

Ghulam Sarwar Khan and Others - - - - - *Appellants*

v.

Abdul Wahab Khan and Others - - - - - *Respondents*

FROM

**THE COURT OF THE JUDICIAL COMMISSIONER,  
NORTH-WEST FRONTIER PROVINCE**

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL, DELIVERED THE 28TH JULY, 1949**

---

*Present at the Hearing:*

LORD SIMONDS  
LORD RADCLIFFE  
SIR MALCOLM MACNAGHTEN

[*Delivered by* LORD SIMONDS]

---

In this appeal which is brought from a judgment and decree of the Judicial Commissioner, North West Frontier Province, dated the 28th July, 1943, a large number of questions have been debated upon which their Lordships think it unnecessary to express any opinion. The question which is decisive of the matters in dispute is a simple one and the relevant facts can be shortly stated.

The first respondent to this appeal, Abdul Wahab Khan, claiming that under and by virtue of a deed of the 23rd August, 1939, he had acquired from one K. B. Muqarrab Khan, since deceased, all the rights which the latter enjoyed under a certain mortgage dated the 25th May, 1921, brought the suit out of which this appeal arises to enforce his rights as mortgagee under that mortgage. His suit was dismissed on various grounds by the Additional Subordinate Judge, Peshawar, on the 24th November, 1942, but his appeal from that decision was substantially allowed by the Court of the Judicial Commissioner.

It appears to their Lordships that, apart from all other defences available to the appellant in the suit, it is a fatal objection to the claim of the first respondent that under the deed of the 23rd August, 1939, upon which he founds his claim, he acquired and could acquire no rights of any kind, inasmuch as K. B. Muqarrab Khan had already parted with the rights which he then purported to dispose of.

The history of the matter, so far as it is necessary to state it, starts with a mortgage deed of the 25th May, 1921, by which one Abdul Akbar Khan (through whom the appellants claim) mortgaged with possession to K. B. Muqarrab Khan for Rs.23,000 certain lands in Shah Dhand and Shakara including an area of 307 kanals 4 marlas in Shah Dhand. The same land had previously been mortgaged to one Tara Chand for Rs.12,000. He was paid off out of the Rs.23,000 and transferred his mortgage rights to K. B. Muqarrab Khan, who will now be referred to as "the original mortgagee". Of the steps taken by the original mortgagee

to obtain possession of the mortgaged land and the disputes that have arisen in regard thereto it is not necessary to say anything. In 1935 there happened the crucial event which in their Lordships' opinion is decisive. On the 18th May in that year the Land Revenue in respect of all or some part of the mortgaged land being long in arrear, and proceedings having been taken for its recovery, the Naib Tahsildar (whose duty it was to report to his superior officer in the Revenue Department) reported as follows:

"Sanction for the sale by auction of the mortgagee rights has been accorded by the Revenue Commissioner by letter No. 123000/RA dated the 15th November, 1934.

The 16th of May, 1935, was fixed for holding the sale. The sale having been held the final bid was knocked down in the name of Faqir Mohammad Khan, Executive Engineer Mardan, through his brother Mohammad Safdar Khan in lieu of Rs.5,500. The one-fourth Rs.1,375 has been deposited into the Treasury. Hence this report is submitted for the confirmation of the final bid under section 92 (Land Revenue Act) in the name of the auction purchaser named above."

Objection was taken to this report by the first respondent but his objection was overruled by the Deputy Commissioner at Peshawar.

On the 3rd June, 1935, the Collector approved of the sale of the mortgagee rights of Rs.23,000 and the recommendation of the Assistant Collector that "Mr. Faqir Mohd Khan may be declared the purchaser of the mortgage rights of 307 kanals 4 marlas . . . after which the sanction of the Revenue Commissioner for confirmation of the sale under section 92, Land Revenue Act, will be obtained".

On the 25th November, 1935, a certificate was issued by the Collector to Faqir Mohd Khan in the following terms:—

"Certificate of Sale under Section 95, Land Revenue Act, 1887.

I, the Collector of Peshawar, do hereby certify that Faqir Mohd. Khan, resident of Charsadda, Executive Engineer, Malakand Division, Tahsil Charsadda, District Peshawar has been declared the purchaser at sale by public auction held on the 16th day of May, 1935, of the mortgagee rights of the value of Rs.23,000 in respect of 307 kls, 4 mls of land situate in the village of Shah Dhand, Tahsil Charsadda sold for the recovery of arrears due in respect thereof and that the sale has been duly confirmed by the Revenue Commissioner under Section 92 of the Land Revenue Act, 1887."

