

## APPELLATE CIVIL.

Before Mr. Justice Stephen and Mr. Justice Vincent.

1909  
May 18.

ULFAT HOSSAIN

v.

GAYANI DASS.\*

*Merger—Mokarari interest—Merger of mokarari interest in superior landlord's interest—Transfer of Property Act (IV of 1882) ss. 2 cl. (c), (d); 111 cl. (d).*

The original owner of a share in a certain *mouza* granted a *mokarari* of it to her grandson, W., conditional on her daughter, F., enjoying the *usufruct* of the *mokarari* for life, and subsequently she sold to her daughter her proprietary interest in the share. Prior to the sale of the proprietary interest, but subsequent to the grant of the *mokarari* and the *usufruct*, the original owner and the *mokararidar* mortgaged their interest to R. On the 17th September 1892, the defendant purchased the *mokararidar's* interest in the share subject to the mortgage. On the 7th October 1898, R. obtained a decree in a suit brought on his mortgage against F., W. and the defendant, and finally became the purchaser of the proprietary and the *mokarari* interest of the share at an auction sale. The defendant, however, failed to exercise his right of redemption. In consequence of default made in payment of the revenue, R.'s interest in the property was sold on the 25th April 1899 under the Revenue Sale Law, and was purchased by D. A further default having been made by D., the latter's interest in the property was sold and the plaintiff purchased the same. The plaintiff, thereupon, brought a suit for *khas* possession and mesne profits against the defendant who claimed the *mokarari* interest under his purchase from W. subject to the R.'s mortgage:—

*Held*, that the *mokarari* merged in the proprietary rights in the hands of R., and that the case was governed by the Transfer of Property Act, s. 111 (d).

*Raja Kishendait Ram v. Raja Mumtaz Ali Khan* (1) and *Surja Narain Mandal v. Nanda Lal Sinha* (2) followed.

*Jibanti Nath Khan v. Gokool Chunder Chowdry* (3) and *Promotho Nath Mitter v. Kali Prasanna Chowdhry* (4) discussed.

SECOND APPEAL by Ulfat Hossain, the plaintiff.

The facts are briefly as follows:—

Musammatt Razihan was the original owner of a share

\* Appeal from Appellate Decree, No. 1323 of 1907, against the decree of H. W. C. Carnduff, District Judge of Patna, dated May 9, 1907, confirming the decree of Tarak Chander Dass, Subordinate Judge of Patna, dated March 30, 1906.

(1) (1879) I. L. R. 5 Calc. 198.

(3) (1891) I. L. R. 19 Calc. 760.

(2) (1906) I. L. R. 33 Calc. 1212.

(4) (1901) I. L. R. 28 Calc. 744.

in a certain *mouza*. On the 9th November 1875, she granted a *mokarari* of it to her grandson, Waizuddin, with a condition that her daughter, Fazilan, should enjoy the *usufruct* of the *mokarari* for her life, and subsequently on the 28th September 1898, she sold her proprietary interest to Fazilan.

On the 22nd September 1884, both the proprietary interest and the *mokarari* were mortgaged by Musammad Razihan and Waizuddin to Rai Radha Kissen Bahadur.

On the 17th September 1892, the defendant, Gayani Dass, purchased the *mokarari* interest of Waizuddin.

On the 7th October 1898, Radha Kissen obtained a decree in a suit brought on his mortgage against Fazilan, Waizuddin and the defendant, and on the 15th April 1899 this decree was made absolute. Subsequently on the 16th August 1899, Radha Kissen became the purchaser at the auction-sale held in execution of the mortgage decree and obtained a sale certificate on the 15th September 1899. The defendant, however, failed to exercise his right of redemption.

After the mortgage decree of Radha Kissen and before his purchase, *viz.*, on the 25th April 1899, his interest in the property was sold under the Revenue Sale Law in consequence of default made in payment of the revenue and was purchased by one Dharam Singh. A further default was subsequently made by Dharam Singh and the latter's interest in the property was put up to sale under the Revenue Sale Law. On the 4th January 1900, the plaintiff purchased the same.

On the 12th February 1903, Radha Kissen obtained an *ex parte* decree against Dharam Singh and the other former proprietors of the share in suit, and on the 6th May 1905 he received from the Collector the surplus sale-proceeds of the plaintiff's purchase on the basis of the *ex parte* decree.

