

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Gulab-singh and others v. Raja Seth Gokuldas and others, from the Court of the Judicial Commissioner, Central Provinces, India (P.C. Appeal No. 91 of 1911); delivered the 8th April 1913.

PRESENT AT THE HEARING :

LORD ATKINSON.

LORD SHAW.

LORD MOULTON.

SIR JOHN EDGE.

MR. AMEER ALI.

[DELIVERED BY SIR JOHN EDGE.]

This is an appeal from a decree, dated the 7th May 1907, of the Judicial Commissioner of the Central Provinces which affirmed with slight modifications a decree, dated the 4th April 1906, of the District Judge of Hoshangabad.

The suit in which the appeal arose was brought on the 22nd September 1904 in the Court of the District Judge of Hoshangabad by mortgagees upon a mortgage of immovable property which was made on the 10th December 1891 by the Deputy Commissioner of the district of Hoshangabad as and being the Court of Wards for that district. The suit was one for possession of the mortgaged property including the *sir* lands, or alternatively for a decree for sale. Certain other alternative reliefs were claimed.

The defences to the suit, so far as they are now material, were that the mortgage had, it was alleged, been made by the Deputy Commissioner without the previous sanction of the Chief Commissioner and was void; that the property mortgaged was the undivided ancestral property of a joint Hindu family under the rules of the Mitakshara, and that the Court of Wards had no right or authority to mortgage the shares, rights, or interests of those members of the family who were not Government wards or who were minors; and that no decree for sale, or for possession, or for any of the alternative reliefs could be made.

The District Judge on the 4th April 1906, having found that there was then due on the mortgage Rs. 232,403 for principal and interest, made a conditional decree for sale. From that decree only the Defendants Gulabsingh, Tikaram, Sitaram, Dulichand son of Pemsha, and Him-matsingh, who are the Appellants here, appealed to the Court of the Judicial Commissioner. The Judicial Commissioner on the 7th May 1907, on appeal, slightly varied the decree of the District Judge and added a declaration that the Defendants will not be personally liable for any sum by which the sale proceeds of the mortgaged property may fall short of the amount due for the time being on the mortgage, and in other respects affirmed the decree for sale of the District Judge with costs of the appeal to his Court against the then appealing Defendants. On the 25th August 1908 the then District Judge of Hoshangabad, finding that the Defendants had not paid into Court or to the Plaintiffs Rs. 267,871.10.8, principal, interest, and costs, made a decree absolute for sale of the mortgaged property specified in a schedule to that decree, and allowed interest on the

decreed sum from the 24th July 1908 until liquidation, adding the declaration which had been made by the Judicial Commissioner.

For the purposes of this appeal it is necessary to refer as briefly as may be to the facts antecedent to the commencement of this suit. On or shortly before the 1st July 1890 Maharaj Singh, now dead, and his brother Dulichand, a Defendant to this suit, who described themselves as zamindars of Baherakhedi, Bagalkhedi, Patlai, Punwasa, Bamuria, and Sarora, Pargana Hoshangabad, made a written application to the Deputy Commissioner of Hoshangabad, in which they stated that they were indebted to the extent of about Rs. 114,358.11.9; that they were neither able to arrange for the liquidation of the debt nor to manage the estate; and that if the villages should be lost on account of the indebtedness—

“Our children will have no estate left to them;” and prayed that “if, under section 7 (c) clause 4, of Act “ XVII. of 1885, you be pleased to assume the management of our Malguzari villages of Baherakhedi and “ others, and to arrange for the discharge of our debt in “ any way possible, our estate will be saved and our “ children will thereby be able to maintain themselves, for “ which they will ever remain grateful to you. The rest “ lies with you.”

The villages mentioned in the petition were the undivided ancestral property of a joint Hindu family governed by the rules of the Mitakshara, and Maharaj Singh and Dulichand, who were brothers, were the senior and managing members of that family. At that time the joint family consisted of Maharaj Singh, his son Gulabsingh then about 36 years old, Tikaram then about 21 years old, and Sitaram then about 9 years old, and Dulichand and his sons Himmatsingh then about 22 years old,

Bajilal then about 16 years old, Fatichand then about 8 years old, and Jaganath then about 5 years old, and a son of Gulabsingh named Dinanath, who was then about 8 years old. The indebtedness of the family in respect of which the property was liable to be lost amounted to about Rs. 120,000. As will later appear, the petition was duly forwarded to the Chief Commissioner for his sanction to the Court of Wards assuming the superintendence of the property mentioned in the petition, that sanction was given, and in the result the mortgage was made upon which this suit was brought.

