

Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Srimati Kamini Soondari Chowdhurani v. Kali Prosunno Ghose and another (Consolidated Appeals), from the High Court of Judicature at Fort William, in Bengal; delivered 27th June 1885.

Present :

SIR BARNES PEACOCK.

SIR ROBERT P. COLLIER.

SIR RICHARD COUCH.

SIR ARTHUR HOBHOUSE.

These appeals are brought from two judgements of the High Court of Calcutta; the first interlocutory, dated 20th July 1878, the second final, dated 27th June 1881, in a suit in which the Respondents were the Plaintiffs, and the Appellant the Defendant.

The circumstances which gave rise to the suit, as far as they are material, are as follows:—Mussumat Kamini (by this short name it may be convenient to designate her) a purda-nashin lady, executed a kut-kobala of the moiety of five mouzahs, the largest and most valuable of which was named Alumpur, to which she was entitled as widow of Ram Chunder Pal Chowdhry, to secure the repayment, within one month, of Rs. 12,000, with interest at the rate of 4 per cent. per mensem until repayment, in favour of Grish Chunder Bandopadhyaya, who was the benamidar of Hari Churn Bose, her moktar.

One of these mouzahs, being subject to a prior mortgage, has been put out of the question;

thus the mouzahs mortgaged may be treated as four.

On the 9th of May 1872 the same lady executed another kut-kobala in favour of the same person, whereby the said four mouzahs, together with three others, were hypothecated to secure the repayment, in April 1873, of Rs. 24,000, with compound interest at 2·4 per mensem (27 per annum), calculated at quarterly rests.

On the 29th of June 1873 a notice of foreclosure was served under the first mortgage.

On the 23rd March 1874 Kali Prosunno Ghose (the first Respondent) purchased on sale for arrears of revenue the interest of Mussumat Kamini in mouzah Alumpur. It may be here observed that, on the adequacy of the price given by him (Rs. 70,000) being questioned by the revenue authorities, he represented, by petition, that the mouzah was subject to encumbrances to the amount of Rs. 1,05,000, which he would be liable to discharge.

On the 3rd of June 1874 Grish Chunder assigned for Rs. 83,910. 10. 9 all his interest under the two kut-kobalas to the second Respondent upon trust to prevent the merger of his rights under them, and to keep them alive for the benefit of the first Respondent, and empowered him to continue and prosecute the pending foreclosure proceedings, and the name of the first Respondent was substituted for that of Grish Chunder in the foreclosure proceedings.

On the 24th April 1875, being more than 12 months after the notice of foreclosure had been given by Grish Chunder, the Respondents filed their plaint in the present suit in the Court of the Subordinate Judge of the 24-Pergunnahs.

That plaint, which relates only to the first mortgage, after stating the facts above recited, prays for an order giving to Plaintiff No. 1 (Prosuno Ghose) a proprietary right based upon

foreclosure in the three mouzahs other than Alumpur, and with respect to Alumpur for a declaratory decree confirming his possession of it, on a right derived from foreclosure of mortgage.

The Defendant, by her written statement, alleged (among other things) that the mortgage had been obtained from her by fraud, denied the right of the Plaintiffs to foreclose the mortgage, and asserted that if he had any claim it was to bring a contribution suit. While this suit was pending, on the 7th February 1876, the Plaintiffs brought another suit in the Court of the Subordinate Judge of Nuddea, in which the three additional mouzahs mortgaged by the second kut-kobala are situated, against the Defendant to recover the principal and interest under that kut-kobala. We have not the plaint in this suit in the record, but it must be taken that the claim was against the Defendant personally.

The Subordinate Judge of the 24-Pergunnahs, finding against the allegation of fraud, dismissed the first suit on the ground that by the Plaintiffs' purchase of Alumpur, coupled with the assignment which he took of the rights of the mortgagee, the whole mortgage debt became extinguished, a ground of decision manifestly wrong, and properly reversed by the High Court.

The second action was dismissed by the Judge of Nuddea, mainly on the ground that the second kut-kobala did not give a personal remedy against the Defendant.

