

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Syed Mahomed Ibrahim Hossein Khan and another v. Ambika Pershad Singh and others, from the High Court of Judicature at Fort William in Bengal; delivered the 16th January 1912.*

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PRESENT AT THE HEARING :

LORD MACNAGHTEN.

LORD ROBSON.

SIR JOHN EDGE.

MR. AMEER ALI.

[DELIVERED BY SIR JOHN EDGE.]

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This is an Appeal by the Plaintiffs against the decree of the High Court of Judicature at Fort William in Bengal, dated the 3rd of March 1905, which varied the decree of the Subordinate Judge of Patna of the 9th of July 1902.

The suit was brought on the 22nd of September 1900, in the Court of the Subordinate Judge on a simple mortgage of the 17th of February 1888, to recover Rs. 12,000 as principal, Rs. 23,150 as interest to the date of suit, and future interest until realization. That mortgage, as will later appear, was executed in favour of Mussammat Alfa, whose heirs assigned it to the Plaintiffs on the 16th of June 1891. The Plaintiffs also claimed to have it declared that the properties covered by the mortgage of the 17th of February 1888, and by a *zarpeshgi* deed of the 20th of November 1874, were liable for the entire

[1] J. 98. 125.—1/1912. E. & S.

decretal amount ; that certain of the Defendants should be directed to pay the decretal amount to the Plaintiffs within a time to be fixed by the Court, and that in default of payment the decretal amount should be realized by the sale by auction of the mortgaged properties included in the mortgage of the 17th of February 1888, and the *zarpeshgi* deed of the 20th of November 1874. Various issues were raised by the Defendants, and much more or less conflicting evidence was recorded, but the facts so far as they are material in the view taken by their Lordships may be briefly stated.

On the 20th of November 1874, Nanda Kumar Singh on his own behalf, and as the husband and agent of his wife, Mussammat Lalpeari Dasi, executed a *zarpeshgi* deed in favour of Girwar Singh for the sum of Rs. 12,000, which was acknowledged to have been received from Girwar Singh, and by that deed mortgaged and hypothecated as security for the *zarpeshgi* Rs. 12,000 certain properties which included the entire 16 annas of the milkiat and the malguzari right of Mouzah Ghowsipur-Dopabra, No. 364, 2 annas out of 16 annas of Mouzah Ghowsipur-Dopahra, No. 362, and 5 annas 4 pies out of 16 annas of Mouzah Fatehpur-Lawaech. With the properties which are named above this appeal is alone concerned. By that deed Girwar Singh was entitled to hold possession of the properties hypothecated until the amount of the *zarpeshgi* Rs. 12,000 was repaid to him, and it was by the deed amongst other things agreed that Girwar Singh should pay certain expenses, and the Government revenue, should keep out of the usufruct Rs. 900 every year as interest on the *zarpeshgi* Rs. 12,000, and should pay Rs. 501, 13 annas, 6 pies, on account of the rent every year by regular instalments to Nanda Kumar Singh and Lalpeari Dasi, and that all the increase

in the produce in consequence of proper cultivation should be enjoyed and appropriated by Girwar Singh. It was also by the deed agreed that when Nanda Kumar Singh and Lalpeari Dasi should repay to the *ticcadar*, Girwar Singh, the *zarpeshgi* Rs. 12,000 in one lump sum at the end of Jeth 1294 Fasli (September 1887) the *ticca* transaction should be cancelled and Nanda Kumar Singh and Lalpeari Dasi should bring the leased properties into their direct possession, but in the case of the nonpayment of the *zarpeshgi* Rs. 12,000 at the end of Jeth 1294 Fasli, the *ticca* transaction should stand good with all its conditions until the payment of the *zarpeshgi*. Girwar Singh was put in possession under the deed.

On the 15th of December 1879, Nanda Kumar Singh being then dead, his son and heir Kishan Kumar Singh executed in favour of Mussammat Jagattarini Debi a simple mortgage of the 2 annas share in No. 362 Ghowspur-Dopahra. On the 3rd May 1890 Dwarkanath Roy, who was the son and heir of Mussammat Jagattarini, then dead, brought a suit for sale on the mortgage of the 15th of December 1879, and made the mortgagor and the puisne mortgagees, including the heirs of Mussammat Alfau, who was then dead, defendants to his suit. Their Lordships, concurring with the High Court, find as a fact that the summonses and notices in that suit were duly served upon the heirs of Mussammat Alfau. The heirs of Mussammat Alfau did not appear, and did not defend that suit. On the 20th of November 1890, Dwarkanath Roy obtained in his suit a decree for sale, and under that decree the 2 annas share in No. 362 Ghowspur-Dopahra was sold.