The plaintiff brought this suit for recovery of *khas* possession with mesne profits of the share in suit from the defendant and for ousting the latter from the same. Both the Original Court and the lower Appellate Court dismissed the suit. The plaintiff thereupon appealed to the High Court.

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*Moulvi Shamsul Huda*, for the appellant. The *mokarari* interest had merged in the superior interest in consequence of the purchase by the mortgagee, Radha Kissen, at the auction-sale of both the proprietary and the *mokarari* interests of the mortgagors of the two interests and the plaintiff is the purchaser of these interests sold at a Revenue Sale. I rely on section 111 (d) of the Transfer of Property Act and *Raja Kishendatt Ram v. Raja Mumtaz Ali Khan* (1) and *Surja Narain Mandal v. Nanda Lal Sinha* (2). The case of *Jibanti Nath Khan v. Gokool Chunder Chowdry* (3) is decided irrespective of the Transfer of Property Act: *Promotho Nath Mitter v. Kali Prasanna Chowdhry* (4) and *Prosunna Nath Roy v. Jogut Chunder Pundit* (5). With respect to the equitable doctrine of merger, I submit, it applies, independent of the Transfer of Property Act, to the *mofussil*, though its application was questioned in the case of *Womesh Chunder Goopto v. Raja Narain Roy* (6).

*Dr. Rashbehary Ghose* (*Babu Digambar Chatterjee* with him), for the respondent. There is no merger in this case, and the question is concluded in *Jibanti Nath Khan v. Gokool Chunder Chowdry* (3), which is directly in my favour. The *mokarari* lease in suit was created before the Transfer of Property Act was passed and, therefore, section 111 (d) is inapplicable. In *Surja Narain Mandal v. Nanda Lal Sinha* (2), the Court merely expresses an opinion. The doctrine set out by the Judicial Committee in *Raja Kishendatt Ram v. Raja Mumtaz Ali Khan* (1) is not founded on the doctrine of merger, but on another doctrine which will be found at page 210 of the report. The case of *Promotho Nath Mitter v. Kali Prasanna Chowdhry* (4) is distinguishable. I rely on Foa's *Landlord and Tenant*, 4th edition, page 646.

*Moulvi Shamsul Huda*, in reply.

*Cur. adv. vult.*

STEPHEN AND VINCENT JJ. This is a suit brought for a declaration that the plaintiff as purchaser at a Government

(1) (1879) I. L. R. 5 Calc. 198.

(2) (1906) I. L. R. 33 Calc. 1212.

(3) (1891) I. L. R. 19 Calc. 760

(4) (1901) I. L. R. 28 Calc. 744.

(5) (1878) 3 C. L. R. 159.

(6) (1868) 10 W. R. 15, 17.

Revenue Sale is the proprietor of a 2 annas 5 gundas and odd share in a certain *mouza* and for possession thereof.

The facts, as far as they are material to the questions we have to decide, are as follows. The share in question originally belonged to one Musammat Razihan. In 1875, she created a *mokarari* of which her daughter Musammat Fazilan was tenant for life with a remainder to her son Waizuddin. In 1878, she transferred the proprietary interest to Musammat Fazilan. In 1884, Fazilan and Waizuddin mortgaged the share to Rai Radha Kissen Bahadur. In 1892, Mohanth Gayani Dass, the present defendant-respondent, purchased the interest of Waizuddin, that is his equity of redemption in the *mokarari*. On the 15th of April 1899, Rai Radha Kissen got a decree absolute in a mortgage suit in which Waizuddin, Fazilan, and Gayani Dass, among others, were defendants, and became purchaser at the auction sale held in pursuance thereof, the sale certificate being dated 15th of September in the same year. Before this sale, however, the proprietary interest in the share in suit had been brought to sale at a Revenue Sale on the 25th April 1899, and had been bought by one Dharam Singh. In 1900, there was another Revenue Sale and the plaintiff-appellant was the purchaser. Against his claim for possession, the defendant sets up the *mokarari* which he alleged is still in existence and which the plaintiff did not acquire by his purchase, which was subject to it as being a prior encumbrance. The lower Appellate Court has held that this contention must prevail, because the *mokarari* was in existence at the time of the second Revenue Sale. As he rightly says, the case turns on a question of merger, and we must see whether merger has or has not in fact occurred.

