

1901
 JAN. 15.
 APPELLATE
 CIVIL.
 28 C. 311.

As to the second contention, it is enough to say that the subsequent additions made to the ornaments, having regard to the nature of the additions, must be treated as being in the nature of gifts subsequent to marriage, and as not being governed by the Law applicable to nuptial gifts.

The appeal, therefore, fails, and must be dismissed with costs.

Appeal dismissed.

28 C. 314.

[314] *Before Mr. Justice Prinsep and Mr. Justice Handley.*

HARA KUMARY CHOWDHURANI AND OTHERS (*Petitioners*) v.
 R. SAVI (*Opposite Party*).^{*} [5th July, 1900.]

Mortgage—Dishonestly or fraudulently preventing debt being available for creditors—Debt—Attempt—Application to withdraw money paid into Court—Penal Code (Act XLV of 1860), ss. 422 and 511.

The petitioners mortgaged their property, and under the terms of the agreement certain persons were appointed managers of the estate under certain conditions in regard to payment of the monies realized by them. In execution of a decree obtained by the managers in a suit brought in the names of the petitioners a certain *putni taluk* was sold for Rs. 3,000. The debtor settled with the petitioners that, on payment of Rs. 1,000, the sale was to be set aside. The money was paid into Court, and an application was made by the petitioners for the withdrawal of this money. The Court, however, made no order on this application. The petitioners were convicted of an attempt to commit an offence under s. 422 of the Penal Code.

Held, that having regard to the relation between the petitioners and their managers, at whose instance the proceedings were taken, it could not properly be said that an attempt to commit an offence under s. 422 of the Penal Code was made. That the interference of the petitioners and their application to obtain the money paid into Court might have been breaches of their contract with the mortgagees, but such conduct could not necessarily be regarded as dishonest or fraudulent so as to render them liable to punishment. Their attempt to get this money was more to put an end to the management than to prevent the money from being available for payment of their debt under the mortgage.

Nobin Chunder Mudduck (1) referred to.

In this case the petitioners mortgaged certain properties to the Eastern Mortgage and Agency Company in consideration of a loan of a lakh of rupees. The mortgage was a simple one, but contained a condition that the entire management of the properties was to be in the hands of Messrs. Garth and Weatherall, the nominees of the mortgagees, and that no change of management was to be effected without the consent of the mortgagees. [315] There were also certain other conditions in regard to payment of the monies realized by the managers, who were to have entire control of all monies due from the mortgaged properties. In execution of a decree obtained by Messrs. Garth and Weatherall, as managers of their estate in a suit brought in the names of the petitioners and the mortgagors, a certain *Putni taluk* was sold for Rs. 3,000 and arrangements were made to enable the debtor to release his property from the sale on payment of certain money within a certain time. He was unable to fulfil the terms of the agreement, so he went to the

^{*} Criminal Revision, No. 867 of 1900, made against the order passed by C. E. Pittar, Esq., Sessions Judge of Backergunge, dated the 8th of May 1900, affirming the order of N. D. Beatson Bell, Esq., District Magistrate of Backergunge, dated the 26th of March 1900.

petitioners, and it was settled with them that, on payment of Rs. 1,000, the sale was to be set aside. On the 31st August 1899 the petitioners by a petition dismissed the pleaders appointed by the managers and appointed their own. Subsequently a petition was filed independently of the managers praying that, on the judgment-debtor depositing Rs. 1,000, the sale of the *putni* might be set aside. On the money being paid into Court an application was made on behalf of the petitioners for the withdrawal of this money. The Court made no order on this application. Proceedings were instituted against the petitioners at the instance of the managers before the District Magistrate of Backergunge, who, on the 26th March 1900, convicted them of an attempt to commit an offence under s. 422 of the Penal Code. The petitioners appealed to the Sessions Judge, who, on the 8th May 1900, dismissed their appeal.

Mr. Jackson (with him Mr. P. L. Roy and Babu Dwarika Nath Mitter) for the petitioner.

Mr. Hill (with him Babu Basanta Kumar Bose and Babu Gyanendra Mohan Dass) for Messrs. Garth and Weatherall.