On the 31st of December 1880 Kishan Kumar Singh and his mother Lalpeari Dasi executed a simple mortgage in favour of Raghunath Singh

and Ganpat Singh of, amongst other properties, the 2 annas share in No. 362 Ghowspur-Dopahra and the 16 annas share in No. 364 Ghowspur-Dopahra. On the 20th December 1883 Kishan Kumar Singh and Lalpeari Dasi executed in favour of Raghunath Singh and Jagarnath Singh a simple mortgage of, amongst other properties, the 2 annas share in No. 362 Ghowspur-Dopahra and the 16 annas share in No. 364 Ghowspur-Dopahra. On the 15th July 1890 two suits for sale were brought, one on the mortgage of the 31st of December 1880 and the other on the mortgage of the 20th of December 1883. Their Lordships, concurring with the High Court, find as a fact that the heirs of Mussamat Alfau were duly made defendants to these suits. The heirs of Mussamat Alfau did not defend either of these suits. Decrees for sale were made in these suits.

On the 7th of January 1888 Kishan Kumar Singh executed in favour of Gajadbur Mahto a simple mortgage of the 5 annas 4 pies share in Fatehpur-Lawaech. On the 6th September 1888 Gajadbur Mahto brought a suit for sale on his mortgage of the 7th of January 1888 against Kishan Kumar Singh, but did not make Mussamat Alfau a defendant. Gajadbur Mahto obtained a decree for sale; under that decree the 5 annas 4 pies share in Fatehpur-Lawaech was sold on the 16th December 1889 to Lalji Mahto. The sale was confirmed on the 22nd of March 1890, and shortly afterwards Lalji Mahto was put in possession. Lalji Mahto died since this suit was brought.

In February 1888 Kishan Kumar Singh borrowed Rs. 12,000 at interest of R. 1 and 4 annas per mensem from Mussamat Alfau. Their Lordships find as a fact that the Rs. 12,000 was borrowed by Kishan Kumar Singh and was lent by Mussamat Alfau for the express purpose of paying off the *zarpehgi* debt of Rs. 12,000 as

security for which the property mentioned in the *zarpeshgi* deed of the 20th November 1874 was mortgaged and hypothecated by that deed. In consideration of that loan of Rs. 12,000 Kishan Kumar Singh executed on the 17th of February 1888 in favour of Mussammat Alfau a simple mortgage of the properties included in the *zarpeshgi* deed of the 20th of November 1874. The principal sum of Rs. 12,000 was under that mortgage repayable in two years. The money lent by Mussammat Alfau was in accordance with the agreement between her and Kishan Kumar Singh applied in discharging the *zarpeshgi* debt of Rs. 12,000, and on the 15th of July 1888 the then holders of the *zarpeshgi* deed of the 20th November 1874 quitted possession and gave up the *zarpeshgi* deed, which was delivered to Mussammat Alfau. Mussammat Alfau died on the 10th of December 1889, and on the 16th of June 1891 her heirs assigned the mortgage of the 17th of February 1888 to the Plaintiffs, who are the Appellants here. On that assignment such rights as Mussammat Alfau had acquired and were then existing passed to the Plaintiffs.

On the 22nd of September 1900 the Plaintiffs in whom was then vested Mussammat Alfau's right as mortgagee under the mortgage of the 17th of February 1888 filed their plaint in this suit, making then, or by subsequent amendment of their plaint, the representatives of Kishan Kumar Singh, who was then dead, and others who were interested in the mortgage properties or in some of them, Defendants. The titles of the Defendants, other than the representatives of Kishan Kumar Singh, arose under the mortgages which were made subsequently to the 20th of November 1874 and prior to the 17th of February 1888.

The Subordinate Judge decreed the suit for sale with costs, giving the Defendant No. 1,

a right to redeem the mortgage so far as it affected the properties other than No. 362 Ghowspur-Dopahra, No. 364 Ghowspur-Dopahra, and Fatehpur-Lawaech by payment within 90 days of the decretal amount with costs. The Defendants Nos. 8 to 13 were given a right to redeem the mortgage, so far as it affected No. 364 Ghowspur-Dopahra, by payment within 90 days of Rs. 4,000 with proportionate costs; the Defendant No. 15 was given a right to redeem the mortgage, so far as it affected No. 362 Ghowspur-Dopahra, on payment of Rs. 4,000 with proportionate costs; and any of the Defendants Nos. 5, 6, and 14 were given a right to redeem the mortgage, so far as it affected Fatehpur-Lawaech, on payment within 90 days of Rs. 4,000 with proportionate costs. The High Court on appeal dismissed the suit with costs so far as it applied to Nos. 364 and 362 Ghowspur-Dopahra and Fatehpur-Lawaech.

