Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Khiarajmal and others v. *Daim and others, from the Sadar Court of the Province of Sindh; delivered the* 11*th November* 1904.

Present at the Hearing:

LORD DAVEY.
LORD ROBERTSON.
SIR ARTHUR WILSON.

[*Delivered by Lord Davey.*]

The suit in which this Appeal has been brought was one for the redemption of two mortgages, dated the 4th June 1878, of certain immoveable property described as the Pir or Chaudhri Wah (canal) with land measuring 3,003 jirebs (equivalent to 1,516 acres and 23 gundas) situate in the Registration District Upper Sindh Frontier. The mortgagors were Mahommedans, but not all members of one family. They are now represented by the Respondents. The mortgagees were two persons named Tekchand and Kodumal who are represented by the Appellants. The suit was originally brought in the Court of the District Judge at Shikarpur and was transferred to the Court of the Assistant Judge. The present Appeal is from the Sadar Court of the Province of Sindh sitting on appeal from the Assistant Judge.

The facts are somewhat complicated, and it will be necessary to state with some precision the tenure of the lands in question and the shares in which the several mortgagors were

38101. 125.—11/1904. [72] A

entitled. The lands were held under five patas, or leases, granted by Government for terms of seven years and renewed from time to time. The current patas at the date of the mortgages in question were numbered 174, 175, 178, 243, and 4. Pata No. 174, dated the 23rd September 1874, was in the name of Naurez. No. 175 of the same date was in the name of Sanwan. No. 178 of the same date was in the name of Khan Muhammad. Nos. 243 and 4, dated respectively the 23rd July 1875 and the 20th March 1877, were in the name of Bugro. Although the patas were granted by Government to the persons named, the wah and lands held with it and comprised in the patas in fact belonged to the following proprietors:—One moiety belonged to Nabibaksh and his brother Alibaksh, and the other moiety belonged as to one-third (or one-sixth of the entirety) to Naurez, and as to two-thirds (or four-sixths of the entirety) to Khan Muhammad, Sanwan, and Bugro in equal undivided shares.

Two previous mortgages, dated the 15th May 1874, had been executed by these proprietors. One of these mortgages was by Nabibaksh (on behalf of himself and his brother Alibaksh), Naurez, Bugro, Sanwan, and Khan Muhammad in favour of Tekchand and Kodumal for Rs. 5,600, and the other mortgage was by the same mortgagors in favour of Waliram, Kodumal, and Tekchand, for Rs. 2,000. Waliram was a partner with Kodumal and Tekchand. These mortgages, like those of 1878, were usufructuary mortgages.

Before the execution of the mortgages of 1878 Naurez died, leaving a widow and four children, including a son, Amirbaksh. Khan Muhammad died, leaving seven children, including a son by his first wife named Kadurbaksh, and Sanwan died, leaving a widow and four children including a son, Sumar.

The first mortgage of the 4th June 1878 was by Nabibaksh, on behalf of himself and Alibaksh only, of one moiety of the property for Rs. 4,300, made up of Rs. 2,470—one half of the amount stated to be due on the first mortgage of 1874—Rs. 378 balance due on the second mortgage, Rs. 852 due on settlement of accounts, and Rs. 600 due in respect of one half of the assessment and clearance expenses of the last year. It was in favour of Kodumal and Tekchand, and was an usufructuary mortgage for a term of five years from date, expiring, therefore, on 4th June 1883. The points deserving special notice are that one fourth of one half of the produce was reserved to the mortgagor for his maintenance and other expenses connected with the wah and land, and the responsibility of cultivation and looking after the land rested on the mortgagor in consultation with and with the consent of the Showkars.

On the same 4th June 1878 Kadurbaksh purported to convey the share of Khan Muhammad in the property, which he described as his share, to Bugro in consideration of Rs. 955. 8. 10, being "his share" of the mortgage debts created by the two mortgages of even date which Bugro agreed to pay but reserving to himself the land denoted by Survey No. 30 in pata No. 178, and containing 8 acres which he stated was his ancestral property. This small piece of land was also excepted from the two mortgages.

