Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mohesh Lal v. *Mohunt Bawan Das, from the High Court of Judicature at Fort William, in Bengal; delivered* 15*th March* 1883.

Present:

LORD BLACKBURN.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

This is an appeal from a judgment and decree of the High Court of Judicature at Fort William, in Bengal, upon appeal in a suit brought by the Appellant against the Respondent and Mungal Das, in the Court of the Subordinate Judge of Bhagulpore.

In that suit the Appellant sought to recover with interest the sum of Rs. 33,989. 12. 6, of which Rs. 18,421. 7. 6 were alleged to be due upon a mortgage bond, dated the 12th of May 1872, and the balance upon a running account from that date to the 13th of August 1875.

The Plaintiff, Appellant, is a banker, who for many years carried on business at Bhagulpoor, not personally, but by means of gomashtas. The Respondent, Bawan Das, the Defendant No. 1, was the Mohunt of the Asthul, at Jankinugger, in zillah Purneah. He is described in the plaint as Chela, or disciple of Mohunt Gorib Das, deceased, and heir of Mohunt Balgobind Das, deceased.

The Plaintiff claimed to recover the whole amount from the two Defendants, and an order

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for auction sale of the property mortgaged and hypothecated under the bond for the satisfaction of the bond money. The property hypothecated by the bond consisted of one third of mouzah Pourani, the whole of mouzah Kankerghat, the whole of mouzah Bishenpore Kantahi, and the whole of mouzah Ghuneshyampore Pathurghat, of which the last three mouzahs at the date of the bond were the property of the Asthul of Jankinuggur, or of the Respondent the Mohunt thereof.

The case was tried in the first instance by the Subordinate Judge of Bhagulpore, who decreed, amongst other things, in favour of the Plaintiff for the amount sued for, with costs and interest at the rate of 6 per cent. per annum, and further ordered that the amount covered by the bond, as well as that portion of the money included in the running account, amounting to Rs. 3,166. 11. 6, expended in payment of the Government revenue, dak contribution, and road cess be realized from the mortgaged property, and the remaining amount recovered from Mungul Dass, the Defendant No. 2, alone, who was also declared to be bound to pay the entire amount of the decree.

Mungul Das did not appeal from the decree of the Subordinate Judge, but the Respondent Mohunt Bawan Das appealed to the High Court, who reversed the decree, so far as it affected him, and ordered, amongst other things, that the Plaintiff's suit against him be dismissed; and, further, that the three mouzahs, Kankerghat, Bishenpore Kantahi, and Ghuneshyampore Parthurghat were not liable for any portion of the Plaintiff's claim.

It having been decided by the High Court, and by Her Majesty in Council, in a suit brought by the present Respondent against Mungul Das, that mouzah Pooraini Khalan was not the property of the Appellant, or of the Asthul of Jankinuggur,

the decree of the High Court was silent as to that mouzah.

The first question in this appeal is, whether the High Court was right in holding, contrary to the opinion of the Subordinate Judge, that the other three mouzahs, in respect of which the decree of the Subordinate Judge was reversed, were not liable to be sold under the mortgage bond of the 12th of May 1872.

A question was raised before their Lordships whether the property of the Asthul was inalienable, except for the benefit of the Asthul in cases of necessity; but in the view which their Lordships take of the case, it is unnecessary to determine that question. They will therefore do as the High Court did, consider the question, assuming, without deciding, that the three mouzahs were not inalienable. In that view of the case the mortgage bond of the 12th of May 1872, which was executed by Mungal Das, and not by the Respondent, did not bind the property, unless Mungul Das had authority, as agent of the Respondent, or of the Asthul, to execute the bond, or the Plaintiff was induced by some act or neglect of the Respondent, or of the Asthul, to believe that Mungul had such authority, or that he was the actual owner of the property, and, acting under the belief so caused, dealt with Mungul as such agent or owner.

As regards the agency, it seems clear from the evidence, and from the findings of both the Lower Courts, that Mungul Das acted as and was the duly authorized agent of the Asthul, and of the Mohunts thereof, and had the management and control of their property from the time of Jairam up to the time of Mohunt Balgobind's death, in or about the month of October or November 1869.