This judgement was affirmed by the High Court. The former judgement was varied in a manner which will be hereafter described.

It is convenient here to consider what were the rights of the parties, and what were the judgements which the Lower Courts ought to have pronounced.

The object of the Plaintiffs in bringing the separate suits in different jurisdictions seems to have been to foreclose the four mouzahs, including Alumpur, under the first mortgage only, whereby Prosunno Ghose would obtain the mouzahs in respect of a comparatively small debt, and freed from any liability to contribute to the payment of the second mortgage, and he would obtain an absolute estate in Alumpur, subject to an encumbrance amounting, not to Rs. 105,000 as he had represented to the Board of Inland Revenue, but probably to something less than Rs. 20,000.

He relied on the second mortgage for procuring the whole sum thereby secured by a personal remedy against Defendant, *i.e.*, against the mortgaged property and any other she might have.

In their Lordships' opinion the Plaintiffs had no right to claim Alumpore, or the three other mouzahs, by foreclosure.

The Defendant could not have redeemed the three other mouzahs without their liability under the second mortgage being taken into account, nor could the Plaintiffs foreclose them under the first mortgage only, thus depriving the second mortgage of their contribution. With respect to Alumpur, he, having purchased the equity of redemption, was bound to contribute to the payment of both the mortgages in the proportion of the value of Alumpur to the other properties, and he could not free himself from this obligation by foreclosing Alumpur under the first mortgage only. Their Lordships are therefore of opinion that his suit was rightly dismissed, though not for the reason given by the Subordinate Judge.

The judgement dismissing the second suit having been affirmed, and no cross appeal having been presented, it cannot now be questioned.

The Appellant, therefore, had a right to judgement in both suits.

This being so, we now come to the manner in which the High Court dealt with the case, in the single desire, their Lordships doubt not, to do what they deemed complete justice between the parties.

Having affirmed the decree of dismissal in the second suit, whereby it was ended, they in some sense revive it, and turn both suits into a contribution suit, which they send by way of remand to the Court of the 24-Pergunnahs. They observe :—

“We think, therefore, that, under the circumstances, the proper decree in both suits will be,—

“1st. That the first suit be dismissed, except as regards Alumpur; and that the Plaintiff’s right to Alumpur be decreed, the Plaintiff No. 1 and the Defendant being subjected to the following conditions :—

“2nd. That, as between the Plaintiff No. 1 and the Defendant, the properties mortgaged by both deeds (except Chapra) be valued by the Lower Court.

“3rd. That the debt secured by the first mortgage be borne by the Plaintiff No. 1 and the Defendant, in the proportion of the aggregate values of the properties Kachiara, Atghara, and Dariapur to the value of Alumpur.

“4th. That the debt secured by the second mortgage be borne by the Plaintiff No. 1 and the Defendant, in the proportion of the aggregate values of all the properties mortgaged by that deed (except Chapra) to the value of Alumpur.

“5th. That the Defendant be at liberty to redeem all the properties except Alumpur, upon repaying the proportion of the mortgage debts and interest due from her, corresponding with

the proportionate value of the other mortgaged properties to Alumpur, until fresh proceedings for foreclosure or for sale of the mortgaged properties (except Alumpur) shall have been taken in due course by the Plaintiff.

“6th. That until the mortgaged debts and interest shall be fully satisfied the said mortgaged properties in the hands of the Defendant shall be considered as charged with the proportion of the mortgage debts, which she is hereby declared liable to pay.

“7th. That each of the parties do bear and pay his and her own costs of the first of these suits, and that the costs of the second suit in both Courts be paid by the Plaintiff No. 1.”

To this judgment it is objected,—

1st. That the High Court, in their appellate capacity, had no power to confer on the Court of the 24-Pergunnas jurisdiction to deal with a suit in the Nuddea district relating to property situated in Nuddea.

2nd. That to change the two suits into one contribution suit was beyond their power.

