

*Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mussamat Basso Kuar and others v. Lala Dhum Singh, from the High Court of Judicature for the North-Western Provinces, Allahabad; delivered 7th July 1888.*

Present:

THE EARL OF SELBORNE.

LORD HOBHOUSE.

LORD MACNAGHTEN.

SIR BARNES PEACOCK.

SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

The question in this case is whether a debt which at one time was due from the Respondent to one Barumal, whom the Appellants represent, and which has never been paid, has been extinguished by lapse of time. The High Court, differing from the Subordinate Judge, have decided the point against the Appellants, and have dismissed the suit brought by them for recovery of the debt.

Barumal and Dhum Singh, who were bankers in Saharunpur, had dealings together, and Dhum Singh came to owe Barumal Rs. 33,359. 3. 6. It was then agreed between them that Dhum Singh should convey to Barumal or to his wife Basso Kuar certain villages for the sum of Rs. 55,000, and that his debt should be set off against the price. On the 1st September 1879 he executed and delivered to Barumal a deed by which he acknowledged

the receipt of the whole purchase money, and conveyed the villages to Basso Kuar, and he endorsed on the deed a memorandum showing that the balance only of the price, after allowing for the debt, was paid in cash. No money was actually paid.

On the same day Barumal took away the deed and signed a letter prepared by Dhum Singh, in which he agreed to register the deed and to pay the balance of the price. But very soon afterwards he found, or alleged, that the deed was not in accordance with certain conditions for which he had stipulated, and, declining to complete the purchase, he demanded what was owing to him. Dhum Singh on his part insisted that the deed was in accordance with the contract, and after an attempt at arbitration had failed, he brought a suit on the 3rd August 1880 against Barumal and Basso for specific performance of the contract, praying that the deed might be registered, and that Barumal might be ordered to pay the balance of the Rs. 55,000 with interest after setting off the debt of Rs. 33,359. 3. 6.

On the 24th of February 1881 the Subordinate Judge decided in favour of Dhum Singh's view, and gave him a decree according to his prayer. Barumal appealed to the High Court. After reviewing the evidence their conclusion was that Dhum Singh did not make out to their satisfaction that the sale deed ever became a contract binding on Barumal, and enforceable against him in law. They therefore dismissed his suit. Their decree was made on the 14th of March 1884.

Upon that event Barumal renewed his demands for the payment of his debt, and not being able to get it, he, in conjunction with his wife Basso, instituted the present suit on the 10th of September 1884. He is since dead, and his sons have been substituted for him as co-

Plaintiffs with the widow. In his plaint he states the deed of the 1st of September 1879, and alleges that, in the preparation of the deed, Dhum Singh took steps contrary to the engagement, that so disputes arose, that Dhum Singh unjustly brought a claim for enforcement of the contract, but that the claim was dismissed by the High Court, who held the contract to be invalid. He then claims that the amount for which Dhum Singh had given credit to him in the sale deed ought to be refunded, and claims interest upon it.

Dhum Singh's defence is that Barumal always denied the existence of a contract; that the High Court held there was no contract; that the character of the debt never was altered; and that there was nothing to save it from being barred by limitation.

The High Court hold that this defence is sound in law, and their decree dismisses the suit as being barred by limitation. They do not state under which Article of Act XV. of 1877 the case falls; but they consider Barumal's claim to be for nothing but the old balance due from Dhum Singh. Probably they would hold it to fall, as was argued at their Lordships' bar, under Article 64 (in the second Schedule); therefore, as none of the statutory provisions by which the time for suing is enlarged can be applied to this case, except that which relates to acknowledgement, and as no written acknowledgement can be found later than the plaint filed by Dhum Singh in the specific performance suit, Barumal's right to sue would be barred at latest long before he sued.

Their Lordships find themselves unable to agree with the High Court as to the nature of the claim. They think that it is substantially put upon the right ground in the plaint. It must be remembered that it has throughout

been common ground to both disputants, that there was a contract made between them, and that among its terms were the sale of the villages for Rs. 55,000, the retention by Dhum Singh of his debt of Rs. 33,359. 3. 6 as part payment, and the payment by Barumal of the balance. Their quarrel was about other matters. Dhum Singh alleged that the terms just mentioned were all the terms of the contract, and he claimed its completion on that footing. Barumal alleged that there were other terms, accused Dhum Singh of dishonesty, and after a time claimed the right of receding from the bargain altogether. But the Subordinate Judge took the view of Dhum Singh, and decreed completion of the contract according to that view. Up to the date of the Subordinate Judge's decree in 1881, Dhum Singh retained the amount of his debt as of right, and in accordance with the contract alleged by him. After the decree of 1881 he still retained it as of right, and with a title which could not be disputed in any court of justice, except by the one mode of appeal from the decree of 1881. Barumal might have sued for his debt, but the utmost benefit that could have come to him from such a suit would have been to have it suspended or retained in Court till after decision of the appeal in the specific performance suit. Dhum Singh's defence would have been that the debt was paid by virtue of the contract, and that defence must have prevailed if the suit were heard while the decree of 1881 still stood unreversed. It would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not. And it would be a lamentable state of the law if it were found that a debtor, who for years has been insisting that his creditor shall take payment in a particular

mode, can, when it is decided that he cannot enforce that mode, turn round and say that the lapse of time has relieved him from paying at all.

In their Lordships' view the decree of the High Court in 1884 brought about a new state of things, and imposed a new obligation on Dhum Singh. He was now no longer in the position of being able to allege that his debt to Barumal had been wiped out by the contract, and that instead thereof Barumal was entitled to the villages. He became bound to pay that which he had retained in payment for his land. And the matter may be viewed in either of two ways, according to the terms of the Contract Act IX. of 1870, or according to the terms of the Limitation Act XV. of 1877.

By the 65th section of the Contract Act, "when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it." In this case there most certainly was an agreement, which, as written, was in the terms alleged by Dhum Singh. But it was held not to be enforceable by him because there were other unwritten terms which he would not admit; and the other party did not seek to enforce the agreement according to his version of it, but threw it up altogether. The agreement became wholly ineffectual, and was discovered to be so when the High Court decreed it to be so. The advantage received by Dhum Singh under it was the retention of his debt. Therefore by the terms of the statute he became bound to pay his debt on the 14th March 1884.

Trying the case by the terms of the Limitation Act, their Lordships think that it falls within Article 97. An action for money

paid upon an existing consideration which afterwards fails, is not barred till three years after date of the failure. A debt retained in part payment of the purchase money is in effect, and as between vendor and purchaser, a payment of that part; and if that were doubtful on the first retention while there was yet undecided dispute, it could no longer be doubtful when a decree of a court of justice authorized the retention, and in effect substituted the land for the debt. Dhum Singh retained the money, and Barumal lost the use of it, in consideration of the villages which formed the subject of the sale deed. That consideration failed when the decree of 1884 was made, and it failed none the less because the failure was owing to Barumal's own reluctance to take it under the conditions insisted on by Dhum Singh.

The result is that in their Lordships' opinion the High Court ought to have sustained the Subordinate Judge's decree, and to have dismissed the appeal with costs, and they will now humbly advise Her Majesty to reverse the decree of the High Court, and to make an order to that effect. The Respondent must pay the costs of the appeal.

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