By the second mortgage deed of 4th June 1878 Bugro, Sumar, and Amirbaksh purported to mortgage the other moiety of the property to Kodumal and Tekchand for Rs. 4,300, made up in the same manner as in the first deed, for a like term of five years, and subject to the same stipulations as to cultivation and so forth. At this date Sumar and Amirbaksh were both minors.

It is apparent on the face of the mortgages of 1878 that as between the parties to these deeds the debts created by the previous mortgages of 1874 were satisfied, and in fact it is admitted in the Appellants' written Statement of Defence, and in their case on this Appeal, that the mortgages of 1874 were extinguished, but apparently only as between the parties.

Waliram however was not a party to the deeds of 1878, and on the 1st May 1879 he commenced a suit (No. 372 of 1879) against Nabibaksh, Bugro, Sumar, Kadurbaksh, and Amirbaksh, described as a " minor aged about 14 years, legal " representative of Naurez, deceased, by his " guardian, his uncle Alahnawaz," to recover Rs. 249. 10. 3. for principal and interest in respect of his share of the sum due under the mortgage to himself and his partners of 15th May 1874. The proceedings in this suit were somewhat extraordinary. On the 4th June 1879 a petition signed by Waliram, Nabibaksh, Bugro, and Alahnawaz described as " guardian of Amirbaksh " was presented to the Court praying that the points in issue between them should be referred for final disposal to the arbitration of Kodumal (the partner of Waliram). The petition was not signed by Kadurbaksh or Sumar, and appended to it was a postscript signed by the same parties praying that the names of Sumar and Kadurbaksh might be struck off from the suit. On the same day (the 4th June 1879) the Subordinate Judge made an order for reference accordingly. Shortly afterwards Nabibaksh died leaving two widows, an infant son, Muhammad Hasan, and a daughter. The names of the widows and son were added to the record and the usual summonses served on them to appear. Kodumal made his Award that the Plaintiff Waliram should recover Rs. 350 from Bugro, the property of Nabibaksh deceased, Sanwan deceased, Khanan or Khan Muhammad

deceased, and Naurez deceased, in three instalments with interest, and the Judge made an order, dated the 20th December 1879, to that effect. On the 8th February 1881 the wah and lands (except the lands comprised in pata No. 174 in the name of Naurez) were sold in execution to Darianomal, son of Kodumal and gomashta of his firm. It is not now disputed that he was benamidar for Kodumal and Tekchand. The sale purported to to be subject to a mortgage to Kodumal for Rs. 5,600, meaning, apparently, the mortgage of May 1874, and ignoring therefore the subsequent mortgage of 1878. By an inexplicable blunder it appears to have been assumed, in making the sale, that the lands were the property of the several persons in whom the patas stood, although the true facts as to the proprietorship were mentioned in the application for execution and in the memorandum of sale.

On the 29th April 1878 Kodumal and Tekchand commenced a suit (No. 160 of 1878) against "Naurez, deceased, by his legal repre-" sentative Amirbaksh, by his guardian, his uncle " Alah Nawaz," the last named personally, and one Mubarak, to recover a sum stated to be due to them and one Motandas (who was also named as Defendant) from Naurez, Alah Nawaz and Mubarak on settled account. This suit was compromised for a lump sum of Rs. 519, and default having been made in payment the land comprised in pata No. 174 standing in Naurez's name on the 11th October 1880 purported to be sold in execution to one Ubhuromal who shortly afterwards transferred it to Darianomal. In this case also it was assumed that pata No. 174 standing in the name of Naurez was his exclusive property, although the true state of the title appeared on the proceedings in the suit.

