

*Privy Council Appeals Nos. 30 and 31 of 1912.*

**Padarath Halwai and others** - - - - - *Appellants,*  
*v.*  
**Pandit Ram Nain Upadhia and others** - *Respondents.*  
AND  
**Same** - - - - - *Appellants,*  
*v.*  
**Same** - - - - - *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 3RD JUNE 1915.

*Present at the Hearing:*

LORD ATKINSON.  
SIR JOHN EDGE.  
MR. AMEER ALI.

*[Delivered by SIR JOHN EDGE.]*

These are consolidated appeals from decrees, dated respectively the 29th March 1909, of the High Court of Judicature at Allahabad. The two decrees appealed from were made in appeals in the same suit. The suit was brought in the Court of the Subordinate Judge of Jaunpur on the 29th November 1904 to enforce, by sale of the village Baragaon and other villages, the payment

of Rs. 66,809 odd, due under a mortgage dated the 25th June 1892. The Subordinate Judge decreed the claim in part, and in part dismissed it. Each side appealed to the High Court at Allahabad. The High Court dismissed the defendants' appeal, and in the plaintiffs' appeal gave them a decree for their claim.

When these consolidated appeals first came on for hearing before this Board it was contended on behalf of the appellants that the mortgage upon which this suit was brought had not been attested by at least two witnesses, and as the amount secured by it exceeded one hundred rupees the alleged mortgage was ineffective and could not be given in evidence. That point had not been raised in either of the Courts below. Under the circumstances this Board remanded the case to the High Court in order to enable the parties to produce evidence on the question of attestation. Evidence on that subject has been taken and has been returned to this Board. On behalf of the appellants it has now been contended that the evidence which was given on the remand in proof of the attestation was unreliable, and, even if accepted as true, did not prove that the two attesting witnesses who gave evidence on the remand had seen the mortgagors sign their names to the mortgage.

The mortgagors were two *purdahnashin* ladies who did not appear before the attesting witnesses, and consequently their faces were not seen by the witnesses. These two attesting witnesses were, however, well acquainted with the voices of the ladies, and their Lordships are satisfied that these two attesting witnesses did identify the mortgagors at the time when the deed was executed. The mortgagors were, on the occasion of the execution of the mortgage deed, brought from the *zenana* apartments of the house in which they were to an ante-room to execute the

deed. In the ante-room the ladies seated themselves on the floor, and between them and these two attesting witnesses there was a *chick*, which was not lined with cloth, hanging in the doorway. These two attesting witnesses recognised the ladies by their voices, and they say that they saw each lady execute the deed with her own hand, although owing to the *chick* they were unable to see the face of either of the ladies. On the other side an attempt was made to prove that a *tut*, through which nothing could be seen, was hanging in the doorway. Their Lordships accept the evidence of these two attesting witnesses as true, and hold it proved that the mortgage deed of the 25th June 1892 was duly attested by at least two witnesses within the meaning of Section 59 of the Transfer of Property Act, 1882. It is not disputed that the mortgage deed was in fact the deed of the two *pardahnashin* ladies, Musammât Niamat Bibi and Musammât Kamar-un-Nisa Bibi, the mortgagors.

The only other question to be considered in these appeals is the contention on behalf of the appellants that the plaintiffs in the suit have by reason of certain events, which will now be referred to, lost their right to enforce against Baragaon payment of a considerable part of the amount which they have claimed.

On the 8th August 1887 Musammât Niamat Bibi and Musammât Kamar-un-Nisa, who will be hereafter referred to as the mortgagors, mortgaged the villages Arghupur and Baragaon, to Sarju Parshad and Ramanand to secure Rs. 12,000 and interest thereon. On the 19th February 1892 the mortgagors mortgaged Arghupur to Lukshmi Prasad and others to secure Rs. 30,000 and interest thereon. The mortgagees of the 19th February 1892 and

their representatives in title will hereafter be referred to as the second mortgagees. On the 25th June 1892 the mortgagors by their deed of that date mortgaged Arghupur and Baragaon, together with three other villages, to Sarju Parshad and Ramanand to secure Rs. 32,000 and interest thereon. This sum of Rs. 32,000 included a sum of Rs. 18,000 principal and interest then due under the mortgage of the 8th August 1887. On the 20th May 1893 the mortgagors further mortgaged Arghupur to the second mortgagees to secure Rs. 21,324 and interest thereon. Sarju Parshad is dead; he is represented in this suit by his son, Ram Narain, who is one of the three plaintiffs. The other plaintiffs are Ramanand and his son S. Narain.

