

*Privy Council Appeal No. 45 of 1912.*

*Bengal Appeal No. 54 of 1908.*

Musammat Jeuna Bahu, since deceased (now represented by Hari  
Kishan Joshi and others) - - - - *Appellants*

v.

Rai Parmeshwar Narayan Mahtha Rai Bahadur, since deceased,  
and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL DELIVERED THE 3RD DECEMBER, 1918.

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*Present at the Hearing :*

LORD BUCKMASTER.

LORD DUNEDIN.

SIR JOHN EDGE.

[*Delivered by* LORD BUCKMASTER.]

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In this case the appellants challenge the validity of an execution sale of a 16 anna share in certain mouzahs appertaining to Mahal Sonkarsa. The sale took place on the 15th December, 1891, pursuant to an Order of Attachment of the 5th November, 1891, issuing out of the Court of the Subordinate Judge of Mozufferpur, and made in execution of a decree of the same Court passed on the 17th April, 1890.

There are two grounds upon which this case rests: the first that the decree of the 17th April, 1890, was, so far as it formed a foundation for the sale of this property, *ultra vires*; and, secondly, that at the date of the sale there was, in fact, another order existing for the sale of the same property. For reasons that their Lordships will state, they think there is no efficacy in either of these contentions.

The facts that preceded the litigation out of which this appeal has arisen are very simple, though they have been the cause of many legal complications. On the 24th March, 1888, Bal Krishan Lal Sand entered into a bond in favour of the members of the firm of Thomas and Co., to secure repayment of sums advanced to him by them up to the limit of Rs. 55,000; and, to secure this repayment, entered into a covenant to execute in their behalf a full and complete mortgage of the block and crop of the Buriarpur indigo concern.

Bal Krishan Lal died a month after the execution of this deed on the 24th April, 1888, leaving a son by his first wife, his second wife (the appellant, Musummat Jeuna Bahu, his widow), and four illegitimate children by a Mohammedan concubine.

Questions arose about the right to obtain letters of administration to the estate of Bal Krishan, which are irrelevant to the present dispute, and on the 30th May, 1889, letters of administration were granted to Mahbub Lal, the eldest of the illegitimate sons. On the 10th September, 1889, proceedings were taken by the firm of Thomas and Co. against Mahbub Lal as administrator of Bal Krishan Lal, claiming as equitable mortgagees upon the block and crop of the said indigo concern, by virtue of the deed of the 24th March, 1888, and asking for sale of the property, and application of the purchase money in or towards satisfaction of the sum of Rs. 17,432, the amount then due upon the mortgage, together with interest and costs.

The decree asked for was made on the 17th April, 1890, and in addition to granting the necessary relief under the mortgage, it further provided that, if the proceeds of the sale were not sufficient to cover the amount secured by the mortgage with interest till the date of realisation, the defendant should pay the balance of the amount from the estate of the deceased, and if the assets were not admitted to be sufficient, the estate should be kept under the management of the Court.

The sale of the mortgaged property took place on the 18th August, 1891, when it was sold for Rs. 7,000, the amount realised being obviously insufficient to clear the debt. On the 29th August, 1891, Thomas and Co. further applied in execution of their decree for attachment and sale of the mouzahs in dispute in this suit, and on the 5th November, 1891, attachment was accordingly ordered, and the sale took place on the 15th December of the same year.

On the 5th April, 1904, the widow instituted the suit giving rise to this appeal in the Court of the Subordinate Judge in District Tirhut against the purchasers and other parties asking, together with other relief not now material, to set aside the sale. In this she failed, though on other points she succeeded, and the decree giving effect to the judgment of the Subordinate Judge was drawn up and dated 31st January, 1906.

Against this decree the plaintiff appealed to the High Court of Calcutta, as also did certain of the defendants. The High

Court on the 19th May, 1908, heard both appeals together, and dismissed them both. The defendants have taken no further steps in the matter; but the plaintiff appealed to this Board. She died on the 12th September, 1910, and the appeal has been continued by those who represent her original interest in the property. The respondents are the administrator of Bal Krishan Lal and the representatives of the purchasers and the mortgagees.

