

## PRIVY COUNCIL.

AMAR CHANDRA KUNDU  
v.  
SHOSHI BHUSHAN ROY.

P.C.\*  
1908  
Nov. 11;  
Dec. 10.

[On appeal from the High Court at Fort William in Bengal.]

*Manager, powers of—Bengal Tenancy Act (VIII of 1885) ss. 93, 98—Mortgage by manager—Restraint on powers of co-owners while estate under management—Mortgage by co-owner of his share, effect of—Appeal to Privy Council—Sufficiency of certificate of leave to appeal—Civil Procedure Code (Act XIV of 1882) ss. 595, 596, 600.*

The powers given by s. 98 of the Bengal Tenancy Act to a manager of joint property appointed under s. 93 "for the purposes of management" include the power to mortgage or to sell the property.

The restraint put upon the co-owners by s. 98, sub-s. (3) of the Act, whilst the estate is under management, is co-extensive with the power conferred on the manager: it does not extend to the exercise of individual rights.

Where one of the co-owners of an estate under management mortgaged his share which in execution of a decree on the mortgage was purchased by the mortgagee:—

*Held*, that the mortgagee thereby became a co-owner under the manager, and as such was entitled to the benefit of a decree for redemption in a suit on a mortgage of the estate by the manager.

On an objection taken that the appeal had not been properly admitted:—

*Held* that the case was governed by *Webb v. Macpherson*(1) and that the certificate of leave to appeal was sufficient.

APPEAL from a decree (16th July 1900) of the High Court at Calcutta, which affirmed a decree (4th March 1898) of the District Judge of Chittagong decreeing the respondents' suit.

One of the defendants, Amar Chandra Kundu, appealed to his Majesty in Council.

The facts giving rise to the suit were as follows:—

On 22nd September 1890 a manager was appointed under the provisions of s. 95 of the Bengal Tenancy Act (VIII of 1885) for an estate owned by three joint proprietors, Assanulla Chowdhry,

\* *Present*: Lord Macnaghten, Lord Lindley, Sir Andrew Scoble, Sir Arthur Wilson and Sir John Bonser.

(1) (1903) Ante, p. 57; L. R. 30 I. A. 238.

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Rahimulla Chowdhry and Basirulla Chowdhry. On 23rd December 1890 the manager, with the permission of the District Judge, and for the purpose of paying the Government revenue borrowed from the present appellant Amar Chandra Kundu the sum of Rs. 6,200 with interest at  $1\frac{1}{4}$  per cent. per mensem, executing a mortgage for that amount on the property of the three joint proprietors. Subsequently on 4th January 1892 the manager, also with the sanction of the District Judge, executed another mortgage of the same property for Rs. 6,700 with interest at 1 per cent. per mensem, in favour of Golak Chandra Chowdhry now represented by the respondents. This mortgage recited the former mortgage of 23rd December 1890, and stated that it was executed to pay off the amount due to Amar Chandra Kundu and the Government revenue: and the money obtained on the later mortgage of the 4th January 1892 was so applied. On 4th August 1891, Rahimulla Chowdhry, one of the three joint proprietors executed a mortgage of his own share of the joint property for Rs. 12,275 in favour of Amar Chandra Kundu. On that mortgage, in a suit in which Rahimulla alone was a defendant, Amar Chandra Kundu obtained a decree in execution of which he purchased the share of Rahimulla Chowdhry. The property was released from management on 1st April 1897.

The present suit was brought on 2nd April 1897 upon the mortgage of 4th January 1892 in favour of Golak Chandra Chowdhry, the plaintiff. The plaint stated the value of the suit as Rs. 7,700-14-11, and prayed for the usual mortgage decree.

The defendants in the suit were the heirs of the three joint proprietors, who had died since the execution of the mortgage, and one Lutful Huq, who had taken a lease of the property with the sanction of the District Judge. Amar Chandra Kundu was afterwards added as a defendant to the suit as being a purchaser of part of the mortgaged property.

The defence of the original defendants, who put in written statements, was that the manager had no power to incur the debt or to execute the mortgage even with the permission of the District Judge, and that there was no necessity for borrowing the money.

Amar Chandra Kundu filed a written statement in which he objected to being made a party to the suit and disputed the

plaintiff's claim. He set up his mortgage and his purchase and possession under it, and claimed priority as against the plaintiff, and that the suit should, as against himself, be dismissed.