It was stated correctly by the High Court that

an agent's power generally terminates upon the death of his principal, and their Lordships are of opinion that there is nothing to show that Gorib Das, who succeeded Balgobind, or the Respondent who succeeded Gorib, ever reappointed Mungul Das as agent, or led the Defendant to believe that Mungul's agency continued.

The Subordinate Judge says, "It appears that, "after the death of Balgobind, a dispute arose "as to who was to be his successor. Both "Mungul Das and Gorib Das were claimants "to the succession, but Mungul failed to esta- "blish his claim, and Gorib Das obtained "certificate of heirship of Balgobind. Mungul "then declared himself to be absolute owner of "the properties."

The finding of the High Court is to the same effect. They say (Record, p. 283, l. 28), that Balgobind died in October 1869, and that the certificate case was decided in favour of Gorib Das, on the 26th of November 1870.

The Subordinate Judge considered that Gorib Das was bound to give notice to the Plaintiff that Mungul's authority as agent had ceased, but the circumstances are such as to render it incredible that the bank was not fully aware of Balgobind's death, and of the termination of Mungul's authority. But whether the Plaintiff had or had not notice that the agency had ceased, it is clear that he cannot rely upon such want of notice unless he was thereby induced to deal with Mungul as agent. This the Plaintiff did not do, for throughout, after the death of Balgobind, he dealt with Mungul as the proprietor of the estates and as a principal, and not as an agent.

It was held by the Subordinate Judge, and contended at the bar, that the Defendant was estopped from showing that the property mortgaged to the Plaintiff in 1872 was not then the property of Mungul.

It appears that after Balgobind became Mohunt, a decree for a large amount was passed against him, and there is on the record a registered deed of sale, dated the 15th August 1860, purporting to have been executed by Balgobind, in favour of Mungul Das, of the three mouzahs which were included in the mortgage bond of 1872, and are the subject of this appeal. As regards two of the mouzahs which were revenue paying estates, the third, Pathurghat Ghuneshyampore, being lakheraj, there was contemporaneously with the deed of sale, a mutation of names, and the name of Mungul Das was substituted in the Collector's register for that of the Mohunt of Jankinuggur. In the Plaintiff's kothi also the accounts, which had been previously kept in the name of Balgobind, were, in September 1861, opened and from that time kept in the name of Mungul Das.

The following extract from the judgment of the Subordinate Judge explains the grounds of his decision on this part of the case. He says, Record, page 274:—

"It is most true, as alleged by the Defendant, that Mungul Das was believed by the Plaintiff and his agents to be the absolute owner of the whole properties which belonged to the Asthul. But how were they led to believe so, and who made them to believe the same? It was the Defendant's ancestor, Bal Gobind Das, who put Mungul Das into the position of being the true owner of the Asthul properties, and allowed him to deal with the Plaintiff's firm as such owner. All the properties belonging to the Asthul were in his name, he had absolute control over them, and no sort of objection was raised by any member of the Asthul to his power; how, then, could an outsider believe him to be otherwise than a true owner of the Asthul properties? Under such state of things, I cannot think the Defendant can take any advantage of such belief of the Plaintiff to deprive him of the money lent to Mungul Das on security of the Asthul properties."

That argument of the Subordinate Judge is, in their Lordships' opinion, completely answered

by the High Court. They say, Record, page 286 :—

"Although there is no evidence to show that the bill of sale of the 15th August 1860 was really executed by Bal Gobind, yet from the fact that, shortly after that date, the name of Bal Gobind was removed from the Collector's register, and that of Mungul Das placed in its stead, and that the accounts in the Plaintiff's kothi were transferred from one name to the other, it may be reasonably deduced that Bal Gobind was fully cognizant of the contrivance of putting the mortgaged property in the benami of Mungul Das, to protect it against the claims of a certain decree holder against himself. But the Plaintiff was not misled by this fraudulent device. The witness, Mohun Misser, who was the managing gomashta of the Plaintiff's kothi at that time, distinctly admits that the real nature of the transaction was fully disclosed to him by Bal Gobind, when the transfer of names in the accounts was effected at the instance of the latter.

