1893

MURRAY v. THE QUEEN-EMPRESS.

The alternative sentence of imprisonment is, as Mr. Justice Prinsep has pointed out, illegal. With that exception, I think that the punishment inflicted is by no means excessive.

The Magistrate has taken into fair and full consideration all the circumstances said to be in mitigation which were urged before him. The same arguments have been addressed to us. I cannot assume that the manager of a tea garden, aged 31, has so little education that he considers that he is entitled to treat his fellow-subjects like cattle, to let them go and come only at his will, and at his pleasure to sentence them to imprisonment.

Mr. Murray has endeavoured to reduce his coolies to a state of slavery. He ought to have known that slave-holding in any form is repugnant to every right-minded British subject. I do not think that there are any mitigating circumstances. I think the fact that he used barbed wire for imprisoning these wretched men much aggravates his case. The effect, if not the object, of using wire of this kind would be to injure coolies trying to leave the coolie lines.

In my opinion this appeal should be dismissed. The circumstances of this case go to show the necessity for efficient inspection of tea gardens. It is intolerable that the accused should have been permitted without prosecution to act as he had done for so long a time.

Appeal dismissed.

J. V. W.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

1892 *July* 26.

JUGUL KISSORE LAL SING DEO (PLAINTIFF) *v.* KARTIC CHUNDER CHOTTOPADHYA AND OTHERS (DEFENDANTS).*

Parties—Suit by mortgagee and sale in execution of mortgage decree—Grant of putni by mortgagor—Putnidar—Right of redemption—Notice—Constructive notice—Transfer of Property Act (IV of 1882), ss. 3 and 85.

A mouza, K, was mortgaged by *D* by bonds extending from 1867 to 1879, the last bond of 5th January 1879 including the amounts borrowed on the

* Appeal from Original Decree No. 213 of 1891, against the decree of Babu Brojendro Coomar Seal, District Judge of Bankoora, dated the 20th of April 1891.

former bonds. On 7th January 1872, whilst it was so under mortgage, the same mortgagor *D* executed bonds whereby he mortgaged K to the defendants, and in suits brought on the basis of those bonds, came to an amicable settlement with the defendants by which on 25th February 1879 he settled K in *putni* with them; the *bonus* for the *putni* going to satisfy the mortgage debts. In 1885 a suit, to which the present defendants were not made parties, was brought by the mortgagees of the bond of 5th January 1879, and in execution of the decree in that suit, K was put up for sale and purchased by the plaintiff on 21st June 1886. In a suit brought in 1890 against the defendants to set aside the *putni* and for *khas* possession of K, it was found that the plaintiff had notice of the *putni*. *Held*, that the defendants as *putnidars* had an interest in K within the meaning of section 85 of the Transfer of Property Act, and should therefore have been made parties to the suit in 1885, and thereby given an opportunity of redeeming the mortgage on which that suit was brought.

Kokil Singh v. *Duli Chund* (1) and *Kasimunnissa Bibee* v. *Nilratna Bose* (2) referred to.

If not as *putnidars*, they were entitled as second mortgagees to have an opportunity of redeeming the prior mortgage and to be parties to that suit. Not having been parties, the plaintiff was not entitled to khas possession as against them.

Nanack Chand v. *Teluckdye Koer* (3), *Dirgopal Lall* v. *Bolakee* (4), and *Radha Pershad Misser* v. *Monohur Das* (5) referred to.

THIS was a suit for khas possession of mouza Khandari after setting aside a *putni* which Kartic Chunder Chottopadhya (defendant No. 1) and the predecessors of the other defendants had obtained on 14th Falgoon 1285 (25th February 1879) from Dhurm Sing, the former proprietor of the zamindari.

For the purposes of this report the facts of the case and the contention of the parties sufficiently appear from the judgment of the High Court.

Baboo *Srinath Dass* and Baboo *Upendro Chunder Bose* for the appellant.

Baboo *Saroda Churn Mitter* for the respondents.

The judgment of the Court (PRINSEP and BANERJEE, JJ.) was as follows:—

This appeal arises out of a suit brought by the appellant to recover *khas* possession of a mouza named Khandari, included in

(1) 5 C. L. R., 243.
(2) I. L. R., 8 Calc., 79.
(3) I. L. R., 5 Calc., 265; 4 C. L. R., 358.
(4) I. L. R., 5 Calc., 269.
(5) I. L. R., 6 Calc., 317.

