

(1880) 06 CAL CK 0029

Calcutta High Court

Case No: None

Brajeshware Peshakar

APPELLANT

Vs

Budhanuddi and
Another

RESPONDENT

Date of Decision: June 22, 1880

Citation: (1881) ILR (Cal) 268

Hon'ble Judges: Richard Garth, C.J

Bench: Single Bench

Judgement

Jackson, J.

In this case I have the misfortune to differ in opinion from my learned colleague, and as the difference relates to a point of law, the appeal will have to be referred, u/s 575 of the Code of Civil Procedure, to one or more of the other Judges of the Court. My view of the case is this: The plaintiff, who is described as peshakar, which, I take it, means a woman of ill-fame, sues to recover the sum of Rs. 625 as principal, and Rs. 406-10 annas as interest, amounting in all to Rs. 1,031-10 annas, by the sale--firstly, of certain property which she alleges to have been mortgaged to her in a registered instrument by the defendant Hur Soonduri as collateral security, and which property has since been conveyed by Hur Soonduri to the other defendant Budhanuddi Chowdhry, who appears to be in possession of the same.

2. Hur Soonduri, the alleged borrower and mortgagor, put in no written statement, but she was examined as a witness in the cause on the plaintiff's side.

3. The plaintiff put in the instrument of mortgage, which purported to have been executed on the part of Hur Soonduri by one Nobin Chunder, who is admitted to be her son, and who appears to have acted under a general power of attorney on her behalf. The mortgage-bond, was registered, and it recites the payment of the advance of Rs. 625 in full.

4. Hur Soonduri fully acknowledged, when examined as a witness, the payment of the money, and swore that she had mortgaged the property to the plaintiff/-" Nobin Chunder appears to have been cited both by the plaintiff and the defendant as a witness; at all events a summons on the side of the defendant was shown to us, and appears to have been served, and it is also shown that the plaintiff applied for and obtained from the Court an order for the prosecution of Nobin on account of his failure to attend upon summons.

5. It may be taken as admitted that the second defendant did [270] receive a conveyance of this property as from Hur Soonduri, and that conveyance, it appears, was also executed by the same Nobin Chunder, Who likewise received the money.

6. In the written statement, which was put in by the Chowdhry defendant, he broadly asserted that the plaintiff's claim was wholly false, and that the bond upon which she relied was collusive and fraudulent; that there had been no payment or receipt of money under the bond, and that Nobin Chunder had got the bond executed beforehand for fraudulent purposes. He then set out the fact of his own purchase, and recited certain other mortgages previously made by Hur Soonduri, which debts, he said, had been paid off with the money taken from him. He urged that he had no notice of the alleged mortgage; that he had purchased the property in consequence of its being situated near his own house, and for that reason had paid a higher price than the market-value for it; and in conclusion he made certain allegations regarding an intrigue between Hur Soonduri's son, Nobin, and a person called Soudaminee, whose mother, he said, the plaintiff was.

7. I observe with great regret, regard being had to the circumstances of the case, that the Subordinate Judge should have permitted this written statement, containing most important allegations, and in the last paragraph containing statements of a scandalous nature, to be filed by the defendant under the verification of the mokhtear; and this fact becomes the more significant, when we see that this defendant in the sequel has abstained from coming into the witness box and giving an account of the facts within his knowledge relating to the purchase of this property.

8. The defendant does not say that the intrigue between Nobin and Soudaminee commenced before, or that his knowledge of that intrigue was subsequent to his purchase through Nobin's agency.

9. Now, at the trial of this case, it seems that the plaintiff swore to the execution of this instrument and to the advance of Rs. 625. The defendant, Hur Soonduri, also deposed to the like effect, and the witnesses, three in-number, speak to the execution of the bond and the passing of consideration.

10. [271] It seems to me clear on general principles, and on the authority of the judgment of the Privy Council in Chowdry Deby Persad v. Ghowdry Dowlut Sing (3 Moore's I. A. 347), and with reference to the case of Radhanath Banerjee v.

Jodoonath Singh (7 W. R. 441), decided by Mr. Justice MARKBY and myself, that, under such circumstances, the plaintiff having put in a duly executed and registered mortgage-deed, containing a recital of payment, having also sworn herself to the payment of the money-and her testimony I do not find has been anywhere discredited-it lay upon the defendant, who pleaded that the mortgage was maid fide, to prove such maid fides. The Subordinate Judge appears to have disbelieved Hur Soonduri for some reason or other. He appears also to have given little credit to the witnesses who gave formal proof of the execution of the mortgage-deed and the passing of the consideration, but he says nothing of the testimony of the plaintiff herself. He remarks upon the absence of Nobin Chunder; but, on the authority of the cases to which I have referred, he considers, as I do, that it lay upon the defendant to give proof of the mala fides asserted, and he therefore felt himself bound to give judgment for the plaintiff.

