Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Umesh Chunder Sircar v. Mussummat Zahoor Fatima, and others, from the High Court of Judicature at Fort William in Bengal; delivered 19th July 1890.

Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

Their Lordships are of opinion that the house in Sahebgunge should be included in the direction to sell, and they will now express their opinion as to the question of the 17 dams of property as to which the Plaintiff and the Defendant Zahoor each claims to be the absolute owner. The question is who acquired the ownership first in point of time. The Plaintiff's claim depends on his purchase of the 17th July, completed on the 22nd September 1879. If that is a valid purchase, it is prior to the purchase of the Defendant, which did not take place till the year 1881; and the Plaintiff is entitled to that share of the property.

The purchase took place under these circumstances. On the 14th April 1879 one Iswardyal, who for this purpose is identical with the Plaintiff, having got a decree on a mortgage, applied to enforce it "by attachment and

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"sale of the immoveable properties owned by "the judgment debtor" (the judgment debtor being Farzund Ali the mortgagee), "as specified "in the inventory mentioned below." The inventory mentioned below specifies 1 anna out of 16 annas of mouza Sirdilla, the property mortgaged in the Bond; and also 7 annas out of 16 annas of Sirdilla owned by the judgment debtor, which was property not mortgaged in the Bond. That application includes 8 annas of the family property. Eight annas was a larger share than Farzund Ali was actually entitled to, because he and his brother held equal shares in the property, and their sister-in-law Hosseini had a share also; but the circumstance that the description of the property includes more than the judgment debtor was actually entitled to would not tend to exclude the 17 dams in question from that description.

The sale took place, and the certificate was granted on 22nd September 1879, and it is there certified that the decree-holder has been declared as the purchaser of the judgment debtor's right in 1 anna out of 16 annas which was mortgaged, and so forth, and by another certificate there is a similar declaration as to the 7 annas. So that it is quite clear that the intention was to attach and to sell whatever right and interest the judgment debtor Farzund had in the 8 annas of the property. The question is, what interest had he as regards these 17 dams. That depends upon the construction of the deed of the 26th January 1871, which is at page 30 of the record. In that deed, there may be some obscurity as to the exact interest that the children of Sultan Ali and his wife Amani Begum were to take, but as applied to the events that have happened there is no obscurity about it. Sultan Ali, the

then owner of 1 anna and 14 dams, grants that share in mokurruri farm to his wife Amani Begum on this condition, that if she has a child by him the grant shall be taken as a perpetual mokurruri. Whether descendible to children or taken by children in remainder does not matter now (the deed is rather obscure on that point), but it is to go to the child of Sultan Ali and Amani Begum in perpetual inheritance. In case of no child being born then it is only to be a life mokurruri, and after the death of Amani Begum the property is to come to the possession of the settlor's two sons Farzund and Farhut. There is to be paid the Government revenue on the share of the estate and one rupee to the settlor. At the time of the attachment Sultan Ali was still living, and at all events in contemplation of law there might be a child to take; but the deed confers upon the sons Farzund and Farhut a definite interest, like what we should call in English law a vested remainder; only that it was liable to be displaced by the event of there being a son of Sultan Ali by Amani Begum. Between the attachment and the sale—very soon after the attachment—Sultan Ali died, and then the contingency, such as it was, was entirely put an end to. It is quite true the parties might not know whether Amani Begum was with child by Sultan Ali or not, but the fact was determined at that time, and there was no longer any contingency in the eye of the law. It does not, in their Lordships' view, very much signify whether Sultan Ali was alive or dead at the time of the sale, but they wish to guard themselves against being supposed to concur in an argument that was presented at the bar, to the effect that if between the time of attachment and the time of sale events should happen which would have the effect of

accelerating or enlarging the interest of the judgment debtor as it stood at the time of attachment, that augmented interest would not pass by the sale which purports to convey all that the judgment debtor has at the time. But taking the case most strongly against the Plaintiff, supposing that he could get nothing but that which was capable of attachment, and was actually attached on 14th April 1879, their Lordships hold that this interest in remainder is a property which was capable of being attached, and which was intended to be attached. It is said that by Section 266 this property was not liable to attachment, because it is there provided that:— "The following particulars shall not be liable "in attachment"; and among them is:—"an "expectancy in succession, by survivorship or "other merely contingent or possible right or "interest." It seems to their Lordships that in all probability the High Court, who held that the 17 dams were not attached, must have had this section in their view, though they do not refer to it, because they treat the case as if the two sons had no interest during the life of their father, but as if, upon the father's death, they inherited the property from him. But that is not the case, excepting as regards the one rupee which for this purpose may be thrown out of consideration altogether. Except as regards that one rupee they inherited nothing from him. He had in his lifetime parted with the whole property, either to Amani Begum his wife and her children by him, or to his two sons. That interest given to the two sons appears to their Lordships not to fall within the description of an expectancy or of a merely contingent or possible right or interest. Their Lordships therefore hold that as regards the 17 dams the Plaintiff has the priority, and that the decree of the High Court is erroneous to that extent.

