

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Chutterput Singh and others v. Maharaj Bahadoor and others, from the High Court of Judicature at Fort William in Bengal; delivered the 11th November 1904.

Present at the Hearing :

LORD DAVEY.

LORD ROBERTSON.

SIR ARTHUR WILSON.

[*Delivered by Lord Davey.*]

The dispute in this Appeal is between the representatives of two persons, named Rai Luchmiput Singh and Rai Dhunput Singh Bahadoor, and it relates to the remnant of a property formerly belonging to a Mahomedan family, described as the Jawaheri family. The unfortunate survivors of the family have no interest in the result of the litigation. The facts are complicated, and the difficulty in forming a judgment upon them has been increased by the foolish attempts of both parties to assist their case by subtlety and chicanery. Their Lordships are also embarrassed by the proceedings in this and in previous suits, in which the rights of the parties seem to have been dealt with in a somewhat irregular manner.

At the commencement of the story the family consisted of three brothers, Hadi, Taki, and Kazim. For the purpose of this Appeal Hadi may be disregarded. Taki died on the 29th No-

vember 1867, leaving six children, including a son named Hossein and a daughter named Zohra.

The family property comprised (amongst other subjects) three estates of putni tenure called respectively Nawa Nankar, Saifganj, and Mirzapore, certain shares of jagir estates described as Ramai Istimrar, and Ramgunge Pipra, and a twelve annas zemindari right in mouzah Simraha. Passing by for the present a prior mortgage and further charge made to the Land Mortgage Bank of India, the first dealing with these properties to be noted is a mortgage of the 5th November 1870, executed by Kazim on his own account and as executor on the part of Taki, then deceased, and as Mokhtar on the part of Hossein, son of Taki, in favour of Luchmiput. This mortgage was for Rs. 50,000., and the security comprised Nawa Nankar, Saifganj, Mirzapore, Dhakpara, and an eight annas share of Ramai Istimrar. It was held in the Court of First Instance that all these estates were the separate property of Taki, except Dhakpara, which belonged to Kazim and is not one of the properties in question in this suit. The title to Saifganj was in the name of Hossein, but throughout these proceedings it has been treated as the property of Taki. The only issue was between Kazim and Taki, and no separate case has been made as to this property.

On the 28th May 1873 Kazim, on his own account and as executor of Taki and also of Hossein, who had died in the interval, executed another mortgage of the same properties to Luchmiput for a lakh of rupees, out of which the previous loan was paid off. This instrument also contained a declaration that Luchmiput should be allowed "the mortgage right" which he had acquired by paying the money due to the Land Mortgage Bank.

Luchmiput shortly afterwards died, and his estate was thenceforth represented by his son, the Appellant Chutterput, and his co-Appellants other than Nathmul Golicha.

In December 1879 Luchmiput's rival, Dhunput, makes his first appearance on the scene. On the 15th of that month a bond was executed by Kazim for self and as executor of Taki, by which he purported to mortgage the same properties as were comprised in Luchmiput's mortgages, except Kazim's own property Dhakpara, but including Saifganj, to Dhunput to secure the repayment of Rs. 60,000 alleged to be made up of existing debts. On the 24th January 1883 Dhunput commenced a suit in the Court of the District Judge at Purnea for the recovery of the sums claimed to be due on this mortgage. The Defendants were the widows and infant son and daughters of Kazim, who was then deceased, described as his heirs, and all the then heirs of Taki, including the sons and daughters of his deceased sons Hossein and Abdool Baki, and including his daughter Zohra, who alone appeared and defended. On the 10th December 1883 a decree was made in this suit, whereby it was ordered that the claim of the Plaintiff be decreed in a modified form, viz., the Plaintiff should recover from the Defendants first party, the heirs of Kazim, the whole amount of claim, with costs and interest; that the right, title, and interest of Kazim and his heirs in the property pledged as security, and in such assets as came into the hands of such heirs and legal representatives of Kazim, be held liable for payment of the decretal money; that the Defendant Zohra Begum be absolved from all liabilities, and her costs with interest be charged to the Plaintiff; that the other Defendants, heirs of Taki, should be held personally liable for the amount of the decree; that the right, title, and interest of Taki in the estate

under mortgage should not be held liable for the decree, and that these last-named Defendants also should be liable for the Plaintiff's costs with interest, jointly with the other Defendants.

