

Maharaja Ram Narayan Singh, since deceased
(now represented by **Maharajkumar Lachmi**
Narayan Singh) - - - - - *Appellant,*

v.

Adhindra Nath Mukhurji and Others . - *Respondents,*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 12TH MAY, 1916.

Present at the Hearing :

LORD SHAW.

LORD SUMNER.

SIR JOHN EDGE.

MR. AMEER ALI.

[*Delivered by* SIR JOHN EDGE.]

This is an appeal from an order of the High Court at Calcutta, dated the 30th August, 1911, which set aside a preliminary decree of the Subordinate Judge of Hazaribagh, dated the 30th June, 1910, in a suit brought upon a mortgage, and remanded the case to the Court of the Subordinate Judge to be dealt with in accordance with the directions contained in the judgment of the High Court. The respondents, who are the plaintiffs, have not appeared.

The deed upon which the suit was brought was made on the 14th April, 1896, by Maharaja Nam Narayan Singh in favour of Rai Babu Jadu Nath Mukhurji, a Government pleader who had been employed as a pleader by the Maharaja. The consideration was Rs. 1,30,000 which were advanced by Jadu Nath Mukhurji to Maharaja Nam Narayan Singh. The principal moneys, together with interest, at the rate of 10 annas per centum per mensem were to be repaid as provided by the deed, by and out of the rents and cesses of certain Mokurari villages of Maharaja Nam Narayan Singh, which were mortgaged with possession to Jadu Nath Mukhurji. A schedule to the deed shows how the repayment with interest was to be effected, and that on the determination, on the 14th January, 1903, of the period for which the mortgage was granted, it

was contemplated that the debt with interest would be satisfied, and a balance of Rs. 230:11:3 would be payable to the Maharaja by Jadu Nath Mukhurji. The total period for which the mortgage was granted was from the Sambat year 1953 to the Sambat year 1959, that is, from A.D. 1896 to the 14th January, 1903, and the times when possession of the different Mokurari villages was to be given to Jadu Nath Mukhurji were specified.

Having regard to the claim which has been made in this suit, the following extracts from the deed appear to their Lordships to be of importance:—

“ It is desired that the said pleader Zarbharnadar should realise in full his dues, principal with interest, by remaining in possession of each of the said properties during the said years and by collecting the rents with cesses thereof. The details of the time when and the manner in which the principal and interest will be realised by the said pleader Zarbharnadar are given at the foot of this deed. The specifications of the villages with Jummabaudis, pergunnahs, stations, sub-registry, district registry, and zillahs wherein the said villages lie are given herein below. The said pleader Zarbharnadar should realise year after year from the Elakadars and tenants mentioned in this deed in accordance with the above specifications. If any Elakadars or tenants mentioned in this deed put off paying the rents, &c., then it is and will be in the power of the said pleader Zarbharnadar to realise the same with interest, damages, and costs by instituting suits in Court in his own name as Zarbharnadar plaintiff, with prayer for ejectment or in any other proper way. In case of ejectment, the said pleader Zarbharnadar will realise the Zarbharna money from the Kham Tehsil or from Thikadar of such village, and any amount of excess jumma resulting from the Kham jumma or Thikadari jumma in respect of the resumed villages over the jumma mentioned in the bond, whatever it may be, shall be paid on taking receipt by the said Zarbharnadar or his heirs to me the executant, or my heirs, year after year. I, the executant, will give the thicca pottah of the resumed villages. The Zarbharnadar shall have no right to grant the thicca pottah of such villages. If, for any reason, the jumma of any village as mentioned in the bond decreases, the said Zarbharnadar shall be entitled to get from me, the executant, the amount of decrease with interest at the above-mentioned rate. After the expiry of the term of the Zarbharna, I, the executant, shall have the right to take possession of the resumed villages as well as of the other villages mentioned in this bond on account of the expiry of the term and redemption of mortgage, and the said pleader Zarbharnadar shall have no right whatever to the same.

“ During the term of the Zarbharna, I, the executant, or my heirs and representatives, shall on no account collect the rents with cesses of the Zarbharna properties mentioned in this bond.

“ If by mistake I, the executant, or my heirs make any collection, then I or my heirs shall be liable to pay the amount collected with interest at the above rate to the said pleader Zarbharnadar. Except in such a case for no other reason and on no other account, the Zarbharnadar has and shall have any claim whatever against me, the executant, or my heirs and representatives, on the ground of realisation and non-realisation. If a claim is made, it is and shall be totally null and void. The said pleader Zarbharnadar shall not be in any way liable for the Government revenue, Road and Public Works cesses or

“ any other public demand. These things shall concern me, the
 “ executant. The sum of Rs. 230 : 11 : 3, the excess amount payable by
 “ the Zarbarnadar to me, the executant, in 1959, as stated in the
 “ account mentioned in this deed, shall be paid to me, the executant,
 “ on taking receipt by the said Zarbarnadar in Pous of the said year.
 “ In case of default on the due date aforesaid, interest at the above
 “ rate up to the date of realisation shall be paid on the excess amount
 “ by the Zarbarnadar.”

