Privy Council Appeal No. 20 of 1917.
Bengal Appeal No. 137 of 1914.

Seth Maniklal Mansukhbai - - - - - - *Appellant*

v.

Raja Bijoy Singh Dudhoria 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 7TH DECEMBER, 1920.

Present at the Hearing:
LORD DUNEDIN.
LORD PHILLIMORE.
MR. AMEER ALI.
SIR LAWRENCE JENKINS.

[*Delivered by* LORD PHILLIMORE.]

The circumstances of this case are as follows. One Chhatrapat Singh, who was a landowner in Bengal, was also engaged in commercial transactions, as was his father before him. Both became involved in difficulties, and both at times resorted to various devices for protecting themselves and their property against their creditors. In 1903 the first respondent, who was a creditor of Chhatrapat and whom it is convenient to call the decree holder, issued an execution against seven properties collectively known as the Sukhsena Group, one of these being the Mahal known as No. 429. Thereupon Chhatrapat's wife, Jamaher Kumari, put in a claim to the properties, saying that they were hers, and producing title deeds vesting them in her. Her claim was disallowed in the local Court as regards six of the properties, as being benami. As regards the seventh, No. 429, it fell under the same conditions, and there is no doubt that in the opinion of the Judge she was as much a benamidar for her husband in respect of this as in respect of the other six; but it happened that it was not within his district or his jurisdiction and therefore he could pronounce nothing upon it. In respect of the other six, Jamaher Kumari appealed to the High Court and her appeal was dismissed. The decision in the local Court was given on the 20th July, 1903, and the decision in the High Court on the 4th January, 1904.

On the 30th July, 1904, the decree holder endeavoured to execute his decree in the proper Court against the Mahal No. 429, when he was met by a claim put forward on behalf of the father of the present appellant. It is convenient to call the father the purchaser. Certain proceedings thereupon took place, the upshot of which was that the decree holder was not allowed to execute his decree summarily, and had to bring the action which is the subject of the present appeal.

The case on behalf of the purchaser was simply that on the 6th July, 1904, at a time when the property was not under attachment, he bought Mahal No. 429 for one lakh and ten thousand rupees, paid for it, took his conveyance and entered into possession of the property.

The case on behalf of the decree holder was that the transaction was a sham and that the purchaser was only a benamdar for Chhatrapat.

The litigation has taken a singular course. The plaint to which not only the purchaser, but Jamaher Kumari and Chhatrapat, were made defendants, after stating the decree holder's title as execution creditor, proceeded to narrate various assurances by which the property in Mahal 429 had passed to Jamaher Kumari; and then averred that she held it as benamdar for Chhatrapat, and that she and Chhatrapat had executed the deed whereby they assumed to sell it to the purchaser. It then averred that the conveyance was a fraudulent document without consideration created by Chhatrapat in collusion with his wife and concurred in by the purchaser, who was aware of the indebtedness and evil motive of Chhatrapat and became his benamdar for the purpose of helping him in his wrongful endeavour to defraud the decree holder. The defence denied the allegations of fraud and collusion and averred that the defendant was a *bona fide* purchaser for value without notice, having taken a conveyance from both husband and wife, so that it did not matter which of the two was the real owner. Upon this the learned Subordinate Judge framed the following issue:—

> "Is the kobala executed by defendants Nos. 2 and 3 in favour of defendant No. 1 collusive, fraudulent and without consideration? Is defendant No. 1 a mere benamdar of defendant No. 3? Was the kobala executed to delay or defraud the creditors of defendant No. 3?"

The burden of proving this issue being upon the plaintiff and none the less so because he alleged fraud and collusion, he called three witnesses and no more. The first two merely proved the signatures to certain documents, necessary for the purpose of deducing the title, but carrying the matter no further, unless it be of importance that they deposed to the fact that the purchaser and Chhatrapat both belonged to the same religious body, being Jains. The third witness seems to have been called as to the topographical position of the Mahal. Incidentally under cross-examination he proved that two persons whose names came into the case were servants of Jamaher Kumari; and that was all.

