

Banku Behari Dhur - - - - - *Appellant*

v.

J. C. Galstaun and another - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 10TH APRIL, 1922.

Present at the Hearing :

LORD SHAW.
LORD PHILLIMORE.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* MR. AMEER ALI.]

This is an appeal from an order of the High Court of Calcutta, dated the 11th December, 1918, which, with a variation as to costs, affirmed an order made by Mr. Justice Greaves in the exercise of the ordinary original civil jurisdiction of the Court on the 26th July, 1918, in a matter which came before him upon an application arising out of a case to which reference will be made presently.

It appears that a Hindu inhabitant of Calcutta named Nanda Lal Mullick, who died on the 22nd February, 1891, owned considerable house property in that city. He left surviving him a widow and an adopted son, Prem Lal Mullick. The estate of Nanda Lal Mullick appears to have been at the time of his death burdened with debts, which increased in the hands of Prem Lal Mullick. In order to save the property from sale in execution of decrees, Prem Lal, with the consent of the Administrator-General, executed on the 2nd October, 1895, a document by which

he conveyed his entire estate inherited by him from Nanda Lal Mullick to the present appellant, Banku Behari Dhur, as trustee for the liquidation of his debts. Prem Lal died intestate on the 20th March, 1907, leaving a widow, Srimati Radharani Dasi.

In order to liquidate the debts of the deceased Prem Lal Mullick, and other liabilities on the estate, Banku Behari Dhur had, in conjunction with Prem Lal, who was then alive, obtained considerable sums of money from the respondent Galstaun on three mortgages in respect of several properties owned by Prem Lal Mullick, among them being 21, Strand Road, to which the present dispute relates. On the 26th June, 1915, Galstaun brought a suit in the High Court of Calcutta upon the several mortgages held by him for the usual mortgage decree.

Beside Banku Behari Dhur, the trustee aforesaid, Srimati Radharani Dasi, the widow of Prem Lal, as the heiress of her husband, was made a party along with a number of puisne mortgagees. One of these puisne mortgagees was a lady named Madhab Mohini Dasi.

This suit was compromised, and the agreement of compromise was incorporated in the decree which was made by Mr. Justice Greaves in the High Court in its ordinary original civil jurisdiction on the 1st May, 1918. The terms of the agreement material to this judgment are as follows :—

“(e) That Mr. Galstaun will at the request and by the direction of Babu Banku Behari Dhur pay off the moneys due to other mortgagees not exceeding Rs. 60,000 and the amount paid will be added to this mortgage claim and carry interest at 7 per cent. per annum with quarterly rests in account and the said Mr. Galstaun will not under any circumstances whatsoever be able to call for or take any steps for realisation thereof until the expiration of four years from the date hereof.

“(g) That the title should be accepted by Mr. Galstaun upon the said Babu Banku Behari Dhur making out a marketable title thereto and that the purchase should be completed within one month from the date hereof. If such purchase be not completed within the aforesaid period then the interest on part of the principal money secured by the said mortgage and further charges, namely, Rs. 2,90,000, should cease to run and Mr. Galstaun shall be deemed to be the owner of the above premises subject to the charge and mortgage mentioned in Clause (a) as well as all existing encumbrances on the property herein and the whole of the said consideration money of Rs. 2,90,000 should *ipso facto* be set off against his claims under his mortgage and further charges.”

Madhab Mohini Dasi, the puisne mortgagee referred to above, appears to have made some delay in furnishing an account of her claim, and when the money was tendered to her by the plaintiff, on behalf of Banku Behari Dhur in the terms of the decree, she refused to accept it, making the delay the reason of her refusal. The matter had to go before the Court, and the learned Judge had to make a peremptory order directing that what was due to her should be paid within one week from the date of his order in certain shape set out therein, and that on her failure to accept the payment the money due should be paid into Court to the credit of the suit, and the Registrar should thereupon approve

