Judgement of the Lords of the Judicial Committee of the Privy Council on the appeal of Doulut Ram v. Mehr Chand and others from the Chief Court of the Punjaub; delivered 19th July 1887.

Present:

LORD HOBHOUSE.
SIR BARNES PEACOCK.
SIR JAMES HANNEN.
SIR RICHARD COUCH.

THIS is an appeal from the decision of the Chief Court of the Punjaub in a suit brought by Doulut Ram against Mehr Chand and others, in order to have it declared that under a purchase which he had made under an execution, he acquired not only a 10-annas share, but also the other six-annas shares which the Defendants dispute, and also to recover possession of those six-annas shares. In his plaint he says "that on "the 11th January 1871, Jiwan Mal and Ratan "Chand mortgaged the property to Plaintiff "for Rs. 20,000, under the necessity of paying "a debt due to the firm known as Nanak "Chand, Sarup Chand, of which Defendants "are also the proprietors." There seems to be a mistake in stating that the debt was due to the firm instead of a debt by the firm. He then states "that on the 11th November "1878 Plaintiff brought a suit by virtue of "the mortgage deed and obtained a decree "against Jiwan Mal and Lal Chand, son of "Ratan Chand. That in execution of the "aforesaid decree, Plaintiff purchased the said "property for Rs. 44,100 at an auction sale; "but when he wanted to take possession,

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" Defendants, who were minors at the time of " the mortgage, set up an objection, and on the " 23rd July 1879 prevented Plaintiff from taking " possession of six out of 16 annas of the " property, the value of which is Rs. 16,537·8."
" Then the Plaintiff prayed for a declaration " to the effect that the share of the property " regarding which the Defendants set up the " objection, was held in mortgage by Plaintiff " in a lawful manner; and that the Plaintiff " purchased the same in execution of the " decree."

Now the circumstances of the case are these: by a mortgage executed by Ratan Chand and Jiwan Mal, the property in question, with some other property, was mortgaged to the Plaintiff. In their mortgage the two mortgagors, who were members of a joint family including the present Defendants, stated that they held ancestral possession of the property, that it was purchased and built by them, and that they owned it to the exclusion of everyone else. Then, having stated that the old title deeds were destroyed during the Mutiny, they proceeded:—" In these days we have pledged " and given in mortgage this property with " all its rights internal and external to Seth " Doulut Ram, son of Lala Nanu Ram "—that is the Plaintiff—" proprietor of the firm " known as Doulut Ram and Sri Ram, bankers." Then they say in consideration of Rs. 20,000 Queen's coin " under the necessity of paying a debt due to "—it is there also said " due to " but it should be " due by "—" the firm known as " Nanak Chand, Sarup Chand, the proprietors of " which are the two of us (promisors) mortgagors " (viz. Ratan Chand, son of Nanak Chand, and " Jiwan Mal, son of Sarup Chand) and also Mehr " Chand," and the other Defendants. Then they say " we have given up possession of the

" mortgaged property in question, and given it " into the possession of the mortgagee after the " execution of a separate lease containing our " promise in regard to the interest. Our agree- " ment is that we will pay the interest month by " month, and the principal sum in a period of " three years."

It appears to their Lordships that although the mortgagors stated that they were the sole proprietors, the statement that they were in ancestral possession showed that they intended to mortgage the whole of what they held as ancestral property, and that the mortgage passed the whole 16 annas of the property which they professed to mortgage, and they mortgaged it, stating that they did so for the purpose of paying the debt due from their firm. The Defendants stated that they were not members of that firm, and they relied upon that fact. They did not state that no debt was due from the firm, but merely that they were not members of it. If they had intended to say that the mortgage being executed by the managers of the joint family was executed by them for their own private purposes, and not for such as would benefit the whole joint family, they ought to have said so, and they would have said so. But instead of saying there was no necessity for the mortgage, they say it was a mortgage for a debt of a firm of which they were not members.

Then there was a second mortgage afterwards executed to which the Defendants were parties, which is to be found at page 9 of the record, in which it was stated that " whereas the whole " of our property, consisting of shops and " houses situated in the City of Delhi, being " ancestral property belonging to our common " ancestor Nanak Chand, is already mortgaged " to Lala Doulut Ram and Sri Ram, bankers " of Delhi." To some extent that might be

evidence against the Defendants, that the first mortgage was binding upon them, and that it included the whole 16 annas, but their Lordships do not think it necessary to place any great reliance upon it.