11. The District Judge on appeal took the opposite view. His judgment is not very clear; but he says: "The question then to decide is whether on such evidence" (having previously spoken of the evidence) "it can be held that the bond was genuine, or that any consideration passed between the parties. I think it is impossible to uphold the genuineness of the bond." Now, the genuineness of the bond was not really in issue. "Even the lower Court," he goes on, "only finds on the first issue for plaintiff, relying on the rulings of the High Court and the Privy Council, but I do not think this ruling can be so interpreted. Such admissions and such recitals are only evidence when they are believed to be good. But when, as in the present instance, the lower Court discredits Hur Soonduri's evidence in toto, it is difficult to see how he can accept that evidence as proving the bond. I hold then that, on the Subordinate Judge's own argument, plaintiff's case cannot stand on the bond or on the plea of consideration having passed."

12. [272] Now, in order to examine how far that judgment is correct, I wish to consider what the plaintiff in this case could have done. The parties to the transaction are herself and Hur Soonduri. She has sworn that she had paid the money, and she has not been discredited. Hur Soonduri has also sworn to the like effect; but both the Judges appear to consider that she cannot be believed. But, in the first place, Hur Soonduri was a really superfluous witness, and in the next place, it is clear that the person with whom the transaction actually occurred was Nobin Chunder. The plaintiff does all she can to secure Nobin's evidence, but Nobin refuses to appear. It is clear there was no affirmative case on the other side on which the Courts below could rely, because the only witness referred to on the side of the defendant, in the judgment of the Court below, by name, is Radhanath Chukerbutty, and he, I find, is unable on oath to deny the bona fides of the disputed bond. There is nothing therefore to displace the affirmative evidence given on the side of the plaintiff, and as I have already said the plaintiff herself gave her oath, and neither of the Courts says that oath is false. In that state of the case it seems to me there was no ground, no judicial basis, on which the Courts below could refuse

the plaintiff a verdict. Of course, if a particular fact is in issue, and evidence is given on one side in the affirmative, and on the other side in the negative, it is open to the Court of first instance, and also to the Court of appeal, to accept the one version or the other; but here the evidence is all on one side, and where, as held by the Judicial Committee of the Privy Council, there is prima facie proof of the fact contained in the recital in the instrument, it appears to me that the Courts below are not justified, and the lower Appellate Court in this case was not warranted in throwing out the case of the plaintiff merely upon grounds of suspicion. Let us assume for a moment that the plaintiff's case was true. She has started it by her own oath. She then calls her vendor, Hur Soonduri, Hur Soonduri's interest is gone. Be it the plaintiff, or be it the other defendant, who has acquired it, Hur Soonduri has none. Either she herself or her son is clearly tainted with a fraud, and under these circumstances she gives evidence in support of the plaintiff's case, but in such a manner that the Courts below refuse [273] to believe in its truth. Is the plaintiff to be affected by this? Is the plaintiff's true case to be thrown out because of the misconduct of Hur Soonduri or of her son? It seems to me, it clearly cannot. But if the plaintiff's case is untrue, it must be shown to be untrue by positive evidence on the side of the defendant. It starts with a, prima facie proof. There is the solemnly registered bond which contains the recital, and on that recital the plaintiff is entitled to rely. In addition to that she has given a quantity of other evidence, and it would be extremely unjust, it seems to me, to throw out her case because of a taint in the evidence coming from the side of her vendor, who is undoubtedly affected in one direction or the other by fraud. I think, therefore, that, under the circumstances of this case, the lower Appellate Court had no judicial ground for reversing the judgment of the Court below, that judgment being given in accordance with the evidence, and in accordance with the authority of previous decisions.

13. I understand the difference between me and my brother Mc DONELL to refer merely to the powers of this Court in second appeal, his view being that the question here is a mere question of fact, with which we are not capable of dealing; but it appears to me that this is a definite question of law, which may be thus concisely stated:

14. The plaintiff having, in the circumstances stated, given not merely prima facie but substantial proof of the advance of which the receipt is acknowledged on the registered instrument of mortgage, and defendant having impugned that instrument on the ground of fraud, which he does not prove, was the lower Appellate Court at liberty to dispose of plaintiff's suit on the ground that she had not completely made out the bona fides of her own mortgage?

McDonell, J.

