

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Nugenderchunder Ghose and others v. Sreemutty Dossee and others, from the High Court of Judicature at Fort William, in Bengal; delivered July 17, 1867.*

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Present:

MASTER OF THE ROLLS.

SIR JAMES W. COLVILLE.

SIR RICHARD T. KINDERSLEY.

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SIR LAWRENCE PEEL.

THIS is an Appeal from a Decree of the High Court of Judicature at Fort William of 15th December, 1862, reversing the decision of the Zillah Judge. The question is whether, under the circumstances set forth in these papers, the Appellant is entitled to have a lien upon the talook described as Turruff Kalikapore, recorded as No. 109, as against the Respondents, who are interested in that talook, in respect of the arrears of revenue due from that talook, which have been paid by the Appellant.

The Respondents do not appear, and it is therefore incumbent on the Court to examine closely whether the Appellant has made out his case and has established his right to have the talook sold to discharge that amount.

The facts are shortly as follows:—Hurrololl Mitter had become the owner of this talook by purchase previously to the year 1842.

In May 1842 he executed a mortgage in due form to Nobokisto Sing to secure 43,340 rupees with interest at 12 per cent. per annum.

Hurrololl Mitter, the mortgagor, died, leaving Sreemutty Kaminee Dossee, his widow, surviving

him. She had no child, and after his death continued in possession of his talook as his widow.

Hurrololl Mitter, however, had had a daughter by a previous marriage, the Respondent, Sreemutty Dossee, who is the mother of two infant sons, the grandsons of the mortgagor, Hurrololl Mitter. Nobokisto Sing, the mortgagee, died shortly afterwards, and left Sreemutty Gourmonee Dossee, his widow, who in that character became entitled to all the rights of her husband as mortgagee of this talook.

The revenue due to the Government for this talook was not paid by the widow of Hurrololl Mitter the mortgagor, and in December 1849 10,317 rupees were due in respect of such revenue.

In consequence of the non-payment of this arrear the talook would have been put up for sale by the Government Collector, and would have been sold according to Act I of 1815, discharged from the mortgage and from all other incumbrances. In order to save the mortgage and the talook, Gourmonee Dossee borrowed from Anundonarain Ghose, on the last day for payment of the revenue, which was the 28th of December, 1849, the amount necessary to discharge the revenue, viz., 10,317 rupees, and he deposited that amount with the Collector just before sunset on that day.

The Appellants are two of the sons and heirs of Anundonarain Ghose, who is dead, claiming under a transfer made to one of them by Gourmonee Dossee of her rights to and interests in the talook, under her Decree against Kaminee Dossee of the 29th March, 1853, which will be afterwards mentioned; and accordingly they have the same rights and powers which she possessed as regards this talook under that Decree, and not further. The question there is the same which is raised on this Appeal, viz., whether the Appellants are entitled to a charge on this talook, and to have it sold in its entirety to pay the amount of the money so paid to the Government Collector in December 1849.

For the purpose of determining this question, it is desirable to consider what, after such payments, the rights of Gourmonee Dossee were against Kaminee Dossee and the talook itself, and the course she adopted.

Considering that the payment of the revenue by

the mortgagee will prevent the talook from being sold, their Lordships would, if that were the sole question for their consideration, find it difficult to come to any other conclusion than that the person who had such an interest in the talook as entitled him to pay the revenue due to the Government, and did actually pay it, was thereby entitled to a charge on the talook as against all persons interested therein for the amount of the money so paid. But their Lordships are of opinion that this is not the form in which the question comes before them, and that what they have to decide is not whether such a charge originally existed or whether it does now subsist, but whether the Appellants can enforce such a charge in the present suit. For this purpose it is necessary to refer to the steps taken by Gourmonee Dossee to obtain payment. There were two courses open to her: she might have instituted a suit to enforce the mortgage and to tack to the mortgage the amount of the revenue paid by her to save the estate, and to have the estate sold to pay that amount; or she might proceed under the ninth section of Act No. 1 of 1845. She might probably have united both these objects in one plaint; but the course which she did adopt was to sue the widow Kaminee alone, under the ninth section of the Act No. 1 of 1845, not making the persons interested in the reversion after her decease party-Defendants to that suit, and not praying that the talook in its entirety might be sold to pay the amount due to her.

