

*Privy Council Appeal No. 73 of 1912. Allahabad Appeals Nos. 5, 6
and 9 of 1910.*

Lala Birj Lal - - - - *Appellant.*

v.

1. Musammat Inda Kunwar and others - *Respondents.*

2. Same - - - - *Respondents.*

3. Het Ram and others - - - - *Respondents.*

(Consolidated Appeals.)

FROM

**THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN
PROVINCES, ALLAHABAD.**

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 6TH FEBRUARY 1914.

Present at the Hearing.

LORD SHAW.

LORD MOULTON.

MR. AMEER ALI.

[*Delivered by MR. AMEER ALI.*]

The suits which have given rise to this consolidated appeal from three decrees of the High Court of Allahabad relate to a property called Mouzah Khilchipur lying in the district of Rae Bareilly in the United Provinces of India.

The mouzah is now in the possession of the Defendant-Appellant under a usufructuary mortgage executed in 1871 in favour of his ancestor Madhoram by two Hindu ladies, Rukmin and Nimma, and one Dhal Chand. Other titles were created subsequently in favour of Madhoram or his son Darbari Lal to some of which reference will be made in the course of this judgment.

But the Plaintiffs' claim to possession depends principally on their right to redeem the mortgage of 1871.

Mouzah Khilchipur belonged originally to one Kundan Lal; he died many years ago, leaving two sons Mihin Lal and Sham Lal who it is not disputed were joint in food and estate. Mihin Lal died in 1853, and Sham Lal in 1859, leaving his widow Nimma and a nephew named Lila Dhar, Mihin Lal's son. On Sham Lal's death the whole property devolved on Lila Dhar. Lila Dhar died in 1861 when Rukmin, his widow, became the owner taking a widow's estate under Hindu Law. But although Rukmin as the widow of the last full owner was entitled to the entire property, it would appear that Sham Lal's widow claimed, or was acknowledged, to possess an equal interest with Rukmin. In 1862 the two widows jointly sold a half or 10 biswas share of the village to Dhal Chand who is said to have been Rukmin's manager. In 1871, the three, Dhal Chand, Rukmin, and Nimma executed the usufructuary mortgage referred to above for a period of 12 years in respect of the entire mouzah represented as 20 biswas in favour of Madhoram, the conditions being that at the end of the term the debt would become satisfied and the mortgagors would recover the property without payment of the "principal mortgage money" or interest. Dhal Chand died, it is said, in 1873, and in 1874 his widow, Bhauna, sold the equity of redemption in respect of eight biswas out of the 10 biswas he had acquired from Rukmin and Nimma to the son of Madhoram, Durbari Lall, and his widow, Chando, one of the Defendants in the present suits. The equity of redemption in respect of the remaining two biswas was sold in execution of a decree against Bhauna, and passed ultimately into the hands of the Appellant.

It is unnecessary for the determination of this Appeal to refer to the subsequent transactions by which Madhoram's son acquired the equity of redemption in respect of the 10 biswas that had remained in the hands of Rukmin and Nimma after the sale of the moiety to Dhal Chand.

The Brahman Plaintiffs claim to be the reversioners of both Lila Dhar and Dhal Chand. They allege that Bhauna, Dhal Chand's widow, died in 1905, Nimma in 1906, and Rukmin a few years ago, and that upon their respective deaths whatever rights they had purported to create in favour of Madhoram came to an end, and they are entitled to possession of the entire property. They have transferred a moiety of the mouzah with all the appurtenant rights to Inda Koer, who brings one suit in respect of the share purchased by her, whilst the Brahman Plaintiffs have sued separately for the other share claimed by them.

With regard to the 10 biswas Dhal Chand had purchased from Rukmin and Nimma, they allege that the sale of the equity of redemption in respect of eight biswas by Bhauna was without legal necessity and that the execution sale of the two biswas was in respect of a personal decree against her, and that, consequently, neither transaction is binding against them.

