

[9] The 11th January, 1858.

PRESENT:—O. B. TREVOR, G. LOCH, AND H. V. BAYLEY, ESQRS.
Officiating Judges.

CASE NO. 129 OF 1855.

Regular Appeal from the decision of Mr. C. McDonald, Principal Sudder Ameen of Bhaugulpore, dated 9th February 1855.

SYED AHMED ALEE AND OTHERS (*Defendants*), *Appellants* v.
MAHARAJ SINGH (*Plaintiff*), *Respondent*.

[*Mortgage—Suit by mortgagee for possession after foreclosure—Defendants claiming to be real owners of mortgaged property—Allegation that mortgagor was only benamidar—Allegation found against—Suit decreed.*]

Plaintiff sues Gobindram the purchaser and subsequent mortgagor for possession with mesne profits of 9½ villages of talook Russoolpore, in virtue of a conditional sale having become absolute.

Gobindram defendant, alleges that he was the real purchaser and mortgagor, states his inability to pay the money due and prays, that plaintiff may be put in possession of the mortgaged property.

The defendant Soorjbuttee and Chunderbuttee allege that Gobindram was their servant and that the sale and mortgage was made in his name but with their money; that they consequently were the real purchasers and mortgagors and have sold their rights to Syed Ahmed Alee and Keramat Hossein who allege also, that they are the purchasers and that as they have deposited the principal due to plaintiff, the suit should be dismissed.

On appeal from the evidence on the record, the court was of opinion that the defendant Gobindram purchased and afterwards mortgaged the property on his own account; that subsequently for some reason or other in collusion with the defendants, Chunderbuttee and Soorjbuttee, he executed the ikranama upon which the alleged benam purchase is based, and that he has now seen reason for receding from the purchase which he then fraudulently set up against the plaintiff in this suit; that consequently as the (defendants) appellants are neither the mortgagors nor their representatives, they are not entitled to redeem the mortgaged property.

The decision of the lower court is consequently affirmed with costs.

Vakeel of Appellants—Moonshee Ameer Alee.

Vakeels of Respondent—Baboo Kishenkishore Ghose and Moulvee Murhamut Hossein.

SUIT laid at Company's rupees 7,871-9 a. 11 c.

Plaintiff, Baboo Maharaj Singh, zamindar of talook Shakerparah, sues Gobindram, purchaser, Mussta. Chunderbuttee and Soorjbuttee Kowuree and Syed Ahmed Alee and Syed Kuramut Hossein and two others, for possession with mesne profits of 9½ villages of talook Russoolpore, in virtue of a conditional sale having become absolute.

Plaintiff alleges that Gobindram, defendant, purchased the right and interest of Baboos Bejnarain Singh and Radha Singh in 9½ villages of talook Russoolpore, at a sale which took place on the 4th December 1849, in execution of a decree passed in favour of [10] Jugmohun Lal Sahoo; that on the 18th December 1849, or 18th Pooos 1257, the said Gobindram sold conditionally to plaintiff, who was a proprietor of a share of the said talook, the above property, for the sum of rupees 6,020; that the deed of sale and a receipt for the consideration money were duly tendered by the vendor to plaintiff and were afterwards registered by the register of deeds; that the vendor took a counterpart agreement from him to the effect, that if he, vendor, repaid the consideration money by the end of Bhadoon 1259 B. C., then

