

Privy Council Appeal No. 21 of 1930.
Allahabad Appeal No. 15 of 1928.

Faqir Chand and others - - - - - *Appellants*

v.

Aziz Ahmad Khan and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 15TH DECEMBER, 1931.

Present at the Hearing :

VISCOUNT DUNEDIN.

SIR LANCELOT SANDERSON.

SIR GEORGE LOWNDES.

[*Delivered by* SIR GEORGE LOWNDES.]

This appeal is concerned with a tangle of mortgages made over a number of years by one Jamil ul Rahman. He owned or had interests in a variety of immoveable properties which were scattered over the different transactions. Some have been brought to sale by one mortgagee or another ; some have been redeemed by puisne mortgagees for the protection of their own interests, and subsequently transferred to other parties subject to the rights of prior incumbrancers : in some cases arrangements have been made as to the contribution due by the purchaser of this or that property ; but no final settlement as between all the parties concerned has ever been come to either in or out of court.

The mortgage with which the present proceedings are directly concerned was dated the 23rd September, 1899. It was the sixth in the series in order of date and comprised ten different properties, eight of which were also included in one or other of prior or subsequent mortgages.

In 1911 the mortgagee under this deed sued upon his mortgage. A preliminary decree in the usual form was made on the

20th September, 1912, and a final decree for sale on the 16th May, 1914.

Thereupon one Chotey Lal, the first defendant in the suit, a puisne mortgagee in respect of one of the properties which had been ordered to be sold, known as Nagla, satisfied the decree by a payment of Rs. 20,000 odd, and by a deed of the 15th July, 1920, transferred the rights which he had thereby acquired to the first respondent and the predecessor in title of the other respondents.

Chotey Lal's object was apparently to free Nagla from further liability, and having regard to similar arrangements which he had made with other parties who were also incumbrancers of Nagla, to provide for the realisation of the moneys due under the decree from two other properties known as Shadipur and Inayetpur.

In pursuance of the terms of this deed the respondents 1 to 8 on the 25th April, 1922, instituted the suit out of which this appeal has arisen. They impleaded thirty-six defendants as persons having an interest in the mortgaged properties, and prayed that in default of payment of the sum of Rs. 26,972-8-0 with further interest, the amount claimed as due under the decree transferred to them by Chotey Lal, the Shadipur and Inayetpur properties should be sold. In the alternative they prayed for an account and contribution.

Nine different statements of defence were filed by different sets of defendants, but this appeal is concerned only with two of them, viz., that of the appellants Nos. 1-4, who are interested in Shadipur, and that of appellant No. 5, who is interested in Inayetpur.

The trial Judge held that the plaintiff-respondents' claim to realise their dues from Shadipur and Inayetpur only was not maintainable. This claim was abandoned in the Court of Appeal and may therefore be disregarded.

On the alternative claim for contribution, which he thought must necessarily involve a detailed examination of all liabilities affecting each of the properties, he held that the plaintiffs had failed to bring all the parties concerned on the record, and had also failed to put before him materials sufficient to enable him to work out the account. He accordingly dismissed the suit, his decree being dated the 13th November, 1923.

The plaintiffs appealed to the High Court at Allahabad, the learned Judges of which disagreed with the trial Judge as to the basis upon which the contribution fell to be assessed. They were of opinion that "the learned Judge of the Court below was wrong in believing that it was incumbent on him to find out, in the case of each prior mortgage, what were the properties mortgaged along with any of the items mortgaged under the sixth transaction, what were the values of those properties, who were the owners of those properties, and so on." They therefore set aside the decree of the trial Judge, and remanded the suit to be

disposed of by him in accordance with the remarks contained in their judgment. He was also directed to bring on the record any parties whose presence before him he should still find to be necessary.

Of the parties who defended the appeal in the High Court, only the present appellants have come up to His Majesty in Council to support the decree of the trial Judge. The respondents have not appeared.

The right to contribution in this case is governed by Section 82 of the Transfer of Property Act, 1882. A new section has now been substituted by an amending Act (XX of 1929), but it is not necessary for their Lordships to refer to the changes which have been affected by it.

The first paragraph of the section in question is the material one. It is in the following terms :—

“ Where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage.”

To arrive at the value for contribution purposes of each of several properties on which a particular mortgage is secured, it is clear that the amount of all prior “incumbrances” upon such properties must be ascertained and deducted. Their Lordships are in agreement with the High Court that “incumbrance” is a term of wider connotation than “mortgage,” but they are unable to follow the learned Judges in the argument they base upon this proposition. Where properties A, B and C are all made security for one mortgage, if property A is subject to a prior incumbrance jointly with properties X, Y and Z, their Lordships think that the rateable share to be attributed to A under the prior incumbrance must necessarily be assessed in order to ascertain its value for the purposes of the mortgage. In the view taken by the High Court all that would be necessary in such a case would be to see what was the total amount of the prior incumbrance to which A was liable, irrespective of the question whether that liability was to be shared by X, Y and Z. Their Lordships are unable to adopt this view of the meaning of Section 82. It would no doubt greatly simplify the enquiry in such a case as the present, but simplification would only be attained by a sacrifice of what they regard as the principle involved.

The view taken by the trial Judge upon this part of the case was, in their Lordships’ opinion, the right one, and as it does not appear to have been contended in the High Court that, upon this basis, there were sufficient materials before the Court to work out the necessary account, their Lordships think that the suit was rightly dismissed. If it had been merely a question of non-joinder of parties their Lordships would, having regard to

the provisions of Order 1, Rule 9, of the Civil Procedure Code, have agreed with the learned Judges of the High Court that the defect could be remedied in the way pointed out by them.

Their Lordships have not found it necessary to deal with a question of limitation which was discussed at considerable length in the High Court, and the finding upon which has been contested by the appellants' counsel before the Board. The question is one of considerable complexity, and they think it undesirable to make any pronouncement upon it in an *ex parte* appeal.

For the reasons given their Lordships think that the appeal should be allowed ; that the decree of the High Court should be set aside, and that of the trial Judge, dated the 13th November, 1923, restored. They will humbly advise His Majesty accordingly. The respondents 1 to 8 must pay the costs of the appellants both in the High Court and before this Board.

In the Privy Council.

FAQIR CHAND AND OTHERS

v.

AZIZ AHMAD KHAN AND OTHERS.

DELIVERED BY SIR GEORGE LOWNDES.

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