The present suit was commenced on the 11th January 1897. The original Plaintiffs were Alibaksh, the heirs of Nabibaksh, Naurez,

Sanwan, Khan Muhammad, and Bugro, and by amendment one Nur Muhammad, who is a purchaser of one half of their interests, was added. The Defendants were the sons of Tekchand and Kodumal, both deceased. The first question is whether the suit is barred by limitation. This point is put in two ways. It is contended that there has been adverse possession for more than twelve years of the equity of redemption and the title of the Appellants who now represent the original Defendants cannot, therefore, now be disputed. Secondly, it is said that the defects in the proceedings in the two suits in which the equity of redemption was purported to be sold were at most irregularities which might entitle the parties to have the execution sales set aside if they had come in time, but no proceedings for that purpose having been brought within the time allowed by law, the sales are now unimpeachable. The circumstances relied on as evidence of adverse possession are, that since the dates of the execution sales no accounts have been demanded by, or rendered to, the mortgagors or their representatives, no payments of subsistence money which they were entitled to under the mortgages have been made to them, and the parties after the sale ceased to cultivate the land and left the village, and renewed patas have been granted to nominees of the mortgagees. If the purchasers had been independent third parties, and accounts had been rendered and payments made by the mortgagees to them instead of to the mortgagors, the circumstances relied on would have been cogent evidence of adverse possession of the equity of redemption in favour of such third parties. But their Lordships cannot differ from the finding of the Appellate Judge, that in each case the nominal purchasers were the agents only of the mortgagees, or the firm of which they were

members, who were the real purchasers, and this was not seriously disputed by Mr. Arathoon. The firm appears to have consisted of many branches, and contained many partners. Darianomal, the purchaser in Suit No. 372 of 1879, was (as already mentioned), son of Kodumal and gomashta of the firm. In the language of the witness Khiarajmal, "Dariano bought the lands for the shop." Ubhuromal, the other purchaser, was also an employé of some kind of one branch of the firm. As changes took place from time to time in the constitution of the firm, the mortgaged property as an asset of the firm was credited at an agreed figure in favour of an outgoing or against an incoming partner. But there have been no separate dealings with the equity of redemption as a distinct subject of property. Their Lordships are satisfied that the possession has been that of the mortgagees throughout, and the question at issue is exclusively one between mortgagor and mortgagee. As between them neither exclusive possession by the mortgagee for any length of time short of the statutory period of sixty years, nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption will be a bar or defence to a suit for redemption if the parties are otherwise entitled to redeem. It is almost unnecessary to add that a renewal of the patas or the making of a new settlement with Government in the names of nominees of the mortgagees did not alter the real title to the lands.

The question, therefore, is whether the equity of redemption not only purported to be, but was in fact sold under the decrees. Their Lordships agree that the sales cannot be treated as void or now be avoided on the grounds of any mere irregularities of procedure in obtaining the decrees or in the execution of them. But on

the other hand the Court had no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. As against such persons the decrees and sales purporting to be made would be a nullity and might be disregarded without any proceeding to set them aside. If authority be desired for these elementary propositions it may be found in the judgment of Sir Barnes Peacock in *Kishen Chunder Ghose* v. *Mussumat Ashoorun*, 1 Marshall 647.

It will be convenient to consider the case of each of the mortgagors separately. In doing so it will not be necessary for their Lordships to consider whether there is sufficient evidence of fraud or chicane on the part of the mortgagees, or whether the proceedings in suit No. 372 of 1879 deserved the epithets which the Appellate Judge applies to them. Those proceedings were conducted with great irregularity, but the only question for consideration is whether the Court had jurisdiction to sell the property which purported to be sold. In Suit No. 160 of 1878 it will be remembered that none of the persons interested were parties to the suit except Amirbaksh, sued as representative of Naurez, deceased.

Nabibaksh was a defendant to the Suit No. 372 of 1879 and signed the agreement of reference. On his death very shortly afterwards his two widows and his son Muhammad Hasan, aged about six years, by his mother, one of the widows, were named as his legal representatives on the record. The Judge was satisfied by evidence that they were served with a summons to appear and that they were prepared to accept the award of the Arbitrator, and they were also served with notice of the sale. Their Lordships think that Nabibaksh's estate was sufficiently represented for the purpose of the suit although the name of his infant daughter was omitted, and

that his share of the equity of redemption in the property sold in execution of the decree in No. 372 of 1879 is therefore bound by the sale, and irredeemable. This share was one-fourth, or (say) six-twenty-fourths. Nabibaksh, however, executed the mortgages of 1878 on behalf of his brother Alibaksh as well as of himself. Alibaksh is still living, and is a Plaintiff in the present suit and one of the Respondents. It must be presumed that Nabibaksh was authorised to sign the mortgages for his brother. At any rate, Alibaksh by suing for redemption admits it. And possibly it might have been held that Nabibaksh's authority extended to representing him in Waliram's suit. But by no possibility could it be considered that he was represented by the widows or infant son of his deceased brother. In fact, his interest in the property seems to have been ignored altogether. He is not mentioned as a debtor in the Award, and there is no decree against him. The Court, therefore, had no jurisdiction to sell his share, amounting to six-twenty-fourths.