15. I regret to have to differ from my learned colleague, but I think in special appeal we cannot interfere with the lower Appellate Court. In this case undeniably the bond had been executed and registered, and if the plaintiff had left the case there, the

onus, under the rulings cited by my learned brother, would have been on the defendant to prove the mala [274] fides of the bond. But the plaintiff was not satisfied to stop here. Besides showing that the bond had been executed, she adduced witnesses to prove the bond. These witnesses the Judge, for reasons given in his judgment, disbelieves; and can we say that he should have believed those witnesses, or that he has committed an error in law in disbelieving: them, without ourselves reading and weighing the evidence, which we have no right to do in special appeal, more especially as it has not been shown that the lower Appellate Court has misread or misinterpreted the evidence in any way. In this view, I think that the plaintiff is not entitled to a decree, and I should therefore dismiss the appeal with costs.

Richard Garth, C.J.

16. The learned Judges of the Division Bench (Mr. Justice Jackson and Mr. Justice McDonell) having differed in opinion upon a point of law, it has become my duty as a third Judge (under Section 575 of the Civil Procedure Code) to decide this case.

17. The pleaders on both sides have been asked whether they wished to argue it again; but as they have declined to do so I proceed to decide the question from the paper-book with the advantage of having before me the judgments of my learned brothers.

18. The plaintiff appears to be a woman of ill-fame, and she sues to enforce a registered mortgage-bond against the property in question, which was given to her, as she alleges, by the defendant No. 1, on the 14th of Jeit 1282 B. S. (27th of May 1875). The sum said to have been the consideration for this bond was rupees 625, and the principle and interest due upon it amounted, when the suit was brought, to rupees 1,031-10.

19. The defendant No. 1 has put in no written statement, but has given evidence in the plaintiff's favour. The defendant No. 2 is the real defendant in the suit, having purchased the property from the defendant No. 1 under a kobala, dated the 7th of Bhadro 1283 B. S. (22nd August 1876), for a sum of rupees 4,300.

20. No attempt was made in the Courts below to contest the validity of the purchase by the defendant No. 2. There is no [275] doubt of his having honestly bought the property, and given a full price for it. The real and only question was, whether the mortgage to the plaintiff was a bond fide transaction, and valid as against the defendant No. 2.

21. The 1st issue was framed to raise this question, viz.-Is the bond in dispute a bona fide engagement or is it fraudulent?

22. The way in which this question has been dealt with in the Court below, and the way in which it ought to be dealt with as a matter of law, has formed the main ground of the difference of opinion between the Court below and the two learned

Judges of this Court.

23. The Court of first instance found that the bond was duly executed and registered; and the bond itself contained a recital, that the consideration-money was duly paid. The Subordinate Judge appears to have considered, not only that there were circumstances which induced a grave suspicion as to the bona fides of the bond, but he mentions several facts, which, as it seems to me, ought to have weighed very strongly upon the mind of any reasonable man in deciding whether the transaction was a real and honest one.

24. One of these is, that Nobin, the son of the defendant No. 1, who is said to have acted for her under a power of attorney in the execution of the bond and carrying out the transaction, was not called as a witness. His absence was certainly a very pregnant circumstance. He had not only acted for his mother in this and other matters of business, but he also notably acted for her in effecting the sale to the defendant No. 2. At the time of that sale a list of the mortgages upon this very property was given by Nobin to the-defendant No. 2, in which the mortgage in question did not appear. Nobin, therefore, when the honesty of the transaction was called in question, was an all-important witness, If the money was really paid, he was the person who received it. If the transaction was bona fide, he could have proved it to be so; and he was probably the only person who could and should have explained the fact that the mortgage in question was not entered in the list of mortgages given to the defendant No. 2.

25. Moreover, the Subordinate Judge finds that Nobin was a lover [276] of the plaintiff's daughter, and had been seen at the plaintiff's house since the institution of the suit; and again, he is shown to have been named as a legatee under her will. Nobin, therefore, ought, undoubtedly, to have been called as a witness for the plaintiff, and Nobin did not make his appearance. But his mother, the defendant No. 1, was examined, and the Subordinate Judge says, that from the very tenor of her deposition, she spoke of what she had been taught to speak for the benefit of the plaintiff, and displayed utter ignorance or loss o memory on many other points upon which she was cross-examined. He evidently considers, that she had been tutored by Nobin, and that her evidence was unreliable.

26. From these and other circumstances which he mentions, the Subordinate Judge seems to have felt great doubt as to the bona fides of the transaction. But he found for the plaintiff apparently upon this ground:-The execution and due registration of the bond was proved, and the bond contained a recital that the consideration-money had been paid by the mortgagee to the mortgagor. This recital-according to two rulings of the Privy Council and this Court *Ohowdry Deby Persad v. Chowdry Dowlut Singh* (3 Moore's I. A. 347) and *Badhanath Banerjee v. Jodoonaih Sing* (7 W. R. 441)-the Subordinate Judge considered to be prima facie evidence of the money having been really paid, and coupled with the evidence of execution and registration, he thought it established a prima facie case for the

plaintiff, and, as the defendant had given no counter-evidence of fraud to rebut this prima facie case, he considered himself bound (more especially having regard to the above rulings) to find for the plaintiff.