Now the mortgage having been executed and the debt not being paid, the mortgagee brought an action not against the whole joint family, but against the two members of the joint family who were managers of it, and who had executed the mortgage. The plaint in that suit is not set out in the record before their Lordships, but it has been brought before them during the course of the argument, it having been sent up under the seal of the Court in another appeal, and consequently their Lordships cannot hesitate to accept it as being a correct copy of the plaint in the suit which was instituted by the mortgagee against the two mortgagors under that mortgage. In that plaint the mortgagee claims not only to recover against the mortgagors the amount of the mortgage debt and interest, but asks that he may have execution and be satisfied out of the mortgaged property. He obtained a decree in that suit, and issued an execution, and applied for an attachment of the property. Unfortunately the application for execution of the decree, like the decree itself, is not before their Lordships in this record, but they have it in a manner similar to that in which they have the plaint, and from that application it appears that the mortgagee asked to execute his judgement, not by seizing the right title and interest of the two mortgagors under the execution, but that he might be satisfied by seizing and selling that portion of the mortgaged property which was the subject of the suit, and if anything further remained due, that he might levy it upon the separate property of the two Defendants. That application was granted, and their Lordships find, by the certificate of sale,

that the whole property was sold. It should be stated that the Plaintiff in this suit was not only the mortgagee of the property and the Plaintiff in the suit upon the mortgage, but he himself purchased, as he had a right to do, the property under the execution. The certificate of sale says: "It is hereby certified that on the 27th "March 1879, by means of a sale by public "auction, Lala Doulut Ram, proprietor of the "firm of Doulut Ram and Sri Ram, was declared "to be the purchaser of six houses and nine shops "immediately adjoining one another, situated in "the Sukhanand Lane, and the Jozri Bazar, "the property of the judgement debtors, for the "sum of Rs. 44,100, in execution of a decree in "this case, and that the said auction sale was "formally sanctioned by the Court." It was contended on the part of the Defendants, that although the Plaintiff purchased the property under execution, he was not entitled to the six-annas shares that belonged to the Defendants, inasmuch as they had not been made parties to the suit upon the mortgage deed, and the learned judges in the Courts below seem to have acted upon the principle that inasmuch as that suit was brought against the two mortgagors alone, and not against the Defendants, all that could be sold, and all that was sold, in execution of the decree, was the right, title, and interest of the two mortgagors, namely, their shares in the property, excluding the six-annas shares which belonged to the Defendants.

It appears to their Lordships that the decree cannot stand. The senior judge of the Chief Court, Mr. Barkley, says: "For the purposes "of this appeal it may be assumed, though "there is no finding on this point by the "Courts below, that the mortgagors were the "managers of an ancestral business belonging "to a family of which the Defendants, who

" were minors when the mortgage was effected, " were members, and that the mortgage was " necessarily entered into, in order to pay the " debts of that business. If this were so, the " mortgage would be a valid mortgage of the " entire property, including the rights of the " Defendants, though it was erroneously stated " that the mortgagors were the sole owners, " and had no co-sharers. It may also be " assumed that the property brought to sale " was the mortgaged property, and not merely " the rights of the judgement debtors therein." Their Lordships think that the learned judge was correct in making those assumptions. It appears from the record, at page 20, that the Plaintiff proposed to prove those facts, but the Defendants rested their defence upon the ground that they had not been made parties to the suit, and consequently that their share in the property had not been sold, and could not be sold under the execution. The Plaintiff's counsel stated :— " We propose to call evidence to prove (1) that " the Defendants were a joint Hindu family with " Jiwan Mal and Lal Chand "—those were the two mortgagors—" and that the two last-named " were the managers of this firm of Defendants. " The transactions were carried out in the name " of 'Nanak Chand,' 'Sarup Chand,' "—the name of the banking firm. Then " (2) the rents " of this property were credited in the books of " this firm. The expenses of this family were " debited in their books; (3) the money we ad- " vanced on the mortgage was expended in " paying debts, &c., of the joint Hindu family; " (4) his family had dealings with Kesri Chand " Balmokand when we brought our suit on the " mortgage. The Defendants joined with the " managers Jiwan Mal and Lal Chand, and " mortgaged the equity of redemption of the " whole property to Kesri Chand Balmokand,