he, the vendor, would return the deed of sale and the receipt, but that if the vendor should not re-pay the said amount at the time specified, then the sale shall become absolute and possession of the property shall be given to the mortgagee; that at the expiration of the time fixed, the defendant, Gobindram, failed to pay the consideration money, plaintiff therefore on the 1st October 1852 A. D., petitioned the judge that notice might be issued on the mortgagor under sections 7 and 8, Regulation XVII of 1806, and notice was issued accordingly; that subsequently Syed Ahmed Alee and Keramat Hossein by the advice of and in collusion with Musst. Chunderbuttee and Musst. Soorujbuttee, presented a petition to the first court, stating that the aforesaid ladies had purchased the property in the name of Gobindram, depositing through him rupees 1000 as earnest money, but that being unable to pay the consideration money, the said Gobindram had sold the property purchased by him, with the consent of the said ladies, on the 10th December 1849, to Maharaj Singh for Company's rupees 6,020; that an ikrarnama was taken by Maharaj Singh, of which the said ladies had possession; that by a deed of sale, dated 2nd August 1853, Musst. Chunderbuttee and Soorujbuttee had sold all their rights and interest in the annas 5-6-11-2 share of talook Russoolpore to the petitioners for the sum of rupees 19,975; that out of this amount rupees 13,975 were paid to the ladies and rupees 6,010 were tendered as a deposit in court, and by the consent of the aforesaid ladies the property was redeemed; that those ladies filed a petition supporting the statement of Syed Ahmed Alee and Keramat Alee; that Gobindram the purchaser, also filed a petition to this purport that Maharaj Singh, the mortgagee, has issued a notice of foreclosure. I am unable to pay the money, I pray that after the sale becomes absolute, he may be placed in possession of the property; that on the 17th September 1853, an order was passed, directing that the rupees 6,010 tendered by Syed Ahmed Alee and Keramat Hossein, be taken and credited, and that the mortgagee was at liberty to take the amount deposited and to return the deed of sale and the receipt; that the above statements of the four defendants in this case Mussts. Chunderbuttee and Soorujbuttee, Syed Ahmed Alee and Keramat Hossein, made in their petitions to the civil court, are all false; that the purchase at the sale in execution was made by Gobindram and [14] the mortgage was made by him also; that even if after this Gobindram has executed any deed collusively with Mussts. Soorujbuttee and Chunderbuttee, such collusive deed cannot in the face of the deed of sale injure him, plaintiff; that the deposit by defendant Ahmed Alee and Keramat Hossein, is, of no avail, they not being the mortgagors of the property, that the defendants have all schemed with a view of depriving plaintiff of his rights, but such scheme will not be allowed by the court; plaintiff therefore sues the defendant for possession with mesne profits of the property mortgaged to him.

The answer of the four defendants, Syed Ahmed Alee and Syed Keramat Hossein, Mussts. Chunderbuttee Kowuree and Soorujbuttee Kowuree, as also those of the proprietors of the property, Keynaram Singh and Radha Singh are all very much to the same effect, they plead that the purchase by Gobindram was only nominal: that the real purchasers at the sale in execution and subsequent mortgagors to the plaintiff were the ladies, defendants in the cause; that these defendants have sold their rights subsequently to the other defendants, Syed Ahmed Alee and Syed Keramat Hossein, who are now in possession of the property; that they are the representatives by purchase of the original mortgagors, and that consequently they are entitled to make the deposit of the loan for which the mortgage was granted; that this deposit they have made previous to the expiry of the term of grace, they therefore pray that the plaintiff's present suit for possession of the property which they have redeemed, may be dismissed.

The defendant, Gobindram's allegation supports the claim of the plaintiff, asserting that he is the real purchaser at the sale in execution and the mortgagor to plaintiff, is silent regarding the ikrarnama pleaded by the other defendants as having been executed by him, acknowledging the benamee nature of the purchase and mortgage by him to plaintiff, admits his present inability to pay the sum borrowed from plaintiff and prays that plaintiff may be put in possession of the mortgaged property.

