Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Bisheswari Debya v. *Govind Persad Tewari and others, from the High Court of Judicature at Fort William in Bengal; delivered 6th May* 1876.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THEIR Lordships think, differing from the opinion of the High Court, that there ought to be a remand of the whole cause, and against all the Defendants, for trial to the Civil Judge. Both the Courts below have given judgment upon the plaint, and the instrument of sale referred to in the plaint, without any evidence having been gone into. The Civil Judge was of opinion that upon these documents no cause of action was shown against any of the Defendants. The High Court thought he was wrong in that view so far as regards one of the Defendants, the fourth, but held that there was no cause of action against the first, second, and third Defendants, who are the sons of the fourth.

The facts which appear upon the allegations in the plaint are to this effect, that the three first Defendants, with a brother who has since died, purchased a property called lot Chagram, a putni mehal in pergunnah Khond Ghose, from Nand Kishare Dass, the former Mohunt of the Rajgange Akhra; that having failed to pay the rent to the Zemindar, lot Chagram was sold, and was first purchased for rupees 22,000

by the three sons, the three first Defendants, as sebaits of Iswar Gopal Jeo Thakoor; that subsequently they presented a petition praying that the name of their mother, Champa Koomari, the Defendant No. 4, might be inserted as purchaser in the place of their names, and that the Collector, in compliance with their petition, entered her name as the purchaser. But the plaint states that the consideration money was paid out of the funds of the Defendants, the sons. Then the plaint goes on to allege the sale to the Plaintiff, which it states in this way: "Subsequently on their being desirous "of selling the aforesaid lot Chagram, I consented to purchase it, as they (Defendants "Nos. 1 to 3) were at that time indebted to me "in a considerable amount, and agreed to allow "a deduction in the consideration money in "part satisfaction of their debt referred to; "accordingly"—then comes what is really the most material allegation in the plaint—"on the "9th of Assar 1276 *they* caused a kobala to be "executed by the auction purchaser, *i.e.* "Defendant No. 4, for a consideration of "Rs. 22,200, and the Defendants Nos. 1 to 3, "being the real owners, became witnesses to "the deed." The plaint then refers to a stipulation, for the breach of which the action is brought, which will be referred to presently. It then goes on to show how the consideration money was arranged. "A sum of rupees 12,672 "was deducted both on account of principal and "interest, in part satisfaction of the debt which the "Defendants Nos. 1 to 3 owed to me on the bonds "they had executed in my favour; and one "of the bonds was returned to them; Rs. 3,950 "was deducted in part liquidation of the money "they owed me on mortgage of certain personalities which, in proportion to the said "payment, they took back, and the balance, *i.e.*

" Rs. 5,577. 8., they have received in (currency) " notes and in ready money." The three sons received the whole of the consideration, they were released from large debts, and received the balance in money. This is the mode in which the contract is stated. The contract of sale itself is set out at page 11 of the Record, and no doubt it appears to be a contract entered into by the mother (Champa) with the Plaintiff. But that is perfectly consistent with her being benamee-dar, and perfectly consistent with all the allegations in the plaint, that the sons caused her to enter into it on their behalf, they being the real owners, they being the real vendors, and they being the persons who actually received the purchase money, which in a given event was to be returned.

The action is brought for a breach of this provision in the instrument of sale: " If any " one making any objection to the sale by " me of the said mehal give you trouble in any " way, then I will put matters straight. If I " fail to do so I will return the consideration " money. If I do not return it you will realise " it by means of a suit "—that clause providing that in the event of disturbance, and the matter not being put straight, the purchase money should be refunded. The breach alleged in the plaint is that after the Plaintiff had held possession of the mehal as the proprietor thereof, " The " Collector of Burdwan, whom the High Court " appointed in the month of Kartick 1277 as " the receiver of the estates belonging to the " Rajgunge Akhra, ousted me in his capacity " of receiver from the above mehal, when I " made an application to the High Court, " seeking to have the estate released; but the " High Court disallowed my prayer, whereupon " I wished the Defendants either to release the " estate or refund the consideration money as

" stipulated in the kobala. They said that " they would have the matter settled, but have " neglected to do so."

