Privy Council Appeal No. 70 *of* 1919.
Oudh Appeal No. 8 *of* 1915.

M. Ehtisham Ali, for himself and in place of M. Sakhawat Ali, since deceased - - - - - - *Appellant*

v.

Jamna Prasad, since deceased, and others - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH JULY, 1921.

Present at the Hearing:

VISCOUNT HALDANE.
LORD PHILLIMORE.
SIR JOHN EDGE.
SIR ROBERT STOUT.

[*Delivered by* LORD PHILLIMORE.]

Ehsan Ali Khan, being in possession of a bazaar called Ehsaganj, mortgaged it to Sheo Prasad by a mortgage dated the 9th November, 1873, and further encumbered it with charges in favour of the mortgagee, the total amounting to Rs. 2,073. The mortgage was a usufructuary one, and the mortgagee was put in possession of the bazaar. Along with the bazaar certain other properties were also mortgaged. On the 13th December, 1882, Ehsan Ali Khan is said by the plaintiff, who is the present appellant, to have sold the property, subject to the mortgage and charges, to the appellant's predecessors in title for Rs. 3,000; it being calculated that Rs. 2,800 would be the amount of the encumbrances with interest and costs and Rs. 200 the value of the equity of redemption. Therefore only Rs. 200, as the plaintiff alleges, was paid to Ehsan Ali Khan. The devolution of the property thus sold, if it was in fact sold, from the original vendees to the appellant is not in dispute.

On the 16th October, 1911, the plaintiff (the present appellant), with another co-plaintiff whose interest he has since acquired,

instituted this suit, claiming under the alleged deed of sale and the subsequent devolution to be representatives of the original mortgagor, against the respondents, who are the representatives of Sheo Prasad, the original mortgagee; asserting their title to redeem and alleging that upon the true taking of the accounts the mortgage charges had been fully paid off, that certain terms as to interest and compound interest were penal or illegal, and that, in truth, money was due to them from the representatives of the mortgagee. They prayed for possession, for a decree for the surplus amounts and for other relief.

The defendants traversed the statements in the plaint and pleaded that the alleged deed was not genuine or for consideration; that no right accrued from it to the vendees; that they did not pay any consideration money to Ehsan Ali Khan and refused to complete; that, accordingly, Ehsan Ali Khan cancelled the deed and retained his interest; that he in fact dealt with it subsequently by further charges in favour of the mortgagee and by professing to sell it over again to Wasi-uz-zaman, who also in his turn repudiated the sale because the property was not worth it; and they relied upon the supposed adverse possession of Ehsan Ali Khan. They further said that on some occasion without date, but subsequent to the transactions already mentioned, Ehsan Ali Khan finally sold to them his equity of redemption for Rs. 10, and, somewhat inconsistently, they said that the heirs of Ehsan Ali Khan, who by this time was dead, were necessary parties to the suit. However, they offered no evidence in support of the Rs. 10 story. Upon these pleadings the Subordinate Judge framed twelve issues, of which the first, sixth and tenth are material for the purpose of the present appeal. They are as follows:—

> "1. Whether plaintiffs are purchasers of the rights of the mortgagor, Ehsan Ali Khan, by deeds dated the 13th December, 1882, the 10th January, 1909, and the 16th February, 1911.
>
> "6 (*a*). Are the plaintiffs' deeds of sale invalid for being without consideration and because they have not been acted upon?
>
> "(*b*) Can defendants raise this plea?
>
> "10. Are the sons of Ewaz Ali Khan and the heirs of Ehsan Ali Khan necessary parties to the suit?"

During the trial the plaintiffs stated that the original sale deed was lost, but that it had been registered; and they offered as secondary evidence a copy certified by the registrar; and the first matter to be determined is whether the copy could be admitted as secondary evidence. The plaintiffs, for the purpose of proving the loss, called the son of Ewaz Ali Khan, who deposed that he, on behalf of himself and his brother, sold their share of the property to the second plaintiff, the present appellant; that he was asked to hand the sale deed over; that he had seen it among his father's papers; that he searched for it and could not find it. They also called another witness who had acted as agent in the matter, who said that he had asked the son for the deed; that he understood that he searched for it, but he said he could not find it. Neither

of these witnesses was cross-examined. But the case made by the defendants in their written statement was insisted upon, namely, that the deed had not been kept by the vendees, but had been handed back to Ehsan Ali Khan because the transaction had become abortive. No evidence, however, was given to prove this contention as a substantive fact except evidence to show that, as pleaded, Ehsan Ali Khan had subsequently to the alleged transaction dealt with the property as if he had not sold it and in the manner pleaded in the defendants' written statement.

