

Privy Council Appeal No. 69 of 1931.

K.S. Mian Feroz Shah - - - - - *Appellant*

v.

Sohbat Khan and others - - - - - *Respondents*

Nawab Major Mohammad Akbar Khan - - - - - *Appellant*

v.

K.S. Mian Feroz Shah and another - - - - - *Respondents*
(*Consolidated Appeals*)

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF THE NORTH-WEST
FRONTIER PROVINCE.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 11TH APRIL, 1933.

Present at the Hearing :

LORD BLANESBURGH.

LORD MACMILLAN.

SIR GEORGE LOWNDES.

[*Delivered by* SIR GEORGE LOWNDES.]

These are consolidated cross-appeals. Only the first of them has been seriously contested. In this, Mian Feroz Shah is the appellant, and Nawab Mohammad Akbar Khan the only appearing respondent, and they will be so referred to in this judgment.

Of the second appeal, their Lordships need only say that there is no valid ground upon which the decision of the Judicial Commissioner can be attacked.

The appeals arise out of a series of complicated transactions which are fully detailed in the judgments below, and it is not necessary to set them out again. It will be sufficient to state the main facts upon which the contentions of the parties turn.

One Sohbat Khan, who is a *pro forma* party to both appeals, was the owner of a considerable area of land in the village of Sheiku in the Peshawar District. On the 12th March, 1917, he mortgaged 1,011 kanals 8 marlas to the appellant and his brother. It is not disputed that the appellant is now solely

entitled under this mortgage. It was for a term of 10 years, and was in form a mortgage with possession, the sum secured being Rs. 44,233. Possession was not, in fact, taken by the mortgagees, but by a second document of even date, the mortgaged land was leased to Sohbat for the same term at a rent of Rs. 1,224 per annum, which may be taken to represent the yearly interest on the mortgage debt. Mutation was duly recorded in the Government records on the basis of the mortgage in the names of the mortgagees.

On the 23rd November, 1918, Sohbat mortgaged another 140 kanals to a third party whose heirs subsequently transferred their security to the appellant

The respondent was an execution creditor of Sohbat. He claimed to have a charge upon another part of Sohbat's land, the validity of which is disputed, but this claim is not material to the present appeal. His decree against Sohbat was dated the 31st March, 1920, and he proceeded to execute it by attachment of *inter alia* the 1,011 kanals odd which had been mortgaged to the appellant and attempted to bring them to sale. Sohbat, however, was a member of an agricultural tribe, and the sale of his land was prohibited by Section 16 of the Punjab Alienation of Land Act, 1900. The sale was at first ordered by the Revenue Assistant, but was disallowed by the Collector. Eventually, some time in 1926 or 1927, a Receiver was appointed by the Revenue Court, who proceeded to lease the attached lands to tenants. The appellant objected, but the order was upheld, and he was referred to a civil suit. The execution proceedings were voluminous and protracted and nothing would be gained by their detailed examination. It may, however, be stated that the attachment was held by the Judicial Commissioner to have been invalid, and this finding has not been contested before the Board.

The suit out of which the present appeals arise was instituted by the appellant in the Court of the District Judge, Peshawar, on the 25th April, 1929. He impleaded Sohbat, the respondent Nawab Mohammad Akbar Khan, and the tenants under the Receiver. The gist of the somewhat involved statements in the plaint was that he claimed possession of both the 1,011 and the 140 kanals of land by virtue of his rights as mortgagee. The District Judge dismissed the suit with costs. The Judicial Commissioner allowed the claim in respect of the 140 kanals covered by the mortgage of the 23rd November, 1918, and made a decree for possession to this extent, but refused possession in respect of the 1,011 kanals under the earlier mortgage, holding, and declaring by his decree, that the appellant was only a simple mortgagee for the sum of Rs. 76,500 in respect of this land; the appellant was also allowed half his costs in both courts against the then respondents. The decree was dated the 8th March, 1930.

The appellant now claims before the Board possession of the 1,011 kanals under the mortgage of the 12th March, 1917. The

cross-appeal by the respondent was against so much of the decree as was in the appellant's favour, but no further reference to it will be necessary.

The ground of the Judicial Commissioner's decision in respect of the mortgage of the 12th March, 1917, was that reading it with the lease of even date, and taking into account the fact that possession had remained all along with the mortgagor, Sohbat, and that there had been other similar transactions between the parties, the mortgage, despite its express terms, which undoubtedly entitled the appellant to possession, should be construed only as a simple mortgage. It is not disputed that at the date of the suit the lease to Sohbat was at an end, and that if the mortgage were, in fact, as well as in form, one with possession, the appellant would be entitled to succeed.

Their Lordships find themselves unable to accept the view of the Judicial Commissioner as to the nature of the transaction evidenced by the two documents in question. It is not suggested that there is anything in the Act of 1900, before referred to, which would invalidate a possessory mortgage accompanied by a lease back to the mortgagor, nor do their Lordships think that there is anything in itself suspicious about such an arrangement. The mortgagee may well have preferred to leave the cultivation of the land in the hands of the mortgagor, being entitled to take possession at any time if the provisions of the lease were not adhered to. Assuming this to have been one of the conditions upon which the mortgage was agreed to, the mere absence of a formal handing over of the land to the mortgagee, and a handing back by him to the mortgagor in the character of lessee, is, they think, of little significance. The reality of the transaction is, moreover, supported by the mutation in the Government records. Section 92 of the Evidence Act forbids the admission or consideration of evidence as to the intentions of the parties, or to contradict the express terms of the document : see *Balkishen Dass v. Legge*, 27 I.A. 58, and their Lordships think that no presumption can legitimately be drawn from the fact that there had been previous transactions between the parties of a similar character.

On the whole their Lordships are of opinion that there is no reason to construe the mortgage as other than a possessory mortgage, as it clearly purports to be, and that the term of the lease having expired, the appellant is entitled to possession.

They think, therefore, that the appeal by Mian Feroz Shah should succeed : that the decree of the Judicial Commissioner, dated the 8th March, 1930, should be set aside : that in lieu thereof a decree should be made giving the appellant possession as mortgagee of both the 1,011 kanals 8 marlas and the 140 kanals which he claims, with costs throughout against all the respondents : and that the appeal of Nawab Mohammad Akbar Khan should be dismissed, the appellant therein paying the costs of the respondent Mian Feroz Shah, before this Board. They will humbly advise His Majesty to this effect.

In the Privy Council.

K. S. MIAN FERROZ SHAH

v.

SOHBAT KHAN AND OTHERS

NAWAB MAJOR MOHAMMAD AKBAR KHAN

v.

K. S. MIAN FERROZ SHAH AND ANOTHER.

(*Consolidated Appeals*)

DELIVERED BY SIR GEORGE LOWNDES.

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