

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Malik Ahmad Wali Khan v. Musammat Shamsi Jahan Begam and another, from the High Court of Judicature for the North-Western Provinces, Allahabad; delivered the 21st March 1906.*

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Present at the Hearing :

LORD DAVEY.

SIR FORD NORTH.

SIR ANDREW SCOBLE.

SIR ARTHUR WILSON.

[*Delivered by Sir Arthur Wilson.*]

This is an appeal from a Decree of the High Court of Allahabad of the 24th February 1903, which set aside the Decree of the Subordinate Judge of Bareilly of the 19th December 1900.

The Plaintiff, Malik Ahmad Wali Khan, is brother of the half-blood of the two ladies who are Defendants. In the year 1896 a criminal charge was pending against Sardar Wali Khan, a half-brother of the Plaintiff and whole brother of the Defendants; and the various members of the family took steps to procure funds for the defence of the accused man.

On the 6th October 1896 the Plaintiff and the Defendants executed a mortgage bond of the ordinary kind for the sum of Rs. 10,000 in favour of Banarsi Parshad, by which the Plaintiff hypothecated certain property belonging to him, and the Defendants certain property belonging to them.

On the 2nd November 1896 the Plaintiff paid off the mortgage, the sum actually paid for principal and interest being Rs. 10,025.

On the 2nd April 1900 the Plaintiff filed his plaint in the present case, in which he alleged that he had joined in the mortgage only as surety for his half-sisters the Defendants, and claimed to recover from them the whole amount of what he had paid, with interest. The Defendants in their written statements denied having been parties to the borrowing at all, but it was added : "The Plaintiff can claim only the rateable amount which he may prove to have given to the answering Defendants."

At the trial before the Subordinate Judge the Plaintiff himself gave some evidence, chiefly during his cross-examination, of an express agreement between him and his half-sisters that he should be a mere surety for them in the matter of the mortgage bond. Neither of the Courts in India appear to have given credence to that evidence, and their Lordships think those Courts were right.

The Subordinate Judge, however, made a Decree in favour of the Plaintiff on the ground that the mortgage money was shown to have been handed to the Defendants in the presence of the Registrar, and was not shown to have been returned by them to the Plaintiff. The handing of the money to the Defendants was carried out by arrangement on the part of the Plaintiff, and the ladies were at the time living in his house where the payment was made. The learned Judges of the High Court considered that these circumstances were quite insufficient to prove that the Plaintiff was a mere surety in the matter of the mortgage, and their Lordships agree in this view.

It was contended, however, before the High Court, and again before their Lordships, that the

Plaintiff was nevertheless entitled to recover from the Defendants a proportionate share, that is to say two thirds, of the amount he paid to the mortgagee. The High Court rejected this contention on the ground that the Court could "show no indulgence to a litigant who comes "into Court with a false case." It appears to their Lordships that the question is hardly one of indulgence, and that the Plaintiff in this case ought not, by reason of his having claimed too much, to be precluded from recovering a proportionate amount of what he actually paid, to which he is undoubtedly entitled, a claim which the pleadings are wide enough to cover.

It was further contended that under Section 95 of the Transfer of Property Act (IV. of 1882) there ought to be a Decree giving the Plaintiff a charge on the interests of the Defendants in the mortgaged property. That section says that:—

"Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession."

That section might be so strictly construed as to limit its operation to mortgages under which possession passes, and, therefore, on redemption properly re-passes. But it seems to their Lordships more reasonable to construe the section distributively, to make the condition of obtaining possession apply only to the cases in which its fulfilment is from the nature of the mortgage possible, and in other cases to make the charge follow upon redemption.

Their Lordships will, therefore, humbly advise His Majesty (1) to discharge the Decrees of the High Court and Subordinate Judge; (2) to declare that the Plaintiff is entitled to recover against the Defendants two-thirds of the sum of Rs. 10,025 paid by him to redeem the mortgage, with interest at 6 per cent. per annum from the

date of the institution of the suit, and that he is entitled to a charge in respect thereof upon the Defendants' interests in the mortgaged property; (3) to remit the case to the High Court to determine the amount due from the Defendants and the time within which it should be paid by them and to give all necessary directions as to the re-transfer or realization of the mortgaged property of the Defendants, and otherwise to give effect to His Majesty's Order; and (4) to order that inasmuch as the costs of the case in the two Courts in India appear to have been occasioned substantially by the untrue cases set up on the one side and on the other, no costs in either of these Courts should be given. For the same reason there will be no order as to the costs of this Appeal.

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