APPELLATE CIVIL.

Before Das and Adami, JJ.

1921

December, 2.

ADHIKANDA SAHU

v.

JOGI SAHU.*

Mortgage——illegal consideration——apprehension of prosecution——validity of mortgage.

Where a decree-holder had obtained sanction to prosecute, under section 183 of the Penal Code, a person who had unlawfully resisted execution, but he agreed not to prosecute him in consideration of the latter executing a mortgage bond for the amount due under the decree jointly with two others who were co-sharers with him in the property covered by the bond, *held*, that the bond was enforcible against all the executants and against their sons.

Sukhdeo Das v. *Mangal Chand* (1), followed.

The facts of the case material to this report were as follows :—

The members of a joint Hindu family consisting of Balkrishna Sahu and his sons Adhikanda Sahu and Gobind Sahu took a loan of Rs. 800 from Jogi Sahu, and as security for the loan they executed and registered a mortgage bond in favour of the lender on the 2nd November, 1911.

Prior to the execution of the bond Jogi Sahu had sued Adhikanda and Gobind and obtained a decree against the latter only. In attempting to execute that decree he was resisted by Adhikanda, and on the 1st September, 1911, he obtained sanction to prosecute the latter under section 183 of the Penal Code.

The recital in the mortgage bond of the 2nd November, 1911, stated that a *punchait* had been

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* Circuit Court, Cuttack. Appeal from Appellate Decree No. 2 of 1921 from a decision of F. F. Madan, Esq., District Judge of Cuttack, dated the 30th September, 1920, reversing a decision of Babu Bibhuti Bhusan Mukerji, Munsiff of Cuttack, dated the 20th November, 1919.

(1) (1917) 2 Pat. L. J. 630.

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held to settle the dispute between the parties and that as a result Jogi Sahu was paid Rs. 100 in cash and a bond for Rs. 800 for the balance due was executed.

The present suit was instituted by Jogi Sahu to enforce the mortgage bond. Balkrishna had died in the meanwhile. Adhikanda and Gobind and their sons were impleaded as defendants. The plaintiff alleged that he accepted the bond in lieu of his right under the decree on condition that Balkrishna and Adhikanda, as co-sharers of Gobind, joined in the liability. The defendants pleaded that the real consideration for the bond was a promise by Jogi Sahu, the plaintiff, not to prosecute Adhikanda under section 183 of the Penal Code. Gobind also pleaded that if the bond was not enforcible against Adhikanda on the ground of its illegality it was also not enforcible against him. The sons of Adhikanda and Govind pleaded that they were not bound by the bond. The trial court passed a simple money decree against Gobind and dismissed the suit as against the other defendants. The plaintiff appealed to the District Judge and the latter decreed the suit in full.

The defendants appealed to the High Court.

Bichitranand Das, for the appellants.

Subodh Chandra Chatterji, for the respondent.

DAS, J.—I have arrived at the conclusion, though not without some hesitation, that the judgment of the lower appellate court must be upheld. It was argued strenuously before us that the facts in this case are different from the facts that were present in the case reported as *Sukhdeo Das* v. *Mangal Chand* (1). In that case the defendant Muni Lal who was the *gomasta* of the defendants had misappropriated a certain sum of money. He happened to be a relation of the plaintiffs and the plaintiffs agreed to set off the sum of Rs. 600 due by Muni Lal to the defendants against the claim which the plaintiffs had against the defendants. Subsequently the plaintiffs sued to enforce

(1) (1917) 2 Pat. L. J. 680.

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their claim against the defendants and the defendants claimed that they were entitled to have the sum of Rs. 600 set off against the claim of the plaintiffs. The plaintiffs maintained that the set-off could not be allowed as the consideration for the agreement was not to prosecute Muni Lal for an offence which was not compoundable. This contention did not find favour with the learned Judges who decided the case. Mr. Justice Chapman delivering the judgment in the case said as follows :—"Where the consideration for an agreement is a promise not to prosecute for an offence which is not compoundable the agreement is not enforcible by law, but this limitation of freedom of contract should only be enforced where it is quite clear that the consideration for the agreement was such an illegal promise. When on a mere threat to prosecute, or on an apprehension that prosecution would take place, an agreement has been come to, this threat or apprehension is not sufficient to vitiate the agreement, The distinction between the motive for coming to an agreement and the actual consideration for the agreement must be kept carefully in view and this care must be particularly exercised in a case where there is a civil liability already existing which is discharged or remitted by the agreement."

Now even if we apply these considerations to the present case, then how does the case stand? There was undoubtedly a civil liability due, not, it is true, on the part of defendant No. 1, but certainly on the part of defendant No. 2. In the case to which I have already referred, there was no liability on the part of the person who was sought to be made liable, and in my opinion no distinction can be drawn between the present case and the case of *Sukhdeo Das* v. *Mangal Chand* (1). The plaintiff was not primarily liable in the latter case and in the case before us Adhikanda was not primarily liable. Each of them made himself liable because there was undoubtedly a liability on the part of somebody else in whom they were interested. It may be that the

(1) (1917) 2 Pat. L. J. 630.

motive for coming to the agreement was that prosecution may not be launched in the case, but as Mr. Justice Chapman says "the distinction between the motive for coming to an agreement and the actual consideration for the agreement must be kept carefully in view."

On a careful consideration of the matter, I am unable to distinguish this case from the case upon which the respondents rely.

I must dismiss this appeal with costs.

ADAMI, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Das and Adami, JJ.

RAGHUNATH MISRA

v.

RAM BEHERA.*

1921

December, 2.

Record-of-Rights—presumption, rebuttal of—evidence of documentary evidence prior to publication of Record, admissibility of—Occupancy rights, whether can be acquired by under-raiyat—*Orissa Tenancy Act 1913, (B. & O. Act II of 1913), sections* 237, 57 *and* 117—Rafa-tankidars, *status of—Provincial Settlement records evidentiary value of.*

Where the plaintiffs were recorded as *rafa-tankidars* in the Provincial Settlement records and as *tankidars* in the records of the Revisional Settlement, *held*, that the entry in the Provincial Settlement records was sufficient to rebut the presumption arising from the entry in the records of the Revisional Settlement inasmuch as there was no procedure by which the status of the plaintiffs could have been changed from that of *rafa-tankidars* to that of *tankidars* in the interval between the two settlements.

Sheonandan Prasad Shukul v. *Bacha Raut* (1), approved.

*Circuit Court, Cuttack. Appeal from Appellate Decree No. 35 of 1921 from a decision of D. H. Kingsford, Esq., District Judge of Cuttack, dated the 9th May, 1921, confirming decision of Babu Ramadeb Choudhury, Deputy Collector of Khurda, dated the 23rd January, 1921.

(1) (1909) 9 Cal. L. J. 284.