

Sagarmull Nathany - - - - - *Appellant*

v.

John Carapiet Galstaun - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 5TH MAY 1930.

Present at the Hearing.

LORD ATKIN.

LORD TOMLIN.

SIR LANCELOT SANDERSON

[*Delivered by LORD TOMLIN.*]

This is an appeal in two consolidated suits (Nos. 1136 and 1138 of 1920) brought by the assignor of the appellant against the respondent. The consolidated suits were tried before Mr. Justice Chotzner in the High Court of Judicature at Fort William in Bengal, Original Civil Jurisdiction, with the result that a decree in favour of the plaintiff was made on the 24th January, 1927.

The respondent appealed, and on the 16th January, 1928, the High Court Civil Appellate Jurisdiction reversed Mr. Justice Chotzner and dismissed the consolidated suits.

The appellant thereupon appealed to His Majesty in Council.

The story of the transactions out of which the suits arise is somewhat intricate, but for the present purpose is sufficiently stated in what follows.

One Pity owed the appellant money and in March, 1910, the appellant obtained a decree against Pity for Rs. 1,40,000. Pity was the owner of property in Wellesley Street, Calcutta.

An arrangement was entered into and carried out between Pity, the appellant and the respondent to the following effect. The appellant borrowed from the Bank of Bengal Rs. 1,50,000. To enable the appellant to obtain this loan the respondent, for a 1 per cent. commission, guaranteed the loan to the Bank. The appellant drew a promissory note for the amount borrowed from the Bank in favour of the respondent, who endorsed it over to the Bank. Out of the monies so borrowed the appellant lent to Pity the amount required to enable the latter to discharge his indebtedness to the appellant. Pity accordingly paid his debt to the appellant. At the same time Pity deposited with the appellant and the respondent the title deeds of the Wellesley Street property to secure the amount lent to him by the appellant.

It is not suggested that as between the appellant and the respondent the latter had any interest in Pity's mortgage beyond his right to be secured thereout against his liability as guarantor to the Bank for the appellant's debt.

On the 9th August, 1910, the appellant and respondent launched a suit (No. 839 of 1910) against Pity to enforce the mortgage. On the 27th November, 1910, a final decree for sale was made in the suit, both the appellant and the respondent being given liberty to bid. Nothing further was done for some years. On the 5th August, 1914, the respondent paid to the Bank the sum of Rs. 31,350.12.5 for interest on the appellant's debt to the Bank, and also from time to time until the date of the sale next to be mentioned, under an authority from Pity, collected the rents of the Wellesley Street property, and paid them to the Bank on account of the interest due on the appellant's debt to the Bank.

On the 29th January, 1916, the Wellesley Street property was put up for sale under the decree of the 27th November, 1910, and the respondent, under the liberty reserved to him by the decree, bid for and was declared the purchaser of the property; the purchase price was Rs. 1,25,000, a sum less than the total amount owing under the decree. The respondent paid to the Registrar a deposit of Rs. 31,250 out of his own monies.

Apart from the debt to the Bank there was at this time another account open between the appellant and the respondent upon which money was owing to the respondent. To secure this account the appellant had deposited certain jewellery with the respondent. Differences arose between the appellant and respondent in connection with the transactions which have been described, and one Mitter, a mutual friend of both parties, intervened to compose them. Mitter's story, which was accepted by the trial Judge, and is not questioned by the High Court, is that on the 12th July, 1917, a verbal agreement was made between the respondent and Mitter, who in this regard acted as agent for the appellant.

The first part of the agreement was to the following effect namely :—

- (1) That the amount due to the respondent in respect of the account secured by the deposit of jewellery was agreed as Rs. 31,000, of which Rs. 27,000 was to be paid at once and the balance of Rs. 4,000 was to be paid before December then next.
- (2) That upon payment of the Rs. 27,000 the jewellery was to be returned by the respondent.

It seems clear that into the account so settled there was brought in the amount for interest paid by the respondent to the Bank in August, 1914, and his claim for commission in respect of the Bank's loan.

