(1869) 03 CAL CK 0026

Calcutta High Court

Case No: None

Raja Sahib Prahlad Sen	APPELLANT
Vs	
Baboo Budhu Sing	RESPONDENT

Date of Decision: March 12, 1869

Final Decision: Allowed

Judgement

1. Their Lordships have now to dispose of five appeals in which the same person, Raja Prahlad Sen, is an actor, being in four of them the appellant, and in the fifth the respondent. Though the cases are not otherwise connected with, or dependent on, each other, it will be convenient to state certain facts relating to the Raja and his title which are common to all. He is now in undisputed possession of the Raj and zamindari of Ramnagar, the title to which was in litigation from 1835 until 1858. He originally sued for them as guardian on behalf of his infant son under a deed of gift; they were at the same time claimed by Run Mardan Sen as a son of the former Raja, Amar Pratap Sen, and by other parties, under different titles. Ultimately the right of succession of the present Raja as the nearest collateral heir of Amar Pratap Sen was declared by a decree of the Zilla Court dated the 27th of February 1845, and that decree was affirmed on appeal by the Sudder Court, on the 9th of September 1846. From that date the litigation was confined to the Raja and Run Mardan Sen, who alone preferred an appeal to Her Majesty in Council, which was finally determined in the Raja''s favour, in January 1858. The estate was in the possession of one of the widows of Amur Partab Sen from the time of his death in 1834, until February 1840, when she died. The Collector of the district was then directed to keep it under attachment until the title to it should be determined in the pending litigation. After the Sudder Court''s decree in 1846, an order was made that the Raja should be put into possession on giving security to abide the event of the appeal to England, but owing to delays in perfecting that security he did not obtain actual possession until June 1848. The security afterwards failed; the Raja was unable to give fresh security to the satisfaction of the Courts; an order was made on the 18th of May 1854, that the property should again be attached by the Collector; and it remained under

attachment from that time until possession was restored to the Raja in 1858, upon the determination of the appeal in his favour. Having stated these facts and dates, their Lordships will proceed to deal with the several appeals in their order, beginning with that in which Budhu Sing is respondent. The suit, out of which this appeal has arisen, was brought to recover from the appellant (the Raja) possession of a four-anna share of certain specified property, comprising the whole, or a very considerable part of the zamindari of Ramnagar. The original plaintiff was a Mussulman lady, claiming to be, at least for the purposes of the suit, the sole representative of her late husband, Sultan Jan, who was the sole representative of one Kaja Hossein Ali Khan. After the institution of the suit she sold all her interest therein to the respondent, who has been substituted as plaintiff on the record, and may be taken to have all the rights in the subject-matter of the suit which could have been successfully asserted either by Kaja Hossein Ali Khan, or by Sultan Jan.

2. His title is founded on a kabala, or bill of sale, of the property in dispute, which is admitted to have been executed to the Kaja, by the appellant, on the 23rd of September 1844, and therefore at a time when the latter neither was in the possession of the zamindari, nor had established in any Court his title thereto. The case of the respondent is that this bill of sale expresses the real contract between the appellant and the Kaja, which was one for the absolute sale by the former and purchase by the latter of a four-anna share of the specified property, for the price of 75,000 rupees, and that that sum was actually paid down in cash when the instrument was executed.

3. The case of the appellant is, that being in want of funds to carry on his suit for the Raj and zamindari, and for his own support, he applied to the Raja, who agreed to make advances for those purposes on condition of having the bill of sale executed, registered, and duly notified in the pending suit; that no part of the expressed consideration or sum of 75,000 rupees was paid on the execution of the instrument; and that though the Kaja, from time to time, advanced small sums of money, the whole amount of his advances fell far short of 75,000 rupees; that afterwards the Kaja absconded from Patna on a charge of disaffection to the Government, whereupon it was agreed between his son, Sultan Jan, and the appellant, that a bond for 76,000 rupees, hypothecating the whole of the property in question, and not merely a twelve-anna share of it, should be substituted for the instrument importing the absolute assignment of the four-anna share; and that, accordingly, such a bond was executed by the appellant to Sultan Jan on the 7th of March 1846; but that the 76,000 rupees was merely a nominal consideration, of which no part was paid, the real contract being one to secure moneys already advanced with future advances which Sultan Jan undertook but failed to make.

4. The questions thus raised between the appellant and respondent are not now litigated for the first time. In August 1848, Sultan Jan instituted two suits against the appellant, of which one being almost identical with the present, was brought to

recover possession of the four-anna share of the property under the title founded on the bill of sale; and the other was for the recovery of the 76,000 rupees purported to be secured by the bond which he alleged to have been advanced in addition to the 75,000 rupees said to have been paid on the execution of the instrument of September 1844.