1892

JUGUL KISSORE LAL SING DEO v. KARTIC CHUNDER CHOTTOPADHYA.

zamindari *kismut* Saharjora, after setting aside a *putni* obtained by defendant No. 1 and the predecessor of the remaining defendants, on the 14th Falgun 1285 (25th February 1879), from the former proprietor of the zamindari. The plaintiff in his plaint states that the late Dhurm Sing Baboo, by a bond dated the 8th Assar 1269 (21st June 1862), mortgaged the said *kismut* Saharjora and another property to one Gadadhar Banerjee, as security for a loan of Rs. 11,000; that on the 25th Cheyt 1278 (8th April 1872) he again executed another bond in favour of the representatives of the said Gadadhur Banerjee for Rs. 8,000, being partly the balance due on the previous bond, and partly a fresh loan on the mortgage of the same properties; that on the 22nd Pous 1285 (5th January 1879) Bunwari Lal Sing, a representative of Dhurm Sing, executed a third mortgage bond in favour of the said representatives of Godadhur on the same security, for the debt covered by the last-mentioned bond and other debts; that in execution of the decree obtained on this third bond, the mortgaged properties were put up to sale and purchased by the plaintiff on the 8th Assar 1293 (21st June 1886); that while the said zamindari was thus under mortgage, Dhurm Sing mortgaged mouza Khandari and another mouza to the defendants, or their predecessors, by three instalment bonds, dated the 24th Pous 1278 (7th January 1872), and upon suits being brought on the basis of these instalment bonds, the said Bunwari Lal Sing, representative of Dhurm Sing, made an amicable settlement with the defendants or their predecessors on the 14th Falgun 1285 (25th February 1879), whereby he settled mouza Khandari in *putni* with them, the *bonus* for the *putni*, Rs. 9,000, going to satisfy the mortgage debt; and that as this *putni* was granted whilst mouza Khandari was under mortgage, the plaintiff as purchaser in execution of the mortgage decree is entitled to set it aside and recover *khas* possession.

The defendants in their written statement denied that any money on account of the bond of 1269 (1862) was included in the bond of Cheyt 1278 (February 1872), and they urged that their bonds of Pous 1278 (January 1872) were on account of a debt secured by an earlier mortgage bond, dated 13th Assin 1267 (28th September 1860); that they were, therefore, entitled to priority over

1892

JUGUL KISSORE LAL SING DEO v. KARTIC CHUNDER CHOTTOPADHYA.

the mortgages set up by the plaintiff; and that, as they were no parties to the suit which resulted in the decree in execution of which the plaintiff made his purchase, they were not bound by the auction sale, and the plaintiff was not entitled to recover *khas* possession as against them.

Upon these pleadings the Court below framed several issues, and it has held that the mortgages set up by both parties are genuine and valid; that the defendants are entitled to priority by reason of the mortgage of 1267 (1860); and that the plaintiff is not entitled to recover *khas* possession. And it has further held that either as *putnidars*, or second mortgagees, the defendants were entitled to be made parties in the suit brought by the representatives of Godadhur Banerjee; and that as they were not made parties, they were not bound by the decree in that suit, or any proceedings that might have been taken in that suit, or by the sale in execution of that decree.

Against that decision the plaintiff has preferred this appeal; and it is contended on his behalf, *first*, that the Court below was wrong in holding that the mortgages of the 24th Pous 1278 (7th January 1872) were on account of debt secured by the prior mortgage of 1267 (1860); *secondly*, that the Court below was wrong in holding that the defendants were entitled to be made parties to the suit brought by the Banerjees; and *thirdly*, that the Court below ought in any case to have apportioned the mortgage debt over mouza Khandari, and given the plaintiff a decree for possession on default of the defendants to pay off the amount so apportioned instead of dismissing the suit altogether.

