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IN THE MATTER OF THE PETITION OF GOPAL DHANUK.

The Judge was further somewhat inconsistent, for, after stating that the prisoner pleaded guilty, he proceeds to show that he was not guilty of the charge as framed, inasmuch as he had not made a complaint of an offence under s. 304A of the Penal Code, which was alleged in the charge.

The Judge committed an error, therefore, in convicting the prisoner without a trial. We therefore set aside the conviction and sentence, and direct that the prisoner be tried according to law, and that the Judge conform to the procedure laid down in chap. XIX, Code of Criminal Procedure.

Conviction set aside.

APPELLATE CIVIL.

Before Mr. Justice Pontifex, Mr. Justice Morris, and Mr. Justice Prinsep.

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WOMESH CHUNDER GHOSE (PLAINTIFF) *v.* SHAMA SUNDARI BAI (DEFENDANT).*

Evidence—Secondary Evidence—Bond—Loss or Destruction of Instrument—Evidence Act (I of 1872), s. 65, cl. (c).

In a suit by the purchaser of a debt, the plaintiff stated that, in 1873, *A* executed a bond in favour of *B* to secure the repayment of Rs. 1,000, and that he had purchased the interest of *B* at a sale in execution of a decree against him. The plaintiff now sued *A* upon the bond, making *B* a party. At the trial, *A* denied the execution of the bond, and it was not produced by the plaintiff, who, having served *B* with notice to produce, tendered secondary evidence of its contents. *B* was not examined as a witness, and no evidence was given of the loss or destruction of the bond.

Held by PONTIFEX and MORRIS, JJ. (PRINSEP, J., dissenting), that secondary evidence was not admissible.

THE plaintiff in this case alleged that the defendant No. 1 executed a registered bond on the 16th Choit 1279 (28th March

* Appeal from Appellate Decree, No. 794 of 1879, against the decree of T. T. Allen, Esq., Judge of Rajshahye, dated the 5th February 1879, reversing the decree of Baboo Jibun Krishna Banerjee, Subordinate Judge of that district, dated the 12th September 1878.

1873) in favor of the defendant No. 2, Ramjoy Sircar; that the bond was for Rs. 1,000, and stipulated that that amount, with interest at 3 per cent per mensem, should be paid in the month of Joisto 1280 (May 1874); that, in execution of a decree against Ramjoy Sircar, his interest in the alleged debt was put up for sale, and was purchased by the plaintiff for Rs. 200 on the 28th of December 1877, four years and nine months after the alleged execution of the bond. On the 12th of March 1878, nearly five years after its alleged execution, the plaintiff instituted the present suit against the alleged obligee, and he also made Ramjoy Sircar a defendant. He claimed that Rs. 2,783 was due on the alleged bond, and asked for a decree for that amount against the defendant No. 1. The defendant No. 1, whom the Judge stated to be a purdanashin lady, by her written statement, denied having ever executed any such bond. The Subordinate Judge gave the plaintiff a decree, but his decision was reversed by the District Judge.

The plaintiff then appealed to the High Court. The learned Judges, before whom the appeal was heard in the first instance, differed in opinion, and the case was accordingly re-argued before three Judges.

Mr. *G. Gregory* and Baboo *Gurudass Banerjee* for the appellant.

Mr. *Bell* and Baboo *Doorga Mohun Das* for the respondent.

The following judgments were delivered:—

PONTIFEX, J. (who, after stating the facts of the case, continued:)—The plaintiff, when he purchased for Rs. 200, does not appear to have made any enquiry as to the existence of the bond. He took no steps to obtain possession of it or to satisfy himself that if it had really been executed by the defendant No. 1, it still existed uncancelled and untransferred by Ramjoy Sircar. His purchase was, in fact, a mere speculative purchase, and may have been a collusive one. In this suit, the plaintiff neither produces the alleged bond, nor does he adduce any evidence that it is still in existence uncancelled; or that, at the date of his purchase, Ramjoy Sircar continued to be

