

condition attached that Purushottam should be shebait. The Thakur Daoji, or those who speak for him on earth, need not take advantage of this gift. Munnî Bibi could not, of her own authority, alter the shebaitship of the Thakur. But if the gift is taken and the condition insisted on, it must be observed. It has now been insisted on, and Daoji must elect whether to change his habitation or to change his shebait.

It is true that money was raised to build the temple, and was raised mainly from the worshippers and in the name of the Thakur Daoji. But the facts of this case are not such as to raise an equity of the kind suggested at the Bar, and favoured by one of the judgments delivered in the Division Court. There is no reason to suppose that the subscribers did not know of Munnî Bibi's deeds, and there is no evidence that the subscriptions, though given to the Thakur Daoji, were given with any reference to the question who should be his shebait.

The decree of the High Court must be affirmed and both appeals dismissed, but there will be no order as to costs. Their Lordships will humbly advise Her Majesty to this effect.

Appeals dismissed.

Solicitors for the appellant : Messrs. *Barrow and Rogers.*

Solicitor for the respondents : Messrs. *Wentmore and Swinhoe.*

C. B.

LUTF ALI KHAN (PLAINTIFF) v. FUTTEH BAHADUR AND OTHERS
(DEFENDANTS).

[On appeal from the High Court at Calcutta.]

Mortgage—Sale of mortgaged property—Purchase by a mortgagor at a judicial sale of interest under a second mortgage—Rights against the mortgagor or purchaser at a sale in execution of a consent decree upon the first mortgage.

The same property, with other, was mortgaged, first to one mortgagor, and secondly to another. Decrees were obtained upon both mortgages : the terms of the first decree giving effect to a compromise between the mortgagor and the first mortgagee. Sales in execution followed ; but before the sale under the decree upon the first mortgage was effected, the sale under the decree upon the second took place, the possession remaining with the purchaser at the first sale, who was acting *benami* for the mortgagor. At the

* Present : LORD HOBHOUSE, LORD MACNAGHTEN, and SIR R. COCHRAN.

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subsequent sale under the decree upon the first mortgage, the plaintiff purchased, and now sued for possession.

The High Court decided that the plaintiff was entitled to the first mortgage lien, in consequence of his purchase at the second sale; and, all persons interested in the matter being before the Court, that the proper course was to direct an inquiry as to how much of the mortgage debt was chargeable upon that portion of the property which formed the subject of the appeal; and to direct that so much of the mortgage debt should be realized by the sale of that property.

Held, that this judgment incorrectly treated the plaintiff as mortgagor, refusing him a charge for the full amount of his purchase money. The case depending upon its own circumstances, it would be contrary to equity to allow the mortgagor to set up any right to possession as acquired by his purchase; and that the plaintiff, as against him, was entitled to a decree for possession as purchaser.

APPEAL from a decree (12th June 1885) of the High Court modifying a decree (2nd November 1883) of the Subordinate Judge of Patna.

The question now raised related to the rights of the plaintiff, appellant, as purchaser at a sale in execution of a decree upon a mortgage. The property, possession of which was claimed by the plaintiff, was a five annas four pies share of mouza Jugdispore Tiari, mortgaged first (with an equal share of mouza Ranipore) to Nawab Syed Velait Ali Khan, C.I.E., on 14th July 1875, to secure Rs. 36,000, and mortgaged secondly to Jagarnath Singh and another, on 18th December 1877, to secure Rs. 12,000.

These shares were sold on the 22nd November 1880 in execution of a decree upon the latter mortgage obtained by Jagarnath Singh, with notice of the prior lien of the Nawab, and purchased by Ram Padurath Upadhia. The same were sold again on the 15th January 1881 in execution of a decree obtained by the Nawab on his first mortgage, and the plaintiff became purchaser.

Of the six defendants, now respondents (who did not appear on this appeal) the first, Futteh Bahadur, was the mortgagor. The second, Haji Syed Velait Ali Khan, C.I.E., was the first mortgagee. The third, Jagarnath Singh, was the second mortgagee, together with the fourth, Jugalkishwar. The fifth and sixth defendants, Gunga Persad and Ram Padurath Upadhia, were in the same interest, having transferred the one to the other after the second sale.

In their Lordships' judgment are set forth the principal terms of the mortgages, and all the facts.

On the 9th April 1830, attachment at the suit of the first mortgagee was issued, and executed on the 18th May following. On the 13th July 1830, attachment at the suit of the second mortgagees was issued, and executed on the 6th August.