The District Judge was of opinion that the main question was whether the share of Rahimulla Chowdhry sold in execution of the decree against him and purchased by the defendant Amar Chandra Kundu was liable for the debt incurred to the plaintiff by the manager. As to this he said:—

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“It has been proved that the original mortgage was permitted by the District Judge in order that the revenue due from the estate might be satisfied. I am of opinion that the power contemplated by the words ‘for the purposes of management’ includes the power to mortgage, and I am not aware that such a proposition has ever been dissented from before. Their Lordships of the High Court have issued rules under s. 100 of the Bengal Tenancy Act, in which it is provided that a manager shall not mortgage without the express sanction of the District Judge. This shows clearly that, in their opinion, the power to mortgage is conferred by the Act. Under the same proviso of the same section the powers which are given to the manager are taken away from the co-owners, and I, therefore, hold that the mortgage created by Rahimulla is wholly invalid as against the present plaintiff's lien. . . . Even if the mortgage were valid it would only be a second mortgage and the present plaintiff's claim would have precedence. As pointed out above, Amar Chandra had a mortgage from the common manager, and subsequently took a second mortgage from one of the owners. He stood by and allowed the common manager to borrow money in order to repay his debt, and received the same, and never hinted that he had a further claim. It is to me clear that the plaintiff would not have lent money on the mortgage, if he had been aware that there was a mortgage still in existence upon a third share of the estate. It is true that no direct evidence has been offered, but the circumstances disclosed seem to be sufficient. I hold that in law and equity Amar Chandra Kundu is bound to treat the mortgage now in suit as prior to his mortgage, upon which his title is based.”

The suit was, therefore, decreed with costs.

The defendant Amar Chandra Kundu alone appealed from this decision to the High Court, valuing his appeal at Rs. 7,700-14-11, and a Division Bench of that Court (AMERR ALI and BRETT JJ.) affirmed the decree of the District Judge. The material portion of their judgment was as follows:—

“Two objections to the decree of the lower Court have been taken before us by the learned counsel on Amar Chandra Kundu's behalf. *First*, it is contended that the common manager had no power under the Bengal Tenancy Act to create a mortgage, and that, therefore, the plaintiff's deed is of no effect, certainly, as regards the share of Rahimulla purchased by Amar Chandra Kundu. In the second

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place, it is urged that Rahimulla had the power to create the mortgage in favour of Amar Chandra Kundu under which the defendant purchased his share and is in possession, and that he is entitled to hold the same against the subsequent mortgage executed by the common manager in favour of the plaintiff.

"It appears to us that both these contentions are untenable. Sub-s. 3 of s. 98 of the Bengal Tenancy Act describes the power vested in a common manager. It runs as follows:—'He shall, subject to the control of the District Judge, for the purposes of management, exercise the same powers as the co-owners jointly might, but for his appointment have exercised,' and then comes this important passage: 'and the co-owners shall not exercise any such power.' Section 100 authorises the High Court to make from time to time rules defining the powers and duties of managers under the foregoing section. In accordance with the power given to the High Court, rules have been framed, and one of these rules is in these terms: 'No manager shall have power to sell or mortgage any property, nor shall he grant or renew any lease for any period exceeding three years without the express sanction of the District Judge.'

"It was contended that we must read the sentence relating to sale and mortgage separately from that relating to the granting and renewing of a lease, that is, we must read them thus: 'No manager shall have power to sell or mortgage any property,' and then, 'nor shall he grant or renew any lease for any period exceeding three years without the express sanction of the District Judge.'

"It is needless to say that the contention, on the face of it, is absurd. The powers of the manager regarding sale or mortgage, or the grant or renewal of a lease, stand on one and the same footing, and are subject only to the condition precedent that he must obtain the express sanction of the District Judge. There can be no question that the manager is vested with the power to mortgage under the rule to which reference has been made, and in this case the mortgages of the 23rd December 1890 and the 4th January 1892 were effected with the express sanction of the District Judge. It follows, therefore, that both these mortgages were perfectly valid. With the proceeds of the latter the previous mortgage was discharged and satisfied. What the effect of that discharge was we shall consider presently. To hold that the manager has no power to sell or mortgage would have the effect of frustrating the object for which, generally speaking, a common manager is appointed. The management of a property carries with it the obligation of paying the dues accruing upon it; and for the payment of the dues which may accrue from time to time, it may become necessary either to sell, mortgage, or grant a lease. To hold that a common manager may grant a lease, but may not sell or mortgage, would have, in our opinion, the effect of nullifying the provisions made by the Legislature for the purpose indicated in the Act. But it is unnecessary to dwell further on this point, for the rules framed by the High Court show clearly the construction to be put on sub-section (3) of section 98 of the Bengal Tenancy Act.

