
(1872) 09 CAL CK 0008

Calcutta High Court

Case No: Regular Appeal No. 177 of 1871

Nuthoo Lall Chowdhry
and Others

APPELLANT

Vs

Shoukee Lall and
Others

RESPONDENT

Date of Decision: Sept. 11, 1872

Judgement

Sir Richard Couch, Kt., C.J.

On the 11th of Jeit 1271 (1st June 1864), a bond was given by the defendants Domun Lall and Bhawani Pershad to the plaintiffs, the bond reciting that the parties had taken a loan of Rs. 20,000, and that they had appropriated that sum "to the use of all of us," and then going on to say, until payment of the said amount, principal with interest, we pledge and hypothecate our own share of the property in Mouzah Cherowtha, and 11 annas and 9 dams in Mouzah Nowada Kullan. In the beginning of the bond, they describe themselves as proprietors and shareholders of Mouzah Jurooah. Whether that means; some other mouzah or not does not appear; probably it means the one which is afterwards mentioned in the bond. That was in June 1864. In February 1865, the plaintiffs instituted a suit against Domun Lall and Bhawani Pershad, the parties to the bond. In that they claimed to recover Rs. 22,250, principal with interest, by virtue of the bond. The defendants apparently did not appear, and evidence having been entered into as stated in the judgment, a decree was made in favor of the plaintiffs that they should recover the sum which they claimed from Bhawani Pershad, Domun being exonerated from the claim.

2. It is not, I think, without significance that, so soon after the bond was given, the plaintiffs put that construction upon it, treating it as a bond by the two only, Domun Lall and Bhawani Pershad.

3. It appears that the plaintiffs executed that decree, and according to the statement in the plaint in the present suit, they sold the right and interest of the two persons named in it; still in the execution of the decree, treating it as an instrument which had pledged the shares of those two. They recovered the sum of Rs. 7,435, and now, instituting a suit on

the 3rd of December 1870, they say:-- "Since the decree was not against all the defendants, the whole of the mortgaged property in which second party, defendants, held a share was not put up to sale, but the fact is, that there being community of interest, the loan was taken and mortgage concluded alike by all defendants; hence all of them are jointly liable to your petitioners, and the entire property ought to be held liable." So their case now is that this, instead of being a bond by the two and a mortgage of the shares of the two, was in reality a bond by all the members of the family jointly and a mortgage of the family property.

4. I will assume they might show that, although this bond purports to be made by two only of the family, the transaction really was a borrowing of money by the family through these two persons as the managers, and a pledging of the family property as a security for the money so borrowed. They might show that the transaction was one in which the persons whose names are in the bond, and who entered into the contract, were acting as agents for the family. But the bond must be one thing or the other; it must be either a bond by the two and a mortgage of the shares of the two only, or the joint bond of the family; it cannot be treated as two bonds. If it is only a bond by the two, the plaintiffs have no cause of action in the present suit, because they have already sued the two, and recovered a portion of the money from them, and they cannot sue other person" not bound by it; but if it is a joint bond by the members of the family, then they have already sued upon it. They have elected to sue some of the persons jointly liable, and not the others, and they have got a decree upon the bond, the cause of action being the non-payment of the money which the parties were jointly liable to pay. They now sue on the same cause of action the persons whom they might have joined in the former suit, but did not choose to do so. If there is a joint contract, not a joint and several, but a joint contract, and that is all this can be, and the party sues upon it and gets judgment, he cannot bring a fresh suit against the persons who were jointly liable, but were not included in the former suit.

5. Notwithstanding the authority of the case to which we have been referred, *Ramnath Roy Chowdhry v. Chunder Sekhur Mohapattur* 4 W.R., 50 and with every respect to the learned Judges who held apparently to the contrary, I am of opinion that, if this is to be considered as a joint bond by all the members of the family, the present action cannot be maintained. It is a second suit on the same cause of action. It is expressly prohibited by s. 2 of Act VIII of 1859, as the defendants in the first suit must, if the other defendants insist upon it, be made parties to the second, and without that I should say on principle that it cannot be maintained.

6. Upon the merits of the case, also, it seems to me that the plaintiffs have failed to make out what they allege in their plaint, that it was a bond by which all the members of the family were bound, and that like mortgage was concluded alike by all of them. (His Lordships discussed the facts of the case and concluded,--) It appears to me, therefore, that both on the question of law and on the merits, the plaintiff's case fails, and the appeal must be dismissed with costs.