

(1878) 08 CAL CK 0010

Calcutta High Court

Case No: None

Ram Chunder Ghosaul

APPELLANT

Vs

Juggutmenmohiney
Dabee

RESPONDENT

Date of Decision: Aug. 16, 1878

Acts Referred:

- Contract Act, 1872 - Section 60

Citation: (1879) ILR (Cal) 283

Hon'ble Judges: Richard Garth, C.J; Markby, J

Bench: Division Bench

Judgement

Richard Garth, Kt., C.J.

This case comes before us under circumstances which naturally give rise to much suspicion and distrust, and which should induce us, in my opinion, to make every reasonable presumption in the defendant's favour.

2. It is brought by the managing member of a Hindu family to enforce a mortgage said to have been made to him by one of his brothers, Hurrish Chunder Ghosaul, so far back as the 1st of February 1842, more than thirty-six years ago. The original consideration for this mortgage having been (according to the plaintiff's own story) less than Rs. 8,000, his present claim upon it, with compound interest, is about three lacs and ten thousand. It is brought at a time when the brother, who is said to have made the mortgage, is dead; when his widow is dead; and when in fact no evidence remains of the real nature of the transaction, except that of the plaintiff himself; and the lady against whom the suit is brought is a daughter of the alleged mortgagor, who had never even heard of this mortgage, and against whom no claim was ever made until a partition of the family property took place about three years ago, when the plaintiff, who had been in possession of the whole property for forty years, as the elder brother and kurta of the family, was about to be dispossessed of it under that partition, and was called upon by the other members of the family to render an

account of his receipts. During all this time, whilst this enormous debt was in process of accumulation on compound interest, the plaintiff was receiving his brother's one-sixth share of the profits of the property, and making that brother an allowance for his maintenance. No one knows, or can know, except himself, whether, assuming the mortgage to have been a bond fide transaction, he has repaid himself any, and if so, what part of the mortgage-money: and, according to the plaintiff's own account, no demand of the money has ever been made, and he has been holding this terrible engine over the heads of his brother's family, until it should answer his own purpose to put it in force.

3. Again, it is a most extraordinary circumstance, and one which it is scarcely possible to believe, that the plaintiff kept no books of account in which this or any of his private transactions were entered. It is well known that every Hindu of any education who engages in business matters on his own account keeps books. The plaintiff professed to keep regular accounts of the joint family property. He says that he was a saving man, he had several properties and money transactions of his own, and yet he produces no books, and states that he never had any.

4. This is just the sort of case, in my opinion which Courts of Justice should approach with the greatest caution, the proof of which they should watch with the utmost strictness, and in which, as I said before, every fair and reasonable presumption should be made in favour of the defendant.

5. Approaching it, however, in this way, I can see no good reason to doubt the fact of the execution of the deed by the mortgagor, or the receipt by him of the original mortgage-money. Whether the money so lent belonged to the plaintiff himself, or to the joint family, or whether the mortgage itself may have been only a contrivance for protecting the mortgagor's property from the hands of creditors, appear to me questions upon which, in the absence of any evidence, it is impossible for us to form any reliable opinion. If the plaintiff's story is to be believed, the money was lent out of his own earnings; and the fact that Rs. 700, which was lent to the mortgagor out of the joint property, appears to have been repaid out of the joint funds whilst this mortgage-money was not, affords some reason for believing that the money was the plaintiff's private property.

6. But assuming this to be so, the first question which arises is,--at what time, by the terms of the mortgage-deed, the money became payable? Are the words "on demand" a mere formula, meaning that the money was repayable at once, as in the case of a promissory note payable on demand?--*Rumball v. Ball* (10 Mad 38)--or do they mean that the money was not to be payable, or the remedies to recover it put in force until after an actual demand, as in the case of a bond payable on demand?--see *Carter v. Ring* (3.Camp. 459).

7. The learned Judge in the Court below seems to have considered that the loan became payable at once, and that the suit was barred by limitation; and that even if

this were not so, the laches of the plaintiff was quite sufficient to debar him in equity from any remedy.

8. After hearing the case very fully and ably argued, I confess I cannot take this view. I have, after considerable hesitation, arrived at the same conclusion as the learned Judge, but upon a different ground altogether.

9. It was contended on appeal by the plaintiff, 1st, that the mortgage-money was not due until a demand was made, and that no demand was made until the 13th of September 1876; and 2nd, that if the money were, by the terms of the bond, payable in praesenti, the Limitation Act applicable to the case would be the Act of 1871, which allows a mortgagee sixty years within which to sue for foreclosure.

