

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Byjnath Lall v. Ramoodeen Chowdry and others, from the High Court of Judicature at Fort William in Bengal; delivered 31st January, 1874.

Present:

SIR JAMES W. COLVILE.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.

SIR LAWRENCE PEELE.

THE suit out of which these Appeals have arisen was brought by the Appellant to recover possession and be registered as proprietor of various parcels of land, all of which once belonged to one Gopal Narain Singh, deceased, but had afterwards been purchased by different persons at several sales in execution of Decrees against him. The Defendants were the representatives of Gopal Narain Singh, and the several auction purchasers; and the title on which the Plaintiff sued was based upon a deed of mortgage by way of conditional sale alleged to have been executed to him by Gopal Narain Singh; and upon the proceedings subsequently taken under Regulation 17 of 1806 to foreclose that mortgage.

The principal defences raised in the suit, and indeed the only defences now to be considered, were—1st, that the mortgage deed having been made collusively and without consideration, was fraudulent and void as against the auction purchasers; and, 2nd, that, even if it were good against them, it conferred no title on the Plaintiff to several of the parcels claimed by him.

The Principal Sudder Ameen who tried the cause in the first instance decided the first question in

favour of the Plaintiff, and gave him a Decree for the lands claimed with the exception of some which are now no longer in dispute.

Against this Decree which bears date the 8th of January, 1866, the different Defendants presented four separate Appeals, the Plaintiff also preferring a cross Appeal, to the Judge of Zillah Tirhoot. That officer on the 14th of June, 1867, decided that the Plaintiff had failed to establish that the mortgage deed was executed *bond fide*, and dismissed the suit. His Decree was, however, reversed on Special Appeal by a Division Bench of the High Court, which transferred the regular Appeals for final hearing and decision to itself. There is no further trace of Plaintiff's cross Appeal; but the Appeals of the different Defendants were separately numbered in the High Court as Nos. 96, 100, 101, and 102, and were heard by this Division Bench, consisting of Mr. Justice Kemp and Mr. Justice Jackson, which made a separate Decree in each. On Appeals Nos. 96 and 101, the two Judges were divided in opinion, Mr. Justice Kemp holding that the mortgage was a fictitious transaction in which no consideration passed, and that the suit ought on that ground to be dismissed generally; and Mr. Justice Jackson holding that the mortgage deed was executed *bond fide* and was valid, but that the Plaintiff could recover only such of the parcels claimed as were specifically mentioned in the deed. Accordingly, each of the Decrees originally made on these Appeals stated that the Senior Judge had given a Decree for the dismissal of the suit; but that the Junior Judge dissented therefrom, and was of opinion that the Plaintiff ought to have a Decree for certain of the lands claimed inasmuch as they were included in the mortgage deed; but that his claim to others which were held not to be covered by the deed, should stand dismissed.

In deciding the Appeals Nos. 100 and 102, the two Judges concurred in the dismissal of the suit as against the parties appellant, on the ground that none of the lands sought to be recovered from them were covered by the mortgage deed; touching the validity of which they expressed no opinion.

In this state of things there was a reference to a Full Bench of the High Court, which held that it was only competent to deal with the two Appeals

in which the Judges had expressed conflicting opinions, and with the particular point on which they differed. And having thus limited the reference to the Appeals Nos. 96 and 101, and to the question of the *bona fides* and validity of the mortgage deed, it decided that question in favour of the Plaintiff (the present Appellant). The result was that the final Decrees upon all the Appeals were drawn up in accordance with the principle laid down by Mr. Justice Jackson. The Plaintiff appealed to Her Majesty in Council in each case; but the four Appeals were afterwards consolidated, and have been heard as one Appeal by their Lordships. Of the Respondents those only who were Appellants in Nos. 100 and 101 have appeared here by Counsel.

Mr. Doyne on their behalf insisted that, although they had filed no cross Appeal, they were nevertheless entitled to impeach the validity of the mortgage deed, on the ground that their Appeals were never before the Full Bench of the High Court, and consequently were not affected by the last Decree. Their Lordships do not think it necessary to examine very nicely into the question of right, because they are of opinion that, if the right be conceded, no sufficient grounds for coming to a conclusion upon the *bona fides* and validity of this deed other than that in which the Principal Sudder Ameen, one of the Judges of the Division Bench, and the three Judges who composed the Full Bench of the High Court have concurred, have been laid before them. There may be in the transaction circumstances of suspicion arising out of the position in life, and presumable means of the Plaintiff; but there is no evidence on which their Lordships would feel justified in over-ruling so many concurrent Judgments.