It is not suggested that the sale to Dharam Singh can effect the case, and it is not denied that the effect of the sale to Rai Radha Kissen in the mortgage suit was to vest in him the life estate of Musammat Fazilan, the reversionary interest of Waizuddin in the *mokarari*, and also the proprietary interest of Razihan in the share in question.

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In the first place, the appellant contends that the case is governed by the Transfer of Property Act, section 111 (*d*) in which case it is not denied that the *mokarari* merged in the proprietary interest as soon as both came into Rai Radha Kissen's hands. The respondent argues, however, that section 2 (*c*) of that Act prevents the application of section 111 (*d*). Were it not for paragraph (*d*) of section 2, we should be inclined to hold that section only saved the effect of the repeals that it enacts in the cases specified : and that the word "herein" meant "in this section" and not "in this Act." Without, however, considering this view, which seems to be contrary to that of Banerjee J. in *Promotho Nath Mitter v. Kali Prasanna Chowdhry* (1), we do not see how to apply clause (*c*) to the present case in the way that recommended itself to the lower Appellate Court. The section enacts that nothing "herein (*i.e.*, in the Act if we take it so) contained shall be deemed to effect any right or liability arising out of a legal relation constituted before this Act came into force." The right or liability which the respondent desires to set up is the right of the original *mokararidar*, Waizuddin, to hold his *mokarari* unaffected by section 111 (*d*) of the Act if the *mokarari* and the parent estate both came into his hands, and this right, he contends, must be passed on to Rai Radha Kissen, the purchaser of the *mokarari*. This is, in our opinion, an incorrect view. The right in this case to which clause (*c*) must apply, if it applies at all, is the right of Radha Kissen to the same effect, and it was constituted by his legal relation to the defendants in the mortgage suit at the time of the mortgage-sale, which took place after the passing of the Transfer of Property Act. We hold, therefore, that there is nothing to prevent section 111 (*d*) of the Act from applying and that a merger has taken place.

Even supposing that the case is taken out of the scope of section 111 (*d*), we are unable to agree with the decision of the lower Appellate Court. In *Surja Narain Mandal v. Nanda Lal Sinha* (2), the decision in *Raja Kishendatt Ram v.*

(1) (1901) I. L. R. 28 Calc. 744, 750. (2) (1906) I. L. R. 33 Calc. 1212, 1217.

*Raja Mumtaz Ali Khan* (1) is treated as an authority for the proposition that apart from the effect of the Transfer of Property Act a *mokarari* interest would merge in a superior tenure. It is true that in *Jibanti Nath Khan v. Gokool Chunder Chowdry* (2) and in *Promotho Nath Mitter v. Kali Prasanna Chowdhry* (3), a different opinion may seem to have been expressed, but in the earlier of these cases the owners of the zemindari interest elected to treat a *putni* interest they had acquired in their own *zemindari* as subsisting, and both cases were decided without reference to the case of *Raja Kishendutt Ram v. Raja Mumtaz Ali Khan* (1). It is true, as has been argued before us, that that case was decided on the respective rights of a mortgagor and mortgagee, but the fact that the *brits* merged in the *talukdars'* interest is an essential portion of the grounds for the decision arrived at. Considering the authority of this case and the view that has been taken of its application in *Surja Narain Mandal v. Nanda Lal Sinha* (4) we consider that we must treat the *mokarari* as having merged in Rai Radha Kissen's superior interest. It has been attempted to show that Rai Radha Kissen treated the *mokarari* interest as subsisting after his purchase, and that it would have been to his interest to do so; because in the event of a Revenue Sale of the share it would not have been affected. There is no direct evidence that he did so treat it, and the argument that he must be taken to have done so to protect himself against a Revenue Sale seems to be amply met by the fact that a Revenue Sale took place within a year of his purchase, and yet he has in his statement of claim expressly disclaimed any right to take advantage of the *mokarari*.

We, therefore, hold that the *mokarari* merged in the proprietary rights in the hands of Rai Radha Kissen. The appellants is, therefore, entitled to judgment and to his costs in this Court and both the Courts below.

O. M.

*Appeal allowed.*

(1) (1879) I. L. R. 5 Calc. 198.

(3) (1901) I. L. R. 28 Calc. 744.

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