This decree is only material in the present suit so far as it affects Taki's estate or his heirs. It has been decided by both Courts in the present suit now before their Lordships in which the issue was directly raised that no portion of the property comprised in Dhunput's mortgage belonged to Kazim, and, on the other hand, Taki's property was expressly discharged from the obligation of the mortgage by the decree. But notwithstanding this, Dhunput's mortgage has been resuscitated in the present suit as conferring on Dhunput's representatives a right to redeem Luchmiput's mortgage. It has, however, been held by both Courts below that Dhunput's mortgage bond was not a *bonâ fide* transaction. It may therefore be put aside for the purpose of the decision of this Appeal. The rest of the decree it is impossible to reconcile with any intelligible view of the rights of the parties. If the suit was dismissed as against Zohra there was no apparent reason for maintaining it against the other heirs of Taki, and on the other hand it is not apparent how they had made themselves personally liable for the amount of the alleged mortgage debt. Their Lordships however must on this Appeal take the decree as it stands. This at any rate is clear, that no debt was constituted by the decree against Taki's estate, and it was at most a money decree only against the parties themselves individually and personally.

In the meantime, on the 5th of April 1880, Chutterput, as son and heir of Luchmiput, had commenced a suit which was transferred to the High Court, Original Side, against Kazim and Hossein for realisation of Luchmiput's mortgage of the 28th May 1873. The other heirs of Taki

were afterwards made Defendants. On the 14th February 1881 a third suit was instituted by Zohra Begum in the High Court, Original Side, against Kazim and the co-heirs of Taki for the administration of Taki's estate, and on the 7th of April 1881 a Receiver in that suit was appointed.

In the course of the years 1885 and 1886 Chutterput bought up the shares and interests of all the heirs of Taki in the name of Nathmul Golicha, one of the Appellants, except those of Syed Jan and his two sisters, the infant children of Abdool Baki, deceased, son of Taki. Nathmul Golicha was thereupon made a party to Chutterput's mortgage suit, and on the 15th August 1887 the usual mortgage decree was made in that suit, directing accounts and sale in default of payment.

Nathmul Golicha was also made a party Plaintiff to the suit for administration of Taki's estate, and the conduct of it was given to him. On the 23rd January 1889 the decree was made in the administration suit, whereby it was declared that Nathmul Golicha was entitled to $\frac{22}{88}$ ths parts or shares of Taki's estate, and, subject to a mortgage which had been assigned to Nathmul Golicha, Syed Jan and his two sisters were entitled to the other $\frac{66}{88}$ ths, and usual accounts and inquiries were directed and the Receiver was continued.

Chutterput subsequently bought the shares of Syed Jan and his two sisters in the name of Nathmul Golicha, and thus acquired the whole equity of redemption on his mortgage. The deeds of transfer of these shares are not in the Record, and it does not appear on what date they were executed, but they were obviously subsequent to the decree in the administration suit and therefore to the decree of the 15th August 1887 in Chutterput's mortgage suit.

Proceedings were taken for the execution of the decrees in these three suits, and the dates here become of importance. In Chutterput's mortgage suit an Order was made on 17th December 1888 for sale of the mortgaged properties, and Chutterput became the purchaser of Nawa Nankar, Mirzapore, Saifganj, and Ramai Istimrar. In the administration action on the 12th January 1891 an Order was made that the Receiver be at liberty to sell, for the purpose of discharging certain mortgages effected by the Receiver, (1) 8 annas 16 gundahs 2 cowries and 2 krants share of the jagirs Ramgunge Pipra, &c., and (2) 1 anna 2 gundahs and $2\frac{1}{2}$ krants share of the same jagirs and some houses in Calcutta not now in question. And on the 19th of March 1891 a similar Order was made as regards the properties remaining in the hands of the Receiver. At the sale which took place on the 29th July 1891 under these Orders, Chutterput became the purchaser of the shares in the jagirs Ramgunge Pipra, &c., of an additional small share in the Istimrar Ramai, &c., and of the property described as Simraha. In Dhunput's suit Nawa Nankar, eight annas of Saifganj, Mirzapore, the eight annas of Ramai Istimrar and "jagir land called Talook Ramgunge Pipra" were put up for sale on the 2nd February 1891, and Dhunput was declared the purchaser, and on the following 3rd of August he was declared the purchaser of (amongst other subjects) the other eight annas shares of Saifganj, described as belonging to Taki, deceased, and of the Simraha property.