The Plaint is set forth in page 7; it does not raise any claim against the estate itself, the claim is against the widow Kaminee personally. It states, first, that the female Defendant, for the purpose of doing away with the mortgage loan, threw the talook into arrears, and was endeavouring to have it sold; secondly, that the female Plaintiff, for the purpose of protecting her rights, and preserving the talook from sale, borrowed the money from the father of the present Appellants, and caused the payments to be made. The words of the Plaint which follow are these: "The female Plaintiff has paid the money which the female Defendant ought to have repaid. The Plaintiff has frequently called upon her for it, but no payment at all is made up to this time;" therefore, after stating the amount the Plaintiff



proceeds thus: "for the recovery of which amount this suit is instituted against the female Defendant, and Plaintiff prays that the amount claimed, together with the interest thereof, due to the date of liquidation, be paid to her." The Answer to the Plaintiff merely contests the debt. It contends that no money was due on the mortgage, and that this would appear to be the case in a suit which had been instituted by the Defendant against the Plaintiff, seeking for an account against the Plaintiff as the executrix of the husband of the Defendant. It is solely an answer directed to meet a personal claim, and accordingly the reply is to the same point, and relies on the ninth section of Act 1 of year 1845. That section is to this effect:—

"It is hereby enacted that the Collector shall, at any time before sunset of the latest day of payment, receive as a deposit from any party not being a proprietor of the estate in arrear, the amount of the arrear of revenue due from it, to be carried to the credit of the said estate at sunset as aforesaid, unless before that time the arrears shall have been liquidated by a proprietor of the estate. And in case the party so depositing, whose money shall have been credited to the estate in the manner aforesaid, shall be a Plaintiff in a suit pending before a Court of Justice for the possession of the sum, or any part thereof, it shall be competent for the Judge of the Zillah in which such estate is situated, to order the said party to be put into temporary possession of the said estate, subject to the rules in force for taking security in the case of Appellants and Defendants. And if the party depositing, whose money shall have been credited as aforesaid, shall prove before a competent Civil Court that the deposit was made in order to protect an interest of the said party which would have been endangered or damaged by the sale of the estate, he shall be entitled to recover the amount of the deposit with interest from the proprietor of the said estate." (Act No. 1 of 1845, sec. 9).

This section, therefore, clearly authorizes the personal action, but it gives no remedy against the land, which it leaves to the then existing law.

The Decree which was made in this suit is, as might be expected, no Decree against the land, but it is a general Decree against the Defendant

Kaminee. It is in these words:--“ Let the female Plaintiff get the money claimed and interest due from date of suit to day of payment, and costs, together with interest, according to practice, from the female Defendant. Costs on the part of the female Defendant are charged to her.”

This decision was appealed from, and affirmed ; but the only point which seems to have been argued and decided in that suit, either on the original hearing or on the appeal, was whether while the other suit already mentioned was pending, for an account between the same parties, and in which Kaminee Dossee, Defendant in this suit, claims a large balance to be due to her from Gourmonee Dossee, the Plaintiff in the suit which is the foundation of the present proceedings, Plaintiff, as mortgagee, before the fact that anything was due to her had been ascertained, had such an interest in the talook as entitled her to pay the arrears of the revenue. If she had, it followed as of course that under the 9th section of the Act 1 of 1845, already mentioned, she could recover the amount in the suit in question.

Shortly after this Gourmonee Dossee assigned the Decree and all rights under it to Girenderchunder Ghose, the son of Anundonarain Ghose, in consideration of the money lent to discharge the arrears, in whose place subsequently the Appellants, the sons of Anundonarain, were substituted, and who have all the rights that Gourmonee Dossee possessed.

When execution was sought to be enforced against Kaminee Dossee, by a sale of the whole talook, the Respondent Sreemutty Dossee, the daughter of Hurrololl Mitter, and the mother of his two grandsons, intervened to prevent the sale of the entirety, insisting that as Kaminee Dossee was a childless widow, the son of Sreemutty Dossee, who was then a minor, had a reversionary interest in the talook, which could not be sold to pay a personal debt of Kaminee Dossee. When the intervention took place, it appears that then for the first time, the holder of the Decree, raised the claim that as the talook in its entirety had been saved from sale by the payment of the arrears of the revenue, the talook in its entirety was liable to be sold in order to obtain repayment of that amount.