The next question, on which also the Courts below have differed, is whether the Plaintiff has a right to treat the Defendant Zahoor as being only a mortgagee of the share of the property which was purchased by her in execution, and on that footing to redeem her mortgage. The District Judge thought that the Plaintiff had that right, and gave him a decree accordingly. The High Court thought otherwise, and varied the decree by dismissing the Plaintiff's suit so far as regards the 2 annas in question.

By the mortgage bond, marked B^2, dated the 29th July 1873, Farzund Ali who owned 4 annas of Sirdilla, Farhut his brother who owned 4 annas, and Hosseini their cousin who owned about 2 annas 4 dams, mortgaged 2 annas of the whole mouza to Arshad Ali, the predecessor in title of Zahoor, to secure Rs. 2,000 with interest at 24 per cent.

On the 26th May 1875 the then owner of the mortgage brought a suit against the three mortgagors, and obtained a decree on the 23rd of June 1875. The decree was for "the amount of the suit" with costs and interest for the period of pendency of the suit, and for future interest at the rate of Rs. 6 per cent. per annum, and for sale of the mortgaged property.

The decree was not executed till the 15th December 1879, when the property described as 2 annas of Kusba Jurra was put up for sale to realize Rs. 3,582. 5a. 1p., the decretal amount, and was purchased by Zahoor, who then owned the mortgage, for Rs. 4,700.

Between the date of Zahoor's mortgage and the suit brought to realize it, five other mortgages were executed, two by the three mortgagors, two by Farzund and Farhut, and one by Farhut alone, each mortgaging undivided shares (not further identified) in Sirdilla; and four of these mort-

gages became vested in the Plaintiff. Afterwards a number of other mortgage deeds were executed, some by one of the owners of Sirdilla, some by another, making altogether about 30 mortgages of undivided shares, most of which became vested in the Plaintiff.

In deciding that the Plaintiff had become mortgagee of the property comprised in Zahoor's mortgage, and was therefore entitled to redeem her, the District Judge allowed no distinction between the mortgages prior to the suit of the 26th May 1875 and those subsequent to it, or those subsequent to the decree of the 23rd June 1875. He appears to think that because at any time before actual sale the mortgagor himself and anybody to whom he may have transferred the property can come in and redeem the property by paying the debt, therefore it follows that after sale the mortgagor's transferee, if not a party to the proceedings, can do the same thing. But if the transfer took place *pendente lite*, the transferee must take his interest subject to the incidents of the suit; and one of those is that a purchaser under the decree will get a good title against all persons whom the suit binds.

Their Lordships think that the High Court were right to confine their attention to the mortgages made prior to Zahoor's suit, for the purpose of deciding whether the Plaintiff is entitled to redeem Zahoor. But the High Court thought that it was necessary for the Plaintiff to show that the whole of the two annas comprised in Zahoor's mortgage passed under the subsequent mortgages to the Plaintiff, and calculations of great nicety have been entered into for the purpose of showing that the whole did not pass. Their Lordships do not follow the calculations because they are founded on an erroneous view. After effecting the joint mortgage each of the

three mortgagors had a right to redeem the mortgagee, and each could transfer his interest, and with it that right. And it is sufficient to say that by mortgage B 7, dated the 11th May 1875, Farhut transferred to the Plaintiff's predecessor in title a share in the property which he had not got without taking in his share comprised in Zahoor's mortgage. Probably by earlier mortgages, certainly by that mortgage, the right to redeem Zahoor in a properly constituted suit was acquired; and it has never been lost, because the Plaintiff was no party to Zahoor's suit.

It was indeed argued by Mr. Mayne that the sale in 1879 had the effect of shutting out all puisne incumbrances. But their Lordships consider that the right view on this point has been taken in both the Courts below. Persons who have taken transfers of property subject to a mortgage cannot be bound by proceedings in a subsequent suit between the prior mortgagee and the mortgagor, to which they are never made parties.

Mr. Doyne then contends that the decree is wrong in directing a sale of the whole property, and leaving the rights of the parties to be worked out against the purchase money, and he claims to treat the suit as a redemption suit. To this it is sufficient to answer, that the plaint asks for a sale, and that the Plaintiff has not till the hearing of this appeal suggested that the Court should deal with the property in any other way. The decree is right in ordering a sale, and the respective rights of the Plaintiff and Zahoor in the purchase money must be adjusted on the footing that the Plaintiff has the right to redeem Zahoor's 2 annas.

