

Seth Manakchand - - - - - Appellant

v.

Chaube Manoharlal and another - - - - Respondents

FROM

THE HIGH COURT OF JUDICATURE AT NAGPUR

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 21ST DECEMBER, 1943

Present at the Hearing :

LORD ATKIN
LORD PORTER
SIR GEORGE RANKIN

[*Delivered by SIR GEORGE RANKIN*]

The matter for decision on this appeal is whether the respondents are entitled to recover possession from the appellant of a four annas share in a village called Chipabad. The question arises upon an application for the execution of a final decree for foreclosure dated 10th July, 1930. The application was made by a tabular statement dated 19th July, 1933, by which the respondents who were the plaintiffs in the foreclosure suit asked that a warrant for possession of the four annas share be issued against the appellant. On the 6th April, 1934, the trial court (the Additional District Judge of Hoshangabad) ordered that a warrant for possession should issue to eject the appellant, and an appeal from this order was dismissed by the High Court at Nagpur on 24th September, 1937, against whose order this appeal is brought.

The respondents' mortgage is dated 31st May, 1919. It was for Rs. 8,000 and interest. The mortgagors were one Govindram and his son Rajaram. The dispute between the present parties arises upon the construction of that part of the deed which describes the property and interest in mouza Chipabad which the deed transfers by way of security. According to the appellant's construction of the vernacular words, what Govindram and Rajaram mortgaged, subject to a certain exception as to *sir* lands, was "our *malguzari* rights" in a four annas share of Chipabad and another village, called Basantpura. According to the respondents' view what the deed transferred to them as their security was "our rights in the following *malguzari* mouzas," with the exception as to *sir* lands. No question now arises as to the other village and Chipabad may be regarded as the only village with which this case is concerned. To explain the difference between "our rights" and "our *malguzari* rights" it is necessary to make some reference to the title of Govindram and of Rajaram.

In 1895 the *malguzar* of Chipabad was one Radhakishan, and by a deed of 13th June, 1895, he had mortgaged Chipabad and Basantpura, together with the *sir* rights to three persons for Rs. 30,000 and interest. Of these three mortgagees, two (Sobhachand and Chogmal) had a half share in the security and one (Ramrao) had the other half. In 1898 these mortgagees had obtained possession. At the time of the respondents' mortgage of 31st May, 1919, Rajaram had acquired a 4 annas interest in Radhakishan's equity of redemption—the other 12 annas having come to be vested in one Partabchand, the appellant's brother. The half interest

of Ramrao in the security had passed as to one moiety thereof to Govindram, who thus held a quarter (four annas) interest as mortgagee under the mortgage of 1895: while the other quarter which had belonged to Ramrao had passed to Govindram's brother Ganpat. On these facts the present respondents maintained that by the phrase "our rights in the malguzari mouza" Govindram and Rajaram had mortgaged the former's interest (four annas) in the security of 1895 as well as Rajaram's interest (four annas) in the equity of redemption. The appellant on the other hand contends that by the phrase "our malguzari rights in a four annas share" there was transferred to the respondents only Rajaram's interest in the equity.

