

the record, and that being so, I cannot accept any plea that there has been any prejudice to the accused.

As for the last plea, which is a plea *ad misericordiam*, I cannot accept any suggestion that a sentence of five years' rigorous imprisonment for the concoction of false evidence intended to implicate two men on a charge of murder is in any way too severe. The learned Judge says he would have passed a much heavier sentence except for the recommendation of the jury on account of the appellant's being in a weak state of health. I dismiss this appeal.

*Appeal dismissed.*

---

### PRIVY COUNCIL.

---

BHAGWATI AND ANOTHER (PLAINTIFFS) *v.* BANARSI DAS  
AND OTHERS (DEFENDANTS).\*

1927  
EMPEROR  
r.  
SIR NATH  
BHADURI.

[On Appeal from the High Court at Allahabad.]

J. C.  
1928  
January, 13.

*Act No. IV of 1882 (Transfer of Property Act), section 55, clause (1) (g)—Act No. IX of 1872 (Indian Contract Act), section 69—Sale of immoveable property—Discharge of incumbrance—Purchaser discharging undisclosed mortgage—Liability of vendor—Construction of contract.*

A stipulation in a contract for the sale of immoveable property that in the event of part of the property being sold as the result of an undisclosed incumbrance the vendor shall repay a proportionate part of the consideration, does not affect the vendor's obligation under section 55, clause (1) (g) of the Transfer of Property Act, 1882, to pay incumbrances, nor the consequent right of the purchaser under section 69 of the Indian Contract Act, 1872, to recover from the vendor the amount paid in discharge of a mortgage decree obtained after possession has been taken.

Decree of the High Court reversed.

---

\*Present :—Lord SHAW, Lord CARSON and Sir LANCELOT SANDERSON.

1928

DEAGWATI  
v.  
BANARSI  
DAS.

APPEAL (No. 91 of 1926) from a decree of the High Court, reversing a decree of the Subordinate Judge of Aligarh.

In 1907 the predecessors in interest of the respondents sold certain immoveable property to the predecessors in interest of the appellants by a deed of sale, the material provisions of which appear from the judgement of the Judicial Committee. The vendees paid the price and obtained possession. Subsequently it was discovered that the property was subject to a mortgage executed in 1882 in addition to the mortgage mentioned in the deed of sale. Under this mortgage of 1882 a mortgage decree was made in 1914 against both the vendors and vendees. In 1920 the decree was put in execution, and the present appellants were compelled to pay thereunder Rs. 13,234.

The appellants brought the present suit to recover that sum.

The Subordinate Judge made a decree allowing the claim, but it was set aside by the High Court. The learned Judges (MUKERJI and DALAL, JJ.) were of opinion that the clause in the sale-deed set out in the present judgement excluded the obligation of the vendors under section 55, sub-section (1) (g) of the Transfer of Property Act, 1882.

1928. January, 23.

*Dube*, for the appellants.

*Hyam*, for the respondents Nos. 1 to 5.

THE judgement of their Lordships was delivered by Lord SHAW :—

This is an appeal from a decree of the High Court of Judicature at Allahabad which reversed a judgement and decree of the Subordinate Judge of Aligarh.

The question is a short and simple one. It arises under section 55, clause (1) (g) of the Transfer of

Property Act, and the bearing thereon of the terms of a particular contract of sale.

The parties were vendor and vendee of a certain piece of immovable property. Section 55 is expressed in terms of a very absolute and clear character. It provides, the irrelevant parts of the section being omitted, that in the absence of "a contract to the contrary," the buyer and the seller of immovable property are subject to liabilities and have rights, in the enumeration of the elementary proposition that the seller is bound to discharge all incumbrances then existing on the property. It is said, however, that this statutory obligation was negated in the particular circumstances of this case by reason of the terms of the contract of sale.