The Subordinate Judge has pointed out the irregularities in the proceedings for the execution of the decree in Dhunput's suit. The most serious was that the entirety of the properties, including even the share of Zohra Begum (who was dismissed from the suit) purported to have

been sold, and not merely the shares and interests of the judgment debtors themselves. The learned Judges in the High Court have assumed that all proper and sufficient notices of the intended sales were served on the Receiver in the administration suit, but there is no evidence of any such notices having been given, and their Lordships do not appreciate the reasons of the learned Judges for making that assumption.

Shortly after the sale in Chutterput's mortgage suit he was put in possession of the properties purporting to have been purchased by him, and by an Order dated the 21st August 1890, made in the mortgage suit and in the administration suit, the Receiver was discharged as regards those properties.

Chutterput was also put into possession of the properties purchased by him in the administration suit.

Dhunput, however, claimed possession as purchaser of the same properties in his suit. After the usual criminal proceedings Dhunput and his son commenced the present action against the Appellants, and by their plaint they claimed possession of as well the properties comprised in Chutterput's mortgage bond, and particularised in Schedule *Ka* to the plaint, as other properties not included in the mortgage which were particularised in Schedule *Ga*, and in the alternative to redeem the former. The Plaintiffs founded their title on Dhunput's alleged mortgage of the 15th December 1879, and the sales made in execution of the decree obtained by him. And they alleged that the decree obtained by Chutterput was collusive and fraudulent on the ground that Nathmul Golicha was his benamidar, and also that the purchases made by Chutterput were illegal, null and void on the ground of the same being collusive and fraudulent, without, however, stating any further particulars.

The Appellants foolishly alleged in their written statement that Nathmul Golicha was the real purchaser on his own account of the shares purchased by him. This issue was decided against them and was not raised before their Lordships. The Subordinate Judge held that the proceedings in Chutterput's mortgage suit were collusive and fraudulent, and that the Appellants acquired no title to the properties in suit by the sales held in that suit. In the judgment of the High Court it is stated that this finding was not impeached before them. The Subordinate Judge, however, found that the Plaintiffs had no title to redeem the mortgage or to obtain possession from the Appellants of the property not comprised in the mortgage except as to one small property which is not now in dispute. By his decree, dated the 16th December 1895, he gave judgment in favour of the Appellants (except as to the one matter), but without costs. By the decree of the High Court, dated the 23rd February 1899, the Respondents were admitted to redeem the property comprised in the mortgage (except the one-ninth share of Zohra Begum therein), and were held entitled to possession of the 1 anna 2 gundahs and $2\frac{1}{2}$ krants share of Ramgunge Pipra, and the 12 annas share in mouzah Simraha. The present Appeal is from this Decree.

The view expressed by the Subordinate Judge as to Chutterput's decree of the 15th August 1887, is open to criticism if (as appears to be the case) he had not at that time acquired the shares of Syed Jan and his two sisters in the equity of redemption. But, having regard to what is stated to have passed in the High Court, the finding of the Subordinate Judge cannot be questioned by the Appellants in this Appeal. At any rate when the sales took place, Chutterput (it appears) was alone represented on each side of the Record, and their

Lordships think that the Appellants cannot rely on the sales effected in these circumstances in support of their title or derive any advantage therefrom.

What then is the consequence? and is there anything to deprive the Appellants of the benefit of the purchases made by Chutterput out of Court? The Subordinate Judge, who took a somewhat extreme view of Chutterput's "acute sagacity," suggested that such a transfer, if not actually void under Section 52 of the Transfer of Property Act, 1882, on the principle of *lis pendens*, was at least voidable under Section 53 of that Act at the instance of the Respondents who had been eventually defeated and defrauded by it. But his decree does not contain any direction for avoiding or setting aside the purchases made by Chutterput in Nathmul Golicha's name, and as the Subordinate Judge decided in favour of the Appellants, it is not clear that he intended to do so. In the High Court, on the contrary, those purchases and the transfers by which they were carried into effect, are simply disregarded without any reasons being given for so treating them beyond a passing allusion to the view of the Subordinate Judge. But on the other hand their decision was against the Appellants. In these circumstances their Lordships feel some embarrassment in dealing with this part of the case, but they think they ought to give the decision which the Judge should, in their opinion, have given on the case presented to the Court. It is not disputed that the shares of all the heirs in Taki's estate were purchased by Chutterput and transferred to his nominee Nathmul Golicha, though some of the transfers are not strictly proved. Those purchases were of course subject to any liabilities which might have been enforced or declared in the suit for the administration of Taki's estate.

