

## PRIVY COUNCIL.

MAHOMED MOZUFFER HOSSEIN AND ANOTHER (PLAINTIFFS) v.  
KISHORI MOHUN ROY AND OTHERS (DEFENDANTS.)

[On appeal from the High Court at Calcutta.]

P. C. <sup>s</sup>  
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February  
5 & 6.  
March 30.

*Sale in execution of decree—Rights of purchasers—Mortgage decree—Purchases in execution by decree-holders—Title of purchaser holding a decree on a mortgage which had preceded his opponent's decree—No notice to mortgagee that mortgagor was only benami-holder for the judgment-debtor—Estoppel—Attachment.*

The plaintiffs and defendants, either party holding a separate decree against the same estate, had by leave purchased in execution. Both parties claimed the proprietary right and possession, the defendants holding the latter. The first of the decrees in date was the plaintiffs' for money, against the representatives of the deceased owner of the property, which before then had been mortgaged to the defendants by his widow. The plaintiffs obtained only the equity of redemption, their purchase having been of the right, title, and interest. The mortgagees, having got a decree upon their mortgage against the widow, purchased at the sale in execution, and defended the possession which they obtained.

*Held*, that the defendants, in whose favour the decree had been made upon a *bond fide* mortgage, without notice that the mortgagor had been only holding *benami* for her husband, had the better title; that the High Court had rightly disallowed an objection taken by the plaintiffs, that this defence, as distinguished from the defendants' answer that the widow was the real owner, had not been set up or decided in the Court of first instance; and *held*, that the owner, having in his life-time authorized his wife to hold herself out as proprietor in her own right, could not have succeeded in a suit to disentitle the mortgagees without proving that they either had taken the mortgage with such notice, or that they had been put upon enquiry; that the same principle applied to these plaintiffs, who had purchased his right, title and interest; and that they were bound equally with him.

*Ramcoomar Coondoo v. Macquisen* (1) referred to and followed, as to the application of estoppel.

An attachment, which had, at one time, prohibited alienation of the property upon which the plaintiffs relied as having rendered the mortgage invalid, was shown to have been no longer in operation at the time when the mortgage was executed.

\* Present : LORDS WATSON, MACNAGHTEN, SHAND, and DAVEY, and SIR R. COUCH.

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APPEAL from a decree (16th September 1890) of the High Court (1) reversing a decree (16th September 1887) of the Subordinate Judge of Dacca.

The plaintiffs, now appellants, and the principal defendants, Kishori Mohun Roy and Gopi Mohun Roy, with the representatives of Baikant Mohun Roy, deceased during this appeal, the only respondents who now appeared, contested the right to a four annas share in a revenue-paying *mehal* in the district of Dacca, and an equal right to a share in *lakhiraj* land in Aga Fazle Ali's bazar in the town.

The plaintiffs, having obtained a decree against the representatives of Moulavi Abdul Ali, deceased in 1869, dated the 28th February 1872, purchased, on the 27th November 1882, at a sale in execution of that decree, the right, title and interest in the above property for Rs. 900. The certificate of sale was dated the 1st December 1883. The Roys, now defendants, on the 13th March 1878, obtained a decree against Amirun Nissa Khatun, the widow of Abdul Ali, on a mortgage dated the 26th May 1873, and purchased at a sale in execution. An order was made on the 21st March 1884 for their possession, which they defended in this suit against the holders of the decree of 1872.

The proceedings, which gave rise to these claims, are stated in their Lordships' judgment, and in the report in I. L. R., 18 Calc., 188.

The principal questions now raised were, first, whether the judgment of the Appellate Court, that the Roys, defendants, had become mortgagees of the property *bonâ fide* and for value, without notice of a defect in the mortgagor's title, was right on the merits, and what was the effect of this not having been expressly averred in the answer, and of no issue having been framed or decided, in the Court of the Subordinate Judge, on this point; secondly, whether the Appellate Court had been right in holding that the plaintiffs, or those through whom they claimed, having caused the Roys to believe that the mortgagor had title as owner, estoppel had been occasioned (Act I of 1872, section

(1) *Kishori Mohun Roy v. Mahomed Mozuffer Hossein Chowdhry*, I. L. R., 18 Calc., 188.

115) ; thirdly, whether an attachment, issued at the instance of the plaintiffs, had been in force prohibiting alienation of the property at the time when the mortgage was executed.