The next share to be considered is Naurez's original $\frac{1}{3} \times \frac{1}{2}$ or $\frac{4}{24}$. Amirbaksh was, of course, one of the heirs of Naurez, but in no other sense his legal representative. It is not pretended that Alahnawaz was in any legal sense or in fact his guardian, or was ever appointed his guardian *ad litem*. It is however contended by the Appellants that Naurez's heirs are bound by the proceedings in both suits, and that his share of the property, whatever it was, was effectually sold in the suit No. 160 of 1878, or at any rate that the share of Amirbaksh himself passed by the sale. The Indian Courts have properly exercised a wide discretion in allowing the estate of a deceased debtor to be represented by one member of the family, and in refusing to disturb judicial sales on the mere ground that some members of the family, who were minors, were not made

parties to the proceedings, if it appears that there was a debt justly due from the deceased, and no prejudice is shown to the absent minors. But these are usually cases where the person named as Defendant is, *de facto*, manager of a Hindu family property, or has the assets out of which the decree is to be satisfied under his control. The Appellants relied on the judgment of this Board in *Malkarjun* v. *Narhari*, L.R. 27 Ind. Ap. 216. In that case a judgment had been given against a debtor, who afterwards died, and in executing the decree against his estate, a person was served, as his heir, with notice of the intended sale. The person served objected (as it was proved rightly) that he was not the heir of the deceased, but the Court overruled the objection. The purchaser at the sale was a stranger and not the judgment creditor. It was to this state of circumstances that Lord Hobhouse's observations were directed. His Lordship said: "He (the person served) contended that he was not the right person, but the "Court, having received his protest, decided that "he was the right person, and so proceeded with "the execution. In so doing the Court was "exercising its jurisdiction. It made a sad "mistake it is true, but a Court has jurisdiction "to decide wrong as well as right. If it decides "wrong, the wronged party can only take the "course prescribed for setting matters right, and "if that course is not taken the decision, "however wrong, cannot be disturbed." Their Lordships think that these observations do not apply to the case now before them. In suits No. 372 of 1879 and No. 160 of 1878, the Judge seems to have accepted without question the statement on the record that Amirbaksh was legal representative of Naurez and Alahnawaz was his guardian and never applied his mind to the matter. Doubtless he would have done so

if the suits had proceeded in the ordinary course, but in the former case the proceedings were cut short by the agreement for reference, and in the latter case it was in effect a consent decree. It was not, therefore, the case of an erroneous decision, ruling, or exercise of discretion of the Judge in a matter in which the Court had jurisdiction. Their Lordships think that the estate of Naurez was not represented in law or in fact in either of the suits, and the sale of his property was therefore without jurisdiction and null and void. Nor can they hold that the share of Amirbaksh himself in his father's estate was bound. In the opinion of their Lordships, it is not a mere question of form but one of substance. In coming to this conclusion their Lordships are quite sensible of the importance of upholding the title of persons who buy under a judicial sale, but in the present case the real purchaser was the judgment creditor, who must be held to have had notice of all the facts.

Sumar and Kadurbaksh never signed the agreement for reference to Kodumal in Suit No. 372 of 1879, and the Court was asked to strike their names out of the Record. They were not, therefore, parties to any of the subsequent proceedings which were founded exclusively on the agreement, and it is immaterial whether their names were actually removed from the Record or not. Sanwan's share ($\frac{1}{3} \times \frac{8}{24}$) and Khan Muhammad's share ($\frac{1}{3} \times \frac{8}{24}$) therefore did not pass by the sale in Suit No. 372 of 1879, subject to the question of what passed by the conveyance from Kadurbaksh to Bugro.