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interested under it. But he made Ramjoy Sircar a defendant to the suit, and served him with notice to produce the bond, which, however, was not produced; nor was it shown to be in Ramjoy Sircar's possession or power. Upon this he sought to use a copy from the Registry Office as secondary evidence. But making Ramjoy Sircar a defendant, and giving him notice to produce, would not, in my opinion, entitle the plaintiff to use the copy from the Registry Office as secondary evidence against the defendant No. 1. The plaintiff can stand in no higher or better position than Ramjoy Sircar would himself have occupied. Before Ramjoy Sircar could have used secondary evidence, it would have been necessary for him to prove the destruction or loss of the alleged instrument. But Ramjoy Sircar has not been examined, and as the evidence stands, there is no proof of destruction or loss. For all that appears, the bond, if really executed, might, at the date of the institution of this suit, have been cancelled, or in the hands of a third party, or purchased for value. To admit secondary evidence under these circumstances would, in my opinion, be most dangerous, and inasmuch as the plaintiff purchased without requiring delivery or proof of the continued existence of the bond, he is not, in my opinion, entitled to claim any benefit under the last part of cl. (*c*) of s. 65 of the Evidence Act, otherwise he, as appears, would be placed in a better position than the obligee. I am, therefore, of opinion, that the decree of the lower Appellate Court is right, and that this appeal should be dismissed with costs.

So far I have treated this as a special appeal upon which we are unable to look at the evidence. But, as the defendant No. 1 had, in her written statement, denied execution of the bond, I asked the question of the plaintiff's counsel whether execution of the alleged bond had been proved. In answer to my question their evidence was read to us. None of the witnesses, named as attesting witnesses on the registered copy, has proved the execution of the bond by the defendant No. 1. One of such attesting witnesses was called, but he admitted that he did not see the defendant No. 1 execute. Another person, a servant, who was not named as an attesting witness, was called,

and he stated that he saw the defendant No. 1 execute a bond and a power-of-attorney to register on the same occasion. But a writer in the Registration Office, who says he has been for the last two years out of employment, deposed that he had witnessed the execution of the power-of-attorney, and that the bond was not there at the time the power was executed.

Again, according to the copy sought to be used as evidence, the bond, if unpaid at the prescribed time in Joisto 1280 (May 1874,) was to be paid by instalments, and the payments were to be endorsed. Therefore, even if the bond had been executed, there may be substantial reasons for its non-production. And no explanation is given why the bond has not been sued upon earlier; or why Ramjoy Sircar allowed a well-secured debt, which, at the time of plaintiff's purchase, must have amounted to Rs. 2,500 at the least, to be sold for Rs. 200.

Under these circumstances I should myself have had no hesitation in dismissing the plaintiff's suit, on the ground that he had not proved the execution of this alleged bond by this purdanashin lady. And these circumstances also show, how dangerous it would be to let in secondary evidence in a case like the present.

MORRIS, J.—I quite agree with Mr. Justice Pontifex, that the plaintiff, as purchaser of a possible debt due under an alleged bond, cannot stand in a higher position than the obligee of that bond. When he sues to recover upon the bond, he must either produce it or satisfactorily account for its loss or non-production; and unless he can show that the obligee had it in his possession and power when his interest in it passed to him, and failed to produce it, though called upon and legally bound to do so, he cannot be allowed to give secondary evidence of its contents, nor can the Court presume that it is still in force.

The appeal is dismissed with costs.

PRINSEP, J.—The plaintiff, in execution of a decree against Ramjoy Sircar on 28th December 1877, purchased the debt due to the said Ramjoy on a registered mortgage bond, dated 16th Cheyt 1279 (March 28th, 1873), purporting to have been

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executed by Shama Sundari Bai. The law (Act VIII of 1859) nowhere provides for delivery by the judgment-debtor of such a bond before sale to the Court, or after sale to the auction-purchaser, but requires that "attachment shall be made by a written order prohibiting the creditor from receiving the debt, and the debtor from making payment thereof to any person whomsoever until further orders of the Court." The sale apparently took place without any objection on the part of either the obligee (the judgment-debtor) or the obligor Shama Sundari Bai.

The auction-purchaser of the debt due to the obligee has now sued to recover the full sum of money due on the bond with interest up to date, and in this suit he has made Ramjoy Sircar, the original obligee, a defendant, as well as Shama Sundari Bai.