Their Lordships turn now to state how the appellant Manakchand comes to be concerned in this controversy as to the meaning of the mortgage deed of 1919. By 1926 when the respondents sued to enforce that mortgage, the appellant had acquired both Ganpat's one-quarter interest in the security of 1895 and the half interest therein which had originally belonged to Sobhachand and Chogmal. The respondents' plaint was filed on 5th January, 1926. It asked for payment of some Rs. 14,000 with future interest and in default of payment it claimed (*inter alia*) foreclosure and possession of four annas share of mouza Chipabad. Govindram and Rajaram, the mortgagors, were defendants 1 and 2. The appellant was defendant 11, and his brother Partabchand was defendant 10, both being impleaded "because they are attaching creditors of the property mortgaged after the date of the plaintiffs' mortgage" (para. 5 of plaint). The property subject to the mortgage was described (apart from a reference to the other village of Basantpura) as "4 annas share of mouza Chipabad." The appellant at that date was in fact an attaching creditor of Govindram's one-quarter interest as a mortgagee under the deed of 1895, but not of any interest of Rajaram in the equity. The appellant and his brother Partabchand had obtained a money decree against Govindram on 4th August, 1919. Under this decree two annas out of the four annas share of Govindram was sold on 3rd November, 1926, to one Gajrajsingh and the other two annas were sold to Gajrajsingh and Shriwallab on 28th September, 1926, under a decree obtained against Govindram and his son by another creditor called Haribhan in a suit of 1921. By transfers dated 6th May, 1927, these shares (four annas in all) were bought by the appellant, who was thus invested with such right title and interest as Govindram had at the date of the sales in 1926. If Govindram's one-quarter interest in the security of 1895 was not comprised in the respondents' mortgage of 1919 they had no right to foreclose the appellant and he had no right of redemption. In their written statement filed in April 1926, the appellant and his brother Partabchand pleaded that Govindram "in whose name the mortgagee rights are recorded has not mortgaged his mortgagee right by the deed in suit. It is only the proprietary rights of the village shares in suit that are purported to be mortgaged by the deed in suit" (para. 3). The respondents maintained "that the deed in suit covers both these rights." After many delays the case came before Mr. K. B. Sheorey A.D.J. on 24th September, 1928, when all the facts and dates of the appellant's title were laid fully before him as appears by the appellant's additional written statement of that date. The appellant's pleader stating that he did not wish to redeem the plaintiff's mortgage, the respondents' pleader said that they thought he had a right to redeem but if he did not wish to exercise it he might be discharged. The Judge's order was: "As he claims a paramount title he is discharged without his costs." At the next hearing, 20th November, 1928, the respondents apparently regretting the attitude which had been adopted on their behalf made an application to retain the appellant on record though he had claimed paramount title, but the learned judge refused it saying that he saw no reason to vary his order of discharge dated 24th September, 1928.

No appeal was brought from this order and the case proceeded without the appellant. It was ultimately heard and decided on 24th August, 1929, by another judge, Mr. S. Ghosh A.D.J. The appellant's brother Partabchand contended that the respondent's mortgage deed was void because

the mortgaged properties were not properly described in it. This argument, which seems to have been somewhat confused, was rejected by the learned judge who arrived at the view that the mortgaged properties were properly described by holding on the construction of the deed of 1919 that the rights of Govindram as mortgagee under the deed of 1895 were not comprised in the respondents' security. His judgment on this point is quite elaborate and plain. His formal preliminary decree by the schedule thereto described the mortgaged property as "four annas share of mouza Chipabad." The final decree for foreclosure on 20th June, 1930, followed the terms of the preliminary decree as was only right.

So far, therefore, the appellant's claim of title to an interest in Chipabad had been held by one learned judge to be a matter which was not to be dealt with in the suit and by another learned judge to be untouched by the mortgage security. This latter finding had been given by the trial Judge in the appellant's absence, and in connection with an argument that the said mortgage was void. But in passing a decree for foreclosure a Court may be supposed to concern itself to know and specify the property which is to be affected by its decree and the learned judge had been at pains to make plain that no interest of Govindram in the security (mortgagee rights) of 1895 was being foreclosed by him or was being decreed to the respondents. From that decree no appeal was taken whether on the ground that the appellant ought to have been retained on the record as a party or on the ground that the trial Court had wrongly construed the deed or mistaken the extent of the interests which it comprised.

On 23rd July, 1930, the respondents obtained possession under Order 21 r. 35—symbolical possession as it is called—a proceeding which in law put them in possession as against the other parties to the suit but neither disturbed the appellant's possession nor affected his rights in any way. After trying in vain to obtain from Revenue Officers some order which would in effect dispossess the appellant, they made to the trial Court on 19th July, 1934, the application in execution which is now before the Board in appeal. The Additional District Judge who dealt with this application was Mr. J. N. Haksar, and his order of 6th April, 1934, was confirmed by Pollock and Digby JJ. in the High Court on 24th September, 1937. It was ordered "that a fresh warrant of possession of 4 anna share of mouza Chipabad be given against Manakchand (the appellant) as representing the share that is mortgaged of Govindram and Rajaram excluding cultivating rights in the *sir* lands which were not mortgaged." The reasons given in both Courts are to the same effect. The construction put upon the mortgage of 1919 in this execution proceeding is contrary to that given by the Judge who tried the suit; the security thereby granted being held to comprise the 4 annas interest of Govindram as mortgagee under the deed of 1895. The reasoning to the contrary in the judgment of 24th August, 1929, is treated as a merely incidental observation and not as a decision. It was said in the High Court that there was nothing in the decree to indicate that the possession of the 4 anna interest in Chipabad which was decreed to the plaintiffs was subject to the rights of Govindram as a mortgagee. Both Courts purport to interpret the foreclosure decree by the mortgage deed. But whereas the first Court says that it is necessary to look to the pleadings and judgment and the mortgage deed itself, the High Court say: "Reading the pleadings, the mortgage deed and the decree as a whole we think that the decree was properly interpreted" by the first Court. They further held that the appellant having taken title from Govindram after the date of the plaint was bound by the decree and was a representative of Govindram. For this they cited a decision of the Board in *Parmeshari Din v. Ram Charan* A.I.R. (1937) P.C. 260.

