

Privy Council Appeal No. 13 of 1921.

Bengal Appeal No. 31 of 1919.

Nathu Khan, since deceased (now represented by Bibi Mahbuban-
nessa and others) and others - - - - - *Appellants*

v.

Thakur Burtonath 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 2ND DECEMBER, 1921.

Present at the Hearing :

LORD BUCKMASTER.
LORD ATKINSON.
MR. AMEER ALI.
SIR LAWRENCE JENKINS.

[*Delivered by* LORD BUCKMASTER.]

On the 6th September, 1904, one Lakhpat Nath sold to Nathu Khan, Girab Ali Khan, Badhan Khan and Ramzan Khan, three mouzahs, situate in the zemindari of Bagdo, at the price of Rs. 19,000. Nathu Khan is dead and his representatives together with the other purchasers are the present appellants. The purchase price was to be discharged by the cancellation of certain debts due from the vendor to the purchasers and as to the balance in cash. The purchase deed contained the express declaration that the property was sold free from incumbrances and consequently by Section 55 (1) (g), Sub-section (2) of the Transfer of Property Act the vendor must have been deemed to contract with the buyers that he had power to transfer the property so sold, and consequently that the property was free from burdens. In truth there were existing upon the estate considerable charges

and it appears that the vendor recognising this fact and being anxious to secure their liquidation on 7th September, 1904, entered into an arrangement with one Bindesri Charan. This took the form of a sale by the vendor to Bindesri Charan of another estate for a sum of Rs. 82,200, the purchase price to be discharged by the payment of a considerable number of debts, which included among others those owing upon the property already sold to Nathu Khan and his co-purchasers. Had Bindesri carried out the terms of that arrangement no dispute would have arisen, but unfortunately he did not and as the mortgagees who held the prior charges upon the property sold to Nathu Khan and others proceeded to extremities and took steps to realise their securities by sale, Nathu Khan, apparently alone but probably on behalf of all the purchasers, paid three separate sums of Rs. 4,287, Rs. 37,090 and Rs. 4,646 in order to clear the property, and no part of these moneys has been repaid to them. About these facts there appears to be no doubt, for although the High Court from where this appeal proceeds appears to have doubted whether the property was actually subject to an effectual order for sale, yet the fact that it was subject to the mortgages appears reasonably clear. After the payments had been made, Nathu and his co-purchasers instituted a suit against Bindesri, Lakhpat, who was defendant No. 2 to the proceedings, and others, asking for the recovery of the sums paid against the properties and persons of the defendants. The plaint was a clumsy document, and the suit as against Bindesri was misconceived, for the plaintiffs were no parties to the deed of 7th September, 1904, and no trust was thereby created in their favour. The real case was a personal claim against Lakhpat, and this is in fact included in the general confusion of the suit. A subsequent suit was also brought by Lakhpat Nath against Bindesri Charan and Nathu Khan and his co-purchasers and others to obtain rescission of the sale of 7th September, 1904, on the ground that Bindesri Charan had wholly failed to comply with the obligations that he undertook for Nathu Khan; the purchaser was made a party to this suit which was compromised before trial and the compromise became incorporated in a decree under the seal of the Court of the 20th July, 1908. It is unfortunate that this decree is couched in language which renders it extremely difficult to give a fair grammatical construction to all its terms, but their Lordships think that none the less its purpose is clear and the obscurity is doubtless due to the fact that it represents the actual agreed terms of the parties which have not been put into plain legal phraseology. The decree provides for the return of the properties sold to Bindesri, subject to a condition expressed in the words:—

“ That in case the defendant No. 2 becomes liable to Nathu Khan and others (plaintiffs in suit No. 122 of 1907), in the final decree in that suit, that sum will be payable by the plaintiff to those defendants, and the property which is the subject of this suit will remain charged with this debt payable to those defendants.”