The plaintiffs, claiming as the grandsons of one of Abdul Ali's wife, who died in his life-time, for inherited shares in money due to her estate, obtained a decree against him on the 9th May 1865, and on his death continued the suit against his representatives, one of whom was his surviving widow, Amirun Nissa. The amount of their decree was fixed on the 28th February 1872 at Rs. 62,913, after an appeal to Her Majesty in Council in *Abdool Ali v. Mozuffer Hossein Chowdhry* (1). In execution attachment was issued, at the decree-holders' instance, on the 18th May 1872, on the property now in dispute, with other estate formerly belonging to Abdul Ali. On the 11th June 1872 Amirun Nissa filed a claim to the property, alleging that it belonged to her in her own right, having been transferred to her by her late husband in satisfaction of her dower. Her claim was allowed by the District Judge, and the property was released on the 28th December in the same year. On an appeal to the High Court, *Amirun Nissa Khatun v. Mozuffer Hossein Chowdhry* (2), her suit was remanded for trial on an issue as to whether the property was her own, or had come to her as part of the estate of Abdul Ali. This issue was not tried, a compromise being arrived at, of which the terms are stated in petitions of the 30th May 1874, and her claim was struck off the file. The terms not being fulfilled by payment of certain instalments, the holders of the decree of 1872 issued execution purchasing the right, title and interest in the property sold.

Meanwhile Amirun Nissa, having obtained the release of the property on the 28th December 1872, had mortgaged to the Roys on the date abovementioned. Their decree, the sale, their purchase, and possession followed. The appellants, on the 7th June 1886, brought this suit, claiming that an order made against them under section 335 of the Civil Procedure Code should be set aside, and that their right to possession should be decreed. They joined,

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(1) 16 W. R., P. C., 22.

(2) 12 B. L. R., 65.

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with the Roy defendants, the widow Amirun Nissa, and Abdul Hai, a son of Abdul Ali. But of the rights of this son no question was raised in the High Court.

The defence was that the alleged sale to the plaintiffs had no effect, the property not having been part of the estate of the deceased Abdul Ali, but having been previously transferred by him to Amirun Nissa by deeds, dated the 29th Pous 1266 (1859) and the 25th Kartick 1269 (1862) with possession. This, when it had been released from the attachment, she had mortgaged to the Roys. They relied also on their decree of the 13th March 1878. They further stated that Abdul Ali had caused the belief that his wife was owner, and that the plaintiffs as decree-holders had, in the proclamation of sale of 1st May 1882, entered the defendants' mortgage as a subsisting encumbrance.

The Subordinate Judge, who did not frame any issue as to the defendants having taken the mortgage of the 26th May 1873 *bonâ fide* for value and without notice of any defect in Amirun Nissa's title, decreed the plaintiffs' claim, after taking all the evidence, on the ground that she was only *benamidar* for her husband, and that the property had remained part of his estate subject to his liabilities.

The High Court (PRINSEP and BANERJEE, JJ.) reversed that judgment. Their principal reason was that, as Abdul Ali had allowed Amirun Nissa to hold herself out to all as the owner of the property the mortgagees had as against him, and those claiming through him, a good title as *bonâ fide* encumbrancers and auction-purchasers in execution of their mortgage decree.

The judgment of the High Court is given at length in the report of the appeal in I. L. R., 18 Calc., 188.

On this appeal,—

Mr. J. H. A. Branson, for the appellants, argued that the High Court's judgment should be reversed. In the first place the Court had not given due effect to the attachment of the 18th May 1872, which should have been held to have been still in force at the date of Amirun Nissa's mortgage, the 27th May 1873. The release of the property attached as part of the estate that had belonged to Abdul was, no doubt, ordered by the District Judge on

the 28th December 1872, but the High Court had set aside that order, and had, on the 10th July 1873, remanded the suit under section 352 of the Code of Civil Procedure, Act VIII of 1859, for the trial of an issue as to whether the property held by Amirun Nissa was her own, or had come into her possession as part of the estate of her late husband. Thus the withdrawal of the attachment as to the four annas share did not appear, and its continuance in force was consistent with the appellants, who held the decree of the 3rd May 1872, proceeding to execute that decree, as they did on the 27th November 1882, when they purchased the right, title and interest in the property attached.

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The compromise of 1874 was followed by Amirun Nissa's suit being struck off the file on the 30th May in that year, and that would seem to make it appear that she had no title to mortgage at that time. On the other hand, the execution proceedings taken by the present appellants as decree-holders were sufficiently continuous throughout; while Amirun Nissa's mortgage was on this view of the case in direct contravention of the prohibitory order in force at the time, and, therefore, ineffectual. Reference was made to sections 240, 274, 276, 278 of Act VIII of 1859; to *Gore v. Stacpoole* (1), where, in appeal, it was held that a settlement made upon the faith of a final decision of a Court below was still a transaction *pendente lite*, and was subject to all the legal and equitable consequences of an appeal; and to *Dinendronath Sannial v. Ramkumar Ghose* (2).