Shama Sundari Bai, in her written statement, denied that she had taken any loan from Ramjoy Sircar, or that she executed any bond to him. She further stated, that Ramjoy Sircar and another person were her mooktears; that they always had cash in their hands; that they still owe her money; that they have never furnished her with their accounts, and that as she has not been able to obtain possession of her papers which were with her father Kashi Singh (deceased) she has not been able to sue them.

She next disputed the necessity specified in the bond for borrowing the money, and contended that the copy of the bond filed by the plaintiff was not admissible in evidence.

Several processes were issued for the attendance of the original obligee, Ramjoy Sircar, with the bond, but without any success, and a prosecution in the Criminal Court was instituted against him. It appears that, during the pendency of the appeal in the District Judge's Court, he has died. An attested copy of the bond obtained from the Registration Office was, therefore, tendered and received as secondary evidence. When the case was first heard by Mr. Justice Morris and myself, we differed on the only point raised, *viz.*, the presumption arising from the non-production of the original bond, and we have now heard this special appeal re-argued.

As I have the misfortune to differ from my learned colleagues in being of opinion that the order of the District Judge should be set aside and a decree given to the plaintiff, it is necessary that I should state my reasons for this opinion.

The District Judge on appeal has found, in concurrence with the first Court, that "it is proved that in Cheyt 1279 B. S. (March 1873), a sum of Rs. 1,000 was borrowed in the name, and for the interest, of defendant Shama Sundari from her Mooktear Ramjoy Sircar, and a bond for the amount, with interest at 3 per cent per mensem, duly registered, executed in his favor to secure repayment." The District Judge then expresses himself in the following terms: "Now on the woman's part the substance of the defence, besides a false denial of the execution of the bond and contraction of the debt in 1279, consists of a general assertion, that Ramjoy Sircar, as her agent, had money constantly in his hands belonging to her, and might, therefore, have cleared off any such debt. I consider that such a defence throws upon the plaintiff the onus of proving the actual existence of a subsisting debt from the defendant to Ramjoy Sircar at the time of his purchase in December 1877.

"His certificate tells us that he bought the interest of Ramjoy Sircar in the debt; he must further show what that interest at the time was. It is too much to presume that, because a debt was contracted in 1279 B. S., under an express agreement that the said debt should be extinguished in three months, it was, therefore, subsisting seven years afterwards. The possession of a bond by the creditor raises the presumption of the subsistence of the debt; here the creditor does not produce the bond. For all we know the debt was extinguished in 1280 Joisto, as agreed, and the bond handed back to the woman's father. It would be very hard to expect a purdanashin woman, after her creditor is dead, and her father who managed her affairs is dead, to prove by positive evidence, that a debt contracted seven years before has been actually paid off, especially when the creditor was her trusted agent, and there is nothing whatever on the other side to raise a presumption of the subsistence of the debt at the present day. I think the Subordinate Judge has been in error in laying any such onus on the woman. The

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non-production of the original bond by the plaintiff raises a presumption against the subsistence of a debt. If he meant to make his speculative purchase effective, he should have got the bond, if any such bond was then in the possession of Ramjoy Sircar."

As I understand the ground upon which the plaintiff is considered to have failed in this suit, it is that, because he has been unable to produce the original mortgage bond, it is to be presumed that it is not in the possession of the obligee, and consequently that no debt to him existed at the time of sale. His purchase is condemned as speculative, and though he has purchased at a public auction held by a Civil Court, and done all that can possibly be expected from him to obtain the necessary evidence of the debt; and though the defendant, the obligor, has never stated that the debt has not been paid off, nor indeed pleaded any payment at all, we are to give her the benefit of a liquidation in full of a debt found to have been contracted on her behalf, the money having been applied to her benefit.