In these circumstances the Subordinate Judge accepted the evidence that the deed was lost, and allowed the copy from the register to be admitted as evidence. The plaintiffs then put it in, and, further, produced two witnesses who swore that they had seen the deed signed and Rs. 200 paid over. These witnesses were the servants of one Imtiaz Ali, a gentleman of position, and an uncle of the plaintiff, Sakhawat Ali. And it appeared in evidence that Imtiaz Ali had negotiated the sale probably with a view to the benefit of his nephew. His servants therefore might very naturally have had knowledge of the transaction. There were three witnesses to the deed, but it was proved that they were all dead. It was not disputed that the copy produced at the trial was a correct copy from the register, and that the deed had apparently been registered with all due formalities, though there was no indication upon the register that the Rs. 200 had been paid over in the presence of the Registrar. The Subordinate Judge therefore held that the sale of the property had been effected, and he considered it immaterial whether or not the Rs. 200 had been paid, though apparently he thought that they had. As regards the defence resting upon the alleged subsequent dealings by the original mortgagor with the property, he considered that they were immaterial, as he said "Ehsan Ali had sold his property and had no interest left in it. He was no longer concerned with that equity of redemption. Being a statement in his own favour, Ehsan Ali himself could not use it in his own favour, much less could the defendants use it." He accordingly declared that the plaintiffs had a right to redeem, and proceeded to take the accounts. He found that the mortgage had been fully discharged, so he gave the plaintiffs possession without payment of any sum to the defendants, and further gave them a decree for recovery of Rs. 9,012 and their costs.

From this decree the defendants appealed to the Court of the Judicial Commissioner of Oudh. The learned Judges of this Court dealt only with the preliminary question. They said: "We are not satisfied that the plaintiffs have succeeded in satisfactorily establishing the loss of the original sale deed, or in proving that they have a subsisting right to the equity of redemption. The decision of other matters is unnecessary." They accordingly dismissed the suit with costs. From this decision the present appeal to His Majesty in Council has been brought.

The view taken by the learned Judges in the Court below was that the statement of the two old servants could not be trusted:

that there were no account-books produced to show the payment of the Rs. 200; that no explanation was made of the delay in redemption; that the subsequent dealings by the mortgagor were inconsistent with his having made any previous real sale; that he settled accounts from time to time with the mortgagee as if he were still liable to him; that they could not accept the statement of the son of Etwas Ali Khan as to his having seen the deed at one time and searched for it later; that the heirs of Ehsan Ali had not been examined, and the Court was not in a position to say that the non-production of the original sale deed had been sufficiently accounted for. They went so far as to determine that the Rs. 200 had not been paid to the mortgagor; and they seem to have thought that the mortgagor could be considered in adverse possession, and that therefore the defendants could rely on the statutes of limitations after twelve years, and that the heirs of Ehsan Ali Khan ought to have been made parties to the suit. They further said that a surrender of rights by the return of a sale deed was not uncommon in that country, and that a sale might become inoperative by surrender or the failure of the parties to enforce it.

It will be seen from this that the two matters of the admissibility of secondary evidence of the deed, and what ought to be deemed to be the truth of the original transaction, run into one another.

It is, no doubt, not very likely that such a deed would be lost, but in ordinary cases, if the witness in whose custody the deed should be deposed to its loss, unless there is some motive suggested for his being untruthful, his evidence would be accepted as sufficient to let in secondary evidence of the deed. And if in addition he was not cross-examined, this result would follow all the more. There is no doubt that the deed was executed, for it was registered, and registered in a regular way, and it is the duty of the registrar, before registering, to examine the grantor, or some one whom he is satisfied is the proper representative of the grantor, before he allows the deed to be registered. There can be no doubt, therefore, that Ehsan Ali Khan executed the deed and was party to its registration, and in the deed there is an admission that he has received the Rs. 200, which would be the full consideration as the vendee had to take upon himself the liability for the mortgage money. He says in the deed that he has received the consideration money in full, and that out of it he has left Rs. 2,800 with the vendees for the purpose of making payment to the mortgagee and defraying Court expenses, and that he has no further claim to the property sold or the consideration money. That he should have taken part in having such a deed registered if he did not receive the consideration money is highly improbable. At any rate, the burden is on him and on people claiming under him to prove that what apparently happened did not happen. And when the Judges in the Court of Appeal say that the heirs of Ehsan Ali Khan have not been examined, they apparently forget that if the defendant's case were true and the deed had been returned to Ehsan Ali Khan as valueless, it ought to be in the

possession of his heirs or assigns ; and some evidence ought to have been offered on the part of the defendants to show that this was so or had been the case. When it is further remembered that a part of the defence was that the defendants had finally bought the equity of redemption, it would appear that they themselves ought to have got the deed and produced it from their custody as part of their case.