5. Both these suits were dismissed by the Zilla Judge (Mr. Hathorn). He held that the plaintiff''s story in one suit as to the payment of the 75,000 rupees, and in the other as to the payment of the 76,000 rupees was false; and in his judgment in the bond suit he expressed an opinion that the appellant''s account of the transactions was substantially the true one. There was an appeal to the Sudder Dewanny Adawlut against both decrees. The appeal in the bond suit was absolutely dismissed. On the other appeal the pleaders for the respondent (the present appellant) unfortunately raised a question as to the sufficiency of the stamps on certain documents which had been put in evidence; and the Sudder Court, avoiding the decision of the case upon its merits, directed the suit to be dismissed on that ground only; and consequently gave to the plaintiff, Sultan Jan, all the advantages which a judgment of non-suit has over a judgment for the defendant.

6. The result, however, of that litigation was a conclusive decision against Sultan Jan in the bond suit; whilst in the other suit a decision on the merits was passed against him in the Zilla Court, which was only so far qualified by the decree of the Sudder Court that he was left at liberty to bring a new suit. The date of that decree was the 4th of January 1853.

7. In this state of things the present suit was instituted on the 22nd of August 1856. It was brought in the Court of the Principal Sudder Ameen, who dismissed it with costs; and on appeal his decision, except as to costs, was confirmed by the Zilla Judge (Mr. Atherton). Both decisions proceeded upon the assumption that the respondent''s case as to the payment of the consideration of 75,000 rupees was false, and the appellant''s true. And both Judges, conceiving that their decision on this point was sufficient to determine the suit, omitted to decide an issue which expressly raised the question whether the bond for 76,000 rupees of 1846 had been given in substitution for the absolute bill of sale of 1844. According to the practice of the Courts of India, these two decisions were final in India on questions of fact, though on questions of law or procedure there lay a special appeal to the Sudder Court. Such an appeal was in fact preferred. It is unnecessary to state any of the grounds of it, except the 4th, which is to the following effect:-- "If, for argument''s sake, it be admitted that the defendant did not receive the full price, yet by reason of his acknowledging to have executed a bainama (bill of sale), a decree in this suit would be just and indispensable, because the defendant has the power to sue for the recovery of the balance of the purchase-money."

8. On that appeal, the Sudder Court, on the 27th of September 1860, made the decree, which is the subject of the present appeal. Though bound by the finding of

the Courts below that the 75,000 rupees had not been paid as alleged by the plaintiffs, the Judges who sat on the appeal, nevertheless, proceeding upon a statement in Mr. Atherton''s Judgment to the effect that the advances made to the appellant probably amounted to about 18,000 or 20,000 rupees in all, arrived at the conclusion that the real and final contract between the parties was one of absolute sale and purchase, upon which there had been a partial payment of the purchase-money. They further held, that in these circumstances a complete title to the lands passed to the Kaja by virtue of the bill of sale on its execution; and (by a supposed application of the doctrines of English Courts of Equity) that the vendor in possession of the lands was to be treated as having only a lien for the unpaid balance of the purchase-money; and was to be held accountable as a mortgagee in possession for the rents and profits. They, accordingly, remitted the cause to the Judge, with directions "to decide it de novo in his Court, on the points now mooted, or upon others which fairly arise on the pleadings."

9. Before they consider whether the principles upon which the Judges proceeded were sound in themselves, or applicable to a transaction of this nature between Hindus or between a Hindu and a Mussulman, their Lordships must observe that this application of them assumed a state of things which was not consistent with the case made by either party, and was certainly not necessarily implied by the findings of the Courts below upon the issues of fact. For even if those Courts had found that advances within a certain limit had been made, it did not follow that they were made in part payment of the consideration for a subsisting contract of sale, and not, as the Raja insisted, upon a contract for security. And, indeed, the decree under appeal, by remitting the cause for trial upon the points fairly arising on the pleadings, including the undetermined issue as to the substitution of the bond for the original contract, left this very point open.

10. Their Lordships, however, are of opinion that even if this question of substitution had been determined in favour of the respondent, the decree of the Sudder Court would, nevertheless, have been erroneous. It is not easy to see what principle of an English Court of Equity, supposing such to be properly applicable to the case, would support the conclusions to which the Judges of the Sudder Court have come upon the facts before them. Their business was to decide the rights of the parties under the particular contract and upon the facts found by the Courts below, according to equity and good conscience. They seem to have ruled that the effect of the execution of a bill of sale by a Hindu vendor is, to use the phraseology of English law, to pass an estate irrespectively of actual delivery of possession: giving to the instrument the effect of a conveyance operating by the Statute of Uses. Whether such a conclusion would be warranted in any case, is, in their Lordships'' opinion, very questionable. It is certainly not supported by the two cases--Gopeechurn Kur v. Koroona Dabee (S.D.R., 1857, 225) and Surbonarayan Sing v. Maharaj Sing (S.D.R., 1858, 601)--cited in the judgment under review, in both of which actual possession seems to have passed from the vendor to the purchaser. To support it, the