The High Court held that the Plaintiffs' suit, so far as it applied to No. 364 Ghowspur-Dopahra and No. 362 Ghowspur-Dopahra, was barred by Section 13, Explanation II., of the Code of Civil Procedure by reason of the heirs of Mussammat Alfian not having set up in the suits of the 3rd of May 1890 and 15th of July 1890, "their title as " prior mortgagees on the basis of the *zarpeshgi* " 1874, the ground of relief in the present " action." Mussammat Alfian's mortgage of the 17th of February 1888 was not prior to the mortgages of the 15th of December 1879, the 30th of December 1880, and the 20th of December 1883, but the Plaintiffs, Appellants here, claimed priority as the Rs. 12,000 which Mussammat Alfian had lent in 1874 were applied to discharge the debt secured by the *zarpeshgi* deed of 1874. The heirs of Mussammat Alfian were persons having an interest in the properties comprised in the mortgages of the 15th of December 1879,

the 31st of December 1880, and the 20th of December 1883, and consequently were under Section 85 of the Transfer of Property Act, 1882, necessary parties to the suits for sale on those mortgages and were made Defendants to those suits and not having set up in those suits such rights as they had under the mortgage of the 17th of February 1888 and the *zarpeshgi* deed of 1874, Section 13, Explanation II, of the Code of the Civil Procedure applied and the claims of the Plaintiffs Appellants as against No. 364 Ghowsipur-Dopahra, and No. 362 Ghowsipur-Dopahra, and those of the Defendants who are alone concerned with these mouzahs are barred. The High Court rightly dismissed the suit with costs so far as it related to No. 364 Ghowsipur-Dopahra and No. 362 Ghowsipur-Dopahra.

It remains to be considered whether the Plaintiffs had, and could have enforced in this suit, any and what rights against the 5 annas 4 pies share in Fatehpur-Lawaech, and against Gajadhur Mahto and Lalji Mahto, Defendants 5 and 6, or either of them. It is not quite obvious on what grounds the High Court dismissed the suit so far as it related to the 5 annas 4 pies share in Fatehpur-Lawaech, and to the Defendants Gajadhur Mahto, and Lalji Mahto.

Gajadhur Mahto did not make Mussammat Alfana a Defendant to the suit for sale which he brought on the 6th of September 1888 on his mortgage of the 7th of January 1888. That suit was brought to obtain a decree for sale of the 5 annas 4 pies share in Fatehpur-Lawaech which had been mortgaged on the 7th of January 1888 to Gajadhur Mahto, and subsequently on the 17th of February 1888 to Mussammat Alfana, and had been mortgaged and hypothecated to Girwar Singh by the deed of the 20th of November 1874 as security for the *zarpeshgi* debt of Rs. 12,000. Under the deed of the 20th November 1874 the Rs. 12,000

was not repayable to Girwar Singh until Jeth 1294 Fasli (September 1887), and consequently the 12 years allowed by Article 132 of the Second Schedule of the Indian Limitation Act, 1877, within which a suit to enforce payment of that debt was allowed, had not expired when Girwar Singh brought his suit. It has been contended that as Mussammat Alfani when she lent her Rs. 12,000 to Kishan Kumar Singh in February 1888 to pay off the *zarpeshgi* debt of Rs. 12,000 did not obtain a formal assignment in writing of the *zarpeshgi* deed of the 20th November 1874, and as the *zarpeshgi* debt of Rs. 12,000 was discharged by payment to the representatives of Girwar Singh on the 15th of July 1888, and they quitted possession, Mussammat Alfani did not in equity obtain the benefit of the charge which Girwar Singh had under the *zarpeshgi* deed of the 20th of November 1874. It is true that so far as the *zarpeshgi* deed of the 20th of November 1874 operated as a lease of the mortgaged properties, it came to an end on the payment of the *zarpeshgi* debt of Rs. 12,000 to the representatives of Girwar Singh on the 15th July 1888, but their Lordships have found as a fact that the Rs. 12,000 were lent by Mussammat Alfani and were borrowed by Kishan Kumar Singh for the express purpose of paying off the *zarpeshgi* debt of Rs. 12,000 which was secured by the deed of the 20th of November 1874; that the Rs. 12,000 lent by Mussammat Alfani were in accordance with the agreement between Mussammat Alfani and Kishan Kumar Singh applied in paying off the *zarpeshgi* debt; that on payment of that debt the *zarpeshgi* deed of the 20th November 1874 was handed over to Mussammat Alfani; and that Mussammat Alfani when she lent her Rs. 12,000 intended to keep alive for her benefit and protection the charge which had been created by the *zarpeshgi* deed of the 20th of