27. The District Judge took a different view. He considered that, as the bona fides of the bond was questioned, the onus of proving that it was a valid transaction as against the defendant No. 2, lay upon the plaintiff, and taking the whole of the plaintiff's evidence into consideration, he found that little or no weight ought to be attached to the recital in the bond; and he dismissed the suit upon the ground that the bond not being a bona fide transaction was void as against the defendant No. 2.

28. In this Court, Mr. Justice Jackson has approved of the view [277] taken by the Court of first instance, considering that as the plaintiff had made out a prima facie case, which the defendant had not disproved, the lower Appellate Court was bound to give judgment for the plaintiff. On the other hand, Mr. Justice McDonnell thought the question to be one of fact, which it was open to the Court below to decide as it did, and that this Court had no right to interfere with the lower Court's decision.

29. It appears to me that the first question for consideration in point of law is, on whom the onus of proof lay; and I think that, having regard to the case on both sides, and to the form of the first issue, the onus of proving prima facie that the transaction was valid as against the defendant No. 2 lay upon the plaintiff.

30. The due execution of the bond is one thing, the bond fides and validity of it as against subsequent purchasers is another. But when, as in this case, the defendant puts the plaintiff to proof of the validity of the bond generally as against him (the defendant No. 2), the plaintiff is bound to prove prima facie both the due execution of the bond and the bona fides of the transaction.

31. But then it is said, that the execution being proved, the bona fides is also proved prima facie by the plaintiff's own evidence as well as by the recital in the bond; and great weight has been attached (in deference to the authorities above cited) to the recital.

32. But it seems to me that the effect of the recital, as well as the decision of the Privy Council in *Chowdry Deby Pershad v. Chowdry Dowlut Singh* (3 Moore's I. A. 347) has been misunderstood.

33. A recital in a deed or other instrument is no doubt in some cases conclusive, and in all cases evidence as against the parties who make it; and it is of more or less weight, or more or less conclusive, against them according to circumstances. It is a statement deliberately made by those parties, which, like any other statement, is always evidence against the persons who make it. But it is no more evidence as against third persons, than any other statement would be.

34. Now, in the Privy Council judgment referred to, the question [278] arose with regard to a recital made in a ruffanama, or deed of compromise, that a particular

sum of money, which was the consideration for the compromise, had been paid by one of the parties to the other; and the question whether that sum had really been paid, was raised in the suit as between the parties to the instrument. It was contended that the recital was conclusive evidence of payment, but it was held by the Privy Council that though not conclusive, it was undoubtedly some evidence of the payment, but evidence which might be explained and rebutted; and it was accordingly proved and decided in that case, that the payment had not been made.

35. In the case of *Radhanath Banerjee v. Jodoonath Singh* (7 W. R. 441), the facts are not very accurately stated. It may be, that there were circumstances which made the recital evidence in that case, but it would certainly seem that the recital was admitted in evidence as against third parties, who were in no way privy to the deed; and if so, the propriety of the decision seems to me extremely doubtful.

36. In this case, the only way in which, as far as I can see, the recital in the bond could possibly be made evidence against the defendant No. 2, was this: He no doubt claimed under the defendant No. 1, and he claimed the very property which was professedly mortgaged by his vendor, consequently the recital was a statement made with reference to that property by the person under whom he claimed, and therefore it was admissible in evidence as against him.

37. But then, in a case of this kind, the weight to be attributed to the recital would depend entirely upon the other evidence of the bona fides of the bond. If the plaintiff's evidence did not satisfy the Court that the transaction itself was honest and bona fide, the fact that the parties to the fraud had stated in the bond that the consideration was truly paid, would, as it seems to me, be entitled to little or to no weight.

38. It was contended on the part of the appellant, that if part of the plaintiff's evidence was sufficient to establish a prima facie case, it was incumbent upon the defendant to prove a substantive case of fraud by evidence of his own. But the answer to [279] this is, that though some of the plaintiff's evidence taken by itself, might have amounted to prima facie proof in her favour, still, looking to the whole of her evidence, and to the circumstances of the case generally, there was ample ground to justify the lower Court in disbelieving her evidence and dismissing the suit.

39. If it were always necessary under such circumstances for creditors and others, impeaching transactions of this kind, to give substantive evidence of fraud, they would often be placed in a hopelessly unfair position. They, generally speaking, have no means of unravelling the fraud, or of enquiring into the nature of the transaction, until they came into Court, and they are then generally driven to rely upon the skill of their counsel and the astuteness and good sense of the Judge.

40. In this case I consider that there were ample grounds in point of law to justify the finding of the Court below, and I therefore concur with Mr. Justice McDonell in

dismissing the appeal with costs.