

the decision of the court below was not correct. The entry mentioned in section 9 is conclusive proof only as to the nature of the tenancy. The case, however, was decided on the preliminary point, and the general merits of the case were not gone into by the lower appellate court. We accordingly allow the appeal, set aside the decree of the lower appellate court and remand the case with directions that the same may be re admitted, and the learned Judge do proceed to hear and determine the same according to law. Costs in this Court will be costs in the cause.

*Appeal decreed—Cause remanded.*

### PRIVY COUNCIL.

PARBATI (DEFENDANT) v. MUZAFFAR ALI KHAN AND OTHERS (PLAINTIFFS) AND MUZAFFAR ALI KHAN AND OTHERS (PLAINTIFFS) v. PARBATI (DEFENDANT).

*Two appeals consolidated.*

[On appeal from the High Court at Allahabad.]

*Mortgage—Suit for redemption of usufructuary mortgage—Defendants setting up title under sales of mortgagor's interest—Title by adverse possession—Separation of member of joint Hindu family and purchase of property with self-acquired means—Possession adverse to mortgagors.*

These were cross appeals from the decision of the High Court in *Muzaffar Ali Khan v. Parbati* (1). The plaintiffs relied on a usufructuary mortgage of 1846 and sued for redemption of the property in suit, two shares in a village called Lohari. The case of the defendants was that they were in possession, not under the mortgage, but under sales of the 27th of May, 1853, and the 20th of March, 1854, respectively by which the equity of redemption in the shares mortgaged in 1846 had passed to those through whom they claimed title, and they pleaded adverse possession. Both the lower courts had upheld the later sale and dismissed the suit as to that share in Lohari. As to the earlier sale the courts below had differed, the first court upholding it, and the High Court deciding in favour of the plaintiffs. On appeals by both parties, it was immaterial, in the view taken by their Lordships of the Judicial Committee of that sale (27th May, 1853) by what title Ashraf-un-nissa, one of the widows of the mortgagor, obtained the share she took, and whether or not she had a daughter who survived him. Her share was certainly transferred by the sale to Baldeo Sahai, who, though he was the grandson of one of the mortgagees and the son of the other, with both of whom he had lived as a member of a joint Hindu family, had, according to reliable evidence, separated from them and at the time of the sale was carrying on, with a nucleus of property derived from his grandmother, a money-lending business from the profits of which he was enabled to purchase, with self-acquired funds,

*Present*:—Lord SHAW, Lord ROBSON, Sir JOHN EDGE and Mr. AMEER ALI.

(1) (1907) I. L. R., 29 All, 640.

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the share in Lohari from Ashraf-un-nissa, who purported to sell it to him as a person who was not a mortgagee under the mortgage of 1846; and he was therefore not precluded from setting up a title by adverse possession, which it was conclusive in the evidence he had held for more than 50 years. Their Lordships therefore, while affirming the decision of the courts below as to the later sale, reversed the decision of the High Court as to the earlier sale, and upheld that transaction also.

Two consolidated appeals (30 and 31 of 1910) from a judgement and decree (13th June, 1907) of the High Court at Allahabad, partly affirming and partly reversing a judgement and decree (14th July, 1904) of the Subordinate Judge of Saharanpur who had dismissed the suit.

The facts will be found sufficiently stated in the report of the appeal to the High Court (SIR GEORGE KNOX, ACTING C. J. and DILLON, J.) and also in the High Court judgement appealed from which will be found in I. L. R., 29 All., 640.

On these appeals—

Sir *R. Finlay*, *K. C.*, and *B. Dube* for the appellants in appeal 30 and respondents in appeal 31, contended that the plaintiffs were not entitled to recover any portion of the property covered by the mortgage of the 22nd of July 1846; that it had been proved that Ashraf-un-nissa had a daughter living at the time of her husband's death; and that Baldeo Sahai had acquired a good proprietary title to the one-third share of mauza Lohari by virtue of the sale, dated the 23rd of May, 1853, and by adverse possession for more than 50 years.

