Privy Council Appeal No. 97 *of* 1913.

Bengal Appeal No. 106 *of* 1910.

Deonandan Prashad - - - - - - - - *Appellant,*

v.

Janki Singh and others - - - - - - - *Respondents,*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH DECEMBER, 1916.

Present at the Hearing:

LORD PARKER OF WADDINGTON.
LORD SUMNER.
SIR JOHN EDGE.
SIR LAWRENCE JENKINS.

[*Delivered by* SIR LAWRENCE JENKINS.]

This suit relates to a 12-annas share of Mouzah Tikarampur, Pergunnah Monghyr, being Towzi No. 5293. The property was offered for sale in the Collectorate of Monghyr, for the recovery of arrears of revenue, under the provisions of Act XI of 1859 on the 25th March, 1907, and was bought for the defendant, Babu Deonandan Prashad, a minor, in the name of Bunwari Lal. Before the sale it belonged as to 9 annas to the plaintiffs 7 to 16, and as to the remaining 3 annas to the plaintiffs 17 to 20, subject to a usufructuary mortgage of these 3 annas for the benefit of Deonandan, and to transfers of parts to the plaintiffs 1 to 6.

The suit, which impugns the sale, failed in the Court of first instance, but on appeal the plaintiffs' claim was upheld, and a decree was passed on the 18th August, 1910, that Deonandan, through his certificated guardian, do convey the property to the plaintiffs.

From this decree Deonandan has preferred this appeal. At one time the property was part of a larger estate, but there was a separation of shares under Act XI of 1859, and thereby the 12-annas share now in suit became subject to a Government revenue of 192 rupees, payable in four annual instalments.

Though the liability to the Government was, and continued to be, joint, yet, as between themselves, it was distributed among the several co-owners in proportion to their respective shares. Thus the amount payable in respect of the 3-annas share was a fourth, that is to say, 9 rupees in June, 12 rupees in September, 12 rupees in January, and 15 rupees in March. The mortgage of the 3-annas share for the benefit of Deonandan was executed on the 23rd December, 1904, and it was thereby stipulated that the mortgagee should, by remaining in possession from 1312 F. up to the repayment to him of the entire debt thereby secured, collect and realise the rent of the mortgaged Mouzah, estimated as not exceeding 150 rupees, and should pay out of it 51 rupees 8 annas into the Collectorate for revenue and other public demands.

In June 1905, 9 rupees became payable by the mortgagee, but 12 rupees 6 annas was paid. The reason of this excess payment does not appear. At the end of the four following instalments there were no arrears.

But of the instalment payable in September 1906, only 9 rupees instead of 12 rupees was paid on behalf of the mortgagee. As the other co-owners paid their several aliquot shares and no more, there was, after giving credit for advance payments from previous instalments, a balance still owing of 2 rupees 10 annas. This became in due course an arrear of revenue as defined by the Act, and it was to recover this arrear that the property was sold by the Collector.

The arrear, therefore, which occasioned the sale, was due to the insufficient payment made in respect of the 3-annas share, and none the less was this the result of the default of those interested in that share, because in June 1905 an excess payment of 3 rupees 6 annas had been made. This excess had long been absorbed, and had ceased to be an excess credit in the Towzi ledger. This, in effect, is the view expressed in the judgment under appeal, and it is made a basis of the High Court's decision in the plaintiffs' favour. The learned Judges as a further and distinct ground of decision find that there was fraud, and the language used by the High Court, read literally, might be understood to attribute personal fraud to the minor, Deonandan. But, in view of his age, this can hardly have been intended. In any case their Lordships acquit him of any personal misconduct in relation to the default or sale. He was, however, represented by agents, and when the position created by them is regarded as a whole, it leads to the conclusion that the Government revenue was intentionally allowed by them to fall into arrear with a view to the property being put up for sale and bought on behalf of the minor. If this be the true view, as their Lordships hold, then, however free from personal blame the minor may have been, he cannot profit by his agents' deliberate default committed in breach of the terms of the mortgage. As against his mortgagor therefore, the mortgagee cannot be allowed to hold for himself the

advantage gained by the default for which his agents were responsible. Nor, in their Lordships' opinion, can he be permitted to hold for himself this advantage to the prejudice of the co-owners. For this purpose the mortgagor and mortgagee may be identified; they together represented the 3-annas share, and theirs was the obligation to pay their quota of the revenue. Equally in relation to the co-owners was the default designed with a view to a subsequent sale and to a purchase on the minor's behalf, and the advantage gained by this scheme must, in like manner, be held for the benefit of the co-owners, who are not shown to have been aware of the default or sale, or to have disentitled themselves to this equitable relief. They had contributed their proper quota to this September instalment, and it cannot be supposed that had they known of the default or the peril to their interests they would have allowed a valuable property, worth, it is said, not less than 8,000 rupees, to be sold away for the failure to pay 2 rupees 10 annas.

In estimating the conduct of the parties it is not without significance that, while the co-owners of the other shares paid in full their contribution to the succeeding January instalment, nothing was paid on account of the 3-annas share.

Their Lordships have not overlooked the decision in *Doorga Singh* v. *Sheo Prashad Singh*, I.L.R. 16, C. 194, which lends support to the appellant's contention as against the co-owners; but it is apparent from the judgment under appeal that this decision has not stood unquestioned. And this also appears from the judgment in *Faizar Rahman* v. *Maimuna Khatun* (17 C.W. N. 1233). This case was not cited in the course of the argument, as the respondents were not represented, but their Lordships wish it be distinctly understood that where an appeal is heard *ex parte* it is the duty of Counsel to bring to the notice of the Board adverse as well as favourable authorities.

The decision in Doorga Singh's case applied too lax a standard of reciprocal conduct in holding that fraud in its strictest sense, such fraud as would support a common law action of deceit, was the test by which to judge these transactions. It failed to pay due regard to the relative position of co-owners in respect of the payment of revenue and to the need of demanding from each such measure of candid dealing and good faith as would ensure that a sharer would not be tempted to make a deliberate default with a view to ousting his co-sharers and appropriating to himself their common property. Here Deonandan, through his representatives, had a duty to perform, which was inconsistent with his becoming a purchaser of the property in the way he did, therefore his title cannot operate to the exclusion of the co-owners.

It is no answer to say that the Act contemplates a purchase by a sharer; the sale stands, but in the circumstances the transaction is in effect nothing more than payment o an arrear

of revenue enuring for the benefit of all. But this gives a right to contribution, so that it must be a term of granting the plaintiffs equitable relief that they contribute to the expenses properly incurred by or for Deonandan in the purchase of the property.

The amount to be contributed has been fixed by the High Court's decree at 425 rupees with interest at 6 per cent. per annum within three months. As no exception has been taken to this, either by way of cross-appeal or otherwise, it may be accepted, but the time for payment must be fixed by the Subordinate Judge after notice to the parties. The declaration in the decree that the sale and purchase is invalid is misconceived as a description of the legal position, and in its place should be substituted a declaration that the property purchased must be held for the benefit of the plaintiffs and the first defendant according to their several interests at the date of the sale, subject to the repayment of 425 rupees, and interest on that sum at the rate of 6 per cent. per annum from the date of the sale, and there should be a direction for a conveyance as decreed by the High Court on payment of that amount on or before a date to be fixed by the Subordinate Judge. With this variation the decree of the High Court should, in their Lordships' opinion, be affirmed, and they will humbly advise His Majesty to this effect.

In the Privy Council.

DEONANDAN PRASHAD

v.

JANKI SINGH AND OTHERS.

DELIVERED BY SIR LAWRENCE JENKINS.

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