Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Juggernath Sahoo and others v. Syud Shah Mahomed Hossein and others, from the High Court of Judicature at Fort William, in Bengal; delivered November 20th, 1874.

PRESENT:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

SIR LAWRENCE PEEL.

THIS is a suit by the heirs and representatives of a Mahommedan lady named Bibee Mujo, to recover possession of property comprised in a zur-i-peshgee lease from the Defendants, who claim to be purchasers for value of the property in dispute. The title of the Plaintiffs is, in fact, founded upon a right to redeem, although the suit is not exactly in the form of an ordinary redemption suit.

The title of the Plaintiffs is thus derived. Some time in the year 1814 one Khadim Hossein mortgaged the whole of the mouzahs, of which a share is claimed in this suit, by a zur-i-peshgee lease to one Sheik Emam Buksh. The zur-i-peshgee was for seven years, and stipulated that out of the gross proceeds of the village five annas should be paid as hukajiree to the mortgagors, and the remainder be retained by the mortgagees; the amount thus coming to the mortgagees to be received by them in lieu of interest. Khadim Hossein died, and a dispute

afterwards arose among his heirs, or persons claiming to be his heirs, which was finally settled by a compromise, in the year 1817. Under that arrangement, his wife, Bibee Emamun, became entitled to seven and a half annas of his interest in the mortgaged property, Bibee Mujo became entitled to four and a half annas, and Amjed Hossein, the nearest male relation, to four annas. After that, though it does not appear very distinctly at what time, an arrangement is admitted to have been made, by which, as between the mortgagors and the mortgagees, the original mortgage was treated as three distinct mortgages, in the proportions in which the estate of Khadim Hossein had been divided under the compromise above mentioned. The result was that Bibee Mujo became solely entitled to the equity of redemption in four and a half annas of the mortgaged property, upon the payment of a similar proportion of the original mortgage debt.

It is admitted that Amjed Hossein unquestionably sold the equity of redemption in his four annas to the persons through whom the Appellants derive their title. The share of Bibee Emamun seems to have been redeemed by her, or by her representatives, as early as the year 1844, upon a suggestion that the whole of the mortgage debt for which she was liable had been satisfied by the retention of the huk-ajiree coming to her, or in some other manner. But the contention on the part of the Plaintiffs in this suit, the Respondents on the present Appeal, is, that the equity of redemption as to her share remained in Bibee Mujo, and that, by reason of the retention of the huk-ajiree due and owing to her, the whole of her share of the mortgage debt has been satisfied, and that, therefore, her representatives are entitled to recover possession of her share of the mouzahs in question with six years mesne profits.

The title set up by the Defendants is as follows:—The original mortgagees sold their interest to Sheikh Taleb Ally and his two sons, Sheikh Fuzul Ali and Sheikh Ashghur Ali. They thus became the mortgagees. Sheikh Taleb Ali died, and his interest descended to his two sons. It is alleged on the part of the Defendants that Bibee Mujo, in the year 1841, sold her interest in the four and a half annas, upon terms similar to those upon which Amjed Hossein had sold his interest in his four annas to Sheikh Fuzul Ali and Sheikh Ashghur Ali; and that by subsequent purchases and conveyances the absolute interest which had thus been acquired by Sheikh Fuzul Ali and Sheikh Ashghur Ali in the four and a half anna share of the mouzahs, which is the subject of this suit, had become vested in some one or more of the Appellants as purchasers for value, and without notice.

