

*Judgment of the Lords of the Judicial Committee  
of the Privy Council on the Appeal of Pud-  
domonee Dossee and another v. Roy Muthoo-  
ronath Chowdry and others, from the High  
Court of Judicature at Fort William, in  
Bengal; delivered 16th May 1873.*

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Present:

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

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SIR LAWRENCE PEEL.

THE suit out of which this Appeal has arisen was brought by the late Rass Monee Dossee, and her Appeal has been continued by two ladies, who appear to be her heirs and representatives.

The suit was brought for the purpose of cancelling a bhaug pottah set up by the Defendants, the Chowdrys, and recovering from them the possession of a parcel of land upon which a bazaar had been built, with mesne profits, the title on which Rass Monee Dossee sued being that of a purchaser at an execution sale.

That was the object of the suit as stated in the plaint. When the Chowdrys put in their answer, they not only relied upon the bhaug pottah, but also set up the second, which we may call the mooroosee pottah; and the validity of that being called in question by the replication, one of the issues settled in the suit put in issue the validity of both pottahs, being in terms whether they had been granted *bonâ fide* to the Defendants or whether they were collusive or illegal.

The title of Rass Monee Dossee to the right, title, and interest of the execution debtors, a

joint family which may be described as "the Sirkars," is not disputed; the only question is what were the extent and nature of their interest in the property sold, at the date of the sale. It is necessary, however, in order to see how this question arose between the parties, to recapitulate, as shortly as may be, the facts of the case.

The proceedings go back as far as the year 1830.

In August of that year one Bhojrub Sein recovered a money decree for an inconsiderable sum against the Sirkars. In execution of that decree, the land in question was attached on the 27th February 1832, and the usual proclamation of attachment was issued on that occasion. Bhojrub Sein died, leaving (as it is said, and their Lordships will assume correctly said) only minor heirs.

Nothing further was done between the date of this attachment in 1832 and the year 1844, when the case in execution was struck off the file, the judgment being still unsatisfied. It appears that within one year after that was done Rass Monee Dossee became mortgagee of the land under instruments executed by the Sirkars. There were two mortgages for Rs. 500 each. They seem to have been ordinary Bengal mortgages operating as mere pledges of the land; and she subsequently instituted proceedings to enforce those securities. Pending her suits, and apparently before she obtained a decree, the heirs of Bhojrub Sein took fresh proceedings to enforce their judgment. A new attachment issued in June 1848. The order for sale was made on the 30th March 1849, and Rass Monee Dossee became the purchaser for a small sum, Rs. 1,400, of the property. This sale was founded upon the second attachment, to which objections were taken and disposed of before the order for sale. One-fifth of the property originally attached was released as not being subject to the attachment, on the objection of some of the Sirkars. Rass Monee Dossee also came in as an objector, alleging her mortgage interest, and the result

of that was that by the lotbundee the property was put up expressly as subject to her mortgage. All therefore that she bought at the execution sale was the equity of redemption remaining in the Sirkars subject to the mortgage to her. She then took proceedings to recover possession of the land; but she was met by the Defendants, the Chowdrys, who alleged that they held the land under pottahs granted by the Sirkars. After this she seems to have slept upon her rights for seven or eight years, at the expiration of which period she commenced the present suit.

The title so set up by the Sirkars was of this kind. The commencement of it was alleged to be a bhaug or share pottah, dated the 17th April 1833. From that instrument (of which a copy is set out at page 19 of the Record, and which was afterwards produced to the High Court) it appears that the land was granted to them for the purpose of having a bazaar erected upon it at their expense, the arrangement between the Sirkars who granted the land and their lessees being that the latter were to pay a 2 annas and 10 gundahs, share of the profits of the bazaar, retaining 13 annas and 10 gundahs for themselves. The duration of this tenure is, upon the face of the bhaug pottah, somewhat indefinite. It was evidently intended to be of an hereditary character, because heirs are mentioned; but there is a stipulation towards the end of the pottah that if the lessees wished to give up the bazaar they should be at liberty to do so, and that in that case the lessors would either purchase the huts and other things incident to the bazaar which had been erected on the land, or allow the lessees to dispose of them elsewhere. And there is also a stipulation that if the lessors wished to transfer their right in the land they would give the lessees information of their intention to do so, and would give the latter a right of pre-emption.

