

*Judgment of the Lords of the Judicial Committee  
of the Privy Council on the Appeal of Kader  
Moideen v. C. W. Nepean and others, from the  
Court of the Judicial Commissioner of Lower  
Burma; delivered 9th June 1894.*

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Present :

LORD HOBHOUSE.

LORD ASHBOURNE.

LORD MACNAGHTEN.

SIR RICHARD COUCH.

[*Delivered by Lord Macnaghten.*]

The Appellant Kader Moideen seeks to redeem certain lands situated in the district of Shwegyin in Lower Burma which the Respondents deriving title from one John Nepean who died in 1883 claim to hold free from any right or equity of redemption.

The lands in question were originally waste lands the property of the Government. In 1866 and 1867 they were sold to Kader Moideen in three lots under the rules then in force for the sale of waste lands in British Burma. On payment of preliminary expenses and a fraction of the purchase money as required by the rules each of the three lots was conveyed to Kader Moideen "in full proprietary right" subject to conditions intended to protect the interest of the Government as an unpaid vendor. In 1871 at the joint request of Kader Moideen and John Nepean the property was transferred into Nepean's name in the Government books and thenceforth he was recognized as owner and acted as such. The question is :—What was the real meaning of



“and the names of the persons to whom “transferred.” Rule 12 provided that on payment of one-tenth of the purchase money and of all expenses of survey demarcation advertisement and sale the purchaser should “receive a deed in the form D annexed signed “by the Deputy Commissioner conveying to him “the lot in full hereditary and transferable proprietary right free for ever from all demands “on account of Land Revenue.” The 18th rule provided that the purchaser might pay the whole of the purchase money when the lot was sold or if he chose he might pay a portion not being less than 10 per cent. at the time of the sale and the remainder in instalments at any future time “not being more than 10 years “from the date of sale.” In the latter case simple interest at the rate of 10 per cent. per year was to be charged on the unpaid portion of the purchase money and the whole lot was to “remain hypothecated as security for the full “discharge of the amount including principal and “interest and be liable to sale by order of the “Deputy Commissioner if the said amount be not “paid within the stipulated period.” Interest on unpaid purchase money was to be payable on the 15th of May in each year.

Form D—the prescribed form of conveyance—so far as material is as follows:—

“Know all men by these presents that the Chief Commissioner of British Burma has conferred on his heirs executors administrators and assigns the grant of a tract of land measuring British Statute acres situated in to be holden by him in full proprietary rights subject to the following conditions:—

“I. The purchase money for this grant is Rs. , of which Rs. have been already paid. On the if the entire purchase money has not been paid up interest at 10 per cent. per annum will be charged on the balance and thereafter until the entire purchase money be paid up such interest will be chargeable on all unpaid arrears of the purchase money and all payments by the grantee shall be first carried to the credit of any outstanding arrear of interest due on such purchase money.



Many of the settlers left; their places were not filled by others and lands which had been reclaimed became jungle again.

In his difficulties Kader Moideen had recourse to Mr. John Nepean, a prosperous money lender in Shwegyin and obtained accommodation from him apparently on the usual terms and with the usual result. It was contended by the learned Counsel for the Respondents that the money paid to the Government for interest while the lands stood in Kader Moideen's name was supplied by Nepean. Very probably that was so. The contention is certainly correct as regards the payments made in 1869 and 1870.

On the 6th of June 1870 Kader Moideen assigned his interest in the lands in question to Nepean by way of mortgage to secure Rs. 3,000 which Kader Moideen acknowledged to have received that day "in cash." He bound himself on or before the expiration of 10 months to repay the loan with interest at the rate of 3 per cent. per month the principal and interest being payable in a lump sum. In default Nepean was empowered to sell and Kader Moideen undertook to make good any deficiency. Out of the sum secured Rs. 639. 0. 5 were paid to Government in discharge of interest. The balance all but a few rupees consisted of old debts and arrears of interest. The mortgage is in English a language which Kader Moideen did not understand. It is referred to as Exhibit F.

In the year 1871 as the time approached for payment of interest to the Government Kader Moideen was at his wits' ends for money. Twice apparently he had been put into jail for non-payment of some judgment debts and twice he had been released on proof of his inability to pay. Nepean refused to lend him anything more, and he had neither cash nor credit.



heard of Kader Moideen's application proceeded as follows :—

“ Your petitioner begs that the waste land rules referred to in the grant (Section 2) now in his possession may be carried out and orders issued accordingly.

“ That if Kader Moideen be unable to pay the interest due to Government, your petitioner may be allowed to occupy his place in the matter after the above rules have been carried out.

“ That your petitioner is ready to produce these three grants and the mortgage bond held by him to prove his claim.”

The order passed was :—

“ The time given for payment has not yet expired and in such cases a little grace is always allowed so that at present I am unable to pass any definite order in the matter.

“ A. G. DUFF,

“ 15th May 1871.”

On the 20th of May 1871 before the Deputy Commissioner a report was read stating that Kader Moideen had failed to pay Rs. 639. 0. 5 due on the 15th of May. The matter was ordered to stand over till the 25th. But as regards Nepean's application an order was made that notice should be issued to him to appear on the 23rd if he should think fit and shew cause why his claim to intervene should not be rejected under Section 3 of the grant.

