CALCUTTA HIGH COURT

Ram Ranjan Roy

Vs

Jayanti Lal Patra

(H Walmsley, C.J. Chakravarti, J.)

09.03.1926

JUDGMENT

Chakravarti, J.

1. This is an appeal by the plaintiffs and arises out of a suit for the enforcement of a registered mortgage bond. The suit was dismissed by both the Courts below and hence this appeal by the plaintiffs.

2. The facts shortly stated are these: The defendant and his two brothers are Khiraji Brahmottardars of a fractional share in Mouza Kamalpur and Metheni. The first plaintiff and one Raghunath Laik, the predecessor in interest of the other plaintiffs, took a prospecting lease from the defendant and his two brothers of their underground rights in the lands of the two mouzas. Simultaneously, they advanced a sum of Rs. 1,000 to each of the three brothers, taking from each of them a mortgage as security for the loan. The prospecting lease originally executed was not registered for some reason or other, and a fresh one was drawn up on the 12fchof Bhadro and was registered. The prospecting lease that was registered admittedly contains the provisions of the one that was not registered, and which the plaintiffs have failed to produce even though cited to do so. One of the provisions of the lease is that the three brothers shall receive a sum of Rs. 3,000 as bonus in the event of the prospecting lease being converted into a mining lease. Other provisions material to the present case are firstly that the term of the prospecting lease shall be three years, and that unless the lessees surrender their rights under the lease within the above period, they shall be entitled to obtain from the lessors a duly executed mining lease or treat the prospecting lease as a mining lease.

3. The plaintiffs' case is that the money due under the mortgage bond is due and, they therefore, pray recovery thereof by enforcing the mortgage bond.

4. The defence of the defendant No. 1 was that the mortgage bond was executed for the money

which was payable as selami for the mining lease and that after the expiration of 3 years, the plaintiffs made their election to treat the amalnamah as a lease and gave a discharge for the debt due under the mortgage bond. The defendants Nos. 2 to 5 were joined as puisne mortgagees but they claimed to be prior mortgagees.

5. Botn the Courts below have found for the defendants and dismissed the suit. Hence this appeal by the plaintiffs.

6. The following points were urged by the learned Vakil for the appellants:

Firstly that oral evidence and the evidence furnished by the letter, Ex. A-3, were inadmissible under the provisions of Sections 91 and 92 of the Evidence Act.

Secondly, that the lease contemplated by the amalnamah was not accepted by the plaintiffs in the exercise of their option provided in the amalnamah.

Thirdly, that assuming that there was a lease, it became inoperative, because the defendants had no title to the demised land and also because the plaintiffs were evicted by title paramount.

7. I propose to deal with all the points together. The mortgage bond and the amalnamah formedpart of one and the same transaction. The sum of Rs. 3,000 which formed the consideration for the three mortgages was the exact sum which would be payable by the plaintiff as selami to the defendant No. 1 and his two brothers. The amalnamah gave an option to the lessees to make an election within one year after the expiration of three years which was fixed as the period for prospecting for coal in the land. Until the lessors made their election to treat the transaction as a lease, the selami to be paid under the lease did not become payable to the mortgagors. The question which then arises is, did the plaintiffs either surrender the lease or elect to treat it as a completed transaction. On this point the learned District Judge finds "the plaintiffs admittedly did not surrender their rights to the defendants as laid down in the prospecting lease; and the letter, Ex. A-3, written by Raghunath Laik on behalf of the plaintiffs proves that the plaintiffs elected to treat the prospecting lease as a mining lease according to the terms of the prospecting lease." Under the terms of the amalnamah the plaintiffs had the right to treat the amalnamah as a lease and when they elected to do so, the selami for the lease became payable to the defendant and his co-sharers.

8. The learned Vakil for the appellants contended that the defendant No. 1 was not entitled to claim the selami, because he had no rights to the minerals of the mouzas and the lease became inoperative on account of the eviction of the lessees by title paramount claimed by the Pacheti Rai. On these points the learned District Judge finds as follows: "As regards the defendants' lack

of title to the minerals, the plaintiffs have nothing to say except that the defendants' zemindars the Pacheti Estate, have obtained a decree against certain other Khiraji Brahmottardars of certain other mouzas declaring that the underground rights belong to the Pacheti Estate. As the learned Court below has said, that decree does not prove that the defendant has no mineral rights in his two mouzas. There has been no ouster by the landlord; and the plaintiffs, as tenants who were inducted into possession by the defendant are estopped from denying the latter's title."

9. I agree with the findings of the learned District Judge, The plaintiffs were put in possession of the mouzas and then after satisfying themselves that there was workable coal in the villages and after three years, deliberately exercised their option given by the amalnamah. It is true, actual physical ouster by a title paramount is not necessary to prove eviction, but there must be clear proof of title of the person claiming paramount title and consequently proof of absence of title of the lessors. In the circumstances of this case there is nothing which amounts to eviction by title paramount.

10. Then as to the question of discharge of the mortgage bond, the learned District Judge says as follows: "The fact that when the mortgage was executed, the parties entered into a simultaneous oral agreement that on the lessees' acquisition of full mining rights the mortgage debt should stand cancelled, cannot be doubted. The defendant has deposed to this; and the facts and circumstances of the case corroborate his statement. To begin with, the amount advanced to the defendant was exactly the amount of his share of the bonus. The interest stipulated for, is so low that one is led to believe that the transaction was not a money lending transaction. The debt was made re-payable by Chaitra 1317, that is to say, after the expiry of over four years, within which period the prospecting lease was to have matured into a full mining lease. Lastly, in Raghunath Laik's letters, Ex. A 3, we have a clear admission that the debt is satisfied by the lessees' acquisition of full mining rights in the land."

11. The learned Vakil for the appellants argued that this finding by the learned District Judge was based upon evidence which was not admissible under Section 92 of the Indian Evidence Act, unless such evidence is admissible under the proviso of that section. His contention was based upon the ground that the oral evidence and the evidence furnished by the letter Ex. A-3, on which the finding of the learned District Judge is based were intended to vary and to add to the terms of the bond.

12. It is unnecessary to discuss the authorities which lay down that evidence of facts and agreement which go to contradict, vary or add to the terms of an instrument in writing is inadmissible. This cannot be doubted, but here the evidence was adduced to prove a discharge of the debt but not to vary or add to the terms of the bond. Such evidence is not excluded by Section

92 of the Evidence Act and, therefore, the saving clauses of Section 92 need not be invoked. In support of this view I shall content myself by quoting the view expressed by Mr. Justice B.B. Ghose, in the recent case of *Mohim Chandra Dey v. Ramdayal Dutta*[1] "A mortgage is discharged either by payment of the full amount of the debt or by release of the debt itself. It has never been doubted that a discharge of the debt by payment may be proved by oral evidence.... Ido not think that this can be called an agreement.... Such a transaction does not fall within proviso (4) to Section 92 of the Evidence Act and I do not think that oral evidence of it is excluded by that proviso." In the present case all that the oral evidence and the letters prove is that the plaintiffs signified their election to treat the amalnamah as a lease and also that the selami which was then payable to the defendant No. 1 was accepted in full satisfaction of the mortgage-debt. This evidence, therefore, did not contradict, vary or add to the terms of the mortgage bond but went to establish that the plaintiffs gave a full discharge of the debt due under the bond. I think, therefore, that the Courts below were right and this appeal must be dismissed with costs.

Walmsley, J.

13. I agree.

[1]91 Ind. Cas. 757 : 30 C.W.N. 371 : 42 C.L.J. 582 A.I.R. 1926 Cal. 170