10. The respondent contends, on the other hand, 1st, that the mortgage-debt became payable at once; 2nd, that the debt became not only barred, but extinguished by force of the Limitation Act of 1859, and was not revived upon the repeal of that Act by the Act of 1871.

11. Upon the first of these points I have had great doubt; and if the words "on demand" had been used only in the proviso for redemption, and in the covenant to pay the mortgage-money, I should have been disposed to hold that the debt became due at once. The money advanced prior to the mortgage is acknowledged in the deed itself to be then due and payable; and the fact that compound interest was to go on accumulating upon the sums advanced seems quite inconsistent with their not being then due. One test, which was very properly relied upon by the respondent as showing that the money became due at once, was, that if it were not due the mortgagor would have no right to come in and pay it, and that it could never have been intended by the parties that the mortgagee might go on for ten, twenty or hundred years accumulating the debt upon compound interest, whilst the mortgagor had no right to pay it off, and so prevent any further accumulation.

12. There is another test also, which is to be found in the authorities, and which might be applicable here, if we only had to deal with the covenant to pay the mortgage-money, viz., that where a man promises to pay a sum of money, &c., on demand, which it is his duty to pay whether a demand be made or no, then the money becomes payable at once, and no demand is necessary before suing him for it; as for instance in the case of money lent and money due for goods sold or for work done. But where a promise is made in consideration of some collateral thing being done on demand, there the demand must be made before the promise can be enforced, as in the case of a promise to pay, Rs. 100 to B., if A. should go to Dacca, on demand, or if A. should pay Rs. 200 to C. upon demand [see *Bicks v. Trippet* (1 Wms., Saunders, 32), *Carter v. Ring* (3 Camp. 459), *Rumball v. Ball* (10 Mad. 38), and *Chitty on Contracts*, p. 1286, 3rd edn.]

13. Here, no doubt, the mortgagor's covenant was to pay money lent or to be lent, which it was his duty to repay, and part of which was declared by the deed to have

already become due and payable.

14. But my difficulty in saying that a demand was unnecessary, and that the plaintiff had a right without any demand to enforce his remedies upon the mortgage is this--that there is a special provision that, on demand of the debt due, he may take possession of the mortgaged property, which means, I conceive, that he cannot take possession until demand. The demand of the money is (as regards that provision) a collateral act, which, until the plaintiff has done, he is not entitled to take possession. If then the words "on demand" in that part of the deed are material, and mean that no possession is to be taken until demand made, it seems to me that they must mean the same in the other parts of the deed, viz., in the covenant to pay and in the proviso for redemption. It can hardly be that these words have different meanings in different parts of the same deed; or that the mortgagee might enforce his remedy in one way without a demand of the money, but could not do so in another way.

15. It appears to me, therefore, that the only reasonable construction to give to the deed is this--that for certain purposes, that is to say, to secure the payment of interest to the mortgagee, and to allow the mortgagor at any time to pay off the debt, the mortgage-money was to be considered as due and payable; but that the mortgagee was not at liberty to enforce any of his remedies until he had demanded the money. That being so, the next question is, when the demand was made? The plaintiff says now that no demand was made until the 13th of September 1876, shortly before suit. If he is right in this, of course he is in time. But I consider that Mr. Phillips' argument on this head is well founded; and that we are justified, under the circumstances disclosed in the case, in presuming that a demand must have been made in or before the year 1847.

16. It appears from the evidence of Eshan Chunder Ghosaul, who is the plaintiff's brother, that in that year an amicable partition of the family property was in contemplation; and on that occasion it was arranged that a specified portion of it should be given to the plaintiff in payment and satisfaction of the debt due to him from Hurrish Chunder. Now before it could have been ascertained how much of the family property should thus be appropriated to payment of the debt, it is only reasonable to conclude that the amount due must have been calculated, and that the plaintiff must have made some demand or claim for that amount. Suppose, instead of so much land being appropriated to the payment of the debt, it had been arranged that a certain sum of Bank stock should be sold out and so appropriated. Surely, after this long lapse of time, and under the peculiar circumstances of such a case as this, it would only be reasonable to presume that the amount of the debt had been calculated and a demand for it made; otherwise the precise sum of stock necessary for the purpose could never have been ascertained.

17. The plaintiff's own evidence confirms this, so far as the arrangements to apportion off a part of the property is concerned. But he denies that any demand of

the debt was made until the 13th of September 1876. But we must look at his evidence in this and other respects with some distrust. He is interested, of course, in showing, on the one hand, that the existence of the debt was known in the family, and that he mentioned it to the defendant's mother-in-law, in order to explain his own delay and laches; but, on the other hand, with a view to limitation, it is his direct interest to say that no actual demand was ever made. Every reasonable presumption, as I have said before, must be made against a man who brings a suit under such circumstances.