"We are, therefore, of opinion that, so far as the claim relating to the bond is concerned, the grounds upon which the Subordinate Judge thinks that the parcels of mortgaged property in possession of the Appellant are liable are not tenable."

Nor can it be disputed with success, in the face of the evidence of Baijnath Sahai (p. 243), and of Mohur Misser at p. 248, both gomashtas of the Plaintiff, that although the dealings in the time of Balgobind were with Mungul Das as principal and not as agent, they were merely nominally so, and that the credit was in reality given to the Asthul in the name of Mungul Das as trustee and Furzi for the purpose of concealing the names of the real parties to the transaction.

Mungul was not the real proprietor, and he was not the agent of the Defendant No. 1. These facts must have been known to the Plaintiff or to his agents after the certificate case when Mungul repudiated the agency, claimed to be the absolute proprietor, and dealt with the property on his own account.

For the above reasons their Lordships are of opinion that the High Court was right in

holding that the bond of the 12th May 1872 was not binding upon the Asthul or upon the Defendant.

It was further contended on the part of the Plaintiff that, even if the bond of the 12th May 1872 was not binding upon the Defendant No. 1, the Plaintiff was entitled to fall back upon the mortgage bond of the 2nd July 1869 in favour of Luchmi Narain, which was binding upon the Asthul and the Mohunts thereof, inasmuch as it was executed at the time when Mungul was merely the apparent owner for the protection of Balgobind from his creditors, and whilst the relationship of principal and agent existed.

This raises the question whether that mortgage was extinguished when Luchmi Narain was paid, or was intended to be kept alive for the benefit of the Plaintiff. Their Lordships are of opinion that it was extinguished.

It has already been shown that, at the time of the execution of the mortgage of the 12th of May 1872, the relationship of principal and agent which had existed between Mungul and the Asthul in Balgobind's time had terminated, and that after Balgobind's death Mungul Das claimed to be the Mohunt of the Asthul in his own right, and the proprietor of the estates. In that mortgage he is described as the proprietor of mouzah Pouraini, &c., and after a recital, amongst other things, that he has taken a loan from Mohesh Lall of Rs. 20,000 on interest at 1 per cent. per month, of which the sum of Rs. 8,266. 8 was for the payment of the balance of the debt due on Luchmi Narain's mortgage of 1869, he declares that he will pay in cash, in one lump, the principal with the interest in the month of Jeyt 1280 Fusli, &c., and further, that until the payment of that money he has mortgaged the estates to Mohesh Lall, &c.

There is nothing in the bond or in the evidence, or even in the surrounding circumstances, to show that Mungul intended to keep Luchmi Narain's mortgage alive, or that he or the Plaintiff intended that the latter should hold that mortgage as an additional security for the loan.

On the 15th of May 1872 the sum of Rs. 8,382, the balance due to the estate of Luchmi Narain on his mortgage was paid *through* the Plaintiff, and on the deed a receipt for that amount was endorsed in the following words :—" Received " in full Rs. 8,382 up to the 15th May " 1872, through Mohur Misser, gomashta of " Baboo Mohesh Lal Mahajun, and returned the " bond." The bond was then delivered to the gomashta, and was retained by the Plaintiff.

It should be remarked that the mortgage to Luchmi Narain carried interest at the rate of Rs. 1. 8 per month, whereas the mortgage to the Plaintiff was at the rate of Re. 1 per month. It therefore seems to have been the intention of Mungul to borrow money at 1 per cent. per month, partly to pay off and extinguish the mortgage debt at Rs. 1. 8 per cent. per month which was a charge upon the estate which he claimed in his own right. There was no intermediate mortgage between Luchmi Narain's mortgage and the mortgage to the Plaintiff of 1872. Mungul, if the proprietor of the estate, as he then claimed and was stated in the recitals to be, had no interest in keeping alive Luchmi Narain's mortgage; on the contrary, it was his interest, and he must therefore, in the absence of any evidence to the contrary, be presumed to have intended, that the mortgage bearing interest at Rs. 1. 8 a month should be paid off and extinguished. Nor upon the hypothesis that Mungul was himself the proprietor of the estates had the Plaintiff any interest in keeping Luchmi Narain's mortgage alive, inasmuch as

