

Judgment of the Lords of the Judicial Committee of the Privy Council on the Consolidated Appeals of Musammat Parbati v. Saiyid Muhammad Muzaffar Ali Khan and others ; and of Saiyid Muhammad Muzaffar Ali Khan and others v. Musammat Parbati, from the High Court of Judicature for the North-Western Provinces, Allahabad ; delivered the 21st February 1912.

PRESENT AT THE HEARING :

LORD SHAW.

LORD ROBSON.

SIR JOHN EDGE.

MR. AMEER ALI.

[DELIVERED BY SIR JOHN EDGE.]

These are consolidated Appeals from a decree of the High Court of Judicature for the North-Western Provinces at Allahabad, dated the 13th June 1907, which partly affirmed and partly reversed a decree of the Subordinate Judge of Saharanpur, dated the 14th July 1904, by which the suit had been dismissed.

The suit was brought on the 1st September 1903 to obtain proprietary possession of 13 biswas, 6 biswansis, 3 tanwansis, 6½ kachwansis and a fraction of the 20 biswas of Mauza Lohari. The Plaintiffs' case briefly was that one, Mehdi Ali, whose representatives in title they alleged themselves to be, had in 1846 mortgaged the

shares in Mauza Lohari, possession of which they claimed, to Sita Ram and his son Sheo Lal; that the mortgage debt had been discharged by the usufruct; and that the Defendants were the representatives of the mortgagees and still held possession under no other title; and the Plaintiffs claimed a decree for proprietary possession and for mesne profits. The case of the Defendants was that they held possession not under the mortgage of 1846, but under a private sale of the 27th of May 1853, of 10 biswas of Mauza Lohari, and under an auction sale of the 20th March 1854 of the remaining 10 biswas of Mauza Lohari, which sales they alleged were made in order to discharge debts which had been contracted by Mehdi Ali. In effect the Defendants' case was that by reason of the sales of 1853 and 1854 the equity of redemption in the shares which were mortgaged in 1846 passed to those through whom they claimed title. It was also contended on behalf of the Defendants that they were not precluded from setting up a title by adverse possession by the fact that possession of the shares in suit had been originally obtained under the mortgage of 1846.

The facts as found by the Board are briefly as follows :—

On the 22nd July 1846 Mehdi Ali, who owned the whole 20 biswas of Mauza Lohari, borrowed Rs. 4,000 from Sita Ram and his son Sheo Lal, and executed in their favour a mortgage for the term of two years of the shares which are the subject of this suit. The mortgage was usufructuary and the mortgagees were put in possession under it. Incidentally it may be mentioned that the Subordinate Judge found as a fact that the mortgage debt had been discharged by the usufruct before 1863. If it were necessary in this appeal to decide that issue their Lordships would probably

not be prepared to dissent from that finding of the Subordinate Judge.

Mehdi Ali, who was a Shia Muhammadan, died on the 9th January 1852, and left surviving him two widows, Ashrafunnisa and Umda Begum, and certainly three daughters who had been born to him by Umda Begum. Through one of those daughters, Askari, who subsequently married and left issue, the Plaintiffs claim title. It has been contended on behalf of the Defendants that Mehdi Ali also left surviving him a daughter born to him by Ashrafunnisa. On behalf of the Plaintiffs it has been contended that Mehdi Ali left surviving him no daughter by Ashrafunnisa, and that Ashrafunnisa was a childless widow. In the view which their Lordships take of this case it is immaterial whether Mehdi Ali left, or did not leave, a daughter surviving him by Ashrafunnisa. It may, however, be mentioned that after Mehdi Ali's death, for some reason which the evidence does not explain, 10 biswas of Mauza Lohari were treated as the share of Ashrafunnisa, and the remaining 10 biswas were treated as the share of Umda Begum and her three daughters.

Mehdi Ali died heavily in debt, and after his death in 1852 suits to recover debts which were due by him were brought by his creditors against Ashrafunnisa, Umda Begum, and her three daughters, as the representatives of Mehdi Ali, and money decrees were obtained in those suits. One of those suits was brought by Sheo Lal on the 8th July 1852, on a bond payable on demand, to recover with interest Rs. 2,000 which Sheo Lal had lent to Mehdi Ali on the 29th May 1849. In that suit Sheo Lal obtained a decree for Rs. 2,786. 5. 6, principal and interest, against Ashrafunnisa, Umda Begum, and the three daughters of Umda Begum, all of whom were sued as the heirs of Mehdi Ali.

Under that decree the 20 biswas of Mauza Lohari were attached. On the 5th of May 1853 a sale proclamation was made fixing the 20th of June 1853 as the date for the auction sale of the 20 biswas in execution of the money decree. On the 19th of May 1853 Sheo Lal, through his pleader, applied to the Court to remove the attachment in order to enable the Defendants in that suit to pay the decree money by a private sale of the estate of Mehdi Ali deceased. On that application the Court removed the attachment. On the 27th May 1853 Inaet Husain, acting under a power of attorney, which had been executed for that purpose by Ashrafunnisa and had been duly registered, executed on her behalf a sale deed of 10 biswas of Mauza Lohari in favour of Baldeo Sahai, son of Sheo Lal, the consideration being Rs. 7,500. In that sale deed it was stated that two thirds of three suls of the 20 biswas of Mauza Lohari had been from the 22nd of January 1846 in the exclusive possession of Sita Ram and Sheo Lal under the mortgage for Rs. 4,000 of 1846 from Mehdi Ali to them, and it was stated that Mehdi Ali had died, and had left a considerable amount of debt unpaid, that Ashrafunnisa had remained the heir of half the estate of Mehdi Ali in lieu of her dower debt; and in order to satisfy the decrees held by, and the debts due, to Sheo Lal she made an absolute sale of the 10 biswas share to Baldeo Sahai. It was by the sale deed agreed that Rs. 2,000 of the purchase money should be left with Baldeo Sahai, and that he should have power to pay the Rs. 2,000 to the mortgagee and to redeem the subject of the sale. In the sale deed the 10 biswas were described as Ashrafunnisa's share. After that sale the 10 biswas were entered in the revenue papers as Baldeo Sahai's share by private sale. Baldeo Sahai obtained possession of the 10 biswas share and held possession of the share until he

died in 1895, when the Defendants as his representatives obtained possession.