The contesting Defendants, the representatives of Madhoram, denied that the Brahman Plaintiffs were the reversioners of either Lila Dhar or Dhal Chand; that their claim was barred by the Statute of Limitations, as Rukmin, the widow of the last full owner, died more than 12 years before suit, and that even if the Brahman Plaintiffs were the reversioners of Lila Dhar or Dhal Chand, the transactions impugned by them were for legal necessity and consequently binding against them. The two suits were tried together, and although in consequence of the decree of the Subordinate

Judge there were three separate Appeals to the High Court, they were heard together; and subsequently on an application for leave to appeal to His Majesty in Council, all three Appeals were consolidated. The case has thus come before their Lordships as a single consolidated Appeal. Their Lordships propose, therefore, in order to avoid confusion, to deal with the two suits as one consolidated action from the outset. The Trial Judge was of opinion that the evidence produced to establish the relationship of the Brahman Plaintiffs to Lila Dhar was wholly untrustworthy. He, therefore, did not consider it necessary to enter upon an enquiry as to the time of Rukmin's death.

He held, however, that the Brahman Plaintiffs (save Lachman) were the reversioners of Dhal Chand, being his brother's sons; that the sale of the equity of redemption by Bhauna in respect of eight biswas was for legal necessity, but that there was no proof that the sale by auction of the two biswas in execution of the decree against her was "in satisfaction of a debt contracted by her for legal necessity." He accordingly made a decree in Inda Koer's suit for the redemption of the mortgage of 1871 in respect of two biswas, and dismissed the rest of her claim as well as the claim of the Brahman Plaintiffs in their suit.

From these decrees there were, as already observed, three Appeals to the High Court; one by the Defendants in respect of the two biswas, and the two others by the two sets of Plaintiffs, namely, Inda and the Brahmans respectively.

As regards the relationship of the Brahman Plaintiffs to Lila Dhar, the learned Judges of the High Court have come to a diametrically opposite conclusion to the Trial Judge. They hold that it is satisfactorily established they are the descendents of one Bhauna, alias Mulo, a daughter of Kundan Lal, and therefore related as *Bandhus*

to Lila Dhar, Rukmin's husband. They have further held that the sale by Rukmin and Nimma in 1862 to Dhal Chand, the mortgage of 1871 by these three to Madhoram, and the sale of the equity of redemption by Bhauna, Dal Chand's widow, in respect of eight biswas, were without legal necessity. They have also held that Rukmin was alive within 12 years from date of suit. They accordingly reversed the Decree of the Trial Judge by which he had dismissed the Plaintiffs' claim in respect of eighteen biswas, and affirming his order in respect of the two biswas, made a Decree in favour of the Plaintiffs in both suits.

In the present Appeal the Defendant Brij Lal, the grandson of Madhoram, challenges all the conclusions of the High Court. The case as presented at their Lordships' Bar is divisible into two parts, one relating to the reversionary right to Dhal Chand's estate, the other to Lila Dhar's. It is not disputed now that the Brahman Plaintiffs, including Jachman, are the sons of Dhal Chand's brothers, and are, therefore, entitled to his estate on the death in 1905 of his widow Bhauna. The only question for determination on this part of the case is whether the sale by Bhauna of the equity of redemption in respect of the eight biswas was for legal necessity. The onus of supporting a sale from a Hindu widow is undoubtedly on the purchaser. In the present case the Appellant has adduced no evidence to prove legal necessity as would bind the husband's estate. He has relied simply on the recitals in the Schedule attached to the Sale Deed. Recitals in mortgages or deeds of sale with regard to the existence of necessity for the alienation have never been treated as evidence by themselves of the fact. And it has been repeatedly pointed out by this Board that to substantiate the allegation there must be some evidence *aliunde*.

In these circumstances their Lordships are of opinion that the conclusion of the High Court with regard to the sale by Bhauna of the equity of redemption in respect of the eight biswas is well founded.

