

Privy Council Appeal Nos. 22, 23, and 24 of 1916.

Bengal Appeals Nos. 38, 39, 40, and 44 of 1912.

Tarini Charan Sarkar -	-	-	-	-	<i>Appellant,</i>
					<i>v.</i>
Bishun Chand and Others	-	-	-	-	<i>Respondents,</i>
Tarini Charan Sarkar -	-	-	-	-	<i>Appellant,</i>
					<i>v.</i>
Bishun Chand and Others	-	-	-	-	<i>Respondents,</i>
Tarini Charan Sarkar -	-	-	-	-	<i>Appellant,</i>
					<i>v.</i>
Bishun Chand and Others	-	-	-	-	<i>Respondents,</i>
Bishun Chand	-	-	-	-	<i>Appellant,</i>
					<i>v.</i>
Sri Kishun Lal and Others	-	-	-	-	<i>Respondents,</i>

Consolidated Appeals

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 26TH NOVEMBER, 1917.

Present at the Hearing :

LORD BUCKMASTER.
SIR JOHN EDGE.
SIR WALTER PHILLIMORE, BART.
SIR LAWRENCE JENKINS.

[*Delivered by* LORD BUCKMASTER.]

These four appeals have been consolidated by order of the Board dated the 26th March, 1917, and have been brought on and heard together.

In three of them Tarini Charan Sarkar is the appellant and Babu Bishun Chand is one of the respondents, and in the fourth Babu Bishun Chand is the appellant and Tarini Charan Sarkar is a respondent.

All the appeals are against a judgment of the High Court of Calcutta dated the 25th April, 1912, and three decrees made by that Court consequent on the judgment.

The questions raised arise out of certain mortgage transactions affecting a Tahal Touzi No. 7062 and, though the facts and circumstances are complicated and involved, for the purpose of explaining the real issues that have to be decided they can be briefly summarised.

In the early part of 1904 the registered proprietors of the said Touzi were Ram Rattan Sarkar in respect of a 4-anna share, and Sangam Sarkar in respect of the remaining 12-anna share. The Touzi, however, was subject to certain mortgages, of which it is only necessary to mention the following: Zarpeshgi Thicca of the 15th July, 1889, in favour of Gajadhar Lal and Sri Kishun Lal to secure 11,506 rupees and interest at 9 per cent. per annum, a further mortgage in favour of the same mortgagees dated the 16th July, 1889, to secure 11,000 rupees and interest at the rate of 12 annas per cent. per month and a mortgage of the 10th February, 1896, in favour of the said Babu Bishun Chand to secure a loan of 5,999 rupees with compound interest at the rate of 24 per cent. per annum with half-yearly rests. In the year 1900 a 4-anna share of the estate was sold in execution of a mortgage decree and was bought on the 8th August, 1900, by Ram Ratan Sarkar, and on the 7th March, 1904, the said Touzi estate was purchased on a sale made in execution of a decree at the suit of another mortgagee by one Chatarbhuji Sahai in the name of one Mahanand Sahai, and he, on the 14th May, 1904, purported to sell the property to one Sangam Sarkar. Sangam Sarkar was, however, but a mere name, it has been found, and it cannot now be questioned that the real purchaser was the appellant Tarini Charan Sarkar, who thus became the owner of the property subject to the mortgages.

On the 2nd June, 1904, the first of the suits, out of which these appeals proceed, No. 39 of 1904, was instituted by Babu Bishun Chand seeking relief in respect of his mortgage of the 10th February, 1896, against the representative of the original mortgagor and other parties. It would seem impossible that any estate could bear for long the burden of a mortgage on which the debt was accumulating by a process of compound interest on the principal sum at the rate of 24 per cent. per annum; and it appears that the appellant Tarini Charan Sarkar, instead of adopting what might have then been the inconvenient process of redeeming the mortgage by payment, resorted to the device of causing the mortgaged property to be sold for arrears of Government revenue and himself becoming the purchaser. To secure this object he wilfully allowed the Government revenue to fall into arrear, and the property was in consequence sold by the Government on the 28th August, 1906, nominally as the property of Ram Ratan Sarkar and Sangam Sarkar, the registered proprietors, and was purchased for 29,500 rupees by Tarini Charan Sarkar, the true owner. Had Tarini Sarkar been successful in concealing the fact of his ownership the result of this device would have been that the

