

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Womeshchunder Roy v. Gooroodoss Roy and others from the High Court of Judicature at Fort William in Bengal; delivered 24th November, 1871.*

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Present:

SIR JAMES W. COLVILE.

SIR JOSEPH NAPIER.

SIR MONTAGUE SMITH.

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SIR LAWRENCE PEEL.

THE Respondent in this case brought his suit to recover possession of the property included in his mortgage deed, having perfected his title under that deed by the usual proceedings in foreclosure. He brought the suit against the mortgagors, against some other incumbrancers whose case it is unnecessary now to consider, and against the present Appellant, who was in possession of part of the mortgaged property as purchaser at an execution sale. The mortgagors admitted the title of the plaintiff the Respondent. The Appellant, however, defended his possession by insisting that the mortgage was from the first a collusive transaction, an arrangement between the mortgagors and the mortgagee designed to protect the property of the mortgagors from the claims of their creditors. One of the issues framed in the suit is whether that proposition is correct or whether the mortgage transaction was *bonâ fide*? The Principal Sudder Ameen, the Judge of First Instance, found that issue in favour of the Appel-

lant, but a division bench of the High Court reversed his decision. It does not appear to their Lordships to be necessary to consider upon whom the burden of proof in such a case must fall, because they think that in the present case the facts are sufficiently before them to enable them to give a judgment upon them, and that there were sufficient circumstances proved and apparent in the case to render it necessary for the Respondent to give better evidence of the *bona fides* of the transaction on which he relied than he has given in this case. Their Lordships observe, among other things, that by the petition filed by one of the mortgagors at page 70, the transaction, though spoken of as a real transaction, is spoken of as one of those arrangements under which the parties had every hope and probability of getting back the lands in future from the Baboo "in case we can pay the amount due to him."

Their Lordships also find that the Respondent did so far undertake to prove what the consideration really was that he examined one or two witnesses upon that point. Those witnesses prove no more than that a colourable consideration passed in the shape of certain notes at Sreedharpore, a payment which may easily be explained by the admitted relation between the parties, and is one of those payments which would be ostensibly made before witnesses of that character in order to give colour to the transaction. But part of the alleged consideration for the original mortgage was a balance found upon a settlement of account, and no evidence whatever is produced as to the fact of the settlement of that account or to show in respect of what transactions it was settled, or that a balance was really struck and found due to the Respondent upon that occasion.

Then again, the High Court, in its judgment reversing the decision of the Principal Sudder Ameen, relies upon the sum of money which was paid into court, whether rs. 15,000 or rs. 16,000 does not very clearly appear, in order to stay the first execution of Panchanun Bose and another; but that payment throws no light upon the original transaction, certainly does not go to establish that that original transaction in its incep-

tion was a *bonâ fide* transaction, or the ordinary transaction of mortgagor and mortgagee, in which the parties would be dealing at arm's length with each other. On the contrary, if anything, it tends the other way, because if the Respondent had then completed his title by foreclosure, if he was in a position to claim this land against all persons by virtue of a *bonâ fide* mortgage title made absolute by foreclosure, what possible motive was there for advancing a very much larger sum than the sum originally secured by the mortgage?

Their Lordships, considering the whole of the evidence, are obliged to come to the conclusion that the Principal Sudder Ameen was right in finding that as against the Appellant this was not a *bonâ fide* mortgage, but one of those transactions into which a friendly party might have been induced to enter in order to protect the young men the mortgagors from the demands with which they seem to have been pressed. The case is not presented, perhaps, in quite so satisfactory a way as it might have been in respect to the amount and nature of these demands. The Principal Sudder Ameen speaks of them in terms which the evidence as sent over on this record hardly supports; but there is, even upon the face of the plaint, an admission of outstanding demands sufficient to show that there may have been a motive that the property should be protected in the way in which it has been attempted to protect it.

Their Lordships think that had the transaction been what it purported to be the Respondent, who might have given his own testimony, who might have called the person spoken of as his Moonshee and as having taken a principal part in the original transaction, and who might have examined the mortgagors and others, had it in his power to adduce far better testimony than has been given in this case, in order to make out the reality and *bona fides* of the transaction.

Their Lordships therefore are of opinion that the decree of the High Court cannot stand, and that it ought to be reversed. All that the present Appellant asks is that the decree of the Principal Sudder Ameen should be affirmed.

Against that decree, so far as it was favourable to the Respondent, the Plaintiff in the case, there was no appeal to the High Court, and therefore nothing which their Lordships do here will in any degree disturb that decree, or alter or affect whatever relations may under it exist between the mortgagee and the mortgagors, or anybody who may hereafter claim under them.

Their Lordships therefore will humbly advise Her Majesty to allow the appeal, to reverse the judgment of the High Court, and to affirm the judgment of the court below, the Principal Sudder Ameen, with the costs of the appeal to the High Court. The Appellant must also have the costs of this appeal.

The reservation at the end of the Principal Sudder Ameen's decree concerning the right to four annas of the property asserted in another suit seems to be unnecessary, because whether the Appellant held three-fourths by virtue of his execution sale, and one fourth by virtue of the decree in that other suit, or whether he holds the whole as purchaser at the execution sale, seems to be, for the purposes of this suit, an immaterial consideration.