

Churaman Vs. Balli

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Court : Allahabad

Decided On : Dec-31-1969

Reported in : (1887)ILR9All591

Judge : John Edge, Kt., C.J. and ;Brodhurst and ;Mahmood, JJ.

Appellant : Churaman

Respondent : Balli

Judgement :

John Edge, Kt., C.J.

1. After stating the facts as above continued: The first question which we have to consider is whether or not the words in the sale-deed 'as malikana' should be treated as words of surplusage. If the intention of Sheo Charan and Mahipat Singh was that the Rs. 25 should only be payable by the latter to the former during the life-time of the former, then it was unnecessary to insert the words 'as malikana,' as the claim in the sale-deed relating to the payment of the Rs. 25 annually would have expressed such intention, even if these words had not been inserted. If no meaning can be inferred from which the intention of the parties can be gathered from the use of the words 'as malikana,' they no doubt might be treated as words of surplusage. If, on the other hand, the intention of the parties can be inferred from the use of these words in the sale-deed, we consider that we should, in construing the sale-deed, give effect to them, if there is in the sale-deed, or the

surrounding circumstances, nothing inconsistent with such inference.

2. The earliest definition of the word 'malikana' of which we are aware is that given in the answer of Gholam Hosein Khan, Appendix No. 16 to Mr. Shore's Minute of 2nd April 1788, when he said--' Malikana is the inalienable right of proprietorship, but nankar depends upon fidelity and attachment to-the State and a due discharge of the public services.' 'See Landholding and the Relation of Landlord and Tenant in various countries, by C. D. Field, p. 738, Note 1). This definition probably would not now be considered as strictly correct or sufficiently wide. In Wilson's Glossary of Judicial and Revenue Terms and of useful works occurring in official documents relating to the administration of the Government of British India, 1855, malikana is described as 'pertaining or relating to the malik, or proprietor, as his right or due; applied, especially in revenue language, to an allowance assigned to a zamindar, or to a proprietary cultivator, who, from some cause, such as failure in paying his revenue, or declining to accede to the rate at which his lands are assessed, is set aside from the management of the estate and the collection and payment of the revenue to Government, which offices are either transferred to another person, or taken under the management of the Government Collector: in such case a sum not less than 5 per cent and not exceeding. 10 per cent. on the net amount realized by the Government, was finally assigned to the dispossessed landlord.-- (Ben. Reg. i, viii, xliii, 1793; vii, 1822). It was also applied formerly to an allowance made to the head man by the other villagers, or, when authorized to collect and pay the revenue of the village, by the State.'

3. In Fallon's new Hindustani-English Dictionary of 1879, we find, the following:

Malikana, adj. Proprietary.

Malikana, adv. In manner of an owner.

Malikana, n. m. An allowance to zamindars ousted from their estates.

Malikna-i-khangi, n. m., fees levied on cultivators by a landholder for his household expenses.

Malikana-rasum. Proprietary dues.

4. In the case of *Herranund Sheo v. Ozeerun*, 9 W. R., 102, Phear, J., said: 'It seems to me that the right to raise malikana is a distinct proprietary right, and that it constitutes an interest in the land.' In the case of *Bhoalee Singh v. Neemoo Behoo*, 12 W. R., 498, Sir Baknes Pkacock, C. J., held that 'malikana is not rent nor has it the elements of rent. It is a right to receive a portion of the profits of the estate for which the Government has made a settlement with another person, the real proprietor having neglected to come in and make a settlement.' In the case of *Hurmuzi Begum v. Hirday Nanun* I. L. R., 8 Cal., 921, it was held that malikana was an annual recurring charge on immoveable property. In the case of *Mohomed Karamnt-oollah v. Abdool Majeed*, N. W. P. H. C. Rep., 1869, p 205, Sir Walter Morgan, C.J., and Mr. Justice EOSS held that a malikana allowance is that which comes to the proprietor in respect of his ownership and as a mode of enjoying his ownership. To the same effect is the judgment in *Gobind Chunder Boy Chowdhry v. Ram Chundra Chowdhry*, 19 W. R., 94.