*DeGruyther*, *K. C.*, and *Cowell* for the respondents in appeal 30 and the appellants in appeal 31, contended that the mortgage-deed of the 22nd of July, 1846, was admitted and the evidence showed that it was still subsisting; that the defendants had not proved their purchases as alleged of the mortgagors' interest on the 27th of May 1853, and the 20th of March, 1854; and that the defendants as mortgagees could not rely on any possession as being adverse to the mortgagors during the continuance of the mortgage. Reference was made to *Simbhunath Pande v. Golap Singh* (1).

Sir *R. Finlay*, *K. C.*, replied.

1912, February 21st :—The judgement of their Lordships was delivered by SIR JOHN EDGE :—

These are consolidated appeals from a decree of the High Court of Judicature for the North-Western Provinces at Allahabad,

(1) (1887) I. L. R., 14 Calc., 572 (579); L. R., 14 I. A., 77 (83).

dated the 13th of June, 1907, which partly affirmed and partly reversed a decree of the Subordinate Judge of Saharanpur, dated the 14th of July, 1904, by which the suit had been dismissed.

The suit was brought on the 1st of September, 1903, to obtain proprietary possession of 13 biswas, 6 biswansis, 3 tanwansis, 6½ kachwansis and a fraction of the 20 biswas of Mauza Lohari. The plaintiffs' case briefly was that one Mehdi Ali, whose representatives in title they alleged themselves to be, had in 1846 mortgaged the share in Mauza Lohari, possession of which they claimed, to Sita Ram and his son Sheo Lal; that the mortgage debt had been discharged by the usufruct; and that the defendants were the representatives of the mortgagees and still held possession under no other title; and the plaintiffs claimed a decree for proprietary possession and for mesne profits.

The case of the defendants was that they held possession not under the mortgage of 1846, but under a private sale of the 27th of May, 1853, of 10 biswas of Mauza Lohari, and under an auction sale of the 20th of March, 1854, of the remaining 10 biswas of Mauza Lohari, which sales they alleged were made in order to discharge debts which had been contracted by Mehdi Ali. In effect the defendants' case was that by reason of the sales of 1853 and 1854 the equity of redemption in the shares which were mortgaged in 1846 passed to those through whom they claimed title. It was also contended on behalf of the defendants that they were not precluded from setting up a title by adverse possession by the fact that possession of the shares in suit had been originally obtained under the mortgage of 1846.

The facts as found by the Board are briefly as follows:—

On the 22nd of July, 1846, Mehdi Ali, who owned the whole 20 biswas of Mauza Lohari, borrowed Rs. 4,000 from Sita Ram and his son Sheo Lal, and executed in their favour a mortgage for the term of two years of the shares which are the subject of this suit. The mortgage was usufructuary and the mortgagees were put in possession under it. Incidentally it may be mentioned that the Subordinate Judge found as a fact that the mortgage debt had been discharged by the usufruct before 1863. If it were necessary in this appeal to decide that issue their Lordships would probably not be prepared to dissent from that finding of the Subordinate Judge.

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Mehdi Ali, who was a Shia Muhammadan, died on the 9th of January, 1852, and left surviving him two widows, Ashraf-un-nissa and Umda Begam, and certainly three daughters who had been born to him by Umda Begam. Through one of those daughters, Askari, who subsequently married and left issue, the plaintiffs claim title. It has been contended on behalf of the defendants that Mehdi Ali also left surviving him a daughter born to him by Ashraf-un-nissa. On behalf of the plaintiffs it has been contended that Mehdi Ali left surviving him no daughter by Ashraf-un-nissa, and that Ashraf-un-nissa was a childless widow. In the view which their Lordships take of this case it is immaterial whether Mehdi Ali left, or did not leave, a daughter surviving him by Ashraf-un-nissa. It may, however, be mentioned that after Mehdi Ali's death, for some reason which the evidence does not explain, 10 biswas of Mauza Lohari were treated as the share of Ashraf-un-nissa, and the remaining 10 biswas were treated as the share of Umda Begam and her three daughters.

