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THE ORIENTAL BANK CORPORATION v. THE BARER TEA COMPANY.

The case of *Gray* v. *Johnston* (1), has been much insisted on as justifying the appellant's contention; but that case merely defined the circumstances which will justify a bank in refusing to honor a customer's cheque, that customer being an executor. In fact, Lord Westbury's remarks seem to me to go strongly against the Bank. "It has been very well settled, that if an executor or trustee, who is indebted to a banker, or to another person, having the legal custody of the assets of a trust estate, applies a portion of them in the payment of his own debt to the individual having that custody, the individual receiving the debt has at once not only abundant proof of the breach of trust, but participates in it for his own personal benefit."

In the present instance, when the bill was discounted, the Bank was in custody of funds which Nicholls and Co. held to the Bank's knowledge in trust for the Company; and being so in custody, it received partial payment of its own debt from Nicholls and Co. out of those funds, and thus it seems to me, fell within the scope of Lord Westbury's remarks.

*Appeal dismissed.*

Attorneys for the appellants: *Messrs. Barrow & Orr.*

Attorneys for the respondents: *Messrs. Harriss & Co.*

## APPELLATE CIVIL.

*Before Mr. Justice Mitter and Mr. Justice Wilkinson.*

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*April 9.*

SITANATH KOER AND OTHERS (DEFENDANTS) *v* LAND MORTGAGE BANK OF INDIA (PLAINTIFFS).*

*Hindu Law, Alienation—Mitakshara—Mortgage by father—Liability of sons not made parties—Civil Procedure Code (Act XIV of* 1882), *s.* 288.

The *L* Bank advanced money to *C*, a Hindu governed by the Mitakshara school of law upon mortgage of ancestral property. *S*, who was stated to be *C*'s only son, joined in the mortgage. Subsequently the Bank obtained a decree against *C* and *S* for the amount due on the mortgage. On attempting to sell the mortgaged property other sons of *C* objected. This objection was allowed, and the mortgagees referred to a regular suit.

* Appeal from Original Decree No. 120 of 1881, against the decree of Baboo Mohendro Nath Bose, Subordinate Judge of Tirhoot, dated the 14th February 1881.

(1) L. R., 3 H. L., 1.

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They then sued all the sons of *C* to establish their lien on the mortgaged property.

*Held*, that the suit was maintainable under s. 283 of the Civil Procedure Code.

*Nuthoo Lall Chowdhry* v. *Shoukee Lall* (1); and *Mussamut Dhaes* v *Hurry Prosad*, (2), distinguished.

THIS was a suit for a declaration that certain property, which had been mortgaged to the plaintiffs, was charged with the plaintiffs' lien, and was liable for the full amount of their claim, and for sale.

It appeared that on the 7th of April 1873 the plaintiff Bana advanced the sum of Rs. 10,000 to one Chundermun Koer, a Hindu governed by the Mitakshara school of law, his son Singheswar Koer joining in the mortgage upon the security of a mouzah called Ababakerpore. The mortgage deed, which was in the English form, contained a recital that the mortgagor was subject to Mitakshara law, and that Singheswar Koer was his only son. On the 13th of June 1873 the plaintiff Bank obtained a decree for the amount of the loan, with interest and costs, making the mortgaged property liable in satisfaction. The Bank then sought to execute the decree by sale of the mortgaged property, but five other sons of Chundermun Koer (in the present suit the defendants 1 to 5) objected to the sale on the ground that as members of the joint family they were equally interested with Chundermun and Singheswar in the ancestral property which had been mortgaged without their consent or permission. This objection was allowed on the 19th of November 1878, the Judge holding that the joint and undivided interest of the sons other than Singheswar was not liable to attachment and sale in execution, and referring the plaintiff Bank to a separate suit to enforce their lien.

The plaintiff Bank now sued all the sons of Chundermun, alleging that they (the plaintiff Bank) were entitled to recover jointly and severally from all the defendants and from the mortgaged property all monies then due, or to become due, under the decree on the following grounds: (1), that the property mortgaged was not family property; (2), because the debt covered by the

(1) 10 B. L. R., 200. (2) Unreported.