— On the 14th December 1896 the second mortgagees brought a suit in the Court of the Subordinate Judge of Jaunpur upon their mortgages of the 19th February 1892 and the 20th May 1893 to obtain a decree for the principal moneys and interest due under the said mortgages, and they prayed that in default of payment on a date to be fixed by the Court, Arghupur should be sold by auction and the proceeds of the sale should be applied towards the satisfaction of their decree. To that suit the second mortgagees made Musammat Kamar-un-Nisa Bibi as one of the mortgagors and as the heiress of Musammat Niamat Bibi, then dead, the other mortgagor, Sarju Parshad, Ramanand and one Indar Sen Singh, defendants. Indar Sen Singh was a subsequent mortgagee; he is a defendant to this suit, but is not an appellant. In their plaint the second mortgagees stated that Sarju Parshad, Ramanand and Indar Sen Singh were mortgagees of Arghupur, and that they, the then plaintiffs, "were ready to pay the

“ mortgage money due to any of them who may  
 “ be prior mortgagees and which they (the  
 “ plaintiffs) may be legally bound to pay.”

In their written statement in the suit of 1896, Sarju Parshad and Ramanand distinctly claimed their right as prior mortgagees and said, “ If the  
 “ plaintiffs be willing to get the hypothecated  
 “ property sold, after paying in full the prior  
 “ amount due to these defendants, they have no  
 “ objection whatever to the plaintiffs’ claim.”

The then Subordinate Judge of Jaunpur, being obviously in confusion of mind as to the rights of the parties to the suit of 1896, by his judgment of the 19th January 1897, decided amongst other things that Arghupur should be sold by auction in the event of the defendants to the suit failing to pay, on or before the 19th May 1897, to the plaintiffs in that suit (the second mortgagees) Rs. 49,275 9. 0, the principal and interest due under the mortgage of the 19th February 1892 and future interest, and that the proceeds of the sale should be applied first in payment of the amount due to the second mortgagees under their mortgage of the 19th February 1892, and that the balance, if any, should be “ applied in payment of the sum which  
 “ may be due to Sarju Parshad and Ramanand  
 “ on that date with interest. Any surplus left  
 “ to be applied in payment of the sum due to  
 “ the plaintiffs under the second document, dated  
 “ the 20th May 1893.” The Subordinate Judge apparently overlooked the rights of Sarju Parshad and Ramanand under their prior mortgage of the 8th August 1887. In accordance with the judgment a decree was made by the Subordinate Judge. Default having been made in payment on the date fixed a decree absolute for sale of Arghupur was made by the Subordinate Judge of Jaunpur on the 4th September 1897. Under the decree of the 4th September 1897, Arghupur

was sold. The proceeds of the sale were applied first in payment to the second mortgagees of the sum then due to them in respect of their mortgage of the 19th February 1892, and the balance of the proceeds of the sale was paid to the first mortgagees; that balance did not satisfy the amount then due to the first mortgagees under their mortgage of the 8th August 1887. If the proceeds of the sale of Arghupur had been first applied to the payment of the amount then due under the mortgage of the 8th August 1887, that mortgage would have been satisfied, and the amount due under the mortgage of the 25th June 1892 would have been to that extent reduced. As the proceeds of the sale of Arghupur did not satisfy the amount due to the second mortgagees under their mortgage of the 20th May 1893, they obtained a decree under Section 90 of the Transfer of Property Act, 1882, and in execution of this decree the village of Baragaon was sold on the 20th April 1904, and was purchased by the appellants.

On behalf of the appellants it has been contended before this Board and in the Courts below that Baragaon was relieved of all liability in respect of the debt due under the mortgage of the 8th August 1887, by reason of the failure of Sarju Parshad and Ramanand to insist on their priority under that mortgage, it being alleged in support of the contention that Sarju Parshad and Ramanand had agreed to waive their priority as mortgagees of Arghupur, or had waived it, of which, if it were material, there is no proof, and that they were guilty of laches in not insisting on that priority. Their Lordships have found it difficult to follow the argument in support of the contention, as the appellants had no interest in Baragaon until they purchased Baragaon on the 20th April 1904, and what they then purchased was the interest of the mortgagors in that village.

It is true that had Sarju Parshad and Ramanand appealed against the decree of the Subordinate Judge, they could have had their interests as first mortgagees under the mortgage of 8th August 1887 protected, and would, on the sale of Arghupur, have obtained payment of the amount then due under that mortgage. Sarju Parshad and Ramanand did not, by an appeal, insist on their right as prior mortgagees, but the fact that they did not insist on having the amount due under the mortgage of the 8th August 1887 satisfied in priority to the claim of the second mortgagees does not disentitle the plaintiffs to recover the full amount of their claim in this suit, and does not entitle the appellants to relief. No other fact which would entitle the appellants to relief has been shown. The appeals fail.

Their Lordships will humbly advise His Majesty that these consolidated appeals should be dismissed.

The appellants must pay the costs.

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In the Privy Council.

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PADARATH HALWAI AND OTHERS

*v.*

PANDIT RAM NAIN UPADHIA AND  
OTHERS.

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DELIVERED BY SIR JOHN EDGE.

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