The 22nd November 1830 was fixed for the sale of the attached property; but the first mortgagee's sale was postponed. That of the second mortgagee's took place.

On the 15th January 1831 was held the adjourned sale, at which the plaintiff purchased, and on the 28th March following, that sale was confirmed, and a certificate granted to the plaintiff, notwithstanding the objections of the mortgagor, by the Subordinate Judge executing the decree. Disputes arose as to the entry of the name of the rightful purchaser of the one-third share of Jugdispore, which were decided against the plaintiff, and in favour of the defendant, Ram Padurath Upadhia, on the 16th March and 25th August 1832, by the revenue authorities, who referred this appellant to a civil suit on the question of title.

On the 8th October 1832 the present suit was instituted, alleging collusion between the defendants Futteh Bahadur, Jagarnath Singh, and Jugalkishwar, and claiming that the plaintiff's right to possession as purchaser should be declared as existing under "the prior lien," and that possession should be decreed to him; or, if the Court should be of opinion that he was not entitled to possession without giving to the third, fourth, fifth and sixth defendants, interested in the second mortgage, an opportunity of redeeming the prior mortgage, a decree for Rs. 36,000, his purchase-money, with interest, to be repaid to him, either by them, or by the second defendant, the Nawab, the first mortgagee.

Futteh Bahadur, the mortgagor, filed no written statement. The Nawab admitted the facts alleged, but contended that he was under no obligation to refund what moneys he had received in respect of the purchase by the plaintiff. The defendants Jagarnath Singh and Jugalkishwar denied collusion, and contended that they were not affected by the prior mortgage. Gunga Pershad disclaimed all interest, on the ground that he

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had sold to Futteh Bahadur, in the name of Ram Padurath Upadhia, what he had purchased; and the latter denied that he was acting *benami* for Futteh Bahadur, asserting that he bought the share from Gunga Pershad *bond fide* for himself.

The decree of the Subordinate Judge was in favour of the plaintiff, that he should recover Rs. 36,000, as principal, and Rs. 3,705, as interest, together with costs and future interest, by the sale of the property purchased by him, as he alleged, unless the defendant Ram Padurath Upadhia should pay off the above amounts to him by the 3rd of April 1884. Ram Padurath appealed to the High Court as to the liability thrown on him to pay the plaintiff's purchase-money of the share of Jugdispore, as a condition of redemption. There was another appeal by the third and fourth defendants as to a share of other property which the decree affected, but to which the present appeal did not relate. Futteh Bahadur appealed as to certain costs which he had been directed to pay. The plaintiff Syed Lutf Ali Khan did not appeal to the High Court, which disposed of the three appeals by one judgment, set aside the decree of the Subordinate Judge, so far as he directed the payment of the Rs. 36,000, with interest and costs to the plaintiff, and directed an inquiry as to how much of the money was chargeable upon the property ordering that he might recover the same by sale of it.

The judgment of the High Court (WILSON and BEVERLEY, JJ.), was as follows:—

“This share was sold on the 22nd November 1880, in execution of a decree of Jagarnath Singh, on the proclamation of Syed Velait Ali Khan, and purchased by Ram Padurath Upadhia. Subsequently, on the 15th January 1881, this same share was sold again in execution of the decree of Syed Velait Ali Khan, and purchased by the plaintiff. The first purchaser is in possession.

It appears, then, that this property was mortgaged first to Syed Velait Ali Khan. It was mortgaged, secondly, to Jagarnath Singh. Suits were brought upon both mortgages. A decree was obtained and sale effected in the first place under the second mortgage, and the property sold became vested ultimately in, or in the name of, Ram Padurath Upadhia. The property was then sold under the decree obtained upon the first mortgage and purchased by the plaintiff. Now, the Court below has held that the plaintiff is not entitled to recover possession from that defendant Ram Padurath, but that he is entitled to recover from that defendant the amount of

the purchase-money which he, the plaintiff, paid upon the purchase of this property. Against that decision this appeal has been brought. The contention in support of the appeal, shortly stated, is this:—It is said that the effect of the plaintiff's purchase under the decree in the suit upon the first mortgage, was to give him certain rights in the property, and in particular the right of enforcing the mortgage lien which the decree-holder, the mortgagee, had upon the property, and no other lien. We think that this contention is well founded, and that after his purchase his right was to enforce the mortgage lien. On the other hand, the right of the purchaser under the decree in the suit on the second mortgage was a right to redeem.