Having regard to the defences which were set up in this suit, it is necessary to consider with what object that petition was presented to the Deputy Commissioner, and what authority, if any, Maharajsingh and Dulichand had to bind the other members of the joint family by their action in presenting the petition. It has been contended on behalf of the Appellants that Maharajsingh and Dulichand had power to bind only their own individual interests in the joint property, and that if their object was to get the Court of Wards to assume the superintendence of the joint family property, they acted without authority and their action could not and did not bind the other members of the joint family.

Maharajsingh and Dulichand were zamindars and were the malguzars of the property mentioned in their petition, and were, as their Lordships have said, the senior and managing members of the joint family of which the property mentioned in their petition was the ancestral property. The application was made under the Central Provinces Government Wards Act, 1885, Act XVII. of 1885. The application was not drawn up with the precision with which

it probably would have been drafted by a trained lawyer, but as has been pointed out by this Board in more than one appeal the art of conveyancing is but little understood in the country parts of India. It must, in their Lordships' opinion, be taken that in making the application to the Deputy Commissioner, Maharajsingh and Dulichand were acting in their capacity as the managing members of the joint family and not merely as two members of the family applying only in their own individual interests.

It appears to their Lordships to be obvious that the intention of Maharajsingh and Dulichand in making that application was that the Court of Wards should in the interests of all the members of the joint family assume the superintendence of the immovable property which was the ancestral property of the joint family, and not merely the management and superintendence of the then unascertained and unpartitioned shares in the joint property, which on a partition of that property, not then in contemplation, might possibly come to Maharajsingh and Dulichand. Neither Maharajsingh nor Dulichand had more than the mere coparcenary interest of a member of the joint family in the family property. Neither of them had any defined share. It was held by this Board in 1903 in *Gharib-ullah v. Khalak Singh and others* (30 I. A. 165), that the interest of a member of an undivided Mitakashara family in the family property is not individual property. It had previously been held by this Board in 1866 in *Appoviar v. Ruma Subba Aiyan and others* (11 Moore's Indian Appeals 75), that no member of a joint Hindu family, whilst it remains undivided, can predicate of the joint or undivided property that he has a certain

definite share. It has not been shown to their Lordships that it was the practice of the Courts of Wards of the Central Provinces to assume the superintendence of the unpartitioned interests of some only of the members of a joint Hindu family in the family property, nor has it been explained in this appeal how a joint family property could be preserved for the members of a joint family by a Court of Wards assuming the superintendence of the unpartitioned interests of some only of the members of the family. Under the circumstances of the family, Maharaj-singh and Dulichand acted prudently and in the best interests of the joint family in applying to the Deputy Commissioner of Hoshangabad to have the family property taken under the management of the Court of Wards, and in their Lordships' opinion Maharaj-singh and Dulichand in making that application acted within their powers and authority as the managing members of the joint family.

Before, apparently, that formal application was made, the Deputy Commissioner had been in communication with the Plaintiffs' firm to ascertain the terms upon which they would advance the money required for the liquidation of the then indebtedness of the family on the security of the immovable property of the family, which he described in a letter of the 21st June 1890 as consisting of five whole villages, a 12 annas share in another village, and 20 plots held on absolute occupancy tenures in different villages. In that letter the Deputy Commissioner enclosed "a list of " the property it is proposed to hypothecate, " with particulars as to income and expendi- " ture." It is obvious that from the first it was on the security of a mortgage of the ancestral

property of the family that it was intended to obtain a loan from the Plaintiffs.