A point which has been taken as to a moiety of the property in dispute makes it necessary to state with some precision what was the devolution of title as to that moiety. The whole interest, whether absolute or merely by way of mortgage, which was vested in Fuzul Ali and Ashghur Ali, was divided between them in equal moieties. And it is alleged that on the 29th of July 1844 Fuzul Ali transferred his interest to his wife by a Baimokasa, or conveyance of property, in satisfaction of her rights of dower; that this wife, whose name was Bibee Zenut, exercised rights of ownership over the property, having mortgaged it on the 8th of December 1849, and that on the 10th of January 1859, *i.e.* within 12 years before the institution of the suit, she transferred her absolute interest in the property to the two first Appellants on the Record. Of the other moiety of the property, being that which was vested in Sheikh Ashghur Ali, it is only necessary to say that by various conveyances the whole

of it, with the exception of the small portion afterwards mentioned, had, before the year 1860, become vested in the principal Appellants, being the first and second on the Record. That small portion, having been purchased at an execution sale by a Mahommedan lady, afterwards became vested in the Appellant Burra Toonissa.

From this statement of the title set up by the Defendant it is obvious that the material question to be determined in the cause was the validity of the alleged conveyance of the equity of redemption by Bibee Mujo to Ashghur Ali and Fuzul Ali. Against the validity of that instrument we have the decision of the two Indian Courts, both concurring in finding that, if not a fabrication, as it was found by the Judge of First Instance to be, it cannot be treated as established against Bibee Mujo or her representatives.

The first consideration upon that point is whether sufficient grounds have been presented before their Lordships to induce them to deviate from their general rule, not to disturb such a finding of fact by two Courts in India. If they are to look merely at the evidence of the execution of that conveyance, they are bound to say that, so far from thinking that there is any ground for an exception being made to the general rule, they are of opinion that upon that evidence the conclusion of the High Court would be correct. To fix Bibee Mujo with the deed, it is necessary to establish the mooktearnamah, and the evidence of the execution of that instrument by her is of the slightest and most unsatisfactory character. The evidence, again, of the execution of the deed, as it is stated to have been executed by the mooktear appointed by the mooktearnamah, and of the subsequent admission of the deed by the lady, is also of a very suspicious character. It appears, moreover, that the deed was not registered even before the

Cazee for several months; and that it was not registered at all, as the conveyance by Amjed Hossein had been, in the office of the Registrar of Deeds. It appears further that in 1843, upon an application made to the Collector by Fuzul Ali and Ashghur Ali for mutation of names, on the suggestion of such a conveyance having been executed by Bibee Mujo, a petition of objections disputing such execution, was filed by that lady's agent, and that the applicants Fuzul Ali and Ashghur Ali thereupon allowed their proceeding to drop.

The only doubt which their Lordships have felt on this part of the case has been founded on the laches of Bibee Mujo and her representatives in taking steps to enforce their rights as mortgagors for so many years; and if there had been a substantial conflict of evidence touching the execution of the deed, their Lordships might have thought that the Courts in India, in weighing that conflicting evidence, had hardly given sufficient weight to the inferences which arise from such laches. But their laches cannot estop the parties from asserting their right, if it exists. The question is one of title, and the right to assert that title is to be determined by the Law of Limitation as it stands. The law, wisely or unwisely, has given to mortgagors the long period of 60 years within which to bring their suit; and no Court of Justice would be justified in diminishing that period on the ground of the laches of a party in the prosecution of his rights. Their Lordships, after weighing the whole of the evidence, and giving full effect to the laches of the parties, cannot say that the execution of this deed by Bibee Mujo has been proved. They must, therefore, deal with the case on the asssumption that the two Courts below were right in finding that material link in the title of the Defendants to be wanting.

