

Privy Council Appeal No. 32 of 1944

Patna Appeal No. 2 of 1942.

Chaturbhuji Singh and others - - - - - *Appellants*

v.

Gobind Prasad Singh - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 23RD JULY, 1945

Present at the Hearing :

LORD SIMONDS

SIR MADHAVAN NAIR

SIR JOHN BEAUMONT

[*Delivered by* SIR JOHN BEAUMONT]

This is an appeal from a judgment and decree of the High Court of Judicature at Patna dated the 27th October, 1941, which on second appeal reversed the judgment and decree of the Additional District Judge of Gaya dated the 21st June, 1940, and restored the judgment and order of the Munsif of Jahanabad dated the 6th March, 1940, decreeing the Respondent's suit with costs.

The question for determination in the appeal is whether the transactions entered into by the Respondent, plaintiff, and the appellants, defendants, on the 24th February, 1938 resulted in a contract of tenancy. The Trial Court held that there was such a contract; the First Appellate Court that there was no such contract; and in second appeal the High Court reversed that decision, and restored the decree of the Trial Court.

At the time of the transactions in question the defendants owed to the plaintiff the sum of Rs.18,500 on a simple mortgage dated the 17th June, 1929. The first document of the 24th February, 1938 was a usufructuary mortgage, called a zurpeshgidar thicca, by which the defendants mortgaged to the plaintiff their 10 annas share in certain immovable property to secure Rs.16,000 and on the terms that Rs.2,500 were to be paid in cash. This was expressed to be in substitution for the rights of the plaintiff under the mortgage of 1929. By the second document of the same date the plaintiff executed in favour of the defendants a sub-lease, or katkana, of the property included in the usufructuary mortgage at an annual rent of Rs.960.

The rent under the sub-lease not having been paid, the plaintiff on the 15th December, 1938 instituted the suit out of which this appeal arises, in the Court of the Munsif of Jahanabad, claiming a sum of Rs.1,055 on account of rent and interest under the sub-lease. The defences raised were that the documents of the 24th February, 1938 had never taken effect as conditions precedent had not been performed.

On the 6th March, 1940, the learned Munsif decreed the suit in favour of the plaintiff. He held that the usufructuary mortgage and the sub-lease had been duly executed and registered, and that the documents took effect according to their terms, there being no obligation to perform any condition precedent.

The defendants appealed against this decision and on the 21st June, 1940, the appeal was allowed by the Additional District Judge of Gaya. The learned judge held that the simple mortgage of 17th June, 1929, did not appear to have been satisfied as there was no endorsement on the bond to that effect, and that accordingly the usufructuary mortgage of 24th February, 1938, was without consideration. This is clearly an error, as the High Court pointed out, as the usufructuary mortgage itself showed that the original mortgage was discharged by the terms embodied in the usufructuary mortgage. The learned additional District Judge further held that the documents of the 24th February, 1934 were not intended to take effect according to their terms since the defendant had withdrawn the usufructuary mortgage from the Registry Office and it did not pass into the hands of the plaintiff, and in the case of the sub-lease, both parties retained their respective portions of the document and there had been no exchange of counterparts, and no notice of the transaction had been given to Parsidh Narayan the owner of the freehold of the property dealt with by the documents. The learned Judge relied strongly, in support of his view that the matter had never proceeded beyond the stage of negotiations, on a notice given some time in August, 1938, by an agent of the plaintiff to the defendants, calling upon the defendants to pay up the Rs.2,500 in cash, to exchange the registration tickets and the documents, and to give notice of the transaction to Parsidh Narayan within a fortnight of the date of the receipt of the notice, and adding: " If you fail to comply with the terms of this notice my client will take it that you do not propose to stick to the transaction of ijara and katkana and my client will be free to institute a suit on the mortgage bond of 17.6.1929 ". The learned Judge allowed that notice to be given in evidence in the appeal and it was marked Ex. B.

In second appeal the High Court of Patna reversed the decision of the Additional District Judge. The learned judges held that the two documents of the 24th February, 1938, as soon as registered took effect according to their terms, and that the notice of August 1938, Ex. B, should not have been admitted in evidence. Mr. Justice Rowland also expressed the opinion that even if the notice were admitted it would have no effect upon the legal position.

Their Lordships agree with the decision and reasoning of the High Court. They think it clear that the two documents of the 24th February 1938 took effect according to their terms from the date thereof as soon as they were registered (see Section 47 of the Indian Registration Act). There is nothing in either document to suggest that an exchange of counterparts or notice to the freeholder was a condition precedent to the documents taking effect. Mr. Khambatta, for the appellant, has argued that the notice, Exhibit " B ", indicates an intention on the part of the parties that the documents should not take effect according to their terms and that this notice displaces the presumption to the contrary which would otherwise arise from the terms of the documents. It appears that the original of this notice was filed by the plaintiff with the plaint, but it was subsequently withdrawn by the plaintiff in circumstances which are not disclosed. The defendant, however, possessed a copy which he could have proved at the trial had the plaintiff declined to produce the original, and this he made no attempt to do. In the first appeal, however, the defendant tendered a copy, which does not appear to have been strictly proved, and the learned Judge admitted it in evidence as already stated. Their Lordships agree with the view of the High Court that the admission of the document was not justified by the terms of Order 41, Rule 27 (1) (b). This Board has pointed out in *Kessowji Issur v. Great Indian Peninsula Railway Company* (34 Indian Appeals, 115) and in *Parsotim and Others v. Lal Mokar and Others* (58 Indian Appeals, 254) that it is only where an Appellate Court requires additional evidence to enable it to pronounce judgment, or for any other sufficient cause, that the sub-rule applies. There is nothing to suggest that the First Appellate Court found it necessary to admit this document in order to enable it to decide the case properly. The document was one on which the defendant relied and which he could have put in evidence in the lower Court and, in their Lordships' view,

no case arose for admitting the document in appeal. Their Lordships further agree with the view of Mr. Justice Rowland that even if the document be admitted it cannot have the effect claimed for it. The document contains a threat as to what the plaintiff would feel free to do if the defendant omitted to take certain steps. The plaintiff took no action on the notice, nor did the defendant treat it as cancelling the usufructuary mortgage and sub-lease and restoring his liability under the original mortgage. An idle threat of that sort cannot destroy the efficacy of two formal documents duly executed and registered.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council

CHATURBHUJ SINGH AND OTHERS

v.

GOBIND PRASAD SINGH

DELIVERED BY SIR JOHN BEAUMONT

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