While making these comments, their Lordships reserve their opinion as to the value of a defence founded upon such a transaction as the defendants set up. Certainly in law no title would pass under it, for immovable property of this value can only be transferred by a registered deed, and when a deed of sale has been once executed and registered it can only be avoided by a subsequent registered transfer. Whether in some form of suit (not this one) between some parties any equitable relief could be got out of such a transaction it is unnecessary to pronounce, for in their Lordships' opinion it was not proved.

As to the alleged subsequent dealings by Ehsan Ali Khan with the property, they could not, if regarded as declarations in his own favour, be received in evidence on behalf of those claiming under him, any more than they could be received if he were himself the defendant. They could not be regarded as acts of ownership so as to prove adverse possession, because he never was in possession, the possession remaining in the mortgagee.

As regards the duty to make Ehsan Ali Khan's heirs parties, subject to one contention raised at the Bar on behalf of the respondents, their Lordships have no hesitation in saying there was no such duty. The plaintiffs sought to redeem : they had to make out their title to redeem, and they gave prima facie evidence. It was for the defendants to rebut it, and call in answer evidence, if there was any, in rebuttal. Moreover, the defendants had dispensed the plaintiffs from any necessity, if there ever had been any, to make Ehsan Ali Khan's heirs parties, because they themselves pleaded that all their rights had been transferred for Rs. 10.

The one circumstance to be considered was that suggested at the Bar, that the original mortgage was not only of the bazaar but of other properties, and that the plaintiffs only claimed title to redeem the bazaar. This, however, in no way injuriously affects the title or interest of anyone to whom the equity of redemption in the other properties has passed. The plaintiffs could not divide the liability for the mortgage between the properties. They could only redeem the one property on payment of the charge upon the whole. This they were entitled to do. The owners of the equity of redemption in the other properties have to this extent the benefit of the plaintiff's redemption.

It might be doubted—their Lordships do not propose to decide it—whether any of the evidence given on behalf of the defendants to the effect of the subsequent dealings by Ehsan Ali Khan with the property was admissible ; but if it is to be looked at at all, it contains some material which is actually helpful to

the plaintiff. It has been said that the mortgagee subsequently endeavoured to sell the property to one Wasi-uz-zaman. This man says that he knew that Ehsan Ali Khan had sold the property, as he expresses it, in Imtiaz Ali's family, and that when the sale deed was talked of to him he said he would have nothing to do with it, because the property had been already sold, which means that though a sale deed to him was executed, he gave up acting upon it when he found that the property had been previously sold. It is remarkable that in the copy of the sale deed to him, which purports to recite all the previous facts, the date of the sale deed on which the appellant relies, is misstated, which is not consistent with its being, as alleged, back in the possession of Ehsan Ali Khan.

The one remaining circumstance in favour of the defendants is that this suit is brought after so long a delay; but it is well within the period of limitation for the redemption of mortgages; and, at any rate for a time, the margin of value after the encumbrances were discharged was small. The defendants were in possession and would have to account for all that they received, and it might have been thought best to wait till the defendants had accumulated a sufficient balance to make it worth while to redeem and to have the accounts taken.

Upon the whole, their Lordships can see no reason for disagreeing with the Subordinate Judge who saw the witnesses. There being no positive evidence to contradict them, the defendants' case rests upon suggestion only; therefore their Lordships think the plaintiff made good his title to redeem.

With regard to the terms on which he should redeem—that is, how the accounts should be taken, whether there should be allowance made for penal or illegal interest and so forth—as these matters were not gone into in the Court of Appeal, their Lordships cannot make, and have not been asked to make any pronouncement upon them. The matter must be remitted to the Court of the Judicial Commissioner. Their Lordships will therefore humbly recommend His Majesty to allow this appeal, and to remit the case to the Court of the Judicial Commissioner to decide the other points raised on appeal from the Court of the Subordinate Judge; and that the plaintiff do have his costs in the Court of Appeal and of the appeal to His Majesty, and that the other costs be left to be disposed of by the Court of the Judicial Commissioner.

In the Privy Council.

M. EHTISHAM ALI, FOR HIMSELF AND IN PLACE OF M. SAKHAWAT ALI, SINCE DECEASED.

v.

JAMNA PRASAD, SINCE DECEASED, AND OTHERS.

DELIVERED BY LORD PHILLIMORE.

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