In accordance with this certificate Faqir Mohd Khan was recorded as owner of the mortgagee rights on 307 kanals 4 marlas of land in the relevant Revenue papers, and on the 14th October, 1939, the remaining area in Shah Dhand covered by the mortgage was entered in the mutation register as being redeemed. This order was reviewed by the Assistant Collector but finally restored by the Revenue Commissioner on the 1st March, 1940.

It may be observed here, though it is not strictly relevant to the present issue, that already in the proceedings the first respondent had attempted to establish his position as purchaser of the mortgagee rights of the original mortgage under a deed of transfer of the 19th August, 1933, but this attempt after an original hearing and two appeals failed, all the Courts agreeing that the so-called transfer had been made without consideration. It was consequent upon this that the deed of the 23rd August, 1939, which has already been referred to, was executed by which the mortgagee rights of the original mortgage for Rs.23,000 were transferred to the first respondent.

But before this the events of 1935 had happened and it appears to their Lordships that in the face of transactions and documents which, even if they are open to challenge have not been challenged, it cannot be contended that in August, 1939, the original mortgagee had any mortgage

rights in respect of the original mortgage which he could sell or the first respondent buy. It may be true, as was submitted by learned counsel for the first respondent, that the normal and proper course for the Land Revenue authorities to take was to put up for sale not the mortgage rights of the original mortgagee but a sufficient part of the mortgaged land: it may even be true that they were deflected from this course by the Lambardar who as one of the mortgagors had other interests to serve. Upon these matters their Lordships express no opinion. For they can only deal with the documents before them, and from these it is plain that the rights of the original mortgagee in the full sum of Rs.23,000 were transferred to Faqir Mohd Khan and nothing was left in the original mortgagee. The first respondent relied on the fact that the mortgage rights were stated in the relevant documents to be mortgage rights "of" or "in respect of" 307 kanals 4 marlas of land in the village of Shah Dhand, arguing from this that the mortgage rights were outstanding in the original mortgagee and his transferee, the first respondent, in respect of the rest of the land originally mortgaged. To this view their Lordships cannot assent. A sufficient explanation of the limitation to 307 kanals may perhaps be found in the earlier disputes in regard to the mortgaged land to which it has not been thought necessary to refer. But, whatever the explanation of this apparent inconsistency, the original mortgagee could not part with his mortgage rights in respect of the whole of the mortgage debt and yet retain any part of his rights in respect of some part of the mortgaged land. The position is the same whether the mortgagee sells himself or, as here, his rights are sold by paramount authority.

It appears then to their Lordships that upon this aspect of the case a correct view was formed by the learned Subordinate Judge who rightly applied the general principle (properly applicable, no doubt, to the N.W. Frontier Province) that except by agreement between mortgagee and mortgagor a mortgage security is indivisible: see, e.g., I.L.R. 22 Madras 209. If it were otherwise, it would presumably be necessary in some way to apportion the amounts recoverable in respect of the mortgage debt by the purchaser Faqir Mohd Khan and the original mortgagee respectively. No feasible or satisfactory way of doing so was suggested by learned counsel.

In the Court of the Judicial Commissioner a different view was taken on this point upon the ground which is thus stated: "Whatever may be the position as regards that part of land, we do not think that the whole of the mortgage debt can be considered to have been sold". If this were the right view a different conclusion might have to be reached, though the difficulty of determining what part of the mortgage debt had been sold and of working out the result might well prove insuperable. But it appears to their Lordships that the transaction does not admit of the construction placed upon it by the Court of the Judicial Commissioner. The whole of the mortgage rights in respect of the sum of Rs.23,000 became vested by purchase in Faqir Mohd Khan, there was nothing left in the original mortgagee to transfer to the first respondent, and upon this ground their Lordships are of opinion and will humbly advise His Majesty that this appeal should be allowed, the judgment of the Court of the Judicial Commissioner set aside and that of the Subordinate Judge restored. The first respondent must pay the costs of the appellants of this appeal and in the Courts of the N.W. Frontier Province.

In the Privy Council

---

GHULAM SARWAR KHAN  
AND OTHERS

v.

ABDUL WAHAB KHAN  
AND OTHERS

---

DELIVERED BY LORD SIMONDS

Printed by His MAJESTY'S STATIONERY OFFICE Press,  
DRURY LANE, W.C.2.  
1949