undetermined. He stated very properly that the points to be decided were whether his allegation that the money was borrowed for the purpose of repairing the dalan of the idol was true? and if that was true,

whether he was entitled to recover the money from the debutter property? In the appeal of the respondent, joint issue upon these two questions which were raised in various forms in the issues drawn up by the Appellate Court. Then the effect of the judgment of the Court is this:--The Judge points out that Rs. 4,000 was borrowed upon a kabinnama and also upon a bond, and that both the documents state that the money was borrowed for purposes connected with the temple. The Judge then having taken the opinion of the pundit of the Court comes to the conclusion that, inasmuch as there was no provision made in the grant of the debutter land authorizing the sale or mortgage thereof, the kabinnama could not be supported. The Judge then goes on to say with regard to the bond that it has been proved that the money borrowed was expended for the purposes therein stated, that is to say, for the purposes of repairing the dalan of the idol; and that notwithstanding the objection of the then defendant Rajah Baboo and the other objectors that the property cannot be pledged for a debt, and therefore its produce cannot be attached on account of a debt contracted by the sebit, the debutter property is liable for that bond debt; and the Judge gives a decree directing that the money should be realized from the proceeds of the debutter land. The second suit was brought by the same Golab Chand Baboo, the present defendant, against Kishen Pershad Surma, alias Rajah Baboo, whom he described as sebit of the idol Luckhee Narain Thakoor. There we have a full abstract of the plaint which shows that the plaintiff in that case alleged that the money was borrowed by the then defendant Rajah Baboo as sebit of the idol for the purpose of certain ceremonies connected with the worship of the idol, and for carrying on the necessary expenses of a certain litigation which was then going on in Court, and he prayed that the amount of the claim with interest thereon be awarded to him from the debutter property. The substance of the answer is that the defendant had not taken the money for the purposes of the idol worship, or for the costs of the litigation, that there was ample money out of the income of the idol to pay for the daily worship and other festivals, and also for all other purposes connected with the temple, and that the real truth was that the defendant had certain private transactions with the plaintiff for which the money was received. Issues were raised with reference to the allegations on both sides, and the Judge found that the money was borrowed by the defendant to defray the costs of the suit of debutter, &c., and it was declared that, if the defendant failed to pay the amount personally, it should be realized from the proceeds of the debutter mehal. Nothing certainly upon the face of it can be clearer than those proceedings are that the very point which is now raised in this case was raised by Rajah Baboo himself in both the former suits and also in the first suit by persons who, as far as we know, were quite independent of Rajah Baboo.

2. Now I find it a little difficult to understand how the Subordinate Judge has dealt with these decrees. He says, and perhaps says rightly, that, inasmuch as there is at any rate an allegation in the plaint that the decrees are fraudulent, the suit cannot be treated as barred by s. 2, Act VIII of 1859. But of course it was obviously necessary for him to go on and determine whether or not they were fraudulent, and I am not certain whether he means to say that there was any fraud in the mode in which those decrees were

obtained, or whether he assumes that that was so, because in his opinion the transactions which led up to them were fraudulent. The appellant, in drawing the petition of appeal, however seems to presume that the question of fraud in obtaining the decrees has not been disposed of by the Subordinate Judge. In his fourth ground of appeal, he says (reads) See ante, p. 334. Now that is by no means the only question in this case disposed of by the Subordinate Judge, and raised for our consideration in this appeal. One question which the appellant was desirous to contend was whether or not these lands were debutter; and there were also other questions which would have to be considered were it necessary to go into the whole appeal. But we were of opinion that the fourth ground of appeal was well-founded in law, and if it could not be displaced, it would be a complete answer to the whole suit. We therefore thought that it was a convenient course to call upon the other side to support the judgment of the Subordinate Judge upon that point. In doing so, Baboo Romesh Chunder Mitter, who argued the case in the first instance on behalf of the respondent, raised three very clear contentions. He contended in the first place, and no doubt he had a right to contend, that the Subordinate Judge had found, and the evidence established, that those decrees were fraudulently obtained; secondly, he argued that the decrees were not in such a form as to be binding on any person but Rajah Baboo himself; and, thirdly, that, independently of any question of former decree, a decree against a sebaity could be no more than prima facie evidence against his successor.

3. Now, with regard to the question of fraud, it would of course be a great help to us to have a clear finding by the Subordinate Judge upon that point. The real question, however, which we have to consider is as to whether or no the evidence supports that allegation. (The learned Judge went through the evidence as to the decrees being fraudulent and continued):--I feel bound to say that, even if the Subordinate Judge did think the decrees were fraudulently obtained, I find no sufficient evidence on the record to justify him in coming to that conclusion. I think, therefore, that upon that question we ought to hold that the decrees were obtained bona fide; that the parties were really at arm's length, and that Rajah Baboo was doing his best to get those suits dismissed. Throughout this case we have not heard a single word that could suggest that the other persons who were defendants in the first case had been implicated in any fraud with Rajah Baboo, and there is no direct evidence whatever of any fraud in connection with the second decree.

