Privy Council Appeal No. 177 *of* 1924.

Allahabad Appeal No. 6 *of* 1922.

Ram Charan Lonia and others - - - - - *Appellants*

v.

Bhagwan Das Maheshri, since deceased, and others - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 15TH APRIL, 1926.

Present at the Hearing:

VISCOUNT DUNEDIN.
LORD BLANESBURGH.
SIR JOHN EDGE.
MR. AMEER ALI.

[*Delivered by* LORD BLANESBURGH.]

The broad issue in this suit is whether a sale of ancestral zemindari property agreed to be made to the appellant, Ram Charan Lonia, and another, now deceased, by the nominal respondent Gopal Das, the head of a joint Hindu family to which the property belonged, is binding upon the major and minor sons of Gopal Das. If it is, no further difficulty arises. If it is not, then the order proper now to be made may in the somewhat unusual circumstances of the case raise supplemental questions of nicety.

Gopal Das is a vaishya or trader by caste. His family at the institution of the suit consisted of seven sons: one is now dead. Four of the sons were, on the 3rd September, 1912, the date of the impeached agreement, adult. The other three were then and at the commencement of the suit, were still infants. The joint family property included a business at Benares for the sale, at first of grain, and later of cloth. From before 1912 the four adult sons had been helping their father in the conduct of that business and in the management of the zemindari. But Gopal Das himself remained throughout the karta of the joint family.

The property in suit consists of three villages in the district of Jaunpur. It represents substantially the entire immoveable heritage of the family. It became part of their possessions when in 1896 it was taken over by Gopal Das in satisfaction of a debt of Rs. 15,000 then owing on business transactions by another firm of traders. No reliable valuation of the property at the different relevant dates is to be found in the evidence. It is estimated, however, by the appellants in their written statement to have been at the date of the agreement in suit of the value of between Rs. 21,000 and Rs. 22,000. By the sons it is alleged to have been worth then, and to be worth now, a great deal more. For the purposes of this judgment their Lordships, while by no means convinced of its correctness, will accept the appellants' estimate of its value at the contract date. It improved in value immediately afterwards.

The family business was not apparently successful, and the position became embarrassing. In 1909 money had necessarily to be raised and, in circumstances which admittedly called for the advance—although whether on the terms on which it was obtained is another matter—the property was, on the 10th July, 1909, mortgaged to one Manik Chand to secure a sum of Rs. 10,500. This mortgage was executed by the four adult sons of Gopal Das and by himself, both on his own account and as guardian of his three infant sons. Compound interest at 8¼ per cent. per annum with half-yearly rests was reserved by the mortgage, and there was a penalty clause under which the interest could be increased to 9 per cent. per annum similarly compoundable. This, possibly somewhat high, rate, even apart from the penalty added, has attracted the notice of the High Court of Allahabad in the judgment under appeal, and to that aspect of the transaction their Lordships will again advert. For the moment they allude to it only to draw attention to the critical position of the family's free interest in the property should there be any persistent neglect on their part to keep down the interest as it accrued under the deed.

And between the date of the mortgage and July, 1912, practically no interest was paid—not more than Rs. 800, possibly not so much. In consequence, by that date the amount due in respect of principal and capitalised interest in arrear amounted to nearly Rs. 14,000. Manik Chand had not so far begun to press for payment either of principal or interest, but the amount charged upon the property was automatically increasing at a great rate. No funds were available to stay the no longer remote possibility of all value in the equity of redemption being extinguished; money also was needed for payment of other trade debts that had accrued, as well as for the development of the family cloth business then recently initiated. In these circumstances, a transaction even involving the disposal by Gopal Das of this entire immoveable family property might well be justifiable and be binding on the whole family, provided the property was not sacrificed for an inadequate price and

provided the consideration was calculated to relieve the necessity, the existence of which called for the disposition. In the present case, for instance, a very short limit of time within which the purchasers must complete or lose their contract was plainly of the essence of any transaction of sale called for by the circumstances as they then existed.

