Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mir Mahomed Mozuffer Hossein and another v. *Kishori Mohun Roy and others, from the High Court of Judicature at Fort William in Bengal; delivered* 30*th March* 1895.

Present:

LORD WATSON.
LORD MACNAGHTEN.
LORD SHAND.
LORD DAVEY.
SIR RICHARD COUCH.

[*Delivered by Sir Richard Couch.*]

This is an appeal against a decree of the High Court at Calcutta, reversing a decree of the First Subordinate Judge of Dacca in favour of the Appellants in a suit brought by them against the first and second Respondents, and another Respondent Baikunt Mohun Roy, who has died during the appeal, and his representatives have been substituted for him. There were two other Defendants who are not Respondents, viz. Mussummat Amirunnissa Khatoon the widow, and Abdul Hai the son of Abdul Ali deceased. The facts upon which the question to be determined arises appear to their Lordships to be these. On the 9th May 1865 the Appellants obtained a decree against Abdul Ali for a large sum of money, from which he appealed to the High Court at Calcutta. That Court affirmed the decree with an immaterial modification. Abdul Ali then appealed to Her Majesty in

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Council. His appeal was substantially dismissed, but in consequence of certain objections taken by him it was referred back to the High Court to ascertain and declare for what amount the Appellants were to be entitled to issue execution under the decree. On the 28th February 1872 a final decree was made by the High Court by which it was ordered and declared that the Appellants were at liberty to take out execution for Rs. 62,913. 9. 3 with costs and interest.

During these proceedings Abdul Ali died, and Amirunnissa for herself and as guardian of her minor sons by Abdul Ali, and Karimunnissa Khatoon a daughter of Abdul Ali, were substituted in his place in the record as his representatives. On the 18th May 1872 the Appellants caused the property in question in this appeal to be attached in execution of the decree, by a prohibitory order dated the 3rd May 1872 issued out of the Court of the District Judge of Dacca. The order prohibited the judgment debtors from alienating the property, and all persons from receiving the same by purchase, gift, or otherwise. By the Code of Civil Procedure then in force, and by the Code subsequently and the Code now in force, any private alienation of the property attached by sale gift or otherwise is made null and void. On the 11th June 1872 Amirunnissa put in a claim to the property attached, alleging that it belonged to her in her own right, having been purchased by her from her husband.

On the 28th December 1872 the Officiating District Judge of Dacca delivered his judgment, allowing the claim and directing the property to be released from attachment. The Appellants appealed to the High Court against this judgment, and on the 10th July 1873 that Court, considering that the real issue in the case had been misconceived, and that the Judge had not

entered into the evidence which was material on the subject to be decided, framed an issue whether the property which had been attached and was admittedly in the possession of Amirunnissa was a property which came into her possession as part of the estate of Abdul Ali, and remanded the case to the Judge of Dacca for trial (Rec. p. 80). The Order of the 28th December 1872, releasing the property from attachment, was not set aside; whether it should be set aside depended upon the finding on this issue.

The issue was never tried; Amirunnissa and the Appellants came to a compromise which is contained in two petitions presented to the Court on the 30th May 1874, one by Amirunnissa (Rec. p. 81), and the other by the Appellants (Rec. p. 130). The petitions differ slightly in some parts, but are in substance the same, and the nature of the compromise may be taken from the latter. It refers to the decree of the 28th February 1872, the attachment in execution of it, the allowance of Amirunnissa's claim, the appeal to the High Court and the remand, and states that it was settled by the Appellants that they should take only Rs. 89,000 out of the total amount due to them, and prays that the agreement made on the terms settled between the parties "be taken as a part of the original "decree, capable of being executed according to "the rules for the execution of decrees, that "the present claim cases be struck off the "file, and that the work of the sale be "stopped."

Then follow the terms:—Amirunnissa paid Rs. 9,000 in cash, and was to pay the remaining Rs. 80,000 by yearly instalments extending over a period of 14 years. Till the realization of that money the attachment in respect of the 4-annas share of the properties that had been

attached, and with regard to which she had put forward her claim, except some property not included in the property now in question, was to subsist, and the attachment in respect of the remaining 12-annas share was withdrawn. It is then said that the 4-annas share of the other properties in connection with the claim, and of all other properties of Amirunnissa whether standing in her own name or in the names of others, and of the properties left by her husband and obtained by her by right of inheritance from him, was to remain liable for the debts under the decree, and that till the realization of the money due Amirunnissa or her heirs or representatives should not be able to make any sale, gift, or any other kind of transfer, of the 4-annas share so hypothecated. The Order of the Court made on the 30th May 1874 on this petition was that "this case be struck off the file." A similar Order was made on the other petition.