claim of all the mortgagees would have been thrown on to the balance left of the 29,500 rupees—after satisfying the Government debt; and he would have held the property free from the inconvenience of the many and heavy charges to which it was subjected. Directly after the sale—on the 22nd October, 1906, Sri Kishun Lal and others instituted proceedings (No. 258 of 1906) to obtain payment in respect of the mortgage of the 15th July, 1889, seeking to obtain payment out of the surplus proceeds of the money due under the mortgages, the amount of which was stated to be—at the date of the proceedings—15,983 rupees. To these proceedings Babu Bishun Chand was by an order dated the 17th January, 1907, added as a defendant. On the 2nd December, 1907, Bishun Chand instituted his second suit, No. 153 of 1907, alleging that the purchase of the estate on the 14th May, 1904, was really made by Sangam Sarkar, *benami* for Tarini Charan Sarkar, that the sale for arrears of Government revenue had been fraudulently effected by the said Tarini Charan Sarkar, and asking either that the sale should be set aside or that his mortgage of the 10th February, 1896, should still remain valid and operative against the estate. In the first suit, No. 39 of 1904, the usual mortgage decree was made on the 6th January, 1905, but it was set aside on the 18th April, 1907, and another trial was ordered. This took place on the 30th June, 1909, when the usual mortgage relief was granted.

In the second suit by Sri Kishun Lal and others judgment was delivered on the 23rd December, 1907, and a decree made in favour of the plaintiffs directing that the money due on the mortgage with interest and costs should be paid out of the surplus proceeds of sale. At the date of this decree the sale itself had become a subject of attack, and consequently the further provision was introduced that, in the event of the sale being set aside, the mortgage monies, interest, and costs should be realised by sale of the mortgaged property if the sum were not paid within six months from the date of decree.

The said Tarini Charan Sarkar did not appeal against this decree, but Babu Bishun Chand did, and the appeal came on for hearing together with the appeal by Tarini Charan Sarkar in the two suits commenced by Bishun Chand and an appeal by Sangam Sarkar in the suit No. 153 of 1907.

On the 25th April, 1912, the High Court delivered judgment, dismissing all the appeals; but at the instance of counsel who appeared for Tarini Charan Sarkar they varied the decree of the Subordinate Judge, in the suit by Sri Kishun Lal, by setting aside the direction that his mortgage monies should be paid out of surplus monies of the revenue sale, and made in its place the ordinary decree against the property itself. It is this latter part of the decree that is challenged by the present appeal of Bishun Chand.

Before dealing, however, with his contention, it is desirable to dispose, in the first instance, of the appeals of Tarini Charan

Sarkar. He stands in this position: He is held to have been the real owner of the estate Touzi 7062 at the date of the sale of the 28th January, 1906, and it is further established by the findings, both of the Subordinate Judge and of the High Court that he deliberately allowed the Government revenue to fall into arrear in order that the property might be sold, and that he succeeded in purchasing it himself at an under-value under circumstances which concealed his original ownership, and appeared to establish an independent sale to an independent third party, so that all the claims of the mortgagees, beyond the amount that would be satisfied by the surplus proceeds of sale, would be wholly defeated.

These grave and serious charges are therefore supported by the concurrent findings of both the Courts, and no grounds whatever can be shown for disturbing these decisions. Counsel for Tarini Charan Sarkar undoubtedly realised this difficulty, and refrained from attacking the substance of the judgment, but said that it was one which Bishun Chand had no right to claim, because he was estopped by his own conduct from seeking any such relief.

This estoppel is said to be effected by his action as a defendant in the suit brought by Sri Kishun Lal and his co-mortgagees. This suit—it will be remembered—was brought after the revenue sale and sought relief against the proceeds. In that suit the plaintiffs alleged that there had been intentional default in payment of the Government Revenue, but they made no reference to the fact that Tarini Charan Sarkar was the real owner, a fact of which they were probably unaware, and which in any event was wholly immaterial to them, since the money in Court was sufficient to satisfy their claims. Bishun Chand was only made a party to this suit as an encumbrancer upon the property. He had no power of controlling the form in which the suit was brought, nor was there any step which he took in the suit irrevocably asserting his intention to rely upon the sale and not impeach the whole proceedings. In these circumstances, it is obvious that no estoppel arises as against him, and as this is the only ground upon which the appeal of Tarini Charan Sarkar is or can be based, it follows that it must fail.

There remains the question of Bishun Chand's appeal, and the question to which that gives rise is one of more general importance. On his behalf it is alleged that Sri Kishun Lal and his co-mortgagees are entitled to be satisfied out of the proceeds of sale, and that, if these are sufficient for the complete satisfaction of their mortgages, their encumbrances are removed from the property, with the result that there is a more abundant security for Bishun Chand's claim; that, in fact, the proceeds of the first sale to the extent of Sri Kishun Lal's claim, are to be added to the proceeds of the sale made under the decree of the High Court, so as to make one fund out of which the mortgage debts may be satisfied.

In order to examine the value of this contention, it is necessary to look at "The Land Revenue Sales Act," No. XI of 1859, by which the rights of the parties are regulated. Section 31 of that Statute provides that the purchase monies, after paying the public claims, shall be held on account of the recorded proprietor or proprietors, provided that if before payment the same be claimed by any creditor in satisfaction of a debt, it shall not be paid over without the decree of the Court.