The first transaction in relation to this property which in 1912 was entered into by Gopal Das was a contract of the 16th July, whereby he agreed to sell to one Musammat Muhammed-un-nisa 16 annas of one of the three mortgaged villages—Duhawar by name. The price was the sum of money which, invested at $4\frac{7}{8}$ per cent., would produce the then net annual rental of the property. The sale was to be completed in a month, and Rs. 502 were paid to Gopal Das by way of deposit. This contract remained operative until July, 1915—three years later—when, but not till then, as a result of Gopal Das's default, it was brought to an end by an order made at the instance of the purchaser for return of her deposit and interest.

The second transaction was the contract in suit. Under it Gopal Das, in effect, agreed to sell to the purchasers, now represented by the appellants, the entire mortgaged property at a price corresponding to the sum which, invested at $4\frac{1}{2}$ per cent. per annum, would produce an amount equal to the then net rentals of the property. The purchasers were to retain so much of the purchase price as was necessary to enable them to discharge all sums owing on the mortgage of the 10th July, 1909, and were to account to the vendor for the balance of the purchase price. The sale deed was to be executed in 30 days, and a currency note of Rs. 500 was paid to Gopal Das as earnest money. Such in its stated effect is the contract which six of the seven sons of Gopal Das sought in this suit to set aside.

On their face these terms seem prudent enough. The price, found by subsequent calculation to be Rs. 22,508.10.10, not only represented an adequate number of years' purchase of the then rental, but under the terms of the contract was payable in 30 days. If so paid, after discharging in full the amount at that date due on the mortgage of 1909, a substantial sum would have remained to meet the other family necessities, thus justifying the propriety of the disposition.

But the terms of the contract as so stated do not describe its real result. They take no account of the influence upon the transaction of Muhammed-un-nisa's earlier contract, the existence of which was well known to the purchasers before they entered into their own agreement to purchase. From this it followed, as will appear in the sequel, that, so long as that earlier contract remained in being, the purchasers were under no enforceable obligation to perform their own. Nor were they liable to be visited with the usual consequences of such laches if, during the same period, they omitted to take any steps to enforce its performance by the vendor. The real question in the suit, therefore,

as their Lordships see it, is whether a contract of sale involving such potentialities, all in the event realised, can be held binding on the plaintiffs.

Gopal Das apparently soon repented of both contracts and would perform neither. The first purchaser, after, as has been seen, standing by her contract for nearly three years, at length sued for and recovered her deposit. Immediately afterwards, namely, on the 31st August, 1915, the purchasers under the contract in suit commenced against Gopal Das alone an action for its specific performance. That suit was resisted by Gopal Das, and, amongst other defences, he contended that it was at that date barred by laches. But the plea was repelled by the Subordinate Judge on the ground, as already indicated, that so long as Musammat Muhammed-un-nisa's contract remained subsisting the plaintiffs to that suit "did not dare enforcement of their contract. But the removal of that obstacle cleared their way to Court. In other words, the plaintiffs are not guilty of any laches." And this was on appeal the view of the High Court also.

In the result, specific performance of the contract against Gopal Das was decreed by the Subordinate Judge of Jaunpur on the 10th February 1917, and his decree was affirmed by the High Court at Allahabad by decree of the 6th March, 1919. Pending the appeal, namely, on the 12th May, 1917, an order for possession of the property was made by the Subordinate Judge, and on the 1st November, 1917, under order of the Court, a formal sale deed of the property was executed by the Judge in the name and on behalf of Gopal Das in favour of the purchasers, and since that date or shortly afterwards they have been in actual possession of the property and in receipt of the rents and profits. It is stated in the sale deed that the amount due on the mortgage of the 10th July, 1909, was, on the 1st November, 1917, Rs. 21,818.14, and that after setting aside that sum out of the purchase price of Rs. 22,508.10.10, and deducting also therefrom the Rs. 500 paid to Gopal Das as earnest money, the sum of Rs. 189.12.10 alone remained for payment to him. The purchasers, however, did not then pay off the mortgage of the 10th July, 1909. They made no payment at all on this account until 4th September, 1919, when they deposited in Court a sum ultimately increased to Rs. 23,200, sufficient to satisfy the debt. Manik Chand, as appears in the judgment of the High Court, has now been paid off by the appellants.

