Privy Council Appeal No. 104 *of* 1918
Oudh Appeal No. 11 *of* 1917

Raj Raghubar Singh and another - - - - - - *Appellants*

v.

Thakur Jai Indra Bahadur Singh - - - - - - *Respondent*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 29TH JULY, 1919

Present at the Hearing:
LORD ATKINSON.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD PHILLIMORE.]

This is an appeal from the Court of the Judicial Commissioner for Oudh.

Thakur Balbhaddar Singh, Talukdar of Mahewa, died in December, 1898, intestate and childless, leaving the taluka and other property, and leaving a widow, Raghubans Kunwar, and a brother, Sheo Singh.

On his death his brother Sheo Singh took possession of all his property; but his widow, Raghubans Kunwar, brought a suit against Sheo Singh to recover the property in the Court of the Subordinate Judge of Sitapur, and on the 6th August, 1902, obtained a decree for possession of the same.

After she had obtained this decree the widow applied to be put into possession of the property in dispute, and she was given possession by an Order of the Subordinate Judge upon her providing security to restore the mesne profits, to the extent of one lac of rupees. The persons who gave that security are or are now represented by the present appellants.

The decision of the Subordinate Judge in favour of the widow was affirmed by the Court of the Judicial Commissioner

of Oudh. But on an appeal being presented to His Majesty in Council, the decree was varied, and it was declared that the taluka with its accretions had passed to the defendant, the brother, though the other property left by the deceased would pass according to Hindu law to the widow. It was referred to the Court of the Judicial Commissioner to ascertain, if there was any dispute, how much of the property formed part of the taluka, and how much was the private estate of the deceased which would pass to his widow.

The Court of the Judicial Commissioner remitted the case for enquiry to the Subordinate Judge, and he reported accordingly; and thereupon the Court of the Judicial Commissioner decided by decree dated the 4th March, 1907, that all the villages claimed by the widow except thirty-one belonged to the taluka, and that the suit of the widow must now be dismissed except as to these thirty-one.

Both parties appealed from this decree to His Majesty in Council, but with some variations immaterial to the present purpose the decree was affirmed on the 22nd March, 1918.

There were, of course, some villages which must belong to the taluka, and in fact the widow admitted that 117 villages formed part of the taluka. Possession of them was forthwith given to the respondent, the son of the original defendant, who had by this time died. And on the 21st August, 1908, the Court of the Judicial Commissioner directed that the Order of His Majesty in Council and its own decree of the 4th March, 1907, should be sent to the Subordinate Judge, and ordered him to ascertain the amount of the mesne profits of the 117 villages during the period that the widow had been in possession of them, but he was not to make any Order for payment until the whole case had been decided.

Thereupon, on the 6th January, 1909, the respondent made an application purporting to be under sections 47 and 144 of the Civil Procedure Code for fixation of mesne profits and damages. The parties against whom the application was made were the widow and the present appellants, the sureties; and the relief prayed was that they might be declared liable for mesne profits of the 117 villages, the liability of the sureties being limited to one lac only. The widow put in a defence which it is not material to consider. The sureties filed a written statement, in which they denied that the respondent was entitled to the relief claimed, and pleaded the following additional pleas :—

"ADDITIONAL PLEAS.

"20.—The so-called Judgment-debtors Nos. 3 and 4 are not liable for the decree of the Judicial Committee of the Privy Council. Their liability ended with the decree of the Judicial Commissioners, dated the 26th March, 1903, which was in favour of Judgment-debtor No. 1.

"21.—The liability, if any, of the so-called Judgment-debtors Nos. 3 and 4 cannot be determined and enforced in execution proceedings."

The Subordinate Judge, on the 21st November, 1914, decided that there was due from the widow over three lacs of rupees,

and that the sureties were liable to the extent of one lac. From this decision the sureties appealed, giving as their grounds :—

"1. That the Lower Court ought to have held that the liability of the appellant as a surety ceased as soon as the Court of the Hon'ble Judicial Commissioner of Oudh dismissed the appeal of Thakur Sheo Singh on the 26th March, 1903.

"2. That the Lower Court has taken a wrong view of the security bond executed by the appellant, and that according to the correct interpretation of the deed the liability was restricted only to the time when the order of the learned Judicial Commissioner was passed on the 26th March, 1903, and for due performance of the said order.

"3. That it has not been shown by the appellant as to what collections were made by the late Rani Raghubans Kunwar during the said period and for this reason there is no definite amount for which the sureties or any one of them are liable.

"4. That the application against the appellant ought to have been dismissed with costs."