In this state of things, it would have been perfectly open to the advocate for the purchaser to demand that the action against his client should be dismissed for want of proof; but a good deal of evidence had been taken on behalf of the purchaser on commission, and other witnesses were forthcoming at the trial including the purchaser himself; and after this evidence had been called it was contended that upon the true inference to be drawn from their evidence, the case for the decree holder could be made out. The Subordinate Judge thought otherwise, and decided the issue in question in favour of the purchaser and dismissed the suit against him with costs. The High Court reversed this decision and gave judgment for the decree holder with costs. Hence the present appeal.

The case has been very fully argued before their Lordships on behalf of the decree holder. His counsel have relied not only upon the reasons expressed in the judgment of the High Court, but upon other considerations which they put forward; and their Lordships have given close attention to them.

It may be taken that Chhatrapat was in desperate straits, and was the sort of man who might embark in any transaction calculated to defeat his creditors, or preserve a portion of his property. It is probable that Jamaher Kumari was his benamdar in respect of this Mahal as well as in respect of the other six villages; and it may further be presumed that the purchaser, a very wealthy m belonging to the same religious body as Chhatrapat, might be willing to assist him by buying a portion of his property, before it could be taken in execution, embarking for no particular reason in a transaction of land-holding in Bengal, while his interests and his business were all in Bombay. But this leaves the real question untouched. Did he buy, or did he merely take a conveyance as benamdar?

Their Lordships start with the fact that, to use the language of the High Court, "the appearances are all in favour of the transaction being genuine." The learned Judges, however, after properly stating that the burden of proof lay upon the decree holder, proceeded to consider whether upon a balance of the inferences suggested by the proved facts of the case, the scale turned unmistakably in favour of the decree holder.

The first significant fact that they saw is that Chhatrapat was the real owner, and his wife the benamdar, and that Chhatrapat, who was very unnecessarily called as a witness for the defence, feigned entire ignorance; and they proceeded to enquire why he joined in the conveyance. The solicitors, one from Bengal and one from Bombay, who acted in the matter, and the purchaser himself, gave a very good reason. The apparent owner was the wife. She was a purdah nashin lady; it was a large transaction and it was deemed best to get her husband to join in the conveyance. Probably a business man might shrewdly suspect that she was a benami for her husband; it did not matter, if both concurred.

The next point that the learned Judges took is that there was

no real enquiry either as to the title or as to the value of the property. Enquiry as to the title there certainly was. In fact it was properly deduced. The accidental piece of good fortune for Chhatrapat and his wife that this particular piece of property was held to be outside the jurisdiction of the particular local court to which the execution creditor had applied, gave them time to sell the property before it was re-attached in a proceeding before the proper Court. As to the value, a man called Giridhari Lal was sent to enquire, and went to inspect the property, enquire about its income and realisations, and the amount of revenue payable to the Government, &c. It is suggested that he was the real author of the mischief, as he had originally resided under the protection of the purchaser in his house for a number of years, and was afterwards in the service of Chhatrapat. It may be that he was the first to suggest the transaction; though there is some reason for believing that another wealthy co-religionist, with whom Chhatrapat stayed when on a visit to Bombay on the occasion of a great Conference of his religious sect, may have been the go-between. Be that as it may, nothing was elicited from Giridhari to show that he had not made enquiries or to affect his evidence, except that he had at one time been in the service of Chhatrapat and his father.

There was, however, one matter on which their Lordships have been strongly pressed by counsel. There was a mortgage over the whole seven villages considered as one unit, and the claim of the mortgagee for the whole could be enforced against any part. It was therefore a somewhat rash transaction to buy such a property; and it might have been that there were heavy arrears of interest unpaid, so as to leave very little value in the property. But as to that, the Bombay solicitor who was examined said that he went into the question and ascertained what amount was due on the mortgage; and it appears that this particular property, though only one of seven villages, was in value two-thirds of the whole.