In the specific performance suit a direction was given on the 17th July, 1916, by the Subordinate Judge that, as the property in question was family property, the sons of Gopal Das should be added as defendants. The plaintiffs, however, elected to continue their proceedings against Gopal Das alone. In consequence the High Court, while affirming the decree for specific performance against him as above mentioned, refused to express any opinion as to its value in the circumstances. In their judgment it had none so far as the present plaintiffs are concerned.

On the 7th September, 1916, this suit was instituted. The

plaintiffs were all the sons of Gopal Das, with the exception of one son, Debi Das, who, along with Gopal Das, was made a *pro forma* defendant. The defendant, Sital Das, one of the purchasers, died during the pendency of the suit, and eleven of the appellants were substituted as his representatives. The plaintiffs, alleging that the property in suit of the value of Rs. 40,000 was joint family property, asked for a decree that the agreement to sell it to the defendants the purchasers was invalid. It is to be noted at this point that no suggestion was made in their plaint by the plaintiffs that the mortgage of the 10th July, 1909, was in any way open to objection or not binding upon them.

On the 29th March, 1919, the Additional Subordinate Judge of Jaunpur dismissed the suit with costs. He held that necessity existed and that the contract to sell was binding on the plaintiffs upon the obligations of the purchasers under the contract in suit. He in no way, however, adverted in his judgment to the influence of the earlier contract of the 16th July, 1912. In supporting that contract as he did, he treated it as effective and enforceable according to its tenor.

The plaintiffs appealed to the High Court at Allahabad, and that Court, on the 31st January, 1922, allowed the appeal, decreed the suit, and set aside the decree of the Court below. The learned Judges there were not influenced to their conclusion any more than the learned Subordinate Judge had been by the effect of the contract with Muhammed-un-nisa upon the obligations of the purchasers under the contract in suit. They agreed, too, with the learned Subordinate Judge in the view that the family circumstances called for definite action in July, 1912, but as a sum of Rs. 14,000 would then have sufficed to pay off Manik Chand, there was, in their judgment, no necessity for Gopal Das to part with property of himself and his sons for Rs. 22,000. Moreover, and this was the principal ground of their judgment, they held that while as to the principal sum of Rs. 10,500 secured by the mortgage to Manik Chand there was legal necessity sufficient to make that transaction binding, not only upon Gopal Das and his major sons, but also upon his minor sons, there was no legal necessity to submit to so high a rate of interest as the rate reserved. In their judgment the sum chargeable against the family property under that mortgage should be limited to Rs. 10,500, with simple interest at the rate of $8\frac{1}{4}$ per cent. per annum from the date of the mortgage, the 10th July, 1909, to the date of the sale deed, the 1st November, 1917, but no longer. Their decree, therefore, in effect, was that the plaintiffs were not bound by the agreement in suit nor by the sale deed of 1st November, 1917 : that the property must be reconveyed on payment to the present appellants of Rs. 10,500, with interest at the rate aforesaid to the 1st November, 1917, only ; and that the appellants were to account to the present respondents for the profits of the property from the date of their taking possession thereof until reconveyance. From that order the purchasers appeal.

Their Lordships are of opinion that the contract in suit

is not binding upon the sons of Gopal Das, so that they are in agreement with the High Court in its main conclusion, and see no reason for restoring the judgment of the learned Subordinate Judge. They are, however, unable to reach that conclusion on the same grounds as the High Court. They think also that in matters of detail the order of that Court requires amendment. They do not, for instance, see why, if the appellants are made accountable for the rents of the property during their period of possession, they should be deprived of any interest on the mortgage during the same period: why they should be placed in a worse position than Manik Chand would have occupied, in whose shoes in this respect they stand.