Next, as to attempted purchases or charges, with knowledge of the pendency of litigation as to the property, reference was made to *Naduroo Nissa Bibee v. Aghur Ali Chowdhry* (3), *Inderjeet Kooer v. Pootee Begum* (4), and *Ohunder Coomar Lahoree v. Goopekristo Gossamee* (5). The main question was whether the Roys had taken the mortgage of 1873 *bonâ fide*, and without notice of the fact that Amirun Nissa was only holding *benami* for her husband, during his life, and holding the property as part of his estate after his death. As had been said by one of their Lord-

(1) 1 Dow., II. L. C., 18 (21).

(2) I. L. R., 7 Calc., 107; L. R., 8 I. A., 65.

(3) 7 W. R., 103.

(4) 19 W. R., 197.

(5) 20 W. R., 204.

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ships, the High Court, having the power to direct an issue on that question, had decided it themselves. But whether the respondents were at liberty to raise the principal point in the case for the first time in the Court of Appeal was open to doubt. Again, it was not clear that there was an entire absence of what might amount to notice of a dispute as to the title; and much had been attributed in the judgment of the High Court to the consequences of Abdul Ali's having allowed his wife to hold herself out as the owner of the property. As to the opinion that this would have estopped him from denying his wife's title to mortgage, it was submitted there were no grounds here for the application of the rule in *Ramcoomar Coondoo v. Macqueen* (1). As purchasers at a Court sale, the appellants were not necessarily bound by an estoppel, even it did affect the judgment-debtor, the original owner. The purchaser might have equities against the claimant different from those which affected the former owner. They referred to *Lehraj Roy v. Motee Marhub Sein* (2), where it was held that the rule of law by which an assignee stands in no better position than the party through whom he derives his title, admits of an exception in favour of those who would be themselves aggrieved or defrauded by the party through whom they claim; and to *Lala Parbhu Lal v. Mylne* (3), which affirmed that a purchaser at an auction sale was not as such the representative of the judgment-debtor within the meaning of section 115 of the Indian Evidence Act I of 1872. *Poreshnath Mukerji v. Anath Nath Deb* (4), was distinguishable.

Mr. R. V. Doyne, and Mr. J. T. Woodroffe, for the respondents, argued that the question whether the mortgage of 1873 had been taken *bonâ fide* by the Roys for value, and without notice of any defect in Amirun Nissa's title, had been fully raised on the evidence taken in the lower Court, and had been rightly decided on the merits. Both the Courts below, though they had arrived at different results, had concurred in finding that Abdul Ali had in his lifetime, for his own purposes, concealed that he was the owner of the property. Though there had been no issue

(1) L. R., L. A., Sup. Vol. 40; 11 B. L. R., 46.

(2) 15 W. R., 333.

(3) I. L. R., 14 Calc., 401.

(4) I. L. R., 9 Calc., 265; L. R., 9 I. A., 147.

framed in the first Court as to the question of notice, the plaintiffs had proceeded to trial, and the evidence had made it clear that there was not any notice. It had also been rightly held that, as against claimants through Abdul Ali, the Roys had a good title under their decree of the 28th March 1878 as auction-purchasers. The burden had been on the plaintiffs to show that the Roys had notice of Amirun Nissa's being only the *benami* holder for her husband. Far from establishing this, the plaintiffs ought to have known that Amirun Nissa had stated in her petition of compromise in 1874 that the property had been transferred to her by her husband in satisfaction of her claim for dower; and the plaintiffs had accepted the compromise on the basis that this statement was true. In their sale proclamation of the 1st May 1882, they had mentioned as existing this mortgage of the 26th May 1873, to the Roys; and this had reduced the price which they had paid. In connection with estoppel, reference was made to *Ramcoomar Coondoo v. Macqueen* (1), and to the judgment in *Luchmun Chunder Geer Gossain v. Kalli Churn Singh* (2), where a representative was held bound by the act of the owner. And in *Poreshnath Mukerji v. Anath Nath Deb* (3) a mortgagee, who had purchased in execution of his decree upon the mortgage, was held bound by an estoppel that affected the mortgagor.

Mr. J. H. A. Branson replied.