Then it is said that neither solicitor made proper enquiries, that each in his evidence seems to devolve the burden on the other and that important papers are missing. It is possible that the matter may not have been carried out with the close attention which one would expect in a strictly commercial transaction, and that the whole procedure was coloured by the fact that here was a wealthy Jain prepared to help his co-religionist. Both, however, of the solicitors were examined, and it was never suggested to either that they were assisting in a benami transaction, or that they had any reason to suspect that it was not the case of a *bona fide* sale. The High Court commented on the absence of documents. The Bombay solicitor said that he had changed his office and that there had been a great deal of confusion and loss or mislaying of documents. He said that he had caused diligent search to be made for them and had not yet found them; and such things do happen. As to the Calcutta solicitor, he said that he had made some notes which he could not find; but he also spoke of documents and was not asked to produce them, nor was he challenged about them.

A further point was made with regard to the taking of possession. It was suggested that there had been no real taking of possession, and that matters had gone on as before; the servants of Jamaher Kumari or of her husband collecting the rent and paying the revenue. But it appeared that the purchaser had actually sent a man, who was called as a witness and no doubt went over to Bengal and did some work, very likely combining with the old agents, who seemed to have been left in charge of the other six villages notwithstanding that they had been attached. It was sworn that the rents were duly credited through the purchaser's Calcutta agents to the purchaser, and applied, as was not unreasonable, in discharge *pro tanto* of the mortgage.

The man thus sent, Mansukh Lal, was called as a witness before the Subordinate Judge, who seems to have found no reason for disbelieving him; and the purchaser himself was examined on commission. And after all, to no one witness was the suggestion made that money did not pass. There was proof that it was given in the presence of the Registrar to Jamaher Kumari, the actual numbers of the notes being given, and no suggestion was made in cross-examination that the money went back again. There was no tracing of the notes back into the hands of the purchaser or his agents. Nor was there anything to balance the sworn evidence and the documents, except the fact that Chhatrapat was likely to adopt any devices he could, and that the purchaser, or those who acted for him, were somewhat remiss or easygoing in the enquiries which they made and the precautions which they took.

There are some elements of suspicion. It is for these reasons that their Lordships have entered more minutely into the details of the case than they otherwise might have done; but upon the whole the decree holder did not discharge the burden of proof which wasu pon him, and the suit was rightly dismissed by the Subordinate Judge.

In a not dissimilar case (*Sreemanchunder Dey* v. *Gopaulchunder Chuckerbutty*, 11 Moore's Indian Appeals, page 43) their Lordships observed as follows:—

> "Undoubtedly there are in the evidence circumstances which may create suspicion, and doubt may be entertained with regard to the truth of the case made by the appellant; but in matters of this description it is essential to take care that the decision of the Court rests not upon suspicion, but upon legal grounds, established by legal testimony."

The same principles ought to be applied to the decision in the present appeal.

One other matter was pressed upon their Lordships. On a supplementary record there are documents to show that after the decision in the High Court, Jamaher Kumari applied for registration and mutation of name in respect of this Mahal, alleging that "the estate was benami in the name of Mansukhbhai Bhaggubhai who has been succeeded by Seth Maniklalbhai Mansukhbhai, but in some civil cases the said Mansukhbhai Bhaggubhai having been declared benamdar it is no longer necessary to keep

