

*Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Syed Lutf Ali Khan v. Futteh Bahadoor and others, from the High Court of Judicature, at Fort William, in Bengal; delivered 6th April 1889.*

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Present :

LORD HOBHOUSE.

LORD MACNAGHTEN.

SIR RICHARD COUCH.

[*Delivered by Sir Richard Couch.*]

The Respondent Futteh Bahadoor was the proprietor of two thirds of a revenue free estate, consisting of Mouzah Jugdispore and other mouzahs and dependencies, of which he had inherited one half and had purchased the other half. He was also the proprietor of the whole of a revenue paying estate called Ranipore. On the 14th July 1875 he executed a mortgage bond in the usual form, by which, after stating that he had borrowed Rs. 35,000 on interest from Haji Nawab Syed Velait Ali Khan (the 2nd Respondent) stipulating to pay interest at 1 rupee per cent. per mensem and mortgaging, pledging, and hypothecating the shares of the mouzahs specified below owned and possessed by him, he declared that in case of non-payment of the principal on the completion of two years, or within that period, Velait Ali Khan should be at liberty to realize the principal with interest by instituting a suit and obtaining a decree, and executing the same till the reali-

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zation of the whole of the decretal amount from the property mortgaged in the bond, and in case of its not being sufficient, from other immovable properties and from his person. The mouzahs specified below were Ranipore one third share, Jugdispore one third share, and one third share of seven other mouzahs. On the 18th December 1877 Futteh Bahadoor executed a similar mortgage of another one third share of Ranipore and of the same one third of Jugdispore to Juggernath Singh (the 3rd Respondent), and another person named Baijnath Singh, to secure repayment in one year of Rs. 7,000, with interest at 3 per cent. per mensem.

In 1878 Velait Ali Khan sued Futteh Bahadoor for Rs. 47,964. 7. 1. 12, principal and interest due on his mortgage. On the 20th December 1878 Futteh Bahadoor filed a petition stating that Rs. 4,645. 3. 2. 8 had been remitted by the Plaintiff out of the money claimed, on condition that the petitioner should pay the whole of the principal amount, with costs, and interest at the rate of 1 rupee per cent., on the 20th December 1879, and praying that according to this admission of claim the case might be decreed in favour of the Plaintiff, allowing the mortgage of the property to stand. And on the same day the Court made a decree in accordance with this agreement. Default having been made in payment of the money, Velait Ali Khan in 1880 took proceedings for execution of the decree, and, on the 9th April 1880, the Court issued an order for attachment of the right and interest of the judgment debtor, "comprising" the one third of Ranipore and one third of Judispore "mortgaged in the bond and decree." The other mouzahs are not mentioned, and it does not appear that anything has been done in respect of them. The attachment was made

on the 20th May 1880. In the meantime Jugul Kishwar, who seems to have taken the place of Baijnath Singh, and Juggernath Singh, had, on the 2nd April 1879, obtained a decree against Futteh Bahadoor on the second mortgage bond, in execution of which, on the 13th July 1880, an order was issued to attach one third "the right and interest of the debtor" out of the entire of mouzah Jugdispore, &c., and one third "the right and interest of the debtor" in mouzah Ranipore. The attachment of Jugdispore was made on the 6th, and of Ranipore on the 10th August 1880.

The 22nd November 1880 was appointed for the sale in both executions. On that day Futteh Bahadoor petitioned that both sales should be postponed. In the case of Velait Ali Khan the sale was postponed until the 15th January 1881. In the case of Juggernath Singh no order was made, and the sale was held on the 22nd November. The notification of sale stated that the property to be sold was mortgaged in 1875 to Velait Ali Khan. One Gunga Pershad, who was at that time in the service of Juggernath Singh, bid Rs. 9, one or two other persons having offered less, and there being no higher bid he was declared the purchaser. On the 19th February 1881 Gunga Pershad executed a deed of sale of what he had purchased to Ram Padaruth for Rs. 100, and on the 21st February he presented a petition to the Court praying that, in lieu of his own name, the name of Ram Padaruth might be entered, and the sale certificate granted and possession delivered to him. Accordingly, on the 24th February, it was ordered that possession should be delivered to Ram Padaruth, the certificate auction purchaser. This was done in the usual form on the 3rd March; but there never was any actual change of possession,

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Futteh Bahadoor remaining in possession all the time.