The second part of the agreement was that the appellant should pay forthwith to the Bank the amount then claimed by the Bank for interest, which had been ascertained at Rs. 30,275.14.1 and keep down the future interest so far as the rents were insufficient to meet them, and that the respondent should make over the Wellesley Street property to the appellant upon the ultimate payment of the capital and interest of the Bank's loan. The appellant alleged he was to have three years in which to make the ultimate payment, but in this respect he was not corroborated by Mitter. As soon as agreement was reached Mitter obtained from the appellant a cheque in his own favour for Rs. 57,275.14.1 to cover (a) the Rs. 27,000, the first instalment of the Rs. 31,000, and (b) the Rs. 30,275.14.1 due for interest, and endorsed this cheque over to the respondent. At the same time Mitter handed to the respondent a form of receipt which he was to sign and return with the jewellery on the following day.

The respondent took the cheque for Rs. 57,250.14.1 and paid Rs. 30,275.14.1 to the Bank, but on various excuses he refused to sign the receipt or to return the jewellery. The matter dragged on till October, when a modification of the July agreement was reached. Both Courts below find that a modification of the agreement took place in October, but it is not clear what either Court considered the full scope of the modification to have been. In their Lordships' judgment the effect of the modification was as follows, namely :—

- (1) That the Rs. 4,000 balance of the Rs. 31,000, should be increased to Rs. 6,000.
- (2) That upon payment of the Rs. 6,000 the jewellery should be handed over by the respondent to the appellant
- (3) That the sale of the Wellesley Street property should be confirmed in the respondent's name, the price of Rs. 1,25,000 being set off against the decree and that the deposit paid by the respondent should be returned to him.
- (4) That the appellant should pay to the respondent interest at the usual Bank rate on the deposit from the time it was made until its repayment, and

- (5) That upon payment by the appellant to the Bank of what was due to the Bank and to the respondent of what is due to him in respect of the matters which have been mentioned, the respondent should make over the Wellesley Street property to the appellant.

Accordingly on the 20th October, 1917, an order was made confirming the sale to the respondent, who was given liberty to set off the amount of the purchase price, viz., Rs. 1,25,000, against what was due to the appellant and respondent under the decree, and the Registrar was directed to return the deposit to the respondent. The deposit, less the Registrar's commission, was returned to the respondent, but in the first instance, with a view to saving costs, no sale certificate was taken out.

On the 24th January, 1918, the appellant executed a fresh promissory note in favour of the Bank. No further progress was made during the year 1918. The appellant did not pay any interest to the Bank and no rents were paid into the Bank by the respondent after the 29th January, 1916. There is some suggestion that Pity made a payment to the respondent in respect of the balance of the decree against him remaining after the set off directed by the order of the 20th October, 1917.

On the 18th January, 1919, the appellant's solicitors wrote to the respondent's solicitors that their client had made every arrangement to pay off the amount due and asked for particulars of the Bank's debt. No answer was received.

On the 10th February, 1919, the respondent took out the sale certificate in his own name and on the 14th February, 1919, his solicitors wrote to the appellant's solicitors informing them of the fact and setting up a claim on their client's behalf to be paid a sum of Rs. 1,72,386.14.9, which included items already dealt with in the settlement of July, 1917, and a large item in respect of certain jute transactions which up to that point had not come into the matter.

Further correspondence followed in which in effect the respondent claimed the Wellesley Street property as his own, alleged that the cheque for Rs. 57,275.14.1, received by him in July, 1917, was paid on general account, claimed that the jewellery was deposited to cover all accounts, and reiterated his claim in respect of the jute transactions.

On the 22nd September, 1919, the respondent sold the Wellesley Street property for Rs. 2,04,000, and on the 17th February, 1920, he paid off the amount due to the Bank. The difference between the sale price and what was paid to the Bank was about Rs. 29,000. Shortly afterwards the appellant launched the present suits.