Next comes the question on what terms the redemption is to be made. The District Judge has laid down certain rules to guide the

course of the accounts. One of them (No. 3) is that a possession of a mortgage shall be taken as equivalent to interest. This rule, which appears to be just and convenient, and is not objected to by either party, will relieve Zahoor from giving an account of her receipts, and will deprive her of interest, from some time in the year 1880, when it appears that she took possession. Under rules 1 and 2 she will be entitled to a lien on the property mortgaged to her for the amount of the mortgage debt for which the property was sold, without regard to the amount paid by her on the purchase. But nothing is said as to the amount of interest to which she is entitled prior to her possession, probably on the ground that possession was given to her immediately after the sale. And the question has been discussed at the bar to what rate of interest she is entitled. Their Lordships suppose that up to the date of the decree of the 23rd June 1875 interest was computed according to the rate allowed by the mortgage deed, viz. 24 per cent. After that date the decree gives interest at 6 per cent.

The Court's power to regulate interest is given by Section 10 of Act XXIII. of 1861, which answers to the 209th section of the present Civil Procedure Code. That power is given when a Plaintiff sues for money due to him, and it is a discretionary power to give such rate as the Court may think proper by decree. The decree can only operate between the parties to the suit, and those who claim under them. The Plaintiff getting the security of a decree has his interest reduced in the generality of cases. But the Plaintiff in this case comes to take away from Zahoor the benefit of the decree. It would be unjust if he could use the decree to cut down her interest, while he deprives her of the whole advantage of it. His case is, that as to him

Zahoor is still but a mortgagee, and if so she should be allowed such benefit as her mortgage gives her. If Zahoor had not got a decree and the Plaintiff had come to redeem her mortgage, he must have paid whatever interest her contract entitled her to, and the Court would have had no jurisdiction to cut it down; and that is the position in which the parties are placed by the decree in this suit. There is a penal rate of interest (120 per cent.) imposed by the mortgage, but it is clear that in 1875 that was not claimed. Nor do their Lordships conceive that it can now be claimed. Setting that aside, the justice of the case demands that Zahoor should be able to claim such interest as her contract gives her, up to the time when she took possession of the mortgaged property.

Supposing the redemption effected by the Plaintiff, what is Zahoor's position? She was mortgagee of the 2 annas of the old mouza Sirdilla or Jurra, the touzi number of which was 1013, and the sudder jumma Rs. 797. She then purchased the ownership, subject to the Plaintiff's mortgage or mortgages, of 2 annas of Kusba Jurra, which bears another touzi number and a smaller sudder jumma, and which was formed out of 12 annas of the former mouza Sirdilla or Jurra, belonging to the family of the mortgagors. She has therefore a right to redeem the Plaintiff as regards these 2 annas, on paying such sum as he can properly claim against them in respect of the four mortgages effected prior to the 26th of May 1875. What that sum may be it is impossible to tell on the present materials, but it can and should be ascertained by inquiry, and a reasonable time should be allowed to Zahoor to elect whether or no she will redeem.

Their Lordships will humbly advise Her Majesty to discharge the order of the High Court

passed on the 10th September 1885, and instead thereof to order as follows :—

Declare that the Plaintiff is entitled to redeem the mortgage of the 29th July 1873 upon payment to Zahoor of the principal and interest moneys secured thereby, reckoning interest at the rate of 24 per cent. per annum up to the day on which possession of the mortgaged property was awarded in execution to Zahoor, and no later.

Declare that if the Plaintiff exercises such right of redemption, then on payment by Zahoor to him of all moneys paid by him for redemption of the mortgage of the 29th July 1873, and of such costs of this suit, including the costs of the appeal to the High Court, and of this appeal, as are properly chargeable on the property comprised therein, and of all other moneys, if any, which are due to him on the security of the property comprised in the mortgage of the 29th July 1873 in respect of the other mortgages which were effected prior to the 26th May 1875, and which afterwards became vested in him, Zahoor is entitled to redeem the share of Kusba Jurra which was purchased by her under the decree of the 23rd June 1875, and possession of which was awarded in execution to her by the Court in the same suit.

Let the Court make such inquiries and take such accounts as are proper for carrying the above declarations into effect, and fix reasonable periods of time within which the Plaintiff and Zahoor respectively shall exercise the rights of redemption hereby declared to belong to them.

Declare that if the Plaintiff and Zahoor respectively do not exercise their rights of redemption within such time as the Court by its final order in that behalf may direct, they shall

respectively be foreclosed and debarred from all right of redemption.

In all other respects let the decree of the 17th September 1883 stand affirmed.

Order Zahoor to pay to the Plaintiff the costs of the appeal to the High Court. Zahoor must pay the costs of this appeal.