But their Lordships go further. The mortgage of the 10th July, 1909, was in no way impeached or questioned in the suit by the plaintiffs, and its terms in the view of the Board are not such as to justify a Court in judicially affirming, without evidence to that effect, that in substance they are either excessive or unconscionable. In these proceedings accordingly a Court must, their Lordships think, act upon the view that at the date of the contract in suit the mortgage of the 10th July, 1909, was valid, and that the question whether the contract was binding upon the family must be determined on that footing.

Dealing with the case on that basis, their Lordships are of opinion that that contract was not so binding for a reason which they have already indicated. In truth the contract was of the most improvident description. Immediate payment of the purchase price being the prime necessity the contract bound the vendor to sell at a fixed price property of apparently increasing value in circumstances which gave the purchasers the privilege of indefinitely postponing completion of the purchase and payment of the price, with the further privilege, if it so suited them, of repudiating the bargain altogether on the ground that so long as the earlier contract was insisted upon by its purchaser, the vendor could make no title. In other words, the existence of this earlier contract in the event showed that the contract in suit was deprived of all value as a solvent of the family's financial difficulties at its date, and was converted into an arrangement not materially more beneficial than one by which Gopal Das, at the end of three years, became bound to hand over to the mortgagees for in effect nothing the entire equity of redemption in the mortgaged property. In their Lordships' judgment such a transaction was entirely beyond the power of Gopal Das as karta of the joint family, and is not binding on the plaintiffs. To this extent, therefore, although on these grounds only, the order of the High Court should, their Lordships think, be affirmed.

The consequential directions proper to be made are, however, not so clear. The position is much complicated by the fact that the appellants have without real title been in possession and receipt of the profits of the property for many years. Their claims, as, in effect, transferees of Manik Chand's mortgage have also to be borne in mind.

In strictness, possibly, their obligations as purchasers under an invalid contract should be alone dealt with in this suit, and their rights as mortgagees, whatever they are, be reserved for determination in another proceeding. But their Lordships agree entirely with Walsh, J., when, in his judgment in the High Court, he expressed the view that this was pre-eminently a case in which the Court being seised of the whole matter, should make such an order as may terminate the controversy and do justice between the parties.

Accordingly, while their Lordships are of opinion that the contract of the 3rd September, 1912, was not binding upon the plaintiffs, they think that in the circumstances it should now be set aside only upon terms. One of these terms must, they think, be that the appellants have the full benefit of the mortgage of the 10th July, 1909, as a mortgage carrying compound interest at the rate of $8\frac{1}{4}$ per cent. per annum, and that their possession of the property, although unwarranted as purchasers, should not—it having been taken under an order of the Court—be treated as that of a mortgagee in possession with all the burdens of such a possession. It is just, as their Lordships think, that the mortgage should for this purpose be treated as a usufructuary mortgage—and the possession of the appellants be treated as possession thereunder—with the result that during that possession they will be entitled to no interest, but, on the other hand, will not be accountable for profits. It will be just also that the plaintiffs should have their costs in both Courts in India, if, ultimately, they redeem the property as below stated, but not otherwise.

With these views in mind their Lordships think that the proper order now to be made is the following :—

Vary the order of the High Court by directing that an account be taken of the amount due on the 1st November, 1917, in respect of the mortgage of the 10th July, 1909, as a mortgage carrying compound interest at the rate of $8\frac{1}{4}$ per cent. per annum. Let that mortgage stand between the appellants and respondents as security for the sum so found less the costs of the plaintiffs in both Court in India. All interest to cease as from the 1st November, 1917, but the appellants not to be accountable for rents and profits of the property during their period of possession. On payment by the respondents within one year from the date of certificate of the sum so certified less the costs aforesaid, let the appellants reconvey the property comprised in the deed of sale of the 1st November, 1917, freed and discharged from all claims and demands in respect of the mortgage of the 10th July, 1909. In default of such payment on or before the date aforesaid, let this suit as from that date stand dismissed without costs.

Each of the parties should, in any event, bear their costs of this appeal.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

RAM CHARAN LONIA AND OTHERS

v.

BHAGWAN DAS MAHESHRI, SINCE DECEASED, AND OTHERS.

DELIVERED BY LORD BLANESBURGH.

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