of the reconveyance on her behalf. Thereafter Mr. Galstaun tendered to Banku Behari Dhur, the appellant, the conveyance in respect of 21, Strand Road in the terms of the agreement embodied in the decree in the mortgage suit. The date of the agreement was the 28th April, 1918, and it was provided under the agreement that the purchase by Mr. Galstaun should be completed "within one month from the date hereof." The conveyance was apparently tendered by Mr. Galstaun three days later, viz., on the 31st May, 1918. It was in the usual form, but Banku Behari Dhur refused to accept it on the ground that Mr. Galstaun was, under the terms of the agreement, bound to complete the purchase within one month from its date and had failed to carry it out; his contention being that Galstaun must consequently bear himself the burden of all outstanding incumbrances, and was not entitled to add them to his own security, which was to form the consideration for the conveyance.

On the objection of Banku Behari Dhur to accept the conveyance as tendered by Mr. Galstaun, the matter had to go again before Mr. Justice Greaves, and he came to the conclusion that the delay in the completion of the purchase was due principally to the default of the appellant himself; that, as a matter of fact, he did not deliver copies of the mortgages to the respondent, and did not make out a marketable title; that is that he did not send to the mortgagee (Galstaun) copies of the mortgages upon the properties other than the mortgages in his favour, which were with him; that he did not send or cause to be sent within one month from the date of the settlement, account of the dues to the several subsequent mortgagees; and that he did not arrange for proper reconveyances being executed and registered by the mortgagees on receipt of their actual claims. It also appears that he did not take proper steps to expedite the reconveyance from Madhab Mohini Dasi. The learned Judge accordingly considered that the respondent was not in default in respect of the delay in tendering the conveyance under the terms of the settlement as embodied in the decree, and he accordingly overruled the objection of Banku Behari Dhur, and directed that he and Radharani Dasi were to execute it in the form tendered by Galstaun, omitting all reference to Clause (g), within a week from the date of his order.

Banku Behari Dhur preferred an appeal to the High Court from the order of the learned Judge sitting on the original side of the Court, and the learned Chief Justice and Mr. Justice Woodroffe, who heard the appeal, came to the conclusion that Galstaun was actually in default; but they were also of opinion that the provision in Clause (g) relating to his default was by way of a penalty, and that as, under Section 74 of the Contract Act, it was not established that he had suffered any loss from the delay in the actual tender, Banku Behari was not entitled to any relief on account of Galstaun's default. They accordingly affirmed the order of Mr. Justice Greaves in so far as the execution of the conveyance was concerned, but varied his order relating to costs,

and made Galstaun liable for all the costs incurred in the course of the proceedings. Banku Behari Dhur has now appealed to His Majesty in Council, and his contention is that as Galstaun has been found to be in default, he must be held subject to the condition embodied in Clause (g) of the terms of settlement and ought to bear himself the burden of whatever charges or encumbrances may be outstanding in respect of the property in question, viz., 21, Strand Road.

Their Lordships, after having fully heard Counsel in support of Banku Behari's contention, are of opinion that the position taken up by him is wholly untenable. They agree with Mr. Justice Greaves that there was a duty imposed on him in relation to the conveyance he had to execute in favour of Galstaun; that he was bound to make out a marketable title in respect of the property, and, as the learned Judge points out, he did not take any steps to do so; and that consequently he is not in a position to ask for the enforcement of the provision on which he takes his stand in Clause (g). Further, their Lordships think that even if he had not been in default, and the provision in Clause (g) might be regarded as one in the nature of a penalty, he has not made out any loss—as the Appellate Court find—and is therefore not entitled to refuse the conveyance tendered.

Their Lordships are therefore of opinion that this appeal should be dismissed with costs, and that the order of the High Court on appeal should be varied by striking out the order as to costs, and that in respect of costs the order of the first Judge should be restored. And their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

BANKU BEHARI DHUR

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J. C. GALSTAUN AND ANOTHER.

DELIVERED BY MR. AMEER ALI.

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