5. It is true that these last five cases related to malikana properly so called which had on a settlement been reserved by the Government settlement officer for the zamindar or proprietor, but still they show what malikana is or may be. It appears to us that the words 'as mahkana' were not inserted in the sale-deed without an object, and cannot be rejected as words of surplusage, and that they clearly indicate that the payment of the Rs. 25 annually was intended by Sheo Charan and Mahipat Singh to be an annual charge upon the property and the profits arising from the property of a nature analogous to that of a malikana reserved on a settlement by a Government settlement officer for a zamindar, and that it was intended by the use of those words to reserve or create a perpetual and heritable charge upon the property. The employment of the words 'as malikana' appears to us to have had the same object as would have been obtained had words expressly declaring the payment to be perpetual or the right heritable been employed. We are not prevented from coming to this conclusion by the omission of specific words of inheritance. For this latter proposition the cases of *Kooldeep Naram Singh v. The Government*, 14 Moo. I. A., 247; *Tulshi Pershad Singh v. Ram Naram Singh* I. L. R., 12 Cal., 117, and *Gaya v. Ramjiawan Ram* I. L. R., 8 All., 569, are authorities. The case of *Gyan Singh v. Kooer Peetum Singh*, N. W. P. H. C. Rep., 1869, p. 73, apparently is an authority against the view which we take of the

construction of the sale-deed. That case, so far as the construction of the sale-deed is concerned, appears to be in point, and to support the contention of Pandit Ajudhia Nath on behalf of the respondent. The Judge who decided that case does not appear to have considered what was the intention of the parties in using the words 'malikana payment' which appear in the judgment, and which we therefore presume were used in the document then under consideration. If the words 'malikana payment' or 'malikana' were not employed in the document in that case, that case is not in point. If those words were used in that document, the Judge in that case appears not to have considered their meaning or the object of their having been used, and we, sitting here as a Bench of three Judges, decline to follow that decision if it be in point. We may also say, if we are entitled to look at the earliest dealing with this property appearing on the record to assist us in ascertaining the intention which the parties had in using the words 'as malikana' in the sale-deed, that we find there that Sheo Charan and the other two mortgagors when they mortgaged the property on the 20th December 1867, reserved 18 bighas as malikana.

6. We are bound in this second appeal to accept the finding of the Judge of Banda that Balli took as mortgagee without notice, in fact, of the terms of the sale-deed, although we should most probably have been led to a different conclusion. Assuming that Balli had in fact no notice of the terms of the sale-deed, does that fact afford a defence to this claim? We are of opinion that it does not. If Balli had searched the register he would have ascertained the terms of the sale-deed, in which case he would have had actual notice. Any prudent intending mortgagee who did not designedly abstain from inquiring for the purpose of avoiding notice, or who was not honestly, as far as he was concerned, misled by fraudulent statements of the mortgagor, would search the register to ascertain the title to the property and the charges, if any, upon it. It is not shown that Balli made any inquiry, or that any statements were made to him which would mislead him or put him off his guard, such as were made in the case of *Agra Bank v. Barry*, L. R., 7 H. L., 135. If Balli, in fact, did not search the register, he must wilfully have abstained from making the search, or he was guilty of gross negligence in not making it; and in either case he cannot be treated as a bond fide mortgagee without notice. In *Pilcher v. Rawlins*, L. R., 7 Ch. App. 259, the purchaser who got the legal estate

had acted with bond fides, and the prior mortgage and the re-conveyance were concealed from him by the mortgagor, with the connivance of the trustee. Obviously that was a very different case to this. The definition of the word notice 'in Section 3 of the Transfer of Property Act, 1882, in our opinion, correctly codifies the law as to notice which existed prior to the passing of that Act.

7. We do not consider it necessary to express any opinion as to whether or not the registration in India operated as notice to all the world, nor do we consider it necessary to decide whether or not notice was necessary in order to bind Balli. In the case of *Abadi Bequm v. Asa Ram I. L. R.*, 2 All., 162, in which a husband had by a deed which was registered, covenanted with his wife, for himself, his heirs and successors, to pay her monthly Rs. 12 in lieu of dower out of the income of certain specified lands, and further covenanted not to alienate those lands without stipulating for the payment of the allowance, it was held that that covenant ran with the land and created a lien which, with or without notice, extended to all subsequent persons claiming to hold the lands to the extent of the amount of the profits set apart for the benefit of the wife, who was the plaintiff' in that case, and was suing a sub-mortgagee of a mortgagee who had taken subsequently to the deed relied upon by the wife.

8. For the reasons above stated we hold that the sale-deed of the 30th March 1870, was intended to create a perpetual and heritable charge upon the land; that Balli, being in receipt of the profits of the lands, is liable for the annual payment of the Rs. 25 from the date when he took possession as mortgagee.