This disposes of the first defence raised in this suit; and the only remaining question is whether the principle applied by Mr. Justice Jackson is correct; or whether the High Court ought to have affirmed the Decree of the Principal Sudder Ameen in its integrity.

To elucidate this question, which is both novel and difficult, it is necessary to consider the facts of the case somewhat more in detail.

Gopal Narain Doss, the mortgagor, was, on the 24th of September, 1860, when he executed the

deed of conditional sale, the undisputed owner of an eight-anna undivided share in an estate consisting of three Uslee Mouzahs, called Gunniporebija, Pemburinda, and Tajpore Ruttumpore, to each of which certain Dakhilee villages were appurtenant. The deed describes him as proprietor of eight annas severally of the two first Mouzahs, and inhabitant and shareholding proprietor of eight annas of Tajpore Ruttumpore, and some argument was sought to be raised on this distinction. Their Lordships, however, conceive that the utmost which it imports is that he may have collected his share of the rents of the two first Mouzahs separately, and the rents of the other Mouzahs jointly with his coparceners, it being perfectly clear from what afterwards took place that his interest in the whole estate was an undivided moiety. In this state of things he executed a conditional sale of "the whole and entire 8 annas out of the whole 16 annas severally of Mouzahs Gunniporebija and Pemburinda," as a security for the sum of 26,050 Company's rupees, expressly excepting from the operation of the deed the 8 annas of Tajpore Ruttumpore and certain Bromuttur and other lands devoted to religious or charitable purposes.

Before the execution of this mortgage, and as early as September 1858, some of the other sharers in the estate had commenced proceedings to effect a Butwara, or partition of the whole estate, under the provisions of Regulation XIX of 1814. The usual proceedings were had, not, as appears from the Collector's proceeding, dated the 31st July, 1862, without disputes between the co-sharers, and objections on the part of Gopal Narain Singh in particular. The partition was finally made by the last mentioned proceeding, which was duly confirmed by the superior revenue authorities. Its effect as regards Gopal Narain Singh was to allot to him, to be held in severalty, and in lieu of his undivided moiety of the whole estate, the whole of Mouzah Pemburinda, the whole of the principal Mouzah of Tajpore Ruttumpore, with a 2 annas and 15 gundas share of its dependency Mouzah Mudwee, the whole of Mouzah Moustafapore, or Joysingapore, a Dakhila, or dependency of Gunniporebijah, and thirty-six beegahs and odd cottahs of other land in the last-named principal Mouzah.

Gopal Narain Singh was duly put into separate possession of these parcels.

He did not, however, long remain in possession. On the 24th of December, 1862, his right title and interest in Mouzah Pemburinda was purchased at an execution sale by Hurreehur Chowdry, now represented by the Respondent Ramoodeen Chowdry and two other persons, who are said to have since come to a compromise with the Appellant. The one-third share of the last-named Respondent in the land so purchased was the subject of the Appeal No. 96.

On the 8th of December, 1864, the right, title, and interest of Gopal Narain Singh in Mouzah Mustafapore was in like manner purchased at an execution sale by the Respondent Ramanoograh, and the land included in that purchase was the subject of the Appeal No. 101.

On the 23rd of December, 1862, the right, title, and interest of Gopal Narain Singh in Mouzah Tajpore Ruttumpore was purchased at an execution sale by the Respondents Moulvie Mahomed Ahsun and Kashee Pershad Singh, and the land included in that purchase was the subject of Appeal No. 102.

And, on the 7th of February, 1865, the right, title, and interest of Gopal Narain Singh in the portion of Mudwee, which was allotted to him on the partition, was purchased at another execution sale by the Respondent Mohunt Parsoo Ram Doss, and that parcel of land was the subject of the Appeal No. 100.

In the meantime the Appellant had proceeded to foreclose his mortgage. The proceedings taken for that purpose began on the 12th of December, 1863, and the final order for foreclosure was obtained on the 12th of December, 1864. Their Lordships think it is established by the evidence that all the purchasers under the execution sales, except the Mohunt, whose purchase was subsequent to the foreclosure, had due notice of these proceedings.

The Principal Sudder Ameen's Decree gave to the Appellant the whole of Mouzah Pemburinda, the whole of Mustafapore, 8 annas of Mouzah Tajpore Ruttumpore, and 193 beegahs and a fraction of Mouzah Mudwee, to which quantity, for reasons which are not now impeached, he reduced the Appellant's claim.