Afterwards, on 30th March, their Lordships' judgment was delivered by

SIR R. COUCH.—This is an appeal against a decree of the High Court at Calcutta reversing a decree of the First Subordinate Judge of Dacca in favour of the appellants in a suit brought by them against the first and second respondents, and another respondent, Baikant Mohun Roy, who has died during the appeal, and his representatives have been substituted for him. There were two other defendants who are not respondents, *vis.* Mussamut Amirun Nissa Khatun, the widow, and Abdul Hai the son of Abdul Ali, deceased. The facts upon which the question to be determined arises appear to their Lordships to be these: On the

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(1) L. R., I. A., Sup. Vol. 40; 12 B. L. R., 46.

(2) 19 W. R., 292, at p. 296.

(3) I. L. R., 9 Calc., 265; L. R., 9 I. A., 147.

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9th May 1865 the appellants obtained a decree against Abdul Ali for a large sum of money, from which he appealed to the High Court at Calcutta. That Court affirmed the decree with an immaterial modification. Abdul Ali then appealed to Her Majesty in Council. His appeal was substantially dismissed, but in consequence of certain objections taken by him it was referred back to the High Court to ascertain and declare for what amount the appellants were to be entitled to issue execution under the decree. On the 28th February 1872 a final decree was made by the High Court, by which it was ordered and declared that the appellants were at liberty to take out execution for Rs. 62,913-9-3 with costs and interest.

During these proceedings Abdul Ali died, and Amirun Nissa, for he self and as guardian of her minor sons by Abdul Ali, and Karimun Nissa Khatun, a daughter of Abdul Ali, were substituted in his place in the record as his representatives. On the 18th May 1872 the appellants caused the property in question in this appeal to be attached in execution of the decree, by a prohibitory order, dated the 3rd May 1872, issued out of the Court of the District Judge of Dacca. The order prohibited the judgment-debtors from alienating the property, and all persons from receiving the same by purchase, gift or otherwise. By the Code of Civil Procedure then in force, and by the Code subsequently and the Code now in force, any private alienation of the property attached by sale, gift or otherwise is made null and void. On the 11th June 1872 Amirun Nissa put in a claim to the property attached, alleging that it belonged to her in her own right, having been purchased by her from her husband.

On the 28th December 1872 the Officiating District Judge of Dacca delivered his judgment, allowing the claim and directing the property to be released from attachment. The appellants appealed to the High Court against this judgment, and on the 10th July 1873 that Court, considering that the real issue in the case had been misconceived, and that the Judge had not entered into the evidence which was material on the subject to be decided, framed an issue whether the property which had been attached, and was admittedly in the possession of Amirun Nissa, was a property which came into her possession as part of the estate of Abdul



Ali, and remanded the case to the Judge of Dacca for trial. The order of the 28th December 1872, releasing the property from attachment, was not set aside; whether it should be set aside depended upon the finding on this issue.

The issue was never tried; Amirun Nissa and the appellants came to a compromise which is contained in two petitions presented to the Court on the 30th May 1874, one by Amirun Nissa and the other by the appellants. The petitions differ slightly in some parts, but are in substance the same, and the nature of the compromise may be taken from the latter. It refers to the decree of the 28th February 1872, the attachment in execution of it, the allowance of Amirun Nissa's claim, the appeal to the High Court and the remand, and states that it was settled by the appellants that they should take only Rs. 89,000 out of the total amount due to them, and prays that the agreement made on the terms settled between the parties "be taken as a part of the original decree, capable of being executed according to the rules for the execution of decrees, that the present claim cases be struck off the file, and that the work of the sale be stopped."

Then follow the terms: Amirun Nissa paid Rs. 9,000 in cash, and was to pay the remaining Rs. 80,000 by yearly instalments extending over a period of fourteen years. Till the realization of that money the attachment in respect of the four annas share of the properties that had been attached, and with regard to which she had put forward her claim, except some property not included in the property now in question, was to subsist, and the attachment in respect of the remaining twelve annas share was withdrawn. It is then said that the four annas share of the other properties in connection with the claim, and of all other properties of Amirun Nissa, whether standing in her own name or in the names of others, and of the properties left by her husband, and obtained by her by right of inheritance from him, was to remain liable for the debts under the decree, and that till the realization of the money due Amirun Nissa, or her heirs or representatives, should not be able to make any sale, gift, or any other kind of transfer of the four annas share so hypothecated. The order of the Court made on the 30th May 1874 on this petition was that "this case be struck off the file." A similar order was made on the other petition.

