APPELLATE CIVIL

Before Coxe and Richardson JJ.

SHEONANDAN LAL

v.

ZAINAL ABDIN.*

1914

Nov. 25.

Debt—Charge—Assignment—Transfer of Property Act (IV of 1882), s. 55, sub-s. (4).

There is no authority for the contention that a charge such as the one mentioned in s. 55, sub-s. (4) of the Transfer of Property Act, is merely a personal right which cannot be transferred to an assignee. The debt could undoubtedly be transferred and there is no reason why the security for the debt should not also be transferred with it..

Hari Ram v. *Denaput Singh* (1) and *Moti Lal* v. *Bhagwan Das* (2) distinguished.

SECOND APPEAL by Sheonandan Lal, the defendant No. 2.

This appeal arose out of a suit to recover 1,600 rupees with interest by the sale of 3 annas and odd share of mouza Dum Duma. Originally it appears that Hafiz Ashraf Husain, paternal grandfather of the present plaintiffs, was a plaintiff with them and claim was made by him and the present plaintiffs jointly. He died during the pendency of the suit and on his death his son Abdul Rawoof and his daughters, Bibi Sagheran and Bibi Soghra, were added as defendants Nos. 5 and 7. Bibi Azizan is another daughter of Hafiz Ashraf Husain but she has been a defendant ever since the filing of the suit.

* Appeal from Appellate Decree, No. 245 of 1911, against the decree of H. Foster, District Judge of Saran, dated Sept. 24, 1910, modifying the decree of Baroda Prosad Roy, Munsif of Chapra, dated Feb. 26, 1910.

(1) (1882) I. L. R. 9 Calc. 167. (2) (1909) I. L. R. 31 All. 443.

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Ashraf Husain's son Abdul Huq, late father of the present plaintiffs, and Ashraf Husain himself executed a registered sale deed, dated the 5th of November 1902, in favour of defendants Nos. 1 to 3 conveying 3 annas and odd share of mouza Dum Duma to them for Rs. 2,000. Out of the consideration money Rs. 500 passed at the time of the execution of the deed and Rs. 1,500 was kept in deposit with the purchasers, the defendants Nos. 1 to 3, in order to pay up two debts, namely, Rs. 500 to Nural Huq and Rs. 1,000 to Mohamad Kazim who held possession of mouza Mohamadpur Ghalib and Gopepur Katsa as *zurpeshgidar* upon a registered mortgage deed by way of conditional sale executed by Hafiz Ashraf Husain. Rupees 500 has been paid to Nurul Huq and the allegation in the plaint is that Rs. 1,000 was not paid to Mohamed Kazim and hence the suit as originally framed for recovery of the money by the sale of the property, part of the consideration of the sale of which was the money alleged to be due, under section 55 (*4*) (*b*) of the Transfer of Property Act. Interest has been claimed on the money by way of the annual profit alleged to be Rs. 120 per year which the original plaintiffs would have derived from Mohamedpur Ghalib and Gopepore Katsa had it been redeemed with the sum of Rs. 1,000 by payment of the same to Mohamed Kazim.

After the execution of the sale deed in favour of the defendents Nos. 1 to 3, Ashraf Husain executed a registered sale deed dated the 24th of March 1904 in favour of his daughter Azizan Bibi, defendant No. 4, in the suit which purported to convey Mohamedpur Ghalib and Gopepur Katsa to her. It was alleged in the original plaint that the deed was a *benami* one executed for family purposes without any consideration and that the defendant No. 4 derived no interest under it.

Before the institution of the suit a notice is alleged to have been served on the defendants, Nos. 1 to 3, for payment of the sum of Rs. 1,000 with interest but no reply is alleged to have been received.

When Abdul Huq died on the 7th of April 1907 after the service of the notice, the present plaintiffs joined with their paternal grandfather Hafiz Ashraf Husain in bringing this suit and jointly claimed the money. After the death of Hafiz Ashraf Husain, during the pendency of this suit, a petition to amend the plaint was filed in which there was mention of a registered *ladavi* deed dated the 1st of August 1905 executed by Hafiz Ashraf Husain in favour of his son Abdul Huq father of the present plaintiffs. By this deed Ashraf Husain disclaimed interest in the sum of Rs. 1,000 kept in deposit with the defendants Nos. 1 to 3 in favour of his son Abdul Huq. According to that petition the defendants Nos. 5 to 7 have been added and the case of the present plaintiffs is that as Ashraf Husain inherited a sixth share of the money from Abdul Huq after his death and as the defendants Nos. 4 to 7 have inherited the same one-sixth share after the death of Ashraf Husain they the present plaintiffs are entitled to get five-sixths of the money claimed.