This question was brought before the Principal Sudder Ameen in March 1856.

He was of opinion that, under that Decree, the claim could not be maintained. He refers to a case in the Sudder Dewanny Adawlut a decision of 16th May, 1841, which determines that a Decree against a Hindu widow cannot be executed against the estate of her deceased husband, except when it is clearly specified in the Decree that the estate is liable for it. The case, when referred to, fully bears out this construction. The words of the Judgment are these: "The Decree is against B for himself—not against B as guardian of C, then a minor. B had only a life estate as widow, and the family property is not liable to sale for the personal debts. Whether this was originally a personal debt has not been judicially determined. But the Decree as it stands is against B personally, and can issue only against her and her heirs. C is not her heir, and the family property is not her property, nor can that property be held liable till a Decree be given for it." (Rajah Hurrendronarain Roy, p. 8.)

The result of this decision was, that the application to make the talook generally liable to pay the debt was refused, on the ground that the question could not be taken into consideration in an execution case, but that the question ought to be determined in a civil action. This order was affirmed on appeal. Shortly after this the present Appellants were substituted for Girenderchunder Ghose; and thereupon in August 1859 the suit was instituted on which the present Appeal has arisen. It was instituted by George Smoult Fagan, who had been intermediately appointed receiver of the estate of Anundonarain Ghose, deceased. The plaint in this suit is set out in page 5 of Appendix, in the following terms:—

"The particulars of the case are these:—

"The Defendant Gourmonee Dossee borrowed a sum of money from the estate of Anundonarain Ghose, deceased, to pay the rent of talook No. 109, Turuff Kalikapore and others, as per the touzee of the Collectorate of this zillah, the annual Sudder jumma of which is 25,730-3½ rupees, for the protection of her interest as mortgagee of the talook. For the recovery of the said sum of money, she obtained a Decree from this Court in suit No. 97 of 1851, against the Defendant Kaminee Dossee, which Decree the Decree-holder Gourmonee transferred to Govind Chunder Ghose, the then receiver to the estate of Anundonarain Ghose under a deed of



conveyance executed on the 17th February, 1855, in lieu of the money due from her to the said estate. When, consequent on the execution of the Decree by the said receiver, a proclamation for the sale of the talook was issued, objections were raised by Sreemutty Dossee and the fictitious putneedars Defendants, whereupon by a summary order passed on the 18th of March, 1856, the sale of the talook was stayed. Hence has arisen the cause of this suit. I, as the present receiver to the estate of Anundonarain Ghose, bring this suit to recover the amount of the said Decree, together with interest and costs according to the scale below furnished."

But this plaint does not seek to obtain a determination that the money paid for the arrears of the revenue constituted a charge upon the talook: all that it does is to constitute a suit to recover the amount of the Decree, with interest and costs, and to have the talook sold for that purpose. The manner in which this is put by the Judge of the Civil Court is, that the suit is, by the agreement of all parties, wholly contingent on the Decree obtained in the first suit. He states that the Decree "was not one in restriction of the remedies open to the Plaintiff, so as to confine the Decree-holder to remedies personal to Kaminee Dossee, she was in possession of the estate. The action was brought against her in that character and capacity, and the law makes the proprietary interest responsible for any sums advanced to protect an interest in the estate. The Decree being passed upon the recitals in the declaration, that cannot now be impeached upon statements that no mortgage existed; we must take the fact as found, the case having gone to Decree against Kaminee, as the party in possession of the estate." (Appendix, page 144.)

The Judge then proceeds, after showing that the action was one not merely personal against Kaminee, but that it also bound her, in her character as possessor, to answer all the issues in favour of the Plaintiff with costs, as between the Plaintiff and Kaminee Dossee and Sreemutty Dossee. From this Decree an Appeal was preferred to the High Court of Judicature, when on the 13th December, 1862, a Decree was pronounced reversing the decision of the Court below. It is important to observe that in