It is argued, therefore, that the decree that has been given cannot be supported; and we think this is so as the decree stands. But on the other hand, it is pointed out that in the Court below there was a contention that the property sold under the decree on the second mortgage vested in Ram Padurath as a mere *benamdar* for the first defendant Futteh Bahadur the original mortgagor. The Subordinate Judge in the Court below has found against that. In that we are unable to agree. We accept what he says with regard to the unsatisfactory character of the witnesses who spoke about the matter. But that evidence stands un rebutted, and we think it ought not to be rejected. If it was not true, Ram Padurath was the man most interested in denying it, and he is a party. But Ram Padurath did not venture to come into the witness-box to say that this was really a purchase by him on his own account and not on account of his master Futteh Bahadur. We are, therefore, unable to agree with the Court below in that finding. We hold that Ram Padurath was a *benamdar* for Futteh Bahadur.

Then it is said that, that being so, a decree against this property in the hand of this man, a mere *benamdar* for the original mortgagor, may properly be made. We think it is not open to the respondent to come forward and ask for a decree other than the decree made by the Court below. But we think he is entitled to dispute the finding on the question of *benami* in order to sustain the decision of the Court below that a decree might properly be made against the property; and we think also that, when the appellant complains that a wrong decree has been given, the respondent is entitled to be heard as to how that decree is to be modified.

Then the question is, what should be the decree? We think that a decree should be given, giving the plaintiff in this case the benefit of that to which he is entitled namely, his mortgage lien. The first mortgage covers ten parcels of property; and the second mortgage covers two out of those ten parcels. The original mortgagees seem to have no interest left in either property; and the person who has acquired title under the first mortgage is the plaintiff. He is before the Court. The persons entitled under the second mortgage are also before the Court. And so is the

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mortgagor. Therefore all the persons interested in the matter are before the Court. There is authority [see *Ramdhone Dhar v. Mohesh Chunder Chowdhury* (1) and *Fakob Ali Chowdhury v. Ram Doolal* (2)] for saying that in a suit like the present, where all parties are before the Court, an enquiry may be made as to how the benefit and the burden of the mortgage debt should be distributed among various persons interested in the various properties originally affected by the mortgages. The claim for relief in the plaint is not very clear. But we think it is sufficient to cover the relief which we propose to give. We think, therefore, that we may direct an enquiry as to how much of the mortgage is properly chargeable upon that portion of the property which forms the subject-matter of this second appeal before us, and direct that so much of the mortgage debt may be realized by the sale of that property. The decree may be modified accordingly.

In this appeal, having regard to the nature of the modification made in the decree, we think that all parties should bear their respective costs.

On this appeal, Mr. R. V. Doyne, and Mr. C. W. Arathoon appeared for the appellant.

The respondents did not appear.

For the appellant it was argued that he ought not to be called ou to redeem at all, because he had an absolute right as purchaser. He had shown that at an execution-sale at the instance of the mortgagee, he had acquired by his purchase all the mortgagor's right title and interest therein existing at the date of the mortgage. Consequently, he was entitled to possession as against a purchaser with notice at a sale in execution of a decree obtained upon a subsequent mortgage; and the purchaser upon the latter had not obtained, by his purchase at the sale effected by the second mortgagee, any right as against the present plaintiff, to retain possession or require redemption. It had been rightly found by the High Court that the defendant Ram, Padurath Upadhia acted only *benami* for Futteh Bahadur, the original mortgagor, who had not by such a transaction acquired any right as against the present plaintiff to retain possession or to insist upon redemption. If it should be considered that Futteh Bahadur had a right to redeem, redemption should have been made conditional on his repayment to the present plaintiff of the whole sum of which he the mortgagor had had the benefit in the part payment of his debt to the first mortgagee, the Nawab Syed

(1) 11 C. L. R., 565.

(2) 13 C. L. R., 272.

Velait Ali. There was no ground for such an apportionment of the mortgage debt as had been directed by the High Court.

Reference was made to *Abdulla Saiba v. Haji Abdulla* (1), *Shringarpure v. Pethe* (2), *Kasandas v. Pranjiwan* (3), *Rajnarain Sing v. Sheera Mean* (4), *Brojokishoree Dossia v. Mahomed Suleem* (5), *Muthoora Nath Pal v. Chundermoni Dabia* (6), *Enam Momtazodeen Mahomed v. Rajcoomar Dass* (7), *Venkata Somayazulu v. Kannam Dhora* (8), *Ganesh Lal Tewari v. Shamnarain* (9).

