

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ganesh Lal Tewari v. Sham Narain and others, from the High Court of Judicature, at Fort William, in Bengal ; delivered April 13th, 1880.

Present :

SIR JAMES W. COLVILLE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THIS was an application by Ganesh Lal Tewari, the Appellant, as the representative of Muddun Mohun Tewari and Kali Pershad Tewari, who had obtained a decree against the Respondents, to execute that decree so far as relates to the recovery of the mesne profits of a mouzah called Koorkoorha awarded by it. The judgment is dated the 2nd of June 1860, and was the result of an action which had been brought by the Tewaris against the predecessors of the Respondents. The facts are shortly these: Perhlad Sen, who was the Rajah of Ramnuggur, executed, on the 23rd December 1851, a zur-i-peshgi mortgage to the Tewaris of certain mouzahs, including mouzah Kookoorha, for a sum of Rs. 49,453. Shortly after the mortgage one Binda Lall, the predecessor of the Respondents, set up a mokururee lease of mouzah Koorkoorha, which, as he affirmed, had been granted to him by the Rajah prior to the zur-i-peshgi mortgage. The suit was brought by the Tewaris to set aside that mokururee on the ground that it was colourable, and put forward by Binda Lall in collusion with the Rajah to defeat the zur-i-peshgi, so far as related to mouzah Kookoorha. The

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judgment of the 2nd June 1860, the execution of which is in question, states that the claim was for the recovery of "the entire 16 annas of mouzah Kookoorha, the property let out in zur-i-peshgi lease on the basis of a zur-i-peshgi lease dated 23rd December 1851." The decree was that the Plaintiffs do recover possession of the entire 16 annas of the mouzah, and that the mokururee pottah be set aside. Then there is this award with reference to mesne profits: "That the amount of mesne profits from 1,262 Fusli to the date of recovery of possession, with interest on the principal amount of each year from the following year up to date of realisation, be awarded to the Plaintiffs from the Defendant Binda Lall." This was the decree of the Principal Sudder Ameen. There was an appeal from it to the High Court, and ultimately an appeal from the High Court to this country; and those appeals went on concurrently with another litigation which was initiated by the Rajah to set aside the zur-i-peshgi lease altogether, on the ground that it had been improperly obtained; and in this litigation also there was a series of appeals, ending in an appeal heard before this Committee. In the result the Rajah failed in his suit; and the Tewaris succeeded in theirs, maintaining the decree of the 2nd June 1860, on which the present execution proceedings are founded.

Prior, however, to any proceedings taken to execute this decree the Rajah obtained a judgment for some debt against the Tewaris, and in the suit in which he obtained that judgment he, by the usual proceedings, attached and sold their interest in the zur-i-peshgi lease. The purchaser under that sale was his own Ranee, and it is said that she purchased benames for him. However that may be, no question now arises as to the validity of that purchase. It

must be taken that the Rance purchased what she professed to have purchased under that decree. The single question in the case is, whether the mesne profits awarded by the decree of the 2nd June 1860 passed by that sale.

We have nothing on this record but the certificate of sale. The preliminary proceedings do not appear. The certificate of sale is at page 36, and is as follows: "And a petition
 " being put in for the sale of his estate, a
 " sale notification was issued pursuant to an
 " order of this Court, and the estate aforesaid
 " publicly sold at auction on the 7th December
 " 1874, A.D. Whatever title, right, and concern
 " the judgment debtor had in the said estate
 " have been purchased by Mussumat Maharani
 " Bind Basini Debi, inhabitant and proprie-
 " tor of Ramnuggur, pergunnah Majhwa, for
 " Rs. 15,500. and she has deposited the entire
 " consideration money. Therefore this certifi-
 " cate is granted to Maharani Bind Basini Debi.
 " the auction purchaser of the estate aforesaid:
 " and it is hereby proclaimed that whatever title,
 " right, and concern the said judgment debtor
 " had in the estate aforesaid have become extinct
 " from the 7th December 1874, the date of sale,
 " and vested in Maharani Bind Basini Debi, the
 " auction purchaser. Hereafter this certificate
 " will be considered as a valid deed in respect
 " of transfer of the right, title, and interest of
 " the judgment debtors." Then there is this
 " description of what is sold: "The right and
 " title under the original deed of zur-i-peshgi
 " lease, dated the 23rd December 1851, for
 " Rs. 42,453 in respect of 15 mouzaha,"—
 " naming them, and including Kockoorha. It
 " may be observed that the purchase money is
 " only Rs. 15,500, and the zur-i-peshgi was given
 " to secure a sum of Rs. 42,453. Upon the

application made by the Appellant for the execution of the decree of 1860, so far as it awarded mesne profits, the Respondents, who represent the judgment debtor, Binda Lall, set up this sale as an answer, contending that the right to the mesne profits had passed by virtue of it to the Ranee, the auction purchaser. But the decree which had been obtained by the Tewaris was not sold, and presumably was not attached; what was sold is that which appears on the certificate, namely, the right and title under the deed of zur-i-peshgi, and the right of the judgment debtor is declared to have become extinct only from the 7th December 1874. This being all that was sold, their Lordships think that the right to the mesne profits under the decree was not the subject of sale. It was no more the subject of sale than any profits of the estate which the mortgagee had received prior to that sale would have been. The title to the mesne profits is derived from the decree. The Defendants in that suit were wrongdoers, and the action was brought by the mortgagee against them as wrongdoers. The right to the mesne profits, therefore, depends wholly upon the decree; and if the decree had been sold, the purchaser, as assignee of the decree, would, no doubt, have been entitled to them. The High Court have based their judgment on the erroneous assumption that the rights under the decree were sold. Their Lordships think that is not the effect of the sale. The High Court refers to the judgment of the Subordinate Judge. The Judges say: "The Subordinate Judge has
" held that the decree cannot be executed, and
" that all the rights of the judgment creditor
" in that decree have been transferred to the
" purchaser of the zur-i-peshgi rights, including
" the right to execute the decree obtained ori-
" ginally by the Appellant before us." Then

their own judgment is: " We also think, with him, " that the whole of the rights of the decree " holder (Appellant before us) under the decree " which he obtained have passed, with the " zur-i-peshgi rights on which the decree was " based, to the purchaser of those rights." Their Lordships think that this is an erroneous view of the sale. If it had been meant to attach and sell the decree, that might have been done. What was done was to sell the existing rights of the judgment debtors under the zur-i-peshgi.

For these reasons their Lordships think the judgments of both the Courts below are wrong. They will, therefore, humbly advise Her Majesty to reverse them, and to remit the case with a declaration that the Appellant is entitled to execute the decree of the 2nd June 1860 for the mesne profits up to the 7th December 1874, the date of the sale to the Maharani, with interest, and is also entitled to the costs of the proceedings in both the Courts in India. The Appellant will also have the costs of this Appeal.