In the first suit he claimed (1) a return of the jewellery upon payment of the Rs. 4,000 in accordance with the agreement of July, 1917, and damages for conversion, or alternatively (2) payment of the value of the jewellery with interest.

It is to be observed that no reference is made in this plaint to the modified agreement made in October, 1917.

In the second suit the appellant claimed damages against the defendant, alleging in effect a sale of the Wellesley property in breach of the respondent's obligations to the appellant and at an undervalue. The parties were unable to agree the form of the issues, though both parties seem to have accepted the view that in each suit one of the issues should be whether if there was an agreement in July, 1917, there was any subsequent modification of that agreement.

Ultimately the trial proceeded and the issues were settled by the trial Judge, who incorporated them in his judgment. The issues were as follows :—

“(1) Was there an agreement on the 12th July, 1917, whereby :—

“(a) Defendant should accept Rs. 31,000 in full settlement of his claim ? Rs. 27,000 to be paid at once and Rs. 4,000 in the following December and thereupon to return the jewellery to the plaintiff.

“(b) The plaintiff should pay the accrued interest to the Bank reducing the amount due to the capital figure of the loan, namely, Rs. 1,50,000, and on payment thereof become solely entitled to the property ?

“(2) Was the agreement modified in the following October to the extent that the plaintiff was to pay the defendant Rs. 6,000 instead of Rs. 4,000 ?

“(3) Was this agreement broken by the defendant ? If so, what damages is the plaintiff entitled to ?

“(4) If there was no such agreement or if it was not broken by the defendant, is the plaintiff as a joint decree-holder with the defendant entitled to any relief against him in consequence of the sale of the property.”

The learned trial Judge in substance found in the affirmative on issues 1 and 2 and on the first part of issue 3, and treated issue 4 as in the circumstances not arising. The learned Judge seems to have taken the view that the sale was a breach of agreement, and that there was some evidence to justify the question of undervalue being investigated on an enquiry as to damages.

By the decree in respect of the first suit the respondent was ordered to pay to the appellant Rs. 20 as damages for detention of the jewellery and upon payment by the appellant of Rs. 6,000 to deliver over the jewellery to the appellant, and in respect of the second suit (1) it was referred to the Assistant Referee to take an account of the sums, if any, due to the respondent by the appellant under the agreement mentioned in the plaint and issues in the second suit, and (2) to ascertain the amount of damages due to the appellant from the respondent in respect of breach of the said agreement, and the further hearing of the second suit was adjourned.

The respondent appealed. The High Court allowed the appeal and dismissed both suits. The ground of dismissal in the first suit was that the plaint was confined to the agreement of July, 1917, and that there was, therefore, a variance between the pleadings and the case alleged at the trial.

As to the second suit the High Court held that the proper inference from what took place in October, 1917, was that the parties agreed that the respondent should be the absolute owner of the Wellesley Street property, but subject to an option to the appellant to purchase back the property within a reasonable time, and that the appellant had failed within a reasonable time to exercise the option.

A full and critical examination of the material available has, with the assistance of counsel, been made before their Lordships' Board.

Their Lordships, so far as the first suit is concerned, see no reason to differ from the main findings of facts of the trial Judge, and are of opinion that the High Court founded themselves upon too narrow a ground in dismissing the suit for variance. Their Lordships are satisfied that, notwithstanding the form of the plaint, the suit was fought by the parties deliberately upon issues substantially as framed by the trial Judge and ought upon that footing to be determined.

The second suit presents more difficulty, but their Lordships find themselves unable to escape the conclusion that the High Court in forming an opinion upon the events of October, 1917, have not given sufficient weight to what was the dominant relation between the parties in connection with the Wellesley Street property.

Their Lordships are unable to accept Mr. Justice Ghose's view that in law the property belonged to the plaintiff and defendant in equal shares when the order of the 20th October, 1917, was made.