Afterwards, on 6th April, their Lordships' judgment was delivered by

SIR R. COUCH.—The respondent, Futteh Bahadur, was the proprietor of two-thirds of a revenue-free estate, consisting of mouza Jugdispore and other mouzas and dependencies, of which he had inherited one-half and had purchased the other half. He was also the proprietor of the whole of a revenue-paying estate called Ranipore. On the 14th July 1875 he executed a mortgage bond in the usual form, by which, after stating that he had borrowed Rs. 35,000 on interest from Haji Nawab Syed Velait Ali Khan (the second respondent) stipulating to pay interest at 1 rupee per cent. per mensem, and mortgaging, pledging, and hypothecating the shares of the mouzas specified below, owned and possessed by him, he declared that, in case of non-payment of the principal on the completion of two years, or within that period, Velait Ali Khan should be at liberty to realize the principal with interest by instituting a suit and obtaining a decree, and executing the same till the realization of the whole of the decretal amount from the property mortgaged in the bond, and in case of its not being sufficient, from other immoveable properties and from his person. The mouzas specified below were Ranipore one-third share, Jugdispore one-third share, and one-third of seven other mouzas. On the 18th December 1877, Futteh Bahadur executed a similiar mortgage of another one-third share of Ranipore and of the same one-

(1) I. L. R., 5 Bom., 8, at p. 12.

(2) I. L. R., 2 Bom., 662.

(3) 7 Bom. A. C., 146.

(4) 7 W. R., 67.

(5) 10 W. R., 151.

(6) I. L. R., 4 Calc., 817.

(7) 14 B. L. R., 403.

(8) I. L. R., 5 Mad., 134.

(9) I. L. R., 6 Calc., 213, at p. 217.

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third of Jugdispore to Jagarnath Singh (the third respondent), and another person named Baijnath Singh, to secure repayment in one year of Rs. 7,000, with interest at 3 per cent. per mensem.

In 1878, Velait Ali Khan sued Futteh Bahadur for Rs. 47,964-7-1-12, principal and interest due on his mortgage. On the 20th December 1878, Futteh Bahadur filed a petition stating that Rs. 4,645-3-2-8 had been remitted by the plaintiff out of the money claimed, on condition that the petitioner should pay the whole of the principal amount, with costs, and interest at the rate of 1 rupee per cent., on the 20th December 1879, and praying that, according to this admission of claim, the case might be decreed in favour of the plaintiff, allowing the mortgage of the property to stand. And on the same day the Court made a decree in accordance with this agreement. Default having been made in payment of the money, Velait Ali Khan, in 1880, took proceedings for execution of the decree, and, on the 9th April 1880, the Court issued an order for attachment of the right and interest of the judgment-debtor, "comprising" the one-third of Ranipore and one-third of Jugdispore "mortgaged in bond and decree." The other mouzas are not mentioned, and it does not appear that anything has been done in respect of them. The attachment was made on the 20th May 1880. In the meantime Jugalkishwar, who seems to have taken the place of Baijnath Singh and Jagarnath Singh, had, on the 2nd April 1879, obtained a decree against Futteh Bahadur on the second mortgage bond, in execution of which, on the 13th July 1880, an order was issued to attach one-third "the right and interest of the debtor" out of the entire of mouza Jugdispore, &c., and one-third "the right and interest of the debtor" in mouza Ranipore. The attachment of Jugdispore was made on the 6th, and of Ranipore on the 10th August 1880.

The 22nd November 1880 was appointed for the sale in both executions. On that day Futteh Bahadur petitioned that both sales should be postponed. In the case of Velait Ali Khan the sale was postponed until the 15th January 1881. In the case of Jagarnath Singh no order was made, and the sale was held on the 22nd November. The notification of sale stated that the property to be sold was mortgaged in 1875 to Velait Ali Khan. One

Gunga Pershad, who was at that time in the service of Jagarnath Singh, bid Rs. 9, one or two other persons having offered less, and there being no higher bid he was declared the purchaser. On the 19th February 1881 Gunga Pershad executed a deed of sale of what he had purchased to Ram Padurath for Rs. 100, and on the 21st February he presented a petition to the Court praying that, in lieu of his own name, the name of Ram Padurath might be entered, and the sale certificate granted and possession delivered to him. Accordingly, on the 24th February, it was ordered that possession should be delivered to Ram Padurath, the certificated auction-purchaser. This was done in the usual form on the 3rd March; but there never was any actual change of possession, Futteh Bahadur remaining in possession all the time.

