

PRIVY COUNCIL

Raja Baghunandan Prasad Singh

Vs.

Raja Kirtyanand Singh Bahadur

P.C.A.No.93 of 1930

(Lord Blanesburgh, Lord Tomlin and Sir George Lowndes JJ.)

12.02.1932

JUDGMENT

LORD TOMLIN J.

1. On 22nd December 1917, a decree was obtained in a suit to enforce a mortgage against the mortgagor and a puisne mortgagee, who is respondent here. The decree was in the ordinary form of such decrees in India ; that is, six months were given for redemption, and at the end of that time in default of redemption the property was to be sold. The decree did not contain, and having regard to Order 34, Civil Procedure Code, could not contain, a personal judgment against the mortgagor for the mortgage money. An appeal to the High Court against the decree was duly taken by the mortgagor.

2. On 31st August 1918, the decree was made absolute. On 25th October 1918 an application was made to the Subordinate Judge by the decree-holders to bring the property to sale.

3. On 2nd April 1919, an order of the High Court was made by consent for a stay, and the order was in these terms: Let the respondents' petition for execution"-the respondents means the decree-holders :

"now pending be stayed for the period of one year as and from 1st April 1919, upon the appellant" (meaning thereby the mortgagor)

"furnishing solvent security in the lower Court to the satisfaction of the Subordinate Judge by 1st May 1919, for the sum of Rs. 1,12,000. In the event of the appellant's appeal to this Court not being disposed of within the period of one year calculated from 1st April 1919, let a further stay be granted for a

period of one more year from 1st April 1920, upon the defendant's [sic] furnishing solvent security in the lower Court to the satisfaction of the Subordinate Judge for a further sum of Rs. 1,12,000 such last mentioned security to be furnished on or before 1st April 1920, in the event of such further or additional stay being necessary."

4. Pursuant to that order there was executed by the respondent here (he being as already indicated a puisne encumbrancer and as such defendant 2 to the suit) a bond by way of security to satisfy in part the solvent security required by the High Court for the sum of Rs. 1,12,000. The sum of Rs 1,12,000 seems to have been fixed because it represented one year's interest on the mortgage money, and the object was to put the decree-holders ultimately in the position of being no worse off by reason of one year's delay in enforcing their security.

5. The bond so executed by the respondent, was in this form : It recited the suit and the decree of 22nd December 1917, in favor of the plaintiffs in the suit and that the defendants in the suit had preferred appeals to the High Court, and it further recited that the decree-holders had applied to execute the decree and that the defendants had made an application for a stay and that they had been called upon to furnish security by the order of 2nd April 1919, to which reference has already been made. Then it proceeds as follows:

"Accordingly I of my own free will stand security, to the extent of Rs. 77,000 out of Rs. 1,12,000 as therein ordered and covenant that if the decree of the first Court be confirmed or varied by the appellate Courts within one year from 1st April 1919, the said defendants shall duly act in accordance with the decree of the said appellate Court and they shall pay the sum of Rs. 77,000 or whatever may be payable under the said High Court order not exceeding Rs. 77,000, but if they should fail to pay the sum of Rs. 77,000 ; then any amount so payable as aforesaid shall be realized from my person and my legal representatives shall be personally liable to pay the same."

6. Up-to this point the document provides for the case of the decree of the first Court being confirmed or varied by the appellate Court within one year from 1st April 1919- an event which did not happen. The next clause however deals with events which did happen in the following terms:

"Be it known that if the judgment debtors fail to furnish security to the extent of rupees one lakh and twelve thousand on 1st April 1920 in case the appeals be not decided within that date then the decree-holders according to the order of

the High Court shall be able to execute their decree with interest and shall be able to realize rupees seventy-seven thousand from me and my representatives the money secured by this bond."

7. In December 1920 the application by the decree-holders to bring the property to sale seems to have been struck out. The appeal against the decree in the suit was not heard before 1st April 1920. It was, in fact, heard on 19th July 1921, and was dismissed. On 6th March 1922, there was a further application for execution of the judgment, and on that application an order was made for the sale of the property. On 26th January 1925, the property was sold under that order, and, as appears from the account of the proceeds of the sale, the sale did not realize by a sum of 93,000 odd rupees enough to satisfy the amount due on the mortgage. On 16th December 1925, there having been an appeal from the High Court to their Lordships' Board, an Order in Council was made affirming the original decree and making an order with regard to additional costs. On 25th January 1927, the decree holders made an application in the suit, to enforce the bond against the respondent here. Upon that application the questions arose which fall for the determination of the Board to-day.

