

Lewan Bahadur Seth Umed Mal, since deceased (now represented
by Sobhag Mal), and others - - - - - *Appellants*

v.

Chand Mal - - - - - *Respondent*

FROM

THE COURT OF THE CHIEF COMMISSIONER, AJMER-MERWARA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 19TH OCTOBER, 1926.

Present at the Hearing :

VISCOUNT HALDANE.

LORD DARLING.

CHIEF JUSTICE ANGLIN.

[*Delivered by* VISCOUNT HALDANE.]

This is an appeal from a decree of the Chief Commissioner, Ajmer-Merwara, in his revisional jurisdiction, which reversed a decree of the Court of the District Judge. The latter had confirmed a decree of the Subordinate Judge at Ajmer dismissing a suit instituted in his Court by the appellants. The subject-matter of the suit was 15½ bighas of land, which, it is agreed, belonged originally to one Haji Mohammed Khan, and at his death had devolved on his daughter, one Musammat Fatima Begum, along with a bungalow called in the suit bungalow No. 5. The proceedings were for a declaration of title and for possession.

On 7th July, 1893, Musammat Fatima and her husband had executed a mortgage charging some of the properties belonging to them for a debt due to the predecessors in title of the appellants. The properties mortgaged to them were enumerated in the mortgage deed. Among them was what was described as follows :—

“ One bungalow No. 5, with outhouses, and the land of the compound connected with the bungalow, situate in Qasba Dargah Khaja Sahib,

Ajmer, which has fallen to the share of Musammat Fatima Begum, *alias* Badshah Begum, by partition—

“ East—Land of Isar and Nihal Mali,

“ West—Road, compound of the bungalow of Rev. Gray,

“ South—Land of Isar and Nihal Mali,

“ North—Land and Baori of Fatima Begum, *alias* Badshah Begum.”

On 27th March, 1903, the predecessors in title of the appellants instituted a suit on the mortgage, and a decree was made in the usual form. There was a subsequent application for execution of the decree by sale, and at the Court auction sale the decree holders purchased two of the properties mortgaged, including what was misdescribed as to its number but was really bungalow No. 5, with the out offices and compound belonging to it. The purchasers were put in possession.

Bungalow No. 5 is shown on the map of the neighbourhood, which was admitted in these proceedings, as plot No. 1594. There are five other parcels, numbered on this map 1592, 1599, 1588, 1600 and 1601, measuring in all over 15 bighas. These belonged to Musammat Fatima, as well as other plots to which she was entitled jointly, and her interest in which was not included in the mortgage.

In 1907 the appellants instituted a suit for preemption of these five parcels, but questions having arisen as to the title of a third party this suit was withdrawn, with leave to institute a fresh suit.

The present suit was commenced on 27th November, 1910, in the Court of the Subordinate Judge of Ajmer, by the appellants against the respondent, who claimed to be a purchaser from the third party, and against his tenant. Among the issues raised was, whether the suit was defective because of non-joinder of parties. On 24th November, 1915, the Subordinate Judge, after trying the suit, made a decree in favour of the appellants' claim to the five parcels. He examined the arbitrator's award, under which Musammat Fatima's share in her father's estate was ascertained, and came to the conclusion that the land in dispute was not described in the award, merely because it had been treated as attached to bungalow No. 5. He held accordingly that it must be taken to have been included in the general description of the property mortgaged. No doubt is raised that the disputed land was awarded to Musammat Fatima, but the question whether that land was included by her in the mortgage she made is quite a separate one. The District Judge of Ajmer, before whom the case was brought by the respondent on appeal, took the same view as the Subordinate Judge. He construed the parcels in the mortgage deed as including the bighas in controversy.

An attempt was made by the respondent to obtain a submission of the questions raised to the High Court of Judicature for the North-Western Provinces. This application was ruled out by the District Judge. Finally an application for revision, under the joint operation of S. 115 of the Civil Procedure Code and the Ajmer

Courts Regulations of 1877, was made to the Chief Commissioner of Ajmer. The effect of S. 115 is that the High Court, or in the case of Ajmer, under the Ajmer Regulations, the Court of the Chief Commissioner, may call for the record of any case which has been decided by any Court subordinate to it and in which no appeal lies ; and if it appears (a) to have exercised a jurisdiction not vested in it by law ; or (b) to have failed to exercise a jurisdiction so vested ; or (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, it may make such order in the case as it thinks fit. In the present case it is common ground that, so far as any simple question of fact was concerned, the jurisdiction of the Chief Commissioner to entertain an appeal was held to be excluded. For so far as the question of what the parcels in the mortgage deed included, the two lower Courts were in agreement, so that to this extent no appeal would lie. The Chief Commissioner, however, looking at the boundaries on the map and comparing them with the description in the mortgage, was of opinion that it was impossible, as matter of law, to reconcile these. This suit was one for possession, in which the plaintiff had to recover by the establishment of his own title, and not by showing flaws in that of those in possession. As the result, the Chief Commissioner, in the exercise of his power under S. 115, dismissed the appellants' suit, reversing the decrees of the Courts below.

Although the point was not very distinctly dealt with, their Lordships think that there was jurisdiction in the Chief Commissioner to entertain the proceedings for revision. So far as they are at liberty to deal with the point as to descriptions and parcels, they have arrived at the same conclusion as the Chief Commissioner, who has sufficiently expressed the reasons which have influenced them in coming to that conclusion. But the real question is whether there was jurisdiction to get so far and review what, in certain aspects at all events, was a decision on a question of fact. Their Lordships are of opinion that S. 115 of the Civil Procedure Code conferred such jurisdiction under the circumstances of this case. They think that the respondent was entitled to apply for a review on the ground that the lower Courts acted in the exercise of their jurisdiction with material irregularity within the meaning of S. 115 (c) of the Code of Civil Procedure. The suit was one in which the plaintiffs claimed the bighas in dispute under a mortgage from Musummat Fatima. They asked for a declaration of title and for possession, and justice required that they should have made Fatima a defendant. The main question was whether she had included the bighas in the mortgage deed. In their Lordships' view it is far from clear that under the terms of the deed she did. There are suits of a class in which a decree of this kind might possibly be made in the absence of the mortgagor for what it is worth. But their Lordships are of opinion that

the present is not a suit of such a class. The very question is whether Fatima ever conveyed the bighas to the alleged mortgagees, and it was a material irregularity to decide it in the absence of Fatima herself. Under the circumstances, the Chief Commissioner had the power to make such order in the case as he thought fit. On consideration of the mortgage deed and the evidence, he has held that the appellants, on whom as plaintiffs in ejectment the burden of proof lay, have failed to make out their title. Their Lordships agree with him in thinking that the suit ought to be dismissed. They agree, also, with his direction as to costs, but they think that the respondent is entitled to have the costs of this appeal. Accordingly, they will humbly advise His Majesty that this appeal should be dismissed with costs.



In the Privy Council.

DEWAN BAHADUR SETH UMED MAL, SINCE
DECEASED (NOW REPRESENTED BY SOBHAQ
MAL), AND OTHERS

v.

CHAND MAL.

DELIVERED BY VISCOUNT HALDANE.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.
1926.