It is to be observed that this section nowhere transfers the charges from the property to the proceeds; but, as the sale by the Government conveys a title free from encumbrances to the purchaser, the mortgagees are clearly entitled to claim the same as creditors under the section referred to, and the Court would undoubtedly direct that such claims, in due order of priority, should be satisfied out of the sums in Court.

It was a decree under this section that was obtained by Sri Kishun Lal, and it of course proceeded upon the assumption that the sale had been made to a *bonâ fide* third party. Section 53 regulates what happens when the property is bought by the recorded proprietor, and in that case it is enacted that the estate is acquired subject to all its encumbrances existing at the time of the sale. In such a case, therefore, the encumbrances are left entirely unaffected; the transaction of sale has merely provided money for payment of the Government claims, and the estate remains as it was before. Were such a purchase honestly and openly made, it was not disputed that the claims against the purchase money could not remain in addition to the claim against the estate. The appellant, however, says that in the present case the owner cannot claim this method of administration. He asserts that as it was by the fraud of Farini Sarkar that the whole transaction was set on foot he is in a worse position than if he had become the purchaser on a sale made against his will.

Their Lordships are certainly not prepared to assist in providing any possible benefit for a course of conduct so dishonest as that revealed in this case but, on the other hand, it is not right to punish a man for fraudulent behaviour by making him suffer other penalties than those which are the direct consequence of his fraud. In the present case it is impossible to see how the position has been aggravated by the fact that the sale was effected for the purpose of defeating the mortgagees. The Act distinctly contemplates the purchase of property by a recorded proprietor, and the rights that arise in such a case are those which have been already mentioned. Their Lordships are unable to see why those rights should be increased against the purchaser because of the motives which led him to cause the sale or the purchase. The only effect of the statute is that, so far as the encumbrances are concerned, the sale is of no effect.

It is then urged that the Court of Appeal had no power to vary the order made in Sri Kishun Lal's suit, since he did

not request such variation, nor were the facts relating to the sale proved and established in any suit to which he was a party.

Their Lordships think it would have been a matter for regret if the Court of Appeal had been thus hampered in making the order, which their Lordships regard as right in all the circumstances of the case. But they think abundant power is given to the Court by Sections 107 and 151 of the Code of Civil Procedure of 1908 and Order 41, Rule 33 of the same statute. Section 107 gives power, if necessary, to take addition alevidence; and Rule 33 of Order 41 gives power to pass any decree and give any orders which ought to have been passed or made, and to pass or make such further or other decrees or orders as the case may require.

On hearing the appeal in Sri Kishun Lal's suit, the Court had before it the facts that showed all the circumstances relating to the sale. Sri Kishun Lal seems to have raised no objection to the variation of the order, and does not appear here on appeal against it. It is Bishun Chand, in whose suit all the facts were established, who seeks, on the one hand, to retain a judgment based upon the view that the sale was regular, and, on the other, to get the benefit of the decree which determined that it was not. There is certainly nothing in the statute which gives him such rights, and there is no equity to which he can appeal which entitles him to their possession. This appeal must therefore also fail.

It may be doubted whether in the end any property will be left for the real owner. Bishun Chand's mortgage runs at 24 per cent. compound interest with half-yearly rests. It began at 5,000 rupees, and in the hearing before the Court it amounted to 40,000; and the long delay, amounting to five years, that has elapsed in prosecuting this appeal has more than doubled the amount. Usury and the abuse of legal procedure are a formidable and dangerous combination to the well-being of any community. The former is one which it is not easy to repress, but the latter ought not to be incapable of remedy. There seems to be no lack of expedition in the Courts in disposing of cases when once entered for hearing. The delay is associated with dilatoriness in procedure and apparent unwillingness on the part of persons who have the control of litigation to bring it to a speedy conclusion.

Eleven years have elapsed since Bishun Chand first instituted the proceedings in respect of his mortgage, and more time must pass by before the accounts are finally worked out and his claim ends; and having regard to the rate at which his debt accumulates, in a short time the amount might reach the total wealth of the entire province.

All the appeals, therefore, fail, and in all the circumstances their Lordships think there should be no costs on either side. They will humbly advise His Majesty to this effect.

In the Privy Council.

TARINI CHARAN SARKAR

v.

BISHUN CHAND AND OTHERS,

TARINI CHARAN SARKAR

v.

BISHUN CHAND AND OTHERS,

TARINI CHARAN SARKAR

v.

BISHUN CHAND AND OTHERS,

BISHUN CHAND

v.

SRI KISHUN LAL AND OTHERS.

DELIVERED BY LORD BUCKMASTER.

PRINTED AT THE FOREIGN OFFICE BY C. R. HARRISON.

1917.