under the mortgage of 1872 he had the security of all the estates included in Luchmi Narain's mortgage, and it is clear that, even if he had taken an assignment of it, he could not have held it as a security for a higher rate of interest on the new loan than 1 per cent. a month. The only benefit that the Plaintiff could have derived from taking an assignment of Luchmi Narain's mortgage of 1869 was that he might have the benefit of that security if it should turn out that Mungul was not the proprietor of the estates, as he represented himself to be, and, therefore could not legally charge them. But such an event could not have been contemplated by the Plaintiff. It is not probable that Mungul would have admitted his inability to bind the property by the deed of 1872, or would have consented to do anything which could raise a doubt as to his power to bind the property as a security for so much of the Rs. 20,000 as was in excess of the amount secured by Luchmi Narain's mortgage. Even if he would have consented, it is not probable that the Plaintiff would have advanced the full amount of Rs. 20,000 upon the security of the estates if he had had any doubt as to Mungul's title or right to charge them.

In Adams *v.* Angell, 5, Law Reports, Chancery, it was held that the question whether a mortgage paid off was kept alive or extinguished depended upon the intention of the parties. The Master of the Rolls, in delivering his judgment, stated that, "in a Court of Equity it has "always been held that the mere fact of a charge "having been paid off does not decide the "question whether it is extinguished. If it is "paid off by a tenant for life without any ex-"pression of his intention, it is well established "that he retains the benefit of it against the "inheritance; for although he has not declared "his intention of keeping it alive, it is presumed

" that his intention was to do so, because it is " manifestly for his benefit. On the other hand, " when the owner of an estate in fee or in tail " pays off a charge, the presumption is the other " way, but in either case the person paying off " the charge can by expressly declaring his in- " tention either keep it alive or destroy it. If " there is no reason for keeping it alive, then, " especially in the case of an owner in fee, equity " will in the absence of any declaration of in- " tention destroy it; but if there be any reason " for keeping it alive, such as the existence of " another incumbrance, equity will not destroy " it." Applying that rule to the present case, it must be presumed in the absence of any expression of intention to the contrary that Mungul, who, when he borrowed the money to pay off Luchmi Narain's mortgage, claimed to be the owner of the estate, and was stated on the face of the bond to be so, intended that the money should be applied in paying off that mortgage, and in extinguishing the charge, there being no intermediate incumbrance. Although the money was paid by the Plaintiff's gomashta to Luchmi Narain's estate, it was paid with money borrowed from the Plaintiff by Mungul, and for which Mungul was liable to him. The mortgage was therefore paid off by Mungul, and not by the Plaintiff.

It must be presumed that when the Plaintiff lent the money to Mungul to pay off the mortgage, he lent it upon the security expressed in the bond, and for which he stipulated. Equity cannot give him an additional security because the security relied upon turns out to be bad, as regards a portion of the lands included in it. If an equitable transfer of Luchmi Narain's mortgage is held to have been included in the mortgage of 1872, it must be as a security for the whole Rs. 20,000, and thus the mortgage at

Rs. 1. 8 per mensem interest, though intended to be paid off, would be a security for Rs. 20,000 at one per cent. a month, contrary to the expressed intention of Mungul to pay it off.