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mortgage bond and the decree was a proper and valid debt for which Chundermun Koer, the father and manager, could legally pledge the property; (3), because the defendants were the heirs and legal representatives of Chundermun Koer, and had inherited from him property far exceeding in value the amount due to the plaintiff Bank; and (4), because the plaintiff Bank were entitled to protection as *bonâ fide* mortgagees without notice of the claim of the defendants 1 to 5. The defendants pleaded that the suit was barred under ss. 13 and 43 of the Civil Procedure Code. It was proved that before the loan the Manager of the plaintiff Bank had made enquiries as to the family of Chundermun Koer, and that the fact that there were other sons than Singheswar was concealed from him. The Subordinate Judge gave the plaintiff Bank a decree, declaring that the entire mortgaged property was liable to satisfy the debt due to the Bank, and that if it was not sufficient the other properties of the defendants should be liable.

The defendants appealed to the High Court.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Doorga Dass Dutt* for the appellants.

Baboo *Dwarka Nath Mookerjee* and Baboo *Kashi Kant Sen* for the respondents.

The judgment of the Court (MITTER and WILKINSON, JJ.) was delivered by

MITTER, J.—The appellants before us are the five sons of one Chundermun Koer, *viz.*, Silanath Koer, Gopinath Koer, Hera Lall Koer, Hurbuns Narain Koer, and Rughoobuns Narain Koer; and Mussamut Amilbutee Thakooranee, widow of Chundermun Koer, Hurbuns Narain and Rughoobuns Narain Koer are said to be minors. It was also stated in the course of the argument that the first four sons are at present adults, and were also adults on the 7th April 1873, when the mortgage bond, the origin of the present suit, was executed. There is some evidence in support of that statement. The lower Court has not expressed any opinion upon it, but we may take it as a fact proved that they were adults on the 7th April 1873. It appears that this bond

of the 7th April 1873 was executed by Chundermun Koer and his eldest son Singheswar Koer, who was the defendant No. 6 in the lower Court, but who has not joined in the appeal which has been preferred to this Court. In this bond, which was for Rs. 10,000, a property named mouzah Ababakerpore Kowahi was hypothecated as collateral security for the loan. A suit was brought against Chundermun Koer and Singheswar Koer, the executants of the bond, and a decree was obtained on the 10th June 1877. After this decree was passed, Chundermun died. Then the decree-holder applied for the execution of this decree against Singheswar Koer and the appellants, other than the widow of Chundermun, as representatives of the deceased Chundermun. An objection was made that the appellants, other than the widow of Chundermun, were not his legal representatives. Thereupon the decree-holders, the respondents before us, withdrew their application to proceed against the appellants, other than the widow of Chundermun, as the legal representatives of the latter. The mortgaged property having been attached on the 23rd June 1878, a petition was filed by the appellants, who are the sons of Chundermun, to the effect that their interest in the mortgaged property could not be sold, inasmuch as they were not parties to the original mortgage transaction of the 7th April 1873. On the 19th November 1878 the execution Court being of opinion that the objection was valid released their interest in the mortgaged property from attachment, and the present suit was brought by the Land Mortgage Bank of India, the decree-holders in that proceeding, on the 17th of November 1879. They pray that it may be declared that in spite of the objections taken by the defendants Nos. 1 to 5 the entire mortgaged property mentioned above is charged with the plaintiffs' lien, and is liable for the full amount of the plaintiffs' claim under the aforesaid mortgaged bond; and (2), that the defendants Nos. 1 to 6 may be declared by the Court liable to pay severally or jointly with defendants No. 6 all the amount due up to this time, and also the amount which may be due in future to the plaintiff Bank according to the conditions laid down in the decree dated 13th June 1877. There are other prayers in the plaint, but it is not necessary to refer to