"Then arises the question whether Rahimulla had the power of creating a mortgage, while the properties were in the hands of the common manager. In the view we take of the case it is not necessary to express any opinion upon this point, but as the question has been raised we desire to indicate that the

words used in the section are clearly prohibitive; in other words, that while the common management exists, the powers of the co-owners must be regarded as in abeyance; and the reason for imposing that restriction is obvious. What the rights may be of a mortgagee taking a mortgage from a part-proprietor, when the property is in the hands of a common manager, is a question unnecessary to determine in this case. It seems to us that so long as there is a common manager, to allow the co-owners to exercise such power as is vested in the common manager, would be to defeat the purpose of his appointment. It follows, therefore, that the mortgage created by Rahimulla on the 4th August 1891 cannot in any way interfere with, or derogate from the rights created under any transaction made by the common manager with respect to the joint properties.

Assuming, however, that Rahimulla had the power of creating a mortgage which might have the effect of interfering with the rights claimed by the plaintiff as a mortgagee deriving his title from the common manager, we have to see what the plaintiff's rights are by virtue of the mortgage of the 4th January 1892, the consideration for which went to satisfy Amar Chandra Kundu's mortgage of the 23rd December 1890. It is clear, from the document executed in favour of the plaintiff by Girish Chandra Kundu, that the plaintiff never intended to give up the benefit of the first mortgage held by Amar Chandra Kundu. Towards the end of the mortgage-deed is the following covenant by the common manager: 'and I shall redeem the mortgage-bond of Amar Chandra Kundu and deliver it to you to your satisfaction.' That, in our opinion, is an indication of the intention on the part of the plaintiff to keep alive the security of Amar Chandra Kundu in his favour. It is unnecessary to refer to the cases cited at the bar in support of this proposition. It is enough to say that any slight evidence would be sufficient indication of an intention to that effect, for the presumption, generally speaking, in the absence of any evidence to the contrary, is, that a person whose money goes to satisfy a prior mortgage intends to keep alive for his benefit that prior mortgage.

"In this case, not only do we not find any evidence to rebut that presumption, but we find a covenant on the part of the common manager which indicates to our mind, that the plaintiff, mortgagee, intended that his security should be kept alive. That being so, the position of the plaintiff is that, so far as the subsequent mortgage of 4th January 1892 is concerned, he will be substituted in the place of Amar Chandra Kundu by virtue of the discharge of the previous mortgage. The decree which has been made by the District Judge, therefore, is perfectly correct, although the reasons stated by him may not be as clear as they might have been.

"The appeal is accordingly dismissed, with costs."

In his petition of appeal to His Majesty in Council, the appellant stated the total net income of the property in suit to be about Rs. 1,611-12, and valued his appeal at twenty times that amount as being the ordinary market value of the property. He stated that besides being over the appealable value of Rs. 10,000 "the appeal involved some substantial questions of law and the

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case fulfilled the requirements of s. 596 of the Civil Procedure Code, and was a fit case for appeal to His Majesty in Council."

The order of the High Court on the petition was "We think on the whole that this is a case in which a certificate for leave to appeal to His Majesty in Council ought to be granted."

On this appeal,

*C. W. Arathoon*, for the respondent, took a preliminary objection that the appeal was not properly admitted. It was under the appealable amount, and there was no special certificate as, according to the decisions in *Banarsi Prasad v. Kashi Krishna Narain*(1), and *Moti Chand v. Ganga Prasad*(2), there should have been.

[Their Lordships were of opinion that the case fell within that of *Webb v. Macpherson*(3) and that the certificate was therefore sufficient.]

*R. B. Haldane K.C.* and *A. Phillips*, for the appellant, contended that the power of the manager appointed under s. 98 of the Bengal Tenancy Act was by s. 98 confined to the "management" of the property, and did not include the power to sell or mortgage it. The rule made by the High Court under s. 100 was *ultra vires* so far as it suggested such a power in the manager. Reference was made to the Rules given in the Law of Rent and Revenue in Bengal by Kedar Nath Roy. Sub-s. (3) of s. 98 of the Bengal Tenancy Act did not, it was submitted, interfere with the power of the joint owners to deal with the property by mortgage or sale. The respondent's mortgage was therefore invalid and did not affect the appellants' right to Rohimulla's share, which he had acquired by purchase under his mortgage decree. Even if the mortgage sued on was valid, the appellant's mortgage being prior in date, had priority. The evidence of any intention to keep alive the mortgage of 23rd December 1890 was insufficient.

*H. Asquith K.C.* and *C. W. Arathoon*, for the respondents, were not called upon.

(1) (1900) I. L. R. 28 All. 227 ;  
 L. R. 28 I. A. 11.

(2) (1901) I. L. R. 24 All. 174 ;  
 L. R. 29 I. A. 40.

(3) (1903) Ante, p. 57 ; L. R. 30 I. A. 238.

