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before the Act came into force can divest rights previously acquired on his death. In this case the death occurred in 1865, and the successors then acquired their rights under the ordinary Muhammadan Law. The Oudh Estates Act did not come into operation until 1869; and to construe its provisions as altering the succession would be not only unjust but plainly contrary to well-settled legal principles.

The able counsel for the appellants endeavoured to surmount this difficulty by suggesting that there must have been some family arrangement to the effect that the entries in question should have been made, and that the succession should be changed. But there is no evidence from which any such conclusion can be drawn. The only evidence bearing on the subject is the consent of the heirs to the entry of the mother of Murtaza Bakhsh in the Collector's books shortly after his death. But when she died, the entry of the names of her two daughters-in-law was objected to and litigation followed. The issues settled in the action do not raise the question whether any such arrangement was in fact come to, and their Lordships cannot adopt the suggestion of the learned counsel as a basis for their decision.

Their Lordships therefore will humbly advise His Majesty to dismiss this appeal and the appellants must pay the costs.

Appeal dismissed.

Solicitors for the appellants.—Messrs. *Barrow, Rogers and Nevill.*

Solicitors for the respondents.—Messrs. *Watkins and Leprieux.*

J. V. W.

P. C.
 1903
 November 11,
 12,
 December 2.

THAKUR DAS AND OTHERS (DEPENDANTS) v. JAIRAJ SINGH (PLAINTIFF).

[On appeal from the High Court of Judicature at Allahabad.]

Act No. 1 of 1872 (Indian Evidence Act), section 111—Position of active confidence—Mortgagor and mortgagee—Burden of proof—Proof of consideration for mortgage bond.

On the facts of this case which was a suit on two mortgage bonds. *Held* (affirming the decision of the High Court) that the plaintiff was not in a

Present :—Lord MACNAGHTEN, Lord LINDLEY, Sir ANDREW SCOBLE,
 and Sir ARTHUR WILSON.

position of "active confidence" towards the defendants within the meaning of section 111 of the Evidence Act (I of 1872), and that the consideration for the bonds was fully proved.

APPEAL from a decree (22nd December 1899) of the High Court at Allahabad which varied a decree (31st March 1897) of the Subordinate Judge of Meerut.

The appeal arose out of a suit brought by the present respondent, Jairaj Singh, against the present appellants or their predecessors in title on a mortgage bond, dated the 18th of October 1894.

The facts that preceded the execution of the bond were that one Debi Singh died in 1889 leaving a widow Bhup Kunwar, two grandsons (sons of a daughter) Rewa Prasad and Sheo Singh, and three nephews (sons of a brother) Thakur Das, Lalji Mal, and Girdhari Mal. Disputes arose between Bhup Kunwar and the nephews concerning the succession to Debi Singh's property; and litigation ensued, the result of which was a decree in favour of the widow made by the High Court on the 12th of May 1893.

On the 21st of July 1893 Bhup Kunwar made a gift of the whole of her husband's estate and of a house at Meerut which she had purchased to her grandsons, Rewa Prasad and Sheo Singh.

On the 25th of July 1893, Rewa Prasad and Sheo Singh executed a mortgage of the house and of a $2\frac{1}{2}$ biswa share of the zamindari property left by Debi Singh for Rs. 4,000 in favour of Jairaj Singh and three other persons; and on the 18th of October 1894 the same mortgagors executed another mortgage of the same property for Rs. 5,000 in favour of Jairaj Singh alone.

On September 8th 1895, a deed of sale of the whole of the property comprised in the deed of gift of the 21st of July 1893 was executed by Bhup Kunwar, Rewa Prasad and Sheo Singh in favour of Thakur Das, Lalji Mal, and Girdhari Mal.

On the 26th of October 1895, Jairaj Singh brought the present suit on the mortgage deed of the 18th of October 1894, against Rewa Prasad, Sheo Singh, Bhup Kunwar, Thakur Das, Lalji Mal and Girdhari Das, and also against the three other mortgagors of the bond of 25th July 1893 and two subsequent mortgagors of the property under a deed dated the 18th of April 1895.

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The plaintiff prayed that, on payment of the amount of a prior charge for which the property was liable when mortgaged to the plaintiff, the mortgaged property should be sold free from the incumbrance created by the mortgage deed of the 25th of July 1893, and that the proceeds of sale should be applied to the payment first of the amount of the prior charge, second of the amount due on the mortgage of the 25th of July 1893, and third, of the amount payable under the mortgage sued upon in accordance with the provisions of the Transfer of Property Act (IV of 1882).