The case of the Respondents, however, goes further than this. They allege that on the 2nd

October 1836, the Sirkars executed to them a permanent mooroosee pottah which materially altered the relation of landlord and tenant. The effect of that was to give them in terms a perpetual mooroosee pottah, in consideration of a salami of Rs. 1,000 and a reserved rent of Rs. 600 per annum, commuting the share of the profits to which the lessors had been previously entitled for that rent of Rs. 600.

This is the second of the deeds of which the validity is in question in this suit.

I have not alluded to a third deed, which appears to have come out in the course of the proceedings, and to have been first produced in the High Court, because it was only a second bhaug pottah, which does not appear to relate to the property in question in this suit, but rather, as their Lordships understand it, to the one-fifth of the land which had been released from the execution. It was in nearly the same terms as the original bhaug pottah, and there is no issue directed to try the validity of that deed in this suit.

That being the state of the case, the two principal questions which have been argued upon this Appeal are, first, whether as represented by the Plaintiff, these deeds, or either of them, were or was fraudulent and collusive, and a contrivance between the Sirkars and the Chowdrys to defeat the creditors of the former, or whether they were *bonâ fide* documents; and secondly, whether, if admitted to have been *bonâ fide* conveyances, they are not void as against Rass Monee Dossee by reason of their having been executed whilst the first attachment was still subsisting and in force.

Their Lordships propose to deal with the first of these questions in the first instance, and without going at length into the evidence. The Principal Sudder Ameen seems to have found that the first bhaug pottah had not been formally or properly proved before him. He also thought that the second pottah was a collusive document,

and had not been proved to be a genuine one; but he seems to have admitted, by the very form of his judgment, that in some way or other the Respondents had been *bonâ fide* in possession of the property; that they had, under and by virtue of the arrangements (whatever they may have been) which subsisted between them and the Sirkars, laid out large sums in establishing this bazaar, and that by reason of that expenditure they were entitled to be allowed one half of the wasilat, or mesne profits, of which Rass Monee Dossee, by her suit, had claimed the whole.

The High Court, on the other hand, has found that both the documents must be taken to be genuine, or at least that they had not been shown to be collusive documents, and that the long possession of the Respondents had been held under them and by virtue of the title which they conferred, and that the suit ought to be dismissed.

Their Lordships, upon the evidence, cannot feel any doubt but that under the share pottah there has been a *bonâ fide* possession during many years on the part of the Respondents. The possession in fact, they think, cannot be disputed. There is nothing to which they can attribute it, except the title commencing with that document. They therefore do not quarrel with the finding of the High Court upon that point.

Then, as to the second mooroosee pottah, the objections seem to be, first, the inadequacy of the consideration stated; and secondly, that although in the course of the proceedings in the suit of Ramruttun Roy the bhaug pottah was there put forward and apparently proved, no mention was made of this second or mooroosee pottah. Their Lordships do not deny that these circumstances cast some suspicion upon this document. On the other hand, looking to the whole of the *res gestæ*, and to the statement

made by the Sirkars on the occasion of the revenue settlement to the effect that the Chowdry's were in possession under a permanent moorosee tenure, their Lordships do not feel at liberty to say that the finding of the High Court in favour of the second pottah was wrong, or one which they would be justified in now disturbing.

There was certainly evidence upon which the Court might come to that conclusion. Besides the evidence of one of the subscribing witnesses, there was that of two other witnesses, of whom one was a member of the family of the Sirkars. No doubt the judge of first instance was not disposed to act upon this testimony. On the other hand, the High Court finding it corroborated by the circumstances to which I have referred have accepted it as true. Their Lordships cannot say that they were wrong in so doing. If the moorosee pottah were executed when it bears date, the whole of the Respondents' title was completed before the grant of the Plaintiffs' mortgage, and when there was no adequate motive for the commission of a fraud. If, on the other hand, this document were concocted at a later date, and to defeat the Plaintiff's claim (of which there is no proof), the parties would hardly have assigned to it a date which exposes it to the objection next to be considered.