18. I think, therefore, that we must presume, from the facts proved, that a demand was made in the year 1847; and then comes the further question whether, even in that case, the plaintiff's suit is barred.

19. The Advocate-General argues that it is not, because the Limitation Act in force when the suit was brought was the Act of 1871; and by the 149th Article of that Act a suit for possession of mortgaged property may be brought, by the mortgagee within sixty years. But that Article is very peculiarly worded. The sixty years is to be reckoned from the time when any part of the principal and interest due upon the mortgage has been paid. But suppose, as in this case, no part of the principal or interest has been paid, is there to be no limitation to such a suit? I confess, if it were necessary for us in this case to put a construction upon that Article I should be much disposed to hold that it is applicable to those cases only where some part of the principal or interest has been paid, and that in other cases the ordinary twelve years' limitation would apply. In cases where any part-payment could be proved, the presumption that would arise from lapse of time (which is the principle upon which all Limitation Acts are founded) would not arise, or at any rate it would not be nearly so strong as in a case where no part-payment had been made. And this might in some degree explain the extraordinary length of time which is allowed to a mortgagee under Article 149.

20. I am, therefore, disposed to think that in a case of this kind, where there has been no payment of any part of the mortgage debt or interest, the plaintiff's remedy was barred at the end of twelve years from the demand.

21. But it seems to me that, on the question of limitation, we are here concluded by authority. Mr. Phillips contends that, under the Limitation Act of 1859, the plaintiff's remedies upon the mortgage were not only barred, but the debt itself extinguished; and therefore that, although the Act of 1871 may have repealed the Act of 1859, and may have given mortgagees sixty years instead of twelve to bring their suits, that Act would not in this case revive the plaintiff's rights, in as much as the Act of 1859 had not only barred the remedy but extinguished the debt. I confess I should have some doubt as to the correctness of this argument; but I find that it was so decided by my brother Markby and Mr. Justice Prinsep, in the case of Krishna Mohun Bose v. Okhilmoni Dossee (I.L.R. Cal. 331), and as my brother Markby adheres to that view, I consider that, in the present case, we are bound by that decision.

22. It has undoubtedly been held that in the case of land, a twelve years' adverse possession not only bars the remedy of the rightful owner, but extinguishes his right; and the 28th section of the Limitation Act of 1877 would seem to extend that doctrine to property other than land.

23. But I think it very doubtful whether the same principle should be held to apply to debts. There are many cases where the creditor has always been considered to have a lien for his debt, where the remedy for it by suit is barred, and the 60th section of the Contract Act, which allows payments to be appropriated to the payment of debts barred by limitation, is perfectly inconsistent with the supposition that the debt itself is extinguished by lapse of time. I observe that Mr. Justice Prinsep decided the above case with some hesitation; and when an opportunity occurs, I should be glad that the point, which is undoubtedly one of great general importance, should be considered by a Full Bench.

24. In the present case, being bound by the above decision, I am of opinion, for the reasons which I have given that the appeal should be dismissed with costs on scale 2.

Markby, J.

25. The plaintiff in this case is one of the sons of Roopnarain Ghosaul, who died many years ago. The plaintiff and his brothers formed a Hindu joint family. The plaintiff, shortly after his father's death, obtained letters of administration to his father's estate, against which there were considerable claims, and whilst he was in possession of the whole estate, on behalf of himself and the other members of the family, he alleges that his brother Hurrish Chunder, in the year 1842, being much pressed by his own private creditors, executed a mortgage in the English form, where by he conveyed to the plaintiff his one-sixth share of the family property to secure an advance of Rs. 3,700 and further advances up to Rs. 8,000 out of the plaintiff's private funds. No payment, either of principal or interest, has ever been made upon this loan, and the total amount now due there on is the enormous sum of Rs. 3,10,000.

26. The present suit arose in this way. One of the brothers in 1876 commenced a suit for partition, the plaintiff being at that time still in possession of and managing the whole family estate. An order for partition was made and Commissioners were appointed. Whilst the Commissioners were engaged in carrying out the partition, the plaintiff filed this suit to have it declared that the mortgage above stated was a valid one, and binding upon the one-sixth share to be allotted to the defendant under the partition, as the daughter of Hurrish Chunder, who had died in 1851. The plaintiff also asks for a foreclosure and for an injunction to restrain the defendant from taking possession of the one-sixth share allotted to her. Notwithstanding this suit, the Commissioners have proceeded to a partition, the plaintiff has been ousted, and the defendant is now in possession of her one-sixth share.