The defence of the principal defendants, the present appellants, was that after the death of Debi Singh Jairaj Singh brought the widow Bhup Kunwar under his control and influence and assisted her in carrying on the litigation with her husband's nephews; that by "undue influence" he fraudulently obtained execution of the bond sued upon from the mortgagors; and that the bond was without consideration and therefore not binding. The first issue raised these questions.

The Subordinate Judge as to this issue stated his opinion as follows:—

"I have come to the conclusion that Rewa and Bhup Kunwar had certainly reposed their confidence in Jairaj and the other men of his party whom I have mentioned above. Therefore section 111 of the Evidence Act (I) seems to be applicable to this case. The burden of proving his good faith, *i. e.* the payment of the full amount of consideration to the executants, lies on Jairaj."

In the result he held that Jairaj had failed to prove payment of the consideration except in respect of a sum of Rs. 1,250, and he gave the plaintiff a decree for that amount.

The plaintiff appealed to the High Court, and the appeal was heard by a Division Bench (STRACHEY, C. J., and BANERJI, J.) of that Court, and judgment given in favour of the plaintiff for the full amount of his claim. As to the allegation of undue influence the Court remarked:—

"That Jai Raj helped Bhup Kunwar and her grandsons in the litigation against Thakur Das and his brothers has been abundantly proved by evidence oral and documentary, and Jai Raj's statements to the contrary are evidently

(1) Evidence Act (I of 1872) section 111. "Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence."

untrue. From this fact alone the learned Subordinate Judge concludes that he stood in a position of active confidence towards Bhup Kunwar and her grandsons at the time when the mortgage bonds in question were executed. I am unable to agree with the learned Judge on this point. From the mere fact that Jai Raj helped those persons in the conduct of their cases, it does not follow that there was any fiduciary relation between them and him. Further, at the time when the bonds for Rs. 4,000 and Rs. 5,000 were executed the litigation had terminated, as has been stated above; the suit relating to Debi Singh's estate was decided in favour of Bhup Kunwar by the Court of first instance on the 27th of April 1891 and by this Court on the 12th of May 1893; and it was on the 25th of July 1893 that the bond for Rs. 4,000 was executed. There was therefore nothing in existence on that date or on the date of the subsequent bond for Rs. 5,000 by reason of which Rewa Prasad and Sheo Singh were under the influence of Jai Raj on those dates. The learned advocate for the respondents has contended that as mutation of names in favour of Rewa Prasad and Sheo Singh upon the basis of the deed of gift executed by Bhup Kunwar was not effected until some time in 1895, the influence of Jai Raj continued till that year. I am unable to accept this contention. It appears that Bhup Kunwar was in possession and she obtained decrees for profits against Thakur Das and his brothers. The non-entry of the names of her grandsons, therefore, did not place them under the influence of Jai Raj or Jai Raj himself in a position of active confidence towards Bhup Kunwar and her grandsons so as to relieve the executants of the bonds in question and the persons claiming under them of the necessity of proving that the admission of the receipt of consideration contained in those bonds was untrue and that in fact no consideration was paid for them."

THE High Court, after a consideration of the evidence, further decided that it was wholly insufficient to establish the plea of non-receipt of consideration, and that, on the other hand, there was satisfactory evidence to prove that the bond in suit was executed for good and valid consideration.

On this appeal

Mr. *H. Cowell* for the appellants contended that under the circumstances disclosed by the evidence relations of "active confidence" existed between the respondent and the appellants, the grandsons of Bhup Kunwar, within the meaning of section 111 of the Evidence Act (I of 1872), and therefore the *onus* was on the respondent to prove that the advances he alleged had really been made. This, it was submitted, he had not done, and his suit, therefore, failed.

Mr. *G. E. A. Ross*, for the respondent, contra, was supported by the Court.

Mr. *Cowell* replied.

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1903, *December 2nd.*—The Judgment of their Lordships was delivered by SIR ARTHUR WILSON :—

One Debi Singh died in 1889, leaving surviving him a widow, Bhup Kunwar, two grandsons, daughter's sons, and three nephews, brother's sons, Thakur Das and his brothers.

The widow claimed the succession to her husband's estate, but was opposed by the nephews.

While the litigation thus caused was in progress, the widow had recourse to Jairaj, a money-lender, the present respondent, who assisted her in her litigation and advanced or procured funds for its maintenance. This involved a series of transactions mainly embodied in documents, the actual execution of which is not disputed, and the details of which it seems unnecessary to examine. The controversy was finally decided in favour of the widow by the decree of the High Court of the 12th of May 1893.