If that be so, it remains to be considered whether Mr. Doyne's argument as to the Statute of Limitations can prevail. He has not attempted to show that the Courts below were wrong, in fact it could not be shown that the Courts below were wrong, in finding that the suit as a whole was not barred by the Statute of Limitations. It follows that the Plaintiffs (the Respondents) can assert a title to redeem the portion of the property which fell to Ashghur Ali, since, if the conveyance of the equity of redemption to him is not established, he had nothing but a mortgage title to convey; and there was no conveyance even of that to the Appellants, except within the period of 12 years. The questions raised by Mr. Doyne are, whether a different rule ought not to be applied to that portion of the property which was vested in Fuzul Ali, and which passed by the Baimokasa to his wife, and from her to the Appellants, the transfer to the wife having occurred more than 12 years before the suit; and whether the suit as to this portion is not barred by the 5th section of Act XIV. of 1859. Upon that point their Lordships, during the argument, entertained some doubt; but they are of opinion that they can make no distinction between the two classes of property, for the following reasons: In the first place, the case which has been made here does not really appear to have been made in either of the Courts below. It certainly was not made in the Court of First Instance; and though it was said that it was raised by the grounds of appeal, it appears to their Lordships that the first ground of appeal points to a general bar of the whole suit; and the observations of the learned Judges of the High Court in giving their judgment show that the argument before them must have proceeded upon that ground. Moreover, upon

the merits of the question their Lordships are of opinion that the supposed bar to the suit is not established. In the case of Radanath Doss *v.* Gisborne and Company, in which the judgment was given by the present Lord Chancellor, the principles upon which the 5th section of Act XIV. of 1859 is to be applied to such cases as the present are very clearly stated. His Lordship said, "But their Lordships cannot fail to "observe that the provisions of this section are "of an extremely stringent kind. They take "away and cut down the title which *ex hypothesi* "is a good title, of the *cestui que* trust or of a "person who has deposited, pawned, or mort- "gaged property. They cut down that title in "regard to the number of years that the person "would have had a right to assert it, from a very "great length of time, 60 years, they cut it "down to 12 years. It is, therefore, only proper "that any person claiming the benefit of this "section should clearly and distinctly show that "he fills the position of the person contemplated "by this section as the person who ought to be "protected. Their Lordships think that in "order to claim the benefit of this section the "Defendant must show three things: first, that "he is the purchaser according to the proper "meaning of that term; second, that he is a "*boná fide* purchaser; and third, that he is a "purchaser for valuable consideration." Now if the 12 years to be computed under the 5th section are to run from the transfer by the Baim-okasa to Bibee Zenut, it is necessary to show that Bibee Zenut was a *boná fide* purchaser, and of that there is no proof; on the contrary, the transaction is open to all the suspicions which attach to transactions between a Mahommedan and his wife, and the necessity of proving that the purchaser is a *boná fide* purchaser makes the absence of a particular plea raising the

particular defence now set up extremely material, because if that point had been distinctly raised in the Courts below, it would have been open for the Plaintiffs to dispute the *bonâ fides* of that transaction, and to have it investigated.

It seems, therefore, to their Lordships, that they cannot give any greater effect to the transfer of the share of Fuzul Ali than they do to that of the share of Ashghur Ali.

There is, however, one point upon which their Lordships are not satisfied with the present decree. They cannot but remark that the laches of the Plaintiffs in the case have been very great, and that the case is far from being a clear one. They have also to remark that there are no grounds for imputing to the Appellants, the actual holders of the property, a knowledge of any fraud that there may have been in the supposed transfer to their vendors. They have also to remark, that, in strictness, some exception might have been taken to the form of the suit considered as a redemption suit, although it is admitted at the bar that there are no grounds for a further investigation of the question whether the mortgage money had been paid off at the date of the suit; and that it may be considered to have been paid off. Their Lordships, however, cannot see that there were sufficient grounds for allowing the Plaintiffs, who have been guilty of such laches, to recover, as against purchasers for valuable consideration, without notice of their title, mesne profits from any date earlier than that of the institution of the suit. They think, that, on the institution of the suit, the laches of the Plaintiffs in enforcing their rights ceased, and that the mesne profits from that date should follow the result.

Their Lordships will, therefore, humbly advise Her Majesty to confirm the decree under appeal, with the exception that the amount of mesne

profits should be reduced to the mesne profits which have been received since the institution of the suit. The Appellants having, to the extent of a reduction in the mesne profits, succeeded on the Appeal, and the Respondents not having put in a case or appeared at the Bar, their Lordships will make no order as to the costs of this Appeal.