27. The suit was dismissed in the Court below. The plaintiff has appealed.

28. There is no doubt that the mortgage-deed was executed by Hurrish Chunder, but the defendant contends, first, that there was never in reality any mortgage at all, and that the only object with which that deed was executed was to protect Hurrish Chunder's property from his creditors; secondly, that even if the mortgage was a real transaction, all claim under it is barred by limitation.

29. It is extremely difficult to determine satisfactorily the first of these questions at this distance of time; but I confess I have not been able to convince myself that the mortgage was a real transaction. I am very unwilling to come to that conclusion as against the plaintiff, who belongs to a respectable family, and who has apparently behaved well and honestly in the management of the family property. But the evidence which he has given has not convinced me of the truth of the story told by him, Hurrish Chunder, at his death in 1851, was succeeded by his widow Omertomoye. She died in 1877, and was succeeded by her daughter, the defendant. We are asked to believe that, during the whole of this period, nothing was paid either for principal or interest upon the debt due to the plaintiff, and that no demand was ever made for it. During the whole of this time the income of Hurrish Chunder, and those who succeeded him, was passing through the plaintiff's hands. One-sixth share of the family property was worth Rs. 40,000, and for a great many years the family property has been unencumbered. Why should the plaintiff have forbore during all these years to make some arrangement for paying off the debt, or at, least for keeping down the interest? Forbearance, under such circumstances, was nothing less than cruelty to the widow and daughter of Hurrish, who must inevitably be ruined if the debt was allowed to go on accumulating.

30. There are also other circumstances in this case, which seem to me inconsistent with the existence of this claim. The plaintiff has an exactly similar claim against another brother, Mohesh, which he is also now seeking to enforce in another suit against Mohesh's representatives. In regard to this mortgage also, the same extraordinary reticence has been observed. In 1859 a suit for partition was commenced by the plaintiff in the Supreme Court, which the plaintiff afterwards allowed to be dismissed. No mention of either of these mortgages was made in this suit; nor was any mention made of them in the suit of 1871, in which the partition took place, out of which this suit arose. From a legal point of view it was not necessary to mention these mortgages in those suits. But they, would, in the ordinary course of things, have been mentioned, if they had been real transactions because a partition could not be carried out without very materially affecting the plaintiff's rights under these mortgages. And with regard to Mohesh's mortgage, the conduct of the plaintiff has been wholly irreconcilable with the existence of any such claim. Mohosh became a lunatic, and his person and property were placed under the control of the Court. There was an inquiry in the presence of the plaintiff as to what property Mohesh was possessed of, and what would be a proper sum to

allow for his maintenance. Without the slightest objection on the plaintiff's behalf, Mohesh was found to be entitled to one-sixth of the family property, and the allowance was fixed accordingly. This part of the evidence was not perhaps strictly admissible, but it is on the record, and it was commented on in the argument before us by both sides, without objection as to its admissibility, and I cannot therefore overlook it.

31. Another circumstance which weighs very much with me against the plaintiff is that he produces no books. I believe it to be a thing almost unheard of amongst Hindus, for a person, situated as the plaintiff was, not to keep books which would show this transaction along with his other transactions on his own account. He had considerable property separate from the family property. He invested this money in various transactions and when he says that he kept no books in which these transactions were entered, I am bound to say that I find the very greatest difficulty in believing him.

32. But even if I could persuade myself that this loan was really made, I should still hold that the present suit was barred by limitation.

33. Upon this point there has been much contention as to when the debt became due. This depends upon the construction of the mortgage-deed. The mortgage-deed begins with a recital that the mortgagor "stands indebted" to the mortgagee in the sum of Rs. 3,700, and then states an agreement by the mortgagee to lend to the mortgagor a further sum not exceeding in all Rs. 8,000. Then in the operative part the mortgagor, in consideration of the sum of Rs. 3,700, "now already due as aforesaid," and the future advances, conveys his one-sixth share in the family property to the plaintiff. There is then a proviso, that if the mortgagor shall pay "on demand" to the mortgagee the said sum of Rs. 3,700, and interest at the rate of 12 per cent, per annum, and shall also repay, "on demand," the further advances and such sums as shall or may appear to be "due and owing" upon any balances of account between the mortgagor and mortgagee, with interest for each and every such sum and sums of money and balance and balances of account respectively, at the rate of 12 per cent, per annum, from the respective times when such sums should be advanced, or such balances be struck, with annual rests on the 30th of April in each year, then the conveyance is to be void. There is then a covenant to pay "on demand" the said sum of Rs. 3,700, and the interest, very much in the same terms as the clause of defeasance, and there is also a right of entry reserved to the mortgagee in default of payment "on demand." There was at the same time executed "a bond and a warrant of attorney given to secure the same loan." The bond also recites the Rs. 3,700 to be due.