execution of the bill of sale must be treated as a constructive transfer of possession. But how can there be any such transfer, actual or constructive, upon a contract under which the vendor sells that of which he has not possession, and to which he may never establish a title? The bill of sale in such a case can only be evidence of a contract to be performed in futuro, and upon the happening of a contingency; of which the purchaser may claim a specific performance if he comes into Court showing that he has himself done all that he was bound to do. In the present case the purchaser had alleged that he was in that condition, having paid the whole of the price at the date of the execution of the instrument; but that allegation had been found to be false. Nor, if the fact had been, as assumed by the Sudder Court, that part of the purchase-money was paid upon the execution of the contract, and the purchaser had come into Court alleging such part payment and tendering the balance, does it follow that he would have been entitled to a decree for specific performance; for the contract sued upon is an eminently speculative, not to say a gambling, one. On the face of it, the vendor agrees, in consideration of a sum presently paid, to sell that which he has not, and may never have; and the price is presumably fixed upon a calculation of the risk undertaken by the purchaser, at a sum far below the real value of the thing sold. But if the purchaser under such a contract has retained part of the price for several years and until the risk has been determined by the happening of the contingency, he has pro tanto diminished the risk which he contracted to bear; and the vendor has pro tanto lost that for which he stipulated--the present use and enjoyment of the money. The contract, therefore, has become incapable of being performed according to the true meaning and intent of the contracting parties. Their Lordships are, therefore, of opinion that the decree made by the Sudder Court upon their assumption of the facts was, in every point of view, erroneous, and cannot be supported.

11. They have now to consider not only what decree the Sudder Court ought to have made on the special appeal, but what ought to be the final decree in the suit; since in order to do complete justice between the parties, they have allowed the learned Counsel for the respondent to impeach the decrees of the two lower Courts, and to argue the whole case upon the merits. And it has been so argued very ably by Mr. Bell. The first and most material question is, whether it has been correctly found that the 75,000 rupees were not paid, as alleged by the respondent, upon the execution of the bill of sale. That has been so found by three Courts in India: and, therefore, in attempting to disturb the finding, the learned Counsel undertook a more than ordinary burthen. He argued, however, that the two decisions in this suit gave undue weight to the former decision of Mr. Hathorn; and that that gentleman''s judgment had not allowed sufficient weight to the presumptions arising from the admitted acts of the appellant in executing the bill of sale, and the receipt for the purchase-money, and in subsequently recognizing them. Their Lordships fully concede, that though, according to the law and practice of the Courts in India, those acts were not conclusive evidence against the appellant, the

presumptions arising from them ought to have been allowed due weight upon the trial of the issue, whether the consideration had been paid as alleged. They observe, however, that the issue came ultimately to be determined upon the testimony of conflicting witnesses, of whom the Judge held that some were credible and respectable, and others altogether unworthy of credit. Nor, can their Lordships say, after giving full weight to the presumptions in question, and to the other circumstances in the case, that the finding was wrong. They are disposed to believe, that the real arrangement between the appellant and the Kaja was for advances to be made from time to time; and that the form of the contract was adopted in order to evade the effect of the decisions of the Indian Courts in respect of what they consider champerty. They think, therefore, that there is no ground for disturbing the finding that the 75,000 rupees were not paid as alleged; and it follows, from the reasons which they have already stated, when dealing with the judgment of the Sudder Court, that if that finding was correct, the suit was properly decided in the appellant''s favour upon it. Their Lordships, however, think it right to add, that upon the evidence, corroborated as it is by the fact, that the bond hypothecated the whole, and not only three-fourths of the property in question, they think that the issue as to the substitution of that security for the bill of sale would also have been properly found in the appellant''s favour.

12. Mr. Bell pressed upon their Lordships the propriety of doing complete justice between the parties, by imposing upon the appellant the terms of repaying the advances actually made to him by the Kaja and Sultan Jan. They do not see how they can do this in the present suit, of which the dismissal will not prevent the recovery of those advances if they are still recoverable. Sultan Jan''s proper course was to sue for the repayment of them in the bond suit, if they were included in that security; or if they were not so included, under his general title as representative of his father. If, in consequence of his failure to do so, or of the lapse of time, the remedy is gone, their Lordships may regret that result; but they do not see how they can supply a new remedy by imposing terms upon the appellant, who is not in this suit seeking the aid of the Court; but is sued upon a different and inconsistent cause of action. And the difficulty of taking such a course is increased by the circumstance that the respondent is not the representative of the Kaja or of Sultan Jan for all purposes, but is merely the assignee of the rights which Farkhunda Khanum has specially claimed in this suit. Their Lordships, therefore, will humbly recommend to Her Majesty that this appeal be allowed with costs; that the decree of the Sudder Court be reversed, and that in lieu thereof an order be made, dismissing the special appeal with costs. The effect of this will be to affirm the decree of Mr. Atherton. Their Lordships are not disposed to interfere with the discretion exercised by him in respect of the costs of the suit in the lower Courts.