

Judgement of the Lords of the Judicial Committee on the Privy Council on the Appeal of Mahabir Pershad Singh and another v. Macnaghten and another, from the High Court of Judicature at Fort William in Bengal; delivered 16th February 1889.

Present :

LORD WATSON.

LORD HOBHOUSE.

SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

In order to trace the circumstances which have given rise to the present litigation, it is necessary to go back to the year 1867; and it will be convenient, for the sake of brevity, to use the terms "Appellants" and "Respondents," as including not only the parties to this appeal but their predecessors in interest. The Appellants, members of a joint Hindoo family, were owners of certain shares of 20 mouzahs, in talooks Malikalipore and Jonapore, which were sold, in that year, for arrears of Government revenue, to one Bunwari Lal. An action was brought by them to set aside the sale as irregular, which was dismissed in the District Court; but, in January 1871, the High Court gave their decision in favour of the Appellants, which was affirmed by this Board in December 1873.

The Respondents held six of these mouzahs in lease before the sale to Bunwari Lal. They were proprietors of an indigo factory in the neighbourhood, and they gave the Appellants pecuniary

and other assistance in their suit, in consideration of which the Appellants, in April 1871, during the dependence of Bunwari Lal's appeal to the Privy Council, executed a mortgage bond, by which they hypothecated their interest in the 20 mouzahs to the Respondents for Rs. 25,000, with interest at 1 per cent. per mensem, payable in one lump sum by the month of April 1875. The Appellants were restored to possession in April 1871, after the judgement of the High Court in their favour. In September 1873 the parties entered into an agreement by which, in consideration of further assistance already given and to be given them by the Respondents, the Appellants undertook, in the event of Bunwari Lal's appeal proving unsuccessful, to renew the lease of the six mouzahs, to let to the Respondents the remaining 14 mouzahs under a ticca pottah for 15 years, and to grant them a mokurruri lease of $13\frac{1}{2}$ bighas, required by them for the extension of their factory. In February 1874, shortly after the dismissal of Bunwari Lal's appeal, the Appellants executed a sunnud, authorizing the Respondents to collect the rents of their mouzahs for the year ending in September 1874, the Respondents accounting to them for their receipts, under deduction of costs and charges. In July 1874 the Appellants, in terms of their previous agreement, renewed the lease of the six mouzahs, at a rent of Rs. 645, for 15 years from September 1874, and granted the Respondents a ticca pottah, for the same period, of the remaining 14 mouzahs, at a yearly rent of Rs. 3,527, subject to future adjustment. They also gave, as stipulated, a mokurruri lease of the $13\frac{1}{2}$ bighas.

These transactions between the Appellants and Respondents, which were by no means complicated, have unfortunately been the occasion of numerous and protracted litigations. The

Respondents began the strife, in June 1877, by bringing a suit upon their mortgage bond. At that date, they undoubtedly owed to the Appellants a considerable sum, for past rents of the 20 mouzahs, no part of which had been paid. The Appellants did not plead in defence to the suit that, in the circumstances already explained, they were entitled to have a general account taken, and the Respondents' decree limited to the balance in their favour. They alleged that there had been a specific agreement (which they failed to prove) to the effect that the rents should be set off against the mortgage debt; and they also stated that it was their intention to institute a separate action for recovery of these rents. The result was, that, on their failure to establish the alleged agreement, the Subordinate Judge, in January 1878, gave the Respondents a decree, without any deduction on account of rents, which was affirmed by the High Court on the 22nd May 1879. The Respondents, in April 1878, sued for execution on the decree of the Subordinate Judge; but, in consequence of its being appealed from to the High Court, proceedings were stayed. The next step was taken by the Appellants, who, in June 1878, raised two actions, one for the rents due in respect of the six and the other for the rents due in respect of the 14 mouzahs. In the former of these actions they obtained a decree, and the latter was dismissed by the Subordinate Judge in April 1879, on the ground that the rent payable for the 14 mouzahs had never been adjusted in terms of the lease; but the High Court, holding that it lay with the Respondents to show what, if any, abatement ought to be made from the rent specified, on the 2nd April 1881 reversed his decision, and gave the Appellants a decree for the amount of their claim, which was upwards of Rs. 15,000.