The principal sudder ameen was of opinion from the evidence before him, that Gobindram was the real auction-purchaser at the sale in execution and the real mortgagor to the plaintiff; that the ikrarnama in which Gobindram is alleged to have acknowledged that the purchase was made by him benamee for Mussts. Chunderbuttee and Soorjbuttee Kowuree, is not a document upon which any reliance can be placed; that in short the above ladies have no right to the property in dispute; that consequently the alleged sale of it to the other defendants, Syed Ahmed Alee and Syed Keramut Hossein, can convey no rights to them and they have no right to make a deposit with a view of redeeming the property, and that even if they had any right, they should have deposited the principal sum borrowed with interest and not the principal alone, and [12] in short that the plaintiff's claim is a just one, the principal sudder ameen therefore decreed to plaintiff possession of the property sued for by him with mesne profits from the date of foreclosure with costs, against the four defendants Mussts. Chunderbuttee and Soorjbuttee and Syed Ahmed Alee and Syed Keramut Hossein, the three other defendants, Gobindram, Bejnarain Singh and Radha Singh, the principal sudder ameen released from plaintiff's claim, with costs payable by the plaintiff.

JUDGMENT.

An appeal has now been preferred by the four defendants, Mussts. Chunderbuttee and Soorjbuttee, Syed Ahmed Alee and Keramut Hossein against the decision of the principal sudder ameen adverse to them; they urge *first*, that the decision of the principal sudder ameen is contrary to the evidence on the record, which evidence clearly established the facts that Mussts. Chunderbuttee and Soorjbuttee were the real purchasers and mortgagors of the property claimed; that Gobindram was only the nominal purchaser; that the appellant Syed Ahmed Alee and Keramut Hossein have purchased the property from the two ladies, defendants, and that from the date of the sale in execution to the present time the appellants have been in possession; and *secondly*, that as in the counterpart agreement to the deed of conditional sale, it is covenanted that on the return of the principal of the sum borrowed, the property should be redeemed, and as appellants within the year of grace have deposited that sum in the judge's court, the property is redeemed, the plaintiff's case should be dismissed and the decision of the principal sudder ameen reversed. From that portion of the decision releasing and saddling the plaintiff with the costs of the three defendants, Gobindram, Bejnarain Singh and Radha Singh, no appeal has been preferred by the plaintiff below.

The facts of the case so far as they are admitted by both parties are as follows. On the 4th of December 1849, the rights and interests of Baboo Bejnarain Singh and Radha Singh, the husbands of the appellants Chunderbuttee and Soorjbuttee Kowuree in talook Russolpore, were sold in execution of a decree obtained by one Jugmohun Lal Sahoo and purchased by one Gobindram for the sum of rupees 6,010, on the 18th of the same month, Gobindram being unable to make good the purchase money, mortgaged the same in his own name to the plaintiff in this case, Maharaj Singh; that the mortgage deed and its counterpart agreement stipulated that the sum borrowed,

viz., rupees 6,010 should be paid in the month of Bhadron 1259 or that of August 1852, and that the sum for which the property was mortgaged, was not paid, by that date.

It is now contended by defendants, Soorujbuttee and Chunderbuttee that though the purchase at the sale in execution was made [13] in the name of Gobindram, that they were the real purchasers; that this will be evidenced by the perusal of an ikrarnama, dated 5th February 1850 or 9th Phalgun 1257 F., executed by Gobindram, in which he acknowledges that the purchase and the mortgage were made on their behalf and that he had no interest in the property sold, and mortgaged, and also from the fact that the rupees 901, the earnest money deposited by Gobindram, was their money; moreover, that they were the real purchasers, will appear from their possession of the property subsequent to its sale and mortgage to the plaintiff and by the retention by them of the deed of sale and the ikrarnama executed by the plaintiff; that as the property was their's, they sold it on the 16th October 1853 for the consideration of rupees 19,965 to the appellants Syed Ahmed Alee and Syed Keramat Hossein; it is then contended on behalf of these appellants that they purchased the property for valuable consideration on the aforesaid date; that they are consequently the representatives by purchase of the real mortgagors, and are therefore entitled within the year of grace to redeem the property which they have done by the payment of the principal sum borrowed into court.

