Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ganesh Pershad v. *Syed Mahomed Khaliluddin, from the High Court of Judicature at Fort William in Bengal; delivered the* 1*st November* 1906.

Present at the Hearing:

LORD MACNAGHTEN.
SIR ARTHUR WILSON.
SIR ALFRED WILLS.

[*Delivered by Sir Alfred Wills.*]

This action was brought by the Respondent to recover possession of certain property situate within the jurisdiction of the Court of the Subordinate Judge of the Third Court, Patna, being eight annas of mouzah Lanka Kachhuara, from the Appellant who claimed to have acquired it by purchase at a sale under the decree of a Court in that behalf made in a suit by a mortgagee against his mortgagor, one Mussummat Misran, who was made a second Defendant. She, however, never appeared, and the action was really one by the Respondent against the Appellant, and no further notice need be taken of her as a party to the action, though she figures prominently in the history of the transactions.

Owing to various circumstances which it is unnecessary to detail, there have been very great delays in prosecuting the Appeal. The Decree of the High Court which allowed the Appeal from the Judgment of the Subordinate Judge was dated 12th May 1897. The Appeal was heard by the Judicial Committee on the

1st August 1906, after a lapse of more than nine years. It is only necessary to state that the delay and the circumstances which gave rise to it do not affect the merits of the Appeal, and this is all that it is necessary to say with respect to them.

With one important exception the facts are not substantially in dispute, and even with regard to the exception it is rather the inference to be drawn from them than the facts themselves that are open to controversy.

The Respondent is the son of Mussummat Misran's daughter. Mussummat Misran was heavily in debt to several mahajans; and one of them, Nand Lal Singh, who had in 1883 lent her 500 rupees at interest (though at what rate does not appear) in 1887 obtained a decree for the sale of the property in question. At the sale the Respondent was declared the purchaser of the property for 1,330 rupees, presumably a sum sufficient to pay the mortgagee.

Less than a year later, viz., on 27th March 1888, Mussummat Misran executed a mortgage to the Appellant of a number of properties including that now in dispute, to secure Rs. 20,000 with interest, repayable at the end of three years. The transaction, so far as the Appellant is concerned, was perfectly *bona fide*, and in the mortgage Mussummat Misran declared that she was the owner of the property, and held it free from any incumbrance. In June 1891 the Appellant obtained against Mussummat Misran a decree for sale, and purchased the property under the sale in March 1892. He obtained possession in June 1892, and the present suit was brought by the Respondent on the 7th October 1893.

The case turns entirely on whether the alleged purchase in 1887 by the Respondent was genuine or a sham presumably for the purpose

of protecting his grandmother against creditors. If it was genuine the Respondent's title is the earlier one and must prevail. If it was a sham, there is nothing to interfere with the right of the Appellant.

The details of the case are numerous and complicated, but no useful purpose would be served in discussing them at length. Their Lordships would rather concentrate their attention upon certain broad considerations which appear to them to be decisive.

The Respondent at the time of the sale to him in 1887 was a student at the Training Academy at Patna. He was then between 17 and 18 years of age. His story is that he went to the sale on his own account, without the knowledge of his grandmother or his mother, and bought the property in dispute for himself. A deposit of Rs. 330 had to be paid down, and he alleges that he had Rs. 300 of his own which he had saved whilst at the Academy out of the allowance of Rs. 25 a month which he received from home. The remaining Rs. 30 he says he borrowed from his sister's husband.

He went to the Academy at the age of 12 or 14, and it was not till two or three years afterwards that he began to receive his allowance himself; up to that time his tutor received it and disbursed it. He had therefore at the most three or four years during which he was himself handling the money. Out of the Rs. 25 he had to pay Rs. 5 to his tutor, and Rs. 5 for house rent. Out of the remaining Rs. 15 per month he says he paid his servant's wages, his school fees, got his clothes "prepared" (whether this means made or mended their Lordships are unable to say), and bought "meat, vegetables, "&c."

The remaining Rs. 1,000 he alleges that his mother borrowed and gave to him.

The property which it is alleged he bought for Rs. 1,330 was shown to the satisfaction of two Subordinate Judges to be worth over Rs. 10,000, and the Respondent himself admitted that the annual income from it was at least Rs. 1,000.

Mussummat Misran took no steps to prevent or to set aside a sale which involved this very heavy loss. The Respondent did not obtain a certificate of sale till June 1890, nor effect registration to himself till November 1891, five months after the Appellant's decree was made absolute. Their Lordships agree with the Subordinate Judge that the evidence of any possession having ever been taken by the Respondent is wholly unsatisfactory.

It is alleged that the Respondent's mother borrowed the Rs. 1,000 for the purchase money for her son, at the rate of 60 per cent. per annum, and the mortgage upon which she raised that sum, dated 6th May 1887, stated that the money was borrowed to enable her son to complete the purchase. The Subordinate Judge observes, and their Lordships agree with him, that if this had been true, the Respondent never would have allowed nearly $3\frac{1}{2}$ years to elapse before taking any step to obtain possession, or any other benefit from his purchase, when out of the income of Rs. 1,000 per annum he might have paid off the loan contracted by his mother at ruinous interest in little more than two years.