The mortgage was in their Lordships' opinion an usufructuary mortgage within the meaning of section 67 (a) of the Transfer of Property Act, 1882, but as it was not attested by at least two witnesses, as required by section 59 of that Act, it was not enforceable as a mortgage. However, possession of the respective Mokurari villages was at the time specified in the mortgage given to Jadu Nath Mukhurji. Except in the events mentioned in the extracts which have been set out above, Maharaja Nam Narayan Singh did not bind himself personally to repay the mortgage money or any of it. The clear intention of the parties, to be inferred from the deed, was that the mortgage money should be repayable from the usufruct and not personally by the Maharaja. On the termination of the mortgage period possession of the Mokurari villages which had been mortgaged was given to the Maharaja or his representatives. Jadu Nath Mukhurji died in 1902.

On the 13th January, 1909, this suit was instituted against Raja Ram Narayan Singh, son of Maharaja Nam Narayan Singh who had died. The plaintiffs, who claim to represent Jadu Nath Mukhurji, alleged in their plaint that Rs. 85,272 : 14 : 9 only had been realised under the deed, and prayed for the following reliefs :—

“(a.) That a decree be passed for Rs. 1,57,985 : 5 : 3, or a decree
 “ be passed ordering, according to Order XXXIV, Rule 4, of the Code
 “ of Civil Procedure (1908), that (1) An account be taken of what will
 “ be due to the plaintiffs for principal and interest on the bond (the
 “ mortgage deed) and for cost of the suit; that (2) defendant do pay
 “ into Court the amount so due on a day within six months from the
 “ date of the decree; that (3) in default of payment as aforesaid the
 “ charged properties, as per Schedule B, or a sufficient part thereof
 “ be sold and the sale proceeds be applied in payment of what is
 “ declared due to the plaintiffs as aforesaid, together with subsequent
 “ interest and subsequent cost.

“(b.) That if in the opinion of the Court the plaintiffs be not
 “ entitled to a decree under Order XXXIV, Rule 4, a simple money
 “ decree for the amount of Rs. 1,57,985 : 5 : 3, or whatever may be
 “ due with cost and subsequent interest be passed against the
 “ defendant, to be realised out of the properties which devolved
 “ on him after his father's death.”

In order to understand the object and meaning of these alternative claims it must be mentioned that the plaintiffs' case was that the deed of the 14th April, 1896, was not a usufructuary mortgage, but that it had created a charge within the meaning of section 100 of the Transfer of Property Act, 1882, upon the Mokurari villages. It had, however, been treated by

Maharaja Nam Narayan Singh and Jadu Nath Mukhurji as a usufructuary mortgage, and under it Jadu Nath Mukhurji obtained and held possession of the Mokurari villages, and it contained the terms upon which the Rs.1,30,000 were advanced, and the terms upon which that advance was to be repaid. That document certainly did not create a charge within the meaning of section 100 of the Transfer of Property Act, 1882; it was a usufructuary mortgage, which could not be enforced as a mortgage. Even if it could be regarded as an enforceable usufructuary mortgage the plaintiffs could not, by reason of section 67 (a), institute a suit for sale based upon it.

Their Lordships are in this appeal placed in a disadvantageous position by reason of the respondents not having appeared, but it is necessary for them to consider whether the plaintiffs have in their plaint stated any cause of action which is shown by their plaint as maintainable and not barred by limitation, and for this purpose it is necessary to consider the causes of action which are alleged in the plaint and the agreement upon which the Rs. 1,30,000 were advanced, which is to be found in the document of the 14th April, 1896. The Subordinate Judge and the High Court have assumed from the mention in that document that the Rs. 1,30,000 had been advanced that it might be inferred that it was the intention of the parties that the Maharaja Nam Narayan Singh should be personally liable to repay the advance. Their Lordships do not draw that inference from that document. On the contrary, their Lordships draw the inference from that document that the Maharaja Nam Narayan Singh did not intend that he should be personally liable for the repayment of any portion of the money advanced, except to the extent and in one or other of the events mentioned in the extracts which have been already given, and that Jadu Nath Mukhurji was, in advancing the Rs. 1,30,000, content to rely upon the security of a usufructuary mortgage of the Mokurari villages. Although the document of the 14th April, 1896, was by reason of its not having been attested as required by the Transfer of Property Act, 1882, not enforceable as a mortgage, Jadu Nath Mukhurji got possession under it of the Mokurari villages, and held possession for the agreed period.

The case, which the plaintiffs attempted to make in the Courts below, was substantially based upon the existence of a personal liability in debt on the part of the mortgagor even after the determination of the period of the usufructuary mortgage and arising by implication from its terms. Since in their opinion this case fails, their Lordships think it unnecessary to discuss the other causes of action pleaded, which, though possibly capable of being sustained in other suits if brought within the periods of limitation, are not established in the present suit. It is enough to add that their Lordships are not satisfied that any of these alleged causes of action, even if they were otherwise maintainable, were not barred by limitation when this suit was instituted.

An examination of the schedule attached to the plaint shows that the amount claimed is to a considerable extent composed of charges in respect of collection expenses, of costs of suits, of interest upon such collection expenses and costs, and of compound interest.

Lokendra Nath Mukhurji, a son of Jadu Nath Mukhurji, in his evidence stated that when his father died in 1902 all his books were with him, and they were not found after his death, and admitted in cross-examination that in a previous suit he had deposed that the Zarbharna (usufructuary mortgage) account was in a state of confusion, "and that was sometime in 1906." This may account for the vague nature of the allegations in the plaint, and for the delay in instituting the suit.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, that the order of the High Court and the preliminary decree of the Subordinate Judge should be set aside, and that the suit should be dismissed with costs throughout.

The respondents must pay the costs of the appeal.