On the part of the (plaintiff,) respondent it is urged that the pleas of the (defendants,) appellants are all false; that the real purchaser and mortgagor was Gobindram; that if, he has afterwards colluded with the ladies and executed an ikrarnama, that collusion cannot injure him who dealt in good faith with Gobindram and with Gobindram alone; that the possession of the ladies, appellants or other parties subsequent to the mortgage cannot affect his rights as against Gobindram, the real purchaser and mortgagor; that the possession to the title-deeds by the appellants was obtained by fraud on the part of Sheebudal Singh, the mocktair of Gobindram, who procured them from the civil court where they were filed and made them over to the appellants.

From the facts above stated, it is clear that both parties acknowledge that Gobindram was the ostensible purchaser and mortgagor to plaintiff of the property now sued for, it is now on the strength of an ikrarnama alleged to have been executed by Gobindram on the 8th February 1850, contended that the sale and mortgage were benamee the real purchasers and mortgagors being the appellants Mussta. Chunderbuttee and Soorujbuttee, who have transferred their rights and interests to the appellants, Syed Ahmed Alee and Syed Keramat Hossein. We see no reason for holding that a plea of benamee purchase and subsequent mortgage is untenable; the courts recognise, though they do not favor benamee purchase, and if they are recognised, there seems no valid ground why a transaction like that now before us in which a benamee mortgage follows, a benamee purchase should not be valid also; though of course the [14] proof required in a case of this nature must, looking to the right of the mortgagee, be cogent and complete. The terms of the ikrarnama pleaded by the appellants are as follows. "I, Gobindram, son of Dharutram, owner and auction-purchaser of the rights and shares of Bejnaraia, and Radha Singh in mouza Russoolpore consisting of 9½ villages, in good health and sound mind, do hereby execute an acknowledgment as follows: all the rights and interests of Bejnaraia Singh and Radha Singh in 9½ mouzas of talook Russoolpore were put up for sale on the 4th December 1849 in the court of the principal sudder ameen, and I on behalf of Mussta. Chunderbuttee Kowuree and Soorujbuttee Kowuree, purchased the property

"in my own name, for rupees 6,010; that in consequence of the speedy occurrence of the sale, no mookhtearnama authorizing me to purchase the same was executed, and consequently at the time of the sale the names of the ladies were not entered as the purchasers; that out of the rupees 1,000 which those ladies assigned to me for the purpose of depositing as earnest money, I deposited Company's rupees 901-8 in court on my own part, and received a receipt for the same; that as the ladies were unable to pay the purchase-money within the time allowed by the court, I with their consent on the 18th December 1849 duly conveyed the aforesaid property, that is, the rights and interests of Raja Bejparain and Radba Singh, by deed of conditional sale to Maharaj Singh for a period of three years for the sum of Company's rupees 6,010, and that I made over the counterpart agreement which was registered by the register of deeds and attested by the signature of Maharaj Singh and the bill of sale granted by the court of the rights and interests of the party aforesaid in the 9½ mouzas of talook Russoolpore to those ladies, I therefore hereby agree and acknowledge that the aforesaid ladies who have been in possession of the property since the sale in execution, are at liberty to act as to the property for the purpose of redeeming the mortgage as they think fit, and I will have the names of those ladies registered in the collectorate in the stead of my own, that neither I, Gobindram, nor my heirs either have, or shall institute hereafter any claim to mesne profits and that if I or my heirs institute such claim, the same shall be dismissed by a court of justice. I, Gobindram, execute these few lines as an ikrarnama which may be useful in time of need, dated 5th February 1850, corresponding with the 9th Phalgun 1257 Fulslee."

