

Privy Council Appeal No. 53 of 1919.

Gulabsingh and others - - - - - *Appellants*

v.

Diwan Bahadur Ballabhdas - - - - - *Respondent*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 31ST JANUARY, 1921.

Present at the Hearing :

LORD BUCKMASTER.

LORD DUNEDIN.

LORD SHAW.

SIR JOHN EDGE.

MR. AMEER ALI.

[*Delivered by* LORD BUCKMASTER.]

The suit out of which this appeal has arisen was instituted by the present respondent asking as against the appellants for possession of the *sir* and *khudkast* lands that had been comprised in a mortgage executed on the 10th September, 1891. The only defence to the suit which now remains for consideration was based upon Section 42 of Act IX of 1883, an Act which although it has been subject to certain subsequent modifications and change operates and binds the parties to this mortgage. That section runs in these terms :—

“ Every person whose proprietary rights in land comprising *sir*-land are, after this Act comes into force, transferred in any of the following cases, namely :— (a) When he sells those rights without expressly agreeing to transfer his right to cultivate the *sir*-land, (b) when those rights are sold for an arrear of land revenue, (c) when those rights are sold in execution of any decree which does not expressly direct the sale of his rights in the *sir*-land, shall become an occupancy-tenant of that *sir*-land, and the rent payable by him as such shall be fixed by a Revenue-officer on application made by him or by his landlord ”

The relevant clause in the section is the last and the question that has been argued before their Lordships is whether or no the decree under which this sale was made did or did not expressly direct the sale of the rights in the *sir*-land. The Judicial Commissioners from whom this appeal proceeds took the view that it did; but their Lordships think in the circumstances of this case it is unnecessary to examine and consider that question, and for this reason that the appellant in this case cannot be heard to maintain that it did not. The mortgage undoubtedly comprised all the rights in the *sir*-land. In the course of the judgment by the Judicial Commissioners, it is stated that it was not contended before them "that upon a true construction of the mortgage deed all the mortgagor's rights in the *sir*-land were not mortgaged and these rights would obviously include the right to cultivate it"; and in a judgment of this Board on an appeal arising out of the same mortgage (*Gulabsingh v. Raja Seth Gokuldas*, 40 I.A. 117), there is an expression of opinion to the same effect. That expression of opinion does not follow upon any elaborate argument; because in truth examination of the mortgage deed makes it plain.

In those circumstances, when the original suit was instituted on the 22nd December, 1904, to obtain a decree for sale, the property which the mortgagee was entitled to sell was property from which the mortgagor could be excluded from his right of cultivation. On the 4th April, 1906, a decree for sale was made in that suit and that decree specified as the property that was to be offered for sale property including the cultivating rights in the *sir*.

An appeal was brought from that judgment and it was challenged upon many grounds. Among others it was urged that the Court had been wrong in holding that under the terms of the mortgage the mortgagee could exclude the mortgagor from his cultivating rights in the *sir*. That question by agreement between the parties was left over. It was in their Lordships' view an unfortunate circumstance that when such a matter, obviously open for decision, could and might then have been readily decided it should have been postponed to a later date with the inevitable result of provoking further dispute in the future. Both parties, however, agreed to this course and the judgment upon which the decree was then based contains this statement:—

"Both sides agree that it would be premature to decide what the position of a purchaser under decree absolute for sale will be in respect of the *sir*. In the list of the mortgaged property on the back of the lower Court's decree for the words 'with cultivating rights in *sir*,' the following will be substituted 'with all actual and reputed rights as detailed in the mortgage.'"

The one thing that is to their Lordships' mind quite plain is that this alteration was not intended to conclude the case in favour of the mortgagor, but to leave open to both sides the rights that would be established in the event of the mortgage deed being decided in the one way or in the other. Consequently, the words in that decree, "with all actual and reputed rights as

detailed in the mortgage" which were to be substituted for the express and exact words that were contained in the original decree were expressly and definitely intended and agreed by both parties to take effect in favour either of the mortgagor or the mortgagee according to the true meaning to be placed on the deed. The property has now been sold under that decree and the appellants here who represent the mortgagor claim that as those words do not comply with the strict conditions mentioned in Section 42 their rights of cultivation have not been taken away; in other words they seek to make the decree operate in a manner opposite to the agreed purpose for which it was framed.

Their Lordships have already pointed out that they do not propose to examine the reasons why the learned Judicial Commissioners think that even that contention is not well founded. They base their view upon the ground that the circumstances in which that modification was made are circumstances which prevent the appellants from asserting that by the result of that alteration the rights of the mortgagee under the original decree with regard to this cultivation were completely taken away.

For this reason they think that the appeal should fail and they will humbly advise His Majesty that it be dismissed with costs.

In the Privy Council.

GULABSINGH AND OTHERS

v.

DIWAN BAHADUR BALLABHDAS.

DELIVERED BY LORD BUCKMASTER.

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