The Decrees under appeal disallowed the Appellant's claim to any portion of the two latter parcels, and gave him only one-half of the share in Pemburinda, which he claimed as against the Respondent Ramoodeen Chowdry, and only 8 annas of Mustafapore.

The principle for which the Appellant contends, and that on which the Principal Sudder Ameen proceeded, is that the mortgagee is entitled to whatever was allotted to the mortgagor on the partition in respect, or in substitution of his undivided 8-anna share in Mouzahs Gunniporebija and Pemburinda, which was the subject of the mortgage, and that this includes all the parcels now in dispute.

The principle on which the High Court has proceeded, and for which the Respondents contend, is, that the Appellant can recover nothing which is not expressly named in and covered by the mortgage deed, and consequently that he can take no part of Mouzah Tajpore and its dependencies, and only an 8-anna share of Mouzah Pemburinda, and an 8-anna share of Mustafapore, the latter being the only portion of Mouzah Gunniporebija which is in dispute.

It will be convenient to consider, first, what in such a case would be the rights of the mortgagee against the mortgagor; and, next, whether the Respondents stand in any better position than the mortgagor.

Now, what was the subject of this mortgage? It was an undivided moiety in two out of three villages forming a joint and undivided estate. The sharers, however do not appear to have been members of a joint and undivided Hindoo family, but to have enjoyed their respective shares (at all events their shares in Gunniporebija and Pemburinda) in severalty. It is therefore clear that the mortgagor had power to pledge his own undivided share in these villages; but it is also clear that he could not, by so doing, affect the interest of the other sharers in them, and that the persons who took the security took it subject to the right of those sharers to enforce a partition, and thereby to convert what was an undivided share of the whole into a defined portion held in severalty.

The partition which actually took place in this case was not one which had for its sole object the

division of the joint estate by metes and bounds, an object which might be effected by the private agreement of the parties. It had for a further object the apportionment of the public revenue assessed on the whole estate, so as to relieve each proprietor from the obligation to pay that revenue *in solido*, and to make him responsible only for the amount to be charged on his separate and defined share. To such a partition the State necessarily became a party, for the protection of the revenue, and it was one which could only be effected by the machinery of the Regulation. The provisions of Regulation XIX of 1814 appear to their Lordships to have been carefully designed to secure a fair partition of the estate to be divided. The division is to be made, in ordinary cases, by a public officer (the Ameen) acting under the orders of the Collector. Even if, under the 22nd section, the terms of the partition are proposed by the parties, or referred by them to arbitration, the law still requires the intervention of the Ameen, before whom the accounts are to be produced and verified, and in whose presence and subject to whose inspection the division is to be made. When the terms have been so settled they must be sanctioned by the Collector, and afterwards by the superior revenue authorities. The partition, after it has been so sanctioned, is declared by section 20 to be final, subject to the power reserved to the Governor-General in Council, by section 25, of directing a fresh apportionment of the revenue in cases of proved error or collusion at any time within ten years after the confirmation of the partition.

Let it be assumed that such a partition has been fairly and conclusively made with the assent of the mortgagee. In that case, can it be doubted that the mortgagee of the undivided share of one co-sharer (and, for the sake of argument, the mortgage may be assumed to cover the whole of such undivided share), who has no privity of contract with the other co-sharers, would have no recourse against the lands allotted to such co-sharers; but must pursue his remedy against the lands allotted to his mortgagor, and, as against him, would have a charge on the whole of such lands. He would take the subject of the pledge in the new form which it had assumed.

It appears, however, to have been settled by decisions, and upon the construction of the Regu-

lations, first, that no such partition can be disturbed by a Civil Court; and, secondly, that a mortgagee who has not perfected his title by foreclosure, and the consequential decree for possession, can neither compel a partition nor be a party to the Butwara proceedings. And this latter point has been the foundation of one of the principal arguments addressed to their Lordships by the learned Counsel for the Respondents.

It was argued that, as the mortgagee could not be a party to the Butwara proceedings, so, upon general principles of jurisprudence, he could not be held to be bound by them; that, consequently, he was at liberty to enforce his rights against an undivided share in every parcel specified in the mortgage deed to whichever of the co-sharers such parcel might have been allotted, but that he could not claim more. The objection that, in such a case, he must either forfeit part of his security or pursue his remedy against those with whom he had no privity of contract was met by the suggestion that the co-sharers thus injuriously affected would, upon the principle of implied warranty such as exists in this country on a title acquired by partition or exchange, have a remedy over against the mortgagor, even if the consequence of that were the re-opening of the partition. And it was further argued that, if the contention of the Appellant concerning a partition by Butwara were correct, it must be equally true of a partition by private arrangement; and that in either case an unequal partition might be effected by collusion between the mortgagor and his co-sharers with the object of defrauding the mortgagee.