When the Appellant obtained possession under an Order of the Court in June 1892, the Respondent presented a petition to set aside the order for possession in favour of the Appellant, and restore the possession to himself. The very question now under discussion was raised before the Subordinate Judge at Bankipur, who heard the witnesses and dismissed the petition with costs, on the ground that the Respondent was not the real purchaser, but that the property was

purchased by Mussummat Misran in the name of the Respondent as furzi, and that she remained in possession till dispossessed by the Appellant.

Their Lordships, without going into other details, some of which certainly afford corroboration of the view taken by the Subordinate Judge, after careful consideration of the evidence on both sides, find themselves in agreement with the result arrived at by the Judgment of the learned Subordinate Judge, and think that the considerations which have been set forth above amply justified the conclusion at which both he and the Subordinate Judge at Bankipur arrived, that the alleged purchase by the Respondent was really a purchase by and for the benefit of the grandmother, and that she told the truth when she stated in the mortgage to the Appellant that the property in question was hers free from incumbrance of any description. Nor ought it to be forgotten that both the learned Subordinate Judges had an advantage which the learned Judges of the High Court could not have, of hearing and seeing the witnesses.

The Judgment of the High Court was delivered on 12th May 1897.

The points which appear to have made most impression upon the learned Judges are that, according to the Plaintiff's evidence, he was present at the sale with Rs. 330 in hand (a fact which the learned Judges say was uncontradicted), and that the Plaintiff's mother borrowed Rs. 1,000, and in the mortgage to secure that sum recited the purchase by her son and declared that the Rs. 1,000 were wanted to make up the purchase money, and the learned Judges treat it as a fact not to be disputed that she found this money and gave it to her son. They appear to have thought that it was "perfectly possible" that the Respondent should

have saved Rs. 300 out of a "small allowance." Amongst these considerations, however, the real keynote of the Judgment is afforded by the recital in the mortgage given by the Respondent's mother. Their Lordships do not doubt that it is an important piece of evidence for the Respondent, but it appears to them to be outweighed by the important considerations which they have pointed out. It is abundantly clear that the members of the family were on good terms, all were living together and one of the answers given by the Respondent's mother on cross-examination renders it probable in a very high degree that she had accommodated her mother Mussummat Misran in a similar fashion, not very long before, by pledging her own property to secure an advance to enable her mother to buy the property now in dispute. If the purchase by the Respondent was genuine and for his own benefit, there was a sacrifice—apparently quite unnecessary—of at least between Rs. 8,000 and 9,000 on the part of the grandmother without an effort to avoid it. If he was a furzi—as in French law he would be termed a *prête-nom*—as found by the Subordinate Judge at Bankipur, the motive is intelligible. By a family arrangement the grandmother was enabled to do what she did—to mortgage the property as unincumbered, or when the mortgagee insisted upon a sale, to set up the previous sham sale to defeat the mortgagee. That there were unscrupulous persons engaged in both transactions is clear. The husband of the Respondent's mother acted as amanuensis in signing her name to the mortgage at 60 per cent., which recited that the money was being borrowed to enable the son to buy the property now in dispute. Less than a twelvemonth afterwards the same husband witnessed the mortgage which declared that

the property was his mother-in-law's free from any encumbrance. Another son-in-law of the grandmother witnessed both these deeds. It is drawing heavily on credulity to suppose that the purport of these instruments was unknown in the family. How the mortgage transaction by which Mussummat Misran's daughter is said to have raised the Rs. 1,000 ended nowhere appears.

It is, in their Lordships' opinion, a mistake to state that the presence of the Respondent at the sale was an uncontradicted fact. On the contrary, the Judgment of the Subordinate Judge who dismissed the Respondent's petition to be reinstated in the property (which was in evidence) states explicitly that the Respondent "admitted that he was in Calcutta Madrassa "and was not present when the property of "Mussummat Misran was sold." The view of the Court that the story of the Respondent's savings whilst at school was perfectly possible can scarcely be sustained when the general expressions are replaced by the exact figures and facts alleged by the Respondent in his evidence.

On the other hand the Judgment of the High Court gives no weight to the delay which took place in perfecting the title of the Respondent to possession. The learned Judges say that "he might not have wished to disturb the old lady." No such explanation was offered by the Respondent in his evidence, and any such pious wish, if it existed, had to be carried out at the expense of his mother, who was liable to interest at 60 per cent. whilst her loan might easily have been paid off from the income of the property; nor does the Judgment deal with the cogent evidence that the Respondent did not in fact take possession at all.

Their Lordships will humbly advise His Majesty that the Appeal should be allowed and the Judgment of the learned Subordinate Judge restored, and that the Respondent should pay the costs of the Appellant in the High Court. The Respondent will also pay the costs of this Appeal.