It was contended on the part of the Plaintiff that it must have been intended to keep alive Luchmi Narain's mortgage for the benefit of the Plaintiff, because, when he paid the money to Luchmi Narain's representative, he took possession of and subsequently kept that mortgage deed. Luchmi Narain's representative was paid by the Plaintiff as the banker of Mungul. It was paid, not by the Plaintiff as the payer, but through him as the agent of Mungul the payer, and with money lent to Mungul upon the mortgage of 1872. The receipt was written on the mortgage bond in accordance with the terms of the bond, by which it was stipulated that the mortgagor should cause all payments which should be made within or after the stipulated time to be endorsed on the bond, and that besides the payments so endorsed the mortgagor should not claim the benefit of payments made in any other way. It would not have been in the course of business for the Plaintiff as Mungul's banker to pay off the mortgage without taking a receipt for the money, or to take a receipt otherwise than by an endorsement on the bond. Having taken that receipt, it was the ordinary course of business for the Plaintiff to retain it as a voucher for the payment made by him on behalf of his customer. He could not take or keep the receipt without taking and keeping the bond on which it was endorsed, and it was therefore necessary for him to take and keep the bond, independently of the course of business, by which an agent paying off a mortgage on behalf of his principal takes back the mortgage on his behalf, instead of leaving it outstanding in the hands of the mortgagee.

Mr. Woodroffe, after the close of his argument,

referred to several cases, but none of them show that a mortgage when paid off and intended by the parties to be extinguished is presumed to have been intended to be kept alive.

Another question is whether the Plaintiff is entitled to recover the Rs. 5,849 applied out of the moneys raised by Luchmi Narain's mortgage in purchasing four small properties, which may be called 8, 9, 10, and 11, and which, by the High Court and by Her Majesty in Council, in a suit brought by the present Defendant against Mungul Das, were held to be the property of the Asthul, because they were purchased with money raised by the mortgage to Luchmi Narain. Those four properties were not included in the mortgage of 1872, nor are they included in the suit now under appeal. It is difficult to conceive how, if Luchmi Narain's mortgage was not kept alive and transferred to the Plaintiff as a security for his loan of 1872, the right of Mungal, if he had any, against the Asthul in consequence of the application of Rs. 5849 raised by that mortgage in the purchase of property now held to be that of the Asthul, can, in the absence of an express intention to that effect, be presumed to have been included in the mortgage of 1872 as an additional security for the loan of that date. The Asthul may be liable to Mungul, but that must depend upon the state of accounts between them, as stated by the Judicial Committee, on the 27th June 1877, in their reasons for the advice given to Her Majesty in Council in the appeal of Mungal Das and the present Respondent. Mungul Das claiming to be the proprietor of the estates included in the mortgage of 1872, retained possession and received the profits of those estates, as well as of the four small properties purchased with the Rs. 5,849. Mungul must render his accounts before he can be held to be entitled to any portion of the Rs. 5,849. Unless Mungul's

claim against the Asthul was included in the mortgage of 1872, and can be held to have been assigned to the Plaintiff as a security for the loan, there is no privity between the Plaintiff and the Defendant No. 1 in respect of the Rs. 5,849.

At all events the Plaintiff cannot be entitled to any greater or other rights than those of Mungul in respect of the Rs. 5,849.

It is scarcely necessary to refer to the fact that the plaint does not contain a claim on the part of the Plaintiff to recover on Luchmi Narain's mortgage, or to recover the Rs. 5,849 expended by Mungul in the purchase of the lots above referred to as 8, 9, 10, and 11. This is not a mere technical objection, for if the claim had been made, or an issue raised relating to it, the Defendant No. 1, Respondent, might have called witnesses to prove that there was no intention to keep alive Luchmi Narain's mortgage, or to include it or Mungul's right to the Rs. 5,849 claimed on account of the purchase of lots 8, 9, 10, and 11, in the security to the Plaintiff for the loan of Rs. 20,000.

As to the sum of Rs. 3,166. 11. 6 awarded by the First Court to be realized from the mortgaged estates on account of money expended on account of the payment of revenue road cesses, &c., on account of the estates, the credit was given to Mungul and not to the Plaintiff, and there is no privity between the Plaintiff and the Defendant No. 1 in respect of it. Mungul may possibly be entitled to it, but that must depend upon the state of accounts between him and the Asthul, which cannot be taken in the suit now under appeal.

Their Lordships will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal. The Appellants must pay the costs of this appeal.