

Judgment of the Lords of the Judicial Committee of the Privy Council on the two Appeals (consolidated) of Bohra Thakur Das and others, since deceased (now represented by Musammat Jarao Kunwar and another) v. The Collector of Aligarh and others, from the High Court of Judicature for the North-Western Provinces, Allahabad, delivered the 25th July, 1910.

Present at the Hearing :

LORD ATKINSON.

LORD SHAW.

SIR ARTHUR WILSON.

MR. AMEER ALI.

[Delivered by Mr. Ameer Ali.]

These two Appeals, which have been consolidated by an Order of His Majesty in Council, arise out of a Suit for redemption brought by the Appellants in the Court of the Subordinate Judge of Aligarh in the United Provinces.

[37] P.C.J. 298.—L. & M.—125.—29/6/10.

The property in Suit, a 6-biswa share of Mauza Agrana, was, with an 11-biswa share of Mauza Kachaura, mortgaged in January, 1870, by a Mr. William L. Gardiner to one Bakhshi Nand Kishore, since deceased, for a sum of Rs. 5,000. Under the terms of the mortgage the mortgagee was to have possession of the mortgaged properties, realise the rents and profits and pay therewith the Government revenue which was separately assessed on the two shares. Out of the balance he was to retain Rs. 600 for the interest on the loan and pay the mortgagor a yearly sum of Rs. 2,400 as *malikana* or proprietor's allowance. In view of settlement proceedings in progress at the time, the deed further provided that "if at the recent settlement the Government revenue, which is paid at present, is enhanced or decreased to some extent, I [meaning the mortgagor] shall be entitled and liable for it, and the mortgagee shall have nothing to do with it."

As a matter of fact, the revenue respectively assessed on the two properties was enhanced, in the case of Kachaura by Rs. 895; in that of Agrana by Rs. 469.

On 20th December, 1873, the equity of redemption in Agrana was acquired by the predecessor in title of the Appellants who afterwards sued and obtained a decree for the apportionment of the *malikana* due in respect of the 6-biswa share of Agrana. Admittedly, the Plaintiffs, Appellants, have since received from Nand Kishore or his representatives the *malikana* for Agrana less the enhanced amount of the Government revenue assessed on it.

William Gardiner appears to have executed in 1868 a simple mortgage of Kachaura in favour of Nand Kishore and another, who in 1878 purchased the property in execution of a decree

on their mortgage. They obtained possession, however, of only 11-biswa share under a decree of the Court.

In the present Suit the Appellants seek to redeem Agrana upon payment of a proportionate share of the Rs. 5,000; their contention being that as Nand Kishore purchased one of the properties on which the mortgage debt was secured, it was *pro tanto* satisfied, and Agrana was only liable for the share legitimately chargeable on it. As Kachaura was sold and purchased by Nand Kishore in execution and part satisfaction of a decree obtained on the prior mortgage of 1868, the Courts in India properly over-ruled the Appellants' contention which has not been pressed before this Board.

Agrana, therefore, is now liable for the entirety of the mortgage debt. But the Defendant, the collector of Aligarh, representing the estate of Nand Kishore, among other pleas, urged that the mortgagee had from the date of the enhancement up to the time of his purchase paid the additional revenue assessed on Kachaura for which the mortgagor had made himself liable, and he was consequently entitled to tack on to the mortgage debt the amounts so paid, with interest from 1873 to 1878.

This claim was disallowed by the Court of First Instance whose judgment was affirmed by the District Court. In second Appeal by the Defendant the High Court of Allahabad has taken a different view. It has held upon the construction of the clause in the mortgage bond relating to the liability of the mortgagor in case of enhancement of Government revenue, that, as the mortgagor did not fulfil his promise to pay the enhancement, and that consequently the mortgagee had himself to pay the enhancement to save the property from being proceeded against

for arrears of Government revenue, the Defendants were entitled to the amount of Rs. 895.15.9 which they paid from 1873 to 1878 inclusive, with interest. The accounts taken on this basis have swelled the amount payable by the Appellants in order to redeem Agrana to over Rs. 30,000.

Their Lordships regret they cannot concur with the learned Judges of the High Court either in the construction of the clause under reference or in the view they have expressed regarding the liability for the payment of the enhanced amount of the assessment on Kachaura. The mortgage bond provided that the mortgagee should, like the mortgagor, remain in possession of the mortgaged properties during the term of the mortgage, and "pay the Government revenue of his own authority." He had thus undertaken the duty of meeting the Government demand. The provision was as much for his own safety as that of the mortgagor. The condition as to mutation of names may be taken to have been duly carried out and his name placed on the Collector's Register as mortgagee in possession. The demand for payment of Government revenue would in the ordinary course be made upon him.

The *malikana* had been fixed on the basis of the existing revenue on the two properties; but as settlement proceedings were pending which involved a possibility of a modification in the assessment, the parties provided that in case of reduction the mortgagor should have the benefit, whilst in case of enhancement the liability should be his. In other words, if the assessment was lowered, he would receive more by way of *malikana*, whilst if it was enhanced he would be entitled to less.