The defendants Nos. 1 and 3 and 5 to 7 did not appear to contest the plaintiffs' suit though they were duly served with summons. The defendant No. 2 filed a written statement and so did the defendant No. 4.

The defendant No. 2 contended that the cause of action, as alleged in the plaint, was incorrect; that the plaintiffs had no cause of action; that the suit was not maintainable as the plaintiffs brought it without taking a succession certificate; that the plaintiff's suit was barred by limitation; that the sale deed

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executed by Hafiz Ashraf Hussain, in favour of Azizan, the defendant No. 4, was not *benami* and without consideration as alleged in the plaint; that the *ladavi iqrarnama* executed by Hafiz Ashraf Husain in favour the plaintiff's father was fraudulent, the executant having no right to Mohamadpur Ghalib and Gopepur Katsa at the time of the execution of the *iqrarnama* aforesaid; that the plaintiffs had no right to the money claimed; that before Bhado 1310 F. S., the due date for payment of Rs. 1,000, Mohamed Kazim died; that the heirs of Ashraf Husain did not take out succession certificate and so the money could not be paid to them; that Ashraf Husain was informed of this and he subsequently sold his interest in Mohamadpur Ghalib and Gopepore Katsa to his daughter, defendant No. 4; that the sum of Rs. 1,000 was subsequently paid to the defendant No. 4 by the defendant No. 2 and that the plaintiffs are not entitled to any relief.

The defendant No. 4 in his written statement supported the defendant No. 2 who purchased defendant No. 4's interest in Mohamadpur Ghalib and Gopepur Katsa by a registered sale deed.

The plaintiffs subsequently took out succession certificate.

The Court of first instance decreed the suit in part for Rs. 1,597-8 with costs in proportion and future interest at 6 per cent. per annum until realization as against the defendants Nos. 1 to 3 only and the amount decreed was allowed to be recovered by sale of 3 annas of mouza Dum Duma.

Against this order of the Munsif the defendant, Sheonandan Lal, appealed to the District Judge of Saran. The appeal was allowed in a modified form. The plaintiffs were allowed Rs. 1,000 with interest at 6 per cent. from the 5th of November 1902 to the date of payment.

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In default of the defendants Nos. 1 to 3 paying this amount with costs within six months from date of decree the share of Mouza Dum Duma was to be put to sale and the proceeds appropriated to the liquidation of Rs. 1,000 *plus* interest at 6 per cent.

Hence this second appeal on behalf of Sheonandan Lall, the defendant No. 2.

Dr. Dwarka Nath Mitra (with him *Babu Satindra Nath Mookerjee*), for the appellant, contended that the right under section 55 of the Transfer of Property Act was merely a personal right in the vendor and it could not therefore be maintained by an assignee. The charge was a personal right in the vendor and he and he alone could invoke the aid of section 55, cl. (4) of the Transfer of Property Act. Under the English Law it was assignable but not so under the Indian Law. The language of the statute must be construed strictly. Moreover, the suit was barred by limitation. Article 132 does not apply to the case of an assignee. The proper article is Article 111. Lastly, the plaintiffs are not entitled to any interest. They had no interest to pay.

Moulvi Mahomed Mustafa Khan, for the respondents. Appellant's case was that the father had made an oral assignment of Rs. 1,000 to Azizan. The Judge has disbelieved the story of the assignment. The admitted fact is that the appellants have never paid Syed Mohamed Kazim the money which they had, undoubtedly, to pay. The result is that they have got Dum Duma without paying the full purchase-money for it.

The defendant No. 2 appeals in the capacity of a purchaser from Azizan Bibi.

Dr. Mitra, in reply.

Cur. adv. vult.

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COXE J. This was a suit for the recovery of Rs. 1,000 said to be a portion of the unpaid purchase money of Mouzah Dum Duma and therefore charged upon that village. This village was sold in 1902 by Ashraf Hossain and Abdul Huq to the appellant. Out of the purchase money a sum of Rs. 1,000 was kept by the appellant on the understanding that he should in September 1903 pay it to one Mahomed Kazim in payment of a mortgage by conditional sale of two villages which may briefly be described as Galib and Katsa.