On the 1st July 1890 the Deputy Commissioner of Hoshangabad forwarded to the Commissioner of the Nerbudda Division the application of Maharajsingh and Dulichand, praying that their estate might be taken under the management of the Court of Wards, and having mentioned his estimate of the then indebtedness as Rs. 114,358 11 9, the annual income of the property and the outgoings, and that it was proposed to borrow Rs. 100,000 from the Plaintiffs' firm, he recommended that the Chief Commissioner should be asked to sanction the assumption of the management of the property by the Court of Wards until the liabilities of the family should be liquidated. There was some further correspondence between the Deputy Commissioner, the Commissioner of the Nerbudda Division, and the Secretariat of the Central Provinces, and ultimately, on the 28th January 1891, the Commissioner of the Nerbudda Division was informed by the Secretariat that the Chief Commissioner had sanctioned the assumption by the Court of Wards, Hoshangabad, of the management of the estate of Maharajsingh and Dulichand, malguzars of Baherakhedi and other villages in that district, and had also sanctioned an allowance of Rs. 883 per annum being made for the maintenance of the proprietors, and accepted the proposals for the liquidation of the debt. What were the precise terms of those proposals does not appear from the papers which are before the Board, but it may be assumed from the papers which are before the Board that the proposals which were approved by the Chief Commissioner

included a proposal to obtain from the Plaintiffs' firm, on the security of a mortgage of the ancestral property, a sum sufficient to liquidate the then indebtedness of the family.

On the 31st January 1891 the following official notification appeared in the "Central Provinces Gazette":—

"No. 609.—Declaration by the Chief Commissioner under section 7 (1) (c) of the Central Provinces Government Wards Act (XVII. of 1885).

"The Chief Commissioner is pleased to declare Maharajsingh and Dulichand, *malguzars* of Baherakhedi, in the Hoshangabad District, on their own application, incapable of managing their property, and has sanctioned the assumption of its superintendence by the Court of Wards of that district."

The property referred to in that notification must, in their Lordships' opinion, be deemed to have been all the immovable property which constituted the ancestral estate of the joint family which was under the management of Maharajsingh and Dulichand, and was referred to in their application. It was that ancestral property which it had been proposed by the Deputy Commissioner should be taken under the superintendence of the Court of Wards until the liabilities of the family should be liquidated. It was by a mortgage of that property that it was intended to raise a sum sufficient to liquidate the indebtedness of the family. It could not have been intended that the Court of Wards should take over the management and superintendence of the family property so far only as the unpartitioned interests of Maharajsingh and Dulichand in the joint family property were concerned; if that had been the object, it would have frustrated the intention with which the proposal was made that the superintendence of the property should be assumed by the Court of Wards.

One effect of the notification was expressly to disqualify Maharaj Singh and Dulichand to manage the family property. It could not have been intended that they should be disqualified so far only as their own unpartitioned interests in the property were concerned, and that they should be qualified to manage the property so far as the interests of the other members of the family were concerned; nor could it have been intended that the Court of Wards and the members of the joint family other than Maharaj Singh and Dulichand should jointly manage the unpartitioned family property.

Act XVII. of 1885 was not as precisely worded as it might have been, but it obviously was intended to apply to the superintendence by the Court of Wards of the family property of Hindu joint families as well as to the superintendence of separate property of Hindus and others situate within the territories for the time being administered by the Chief Commissioner of the Central Provinces. In passing Act XVII. of 1885 the Indian Legislature could not have been unaware that much of the immovable property held by Hindus within these territories was family property of joint Hindu families. It is difficult to see how the Court of Wards could exercise some of the powers entrusted to it under the Act, as, for example, the power of letting the whole or any part of the property of Government wards under its superintendence, or could perform the duties of superintendence, which included the management and collection of rents, unless in such a case as this the Chief Commissioner was entitled under the Act to sanction the assumption by the Court of Wards of the superintendence of the family property of the joint Hindu family, whether the application that the property should

be taken under the management of the Court of Wards was made by all the members of the family or by the managing members only. Their Lordships are of opinion that the Chief Commissioner had power to sanction the assumption by the Court of Wards of Hoshangabad of the superintendence of the joint family property which was the property mentioned in the application of Maharajsingh and Dulichand.

It must in their Lordships' opinion be inferred from the letter of the 28th January 1891 from the Secretariat to the Commissioner of the Nerbudda Division that the Chief Commissioner of the Central Provinces had given his sanction to the proposal that the Court of Wards of the district of Hoshangabad should mortgage the property of the family in order to raise a sum sufficient for the liquidation of the indebtedness. It was not in their Lordships' opinion necessary under section 18 of Act XVII. of 1885 that the actual mortgage to be made by the Court of Wards should be submitted to the Chief Commissioner for his sanction, nor was it necessary that the Court of Wards should have his sanction to the precise terms of the mortgage. The sanction which is be inferred from the letter of the 28th January 1891 empowered the Court of Wards to mortgage the property under section 18 of Act XVII. of 1885.