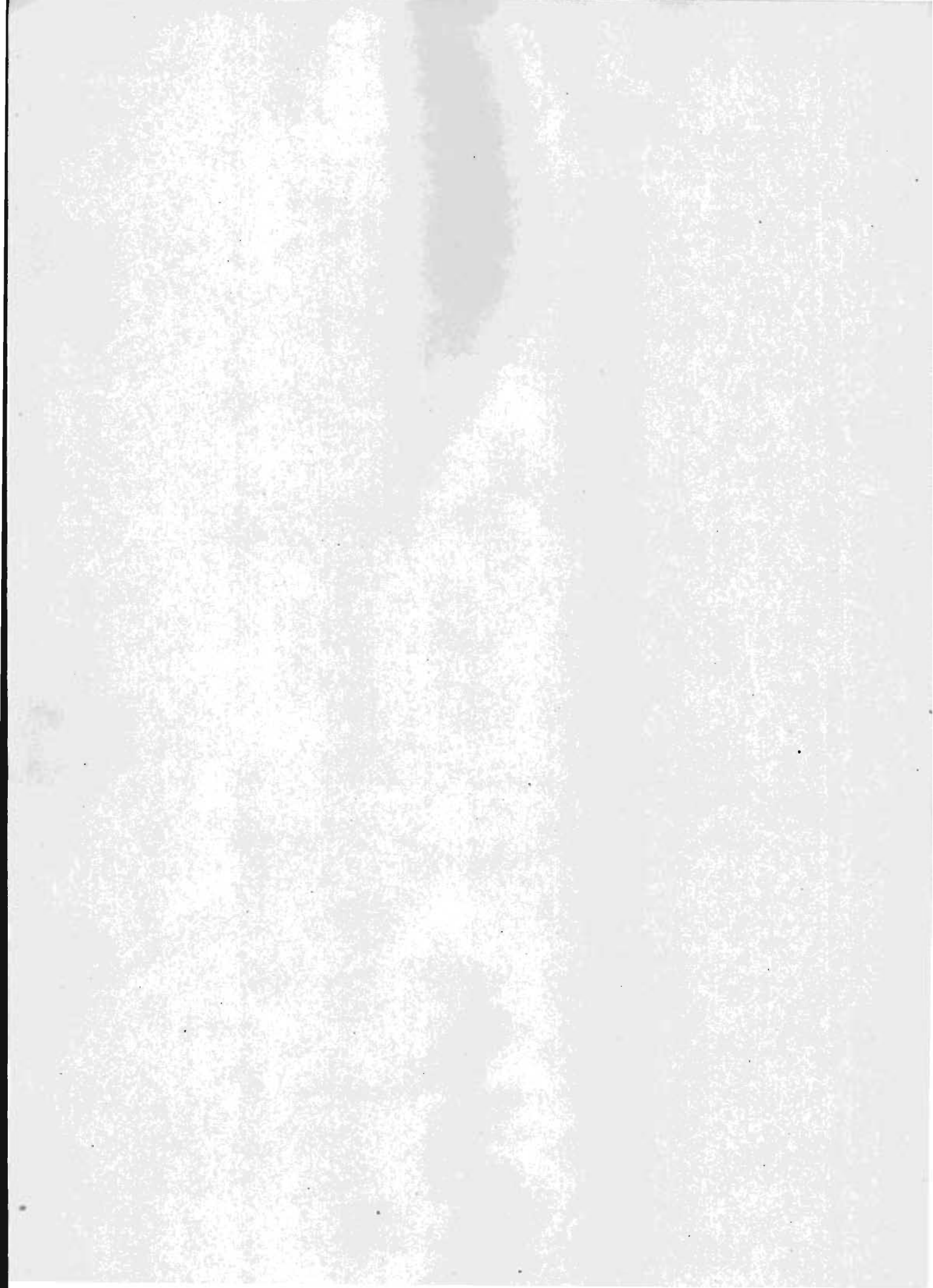
Their Lordships do not consider it necessary for the determination of this appeal that they should decide the important and by no means easy question of the meaning of the vernacular language of the deed of 1919 upon which Courts in India have differed. They think that the issue of a warrant of possession against the appellant was