No doubt, all purchases of debts through the Courts in execution of a decree must generally be speculative, because in mostly every case the judgment-debtor is obstinately passive. The Codes of Civil Procedure, however, have always recognized debts as saleable property, and though under the present Code of 1877, enquiry is made before sale to ascertain, with as much accuracy as possible, the exact property to be sold, no such provision existed under the law of 1859 under which the sale now under consideration was held. A purchaser like the plaintiff would, therefore, have little means of ascertaining what he purchased, except that in the present case he would have something tangible in the knowledge that the debt was secured by a registered instrument; and though the obligor was not bound to appear on service of the notice of attachment under s. 236, Act VIII of 1859, to deny the existence of any debt, he would be entitled to draw some inference from her non-appearance. Further, I would observe, the Court, under Act VIII of 1859, had no power to compel the appearance of the judgment-debtor or the production of any instrument forming evidence of the debt under sale, and, therefore, a purchaser would be at some

disadvantage in establishing the debt when the entire evidence might be in the hands of one who, like Ramjoy Sircar, has persistently declined to appear. That has, as far as my experience goes, been the practice in the Mofussil Courts.

Now as regards possession of the original bond, it is clear that, originally, it was with Ramjoy Sircar the obligee, and as I understand the law, the presumption would be, that it has so remained. It is not for us to suggest what may have happened. There has been the publicity of a public sale in Court, and we have in the present case the additional security that even supposing that it has been transferred to a third party, it could no longer be made the subject of a suit, as the claim has become barred by limitation.

It has, however, been stated that, before bringing the present suit, the plaintiff should have sued Ramjoy Sircar for delivery of the bond; but the uselessness of such a proceeding is shown by what has happened in the present case. Ramjoy would not have appeared, and with an *ex parte* decree the plaintiff would be in no better position than he now is without the expense of such a suit. It appears to me that the plaintiff has done all that is in his power to prove his case, and that, in the absence of any proof or even any plea of payment on this bond, we are bound to give him a decree.

It has been suggested that the plaintiff may have colluded with Ramjoy Sircar, but this is amply explained away by his action in prosecuting him criminally for not appearing in answer to process of the Court to produce this bond. We should be more justified in imputing collusion on the part of the female defendant with Ramjoy Sircar, her old servant, to evade payment of a portion of her debt by inducing him to withhold production of the bond.

We have it found in two Courts that the bond was executed by the defendant Shama Sundari; that it was duly registered under a power-of-attorney executed by her; and that the money was paid to her father Kashi Singh, and applied to the payment of Government revenue due for her estates. With these findings, and in the absence of any allegation of payment of any portion of the debt, it appears to me, that the plaintiff is

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entitled to a decree. Evidence of any payment would clearly be in the hands of Shama Sundari, and if, as has been thrown out at the second hearing of this special appeal for the first time, the bond itself might bear evidence of this by endorsements of payments, we should expect that this would have been the obligor's case, and that she would have united with the plaintiff in requiring the production of the original bond. The evidence in this case has been read to us, though we are sitting in special appeal, and that shows, that whatever may be the value of the direct evidence as to the execution of the bond by Shama Sundari, and that has been believed by two Courts, there can be little doubt that she executed the power-of-attorney to her father Kashi Sing and another, to register it; and that in that mookhtarnamah the bond is so described as sufficiently to connect it with the bond now set up, and while referring in passing to the evidence, I would remark that the first Court finds that "no money was kept with Ramjoy Sircar, and no revenue was paid from such a fund as alleged by the defendant," but the District Judge on appeal merely states that Ramjoy Sircar the creditor was her trusted agent. The transaction was, however, conducted on behalf of the lady by her father Kashi Singh, against whom nothing has been said, and to say the least of it, it has been left doubtful whether Ramjoy Sircar had any other money dealings with Shama Sundari. If any thing turned on this, we ought to remand the case to the District Judge to determine this point.

We have, therefore, in the present case the finding of the lower Court, that the bond was executed by the defendant, that the money paid on it was received by her father and applied to her use; and in my opinion, it follows, that the onus lies on her to prove payment. It is not for us to suggest for her what she has never said in her defence, or to consider what may have become of the bond itself. It is sufficient, I conceive, that execution of the bond has been proved, and that the defendant has received the benefit of the money paid. She has not attempted to plead any repayment of that debt. I would, therefore, give the plaintiff a decree.

Appeal dismissed.