But Dhunput's suit, so long as the decree made therein stood unreversed, was not one in which the title of Taki's heirs was "directly and specifically in question." And he was not a necessary party and could not properly have been made a party to Chutterput's suit. No issue was stated in this suit whether the transfers were or were not liable to be set aside at the instance of Dhunput under Section 53 of the Transfer of Property Act, and no decree has been made for setting them aside. Such an issue could be raised and such a decree could be made only in a suit properly constituted for that purpose, and this suit was not so constituted either as to parties or otherwise. Their Lordships do not express and have not formed any opinion whether the transfers or any of them could have been avoided in a properly constituted suit. As was said by Lord Hobhouse in a somewhat similar case before this Board: "There may be defences to such a proceeding, and justice cannot be done unless those defences are examined by legal methods."

Their Lordships therefore are of opinion that on this Appeal they must treat Chutterput as the purchaser and Nathmul Golicha as the transferee for value of the entire equity of redemption, and hold that the Respondents have not made out any title to redeem Chutterput's mortgage notwithstanding the subsequent sales in Dhunput's suit under which they claim.

With regard to the two items of non-mortgaged property to the possession of which the High Court has held the Respondents to be entitled, it is not proved that Dhunput took any steps effectual to attach those properties in the possession of the Receiver in the administration suit. They are included in the purchases made by Chutterput of the shares and interests of Taki's heirs in his estate. Independently,

See Section 52 of the Transfer of Property Act.

Malkarjun v. Narhari, 27 Ind. Ap. 216, at p. 226.

however, of this circumstance their Lordships think the title of the Appellants superior to that of the Respondents. The sale purporting to be made to Dhunput in his suit of the 1 anna 2 gundahs and $2\frac{1}{2}$ krants share in the jagirs Ramgunge Pipra, &c., was subsequent in date to the order of the 12th January 1891 authorising the Receiver to sell this property, and the sale purporting to be made of the Simraha property was subsequent to the sale of this property to Chutterput on the 29th July 1891. These dates are sufficient to give priority to Chutterput. But their Lordships agree with the broader proposition stated by Mr. Phillips. When the estate of a deceased person is under administration by the Court or out of Court, a purchaser from a residuary legatee or heir buys subject to any disposition which has been or may be made of the deceased's estate in due course of administration. In fact the right of the residuary legatee or heir is only to share in the ultimate residue which may remain for final distribution after all the liabilities of the estate, including the expenses of administration, have been satisfied. The judgment debtors in Dhunput's suit were certain of the heirs of Taki, and nothing more could be sold in execution of the judgment against them than their shares or what might prove to be their shares in the ultimate residue of Taki's estate. On every ground, therefore, their Lordships think that the purchaser at the sales made in the administration suit is entitled to priority over the purchaser at the execution sales purporting to have been made in Dhunput's suit.

The High Court have, however, held that the 1 anna 2 gundahs and $2\frac{1}{2}$ krants share in Ramgunge Pipra was not the property of Taki but of Kazim, overruling to this extent the finding of the Court below on the seventh issue that all

the properties in suit belonged to Taki, and Kazim had no interest in them. It appears, however, that this share, as well as the larger shares in the same estate, was in the possession of the Receiver, and he gave possession of it to Chutterput. On the whole their Lordships think there is not sufficient reason shown for disturbing the finding on this point of the Subordinate Judge.

Their Lordships will humbly advise His Majesty that the Decree of the High Court dated the 23rd February 1899 should be reversed, and the Decree of the Subordinate Judge of Purnea dated the 16th December 1895 restored, and that the Respondents should pay the costs of their Appeal to the High Court. The Respondents will also pay the costs of this Appeal.