The effect of this order was as follows: that if Lakhpat Nath, who, notwithstanding the fact that he was plaintiff, because he

was defendant No. 2 in suit No. 122 of 1907, is referred to as the defendant No. 2 becomes liable to Nathu Khan and others who are the plaintiffs in the suit No. 122 of 1907, in the final decree of that suit, that sum—that is the sum for which he is liable—will be payable by him Lakhpat Nath to Nathu Khan and others and the property the subject of the present suit will remain charged with the debt payable to those defendants. The confusion in this decree is due to the fact that while it refers to the suit instituted by Nathu Khan against Lakhpat Nath and others to obtain a declaration of liability, it introduces the description of the parties alternately by virtue of their capacity in that suit and their capacity in the suit which is being compromised, with the result that the same person becomes the defendant and the plaintiff in the same sentence. Their Lordships having carefully studied the language of the decree are satisfied that the interpretation that they have placed upon it is correct and indeed it is the only interpretation that could give reasonable effect to the claim that Nathu Khan possessed against Lakhpat Nath at the time when the suit was set on foot. The suit referred to as No. 122 of 1907 was the suit brought by Nathu Khan and others asking for relief against Lakhpat Nath in respect of payments to which reference has been made and it is the suit out of which this appeal has arisen. Lakhpat died before this suit came on for hearing, his heir was added in his place, and the learned Subordinate Judge held that as he derived benefit from the payments made by the plaintiffs, it was equitable that the plaintiffs must be recouped, and he ordered sale of the properties that had been sold to Bindesri, if the amount were not paid.

Upon appeal the High Court held that the plaintiffs were not compelled to make the payments to avert the sale and that they were not entitled to any relief.

Their Lordships find it difficult to accept the view that purchasers of a property are not compelled to pay off mortgagees who have obtained decrees for sale, even though a sale is not immediately threatened, but it appears there were questions about the nature of the sales not explained to their Lordships which may have caused misunderstanding on this head.

The present appellants are themselves responsible for what occurred, for there would have been no difficulty in obtaining relief had the section of the Transfer of Property Act to which attention has been called been placed before the Court. It is plain from that section that as Lakhpat Nath had bound himself to deliver the property free from incumbrances, and had only delivered it subject to the charges which Nathu paid. Lakhpat was therefore liable for the monies paid by the purchaser in order to clear his title. If that simple view had been presented to the Court of first instance and to the High Court their Lordships see no reason to doubt that the matter need not have proceeded as far as this Board; but the Courts below appear to have been confused with the effect of what

had taken place and they do not seem to have had their attention directed either to the statute or to the decree although the compromise was mentioned. It may be that as the decree was made after this suit was instituted, its execution might have been a difficult matter in the present proceedings, but with that their Lordships do not intend in any way to interfere. All that they think the appellants here are entitled to is (a) a declaration that in the circumstances Lakhpat Nath did become liable to Nathu Khan for the monies paid by Nathu Khan either for redemption of the mortgages existing on the property purchased by him on the kobala of the 6th September, 1904, at the date of such purchase, or for purchase of the properties on sales under such mortgages, or to prevent such sales; and (b) that the person mentioned in the decree of the 20th July, 1908, as the defendant No. 2 was intended to be Lakhpat Nath. Their Lordships for these reasons will humbly advise His Majesty that the judgment appealed from should be set aside and the decree of the learned Judge of first instance be modified by the introduction of the above declaration that Lakhpat was liable to the plaintiffs in the suit for the monies paid under either of the above heads, and if any dispute exists as to such payments an enquiry must be directed to ascertain the facts. The appellants will have their costs in the Courts below. There will be no costs of the appeal.

In the Privy Council.

NATHU KHAN, SINCE DECEASED (NOW REPRESENTED BY BIBI MAHBUBANNESSA AND OTHERS) AND OTHERS

v.

THAKUR BURTONATH SINGH AND OTHERS.

DELIVERED BY LORD BUCKMASTER.

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