November 1874. It has been held by this Board, in *Mohesh Lal v. Mohunt Bawan Das* (10 I. A. 62), that whether a mortgage paid off is extinguished or kept alive depends upon the intention of the parties. It has also been held by this Board in *Gokuldoss v. Rambux Seochand* (11 I. A. 126), that the ordinary rule is that a man having a right to act in either of two ways shall be assumed to have acted according to his interests. In the last mentioned case it was held by this Board that the purchaser of an equity of redemption in immovable property situated in India, who, having notice of a second mortgage, paid off a first mortgage upon the property without an assignment of the first mortgage to him must be assumed, according to the rule of justice, equity, and good conscience, to have intended to keep the first mortgage alive, and consequently was entitled to stand in the place of the first mortgagee and to retain possession against the second mortgagee until repayment. In that case this Board was pressed to apply the doctrine of *Toulmin v. Steere* (3 Mer. 210), but this Board observed that :—

“ In India the art of conveyancing has been and is of a very simple character. Their Lordships cannot find that a formal transfer of a mortgage is ever made, or an intention to keep it alive ever formally expressed. To apply to such a practice the doctrine of *Toulmin v. Steere* seems to them likely, not to promote justice and equity, but to lead to confusion, to multiplication of documents, to useless technicalities, to expense, and to litigation.”

And their Lordships in that case held that the obvious question to ask in the interests of justice, equity, and good conscience, is, what was the intention of the party paying off the charge? What this Board said in 1884 as to the art of conveyancing in India, and the practice in such cases, is true as to the art of conveyancing and the practice in such cases at the present day. The law on these points applied in the judgments

of this Board in *Mohesh Lal v. Mohunt Bawan Das* and *Gokuldoss v. Rambux Seochand* was subsequently applied by this Board in *Dinobundhu Shaw Chowdhry v. Jogmaya Dasi and others* (29 I. A. 9). Applying the rule of justice, equity, and good conscience their Lordships in this Appeal hold that the charge created by the *zarpeshgi* deed of the 20th of November 1874 was kept alive for the benefit of Mussammat Alfau. Nothing to bar a claim in respect of that charge, so far as the 5 annas 4 pies share in Fatehpur-Lawacch was concerned, had occurred when Gajadhur Mahto brought his suit on the 6th of September 1888.

As their Lordships have said, Gajadhur Mahto did not make Mussammat Alfau a Defendant to his suit of the 6th of September 1888. Under Section 85 of the Transfer of Property Act, 1882, Mussammat Alfau was a necessary party to that suit. It is not alleged that Gajadhur Mahto when he brought his suit had not notice that Mussammat Alfau was a person having an interest in the property comprised in the mortgage upon which he was suing. If Gajadhur Mahto had taken the ordinary precaution of inspecting the register of the district in which Fatehpur-Lawacch is situate, before he took his mortgage of the 7th of January 1888, he would have found that the 5 annas 4 pies share in Fatehpur-Lawacch had been charged by the *zarpeshgi* deed of the 20th of November 1874. It is to be presumed that Gajadhur Mahto took the ordinary precautions before parting with his money which a prudent intending mortgagee would take. If Gajadhur Mahto had before bringing his suit of the 16th of September 1888, and in order to ascertain who would be under Section 85 of the Transfer of Property Act, 1882, the necessary parties to his suit, taken the ordinary precaution of searching that register,

he would also have found that the 5 annas 4 pies share in Fatehpur-Lawaech was included in Mussanmat Alfa's mortgage of the 17th February 1888. It has been contended that Section 85 of the Transfer of Property Act, 1882 did not apply to the suit which Gajadhur Mahto brought, the contention being that that section does not apply to a suit for sale of an equity of redemption and that a puisne mortgagee is not a person "having an interest in the "property comprised in a mortgage" of a first or any prior mortgagee who brings a suit for sale on his prior mortgage. That contention, if correct, would, as it appears to their Lordships, lead to the conclusion that neither a prior nor a subsequent mortgagee need be made a defendant to a suit for sale by a mortgagee of the specific lands included in his mortgage. The fact is that in suits for sale in India to which other mortgagees are not made parties, what a puisne mortgagee seeks to sell by means of a decree for sale, is not the equity of redemption so described, but the actual property, lands or houses, mortgaged. It is not obvious why a puisne mortgagee who desires to sell a mere equity of redemption, and not the actual property, lands or houses, described in his mortgage as the property mortgaged to him, should not dispose of his interests by private contract by an assignment of his mortgage to a purchaser, instead of by bringing a suit for sale of the property, land or houses, mortgaged, unless he hopes by concealing what his real interests are to obtain a larger price from an unwary purchaser at an auction sale under a decree for sale, than he could otherwise expect to obtain.