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On the 1st May 1882, on the application of the appellants, a sale-proclamation was issued from the Court for the sale by public auction of the property now in question. It stated that the right, title and interest of the judgment-debtors only should be put up to sale, and that these and the incumbrances and other charges on the property were all specified in detail in the schedule against each lot. The lots of this property were Nos. 1 and 2. Under the heading in the schedule "detailed description of encumbrances on the property," there is against each of these lots a statement that Amirun Nissa had mortgaged the property by a deed of mortgage, dated the 14th Jeyt 1280 (26th May 1873) to Kishori Mohun Roy (the first respondent), and that he had instituted a suit against her for the recovery of Rs. 18,719-14-5 out of the mortgaged property, and obtained a decree dated the 13th March 1878. The property was sold on the 27th November 1882, and was purchased by the appellants for Rs. 900. This was a purchase of the equity of redemption. The property was represented by the appellants for the purpose of presenting this appeal to be of a value exceeding Rs. 10,000. A sale certificate was granted to them on the 1st December 1883. They were unable to obtain possession, and the Roys being in possession the appellants, on the 7th June 1886, brought this suit against them; and Amirun Nissa and Abdul Hai, the son of Abdul Ali, to recover possession free of the encumbrances.

The case of the Roys was that Abdul Ali had, before the appellants obtained their decree, sold the properties in suit to Amirun Nissa in part satisfaction of her dower; that she on the 26th May 1873 mortgaged the properties to these defendants, on which mortgage they had sued her and obtained a decree on the 13th March 1878; and that at a sale in execution of the decree they had purchased and been given possession of the properties in suit in March 1884. The mortgage is the same as that mentioned in the sale-proclamation. It has been found by the High Court and by the lower Court that the conveyances by Abdul Ali to Amirun Nissa were *benami*—not in good faith for consideration. But on the 19th February 1864 Amirun Nissa's name was ordered by the Officiating Collector of Dacca to be registered in the Collectorate

as the owner of the part of the property which was a revenue-bearing estate, and it was not denied that from that time down to Abdul Ali's death in August 1866 all the usual acts of ownership were exercised in her name. She was for all purposes the apparent owner. In the written statement of the defendants they set up the mortgage to them, and said that, according to the terms of the deed, Amirun Nissa received from them a large sum of money as a loan, but they did not aver that the mortgage was taken *bonâ fide* and without notice of her being a *benamidar*. At the settlement of the issues many were framed, but not one raising this question. If the appellants had intended to raise it, they might have asked for an issue upon it. There being no issue the Subordinate Judge did not take any notice of this question, but it appears to have been raised in the High Court and to have been argued that the defendants, who were there the appellants, were not entitled to succeed, because it had not been raised in the defence or made the subject of an issue. The High Court did not allow this objection, and held that the Roys had a good title as *bonâ fide* mortgagees and auction-purchasers in execution of their decree. This must now be taken as the fact. Their position is such as is described in the judgment of this Committee, delivered by Sir Montague Smith, in the case of *Ramcoomar Coondoo v. Macqueen* (1), where he says: "It is a principle of natural equity, which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing either that he had direct notice, or something which amounts to constructive notice, of the real title, or that there existed circumstances which ought to have put him upon an enquiry that, if prosecuted, would have led to a discovery of it." This principle applies to Abdul Ali, and the appellants are in the same position, as they purchased only his right, title and interest, and are equally bound by it.

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The question then is: Had the attachment or prohibitory order any effect upon the mortgage? The order of the District Judge had released the property from the attachment. The High Court, upon appeal, framed an issue and remanded the case for trial of it. The Court did not set aside the order of the District Judge. Whether that should be done depended upon the finding upon the issue which in consequence of the compromise was never tried. The orders of the 30th May 1874 to strike the case off the list of pending suits could not have the effect of reversing the order releasing the property from attachment. The case being before the High Court on appeal, the District Judge had no power to reverse his order. The case had passed out of his hands. But, assuming that the orders of the 30th May were intended to give effect to the compromise, and (although most informal) that they did so, their Lordships are of opinion that the compromise did not operate to revive or restore the attachment, and make it effective upon the mortgage. The liability of Amirun Nissa under the compromise was different from the liability of the representatives of Abdul Ali under the decree of the 28th February 1872. She became personally liable for the payment of the instalments, and all her property was made liable for it. The effect of the compromise was to substitute that liability for the liability under the decree of February 1872 and to put an end to the attachment. The appellants who purchased only the right to redeem the property, and now seek to recover possession of it freed from the mortgage, have failed to show their title to possession, and their Lordships will humbly advise Her Majesty to affirm the decree of the High Court and to dismiss this appeal. The appellants must pay the costs of this appeal.

*Appeal dismissed.*

Solicitors for the plaintiffs: Messrs. *Neish & Howell*.

Solicitors for the respondents: Messrs. *Barrow & Rogers*.

C. B.

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