It is admitted that Bugro's share (in Patas 175, 178, 243, and 4) is irredeemable, and their Lordships think that this includes whatever he took by conveyance from Kadurbaksh. By the

deed of the 4th June 1878 Kadurbaksh purported to convey the whole of Khan Muhammad's share, except the land denoted by Survey No. 30 in pata 178. Whether he did so in fact (that is to say) whether he had by some means acquired it from his father or whether he was authorised to sell more than his own heritage is a question which has not been argued before their Lordships, and there are no materials upon which they can form an opinion. *Primâ facie* his conveyance would pass only his own share, but if there be any question upon it the point must be decided in the Court below. Except so far as Khan Muhammad's interest vested in Bugro, his estate is not bound by either decree. In any case the lands denoted by Survey No. 30 in pata 178, being excepted from the mortgages, are not redeemable in this suit.

Their Lordships therefore substantially agree with the Appellate Judge as to his view of the facts of the case. But the Judge has made a decree for redemption of the whole estate, on the ground that "the mortgagees could not "acquire the equity of redemption directly or "indirectly by purchase at a Court sale except "by a suit brought on the mortgage, on account "taken and time specially allowed for re-"demption." Their Lordships cannot concur in this view, which they think is based on a misapplication of a sound principle of equity. Their Lordships throw no doubt on the principle, which has been acted on in many cases in India, that a mortgagee cannot, by obtaining a money decree for the mortgage debt, and taking the equity of redemption in execution, relieve himself of his obligations as mortgagee, or deprive the mortgagor of his right to redeem on accounts taken, and with the other safeguards usual in a suit on the mortgage. But in Waliram's suit the parties agreed that the points in issue in

the suit should be referred to arbitration, and the case was taken out of the hands of the Court. In suit No. 160 of 1878 the debt sued for was not the mortgage debt. The creditors were different, and the debtors were different, and the debt does not appear from the plaint to have been secured by a mortgage. In any case the point taken by the Appellate Judge would not be a cause of nullity for want of jurisdiction, but a case of irregularity in procedure only.

The result is that the Respondents between them are entitled to redeem (1) the whole of the lands comprised in pata No. 174, and (2) the wah and the lands comprised in the other four patas, except the original six-twenty-fourths share thereof of Nabibaksh, and the original $\frac{1}{3} \times \frac{8}{24}$ share thereof of Bugro, and whatever share was conveyed to him by Kadurbaksh by the deed dated the 4th June 1878, and except the land denoted by survey No. 30 in pata 178. The account of what is due on the mortgages to the Appellants has already been taken, and the Judge has rightly added the two sums of Rs. 325 and Rs. 300 paid by the purchasers on execution of the decrees in the two suits No. 160 of 1878 and No. 372 of 1879. But the Judge has not allowed interest on these sums on the ground that no money in fact passed. The debts however were discharged in whole or in part, and there seems to their Lordships to be no reason why interest should not be allowed on these sums also.

Their Lordships therefore will humbly advise His Majesty that the Decree of the Appellate Judge, dated the 2nd March 1900, be varied by (1) a declaration that the Plaintiffs or some of them are entitled to redeem the above-mentioned shares in the wah and lands in suit; (2) directions to ascertain (in case the parties differ as to it) what share in the property in suit passed by Kadurbaksh's conveyance of the 4th

June 1878, and finally settle the shares which are redeemable and irredeemable having regard to the foregoing declaration and the result of such inquiry (if any), and to apportion the sum of Rs. 7,885. 14. 6 mentioned in the said Decree with interest thereon (including the two sums of Rs. 325 and Rs. 300) at 9 per cent. per annum from the 2nd March 1900, and the amount of surplus of profits and mesne profits when ascertained in the shares in which the property in suit is ascertained to be redeemable and irredeemable, and for otherwise carrying into effect the foregoing declaration, and that *quoad ultra* the said Decree be affirmed and the suit be remitted to the Sadar Court of Sindh to proceed accordingly.

No costs were given of the Appeal to the Sadar Court and there will be no costs of this Appeal.