Gajadhur Mahto, in his suit for sale, sought for and obtained a decree for sale of the specific 5 annas 4 pies share in mouzah Fatehpur-Lawaech which had been mortgaged by the *zarpehqi* deed

of the 20th of November 1874, and Mussammat Alfán's mortgage of the 17th of February 1888, and under his decree for sale that 5 annas 4 pies share was sold, and it was sold free of all charges and incumbrances so far as the decree or any documents relating to the decree would show. Had Section 85 of the Transfer of Property Act, 1882, been complied with by making Mussammat Alfán a party to the suit, the decree for sale in Gajadhur Mahto's suit would have dealt with the rights and claims of Mussammat Alfán in relation to the charge under the *zarpeshgi* deed of the 20th of November 1874, and her mortgage of the 17th of February 1888, if put forward by her in the suit, and Gajadhur Mahto would have been allowed to redeem the charge of 1874 by payment of Rs. 12,000, and Mussammat Alfán would in her turn have been allowed to redeem Gajadhur Mahto's mortgage. If Mussammat Alfán had been made a Defendant to Gajadhur Mahto's suit and had neglected to put forward her claims, those claims would have been barred under Section 13 of the Code of Civil Procedure. In either event all intending purchasers at a sale under the decree would have known what rights were to be sold, and in either event the necessity for the bringing of this present suit, so far as the 5 annas 4 pies share in Fatehpur-Lawaech is concerned, would not have arisen.

As Mussammat Alfán was not made a Defendant to Gajadhur Mahto's suit, her rights were not affected by the decree in that suit, and Section 13 of the Code of Civil Procedure did not bar this suit of the Plaintiff so far as the 5 annas 4 pies share in Fatehpur-Lewaech, and the Defendants Gajadhur Mahto, and Lalji Mahto were concerned. But as the Rs. 12,000 were under the *zarpeshgi* deed of the 20th of November 1874, repayable in Jeth 1294 Fasli (September

1887) and this suit was not brought until the 22nd of September 1900, the claim of the Plaintiffs to priority is barred by Article 132 of the second schedule of the Indian Limitation Act, 1877, and all that they are entitled to so far as the 5 annas 4 pies share in Fatehpur-Lawaech is concerned is a decree entitling them to redeem the mortgage of the 7th of January 1888 on payment to the legal representatives of Lalji Mahto of the amount of the principal and interest in respect of which the 5 annas 4 pies share in Fatehpur-Lawaech was sold to him under the decree for sale in Gajadhur Mahto's suit of the 6th of September 1888.

Their Lordships will humbly advise His Majesty that the decree of the High Court so far as it operated as a dismissal of the Plaintiffs' suit for sale of the 5 annas and 4 pies share in Fatehpur-Lawaech, and dismissed with costs in the High Court and in the Court of the Subordinate Judge the Plaintiffs' suit as against Gajadhur Mahto and Lalji Mahto, should be varied by decreeing that the Plaintiffs, Appellants here, by payment to the legal representatives of Lalji Mahto, or into the High Court to their credit, within 90 days from the filing of His Majesty's order in the High Court, of the amount of principal and interest in respect of which the 5 annas 4 pies share in Fatehpur-Lawaech was sold to Lalji Mahto under the decree of Gajadhur Mahto in the suit of the 6th of September 1888, may redeem the mortgage of the 7th of January 1888, and may bring the 5 annas 4 pies share to sale for the balance then remaining due of the amount of principal and interest decreed by the Subordinate Judge in this suit; by decreeing that the Plaintiffs shall have their proportionate costs of the suit in the Court of the Subordinate Judge and the appeal to the High Court in respect of their claim against the 5 annas 4 pies share in

Fatehpur-Lawaech and the Defendants Gajadhur Mahto and Lalji Mahto, the amount of such costs to be ascertained by the High Court, and any costs paid by the Appellants to Gajadhur Mahto and Lalji Mahto or his legal representatives or any of them shall be repaid to the Plaintiffs; and that in all other respects the decree of the High Court be affirmed, but that there shall be no costs of this Appeal.

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In the Privy Council.

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SYED MAHOMED IBRAHIM HOSSEIN  
KHAN AND ANOTHER

v.

AMBIKA PERSHAD SINGH AND  
OTHERS.

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DELIVERED BY SIR JOHN EDGE.

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