Abdul Huq died and this suit was brought by Ashraf Hossain as one of Abdul Huq's heirs and by the other heirs of Abdul Huq. The facts are not very definitely found by the Courts below, but, if I understand their judgments right, they think that Ashraf Hossain in 1904 gave the right of redeeming Galib and Katsa to his daughter Bibi Azizan, in order that she might obtain those villages by paying the mortgage money viz. Rs. 1,000 from her own pocket; and that in 1905 he gave to Abdul Huq, his son, his interest in the right of recovering the sum of Rs. 1,000 which was in deposit with the appellant. The appellant had not paid the money although it was two years after the due date, and perhaps there seemed little likelihood of his doing so. In 1906 Abdul Huq gave the appellant notice to pay this money, but as he did not do so, the present suit was instituted. After the suit was instituted the appellant brought the equity of redemption of Galib and Katsa from Azizan and asserts that he gave her the sum of Rs. 1,000 to be paid by her to the original mortgagee. This allegation was supported by Azizan. The Court below does not believe that this sum was ever paid and has given the plaintiffs a decree.

On behalf of the appellant it is first contended that the suit cannot be maintained by the present plaintiffs

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COXE J.

on the ground that the charge mentioned in section 55 sub-section (*d*) clause (*b*) of the Transfer of Property Act, 1882, is a personal right of the seller himself, and cannot be transferred to an assignee. There is, however, no real authority in support of this view. The cases cited, *Hari Ram* v. *Denapat Singh* (1) and *Moti Lal* v. *Bhagwan Das* (2) are quite different and do not support the present contention. The debt itself could certainly be transferred, and I see no reason why the security for the debt should not also be transferred with it.

Secondly, it is contended that, as the defendant says that he has paid Azizan and is supported by Azizan, the plaintiffs can have no right to the money. The Judge, however, finds as a fact that this payment was not made. And if it is the case, as the Courts below evidently think, that in consequence of the appellant's neglect to pay the money Ashraf Hossain decided to cancel the arrangement, under which the appellant had to pay the money to the original mortgagee, and transferred to Abdul Huq his right to recover the money directly from the appellant, the payment to Azizan could not possibly be a valid discharge of the appellants' obligation. Notice was given to the appellant to return the money before the institution of the suit and the alleged payment to Azizan was made long after the suit was instituted.

The only other point that has been pressed is that the plaintiffs are not entitled to the whole of the money. This, however, is not raised in the grounds of appeal, and the other defendants who are prejudiced by this decision, if it is wrong, in this respect, do not appeal. The appellant is clearly bound to pay the sum and it matters nothing to him how the plaintiffs and the other defendants divide it among themselves.

(1) (1882) I. L. R. 9 Calc. 167. (2) (1909) I. L. R. 31 All. 443.

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The appeal must be dismissed with costs.

RICHARDSON J. I agree.

S. K. B. *Appeal dismissed.*

APPELLATE CRIMINAL.

Before Fletcher and Beachcroft JJ.

1914

Dec. 1.

SHASHI RAJBANSHI
v.
EMPEROR.*

Pardon—Failure of approver to comply with terms of the pardon on examination at the preliminary inquiry—Forfeiture of pardon—Commitment of approver along with other accused—Joint trial of approver and others—Plea of pardon taken in the Sessions Court—Proper procedure thereon—Trial of question of forfeiture as a preliminary issue—Power of Jury to determine the point—Criminal Procedure Code (Act V of 1898), ss. 298 (1) (c), 337.

Where an approver has forfeited his pardon, on his examination at the preliminary enquiry, the Magistrate may put him in the dock, recommence the enquiry and commit him for trial along with the other accused.

Queen-Empress v. *Natu* (1) discussed.

Queen-Empress v. *Brij Narain Man* (2), *Emperor* v. *Budhan* (3), *Sultan Khan* v. *King-Emperor* (4) and *King-Emperor* v. *Bala* (5) followed.

When an approver has been committed to the Court of Session as an accused he may plead his pardon in bar at the trial, and the Judge must first try the issue of forfeiture and take the verdict of the Jury thereon, and then proceed with the trial of the accused for the offences charged.

Emperor v. *Abani Bhushan Chuckerbutty* (6) discussed.

Kullan v. *Emperor* (7), *Alagirisami Naicken* v. *Emperor* (8), *King-*

* Criminal Appeal, No. 703 of 1914, against the order of W. A. Seaton, Sessions Judge of Murshidabad, dated July 15, 1914.

(1) (1899) I. L. R. 27 Calc. 137.
(2) (1898) I. L. R. 20 All. 529.
(3) (1906) I. L. R. 29 All. 24.
(4) (1908) 5 All. L. J. 691.
(5) (1901) I. L. R. 25 Bom. 675.
(6) (1910) I. L. R. 37 Calc. 845
(7) (1908) I. L. R. 32 Mad. 173.
(8) (1910) I. L. R. 33 Mad. 514.