It having been agreed between the Court of Wards and the Plaintiffs' firm that they should advance Rs. 120,000 on the security of a mortgage of the family property, the Plaintiffs' firm in March 1891 advanced the Rs. 120,000, and by the 25th March 1891 the Court of Wards with the money so advanced discharged the then indebtedness of the family. On the 10th December 1891 the Court of Wards of Hoshangabad in the exercise of its statutory power made the mortgage,

upon which this suit has been brought. In their Lordships' opinion the Court of Wards had obtained from the Plaintiffs' firm most favourable terms for the loan, although owing to then unforeseen circumstances the object of saving the property for the family has not been obtained.

By the mortgage all the right, title, and interest of the mortgagors in the property mentioned in the first schedule to the mortgage, together with all actual and reputed rights, easements, and appurtenances to the same, and all cultivated and uncultivated land, groves, *abadi, sir*, rents, and profits, by whatever name the same should be known, were hypothecated by way of mortgage to the mortgagees. The mortgage money was to be repaid with interest by annual instalments extending over more than 30 years. It was agreed that in the event of Rs. 30,000 becoming overdue the Court of Wards should recover such sum by sale or otherwise of sufficient of the hypothecated property.

The mortgage deed also contained the following important clauses:—

“And it is further agreed that the Court of Wards shall continue to manage this estate so long as there is any prospect of the debt being repaid from income of the same, and that if from any cause this should appear impossible, that the Court of Wards shall, if the mortgagors so desire, either sell up the entire property or so much as may be necessary and devote the proceeds to liquidation of the debt, or make the estate over to the mortgagees if they prefer this course in satisfaction of their claims, and that upon such sale or transfer all further liabilities on the part of the Court of Wards towards the mortgagees shall cease.

“And it is further agreed that it will not relinquish management of the estate till such time as the debt is liquidated in ordinary course, or in the event management being relinquished before such time, liquidate the debt remaining due by sale of such portion of the property as may be necessary or otherwise.”

During the years 1892 and 1893 the Court of Wards paid to the mortgagees Rs. 16,000. Since then no instalment has been paid. The Court of Wards, owing to unforeseen circumstances, found it impossible to pay the balance of the mortgage debt or any other instalments or interest, and on the 10th December 1901 the Plaintiffs called upon the Court of Wards either to put them in possession of the mortgaged property or to pay the sums due under the mortgage. On the 13th March 1902 the Deputy Commissioner of Hoshangabad, who was the Court of Wards, by letter of that date, gave the Plaintiffs notice that the relinquishment of the management of the estate by the Court of Wards had been sanctioned, and offered to make over to them the mortgaged portion of the estate—
“in full satisfaction of your claims with all outstanding rental arrears and debts, excepting the cultivating rights in *sir* land which are to be reserved for the maintenance of the Wards.”

It is to be observed that in that letter the members of the joint Hindu family were treated as Government wards. The offer to hand over the mortgaged property less the *sir* lands was not in compliance with the contract in that respect in the mortgage deed, and was declined. On the 23rd August 1902 it was officially notified that the superintendence of the estate of the family had, with the sanction of the Chief Commissioner, been relinquished by the Court of Wards with effect from the 12th June 1902. The mortgaged property was not sold by the Court of Wards, the mortgage debt, with the exception of Rs. 16,000 which were paid in 1892 and 1893, has not been paid, and the Court of Wards did not transfer the mortgaged property to the mortgagees, and the management of the estate was relinquished by the Court of Wards.

Their Lordships are of opinion that under these circumstances the moneys remaining unpaid under the mortgage became payable, and the Plaintiffs were entitled to bring this suit for sale. Their Lordships will humbly advise His Majesty that the decree of the Judicial Commissioners should be affirmed, and that this Appeal should be dismissed. The Appellants must pay the costs of this Appeal.

In the Privy Council.

GULABSINGH AND OTHERS

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RAJA SETH GOKULDAS AND
OTHERS.

DELIVERED BY SIR JOHN EDGE.

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