According to the evidence of Gunga Pershad, Futteh Bahadur was the real purchaser, Ram Padurath's name being used by him. The first Court considered that Ram Padurath must be held to be the real purchaser, but the High Court, on the appeal, did not agree in this, and held that Ram Padurath was a *benamdar* for Futteh Bahadur. Their Lordships agree in this with the High Court, which properly remarked that Ram Padurath had not ventured to come into the witness-box to say that it was really a purchase by him on his own account.

The sale in execution of Velait Ali Khan's decree, which decree it has been stated was made by consent upon his agreeing to relinquish part of his claim and give time for payment of the remainder, took place on the 15th January 1881. At that sale the appellant became the purchaser of the share of Ranipore for Rs. 12,000, and of the share of Jugdispore, &c., for Rs. 36,000; the sum to be realized by the execution being Rs. 61,265-6 pies, and there was consequently not sufficient to satisfy the sum due on mortgage by upwards of Rs. 13,000. The sale was confirmed by an order dated the 28th March 1881, and on the 12th September 1881 the bailiff of the Court was ordered to put the appellant, being the certificated auction-purchaser, in possession of the properties. On the 25th October 1881 the nazir reported that he had given formal possession, but the appellant was unable to obtain actual possession, and on the 9th October 1882 he instituted the present suit, and claimed a decree for possession of

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the share of Jugdispore, &c., or, if that was not granted, a decree for Rs. 36,000, and interest thereon, to be recovered from the disputed property. He also claimed a similar decree in respect of the share of Ranipore, but there is no question in this appeal about that property, he having obtained a decree for possession of it.

The Subordinate Judge, acting on his finding that Ram Padurath was the purchaser, ordered that if he did not pay Rs. 36,000, with interest up to the 3rd of April 1884, the plaintiff should have power to put up to sale the third share of Jugdispore, &c., for the realization of that amount, and also that it might be recovered from his personal property. Ram Padurath appealed to the High Court, which held that the decree could not be made against him, a mere *beramdar* for the original mortgagor, and that a decree should be made, giving the plaintiff "the benefit of that to which he is entitled, namely, his mortgage lien," and they directed an inquiry as to how much of the mortgage was properly chargeable upon that portion of the property which formed the subject of that appeal, and directed that so much of the mortgage debt might be realized by the sale of that property.

This direction and the enquiry upon which it is consequent seem to be founded on some misapprehension. The High Court treat the appellant as mortgagee in respect of his purchase, and at the same time refuse to give him a charge for the full amount of his purchase-money. As between the appellant and the other parties to the suit there can be no ground for apportioning the original mortgage debt in the manner proposed.

A question of general importance on the law relating to Indian mortgages, and one on which the Courts in India are not altogether agreed, was raised by the learned Counsel for the appellant in the course of his argument. Their Lordships, however, do not think it necessary to go into any general question. In their view the decision of the present case must depend on its own special and peculiar circumstances.

Upon the facts which have been stated, they are of opinion that it would be contrary to equity to allow Futteh Bahadur to set up against the title of the appellant any right to possession

as acquired by his purchase from Gunga Pershad. The sale to the appellant was in the execution of a decree which was made to give effect to a compromise between the mortgagor and the mortgagee. He undoubtedly acquired by his purchase a right to possession against the mortgagor, and the mortgagor ought not to be allowed to defeat that by having purchased the interest which was sold in execution of the decree upon the second mortgage.

The High Court, instead of varying the decree of the lower Court in the manner it has done, should, in their Lordships' opinion, have varied it by decreeing possession of the share of Jugdispore, &c., as there described, in the same manner as possession of the share of Ranipore is decreed, with the like order as to mesne profits and costs.

Their Lordships will humbly advise Her Majesty to order the decree of the High Court to be varied accordingly. The respondent, Futteh Bahadur, will pay the costs of this appeal.

Decree varied.

Solicitors for the appellant: Messrs. T. L. Wilson and Co.

C. B.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Banerjee.

JASODA KOER (PLAINTIFF) v. SHIBO PERSHAD SINGH AND OTHERS
(DEFENDANTS),*

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Feb. 21.

Hindu Law—Survivorship—Mitakshara Law—Limitation Act (XV of 1877), Sched. ii, Arts. 127, 144.

The principle of survivorship under Mitakshara Law is limited to two descriptions of property, viz. :—

(1) That which is taken as unobstructed heritage, and property acquired by means of it ; and

(2) That which forms the joint property of reunited co-parceners.

Property inherited by brothers from their maternal grandfather is not of those descriptions.

SUIT for a declaration of title to certain properties.

* Appeal from Original Decree No. 226 of 1887, against the decree of Baboo Nilmoni Das, Subordinate Judge of Patna, dated the 14th of May 1887.