Their Lordships do not understand that the mortgagor by the clause under reference,

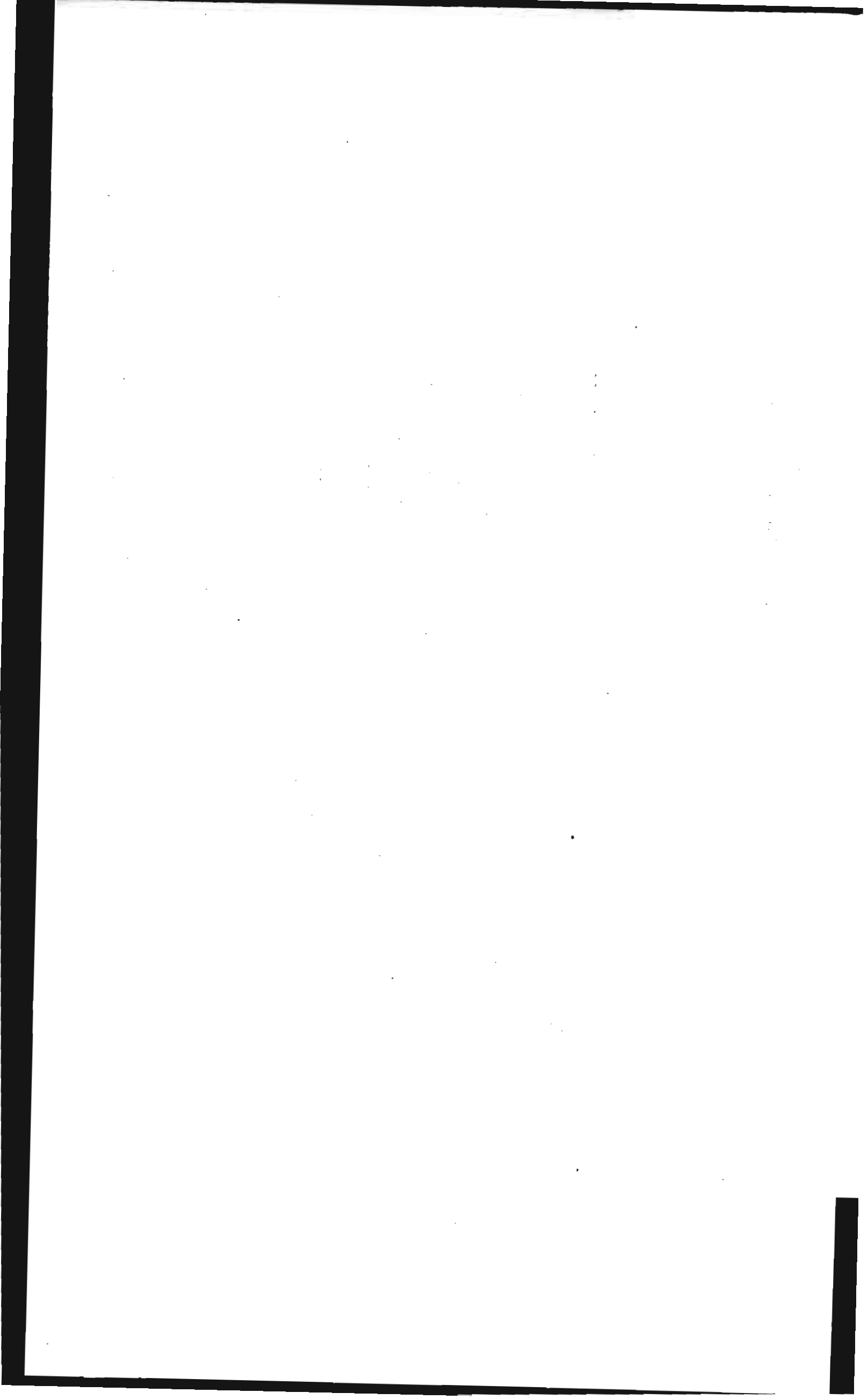
agreed to pay year by year separately the enhanced amount to meet the Government demand, or that the clause in any way altered the liability of the mortgagee in possession to pay the Government revenue assessed on the mortgaged properties. The conduct of the mortgagee in respect of Agrana may be taken as affording some indication of the meaning the parties attached to the clause. After the decree for the apportionment of the *malikana* in respect of Agrana, he invariably deducted the additional amount of the assessment from the sum payable to the Appellants. Instead of taking the same course with regard to Kachaura, he appears to have paid to the mortgagor the whole *malikana* less the share payable for Agrana.

In their Lordships' judgment the principle on which the learned Judges of the High Court have based their view of the rights of the parties is not applicable to the circumstances of the present case. It was the plain duty of the mortgagee to pay the Government revenue for both properties; in one case he took care to protect himself by deducting the enhanced revenue from the *malikana*; in the other he omitted to do so. Whatever the reason, he cannot be allowed now to throw the burden of his own laches on Agrana. In the present Suit it is not the mortgagor who is seeking to redeem the property; and it seems to their Lordships that any equity that might have been invoked against him does not arise as against the Plaintiffs.

On the whole their Lordships are of opinion that the Decree of the High Court dated the 10th April, 1906, in second Appeal 265 of 1904, should be affirmed, and the Decree of the High Court of even date in second Appeal 298 of 1904, should be discharged, and in lieu thereof it should be ordered that the accounts between the parties

should be taken on the lines laid down by the District Judge in partial modification of the Order of the Court of First Instance. And their Lordships will humbly advise His Majesty accordingly.

Their Lordships think that, in the circumstances, the parties should bear their respective costs before this Board and in the High Court.



In the Privy Council.

**BOHRA THAKUR DAS AND OTHERS,
SINCE DECEASED (NOW REPRESENTED
BY MUSAMMAT JARAO KUNWAR AND
ANOTHER)**

v.

**THE COLLECTOR OF ALIGARH AND
OTHERS.**

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