Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Dooli Chand v Baboo Ram Kishen, and others, from the High Court of Judicature at Fort William, in Bengal; delivered, April 5th, 1881.

Present:

SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.

THIS is a suit brought by the Respondents, Ram Kishen and others, against Dooli Chand, the Appellant, to recover back a sum of Rs. 78,397 which the Respondents had paid to the Appellants to prevent the sale of a mouzah called Korina, which had been attached and put up for sale in execution of a decree obtained by the Appellant against one Neogi. The suit claimed, in the alternative, that the amount of Rs. 78,393 should be apportioned between Korina and another mouzah of the name of Nandan. The point, upon the facts found in the Courts below, is a short and plain one, but in order to make it intelligible it is necessary to refer to the transactions which took place between the parties, though not at great length.

Ram Rutton Neogi, a zemindar, was the owner of several mehals, and amongst others of two mouzahs called Korina and Nandan. These mouzahs were mortgaged in the way which will be hereafter described. The first mortgage which appears is of the date of the 3rd July 1865, and is a mortgage of Korina made by Neogi to the Land Mortgage Bank of India to secure a lac of rupees. In January 1867 Neogi borrowed

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from one Lutf Ali Khan a sum of Rs. 10,000, and gave as security a mortgage bond on certain mouzahs, not including either Korina or Nandan. It is only necessary to refer to this mortgage bond for the purpose of explaining the next mortgage transaction, and also of explaining a reference which is made in the course of the proceedings to the debt due to Lutf Ali Khan. It appears that Lutf Ali Khan obtained a decree upon his bond for Rs. 19,416. He did not, apparently, attach the properties included in his mortgage bond, but he attached and was about to sell Nandan. In order to prevent the sale of Nandan, on the 8th of January 1870 Neogi mortgaged to the Appellant, with several other mouzahs not material to be mentioned, the two mouzahs, Korina and Nandan, to secure Rs. 38,000. The mortgage of Korina was a second mortgage, it being subject to the prior mortgage to the bank; that of Nandan was apparently a first mortgage. The next transaction is a mortgage by Neogi of Nandan and other mouzahs to the Respondents for Rs. 5,500. The bank brought a suit on their mortgage, and on the 17th April 1871 they obtained a decree for the sale of Korina and other mouzahs to realise the debt due to them. On the 29th July 1872 Korina was attached by the bank, and also by another decree-holder creditor, one Chuttun Singh. On the 16th December 1872 mouzah Korina was sold under Chuttun Singh's decree, but subject to the bank's mortgage, to the Respondents, for Rs. 115. Shortly after the sale the Respondents paid into Court Rs. 58,719 to satisfy the mortgage and decree of the bank against Korina, and in the following October (1873) were put into possession of that mouzah. They, therefore, were the purchasers of Neogi's interest in Korina, which had been sold by Chuttun Singh,

and paid off the prior mortgage to the bank, and the amount so paid is found by the Courts below to have exceeded the value of Korina.

Concurrently with these proceedings affecting Korina, others were going on with regard to Nandan. The Respondents, on the 29th of February 1872, obtained a decree in a suit which they had brought on their mortgage of Nandan, and attached it and other mouzahs. On the 5th August 1872 the Appellant intervened in the execution proceedings in this suit. He gave notice of his mortgage, and required that it should be notified at the time of the sale; and it was so notified. The sale was made subject to that notification, and of course subject to the mortgage to the Appellant, upon which he at that time claimed that a sum of Rs. 151,239 was due. It is plain what the effect of such a notification upon the sale must have been, and the biddings were only for the equity of redemption, which was of small value. The sale took place in August 1872, and the purchaser was one Dindyal, the Appellant's brother, the price being Rs. 11,710. A certificate of sale and possession were obtained on the 11th September 1873. It has been found by both Courts that Dindyal purchased benami for the Appellant. The Appellant, therefore, having given notice of his mortgage, purchased the equity of redemption subject to his own debt, and thus became both owner of the equity of redemption and mortgagee. In that state of things it became material to inquire what was the value of Nandan. It has been found by the Courts that its value, beyond the purchase money, exceeded the amount due upon the Appellant's mortgage, and was sufficient to cover not only that amount but the Rs. 18,800 due to Lutf Ali Khan, if that sum was really due to him. Under these circumstances, it

must be taken that the mortgage debt was satisfied by the purchase of Nandan and the value of that estate. The Appellant, having thus obtained the full amount of his debt, could no longer avail himself of any other part of his security. The mortgage was only a security for the debt, and when it was satisfied there was an end of any right to resort to the further securities he held. What gives occasion to the present action are the circumstances which will now be stated.