On the 21st of July 1893, the widow transferred her estate to her two grandsons. On the 25th of July 1893, the two grandsons executed a mortgage bond for Rs. 4,000 in favour of Jairaj and others. The consideration was expressed to be the satisfaction of prior charges in favour of persons who may very likely have been connected with Jairaj, and a parol debt to Jairaj. On the 18th of October 1894 the two grandsons executed a further mortgage bond for Rs. 5,000 in favour of Jairaj alone. The consideration was expressed to be the satisfaction of certain existing obligations and a fresh cash advance of Rs. 1,250. On the 8th of September 1895 the two grandsons with their grandmother conveyed the whole property to the nephews Thakur Das and his brothers.

On the 26th of October 1895 Jairaj brought the present suit upon the mortgage of the 18th of October 1894. He made defendants, amongst others, his mortgagors the two grandsons, their grandmother, and the three nephews as purchasers, and he asked that the sale proceeds of the property should be applied, first in payment of a charge, which is not disputed, in favour of the nephews defendants, secondly, in satisfaction of the mortgage bond of the 25th of July 1893, and thirdly in satisfaction of that of the 18th of October 1894. The questions in the

case were as to the validity of the two mortgage bonds of the 25th of July 1893 and the 18th of October 1894.

The substantial defendants were the now appellants, that is to say the nephews Thakur Das and his brothers, and they set up a case of want of consideration, undue influence, and fraud, and an issue was raised accordingly. The mortgagor defendants, the two grandsons, told a detailed story leading to the same result as that aimed at by their co-defendants; but that story has been disbelieved by both Courts in India and need not be further noticed.

The Subordinate Judge who heard the case came to the conclusion that there was such a relation of active confidence between Jairaj and his mortgagors, within the meaning of section 111 of the Indian Evidence Act, as to throw upon the former the burden of proof of the good faith of the transaction upon which he relied. He held further that Jairaj had failed to prove the consideration for either of the mortgage bonds in question except the cash advance of Rs. 1,250 under the second instrument; and except to this extent he decided against the validity of the two mortgage bonds.

The High Court, on appeal, dissented from the opinion of the Subordinate Judge that any relation of active confidence existed between Jairaj and his mortgagors at the dates of the mortgage bonds. Their Lordships agree with the opinion of the High Court upon this point. Whatever may be thought of the relations between Jairaj and the widow while he was dealing with her during the course of her litigation, their Lordships can see no sufficient evidence that during the later transactions there was any relation of active confidence between Jairaj and the grandsons within the meaning of section 111 of the Evidence Act.

The learned Judges of the High Court arrived at another conclusion of much greater importance than anything affecting the burden of proof. They carefully examined the evidence, and were of opinion that the consideration for the two mortgage bonds in question was proved to the full extent. Their Lordships agree in this view. The contrary view taken by the Subordinate Judge appears to have resulted from two opinions

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which he had formed, first, that the conduct of Jairaj had been dishonest throughout the transactions in question, and secondly, that practically all those concerned in those transactions were parties to a conspiracy to defraud; and for these opinions their Lordships, concurring with the High Court, can see no sufficient foundation.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants will pay the costs.

Appeal dismissed.

Solicitors for the appellants.—Messrs. Ranken Ford, Ford and Chester.

Solicitors for the respondent.—Messrs. Barrow, Rogers and Nevill.

J. V. W.

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July 3.

APPELLATE CIVIL.

Before Mr. Justice Blair and Mr. Justice Banerji.

ISHRI DAT AND OTHERS (OBJECTORS) v. MEWA LAL AND ANOTHER
(OPPOSITE PARTIES).*

Execution of decrees—Civil Procedure Code, section 244—Attachment and sale of decrees held by the judgment-debtor against a third party—Objection by judgment-debtor to such decree—Objection disallowed—Appeal.

Mewa Lal and another held a money decree against Ram Singh. In execution thereof they attached a mortgage decree held by Ram Singh against one Ishri Dat. They next applied for the sale of the mortgage decree which they had attached in execution of their own money decree. To this Ishri Dat objected that the decree had been already satisfied. His objection was disallowed, and on appeal by Ishri Dat from the order disallowing the objection it was held that no appeal would lie.

MEWA LAL and Lachmi Narain, who held a decree for money against Kunwar Ram Singh, applied for execution of their decree by attachment and sale of a decree upon a mortgage held by Kunwar Ram Singh against Ishri Dat. Ishri Dat objected to the sale of the decree against him on the ground that it had already been satisfied, but his objection was disallowed. From the order of the Court (Subordinate Judge of Allahabad) disallowing this objection Ishri Dat appealed to the High Court.

* First Appeal No. 46 of 1903, from an order of J. H. David, Esq., Subordinate Judge of Allahabad, dated the 22nd of March 1901.