On the 20th November, 1916, the Court of the Judicial Commissioner dismissed the appeal with costs. Thereupon the sureties, the present appellants, applied for leave to appeal to His Majesty in Council, giving as their grounds :—

"(1) That on a correct interpretation of the Security Bond, dated the 16th September, 1902, executed by the appellants it should have been held that the liability of the petitioners as sureties ceased on the 26th March 1903, when this Honourable Court dismissed the appeal by Thakur Sheo Singh.

"(2) That the Bond ought to have been construed not only with reference to the order of the Subordinate Judge, but also with reference to the terms of section 546 of the old Code of Civil Procedure corresponding to order XL, rule 6, of the new Code, interpreted in the form of the Security Bond given in it.

"(3) That if the Security Bond in question had not been filed, execution of decree would have been stayed only till the decision of the case by the Honourable Court. After that Rani Raghubans Kunwar would have obtained execution of her decree under the orders of this Honourable Court, which was never stayed, and in respect of which no action was taken under section 608 of the old Code of Civil Procedure."

Leave was given accordingly.

In their case on appeal below the Board they raised three points: That the appellants had not undertaken any personal liability, but had only charged their estate, that their charge only applied to and secured orders passed by the Court of the Judicial Commissioner in deciding the appeal then pending to it, and that the Court had no jurisdiction over them in the present proceedings and no order should have been made against them in these proceedings.

Of these points the first was not specifically raised in either of the Courts below. There is just enough in the general denial of liability and in the general words in the grounds of appeal to make it open to the appellants before their Lordships. It seems probable that the estates charged are so ample that it was hardly worth the while of the sureties to make this point. But as it has been made

before their Lordships it must be decided, and in the opinion of their Lordships the true construction of the document is that it is an instrument of charge only and not a bond imposing any personal liability and the decree must be corrected in this respect.

The second point, and that which has been principally fought throughout, is whether the appellants became sureties for the restitution of the mesne profits according to the ultimate decision of the Courts, or whether they were only to be liable in the event of the first Court, that of the Judicial Commissioner, deciding against them, and not liable if that Court decided in their favour, though the decree was finally reversed in the Privy Council.

Upon this point their Lordships are in agreement with the Subordinate Judge and the Court of the Judicial Commissioner. The other construction would give a strange result. According to it if the Court of the Judicial Commissioner had reversed the decree of the Subordinate Judge, but wrongly reversed it and been itself corrected on final appeal, so that the widow was really entitled to possession and the mesne profits, still the Court of the Judicial Commissioner having decided against her, the sureties would have had to pay to the defendant, who had no title, the amount of the mesne profits from the date of the original decision to that of the intermediate Court of Appeal.

It would be strange indeed if the language of the instrument had been such as to create a kind of wagering contract of this nature; but there is really no difficulty in the language of the instrument. These are its terms:—

> "We are Raj Debi Bakhsh Singh, Raj Raghubar Singh and Raj Mangal Singh.
>
> "Whereas a decree for possession of Taluka Mahewa, etc., has been passed on 6th August, 1902, by the Subordinate Judge of Sitapur, in favour of Rani Raghubans Kunwar, widow of Thakur Balbhaddar Singh, Talukdar of Mahewa, against Thakur Sheo Singh; and whereas, for the purposes of delivering possession in execution proceedings, the said Court of the Subordinate Judge has, under order dated the 21st August, 1902, required the Rani, Plaintiff-Decree-holder, to furnish security in the amount of Rs. 1,00,000, so that any order that might be passed by the Court of the Judicial Commissioner of Oudh be made binding on the surety for the said sum of Rs. 1,00,000; and whereas Thakur Sheo Singh preferred an appeal to the Court of the Judicial Commissioner against the order of the 21st August, 1902, at the end of August, 1902, and it was dismissed on the 12th September, 1902, we, the declarants, furnish security for Rs. 1,00,000, hypothecating the following property therefor, and declare that the hypothecated property shall serve as security, and be liable to the extent of Rs. 1,00,000 for carrying out the aforesaid purpose. Wherefore this security bond has been executed so that it may serve as an authority."

By this instrument the obligors make themselves liable to the amount of one lac as security for any order that might be passed by the Court of the Judicial Commissioner, not the first order but any order; and the ultimate orders of the Judicial Commissioner were that of March 4th, 1907, decreeing that the claim of the widow be dismissed as to all but a few villages, and

that of the 20th November, 1916, by which, *inter alia*, the assessment of the Subordinate Judge finding that the mesne profits amounted to more than three lacs of rupees was affirmed. On this point, therefore, the appellants fail.

There remains a matter which has given their Lordships considerable trouble. When this suit began the old Code of Civil Procedure was in force; but when the application against the widow and the sureties for the recovery of the mesne profits was started the new Code of Civil Procedure of 1908 had come into force and, as already stated, the application purported to be made under sections 47 and 144 of that Code.