Nepean appeared on the 23rd and presented another petition alleging that a transfer of interest had been created by the mortgage of the 6th of June 1870 and the deposit of the three grants, and after protesting against Kader Moideen allowing the Government to resume the land before satisfying his claim he stated that in the event of the Government not being able to





“ transferred from Kader Moideen’s name to  
 “ Mr. Nepean’s.

“ Signature of

“ KADER MOIDEEN,

“ 29th May 1871. “ J. NEPEAN.”

The order on the petition was,—

“ The matter requires consideration, a definite  
 “ order will be passed to-morrow.

“ A. G. DUFF,

“ 29th May 1871.”

On the next day the following order was  
 passed :—

“ Rangoon, the 30th May 1871.

“ Kader Moideen Mr. Nepean both present.

“ Read petition of Kader Moideen and Mr.

“ Nepean requesting that the lands in question  
 “ may be transferred to the latter. . . .

“ Court.—As Mr. Nepean is fully aware of the  
 “ circumstances of the case and that in taking  
 “ over the land he takes with it the responsibility  
 “ for what is due to Government on it, I see no  
 “ objection to the transfer being made and  
 “ therefore—

“ Order—Transfer to be made as requested.

“ A. G. DUFF.”

On the 3rd of June Kader Moideen and  
 Nepean again attended before the Deputy  
 Commissioner and the following note in English  
 was entered in column 15 of the Register of Sale  
 of Waste Lands against each lot.

“ Ownership transferred by original purchaser  
 “ Kader Moideen to John Nepean on the third  
 “ day of June 1871.

“ KADER MOIDEEN,

(in Native character),

Original purchaser.

“ J. NEPEAN,

New holder.

“ Before me, A. G. Duff, Deputy Com-  
 “ missioner.”



he sent a message to Mrs. Nepean asking her to furnish accounts of the rents and profits of the lands which he had transferred to her husband. After some little delay a formal application to the like effect was made on his behalf. It was refused and then the present suit was brought against the Respondents.

Among other defences to which it is not necessary to refer the principal Defendants set up that the transfer to Nepean was an absolute and unconditional transfer and that Nepean agreed in consideration thereof "to cancel the said mortgage of 1870 to release the Plaintiff from his covenant to repay the 3,000 rupees and interest secured thereby and other debts and to pay and indemnify the Plaintiff from all liability to pay the balance of the purchase money of the said lands and the interest due thereon."

The evidence of the witnesses on behalf of the Plaintiff at the trial is not worth much attention. No statement by the Plaintiff himself can be accepted without corroboration. There were witnesses who said they heard Nepean tell Kader Moideen that he could redeem the land at any time. One of them was a subordinate officer of the Court who remembered drafting the joint petition of the 29th of May 1871. Another was a person who is described by the principal witness for the defence with some breadth and freedom of outline as "an East Indian gentleman of sorts" but who seems to have been neither more nor less than an itinerant hawker of jewellery. Another was a person who is now a myook or township officer. The learned Judge of First Instance gave weight to his evidence on the ground of his position and also on the ground of his age. The latter consideration is not unimportant having regard to the habits of the people and the teachings of their religion. "His age" observes the learned



the note or memorandum endorsed on each of the three deeds of grant and to consider the effect of those documents by themselves apart from the rest of the evidence; if the transaction so regarded presents the appearance of an absolute and unconditional transfer then, they said, arises the question whether the rest of the evidence is sufficient to displace the *primâ facie* view of the transaction. That was a very plausible way of putting the case for the Respondents and it was urged with much force and ability by Mr. Fox as well as by his learned leader. But in their Lordships' opinion the learned Counsel laid too great stress on the endorsements upon the deeds of grant and rather overlooked the effect of the statements in the joint petition.

It may be conceded that if the Court had nothing but the endorsements before it the proper inference would be that for some consideration or other which was not disclosed the property had been made over to Nepean by way of sale. But when the joint petition and the orders made upon it are examined it becomes apparent that the entries in the Register of Waste Lands were intended merely to give effect to the prayer of the petition and that the endorsements on the deeds of grant are nothing more than a record of the arrangement proposed by the parties and sanctioned by the Deputy Commissioner. The petition asks that the lands may be transferred into Nepean's name. But that is not all. It purports to proceed upon an arrangement that Nepean shall forthwith pay the arrears of interest due to the Government and the balance of the purchase money. What is the effect of this arrangement? If the transaction were an absolute sale or even an out and out gift it would have been immaterial to Kader Moideen whether Nepean



which Mrs. Nepean a Burmese lady does use in her evidence to describe the transaction, is not found in the joint petition of the 29th of May 1871. It is, said the learned Judge, "conspicuously absent."