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them. The defendants in their written statement allege that the original loan transaction was not for the benefit of the family, and that their shares in the family property were, therefore, not liable for the debt, and for the same reason they alleged that they were not also personally liable. This was their statement on the merits of the plaintiffs' claim, but they urged two objections against the maintenance of the suit: (1), that the present claim was barred under s. 13 of the Procedure Code, there having been already an adjudication of the cause of action upon which the suit was brought; (2), that the claim of the plaintiffs was barred by the law of limitation. The lower Court, overruling all these objections, has awarded a decree in favor of the plaintiffs in these terms: "That the suit be decreed in favor of the plaintiffs, and it being proved that the entire mortgaged property, *i.e.* Mouzah Ababakerpore Kowahi, is ancestral property, the same is liable for Rs. 16,859-13-9, being the amount of decretal money, principal with interest, up to date of suit, and further interest from the date of suit up to the date of realisation under the terms of the decree dated 13th June 1877; and that in case of the entire amount not being realised therefrom, the persons and other property of the defendants shall be held liable for the remaining portion of the debt." Against this decree Singheswar Koer has not appealed, and it must therefore stand as against him. We have no jurisdiction to go into the question whether it was a correct decree against him or not. We have only to deal with the appeal of the appellants before us. It was contended on their behalf that this suit was not maintainable, that it was based upon a cause of action upon which a suit had been brought and disposed of, that there was no separate cause of action upon which this suit has been brought, and that, although it was urged that the appellants were not parties to the suit which was brought upon the bond and decreed on the 13th June 1877, still, if they were jointly liable with the executant of the bond a second suit would not lie against them, the cause of action having been exhausted in the first suit. In support of this contention two cases have been cited before us, *viz.*, the case of *Nuthoo Lall Chowdhry* v. *Shoukee Lall* (1),

(1) 10 B. L. R., 200.

and the case of *Mussamut Dhaee* v. *Hurry Prosad,* an unreported decision of this Court dated 22nd March 1882. The whole of this contention, it seems to us, is based upon a misapprehension as to the nature of the plaintiffs' claim. We are of opinion that the present suit was maintainable under the provisions of s. 283 of the Civil Procedure Code. It has been already stated that in execution of the decree dated 30th June 1877, the whole of the mortgaged property was attached. Thereupon an objection was preferred by the sons of Chundermun other than Singheswar Koer. That objection (as the execution Court distinctly says) was disposed of under s. 280 of the Code, and it appears to us from the statements made in the petition by which that objection was first preferred that it properly came within the purview of ss. 278 to 282. Now s. 278 says: "If any claim be preferred to, or any objection be made to the attachment of, any property attached in execution of a decree, on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection." In this case their contention was that the property attached in execution of the decree, dated 10th June 1877, was not wholly liable to sale in execution of that decree. Then s. 280 says, after providing for other cases which have no application to the present, that if upon the said investigation the Court is satisfied that, for the reasons stated in the claim or objection, the property attached was in the possession of the judgment-debtor, partly on his own account and partly on account of some other person, the Court shall pass an order for releasing the property wholly, or to such extent as it thinks fit, from attachment. In this case, as we shall presently show from the judgment of the execution Court, it was found that the property attached was partly in the possession of the judgment-debtor and partly in the possession of the claimants—in fact that it was a joint-family property belonging to the father and the son; and the sons being objectors the Court found that it was partly in the possession of the father and partly in that of the sons. Having found that fact the Court released the interest of the sons from attachment under s. 280. That being so the plaintiffs were entitled to bring this suit under s. 283. In order to show

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that this was really the nature of the proceedings in the execution Court, we have only to glance at the points decided by that Court. The proceeding is to be found at page 42 of the paper book. After stating the questions that were to be determined in that proceeding, the Court said: "Whether the act of the father was or not valid is not, however, a question that can be tried in this summary case like the claim preferred under s. 278 of the Procedure Code by third parties to property attached in execution of a decree. "The Court has to try such claim, and see whether the property belongs to such third party, and to release it from attachment and sale if it is found to belong to him and to be in his possession; so upon the objections of the sons of the mortgagor in this case, the Court must see whether the property mortgaged is ancestral and the sons were in conjoint possession, and if they were, whether they should not have the share claimed by them, the extent of which is not disputed, exempted from attachment and sale." Then the learned Subordinate Judge further said: "I cannot enter into the question of the validity, or otherwise, of the mortgage summarily," and so on. After coming to the conclusion that the mortgaged property was in the joint possession of the father and the sons he allowed the claim, and declared that the share claimed was to be exempted from attachment and sale. Then, there is a further declaration at the end of the order to the effect that, "if the decree-holders have any lien on the shares released by virtue of the hypothecation of the said shares having been included in their bond, they must sue to enforce the same by a suit against the objectors." It is, therefore, quite clear that the present suit was brought under s. 283 of the Civil Procedure Code. That being so, the cases cited have no sort of application to the present. In the case of *Nuthoo Lall Chowdhry* v. *Shoukee Lall* (1) the facts were these: A bond was executed by two persons named Domun Lall and Bhowani Pershad in favor of the plaintiffs in that case. In that bond they hypothecated their share of a certain property, and a decree was obtained against Domun and Bhowani Pershad declaring