Mehdi Ali died heavily in debt, and after his death in 1852 suits to recover debts which were due by him were brought by his creditors against Ashraf-un-nissa, Umda Begam, and her three daughters, as the representatives of Mehdi Ali, and money decrees were obtained in those suits. One of those suits was brought by Sheo Lal on the 8th of July, 1852, on a bond payable on demand, to recover with interest Rs. 2,000 which Sheo Lal had lent to Mehdi Ali on the 29th of May, 1849. In that suit Sheo Lal obtained a decree for Rs. 2,786-5-6, principal and interest, against Ashraf-un-nissa, Umda Begam, and the three daughters of Umda Begam, all of whom were sued as the heirs of Mehdi Ali. Under that decree the 20 biswas of Mauza Lohari were attached. On the 5th of May, 1853, a sale proclamation was made fixing the 20th of June, 1853, as the date for the auction sale of the 20 biswas in execution of the money decree. On the 19th of May, 1853, Sheo Lal, through his pleader, applied to the Court to remove the attachment in order to enable the defendants in that suit to pay the decree money by a private sale of the estate of Mehdi Ali deceased. On that application the Court removed the attachment. On the 27th of May, 1853, Inayat Husain, acting under a power of attorney, which had been executed for that purpose by Ashraf-un-nissa and had been duly registered,

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executed on her behalf a sale deed of 10 biswas of Mauza Lohari in favour of Baldeo Sahai, son of Sheo Lal, the consideration being Rs. 7,500. In that sale deed it was stated that two-thirds of three suls of the 20 biswas of Mauza Lohari had been from the 22nd of January, 1846, in the exclusive possession of Sita Ram and Sheo Lal under the mortgage for Rs. 4,000 of 1846 from Mehdi Ali to them, and it was stated that Mehdi Ali had died, and had left a considerable amount of debt unpaid, that Ashraf-un-nissa had remained the heir of half the estate of Mehdi Ali in lieu of her dower debt; and in order to satisfy the decrees held by, and the debts due to, Sheo Lal, she made an absolute sale of the 10 biswas share to Baldeo Sahai. It was by the sale deed agreed that Rs. 2,000 of the purchase money should be left with Baldeo Sahai, and that he should have power to pay the Rs. 2,000 to the mortgagees and to redeem the subject of the sale. In the sale deed the 10 biswas were described as Ashraf-un-nissa's share. After that sale the 10 biswas were entered in the revenue papers as Baldeo Sahai's share by private sale. Baldeo Sahai obtained possession of the 10 biswas share and held possession of the share until he died in 1895, when the defendants as his representatives obtained possession.

It has been contended on behalf of the plaintiffs, first, that Ashraf-un-nissa had no title to the 10 biswa share in Mauza Lohari, and, consequently had no title which she was capable of passing by the sale deed, and, secondly, that Baldeo Sahai was a member with his father Sheo Lal of joint Hindu family, and that the family held possession as mortgagees and could not set up a claim of adverse possession against the representatives in title of Mehdi Ali, the mortgagor of 1846.

It has not been suggested that Ashraf-un-nissa had any interest in Mauza Lohari which she could sell other than such interest, if any, in the immovable property of Mehdi Ali as she obtained under the Shia law as his widow. Her right to dower did not confer upon her a saleable estate in Mauza Lohari. If she had not borne to Mehdi Ali a daughter who survived him, Ashraf-un-nissa as his widow took no title to any share in Mauza Lohari. If on the other hand, as the defendants have contended, Ashraf-un-nissa had borne to Mehdi Ali a daughter who survived him for a few months,