Upon this it is to be observed that fraud would be a substantive ground for relief, and that, if the fraud supposed were effected by private arrangement, the mortgagee would have a clear remedy against all who were parties to it in the Civil Court.

In the more improbable case of such a fraud being effected by means of Butwara proceedings, his remedy might be more difficult by reason of the finality of the partition, and the incapacity of the Civil Court to entertain a suit to disturb it. But without entering into these nice questions, which do not directly arise on this Appeal, their Lordships deem it sufficient to observe that the finality of such

a partition cannot be greater than that of the purchase of an estate at a sale for arrears of the public revenue; and that even in this latter case Courts of Justice have found the means of relieving the person injuriously affected by fraud. (See the case of Nawab Sidhee Nuzur Ali Khan and Rajah Ojodyaram Khan, 10 Moore's I. A., 540.) In such cases, however, the alleged fraud is the foundation of the suit, and it is difficult to see upon what principle, in the absence of that or some equivalent cause of action, the mortgagee, who could not have sued the co-sharers for a partition, could have any remedy against them or their separated shares, which, under the Batwara, had become distinct estates. And if he does not claim to have such a remedy, but is content to claim, as the subject of his security, that which his mortgagor has received in substitution of the original pledge, it is still more difficult to see what right the mortgagor can have to resist such a claim, or to say, I, being in possession of the new estate, insist on your being limited to the old.

In the present case there is not a suggestion of fraud, nor is there any ground to suppose that the partition was other than fair and equal. The mortgagee is content to accept what has been allotted in substitution of the undivided interest as the fair equivalent of it. Their Lordships are of opinion, not only that he has a right to do so, but that this, in the circumstances of the case, was his sole right, and that he could not successfully have sought to charge any other parcel of the estate in the hands of any of the former co-sharers. There is, therefore, no question here of election, or of the time when the election was made.

A distinction has, however, been taken between the parcels in the possession of the Respondents, Ramodeen Chowdry and Ramanoograh Sahoy, and those in the possession of the Mohunt and of the Respondents Mahomed Ahsun and Kasheepershad Singh, on the ground that the latter are portions of the Mouzah Tajpore Ruttumpore, which was expressly excluded from the security. It is certainly possible to conceive cases in which, the security not covering the undivided share in the whole estate, it might be difficult to determine which of the lands allotted in substitution of that share represented the mortgage premises. No such difficulty, however, exists in

the present case, inasmuch as the whole of Tajpore Ruttumpore was allotted to Gopal Narain Singh on the partition. He was already entitled to an eighth undivided share in this Mouzah, which, being excluded from the mortgage, is not claimed by the Appellant. But it follows from this that whatever portion of this Mouzah was allotted to him in excess of those eight annas must have been so allotted in substitution of his interest in the Mouzahs 'Gunniporebija and Pemburinda, and, therefore, became subject to the mortgage. Their Lordships, therefore, are of opinion that, if all the parcels in dispute were still in the possession of Gopal Narain Singh, he would have no defence to the Appellant's claim in respect of any of them.

The only remaining question is, whether the Respondents other than the representatives of the mortgagor are in a better position than he would have been. They were all mere purchasers at execution sales of his right, title, and interest (the Mohunt purchasing at a date subsequent to the final foreclosure), and could acquire no higher rights than he possessed at the date of the purchase. In respect of such purchases, the question whether they were made with notice of the Appellant's title is not very material; but if it were, there is no doubt that they were made with such notice. Not only was the mortgage deed registered, but all the Respondents, except the Mohunt, whose title had not then accrued, seem to have been served with notice of the foreclosure proceedings, and might have claimed the right to redeem. They had, also, notice of the partition. To say that they were deceived by the description of the mortgaged premises, is to affirm, not that they had no notice of the Appellant's superior title, but that they mistook its legal effect.

Their Lordships are therefore of opinion that the Decree of the Principal Sudder Ameen was right as against all the Respondents; and they will humbly advise Her Majesty to reverse all the four Decrees under appeal; and, in lieu thereof, to make a Decree dismissing all the four Appeals, and affirming the Decree of the Principal Sudder Ameen with the costs of the proceedings in the High Court. The Appellant must also have the costs of these Appeals.