The important statement which this ikrarnama contains are that, he, Gobindram, has no claim to the property purchased in his name, that he deposited as earnest money rupees 901 out of the rupees 1,000, which had been given to him by the appellants Chunderbuttee and Soorujbuttee for that purpose; that by reason of the sale in execution having taken place very quickly, no power of [15] attorney empowering him to purchase for the ladies, had been made out or that their names did not appear as purchasers and that he with the consent of the real purchasers on the 18th December 1849, mortgaged the property to the plaintiff. We see no sufficient grounds for disbelieving the genuineness of this ikrarnama; the defendant, Gobindram, in his answer filed in the court below, is silent regarding it, and this silence when it was directly pleaded in the cause, seems to us to be an argument in favor of it; it is true that it is not registered, but this non-registration, though it may be a strong argument against the *bona fides* of the instrument is not fatal to the genuineness of the document itself; but the circumstances under which the execution of the ikrarnama was made, are not before us; Gobindram is represented, though of this fact no satisfactory evidence has been produced, to be the servant of the plaintiff and to have been trusted by them in that capacity, it would have therefore been satisfactory for the court to have been informed of the particular circumstances which rendered the execution of such a deed necessary or advisable; looking however to the terms of the ikrarnama itself, we find great reason for questioning the good faith of that instrument, that the purchase should be made in the name of Gobindram for the ladies who were the wives of the judgment-debtors is a fact in itself sufficiently probable, and that from haste or other cause, such a desire to avoid the appearance of their names as purchasers of the rights and interests of their husbands no mention should be made of their names at the time of the sale is probable also; but we can see no reason for the non-mention of their names, on the supposition that they were the real purchasers, in the mortgage-deed executed 15 days after the sale in favor

of the plaintiff in this cause; here the probabilities are all against the suppression of their names if they were the real purchasers; in this case there was no haste rendering the mention of their names impossible or impracticable, as is alleged to have been in the case at the time of the purchase at the sale in execution; neither was there any reason why their names should not have appeared in any documents executed with a third party a mortgagor, when by such intention perfect good faith would be kept with the mortgagor and their own right secured against the benamee purchase; nevertheless the mortgage was executed by Gobindram as the real purchaser and not a hint was, judging from the deeds themselves, given to the mortgagor that he was dealing with any one other than the real purchaser at the sale in execution of the decree against Raja Bejnarain and Radha Singh; again had the ikrarnama been executed on any date between the 4th and the 18th December 1849, and had the mortgage been made out in the name of the ladies, no question like that now before us could have arisen; as it is we are required, on the strength of a deed, dated 5th February 1850, six [16] weeks subsequently, to believe in direct opposition to the terms of the deeds executed on the 4th and 18th December 1849, that the ladies are the real purchasers and mortgagors, and that Gobindram, who figures throughout as the sole person concerned, was simply their agent for these transactions.

Looking then to the terms of the ikrarnama itself, we strongly distrust its good faith, and this distrust is not removed by any extraneous evidence produced by the (defendant) appellant; that Gobindram was the servant of the ladies or their husbands, is in no way proved sufficiently before us; in fact with the exception of the ikrarnama we have no document in any way connecting Gobindram with the appellants before, or at the date of the sale of the property in execution, we have therefore no proof, nothing in short except the statement in the ikrarnama of the fact, that the rupees 901 paid in as earnest money by Gobindram, was provided by the appellants Chunderbutte and Soorujbuttee; then again as to the possession of the property by the appellant, we have nothing shewing their *continuing* possession of the property from the date of sale to the present time; the earliest dakhilas filed are those of June 1851, which prove nothing as to the purchase and mortgage of December 1849; true the bill of sale and the ikrarnama executed by plaintiff, are in the possession of the (defendants,) appellants, and it is alleged in the ikrarnama executed by Gobindram, that they were made over to the appellants by Gobindram, and by the other side, that they were fraudulently obtained by the appellant; on this point the evidence is very defective, but we think that the possession of the bill of sale and ikrarnama executed by the plaintiff, are insufficient to outweigh the other evidence in the cause; altogether we are of opinion that the defendant, Gobindram, purchased and mortgaged the property on his own account, that subsequently for some reason or other, in collusion with the defendants, Chunderbuttee and Soorujbuttee, he executed the ikrarnama upon which the alleged benamee purchase is based and that he has since seen reason for receding from the position which he then fraudulently took up against the plaintiff in this cause. Had the purchaser and mortgagor Gobindram instead of executing a deed like the ikrarnama before us, executed a simple relinquishment of his rights in favor of the appellants, Chunderbuttee and Soorujbuttee, the case might have appeared to us under an aspect other than that which it now bears. Such being our view of the original purchase and mortgage, it becomes unnecessary for us to enter upon the other points raised in the appeal; as the defendant Gobindram was the original mortgagor, as the (defendants) appellants, Syed Ahmed Alee and Syed Keramat Hossein are not, under the view adopted by us, his representatives, either by purchase or by assignment, it is quite