On the 1st May 1882, on the application of the Appellants, a sale-proclamation (Rec. p. 107) was issued from the Court for the sale by public auction of the property now in question. It stated that the right title and interest of the judgment-debtors only should be put up to sale, and that these and the incumbrances and other charges on the property were all specified in detail in the schedule against each lot. The lots of this property were Nos. 1 and 2. Under the heading in the schedule, "Detailed description of "encumbrances on the property," there is against each of these lots a statement that Amirunnissa had mortgaged the property by a deed of mortgage dated the 14th Jeyt 1280 (26th May 1873) to Kishori Mohun Roy (the first Respondent), and that he had instituted a suit against her for the recovery of Rs. 18,719. 14. 5 out of the mortgaged property, and obtained a decree dated the 13th March 1878. The property was

sold on the 27th November 1882, and was purchased by the Appellants for Rs. 900. This was a purchase of the equity of redemption. The property was represented by the Appellants for the purpose of presenting this appeal, to be of a value exceeding Rs. 10,000. A sale certificate was granted to them on the 1st December 1883. They were unable to obtain possession, and the Roys being in possession the Appellants on the 7th June 1886 brought this suit against them and Amirunnissa and Abdul Hai the son of Abdul Ali, to recover possession free of the encumbrances.

The case of the Roys was that Abdul Ali had before the Appellants obtained their decree sold the properties in suit to Amirunnissa in part satisfaction of her dower; that she on the 26th May 1873 mortgaged the properties to these Defendants, on which mortgage they had sued her and obtained a decree on the 13th March 1878; and that at a sale in execution of the decree they had purchased and been given possession of the properties in suit in March 1884. The mortgage is the same as that mentioned in the sale-proclamation. It has been found by the High Court and by the Lower Court that the conveyances by Abdul Ali to Amirunnissa were benami—not in good faith for consideration. But on the 19th February 1864 Amirunnissa's name was ordered by the Officiating Collector of Dacca to be registered in the Collectorate as the owner of the part of the property which was a revenue-bearing estate, and it was not denied that from that time down to Abdul Ali's death in August 1866 all the usual acts of ownership were exercised in her name. She was for all purposes the apparent owner. In the written statement of the Defendants they set up the mortgage to them, and said that according to the terms of the deed Amirunnissa received from them a large sum of money as a loan, but they did not

aver that the mortgage was taken *bonâ fide* and without notice of her being a benamidar. At the settlement of the issues many were framed, but not one raising this question. If the Appellants had intended to raise it they might have asked for an issue upon it. There being no issue the Subordinate Judge did not take any notice of this question, but it appears to have been raised in the high Court and to have been argued that the Defendants, who were there the Appellants, were not entitled to succeed, because it had not been raised in the defence or made the subject of an issue. The High Court did not allow this objection, and held that the Roys had a good title as *bonâ fide* mortgagees and auction purchasers in execution of their decree. This must now be taken as the fact. Their position is such as is described in the judgment of this Committee, delivered by Sir Montague Smith, in the case of *Ramcoomar Koondoo* v. *Macqueen* (I. A. Sup. Vol. 43) where he says "It is a principle of natural equity, "which must be universally applicable, that "where one man allows another to hold himself "out as the owner of an estate, and a third "person purchases it for value from the apparent "owner in the belief that he is the real owner, "the man who so allows the other to hold him-"self out shall not be permitted to recover upon "his secret title, unless he can overthrow that of "the purchaser by showing, either that he had "direct notice, or something which amounts to "constructive notice, of the real title, or that "there existed circumstances which ought to "have put him upon an enquiry, that if pro-"secuted would have led to a discovery of it." This principle applies to Abdul Ali, and the Appellants are in the same position, as they purchased only his right title and interest, and are equally bound by it.

The question then is:—had the attachment

or prohibitory Order any effect upon the mortgage? The Order of the District Judge had released the property from the attachment. The High Court upon appeal framed an issue and remanded the case for trial of it. The Court did not set aside the Order of the District Judge. Whether that should be done depended upon the finding upon the issue which in consequence of the compromise was never tried. The Orders of the 30th May 1874 to strike the case off the list of pending suits could not have the effect of reversing the Order releasing the property from attachment. The case being before the High Court on appeal the District Judge had no power to reverse his Order. The case had passed out of his hands. But assuming that the Orders of the 30th May were intended to give effect to the compromise, and (although most informal) that they did so, their Lordships are of opinion that the compromise did not operate to revive or restore the attachment and make it effective upon the mortgage. The liability of Amirunnissa under the compromise was different from the liability of the representatives of Abdul Ali under the decree of the 28th February 1872. She became personally liable for the payment of the instalments and all her property was made liable for it. The effect of the compromise was to substitute that liability for the liability under the decree of February 1872 and to put an end to the attachment. The Appellants who purchased only the right to redeem the property, and now seek to recover possession of it freed from the mortgage, have failed to show their title to possession, and their Lordships will humbly advise Her Majesty to affirm the decree of the High Court and to dismiss this appeal. The Appellants must pay the costs of this appeal.