the opinion of the Judges of the High Court they had not to decide the question whether, by payment of the rent in arrear, the person who had such an interest in the talook as to entitle him to pay the arrear, and who thereby saved the talook from being sold, did not thereby acquire a lien or charge on the talook to the extent of the money so paid and interest thereon, but that the question they had to decide was simply and merely whether that equity could be enforced in a suit brought under the provisions of section 9 of Act 1 of 1845, which was confined to the object authorised by that section, and which did not proceed against the persons who had an interest in the property in succession after the death of the widow in possession. This will appear plain by the passage in the Judgment at the bottom of page 176 and top of page 177, which is to this effect, viz., "the only point which we have to determine in this Appeal is, whether as the Decree in the suit brought against Kaminee Dossee by Gourmonee Dossee for the recovery of a sum of money paid to protect her own interests as mortgagee, and to save the estate on which she held the mortgage from sale, though personal in its terms against Kaminee Dossee, does or does not, under section 9, Act 1 of 1845, give, to use the Judge's terms, to the Decree-holder a statutory lien on the estate. Were the case one of first impression, we should even then have little hesitation, looking to the plain terms of the law, which simply gives a right of action against the proprietors of the estate in declaring that the Decree in a suit brought under the section of the law above cited is only a personal one, and gives no equitable lien on the estate to the Decree-holder, so that the property itself, in the hands of the person on whose account the payment was made, or any purchaser from him, is liable for the amount decreed."

They proceed to point out a distinction between the case cited by the Respondent in that Appeal and the present case, and they decide that the Decree against Kaminee Dossee was a personal one against her, and that consequently the action of the Court in execution must be confined to her interest in her husband's interest in the estate, and that the rights of Kaminee's husband in the estate, or the portion of the estate upon which an equitable lien



was acquired, cannot be brought to sale. They, therefore, reverse the decision of the Court below, and allow the Appeal of Sreemutty Dossee with costs. Upon the fullest consideration that their Lordships have been able to give to this case they are of opinion the Judges of the High Court came to a correct conclusion as to the construction of Section 9 of Act 1 of 1845, and that the decision of the High Court was correct, and ought to be affirmed.

They repeat that it is not, in their opinion, the question whether the person who pays the arrear of the rent does not acquire thereby a charge on the talook which he saves from sale, but whether, if he seek to enforce that right, he must not do so in a suit properly framed for that purpose, and not merely in a suit which is confined to a personal remedy against the person in possession of the talook. If the person who so pays the arrears of rent seek repayment only under the ninth section of Act 1 of 1845, as against the person in possession of the talook, who has but a limited interest therein, and confines his suit to that object, their Lordships concur with the opinion of the High Court that the Decree so obtained against the person in possession can only be made effectual against the property of that person, including such interest as she had in the talook.

That this was the character of the suit in this case originally is shown by the pleadings in the case, and by the observation of the Zillah Judge in the passage already cited.

That the present suit, in which this Appeal is presented, was only one supplemental to the original suit, and brought to enforce and extend the Decree so obtained, is also shown by the consideration of the plaint itself, and observations already cited of the Zillah Judge in pronouncing his Decree, which fact is confirmed by the observation of the Judges in the High Court. Their Lordships think that it is impossible for them, in a case where the Respondents do not appear, to upset a decision of the High Court, which, in substance, only affirms that an action brought under section 9 of Act 1, 1845, is only a personal action, and that in an action which was personal against Kaminee Dossee, as the possessor of the talook, only her property and

her interest in the talook can be affected, and that an equity which the Plaintiff possessed, and which she might have enforced against the owners in reversion also, cannot be enforced against them in a suit brought to extend and enforce a personal Decree obtained against the possessor of the limited interest.

Their Lordships wish it to be understood that they leave unimpaired the general rule that in a suit brought by a third person, the object of which is to recover, or to charge an estate of which a Hindu widow is the proprietress, she will, as Defendant, represent and protect the estate, as well in respect of her own as of the reversionary interest. In the present case she is charged by the Plaintiffs with having sought to destroy the estate by causing it to be sold for arrears of revenue. If such a charge be true, the reversioners are entitled to recoup out of her life profits the money which is advanced to avert a sale, if they redeem, as they are entitled to do, the actual salvor; and it would be obviously inequitable for a person with such knowledge of the dealings of the proprietress, determining to save the estate, to seek indirectly its destruction by a sale of the whole estate under an ordinary execution, without giving the reversioners the means of protecting their interests, by making them parties to a suit the object of which, by a mortgagee who advances to save the estate, should properly be to have an additional charge declared in his favour on it, subject to redemption, and in default only of redemption, seeking a sale.

Their Lordships, therefore, will humbly advise Her Majesty that the Appeal ought to be dismissed.

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