The fact is that there had been more than one mortgage existing on the property prior to the transaction of sale. But the language of the deed of sale recognizes only one of those mortgages and makes no mention of the others. "The said property" (says the sale-deed) "is mortgaged to Parshadi Lal, son of Tika Ram . . . under a mortgage-deed for Rs. 4,000." *Quoad ultra* this deed is an absolute and unreserved disposal by sale of the property, unencumbered and free from all mortgage. The language of the deed of sale is that, apart from the Parshadi Lal mortgage, "the property is up to this date free from all rights of transfer by sale, mortgage," etc. There is an absolute declaration by the vendor to the vendee that he is buying the property free from all mortgages and covenants, except the one that has just been named.

It may reasonably be asked: Up to that point is there any "contract to the contrary" of the terms of the statute? There is none.

But the contract provided further: "If, God forbid, any person comes forward as partner or co-sharer and brings a claim, or if an encumbrance, etc., is found

1928  
 BHAGWATI  
 v.  
 BANARSI  
 DAS.

in respect of the whole or part of the property sold, and as a result of his claim the property pass out of the possession of the vendees, we, the vendors, shall pay to the vendees, the consideration of this sale-deed to the extent the property sold passes out of their possession.' It is said that that provision is exclusive of all other rights on the part of the vendee.

It is sufficient in their Lordships' opinion to point out that no such event ever happened. The property did not pass out of the possession of the vendee. The vendee stuck to his property, but he was forced in a court of law to answer the rights of the mortgage holder, and to meet another mortgage of a very considerable amount. Certain legal proceedings were taken, and a decree of the High Court was granted putting in execution this other mortgage and the vendees, that is to say, the present appellants, were compelled to pay the sum of Rs. 13,204. In their Lordships' opinion that sum was paid under compulsion, and, secondly, it was undoubtedly a payment for which they were, and are, entitled to be recouped from the vendor of the property for a payment so made.

It is of no use reciting the law to this effect: the law is plain. Under section 69 of the Contract Act it is clear this was payment of money which another was bound to pay by law and, therefore, the person who paid it is entitled to be re-imbursed by the other party.

With regard to the last portion of the sale-deed, which states what is to ensue in the event of the vendees being put out of possession, it may, of course, be an additional safeguard, it may have been a thing suggested by the parties to cover contingencies which were not yet wholly foreseen, but that it contradicts or restricts the wider language of the contract of sale or that it either narrows or wipes out the obligations under the statute cannot be maintained.

On those grounds their Lordships cannot uphold the judgement under appeal, and they think that the Subordinate Judge was right and his judgement should be restored and that the appellants should be awarded costs from the date of that judgement, including the costs of this appeal. Their Lordships will humbly advise His Majesty accordingly.

Solicitor for the appellants: *H. S. L. Polak.*

Solicitors for the respondents Nos. 1 to 5: *Barrow, Rogers, and Nevill.*

1928

BIHAGWARI  
v.  
BANARSI  
DAS.

NARSINGH RAO (PLAINTIFF) v. MAHA LAKSHMI BAI  
AND ANOTHER (DEFENDANTS).\*

J. C.  
1928

January, 31.

[On Appeal from the High Court at Allahabad.]

*Hindu law—Deed of settlement—Construction of deed—Gift to wife—Defecance—Condition subsequent—Invalid condition—Act No. IV of 1882 (Transfer of Property Act), sections 28, 30.*

A deed of settlement executed in 1875 by a Hindu recited that his only surviving son *B* being of bad character and his declared enemy, he was compelled to exclude him from inheritance, and that there being nobody to represent the settlor except his surviving wife (the Rani), he had, therefore, made a gift to her of all his properties, together with all rights and interests, and he appointed her his successor and representative subject to conditions which followed. By condition 1, the zamindari and *malguzari* in five villages were to be "owned by the Rani just as I owned" them. By condition 2, he made a gift of the *jagir* property in seven villages to the Rani, reserving to himself the income during his life. By condition 6, if during the succeeding 16 years a lawful son were born to *B*, he should take the property on attaining majority, but if at the end of that period no son had been born, the Rani could give or bequeath the property to her daughter, or her daughter's son, and failing them could make an adoption. The

\*Present:—Viscount SUMNER, LORD ATKINSON, LORD SINHA, SIR JOHN WALLIS and SIR LANCELOT SANDERSON.