According to the evidence of Gunga Pershad, Futteh Bahadoor was the real purchaser, Ram Padaruth's name being used by him. The First Court considered that Ram Padaruth must be held to be the real purchaser, but the High Court, on the appeal, did not agree in this, and held that Ram Padaruth was a benamdar for Futteh Bahadoor. Their Lordships agree in this with the High Court, which properly remarked that Ram Padaruth had not ventured to come into the witness box to say that it was really a purchase by him on his own account.

The sale in execution of Velait Ali Khan's decree, which decree it has been stated was made by consent upon his agreeing to relinquish part of his claim and give time for payment of the remainder, took place on the 15th January 1881. At that sale the Appellant became the purchaser of the share of Ranipore for Rs. 12,000, and of the share of Jugdispore, &c., for Rs. 36,000; the sum to be realized by the execution being Rs. 61,265. 6 pies, and there was consequently not sufficient to satisfy the sum due on mortgage by upwards of Rs. 13,000. The sale was confirmed by an order dated the 28th March 1881, and on the 12th September 1881 the bailiff of the Court was ordered to put the Appellant, being the certificated auction purchaser, in possession of the properties. On the 25th October 1881 the nazir reported that he had given formal possession, but the Appellant was unable to obtain actual possession, and on the 9th October 1882 he instituted the present suit, and claimed a decree for possession of the share of Jugdispore, &c., or, if that was not granted, a decree for Rs. 36,000, and interest thereon, to be recovered from the disputed property. He also claimed a similar decree in respect of the

share of Ranipore, but there is no question in this appeal about that property, he having obtained a decree for possession of it.

The Subordinate Judge, acting on his finding that Ram Padaruth was the purchaser, ordered that if he did not pay Rs. 36,000, with interest up to the 3rd of April 1884, the Plaintiff should have power to put up to sale the third share of Jugdispore, &c., for the realization of that amount, and also that it might be recovered from his person and property. Ram Padaruth appealed to the High Court, which held that the decree could not be made against him, a mere benamdar for the original mortgagor, and that a decree should be made, giving the Plaintiff "the benefit of that to which he is entitled, namely, his mortgage lien," and they directed an inquiry as to how much of the mortgage was properly chargeable upon that portion of the property which formed the subject of that appeal, and directed that so much of the mortgage debt might be realized by the sale of that property.

This direction and the Enquiry upon which it is consequent seem to be founded on some misapprehension. The High Court treat the Appellant as mortgagee in respect of his purchase, and at the same time refuse to give him a charge for the full amount of his purchase money. As between the Appellant and the other parties to the suit there can be no ground for apportioning the original mortgage debt in the manner proposed.

A question of general importance, on the law relating to Indian mortgages, and one on which the Courts in India are not altogether agreed, was raised by the learned Counsel for the Appellant in the course of his argument. Their Lordships, however, do not think it necessary to go into any general question. In their view the decision of

the present case must depend on its own special and peculiar circumstances.

Upon the facts which have been stated, they are of opinion that it would be contrary to equity to allow Futteh Bahadoor to set up against the title of the Appellant any right to possession as acquired by his purchase from Gunga Pershad. The sale to the Appellant was in the execution of a decree which was made to give effect to a compromise between the mortgagor and the mortgagee. He undoubtedly acquired by his purchase a right to possession against the mortgagor, and the mortgagor ought not to be allowed to defeat that by having purchased the interest which was sold in execution of the decree upon the second mortgage.

The High Court, instead of varying the decree of the Lower Court in the manner it has done, should, in their Lordships' opinion, have varied it by decreeing possession of the share of Jugdispore, &c., as there described, in the same manner as possession of the share of Banipore is decreed, with the like order as to mesne profits and costs.

Their Lordships will humbly advise Her Majesty to order the decree of the High Court to be varied accordingly. The Respondent Futteh Bahadoor will pay the costs of this appeal.

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