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Ashraf-un-nissa's share as his widow, and the share of his daughter, which on that contention came to her on the daughter's death, did not together amount to a 10 biswas share in the mauza. If Ashraf-un-nissa had any other title in 1853 to the 10 biswas share which she purported to sell to Baldeo Sahai, it has not been shown what it was or how she had obtained it. But it is not necessary to consider what title, if any, Ashraf-un-nissa had to the 10 biswas share as by the sale deed of the 27th May, 1853, Ashraf-un-nissa sold to Baldeo Sahai such interests, if any, as she had in the 10 biswas of Mauza Lohari, and Baldeo Sahai got possession of the 10 biswas, and in course of time obtained a title by adverse possession to the whole 10 biswas or any portion of that share which Ashraf-un-nissa may not have been empowered to sell to him, and that title became indefeasible unless he or the defendants who claim under him were precluded from setting up a title of adverse possession.

The High Court found as a fact that Baldeo Sahai was in 1846, and continued to be, a member of the joint Hindu family of which his father Sheo Lal had been a member, and on that finding of fact decided that Baldeo Sahai's possession and the possession of the defendants as his representative had always been that of mortgagees and consequently that Baldeo Sahai and those who claim under him were precluded from setting up any title of adverse possession to any portion of the share which was mortgaged in 1846 to Sita Ram and Sheo Lal. Their Lordships are unable to agree with the findings of fact of the High Court upon which that decision was based. At the date of the mortgage of 1846 Baldeo Sahai was undoubtedly a member of the joint Hindu family, of which Sita Ram and Sheo Lal were members, and that family was governed by the law of the Benares School of the Mitakshara. Their Lordships, however, find on evidence which they consider is unimpeachable, that in 1847 or 1848, owing to disputes in the family, Baldeo Sahai ceased to be joint in food and joint in business with Sheo Lal, but no partition of the family property was then made, and thenceforward during their lives Baldeo Sahai and Sheo Lal had been separate in food and in business. Their Lordships also find that when Sheo Lal and Baldeo Sahai ceased to be joint in food and in business Baldeo Sahai received a present of a considerable sum of money from his grandmother, with which he carried on the business

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of a money lender on his own account, and that out of his separate self-acquired property he found the purchase money of Rs. 7,500 of the sale deed of the 27th of May, 1853. The oral evidence showing a separation is in their Lordships' opinion confirmed by the terms of that deed. Ashraf-un-nissa purported to sell the 10 biswas to Baldeo Sahai as a person who was not a mortgagee under the mortgage of 1846. So far as the 10 biswas which Ashraf-un-nissa purported to sell to Baldeo Sahai on the 27th of May, 1853, their Lordships find that a title at least of adverse possession has been established and that the defendants are not precluded from setting up that defence.

Their Lordships concur with the finding of the Subordinate Judge and the finding of the High Court that the remaining 10 biswas share in Mauza Lohari was sold to Sheo Lal on the 20th of March, 1854, at an auction sale held in execution of a decree for money which had been obtained by a creditor of Mehdi Ali, in a suit brought against Umda Begam and her three daughters as the heirs and representatives of Mehdi Ali, and Sheo Lal obtained possession and held it until he died, when his interest passed to his son Baldeo Sahai as his heir.

The plaintiffs failed to establish any title by way of redemption or otherwise to any interest in Mauza Lohari, and their suit was rightly dismissed by the Subordinate Judge.

Their Lordships will humbly advise His Majesty that the appeal of the representative in title of Baldeo Sahai be allowed with costs and the decree of the High Court be varied by dismissing the appeal to that Court with costs, and that the appeal of Saiyid Muzaffar Ali Khan and other plaintiffs to His Majesty in Council be dismissed with costs.

*Appeal 30 allowed: decree varied.*

*Appeal 31 dismissed.*

Solicitors for the appellant in Appeal 30 and respondent in Appeal 31:—*Barrow, Rogers, and Nevill.*

Solicitors for the respondents in Appeal 30 and appellants in Appeal 31:—*Ranken Ford, Ford and Chester.*

J. V. W.