" reciting in that deed that the property was " already in mortgage to us." That is the second mortgage to which allusion has already been made, and upon which their Lordships have not placed much reliance. Then " (5) after we " attached the property, Jiwan Mal, in virtue " of a certificate under section 305, tried to sell " the whole property per Ganga Pershad, " auctioneer. The property was twice put up " for auction after being advertised, and the " Defendants took no steps to make any ob- " jections. These sales fell through. (6) Sub- " sequently at the sale in execution of decree, " Kesri Chand Balmokand bid us up to Rs. " 44,000, and we eventually purchased for " Rs. 44,000." That is the Plaintiff's pur- chase at that sale. Then in another part of the record it appears that they also proposed to prove that after the sale had taken place, the Defendants received a portion of the purchase money, which was more than sufficient to pay off the mortgage, but the Defendants objected, and refused to allow the Plaintiff to go into evidence of those facts. Again, at page 42 Jiwan Mal in his evidence stated that the business was managed by Rattan and himself; that it was an ancestral business; that there had been no partition; and that the debt for which the mortgage was executed was due from the business in which the Defendants had a beneficial interest.

Under those circumstances their Lordships think that the learned judge of the Chief Court was perfectly justified in making the assumptions which he did make, but that he was in error in deciding as he did the question upon the point upon which the Defendants have made their stand, namely, that as they had not been made parties to the action their shares in the property had not been sold.

It appears from the cases that have been cited, that notwithstanding the Defendants were not made parties to the suit, still as the suit was brought on the mortgage to recover the mortgaged property, and the Plaintiff in the suit obtained a decree, and executed that decree by seizing the mortgaged property, the question would be whether the mortgage included the interest of all parties, or only the right title and interest of the two parties who were made Defendants. In the case cited from volume 5 of the Indian Law Reports, Mr. Justice Pontifex in giving his decision says, at page 852: "It has been decided "that if the managing member of a family, the "other members of which are at the time "minors, having authority (the touchstone of "which is necessity) mortgages the whole 16 "annas of the ancestral property, then, in a suit "by the mortgagee, the sale under the decree "would pass the whole 16 annas of the mort-"gaged property, although the mortgagor alone "was made Defendant; and the reason for such "decision probably is that the 16 annas having "been validly mortgaged to the mortgagee, and "his remedy being foreclosure or sale, the "decree of the Court would affect what was in "the parties before it, namely, the mortgagee's "right validly acquired to have the whole "16 annas sold."

The present case was first heard before the Assistant Judicial Commissioner, who held the same opinion as that at which the Chief Court arrived. Then it was appealed to the Commissioner, and he came to the same conclusion; but at the time of these decisions the Courts certainly had not before them a recent decision which is reported in the 13th volume of the Indian Law Reports, page 1. There, their Lordships, after very full consideration of the whole case, said: "Their

" Lordships do not think that the authority of " Deendyal's case bound the Court to hold that " nothing but Girahari's coparcenary interest " passed by the sale. If his debt was of a " nature to support a sale of the entirety, he " might legally have sold it without suit, or the " creditor might legally procure a sale of it by " suit. All the sons can claim is that, not being " parties to the sale or execution proceedings, " they ought not to be barred from trying the " fact or the nature of the debt in a suit of " their own. Assuming they have such a right " it will avail them nothing unless they can " prove that the debt was not such as to justify " the sale."

When the Plaintiff applied to be let into possession under the certificate of sale, the Defendants objected. He thereupon brought this suit, and the Defendants had the opportunity of trying whether the mortgage was a valid mortgage which bound the ancestral property. The Plaintiff proposed to prove all the facts that were necessary to make the mortgage valid and binding upon them. The Defendants had the opportunity of trying that question, but they did not wish to try it. They made their stand upon the ground that they had not been made parties to the suit, and that the two mortgagors alone had been sued. But that ground falls from under them. Then when they stood upon that ground, and objected to have the evidence gone into at the proper time for going into it, can they now ask their Lordships to remit the case? Their Lordships at first had some little doubt as to whether the case ought not to be remanded; but considering the evidence of Jiwan Mal, and that the Plaintiffs offered to go into the whole evidence, and to prove that a portion of the purchase money was paid over and received by the Defendants, and that the Defendants refused

to meet the case upon that ground, their Lordships have come to the conclusion that the case ought not to be remanded, and that the decision of the Chief Court must be reversed, as also the decree of the First Court and that of the Commissioner.

It is therefore necessary that the decree be made which the Chief Court ought to have made, and their Lordships will therefore humbly advise Her Majesty that the decrees of all the Courts below be reversed, and that it be decreed that the Plaintiff is entitled to the six-annas share for which he sues, and that he is entitled to recover possession thereof, and further that the Respondents do pay the costs in all the Lower Courts.

The Respondents must pay the costs of this appeal.