

**(1869) 02 CAL CK 0025**

**Calcutta High Court**

**Case No:** Special Appeal No. 772 of 1868

Lala Tilakdhari Lal

APPELLANT

Vs

James Furlong and Another

RESPONDENT

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**Date of Decision:** Feb. 11, 1869

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### **Judgement**

E. Jackson, J.

The plaintiff in this suit sought to recover a certain sum of money due to him from defendant Syed Korban Ali, who, it appears, was a batwara amin, employed on the part of Government, and to have it declared that certain fees, which were in deposit in the Collectorate, were mortgaged to him by the said amin; and that under that mortgage, he (the plaintiff) held a prior lien upon those fees, to the Court of Wards, defendant No. 2, who appears to have also, in execution of a decree, attached those fees in order to recover certain money to which the defendant No. 2 was entitled. It appears that the plaintiff brought a previous suit against the defendant No. 1, and obtained a decree in that suit. His present suit is specially for a declaration of his lien upon those fees, and of his right to obtain them in preference to defendant No. 2.

2. Both the Courts below have dismissed the plaintiff's suit. The Judge has dismissed it, firstly, because the attachment of the defendant No. 2 had been carried out before the plaintiff had obtained any decree declaring his lien; and, secondly, because the mortgage was indefinite in its terms, and could not be sustained. It is on these two points that the special appeal has been pressed before us.

3. I am of opinion that the Judge below is wrong on both the points. The attachment on the part of defendant No. 2 was merely with a view to prevent the amin from taking the money out of Court. It is not material whether the attachment was before or after the judgment. The question still remains, viz., after the attachment to whom is the money to be given, and that is the point to determine which this suit is brought, and the determination of that point rests wholly on the question as to whether the plaintiff had obtained a prior lien upon the money.

4. On the second point, viz., as to the character of the mortgage, I also think that there is nothing indefinite in the terms of the mortgage. The plaintiff gave a certain sum of money in loan to the amin, and the amin mortgaged to him certain fees in deposit, and certain fees which he would receive to cover the amount of the loan with interest. I am of opinion, therefore, that the Judge was wrong on both these grounds, and that his decision should be reversed, and a decree given to the plaintiff.

5. There was a further argument raised during the hearing of the case by the vakeel for the respondent to the effect that the plaintiff could not now sue upon his lien, because he had already brought one suit upon his cause of action upon the bond, and was therefore, unable, with reference to the provisions of Section 7, Act VIII of 1859, to bring a further suit on the same cause of action. It is sufficient to say that in my opinion the causes of action in the two suits are not identical; for although the amin, defendant No. 1, is a party to this suit, he is a mere nominal party, and the suit is really directed against defendant No. 2.

6. There have been several cases before several Division Benches of this Court in which opinions have been delivered by different Judges of the Court to the effect that a person, who sues upon a bond containing a lien only to obtain a money decree in the first instance, can afterwards bring a suit to enforce his lien. I concur in those opinions; and following them, the contention of the respondents' vakeel in this case must in my opinion fail.

Hobhouse, J.

7. The prayer in the plaint was no doubt a confused one, hut the real contention between the parties was that mentioned by Mr. Justice E. Jackson, viz., whether the plaintiff could recover the sum in question by the establishment of his previous lien under the bond of the 25th October 1853, or whether he was prevented from so recovering by reason of the previous attachment of the Court of Wards and by reason of the indefinite nature of the mortgage bond.

8. The Courts below have dismissed the plaintiff's suit, holding, that the previous attachment of the Court of Wards must prevail, and that the mortgage bond is so indefinite, that no previous lien thereunder can be established in favour of the plaintiff.

9. I observe, on the question of previous attachment, that, in the words of the section, the attachment is only to prevail "until further orders of the Court."

10. It is clearly, therefore, in my judgment not a final attachment barring all remedy against it, but it is an attachment which may be removed by recourse had to any legal measures; and as regards the mortgage bond, I cannot say that it is to my mind at all indefinite. It specifies distinctly certain fees deposited, or to be deposited, in a certain place to the credit of a certain person for certain services

performed, and it is not denied that, at the time of the institution of this suit, there was to the credit of that certain person, for that certain purpose, and in that particular place, a sum aggregating Rs. 2,229 or thereabouts.

11. It cannot, therefore, in my judgment be said that there is any indistinctness as to the property pledged in the bond, and the only further question that remains is that raised in cross-appeal on the part of the special respondents to the effect that the suit was barred by application of the provisions of Section 7, Act VIII of 1859. Those provisions are:-- "Every suit shall include the whole of the claim arising out of the cause of action, but a plaintiff may relinquish any portion of his claim, in order to bring the suit within the jurisdiction of any Court. If a plaintiff relinquish or omit to sue, for any portion of his claim, a suit for the portion so relinquished or omitted, shall not afterwards be entertained.

12. Now the question between the present plaintiff and the Court of Wards, respondent, did not arise out of the same cause of action as that which existed between the plaintiff and Korban Ali. The cause of action to the plaintiff in this case was the obstruction offered by the Court of Wards, defendant, to plaintiff's receiving a certain sum of money, which he alleged was his property by reason that it had been pledged to him as security for the money he advanced to Korban Ali. This cause of action arose to the plaintiff, not when he sued Korban Ali for the debt, but when, on the 26th August 1862, the Court of Wards, defendant, refused to allow him the money which had been pledged to him.

13. I am of opinion, therefore, that the plaintiff's suit will lie, and I find that we are supported in this view by opinions expressed by various Judges of this Court in the cases of Gupinath Sing v. Shiu Sahaya Sing (Case No. 2809 of 1863, 14th December 1864); Shaikh Mowla Buksh v. Bhyrab Doss (5 W.R., 115); Bindabun Chunder Shaha v. Janee Bibee (6 W.R., 312). I agree, therefore; that the decisions of the Courts below must be reversed, and we must declare that the plaintiff is entitled to recover, out of the deposit in the Collectorate, the fees placed to the credit of Korban Ali, the Court of Wards, defendant's previous attachment of the 26th August 1862 notwithstanding, and we think that the plaintiff must have his costs in all Courts.