The Civil Judge upon this plaint, and upon this instrument of sale, held that there was no cause of action against anybody, apparently on the ground that this stipulation in the bill of sale was not intended to provide against a general defect of title, but only against objections arising from the personal status of the benamee-dar, the mother, as a Hindoo widow. The High Court thought this view was erroneous, and their Lordships entirely agree with the High Court in the opinion that there is a question to be tried, viz., whether there has been the ouster and disturbance alleged, and whether under the circumstances they constitute a breach of the contract. This is a question depending on the evidence, and the High Court properly remanded the cause to the Civil Judge to try it. But, having made this remand, they decided that the contract was one which bound the mother only, and that the sons not being bound by it, the suit ought to stand dismissed against them.

Their Lordships have some difficulty in perceiving the exact grounds upon which the High Court have come to this conclusion. Mr. Justice Markby seems to admit that there may be circumstances under which the real parties may be bound, although the contract is entered into nominally with the benamee-dar. But he says,—" It is contended before " us that because Champa Koomari was only " what is called a benamdar, that therefore " all the covenants which she made in this " transaction are binding upon the true owners " of the property. But no authority for that " very general proposition is produced before us, " and I certainly do not feel inclined or autho- " rised to lay down any such proposition."

Their Lordships agree with Mr. Justice Markby that no such general proposition can be laid down.. The question in all these cases is with whom the contract was made. Cases may be supposed where the contract may be intended to be made, and may be, in fact, made with the nominal party only; but, on the other hand, there may be cases where the contract is with the real parties, and probably in the greater number it will be found that the contract is so made; and when persons are interested on the one side in the estate, and on the other in the money to be received for the estate, the parties who are so beneficially interested on either side are those between whom it may be expected that the contract would actually be. Mr. Justice Markby says at the end of his judgment, "Whether the male Defendants would have "been liable had the Plaintiff's case been that "their names were not disclosed in the transac- "tion, although they were the real vendors, it is "not necessary to determine. I think it must "be taken upon this plaint that the Plaintiff, "knowing the circumstances, has elected to deal "with the female Defendant on the footing that "she is the owner." Their Lordships think that the learned Judge has taken a mistaken view of the plaint, because, so far from its appearing upon the plaint (whatever may hereafter appear upon the evidence) that the Plaintiff had elected to deal with the female Defendant, the allegations all point the other way; the allegations are that the sons caused the contract to be made, and the plaint throughout treats the mother as the mere instrument, and the sons as the parties entering into the contract.

The question, therefore, to be tried on this point will be, whether this contract was really entered into by the mother as the agent and on behalf of the three sons and by their authority.

If it should appear from all the circumstances that the Plaintiff, knowing the facts, really did elect to treat the mother as the sole contracting party, then the Plaintiff will fail.

Mr. Forsyth in his argument contended that although it might be true that the mother was the agent in making the sale, she must be deemed to be the principal in entering into this particular instrument. Their Lordships think that upon the face of this plaint there is no foundation for such a distinction. This is not a case where an authority is given to an agent to sell, and the agent exceeds his authority by entering into a particular stipulation; because not only is it averred in the plaint (of course that is to be proved) that the sons caused their mother to sell this property, but also that they assented to the instrument of sale by becoming attesting witnesses to it. If that should turn out to be the case when the evidence is given, it would appear that they authorised not only the sale itself, but a sale in the very terms of the kobala which the mother executed.

Their Lordships give no opinion whatever on the case upon the merits. They desire to say no more than this, that upon the plaint and the allegations found in it, they think that the Plaintiff has disclosed what may be a cause of action against all the Defendants. Whether or not she proves her case at the trial is a totally different question, upon which no opinion can now be given.

In the result, therefore, their Lordships will humbly advise Her Majesty to direct that the decree of the High Court be varied, by ordering that the cause be remanded as against all the Defendants.

Their Lordships see no reason why the ordinary rule as to costs should not prevail in this case. The Plaintiff will, therefore, have

the costs of this Appeal, and of the Appeal to the High Court; and their Lordships will direct that the costs of this Appeal be taxed by the Registrar, and that these costs and the costs of the Appeal to the High Court be the Plaintiff's costs in the cause in any event.