The judgement of the High Court in their mortgage suit having then become final, the Respondents, in June 1879, revived the execution proceedings which they had instituted in April 1878. The mortgaged property was exposed for sale on the 15th September and 20th November 1879, when it was purchased in two lots by the Respondents, who had obtained leave to bid from the Court, for Rs. 17,000. The regularity of the sale was impeached by the Appellants, but their objections were overruled by the Subordinate Judge, and after being sustained in part by the High Court, were ultimately disallowed by this Board on the 24th December 1882.

Having thus failed to make good their statutory objections, the Appellants, on the 24th November 1883, filed their plaint in the present suit, which prays to have the two judicial sales of 15th September and 20th November 1879 set aside or treated as nullities, to have the mortgage debt extinguished by setting against it the rents which had already accrued or might afterwards accrue, and for khas possession of the mortgaged property after the expiry of the Respondents' leases in 1889. The prayer was based upon two grounds. The first, which attributed the sales to undue influence and oppressive conduct on the part of the Respondents, was abandoned in the High Court, and was not insisted on here. The second consists in an alleged equity, arising out of the relations of the parties to each other in the years 1871 to 1874, and the transactions between them during that period, to have an account taken, and to have the rents payable by the Respondents credited against the sums due by the Appellants under the mortgage bond. Their Lordships are disposed to think that the circumstances upon which the Appellants rely did raise such an equity in their favour.

The mortgage bond, the agreement, followed by the granting of the leases therein stipulated, and the sunnud, were all parts of one complex transaction, the objects of which were to enable the Appellants to recover their property from Bunwari Lal, and to secure to the Respondents repayment of moneys which they had advanced, as well as remuneration for services rendered. But, assuming the existence of the equity, the real question in the present appeal is, whether it could be enforced by the Appellants, in November 1883, to the effect of annulling the judicial sales of 1879.

Their Lordships entertain no doubt that the proper occasion for enforcing the equity now pleaded would have been in defence to the mortgage suit of 1877. That was certainly the suit in which any account to which the Appellants were entitled, as in a question with their mortgagees, ought to have been taken. But the Appellants not only abstained from putting forward any claim to a general accounting; they declared in their pleadings their intention of bringing a separate action for recovery of the rents, a proceeding which would have been wholly unnecessary if the plea which they urge in this appeal had been put forward and given effect to. The plea is within the meaning of Section 13 of the Civil Procedure Code of 1882, a matter which ought to have been made ground of defence in a former suit between the same parties, and the Appellants are therefore barred from insisting on it, *exceptione rei judicatae*.

It was argued by Mr. Doyne, upon the authority of a decision by Macpherson, J., reported 5 B. L. R., 450, that the Respondents must be held to have purchased as trustees for the Appellants. The same argument, which is not raised in the pleadings, seems to have

been addressed to the High Court, who, in their judgement, distinguish between that case and the present, on the ground that, in the former, the mortgagee did not purchase the mortgaged property, but the mortgagor's equity of redemption. Their Lordships cannot regard that explanation as satisfactory. It appears to them to be probable that, in the case referred to, the mortgagee had not obtained leave from the Court to purchase. The report does not state that he had; and the reasoning of the learned Judge, and the mass of authorities by which he supports it, have a direct bearing upon the case of a mortgagee purchasing without leave, and in that view of the facts his reasoning is intelligible and logical. Leave to bid puts an end to the disability of the mortgagee, and puts him in the same position as any independent purchaser. If the decision of Macpherson, J., proceeded on the footing that the mortgagee had obtained leave, their Lordships are not prepared to assent to it. On that footing it appears to them that purchase of the equity of redemption by the mortgagee at a judicial sale would have the same effect against the mortgagor as the purchase of the mortgaged property.

Their Lordships will therefore humbly advise Her Majesty that the judgement appealed from ought to be affirmed, and the appeal dismissed. The Appellants must bear the costs of the appeal.