On the 1st of July 1872 the Appellant sued Neogi on his mortgage for principal and interest. The claim he then made was the same he had notified in the suit brought by the Respondents as mortgagees of Nandan, to which reference has been already made, namely, Rs. 151,239. It appears that sum included penal interest, and the Courts reduced it to a sum of Rs. 78,393. In June 1873 he obtained a decree, and on the 7th January 1874 an Order to attach Korina. At the time he obtained that Order he had become the purchaser of Nandan, under the circumstances which have been stated; and his obtaining it after his mortgage debt had been thus virtually satisfied was clearly inequitable. Korina being attached, the Respondents intervened, as the purchasers of that mouzah, and as representing the first mortgagees of it, the bank, and filed objections to the attachment and sale. The Respondents in this way made the strongest protest that they could against the sale, but their objections did not prevail. The Judge of Patna disallowed them, and the High Court upon appeal affirmed the decision of the Judge, stating that the Petitioner must be left to his remedy, if any, in a regular suit. The result was that the sale of Korina was ordered to take place; and to prevent that sale, and to protect the property which they had pur-

chased, the Respondents paid into Court the sum of Rs. 78,323 to satisfy the Appellant's decree. They at once gave notice in writing that they should seek a refunding of that money in due course of law, and the present suit was brought for that purpose.

It is only necessary to refer shortly to the judgments. Both the Courts have concurred in holding that the Plaintiff is entitled to recover. Certain facts are found clearly and succinctly by the Judge of the District Court. His findings are these: "I find, therefore, that the following "facts are established: (1) that mouzahs Korina "and Nandan are both made subject to a lien of "Rs. 78,393 by the mortgage of January, 1870" —that is, the Appellant's mortgage; "(2) that "Plaintiffs have, as owners of mouzah Korina, "paid off a lien of a date prior to 1870 on mouzah "Korina,"—that is, the bank's mortgage,— "exceeding in amount the estimated value of "mouzah Korina as estimated by Defendant him- "self; (3) that the whole amount of the lien of "Rs. 78,393 therefore falls upon mouzah Nandan, "if its value is equal to the amount of the lien; "(4) that the value of mouzah Nandan is equal "to the amount of such lien even if Rs. 18,393 "paid by the Defendant be deducted"—that is, the amount said to have been paid to Lutf Ali; "that Plaintiffs, having paid this lien, are "entitled to recover the amount so paid "from the auction purchaser of mouzah Nandan; "that Defendant No. 1 is the auction purchaser "of mouzah Nandan." It has been shown that at the time that this payment of Rs. 78,393 was made by the Respondents to the Appellant, the debt had been satisfied by his purchase of Nandan under the circumstances above stated. He has, therefore, received it twice over, and it is obvious that in such a case it is inequitable that he should hold the money paid to him, under

compulsion, by the Respondents. It is to be observed that the Appellant had only a second mortgage upon Korina, but in the view their Lordships have taken of the case it is unnecessary to go into the question of marshalling the securities.

The arguments at the bar were not directed to show that there is any equity upon which the Appellant could retain this money; but the objections taken to the action were that the payment was voluntary, and that the remedy, if any, was in the execution proceedings. Their Lordships think that there is no pretence for saying that the payment was voluntary. It was made to prevent the sale which would otherwise inevitably have taken place of the mouzah which the Respondents had purchased, and was made therefore under compulsion of law; that is, under force of these execution proceedings. In this country, if the goods of a third person are seized by the sheriff and are about to be sold as the goods of the Defendant, and the true owner pays money to protect his goods and prevent the sale, he may bring an action to recover back the money he has so paid; it is the compulsion under which they are about to be sold that makes the payment involuntary. (*See* Valpy and others *v.* Manley, 1 C. B. 594).

It was also objected that the remedy is not the proper one, and that some further proceedings should have been taken in the execution suit; but none were pointed out by Mr. Arathaon which would afford a suitable remedy or which would preclude such an action as the present.

Their Lordships think the decree of the Judge of Patna is incorrect in declaring that the Plaintiffs are entitled to realise the decretal money by auction sale of mouzah Nandan; and that it ought to be amended by striking out that declaration. In the view they take of the case

the decree should be a simple money decree. On the whole case, they agree with the Courts below, though not altogether on the same grounds, that the Plaintiffs are entitled to succeed in the action; and they will humbly advise Her Majesty, subject to the amendment above indicated, to affirm the decrees appealed from. The Appellant must pay the costs of the Appeal.