The judgment of the Court (PRINSEP and HANDLEY, JJ.) was delivered by

PRINSEP, J.—The three petitioners have been convicted of an attempt to commit an offence under s. 422 of the Indian Penal Code. It appears that their property is now under mortgage to the Land Mortgage Bank, and that under the terms of the agreement Messrs. Garth and Weatherall are managers of that estate under certain conditions in regard to payment of the monies realized by them. The petitioners have shown a [316] disposition to be dissatisfied with that management, and are endeavouring to get rid of it, if possible. In execution of a decree obtained by Messrs. Garth and Weatherall, as managers of their estate, in a suit brought in the names of the mortgagors, a certain *putni taluk* was sold for Rs. 3,000 and arrangements were made to enable the debtor to release his property from the sale on payment of certain money within a certain time. He was unable to fulfil the terms of that agreement; so he appears to have gone to the petitioners, and it was settled with them that, on payment of Rs. 1,000, the sale was to be set aside. The money was paid into Court, and on the 15th September a petition was presented on behalf of the mortgagors, who are the persons now before us, to obtain this money. The Court made no order on this petition, and on the 22nd of the same month the present proceedings were taken before the Magistrate. The petitioners have been convicted, and their appeals to the Sessions Judge have been dismissed.

We have now to consider, whether, on these facts, the petitioners have been properly convicted of an attempt to commit an offence under s. 422 of the Indian Penal Code. We think that having regard to the relation between the petitioners and Messrs. Garth and Weatherall, at whose instance the proceedings were taken before the Magistrate, it cannot properly be said that an attempt to commit an offence under s. 422 has been made. The application to obtain payment of this money was publicly made. If the money had been paid to them it would no doubt have been a breach of the terms on which their mortgage had been renewed, for they then agreed that Messrs. Garth and Weatherall as managers were to have entire control of all monies due from the mortgaged properties, and this money represented the rent of an under-tenure. But

1900
 JULY 5.
 APPELLATE
 CIVIL.
 28 C. 314.

still there was ample security for repayment of the debt, and a breach of this agreement would probably have enabled the mortgagees to take steps to release at once the full amount of the debt. The action of the petitioner seems to have been prompted by their desire to put an end to the management rather than to act dishonestly or fraudulently, so as to make them liable to punishment under s. 422 of the Indian Penal [317] Code. Any breach of their contract would not, in our opinion, render them liable to penal consequences. This is not a case in which the creditors would really suffer, though no doubt the means of obtaining this money and applying it towards liquidation of the debt or the expenses of the management might be postponed or hindered. The conduct of the petitioners was, in our opinion, neither dishonest nor fraudulent within the meaning of those terms in the Penal Code. We also think that the agreement that they made with the under-tenure-holder did not endanger the estate, for, as represented on their behalf, as matters then stood, it was a bargain that was likely to be beneficial. The superior tenure belonging to the estate had been sold for arrears of rent, and, if that sale was a valid sale, the undertenure would become void, and it would therefore be without value, so as to realize anything by its sale. The validity of the sale of the superior tenure had been given against the petitioners, and it was doubtful whether the High Court, before which this matter was on appeal, would set aside this order. Consequently to obtain one thousand rupees for what might turn out to be of no value, and to leave the undertenure-holder to run the risk of the decision of the High Court being in his favour, would certainly be a good bargain. The interference of the petitioners and their application to obtain the money paid into Court by the undertenure-holder might have been breaches of their contract with the mortgagees, but such conduct cannot necessarily be regarded as dishonest or fraudulent so as to render them liable to punishment. Their attempt to get this money was more to put an end to the management than to prevent the money from being available for payment of their debt under the mortgage. In this respect the case does not seem dissimilar to that of *Nobin Chunder Mudduck* (1). For these reasons we think that the petitioners have not been properly convicted. We accordingly set aside the conviction and sentence and direct the petitioners be released. The fine, if paid, will be refunded.

28 C. 318.

[318] *Before Mr. Justice Banerjee and Mr. Justice Brett.*

BISHNU PRIYA CHOWDHURANI AND OTHERS (*Defendants*) v.

BRABA SUNDARI DEBYA (*Plaintiff*).^{*} [9th, 10th and 16th Jan., 1901.]

Res judicata—*Civil Procedure Code (Act XIV of 1932), s. 13*—*Court of competent jurisdiction*—*Whether a decision of a previous suit for compensation was one of a Court of competent jurisdiction to bar a subsequent claim for compensation in a suit for arrears of rent, as well as for compensation*—*Mixed question of law and fact.*

* Appeal from Appellate Decree No. 51 of 1899, against the decree of W. Teunon, Esq., District Judge of Murshidabad, dated the 25th of November 1898, reversing the decree of Babu Jogendra Nath Ghose, Munsif of Berhampore, dated the 21st of May 1898.

(1) (1874) 22 W. R. Cr. 46.