The case of property the subject of suit being situated in two jurisdictions is thus provided for in Act 8 of 1859, the Act governing the procedure in this action. Section 12 is in these terms :—

“If the property be situate within the limits of different districts, the suit may be brought in any Court otherwise competent to try it within the jurisdiction of which the land or other immoveable property in suit is situate, but in such case the Court in which the suit is brought shall apply to the Sudder Court for authority to proceed in the same.”

This section, in their Lordships' judgment, is not applicable to circumstances of this case. Neither suit comprised the whole property, nor did either

District Court apply to the High Court (now substituted for the Sudder) for leave to deal with the whole of it. The Plaintiffs intentionally divided their claim, and preferred its parts in different jurisdictions.

Their Lordships are aware of no power of the High Court in its appellate capacity to give jurisdiction to the Court of the 24-Pergunnahs to deal with a suit commenced and prosecuted in Nuddea relating to lands in Nuddea.

It may be observed that the Court of the 24 Pergunnahs dealt with Alipur, which is in Nuddea, and that the Court of Nuddea dealt with the three mouzahs twice mortgaged which were in the 24 Pergunnahs. The Defendant, who succeeded in both suits, raised no question upon this, and each of the District Courts must be taken to have tried the whole suit before it by consent. But the order of the High Court now appealed against can in no sense be deemed to have been made by consent.

With respect to the second objection, their Lordships, while fully recognizing the advantages to the administration of justice of the wide powers of amendment and modification of decrees, and of framing new issues, conferred upon the High Court by Sections 350, 351, 352, 353, 354, and being by no means disposed to narrow their plain meaning by judicial construction, are nevertheless of opinion that to change (as has been done in this case) two suits, one of which had been dismissed on appeal, into one suit of a totally different description from either of them, and this without consent, exceeds the powers conferred by the Act.

It follows that the judgement of the 20th July 1878 must be reversed. If so, all that followed on that judgement, the remand, and subsequent judgement of 1881 will fall to the ground, and the judgement of the District Courts respectively

dismissing both suits will be affirmed. The Defendant should have her costs in the High Court as well as in the Lower Courts, and the costs of this appeal. Their Lordships will humbly advise Her Majesty to this effect.

This view of the case makes it unnecessary to determine a question which has been argued at the bar, viz., whether the Defendant can be relieved from the exorbitant rates of interest stipulated for in the mortgages; but as unfortunately further litigation with respect to the mortgages seems not improbable, their Lordships think it may be useful to intimate the view that they are disposed to take of this question.

The finding of the Lower Court against fraud and undue influence must now be accepted; a contrary finding would have avoided the whole transaction.

But assuming the validity of the mortgage, a question arises whether, under the circumstances, the rate of interest exacted did not amount to a hard or unconscionable bargain such as a Court of Equity will give relief against.

The doctrine of equity on this subject was laid down by the Master of the Rolls in *Beynon v. Cook* (10 L. R., Ch. App., 391), and his judgment was affirmed by the Court of Appeal.

Rhys Beynon was a reversioner or remainder man, Cook was a money lender who took from him a promissory note for 100*l.*, for which he was charged 15*l.* discount for six months, and a mortgage of his reversionary interest, with interest at the rate of 5 per cent. per month. The Master of the Rolls made a decree for redemption on payment of the amount advanced, at simple interest at 5 per cent. per annum. He observed, "The point to be considered is, was that a hard bargain? The doctrine has nothing to do with fraud. It has been laid down in case after case that the Court, wherever there

“ is a dealing of this kind, looks at the reason-
“ ableness of the bargain, and, if it is what is called
“ a hard bargain, sets it aside. It was obviously
“ a very hard bargain indeed, and one which
“ cannot be treated as being within the rule of
“ reasonableness which has been laid down by
“ so many Judges.”

This equitable doctrine appears to have a strong application to the facts of this case, where we have the borrower, a purda-nashin lady; the lender, her own mooktar, under the cloak of a benamidar; the security an ample one, as abundantly appears; the interest on both mortgages, especially the compound interest on the latter, exorbitant and unconscionable; and a purchaser, with full notice of these circumstances.