There is no doubt that up to the moment when the respondent was declared the purchaser of the property his interest in it as between himself and the appellant was this and this only, that he was entitled to treat himself as secured by means of Pity's mortgage against any liability with which he might ultimately be fixed in respect of the loan by the Bank. What the purpose was in the respondent becoming the purchaser of the property is not clear upon the evidence, though there is material from which it might fairly be inferred that he did so by arrangement with the appellant merely to get rid of Pity's interest in the property and not so as to alter the relation between himself and the appellant. Their Lordships do not find anything to support Mr. Justice Buckland's statement that it was not disputed that the purchase was on behalf of the two unless that statement is intended to express the position which has just been indicated. However this may be, their Lordships are of opinion that the transactions of October, 1917, either continued or restored the original relation between the parties. In other words as from October, 1917, at any rate, the respondent had no interest in the property except as a creditor with a security upon it, but the field of indebtedness covered by the security was somewhat enlarged because in their Lordships' view the respondent was

to have secured to him payment of the Rs. 6,000 and the interest on his deposit as well as to be protected against liability in respect of the Bank's loan.

Upon this footing the respondent held the property to secure himself in the manner indicated and subject thereto was a trustee of it for the appellant—a sale by him of the property without the concurrence of the appellant who was entitled in equity to redeem it could not be justified.

Upon the question of undervalue their Lordships see no reason to differ from the view taken by the trial Judge, and think that there is sufficient evidence to justify an enquiry being directed to bring out whether the sale was or was not at an undervalue. In all the circumstances and for the reasons which have been indicated their Lordships are of opinion that the appeal should be allowed and that the decree of the High Court of the 16th January, 1928, should be discharged, and that the following relief should be given, that is to say:—

I.—That the decree of Mr. Justice Chotzner should be restored so far as it directs delivery up by the respondent to the appellant of the jewellery upon payment of the Rs. 6,000, and so far as it gives relief by way of enquiry as to value in the event of the respondent failing to deliver up the jewellery to the appellant.

II.—That it should be declared that the respondent held the Wellesley Street property as a security for (a) all sums paid by him since October, 1917, for principal and interest in respect of his obligation as guarantor of the Bank's debt; (b) the sum of Rs. 6,000 agreed to be paid to him in October, 1917; (c) interest at the usual Bank rate on the deposit of Rs. 31,250 in accordance with the agreement of October, 1917; and (d) his mortgagee's costs, charges and expenses properly incurred, including the Registrar's commission on the deposit, and any costs of taking out the sale certificate, and that, subject as aforesaid, the respondent held the Wellesley Street property in trust for the appellant.

III.—That it should be also declared that the sale by the respondent without the appellant's consent of the Wellesley Street property was a breach of the respondent's duty to the appellant.

IV.—That the matter be remitted to the High Court in order that directions may be given:—

(1) for the taking of the following accounts and enquiry (that is to say):—

- (a) An account of what is due from the appellant to the respondent upon the footing of the declaration No. II.
- (b) An account against the respondent of (i) the proceeds of sale of the Wellesley Street property received by the respondent; (ii) the rents of the same property since the 29th January, 1916, upon the footing of the respondent being a mortgagee in possession; and (iii) any monies received by the respondent from Pity in satisfaction of the decree against Pity.

(c) An inquiry what damages (if any) the appellant has suffered by reason of the sale, the question whether or not the sale was at an undervalue to be taken into consideration upon the enquiry: and

(2) for setting off what is certified under account (a) against the aggregate of what is certified under account (b) and enquiry (c), with consequential directions for payment of the balance to the party entitled.

V.—That the costs of the appellant before their Lordships' Board and in the Courts below heretofore incurred be paid by the respondent, but that the costs of and consequent upon the accounts and enquiry to be taken as the result of this appeal be reserved to be dealt with by the High Court or as the High Court shall direct.

Their Lordships will humbly advise His Majesty accordingly.



In the Privy Council.

SAGARMULL NATHANY

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v.

JOHN CARAPIET GALSTAUN.

DELIVERED BY LORD TOMLIN.

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