If it had been necessary to decide the first point, then, notwithstanding certain defects in the evidence noticed by the learned Judge below, we should, on the whole, have agreed with him in the conclusion he has arrived at; but in the view we take of the case upon the two remaining points, we think it unnecessary and undesirable to dispose of this question in this suit. Upon the second point, we think the plaintiff must fail. At the date that the Banerjees brought their suit upon their mortgage (1885), the defendants had been for some years in possession of the mouza, which was part of the mortgaged premises, as *putnidars*; and their *putni* was created in satisfaction of mortgages which, if

1892

JUGUL KISSORE LAL SING DEO v. KARTIC CHUNDER CHOTTOPADHYA.

there had not been such satisfaction would, irrespective of the question of priority, have given them at least the position of second mortgagees. The Banerjees were, therefore, in our opinion, clearly bound to make the defendants parties to their suit, under s. 85 of the Transfer of Property Act. As *putnidars* of part of the property comprised in the mortgage, they clearly had an interest in such property, within the meaning of that section, and were entitled to have an opportunity of redeeming. This view is in accordance with the decisions of this Court in *Kokil Singh* v. *Duli Chund* (1) and *Kasimunnissa Bibee* v. *Nilratna Bose* (2). And if as *putnidars* they were not necessary parties, it would clearly be inequitable to hold that they were not entitled to fall back upon their position as second mortgagees, and claim the right to redeem the prior mortgage, if the *putni*, which went to satisfy the second mortgage, is to be held invalid as against the first mortgagee.

It was contended by the learned vakil for the appellant that the Banerjees had no notice of the defendant's interest as *putnidars* or second mortgagees at the date of their suit; and that they were therefore not bound to make the defendants parties to that suit. This argument, in our opinion, has no force. The notice required by s. 85 of the Transfer of Property Act need not be actual notice, but includes constructive notice, as defined in s. 3: and seeing that the defendants had been in possession of the mouza in dispute for some years before the date of the suit of the Banerjees, there can be no room for doubt that they had such constructive notice.

Whether the defendants are prior mortgagees or not, they having obtained possession first are entitled to retain it as against the plaintiff in this suit, see *Nanuck Chand* v. *Tehuckdye Koer* (3), *Dirgopal Lall* v. *Bolakee* (4), and *Radha Pershad Misser* v. *Monohur Das* (5).

It now remains to consider the third point urged before us. We think it sufficient to say upon this point that the frame of the suit precludes the plaintiff from claiming the relief which he has asked us to give him now, and that the mere insertion of a general

(1) 5 C. L. R., 243.
(2) I. L. R., 8 Calc., 79.
(3) I. L. R., 5 Calc., 265; 4 C. L. R., 358.
(4) I. L. R., 5 Calc., 269.
(5) I. L. R., 6 Calc., 317.

prayer clause in the plaint is not sufficient for the purpose. Having regard to the pleadings in the case, and to the terms of the several bonds that have been put in by the parties, we think the plaintiff has not placed before the Court sufficient materials to enable it to apportion the mortgage debt on the mouza in dispute. There is no sufficient evidence to satisfy us as to how much of the mortgage debt covered by the bond of 1269 remained unpaid on the date of the bond of 1278. Nor is there any clear evidence to show what the relative values of the mouza now in dispute and the remainder of the mortgaged properties are.

1892

JUGUL KISSORE LAL SING DEO v. KARTIC CHUNDER CHOTTOPADHYA.

The result, then, is that appeal must be dismissed with costs.

Appeal dismissed.

C. D. P.

CRIMINAL REVISION.

Before Mr. Justice Prinsep, Mr. Justice O'Kinealy, and Mr. Justice Trevelyan.

DAMU SENAPATI AND SEVEN OTHERS (PETITIONERS) *v.* SRIDHAR RAJWAR (OPPOSITE PARTY).*

1893 *August* 17.

Criminal proceedings—Irregularity—Magistrate passing sentence before finishing his judgment—Criminal Procedure Code (Act X of 1882), ss. 365, 367 and 537.

A Magistrate on a charge of rioting passed sentence on the accused without delivering his judgment in open Court, the judgment (one in course of being written during the hearing of the case) being in fact not then completed. The case went on appeal to the Sessions Judge, who dealing fully with the evidence taken before the Magistrate, confirmed the conviction and sentence.

Held, per PRINSEP and TREVELYAN, JJ., that the judgment of the Magistrate was not one in accordance with the law as laid down in section 366 of the Criminal Procedure Code: but *held* by PRINSEP and O'KINEALY, JJ. (TREVELYAN, J., dissenting) that the irregularity was one contemplated by section 537 of the Code, and not having occasioned any failure of justice, it did not necessitate a retrial of the case.

* Criminal Revision No. 370 of 1893, against the order of J. Pratt, Esq., Sessions Judge of Midnapore, dated the 5th of June 1893, affirming the order passed by Mr. M. A. Kadar, Deputy Magistrate of Midnapore, dated the 12th of May 1893.