34. The plaintiff now contends that no portion either of principal or interest was due until the 13th September 1876, when the mortgagee made a formal demand for Rs. 7,172-0-10 principal, being the amount of the original debt and the subsequent advances and interest at 12 per cent.

35. This seems to me to be rather a startling proposition. In the first place, I don't quite see how, strictly speaking, a debt not due can carry interest and compound interest. Appropriate words might impose upon a debtor an obligation to pay a sum vastly greater than he had received calculated in the same way as interest is calculated upon a debt overdue. But "interest" in its ordinary sense means something paid for money overdue. And *prima facie* a debt which carries interest appears to import a debt already due (see Angell on Limitation, page 90). In the next place, the bond and the deed both state several times over that the Rs. 3,700 at any rate was actually then due, and from time to time balances were to be struck of what was due and owing; and the plaintiff from time to time did (as he says) strike those balances in a book which he kept for the purpose, and calculated the rate accordingly. The words "on demand," if taken to mean that the debt and interest is not to be due until demand, are wholly inconsistent with the other parts of the deed. Under these circumstances, it seems to me that, for the purpose of asserting when the debt became due, we ought to read in this mortgage-deed and bond the words "on demand" in the same way as they are always read in a promissory note, and not as postponing the date of payment. If we read them in the way in which the plaintiff desires to read them, the transaction would be a most unreasonable one. The mortgagor could not, according to the terms of the deed so understood, redeem his property until the plaintiff chose to make his demand. Perhaps a Court of Equity would step in and compel the mortgagee to receive the money and return the property. But it is not likely that a mortgagor would put himself in such a position. Of course if he has done so, he must take the consequences. But I confess this is not how I should read these stipulations. Upon the language of this deed construed as a whole. I think that the money advanced was due as soon as the advances were made, and that the interest became due as it accrued.

36. But even if a demand were necessary, and there was no debt due until the demand was made, still there are, as the Chief-Justice has pointed out, very good grounds for inferring that a demand was in fact made. I need not repeat these reasons: it is sufficient to say that I concur with the Chief Justice's judgment upon this part of the case.

37. This being so, there is no doubt that, as soon as the Act XIV of 1859 was passed, the suit for foreclosure was barred. The utmost the plaintiff could have under that Act was twelve years from the date of the mortgage, if a demand was not necessary, and from the date of the demand if the debt only then became due. In either case the suit for foreclosure was barred by the operation of Act XIV of 1859 before Act IX of 1871 came into force. And if the right to bring a suit for foreclosure was barred by the Act of 1859, it has been held that it could not be revived by the Act of 1871. These cases are *Krishna Mohun Bose v. Okilmoni Dossee* (I.L.R. Cal. 331), *Nocoor Chunder Bose v. Kali Koomar Ghose* (I.L.R. Cal. 328), and *Thakoor Kapilnauth Sahai Deo v. The Government* (13 B.L.R. 445).

38. Moreover, even under the Act of 1871, I do not at present see how the plaintiff can get more than twelve years, from the date when the debt became due, to bring his suit for foreclosure. In my opinion, therefore, the suit for foreclosure is barred.

39. With regard to possession, even if we could treat the present as a suit of that nature, it seems to me that the plaintiff must equally fail. I agree with the learned Judge in the Court below that the plaintiff was, until ousted by the proceedings on the partition, in possession as manager and not as mortgagee. He now seeks to get possession, not of the undivided share, which was mortgaged to him, but of that which upon partition has been substituted for it. He has a right to do this, if the mortgage-debt is still subsisting. But, in my opinion, his claim to that debt being barred, he had no longer any right to recover possession, either of the mortgaged property, or of what has been substituted for it.

40. The plaintiff has relied upon Clause 149 of the Act of 1871. As, in my view of the matter, the plaintiff's right to possession was extinguished before that clause came into operation, I don't think that clause can, upon any construction of it, help him. But even if it were otherwise, the sixty years spoken of in that clause is sixty years from the date when any part of the principal or interest was last paid on account of the mortgage debt. This would seem as if the clause only applied to transactions where something had been paid for principal or interest; and there may be a good reason for this; for where some part of the principal and interest has been paid, there is not likely to be any dispute as to the original transaction, of which the payment operates as an acknowledgment.

41. For these reasons I agree that the appeal should be dismissed with costs.