It has been contended on behalf of the Plaintiffs, first, that Ashrafunnisa had no title to the 10 biswas share in Mauza Lohari, and, consequently had no title which she was capable of passing by the sale deed, and, secondly, that Baldeo Sahai was a member with his father Sheo Lal of a joint Hindu family, and that the family held possession as mortgagees and could not set up a claim of adverse possession against the representatives in title of Mehdi Ali, the mortgagee of 1846.

It has not been suggested that Ashrafunnisa had any interest in Mauza Lohari which she could sell other than such interest, if any, in the immovable property of Mehdi Ali as she obtained under the Shia law as his widow. Her right to dower did not confer upon her a saleable estate in Mauza Lohari. If she had not borne to Mehdi Ali a daughter who survived him, Ashrafunnisa as his widow took no title to any share in Mauza Lohari. If on the other hand, as the Defendants have contended, Ashrafunnisa had borne to Mehdi Ali a daughter who survived him for a few months, Ashrafunnisa's share as his widow, and the share of his daughter, which on that contention came to her on the daughter's death, did not together amount to a 10 biswas share in the Mauza. If Ashrafunnisa had any other title in 1853 to the 10 biswas share which she purported to sell to Baldeo Sahai, it has not been shown what it was or how she had obtained it. But it is not necessary to consider what title, if any, Ashrafunnisa had to the 10 biswas share, as by the sale deed of the 27th May 1853 Ashrafunnisa sold to Baldeo Sahai such interests, if any, as she had in the 10 biswas of Mauza Lohari, and Baldeo Sahai got possession of the 10 biswas, and in course of time obtained a

title by adverse possession to the whole 10 biswas or any portion of that share which Ashrafunnisa may not have been empowered to sell to him, and that title became indefeasible unless he or the Defendants who claim under him were precluded from setting up a title of adverse possession.

The High Court found as a fact that Baldeo Sahai was in 1846, and continued to be, a member of the joint Hindu family, of which his father Sheo Lal had been a member, and on that finding of fact decided that Baldeo Sahai's possession and the possession of the Defendants as his representatives had always been that of mortgagees, and consequently that Baldeo Sahai and those who claim under him were precluded from setting up any title of adverse possession to any portion of the share which was mortgaged in 1846 to Sita Ram and Sheo Lal. Their Lordships are unable to agree with the findings of fact of the High Court upon which that decision was based. At the date of the mortgage of 1846 Baldeo Sahai was undoubtedly a member of the joint Hindu family, of which Sita Ram and Sheo Lal were members, and that family was governed by the law of the Benares School of the Mitakshara. Their Lordships, however, find on evidence, which they consider is unimpeachable, that in 1847 or 1848, owing to disputes in the family, Baldeo Sahai ceased to be joint in food and joint in business with Sheo Lal, but no partition of the family property was then made, and thenceforward during their lives Baldeo Sahai and Sheo Lal had been separate in food and in business. Their Lordships also find that when Sheo Lal and Baldeo Sahai ceased to be joint in food and in business Baldeo Sahai received a present of a considerable sum of money from his grandmother, with which he carried on the business of a money-lender on his own account, and that out of his separate self-acquired property he

found the purchase money of Rs. 7,500 of the sale deed of the 27th of May 1853. The oral evidence showing a separation is in their Lordships' opinion confirmed by the terms of that deed. Ashrafunnisa purported to sell the 10 biswas to Baldeo Sahai as a person who was not a mortgagee under the mortgage of 1846. So far as the 10 biswas which Ashrafunnisa purported to sell to Baldeo Sahai on the 27th of May 1853, their Lordships find that a title at least of adverse possession has been established and that the Defendants are not precluded from setting up that defence.

Their Lordships concur with the finding of the Subordinate Judge and the finding of the High Court that the remaining 10 biswas share in Mauza Lohari was sold to Sheo Lal on the 20th of March 1854, at an auction sale held in execution of a decree for money which had been obtained by a creditor of Mehdi Ali, in a suit brought against Umda Begum and her three daughters as the heirs and representatives of Mehdi Ali, and Sheo Lal obtained possession and held it until he died, when his interest passed to his son Baldeo Sahai as his heir.

The Plaintiffs failed to establish any title by way of redemption or otherwise to any interest in Mauza Lohari, and their suit was rightly dismissed by the Subordinate Judge.

Their Lordships will humbly advise His Majesty that the Appeal of the representatives in title of Baldeo Sahai be allowed with costs and the decree of the High Court be varied by dismissing the Appeal to that Court with costs, and that the Appeal of Saiyid Muzaffar Ali Khan and other Plaintiffs to His Majesty in Council be dismissed with costs.

In the Privy Council.

MUSAMMAT PARBATI

v.

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KHAN AND OTHERS,

AND

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