9. It now only remains to be considered whether this is a case in which a second appeal lies, and this depends upon the construction to be placed upon Section 6 of Act XI of 1865 the Mufassal Small Cause Courts Act of 1865. That section, so far as is material, is as follows: 'The following are the suits which shall be cognizable by Courts of Small Causes, namely, claims for money due on bond or other contract, or for rent, or for personal property, or for the value of such property, or for damages, when the debt, demand or demand does not exceed in amount or value the sum of five hundred rupees, whether on balance of account or otherwise; provided no action shall lie in any such Court...(4) for any claim for the

rent of land or other claim for which a suit may now be brought before a Revenue Officer, unless as regards arrears of rent for which such suit may be brought, the Judge of the Court of Small Causes shall have been expressly invested by the Local Government with jurisdiction overclaims for such arrears.' Looking at this section, the first thing which we notice is that, although the Small Cause Courts are given jurisdiction overclaims within the specified amount on contract, claims for rent subject to the limitation contained in the 4th proviso, are also expressly brought within the jurisdiction of the Small Cause Courts. Claims for rent are claims which can only arise out of contract: and if it were intended by the Legislature that all claims or contracts other than those excluded by the proviso in the section, should be within the jurisdiction of the Small Cause Courts, it is difficult to see why claims for rent should have been specifically mentioned in the enabling portion of the section. Again, we notice that claims within the specified amount or value for personal property, are specifically brought within the section, whilst claims for immoveable property are not referred to in the section. Again, the effect of the 4th proviso is to limit the jurisdiction as to suits for rent to suits in which the rents sued for accrue in respect of house property, and to arrears of rent in cases provided for. The inference which we draw from an examination of Section 6 is that it was the intention of the Legislature that suits which directly involved questions of title to immoveable property should not be cognizable by the Small Cause Courts. We do not question the correctness of those decisions in which it has been held that in those cases in which the suit is otherwise within the jurisdiction of a Small Cause Court, that jurisdiction is not ousted because it may become necessary incidentally to decide a question of title. In this case it appears to us that the question of title to immoveable property was directly involved. The respondent's case was and is that he held the lands free of any charge. The appellant's case was and is that the respondent held the lands subject to the charge of Rs. 25 annual payment. We are aware that it has been decided that a suit to recover the principal money and interest secured by a hypothecation-bond on immoveable property can be maintained in a Small Cause Court. In such cases, unless otherwise provided by the hypothecation-bond, the mortgagee would be entitled to his personal remedy against his debtor for the debt, or on the debtor's promise to pay, of which the bond would probably be evidence. Here

there is no purely personal contract on the part of Balli to make the annual payments: his liability arises out of the fact that he is the person who is in possession of the property charged with the payments. He cannot take the benefit to be derived from the profits of the land without taking up at the same time on himself the liability to make the payments charged on that land. In *Mohomed Karamut-oollah v. Abdool Majeed*, N.-W. P. H. C. Rep., 1889, p. 205, Sir Walter Morgan, C.J., and Mr. Justice Ross held that a suit for malikana allowance concerned the proprietary right in land, and was not one for a Small Cause Court, although they said 'it is true that the allowance is as to its amount fixed by contract, and that ordinarily a claim arising under a contract would be cognizable by a Small Cause Court.'

10. In the case of *Bhawan Singh v. Ghottar Kuar*, Weekly Notes, 1882, p. 114, Mr. Justice Straight and Mr. Justice Brodhurst held that a suit for arrears of mahkana affected the proprietary interest in immoveable property, and fell without the scope of the Small Cause Court. It appears to us that the same principle applies here. The view which we take is not at variance with any of the authorities cited before us. In *Pestonji Bezonji v. Abdool Rahiman* I. L. R., 5 Bom., 463, no question of title to immoveable property arose. There the mortgage contained a personal undertaking to repay, and the suit was for a money decree only. In *Kutub Husain v. Abdul Hasan* I. L. R., 4 All., 134, the only question which could be called in any sense a question of title, was whether the defendant was the proprietor of the village in respect of which the plaintiff had been compelled to pay the Government revenue which he sought to recover in the suit. It does not even appear that the fact of such proprietorship was in issue. In *Kadaressur Mookerjea v. Gooroo Churn Mookerjea*, 2 Cal. L. R., 388, the sole question was, whether the plaintiff had purchased the properties for himself or benami for the defendants, and if as benami for the defendants, whether they were liable on the implied contract of indemnity.

11. In conclusion we hold that the respondent Balli is liable in this suit for the arrears of the annual payments of Rs. 25 claimed in the suit, and that the decree of the Lower Appellate Court, so far as Balli is concerned, must be accordingly reversed, and that this appeal must be allowed with costs.

Brodhurst, J.

12. Concurred.

Mahmood, J.

13. I concur.

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