clear that they are not entitled to redeem the property mortgaged [17] and as the original mortgagor has failed to pay the sum borrowed from him, nothing remains for the court but to decree to plaintiff possession of the property used for by him with mesne profits from the date of foreclosure, and to affirm the decision of the lower court with costs.

The 11th January, 1858.

PRESENT: B. J. COLVIN, A. SCONCE AND J. S. TORRENS, ESQRS., Judges.

CASE NO. 19 OF 1856.

Regula Appeal from the decision of Baboo Ramlochan Ghose, Principal Sudder Ameen of Nuddea, dated 28th November, 1855.

SHUMBHOO CHUNDER SINGH (*Plaintiff*), *Appellant v.* FRANKISHEN PAL CHOWDREE, NOBOKISHEN PAL CHOWDREE AND OTHERS (*Defendants*), *Respondents*.

[*Benami transaction—Suit by ostensible owner for possession—Burden of proof—Defendants bound to prove that plaintiff in whose name document stood was only benamidar—Payment of consideration money, criterion as to real ownership—Proof of payment of principal portion of money by defendants—Payment of whole inferred from evidence.*]

This suit was instituted to recover a putnee talook under a deed executed in the name of plaintiff: and as defendants pleaded that the grant was made nominally to plaintiff, but really to them, it was held that the burden of proof, to shew that defendants were the substantial talookdars contrary to the express terms of the potta, lay on defendants.

Taking the payment of the consideration money as a criterion of the character of the transaction, it was held that defendants had directly proved the payment of the principal portion thereof, and that the payment of the entire sum by them was to be inferred from the evidence.

Vakeels of Appellant—Babcos Shumbhoonath Pundit, Dwarkanath Mitter, Unodapersaud Banerjea and Mr. R. T. Allan.

Vakeels of Respondents—Baboos Buagsbeebuddun Mitter, Baneemadhub Banerjea, Kishenkishore Ghose and Ramapersaud Roy.

SUIT laid at Company's rupees 99,407-1 a. 8 g. 1 c.

This suit was instituted by the appellant, Shumbhoochunder Singh, to recover possession of a putnee talook, consisting of turruf Moonsihpore and of dehee Rajapore, which he states the zamindar of those mehals Oomeshchunder Pal Chowdree granted to him.

That the putnee tenure was drawn in the name of the appellant, is not contested; but the principal defendants, Frankishen Pal and Nobokishen, who are brothers, assert that the appellant had no substantial interest in the talook; that his name was used "benamee" on their behalf, and that they alone are the parties in whose favour the putnee talook was created. Stated broadly and concisely, therefore, the single issue which in this appeal we have to try is whether the talook in question belongs of right to the appellant or to the respondents.

Appellant's statement of his case is that in Calcutta he arranged with the zamindar, Oomeshchunder Pal, to pay him the total sum of rupees 98,000, of which rupees 94,000 represented the price or consideration paid for the execution of the putnee; rupees 2,000, the purchase money of the Pooteemaree indigo factory, and rupees [18] 2,000 were taken to cover certain balances of rent due to the zamindar; that on the 28th Dec 1854, he paid in advance the sum of