Respecting the other two biswas which belonged to Dhal Chand, there is a concurrent finding of fact by the two Courts that the decretal debt in execution of which it was sold was not for legal necessity. In the result, therefore, as regards the share purchased by Dhal Chand from Rukmin and Nimma in 1862, and which he jointly with them mortgaged in 1871 to Madhoram, the Brahman Plaintiffs as reversioners of Dhal Chand, are entitled to the same.

The position respecting the other 10 biswas seems to their Lordships quite different. The right of the Plaintiffs to that share rests on the allegations that they are the grandsons of one Bhauna *alias* Mulo, who was a daughter of Kundan Lal and the sister of Sham Lal and Mihin Lal. There is no documentary evidence in support of the statement that the wife of Hulas Rai, the grandfather of the Plaintiffs, was a daughter of Kundan Lal. It was natural to expect that in 1862, when Rukmin and Nimma sold a moiety of the property to Dhal Chand, the uncle of the Plaintiffs, on which occasion the relationship of Lila Dhur, Rukmin's husband, was stated, with some particularity, a reference should be made to the vendee's connection with the family. Other documents of a similar nature are equally silent. As observed already, the Plaintiffs' allegation rests entirely on oral testimony. Having regard to the divergence of opinion between the two Courts in India with respect to the credibility of the Plaintiffs' witnesses, their Lordships have closely examined the evidence, and they cannot help considering it to be of a very

dubious character. The witnesses had to prove only one link in the chain of relationship; the discrepancies, therefore, in their statements on material points, which have been somewhat lightly passed over by the High Court, seriously affect, in their Lordships' opinion, the value of their testimony. Their Lordships agree with the Trial Judge in considering the evidence as to Mulo being a sister of Sham Lal and Mihin Lal as worthless. In this view of the case, it is hardly necessary to determine whether Rukmin was alive or not within twelve years from date of suit. Admittedly she left her home many years ago. The Plaintiffs allege she went on a pilgrimage, and was last heard of eight or nine years before the action. The Defendant, on the other hand, says she had to leave her home a considerable time before owing to having been outcasted for unchastity. Most of the witnesses who speak to her being recently alive state they obtained their information from Het Ram, one of the Plaintiffs, who has not thought fit to enter the witness-box. On the other hand, there are some corroborative circumstances which incline their Lordships to believe that Rukmin left the village in consequence of her lapse, and died many years ago in a distant relative's home.

On the whole it appears to their Lordships that the Plaintiffs have failed to establish their right to recover possession of the remaining 10 biswas, as reversioners to Rukmin's husband. The Decree of the High Court in the suit of Inda Koer omits, however, from consideration the covenant in the deed of mortgage which provides that at the time of redemption the mortgagors:—

“ Shall be liable for the amount of arrears and the amount
 “ of *takavi* advances and the amount advanced on account of
 “ seed which may be due to the mortgagee by the tenants
 “ of the village according to the entries in the *patwaris'*
 “ papers.”

Their Lordships are of opinion that the Decrees of the Courts in India should be discharged, that the claim of the Brahman Plaintiffs in their suit should be dismissed, and in the suit of Inda Koer who has acquired the 10 biswas which alone the Brahman Plaintiffs had a right to sell, there should be a Declaration that she is entitled to recover possession of the same from the Defendant-Appellant, with mesne profits as provided by law, less any sum that may be found due to the mortgagee Defendant upon the taking of proper accounts on the basis of the above-recited covenant within a time to be specified by the High Court.

And their Lordships will humbly advise His Majesty accordingly.

Considering the result, they think the ends of justice will be served by making the parties bear their respective costs in the Appeals to the High Court and to this Board.

In the Privy Council.

LALA BIRJ LAL

v.

1. MUSAMMAT INDA KUNWAR AND OTHERS.
2. SAME.
3. HET RAM AND OTHERS.

(Consolidated Appeals.)

DELIVERED BY MR. AMEER ALI.

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