The next question is this:—Can any reliance be placed on Mr. Moss' statement that the consideration for the transfer was the cancellation of all debts then due from Kader Moideen? According to Mr. Moss' story there were many interviews between Kader Moideen and Nepean in connection with the matter and the final bargain was made in his presence on the evening of the 28th May. His account of it is as follows:—

"Mr. Nepean said the land must be made over to him entirely and no other rights allowed. It was further agreed that upon the land being entirely made over all debts due from Kader Moideen to Nepean should be cancelled. It became late when the interview ended—it took place in Mr. Nepean's house—the bargain was that they should present a petition next day. The debts referred to were the money due on F Exhibit and also on some promissory notes Exhibits 1, 2, 3, 4, 5, and 17."

That account has an air of precision but it is a careless statement at best. On cross-examination Mr. Moss admitted that on one of the notes Exhibit 1 (which was the largest in amount and only Rs. 100 short of all the rest put together) there was endorsed a memorandum dated the 6th of June 1870 showing that that document did not at the time of the alleged bargain represent an existing liability on the part of Kader Moideen. It had been merged in the mortgage security of the 6th of June 1870. When he gave his evidence in chief Mr. Moss must have been either aware or ignorant of this indorsement. If he was aware





Mr. Nepean was justified in not performing to the full his part of the bargain until Kader Moideen executed an absolute conveyance of the property in his favour. But Nepean never set this case up in his lifetime. His case was that the transfer entered in the Government books and recorded in the endorsements on the deeds of grant was sufficient and complete and that nothing more was required; and if Mr. Moss is to be believed Nepean never asked for anything more. "I don't know" he says "of any efforts being made after the transfer in 1871 to get Kader Moideen to sign a regular conveyance of the land."

If matters stood there and there were nothing more in the case the inference from the retention of the documents in question would be very strong. But it seems to be irresistible when the circumstances connected with one of these documents (Exhibit 5) are examined.

Exhibit 5 purports to be dated the 25th of June 1869 and to be a security for a loan of Rs. 300. It is not merely a bond or note binding Kader Moideen personally but it is also a mortgage of his house in Shwegyin to secure the sum borrowed with interest at 3 per cent. per month. This house was not situated on any part of the lands comprised in the Government grants. So Mr. Nepean could not have had the excuse for retaining it which it is alleged he had for retaining Exhibit F. If Mr. Moss' statement is correct the house ought to have been released and the mortgage itself handed back to Kader Moideen when the lands were transferred to Nepean. Now the subsequent dealings with this house can be traced in the record. When Kader Moideen applied for leave to sue as a pauper in September 1871 he had to file a list of property belonging to him and to account for it. In that list is to be found this



his all upon this property. He seems to have spent upon it everything he had and everything he could borrow. It was the only thing he had to look to. He evidently fancied that it was of great value. That it was of some value is plain from the Deputy Commissioner's reply to his petition of the 13th of May 1871 and plainer still from Nepean's own conduct. Kader Moideen clung to the property desperately. He was a reckless and an unscrupulous man and certainly had no consideration for his chief creditor. It is inconceivable that he should have consented to give the land to Nepean without stipulating for some benefit for himself. He was under no personal liability to the Government. The only remedy the Government had was against the land. As regards his debts to Nepean he was secure in his impecuniosity. To such a man as he was a release from debts which he could not possibly pay and for which in all probability he would never be troubled was no benefit at all. Mr. Nepean was quite at his mercy. He had simply to do nothing and the land would be forfeited and Mr. Nepean's chance of saving anything from the wreck would be gone. On the other hand it was well worth Nepean's while to give something to get the land into his own hands. He thought so too. There is a significant passage in Mr. Moss' evidence. In the course of the negotiation which led to the final arrangement the position which Nepean took up according to Mr. Moss was not that he had advanced as much as the land was worth and that he would not throw good money after bad. His refusal to give any further assistance was based on the precarious nature of the title. What he said to Kader Moideen according to Mr. Moss was "I refuse altogether to advance you more money because I find you have not got a full title to



Nepean never asserted that he had bought the land from Kader Moideen. Kader Moideen had "abandoned" it. It was "legally transferred" to him. But there was no suggestion of a sale. That case was not set up until after his death—nor was he ever called upon to allow Kader Moideen to redeem. It is not by any means clear that he would have resisted a suit for redemption if such a suit had been brought in his lifetime.

As regards the terms of redemption Kader Moideen states that the land was to be retransferred to him when he repaid all he owed and all Nepean paid on account of the land to Government and that the interest was to be 10 per cent. and to be compound interest. It was said there was no proof in support of these statements and that they rested on Kader Moideen's word alone. That is true. But they are statements in some degree against his interest and having regard to the rate of interest payable to Government it seems not improbable that such an arrangement should have been made. If there is to be redemption the terms are certainly not unfavourable to the persons in possession and Kader Moideen must be held to them. As regards moneys laid out in improvements the decree as originally framed gave no interest. On the application of the Defendants with the consent of the Plaintiff the decree was varied so as to give simple interest. But the rate of interest was not specified. The rate of interest will be the same as the rate of interest on the moneys paid to the Government. Probably the decree as it stands would be so construed. But in order to prevent any possible misunderstanding the decree will be varied by leaving out the word "interest" in paragraph 2 and inserting "simple interest at the rate of 10 per cent. per annum."