The judgment of their Lordships was delivered by

SIR ANDREW SCOBLE. The Bengal Tenancy Act of 1885 by s. 93 provides that "when any dispute exists between co-owners of an estate or tenure as to the management thereof, and in consequence there has ensued, or is likely to ensue, (a) inconvenience to the public, or (b) injury to private rights, the District Judge may," upon proper application and under certain specified conditions, appoint a manager. The powers and duties of the manager are mainly to be found defined in s. 98, sub-s. (3) of which provides that "he shall, subject to the control of the District Judge, have, for the purposes of management, the same powers as the co-owners jointly might but for his appointment have exercised, and the co-owners shall not exercise any such power." By sub-s. 8 of the same section "he shall be removable by the order of the District Judge and not otherwise." And by s. 100 "the High Court may from time to time make rules defining the powers and duties of managers under the foregoing sections." Under this section the High Court made a rule that "no manager shall have power to sell or mortgage any property, nor shall he grant or renew any lease for any period exceeding three years, without the express sanction of the District Judge."

Mr. Haldane took a preliminary objection that this rule was *ultra vires*, sale and mortgage not being included in the terms "for the purposes of management" contained in s. 98 (3) of the Act. There is no definition in the Act of what is to be included in the word "management," and it must therefore be construed with reference to the subject-matter of the Act itself. Their Lordships agree with the learned judges of the High Court at Calcutta in the opinion that "to hold that the manager has no power to sell or mortgage would have the effect of frustrating the object for which, generally speaking, a common manager is appointed. In India, the management of a property carries with it the obligation of paying the dues accruing upon it; and for the payment of the dues which may accrue from time to time, it may become necessary either to sell, mortgage, or grant a lease. To hold that a common manager may grant a lease, but may not sell or mortgage, would have, in our opinion, the effect of nullifying the provisions made by the Legislature for the purpose indicated in the Act."

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Passing now to the facts of the case, it appears that on the 20th September 1890 a manager was appointed under the Act of an estate in Chittagong belonging to three co-owners named Rahimulla, Assanulla, and Basirulla. There was a considerable amount of Government revenue due on the estate, and on the 23rd December 1890 the manager, with the sanction of the District Judge, borrowed from the present appellant, Amar Chandra, the sum of Rs. 6,200, at  $1\frac{1}{4}$  per cent. per month interest, in order to pay off these arrears. To secure the advance he gave the appellant a mortgage on the property under his management. On the 24th November 1891, finding he could borrow at a lower rate of interest than that charged by the appellant, he obtained the sanction of the District Judge to carry out this purpose; and on the 4th January 1892 he executed a mortgage in favour of one Golak Chandra for the sum of Rs. 6,700, with interest at 1 per cent. per month. With the money thus obtained he paid off the appellant's mortgage.

In the meanwhile, on the 4th August 1891, the appellant obtained from Rahimulla, one of the co-owners, a mortgage of his own share in the property; and subsequently brought a suit and obtained a decree against Rahimulla alone, in execution of which decree he purchased Rahimulla's share.

The estate having been released from management under the Act, the heirs of Golak Chandra, on the 2nd April 1897, brought the present suit in the Court of the District Judge of Chittagong to establish their claim under the mortgage of 4th January 1892. To this suit the appellant was made a party, and the sole question on this appeal is whether the mortgage of Rahimulla's share to him gives him any right as against the mortgage of the whole property by the manager to Golak Chandra.

It appears to their Lordships that all that the appellant obtained under the mortgage by Rahimulla or his subsequent purchase of Rahimulla's interest was that he should be substituted as a co-owner in the place of Rahimulla, and that whatever he took, whether under the mortgage or by reason of the purchase, was subject to any charge on the estate that might be properly incurred by the manager during the period of management. In this view no question of priority or subrogation arises, and it is



unnecessary to do more than enquire whether the mortgage to Golak Chandra was a valid charge upon the estate. As already intimated, their Lordships think that it was.

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The question raised in the Courts below, "whether Rahimulla had the power of creating a mortgage while the properties were in the hands of the common manager," has, in their Lordships' opinion, been incorrectly decided by the High Court. Rahimulla, no doubt, had no power of creating a mortgage on the whole estate; but there is nothing in the Act to take away his power of dealing with his own share. The words of section 98(3) give to the manager "the same powers as the co-owners jointly might but for his appointment have exercised," and the co-owners are prohibited from exercising "any such power," that is, any power which they might jointly have exercised had no manager been appointed. The restraint upon them is co-extensive with the power conferred on the manager; it does not extend to the exercise of individual rights. In the view which their Lordships take, the acquisition of Rahimulla's share in the property by the appellant made the appellant a co-owner of the property under the manager, and as such co-owner he is entitled to the benefit of the decree for redemption, which has been passed in the suit, with such alteration of the date for redemption as the High Court may find proper.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

*Appeal dismissed.*

Solicitors for the appellant: *Watkins & Lempriere.*

Solicitors for the respondents: *T. L. Wilson & Co.*

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