That objection is whether, supposing the documents to be neither fraudulent nor collusive, they were void as against Rass Monee Dossee, by reason of the date at which they were executed, viz., whilst the first attachment was subsisting.

On that point we have been referred to a great many authorities, and it may be admitted that there is some difficulty in reconciling all the cases on the construction of the prohibition against alienation which is involved in an attachment under the new procedure, and seems to have been equally involved in an attachment according to the old procedure. But it appears to their Lord-

ships that one point at least has now been conclusively settled, viz., that the prohibition against alienation avoids the conveyance only as against the execution creditor, or some person entitled to claim under him.

Again, it follows from the first case which was cited by Mr. Leith, (*Gobrisdhan Singh, appellant, Meer Mushun Alee and others, respondents; Bengal G. I. A. Reports for 1855, p. 244,*) as in fact he admitted, that if an attachment has been permanently struck off and a new attachment has become necessary, a conveyance which is executed by the judgment debtor between the two attachments will be valid. And one result of that rule, when applied to the present case, is that the conveyances by which Rass Monee Dossee acquired her interest as mortgagee must be taken to have been valid, notwithstanding the old attachment which had been issued in 1830.

It may, however, be argued that although a conveyance executed between the striking off of the first attachment and the issuing of the second may be valid, it does not follow that one executed whilst the first attachment was subsisting becomes valid by relation, or ceases to be void as against the execution creditor and those who claim under him. That seems to be a point which is not touched by the authorities cited. Their Lordships, however, are of opinion that in this case Rass Monee Dossee cannot claim the benefit of any such rule, if it exists. Her case is peculiar. After the first execution was struck off she became mortgagee. When the second attachment was taken out she intervened in the proceedings as an objector. The result of that was that the property was put up for sale as subject to her mortgage. She therefore bought only the equity of redemption, and presumably paid a smaller price than the property would have realised if it had not been sold subject to her mortgage. She did not buy the subject which was originally attached, viz., the whole property free from mortgage, but the mere

equity of redemption. She cannot be allowed to say that the original attachment ceased to be operative, so as to give her the power of acquiring the mortgage interest subject to which she has purchased, and yet to claim the benefit of it, in order to defeat conveyances which would unquestionably have been binding between the Sirkars, the judgment debtors from whom she took her mortgage, and the Respondents in this case, if there had been an end of the execution altogether.

Their Lordships moreover are not prepared to say that in this case it would, under any circumstances, have been competent to the judgment creditor, or any person claiming under him, to say that conveyances executed pending the first attachment were absolutely null and void. It seems to their Lordships that generally where the party prosecuting the decree is compelled to take out another execution, his title should be presumed to date from the second attachment. Their Lordships do not mean to lay down broadly that in all cases in which an execution is struck off the file such consequences must follow. The reported cases sufficiently show that in India the striking an execution proceeding off the file is an act which may admit of different interpretations according to the circumstances under which it is done, and accordingly their Lordships do not desire to lay down any general rule which would govern all cases of that kind; but they are of opinion that when, as in this case, a very long time has elapsed between the original execution and the date at which it was struck off, it should be presumed that the execution was abandoned and ceased to be operative, unless the circumstances are otherwise explained.

Their Lordships desire to add that the extraordinary and unexplained delay which has taken place in the conduct of this suit would have increased their regret at finding themselves compelled, if they had been compelled, to give way



to the objection that these instruments were null and void by reason of the date at which they were executed. The effect of allowing this appeal would be to disturb a possession, now found to be a *boná fide* possession, which has endured for 40 years.

For much of this delay Rass Monee Dossee and the Appellants are responsible. It has been stated that seven years elapsed between the first assertion of the Respondents' title and the institution of the suit, and it appears that this appeal had been some 10 years in the country before it was brought to a hearing.

For the reasons above stated their Lordships have come to the conclusion that it is their duty to advise Her Majesty to affirm the judgment of the Court below, and to dismiss the Appeal.

As it has been heard *ex parte* there will be no order as to costs.