In the course of the judgments in India section 145 was referred to; but whatever might have been its effect if the sureties had been personally liable it has no application now that their Lordships have construed the instrument as giving only a charge upon property; and indeed the application did not purport to rely upon this section. What, then, is the authority for it? Sections 47 and 144 provide for the decision of questions relating to the execution, discharge or satisfaction of the decree, and for restitution including the payment of mesne profits when a decree has been varied or reversed; and they enact that any such questions shall be determined in the suit and not by a fresh suit. But these sections apply only to the parties or the representatives of the original parties, and do not apply to sureties. No reliance can, therefore, be placed upon these sections as authorising the inclusion of the sureties as parties to the application made against the widow.

The assessment of damages, however, is one to be made once and for all as between the parties to the suit. The sureties are bound by that assessment and have no right to question it, as was not only admitted but contended by Counsel for the appellants before their Lordships' Board.

It is possible that in an extreme case the Court to which application was made to enforce such an instrument of suretyship, if it thought that there had been no real trial of the amount of the mesne profits might, upon terms, admit the sureties to question the amount; but it would be an extreme case, and no such case is made here. So far, therefore, as the applicant sought to have the assessment determined in the presence of the sureties no harm was done, and indeed the sureties need not have appeared.

But the questions of their liability upon the instrument, whether they were personally liable and whether, in the events which happened, it had become applicable, were matters which they were entitled to have determined against them in a regular and authorised manner. The contention for the appellants is that for this purpose there should have been a separate suit to enforce the charge, and that this must have been one according to the procedure provided by section 90 of the Transfer of Property Act.

In order to see whether this is so their Lordships turn to the instrument itself. For a proceeding under the Transfer of Property Act there must be a mortgagor and a mortgagee. Their Lordships have to examine whether in this case there is any mortgagee, any person to whom the security was given. Now no person is mentioned in the instrument. It recites the decree that the widow has been ordered to furnish security, and then the declarants furnish security by hypothecating their property. The form of an instrument such as this, in the absence of any special form being provided by the Code, and there is no suggestion that there was any such form provided under the Code then in force, must vary according to the practice of the Court. It appears that in the High Court at Calcutta, in instruments of this nature, the parties bind themselves to some named officer of the Court, and that, if the instrument has to be put in suit, either the officer sues or he, under order of the Court, assigns the security to the party who wishes to avail himself of it; but this instrument does not purport to bind the sureties to any individual officer or to anyone.

It is suggested that they are bound to the Court. But the Court is not a juridical person. It cannot be sued. It cannot take property, and as it cannot take property it cannot assign it. It remains, therefore, that here is an unquestioned liability, and there must be some mode of enforcing it, and that the only mode of enforcing it must be by the Court making an order in the suit upon an application to which the sureties are parties, that the property charged be sold unless before a day named the sureties find the money.

This form of procedure is that to which the High Court of Allahabad gave its sanction in the case of *Janki Kuar* v. *Sarup Rani and another* (I.L.R. 17 All., 99).

The new Code of Civil Procedure, that of 1908, provides a special form of security bond to be given during the pendency of an appeal (Appendix " G," No. 3). The form shows that it is intended to be given to someone and not to be a mere undertaking to the Court. Whether that someone should be the other party or an officer of the Court is not made clear; but with this form in use it is not likely that the difficulty which surrounds the present case will arise in future.

It appears to their Lordships that the proper way of dealing with the present case is to consider that there are three steps :—

(1) The assessment of the mesne profits to which the sureties need not be parties.

(2) The construction of the instrument determining that the property charged is liable as security in the events which have happened.

(3) The order that the property be sold unless the sureties pay.

It might have been more regular to take the first by itself and without the sureties, and to take the second with the third;

but unless it be that there is possibly some increase of costs, no harm has been done. It is idle to talk of the proceedings as if they had been taken before a Court which had no jurisdiction; and no serious objection was raised to the form of procedure; nor can the appellants point to anything which would show that justice has not been done to them.

In the result, therefore, their Lordships think that except as to the matter of the personal liability of the appellants, the decree appealed from is right. The variation which they would propose is as follows:—"That the decree of the Court of the Judicial Commissioner dismissing the appeal from the Subordinate Judge should be set aside, and that instead it should be decreed that the decree of the Subordinate Judge should be varied by striking out the words "the two sureties are liable," and substituting the words "the property hypothecated by the instrument of security of the 16th September, 1902, is liable," but otherwise affirmed.

Their Lordships see no reason to disturb the decrees as to costs in either of the Courts in India; but as the appellants have succeeded to some extent there will be no costs of the appeal to His Majesty in Council. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

RAJ RAGHUBAR SINGH AND ANOTHER.

v.

THAKUR JAI INDRA BAHADUR SINGH.

DELIVERED BY LORD PHILLIMORE.

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