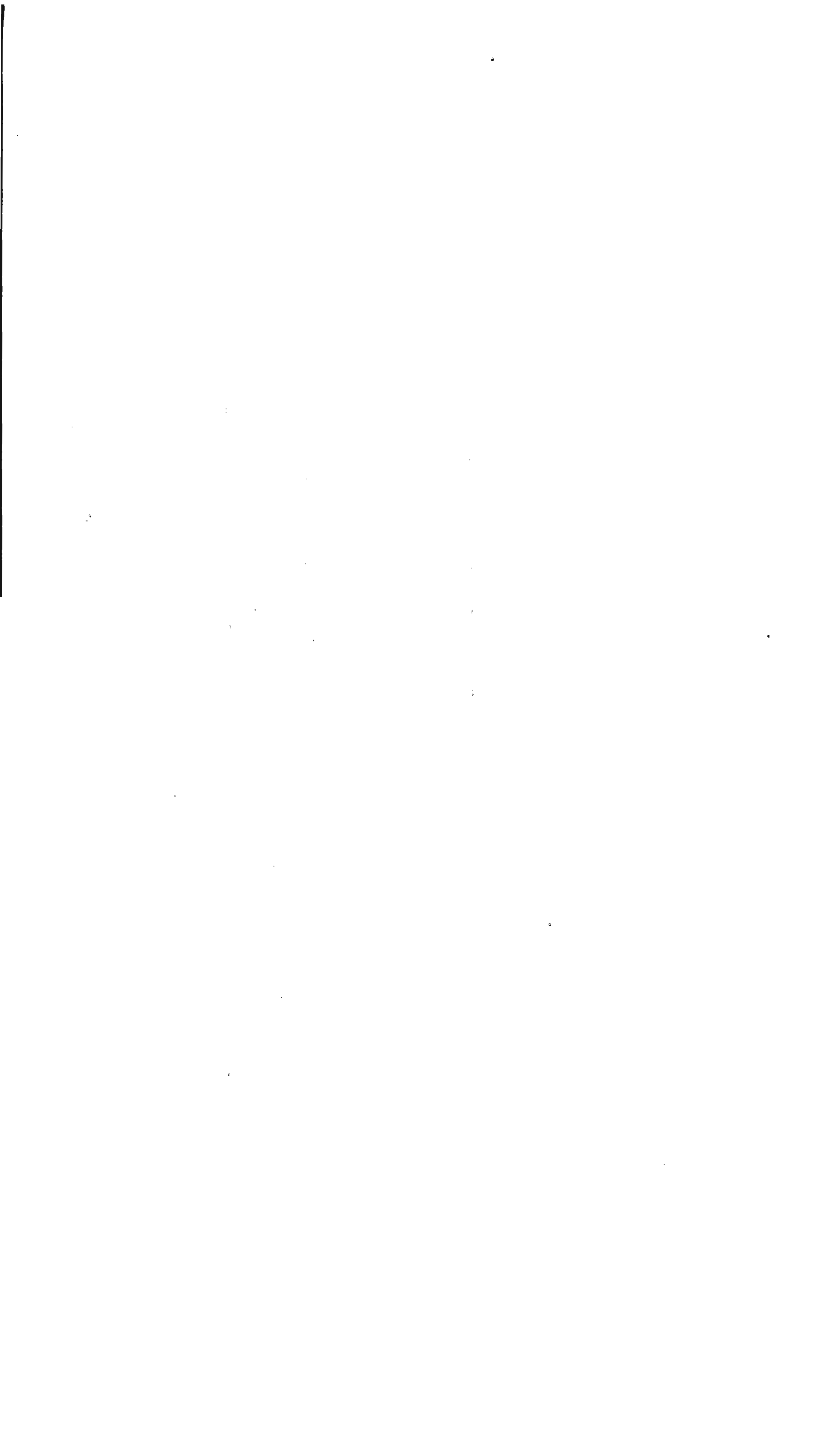
the estate benami, hence this application"; and that she called two witnesses to prove that the estate was now in her actual possession, making, it should be observed, a case in one respect contradictory to that now set up by the first respondent, because she put herself in the position of true owner and not of benamdar for her husband.

These documents also show that no appearance within the proper time was entered for the present appellant, a minor., and that his subsequent intervention was held to be too late, and mutation of names was ordered by the Deputy Collector.

Their Lordships have grave doubts whether they ought to pay any regard to these matters, as having any bearing on the present appeal; but if they are to look into them, they carry the case no further. The transaction took place after the decision of the High Court, and when, until the decision of that Court should be reversed, the present appellant had been ousted from all interest. What Jamaher Kumari might be pleased to say in such a business is no evidence against him. Nor for this purpose ought they to regard, as it has been suggested they should, some statements made by the legal adviser of the minor, when he unsuccessfully applied for leave to make opposition after the time for opposition was past.

The case stands as it did when the High Court rendered its judgment, and for the reasons which their Lordships have already given, they are of opinion that this judgment cannot stand.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed, the judgment of the High Court set aside and the suit dismissed with costs, here and below, to be paid by the first respondent.



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v.

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DELIVERED BY LORD PHILLIMORE.

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