(1) 10 B. L. R. 200.

their shares in the hypothecated property to be liable for the satisfaction of the mortgage debt. In execution of that decree their shares were brought to sale, and a part of the money decreed was realised. These facts are thus stated by Chief Justice Couch in his judgment. It appears that the plaintiffs executed that decree, *viz.*, the decree which they obtained against Domun and Bhowani Pershad, "and according to the statement in the plaint in the present suit, they sold the right and interest of the two persons named in it, still, in the execution of the decree, treating it as an instrument which had pledged the shares of those two. They recovered the sum of Rs. 7,435, and now, instituting a suit on the 3rd of December 1870, they say: "Since the decree was not against all the defendants, the whole of the mortgaged property in which the second party defendants held a share, was not put up to sale, but the fact is, that there being community of interest, the loan was taken, and mortgage concluded alike by all defendants; hence all of them are jointly liable to your petitioners; and the entire property ought to be held liable." In that case, therefore, the plaintiffs having obtained a decree by which the shares of the two persons who were the executants of the bond were rendered liable, and having, in execution of that decree sold these shares, brought a second suit for the purpose of extending the operation of that decree on the ground that the original loan that was taken by Domun and Bhowani Pershad was taken not on behalf of themselves only, but on behalf of themselves and the remaining members of the joint Hindu family of which they are the members. It was held that such a suit would not lie, and that conclusion was arrived at upon the ground that either the original bond was executed by these two persons alone, or that it was executed by these two persons as managers of the joint family; if executed by these two alone no suit would lie against the others; if executed by them as managers then all the other members were liable jointly, but the creditors having elected to sue some of the joint-debtors only, were not entitled to bring another suit against those left out in the first suit. That is not the nature of the present suit. It is not the sole object of this suit to make the appellants before us liable on the original cause of action. So far as the

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plaint contains a prayer to that effect, it is no doubt liable to objection; but so far as it is a suit to have it declared that the mortgaged property is liable to be sold in execution of the plaintiff's decree, it comes under s. 283. That section says: The party against whom an order under s. 280, 281, or 282 is passed, may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive. Here the decree-holders have brought this suit to establish the right that they are entitled to sell the mortgaged property in execution of the decree they have already obtained upon the original cause of action. Therefore the decision in *Nuthoo Lall Chowdhry* v. *Shoukee Lall* is not applicable to the facts of the present case. The other case cited is entirely based upon the decision in the case of *Nuthoo Lall Chowdhry* v. *Shoukee Lall*. It may be observed, however, that in this last case the learned Judges make this observation: "We do not wish to be understood to hold that in a suit properly brought the mortgagee cannot obtain an order from the Court declaring that as a son in a Mitakshara family, a person in the position of the defendant might not be liable for debts lawfully incurred by his father. That is not, as we understand it, the present case and the nature of the claim now made. The original mortgage bond, we observe, is not on the record, but so far as we can gather from the terms of the plaint and from the counter-objection made by the decree-holder in execution of his decree, we learn that the mortgagee throughout regarded this transaction as being one in which the father alone was concerned, and in which he sought to obtain payment of his debt out of property which belonged exclusively to the father." This observation at once shows that this case is clearly distinguishable from the present. We are, therefore, of opinion that so far as this is a suit under s. 283 it is not barred as *res judicata*. That being our view upon the question of *res judicata* the question of limitation as a matter of course falls to the ground, for the limitation laid down in respect of suits under s. 283 is one year from the date of the order, and the present suit was admittedly brought within that period. Therefore, we need not discuss the questions that have been raised in this appeal, *viz.*,