without justification and that the Courts in India have committed a serious irregularity in putting the appellant to trial of his title on an application for the execution of this foreclosure decree.

It might seem unnecessary to elaborate the proposition that a party who is dismissed from a suit on the ground that he has no concern with it is no longer a party to the suit and is not bound by the decree.

No doubt if during the pendency of the foreclosure suit the appellant acquired from Govindram a right which was no more than an interest in the equity of redemption he would be bound by the decree. But that was not the claim of right by which he was defending his possession. It was decided by the order of 24th September, 1928, to treat his claim as being "outside the controversy of the suit"—to use the language of Sir Lawrence Jenkins in *Radha Kishen v. Kurshed Hossein* (1919) L.R. 47 I.A. 11, 15. The Court acted on the principle that his claim to a paramount title—be it right or wrong—would be in no way prejudiced by any foreclosure decree that might be passed. If he was right in his contention as to the interests comprised in the mortgage of 1919 the doctrine of *lis pendens* did not apply. In these circumstances it seems contrary to the order of 24th September, 1928, that the decree should be executed against him as a person who was bound by it; and if he was claiming in good faith to have a right of possession not affected by the mortgage of 1919 he could not be ejected on any other footing (*cf.* Order 21 r. 99) save by an independent suit. But independently of these objections a proper construction of the foreclosure decree seems to their Lordships to afford to the respondents no basis for their claim to eject the appellant under it. Their Lordships cannot accept as correct the method adopted or the result arrived at by the Indian Courts. The question is not one of *res judicata* but of the meaning of the decree which these Courts were asked to enforce. The trial judge had rejected the argument that the mortgage was void by holding that it did not include Govindram's right as mortgagee. *Non constat* that he would have decreed the suit if he had thought these rights to be included. Yet the appellant is to be ejected by proceedings in which it is not open to him to question the validity of the mortgage or the correctness of the decree. The High Court say that they interpret the decree by the mortgage deed and by the pleadings; and doubtless these documents will sometimes throw light on the meaning of a mortgage decree. What use the High Court have made of the pleadings in this case is not quite clear, but the use which they have made of the mortgage deed is only too plain. They find that the judge's construction was erroneous and they construe his decree by an interpretation which he had expressly rejected. He had said in his judgment: "I thus conclude that the prior mortgage is not included in the mortgage in suit and that 0—4—0 share of each of the villages Chipabad and Basantpura are mortgaged." The words inserted in the schedule to the decree repeat the latter part of this sentence and though chosen by him—not very happily, it is true—to show that certain rights were not mortgaged are now interpreted as including those in the security—and that as against the appellant who had no say whatever in the drawing up of the decree. Such a result casts doubt upon the method by which it is reached. Under the Code the decree is the formal expression of the adjudication (s. 2): it is imperative that it should conform to the judgment (Order 20 r. 6): every Court has power to amend its decree so as to carry out its own meaning (*cf.* s. 152). For the purpose of interpreting a decree no other document is so directly in point as the judgment or can in the nature of things have comparable force.

Their Lordships are of opinion that the order to eject the appellant was irregular and unjustified. They will humbly advise His Majesty that this appeal should be allowed; that the orders of the Courts in India dated 6th April, 1934, and 24th September, 1937, be set aside; and that the respondents' application in execution dated 19th July, 1933, be dismissed as against the appellant Manakchand. The respondents will pay the appellant's costs in both Courts in India and his costs of this appeal.



In the Privy Council

SETH MANAKCHAND

v.

CHAUBE MANOHARLAL AND ANOTHER

DELIVERED BY SIR GEORGE RANKIN

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