8. On 18th May 1927, a decree was passed in the suit ordering the mortgagor in the suit to pay the balance of the mortgage money. After that the application of the present appellants to enforce the respondent's bond came before the Subordinate Judge, and on 28th July 1927, he delivered his judgment. He stated that the issues were as follows:

"(1) Is the application barred by limitation? (2) As the interest due from April 1919 to March 1920 has already been realized by the sale of the mortgaged property, can the decree-holders realize the surety money from the applicant? (3) Is the security without consideration? (4) Is the petitioner precluded from raising this point after notice under Order 21, Rule 22. Has the said notice been served?"

9. He dealt, first of all, with the point with regard to interest, and their Lordships understand that the view that he took was this : inasmuch as the one lakh and twelve thousand rupees was fixed by reference to the amount of the interest for one year, the rupees seventy-seven thousand mentioned in the bond was, in fact, part of the interest for that one year ending 31st March 1920, and further that as the purchase money received on the sale would have been applied first in satisfaction of interest before being applied in satisfaction of capital, therefore the liability for which the seventy-seven thousand rupees had to answer had disappeared and, that being so, the giver of the bond was under no liability in respect of it. That was his answer to the second

point.

10. The learned Judge held upon the first point, which he dealt with next, that the application was not barred by the Statute of Limitations. Then he dealt with the points about consideration and notice which do not now arise, and he concluded that the decree-holders, the appellants here, were not entitled to realise anything in respect of the bond, as the dues for which the respondent here stood surety had all been satisfied. An appeal was taken to the High Court and on 16th August 1928 the judgment of the High Court was delivered and the appeal was dismissed. The Judges of the High Court took a different view from that of the Subordinate Judge. They rejected the conclusion of the Subordinate Judge that the bond was given for interest only, and held that upon the true construction of the bond the sum of Rs. 77,000 had become payable on 1st April 1920 and therefore that the appellants were statute barred and not in a position to enforce the bond against the respondent.

11. In their Lordships' judgment the success or failure of this appeal depends primarily upon the true construction of the bond, the material passages of which have already been stated. The bond must be considered in the light of the order directing the security to be given. It will be observed that under the terms of that order no payment had to be made immediately on the expiration of the first year for which the stay was granted, but what is said is that the stay is allowed for one year from 1st April 1919 upon the decree-holders furnishing solvent security in the lower Court for the sum of one lakh and twelve thousand rupees ; in other words, the decree-holders are to get, in addition to the existing mortgage, further security for one lakh and twelve thousand rupees which shall put them in a position not worse than they would have occupied if the stay had not been granted.

12. In those circumstances what is the meaning of the language employed in the bond ? In the first part of the clause which has been read this phrase occurs :

"And they shall pay the sum of rupees seventy-seven thousand or whatever may be payable under the said High Court order not exceeding rupees seventy-seven thousand."

13. Although that phrase occurs in the clause which applies to the event which did not happen, it is some indication as to whether or not the rupees seventy-seven thousand was an absolute sum which was to be paid in any case, and in their Lordships' judgment, it indicates that it was not necessarily such a sum. When the terms of the clause which operated in fact are looked at it is found that two things are to result in

the event there mentioned : one is that the decree-holders shall be able to execute their decree with interest, and the other is that they shall be able to realize rupees seventy-seven thousand from the giver of this bond and his representatives. It is not a clause which puts upon the giver of the bond an obligation to make an immediate payment in cash ; it is a clause which puts the decree-holders in the position of having a realizable security of rupees seventy-seven thousand. The question is whether that is an absolute security which the decree-holders are to be free to realize immediately on 1st April 1920 or whether it is security to the extent of rupees seventy-seven thousand for the balance of the sum, if any, remaining unpaid after the mortgage property has been realized.

14. In their Lordships' judgment, upon the true construction of this document having regard to the circumstances in which it was executed, this bond is a bond for securing the balance unprovoked for by the proceeds of sale of the mortgage property, up to a sum not exceeding rupees seventy-seven thousand.

15. Upon that view of the case it is plain that until the property was sold the liability of the giver of the bond, the respondent here, could not be enforced. The application which was made in January 1927 was necessarily within time inasmuch as under the Indian Limitation Act it must either be within three years if the application is properly an application in the suit, or within six years if the application should have been made by independent suit.

16. The point was not raised below that the application should have been made by independent suit and the point was not taken by the respondent in his printed case before their Lordships' Board. Having regard to the fact that the point has never been taken before, and that if it was allowed to be taken now and succeeded, the appellants would be barred by lapse of time; although their original application was in time, their Lordships are of opinion that it is not open to the respondent to take the point here.

17. The result therefore is that the appeal must be allowed. There will be a declaration that the appellants are entitled to receive from the impendent his person and property the amount now properly payable under the bond on the footing that the bond is a security up to seventy-seven thousand rupees for the deficit on the mortgage. If necessary, there must be an inquiry to ascertain what the amount is and for that purpose the case should be remitted to the High Court. The appellants must have their costs throughout. Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.