Possibly as the result of deaths, or it may be for other reasons which their Lordships cannot ascertain, but which certainly are not in any way associated with lack of despatch of business before this Board, the appeal now comes on for hearing ten years after the date of the decree of the High Court. The ground upon which the sale is disputed is that by virtue of section 90 of the Transfer of Property Act, 1882, the decree of the 17th April, 1890, was inoperative so far as it ordered payment of the balance of the moneys and formed a foundation for the sale of property outside the mortgage. This argument turns on the language of the section, which is in these terms: "When the nett proceeds of any such sale are insufficient to pay the amount due for the time being on the mortgage if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such sum."

The appellants contend that the opening words establish as a condition precedent to the power of decreeing payment of the balance that the mortgaged property must first be sold and found insufficient to satisfy the debt. It is admittedly a strict and technical construction of the statute and one for which no reason can be assigned, and from which no advantage can possibly be derived by any mortgagor. It would be unfortunate if the statute by its terms rendered necessary the adoption of this contention; but in their Lordships' opinion it is not necessary so to construe the Act. The words of the section are, in their opinion, satisfied in cases where the Court passes a decree that, on the happening of the event when the nett proceeds of the sale are found to be insufficient, the balance should be paid. The order, though made at the time of the decree for the sale of the mortgaged estate, operates at a future date, and is made in such terms that it can only operate when the sale has failed to satisfy the debt, and this is the event specified and defined in the section as the event when the decree can be made.

Their Lordships, therefore, think that the first ground is untenable. The second contention depends on this, that on the 18th August, 1891, the same property was purchased at an execution sale under a decree held by one J. Tripe. No certificate of sale was issued in respect of the purchase, and on the 11th March, 1892, the purchasers framed a petition stating that they were not prepared to support the sale in question, and upon this petition on the 31st March, 1892, the sale was set aside.

The High Court dealt effectively with the contention that in these circumstances there was nothing that could be sold

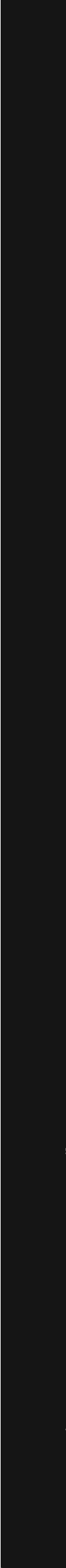
on the 15th December, 1891, and to their judgment their Lordships have nothing to add; but the appellants further say that under section 311 of the Code of Civil Procedure, the former sale could not be set aside unless the applicant could prove to the Court that he had sustained substantial injury by reason of the irregularity by which the sale was impeached, and of this there was no evidence and nothing to show that the proper parties were before the Court. But the order setting the sale aside was not appealed from, and the appellants, on whom the burden of challenging the order rests, have completely failed to satisfy their Lordships that it was not duly and properly made in the presence of all the interested parties.

Their Lordships, therefore, have no hesitation in holding that the second ground of this appeal fails equally with the first.

Finally, their Lordships regard it as their duty once more to direct attention to the unsatisfactory conditions which this case discloses relating to Indian litigation. The sale challenged was an ordinary execution sale that took place twenty-seven years ago. The proceedings culminating in this appeal began on April 4th, 1904, and it has taken over fourteen years before they have been finally concluded, and the purchaser confirmed in his holding. That the delay may in part have been occasioned by deaths is both true and obvious, for the allotted span of human life is not long enough to enable a group of adult people to contemplate with reasonable certainty a prolongation of life sufficient to see the end of such litigation. Security of title and reasonable swiftness of legal decisions are essential conditions of commercial development, and both are lacking in such a case as the present, a case which, in their Lordships' experience, unfortunately does not stand alone.

They will humbly advise His Majesty that this appeal should be dismissed with costs.

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In the Privy Council.

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MUSAMMAT JEUNA BAHU, SINCE DECEASED  
(NOW REPRESENTED BY HARI KISHAN  
JOSHI AND OTHERS), AND OTHERS

r.

RAI PARMESHWAR NARAYAN MAHTHA RAI  
BAHADUR, SINCE DECEASED, AND OTHERS

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DELIVERED BY LORD BUCKMASTER.