4. Then I pass on to the next point. It has been argued (and this objection will only apply to the first of those cases) that Rajah Baboo had not been, as far as we have any evidence before us, described in the plaint as sebaity of the idol, and that therefore that decree is not binding upon the sebaitys, his successors. But it is perfectly clear, from the abstract of the claim given in the decree, that Rajah Baboo was sought to be made liable as the sebaity of the idol, and it is also clear from the abstract of the answer that he had defended that suit as sebaity. No doubt, as a matter of form, he ought to have been described in the plaint as sebaity; but I do not think that that alone would be sufficient

ground for saying that the decree is not binding upon any person except Rajah Baboo himself.

5. The last point is that which has been most strongly argued, namely, whether or not the decree against a person as sebaite of the idol is binding on his successor. Now upon that point we have the authority of a Division Bench of this Court, *Kissnonund Ashram Dundy v. Nursingh Doss Byragee* Mar. Rep., 485 and it has not been attempted by either of the Counsel for the respondent to distinguish that case or the case of *Juggut Chunder Sein v. Kishnanund* 2 Sel. Rep., 126 on which that case was founded, and which was also cited by Mr. Woodroffe. Those cases establish that a decree obtained honestly against a sebaite is binding on his successor, and we see no reason to doubt the correctness of those decisions. A great deal of argument has been imported in this matter as to whether a sebaite could alienate debutter property, or how far he would be barred by limitation, or whether an arrangement made by a person in charge of such property in reference to the property would be binding on his successor. All that as it appears to me has nothing to do with the present case. The question which we have now to consider is whether the decrees which were obtained against Rajah Baboo are binding upon the present plaintiffs, and in deciding that point, we have no hesitation in following the decision of *Norman and Kemp, JJ.*, in *Kissnonund Ashrom Dundy v. Nursingh Doss Byragee* Mar. Rep., 485 unless there is any superior authority to the contrary. But the decisions of the Privy Council which have been referred to do not appear to me to have any bearing upon that question. The decision in *Jewun Doss Sahoo vs. Shah Kubeer Ooddeen* was actually before *Norman, J.*, when he delivered his judgment, and what the question there was appears in page 421, namely, whether a matwali has a right to alienate or transfer wakf property by gift or otherwise. And no doubt this case is an authority that he cannot do so; but it has nothing to do with the question which we have to consider. Then, with regard to the case of *Lalla Bunseedhur vs. Koonwur Bindeseree Dutt Sing* and , if the circumstances of that case are looked at, it is plain that it has no bearing upon this case. What is binding is a decree of Court properly obtained, and not a mere agreement which the parties have entered into for their own purposes and embodied in a decree, drawn up by consent. In that case what happened was that a previous arrangement having been made between the parties for their own purposes, the suit was commenced on one day, and on the following day a compromise was made and a decree given, and Lord Chelmsford in dealing with it says:--"You get a cognovit for us. 54,000 on an advance of Rs. 26,986, borrowed according to your argument to save the estate, but under that cognovit, or confession of judgment, you force a sale yourself and actually buy in the minor's estate can that stand? "The use of the word "cognovit" shows how the Privy Council looked at it; and of course that is not an instance of a decree for the purposes of the question which we are now considering. The only other case quoted is *Maharanee Shibessuree Debia v. Mothooranath Acharjee* 13 Moore's I.A., 270, see 275. There is nothing in that case very precisely bearing upon the present question. I think however that it is quite enough to cite one passage in it. The Privy Council say in giving judgment that, "if the decrees appealed against stood un-reversed, the title to hold at a fixed

invariable rent would, on the pleadings, and especially on the judgments, be viewed as *res judicata*, binding on the parties and those claiming under them." It seems to me that the Privy Council would never have used that language had they intended to intimate an opinion adverse to the opinion expressed by Norman and Kemp, JJ., in the case I have referred to.

6. This being the view that we take of the case, all the other questions which have been taken in this appeal, and which were raised in the Court below, are questions upon which we need not express any opinion whatever. We confine our judgment entirely to the objection taken in the fourth ground of appeal, and hold that the decrees which the plaintiffs seek to set aside, were fairly and honestly obtained as far as appears on the evidence before us, and that therefore they are binding upon the parties, and that the proceedings taken with reference to those decrees are also binding upon them.

7. There were two other questions raised by the Advocate-General in this case. One was that the order for attachment and appointment of a manager which had been made in execution of those decrees was not authorized by Act VIII of 1859. But no such point was raised in the Court below, or in this Court by cross-appeal, and I think it is sufficient to say that nothing has been shown to us upon which we can say that there was anything wrong in the proceedings that have been taken. The other point was that there ought to be an enquiry now to ascertain whether the amount covered by those decrees has been realized from the profits of the property through the manager. We think it is unnecessary to consider this point. It is quite sufficient to say that no such prayer has been inserted in the plaint. If the plaintiffs wish to have an enquiry made upon this point, it must be in a proceeding properly framed for that purpose. The result is that the decree of the lower Court ought to be reversed, and the plaintiffs' suit dismissed. The appellant is entitled to his costs both in this Court and in the lower Court.