whether this was a suit to enforce the original mortgage lien, or to make the defendants liable for money had to their use. The next question is, whether under s. 283 the plaintiffs in this case have established their right to have the whole of the mortgaged property sold in execution of the decree obtained against the appellant's father, and the solution of this question depends upon the solution of another, *viz.*, whether or not the original mortgage bond of 1873 is binding upon the sons. It has been already stated that four of these appellants were adults at the time when this bond was executed. Several cases have been cited before us in order to establish this proposition of law, *viz.*, that where there are adult sons, the father, even in case of necessity, has no right, without the concurrence of these sons, to deal with the ancestral property. So far as this proposition goes it has been well established by decided cases, and we are bound to hold that the adult sons are not concluded by a transaction to which they are not parties, unless their assent to it, express or implied, is proved. It may be mentioned here that one of the questions at issue between the parties was, whether the mortgaged property was ancestral or not. The plaintiffs stated that it was the self-acquired property of Chundermun. The lower Court has found against the plaintiffs upon this point, and there is no appeal against that part of the judgment. We must, therefore, take it that it was ancestral. But having regard to the circumstances, to which we shall presently refer, it seems to us that, although there was no express consent by the sons, there was clear evidence of implied consent on their part to the transaction of 1873. (His Lordship then considered the evidence as to this point and continued). We consequently come to the conclusion that the mortgage of the 7th April 1873 was a valid transaction binding upon the whole of the family. The widow has no *locus standi* in the case, unless a partition of the family property be decreed. Therefore, we need not take any notice of the widow, so far as the question of consent is concerned. The plaintiffs have established their right to sell the mortgaged property. That being so, so far as the lower Court's decree declares that right it is correct; but then that decree goes further and declares that all the defendants are personally liable. It does

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not appear to us upon what ground that part of the decree is based. That part of the decree must, therefore, be set aside. Although we set aside that part of the decree of the lower Court, having regard to the unjustified opposition on the part of the appellants, we think that they ought to be made liable for the costs of the plaintiffs. The plaintiffs' suit will, therefore, be decreed in the manner stated above against all the defendants with costs in both Courts.

*Appeal allowed.*

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*Before Mr. Justice Cunningham and Mr. Justice Maclean.*

1883
*April* 10.

KASHI NATH DASS AND ANOTHER (DEFENDANTS) *v.* HURRIHUR MOOKERJEE (PLAINTIFF).*

*Evidence Act (I of 1872), s. 92.—Evidence contradicting Document—Mortgage—Conditional Sale.*

It does not necessarily follow from s. 92 of the Evidence Act that subsequent conduct and surrounding circumstances may not be given in evidence for the purpose of showing that what on the face of it is a conveyance is really a mortgage. This rule turns on the fraud which is involved in the conduct of the person who is really a mortgagee, and who sets himself up as an absolute purchaser, and the rule of admitting evidence for the purpose of defeating this fraud would not apply to an innocent purchaser without notice of the existence of the mortgage, who merely bought from a person who was in possession of title deeds and was the ostensible owner of the property.

THIS was a suit to establish the plaintiff's right to certain land. The plaintiff alleged that the defendant Kashi Nath Dass had conveyed the land in question to the second defendant Jadu Nath Dass, from whom the plaintiff purchased. The defendant Kashi Nath Dass pleaded that the deed executed by him in favour of Jadu Nath Dass, though it purported to be a kobala, was in fact a deed of conditional sale. At the hearing the Munsiff refused to admit evidence to show that the transaction between Kashi Nath and Jadu Nath was really a mortgage

* Appeal from Appellate Decree No. 2280 of 1881, against the decree of Baboo Radha Kishna Sen, Additional Sub-Judge of Hooghly, dated the 5th September 1881, affirming the decree of P. M. Bannerjee, Munsiff of Howrah, dated the 30th September 1880.