Judgment of the Lords of the Judicial Committee of the Privy Council on the Consolidated Appeals of Chooramun Singh v. *Shaik Mahomed Ali, and Ahmed Kabir and others* v. *Chooramun Singh, from the High Court of Judicature, at Fort William, in Bengal; delivered* 12*th January* 1882.

Present:

LORD BLACKBURN.
LORD WATSON.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

IN this case there are two appeals, an appeal and a cross appeal. The circumstances under which the point upon which their Lordships have to express an opinion arises are these: A family, consisting of the father, the wife, and the son, are the three Defendants. They have been called Defendants 1, 2, and 3; but the expressions, "father," "wife," and "son," which have been used as most convenient, may be used here. There have been two bonds made creating a charge upon the estate. The first in point of date was in the name of the wife. She, on the face of the bond, was the lender of the money. The next in point of date was a bond in the name of the husband, the first Defendant. There was a third, also to him; but that is not very material to consider. That being the state of things, these bonds were brought to judgment and execution. The first suit, instituted against the original grantor of the bonds, was that which was brought, in the name of the wife, upon the

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7th of July 1875. The second suit instituted was that which was brought in the name of the husband; and that was instituted on the 24th of July 1875—very shortly afterwards. The two came to judgment upon the same day, the 6th of September 1875; and two judgments were given. As far as there was any question of priority, the prior suit was the suit on the prior bond. The execution of the bond that was in the name of the wife had priority over the other; but the execution which was first carried out to a sale, upon the 1st of May 1876, was upon the bond which was second in point of date, which bond had been in the name of the husband. It was upon that execution that a sale took place, and at that sale the Plaintiff became the purchaser. On the 23rd of October 1876, some months afterwards, they proceeded to the sale under the execution which was first in point of date on the bond that had been in the name of the wife; and on that sale the son became the purchaser. The question here is between the Plaintiff, the purchaser under the first execution, though under the second bond, and the purchaser under the second sale. The Plaintiff in substance brought his action to set aside the sale to the son, and to have himself declared the purchaser; he expressly stating in his plaint that he claimed it as purchaser, and to be entitled to redeem. He did not say that the bond debt to the father and husband on the second bond was prior in date; all that he claimed was that, under the circumstances of the case, he should be entitled to redeem. The original grantor of the bonds was no party to the suit, and was not in any way brought before the Court. That being the state of things, and there being a great many phrases about fraud and other matters of that sort, the Plaintiff's contention was that in fact, though there were the three names used,

and though it was said that the money was lent by the wife on the first bond, and that the son was the purchaser under the sale, yet in reality the father was the party all through; that it was the father who had lent the money in the name of his wife; and that it was the father who had purchased in the name of the son. That was really and truly the contention; and on that contention of fact both the judge of the Inferior Court, and the judges of the High Court upon appeal, have found in favour of the Plaintiff. They found that the husband or father was merely using the names of the others, because the three, the husband, the wife, and the son, were living joint in family together; and though some evidence was called to show that the wife had a separate estate, and that she might have been the lender of the money, there was no evidence whatever attempted to be given to show that the son had any separate estate, or that he purchased, or that the son, in fact, was anything else but what the Plaintiff alleged him to be. Their Lordships think that, both the Inferior Court and the Supreme Court having decided that question of fact without any apparent difficulty or doubt, they should not further enter into the question as to whether it were so or not, especially as it rather appears as if, upon further entering into the question, there would be very strong grounds for their Lordships coming to the same conclusion as that at which the Courts below arrived. When once it is established, as their Lordships now take it to be, as a fact to start with, that the purchase under the second sale was by the Defendant, the husband or father, himself, who had himself caused the first sale to take place and then purchased under the second sale, it is quite clear that that could not stand against the purchaser under the first sale and it is clear that it must be set aside. The

High Court, in altering the judgment of the Court below, say, that being so, it must be set aside, and the Plaintiff is entitled to redeem. But then, unfortunately, the Court, strongly impressed with the fact that the original mortgagor might have been ill-used or might have some claim, went on to declare something favourable to the original mortgagor, who was not before the Court at all, and which might very possibly embarrass the Plaintiff in his title. Accordingly, he complains that when they made their decree they put in unnecessary matters. The decree at page 143 of the record, as actually drawn up, would be all right until it comes to line 30. Then, as it stands at present, it goes on, "And it is declared that the Plain-" tiff, as the second mortgagee in respect of the " said property, is entitled to redeem the first " mortgage of the said Defendant, Mahomed Ali." It seems to their Lordships that it was quite unnecessary and irrelevant to say whether it was as a second mortgagee or whether it was as a purchaser. It may be that the original grantor of the bond might be induced to make out some case or other that there was *res judicata* in his favour on these words, and consequently their Lordships think that those words, "as the second mortgagee in respect of the said property," should be struck out. It then goes on up to line 35, as to which there is no objection; and then it says " And it is further declared that the said Plaintiff " has not acquired the equity of redemption re-" garding the said property belonging to the " said Lala Rughoobuns Sahas, alias Domi Lal."

Now that is a question which, if raisable at all, as to which their Lordships express no opinion, can be raised only by Lala Rughoobuns Sahai, and has nothing to do with this suit. That declaration, therefore, ought also to be struck out. That is really the only alteration. In every other respect the decree of the High Court seems to be

perfectly right. In those respects it should be altered.

The cross Appeal is upon the question of fact which has already been mentioned. It is brought by the son, who also opposes the first Appeal. The son's case upon the cross Appeal is that he was not merely benamee for his father; but he produces no evidence, nor does he show that any evidence ever was produced, to show that he was not a mere name. Both the Courts below have thought that he was so; and consequently he fails on that. The result is that the decree stands, with the alteration mentioned, and the cross Appeal is dismissed.

There remains only one other question, what is the effect on the costs of the litigation? The general rule is, that where an appellant succeeds he gets the costs of the appeal, and that where a respondent succeeds he gets the costs. The question now is, whether there is any ground for altering that general rule. The cross Appeal, which is brought on the question of fact, and which the Appellant was fully entitled to oppose, has been decided against the cross Appellant and in favour of the original Plaintiff; and no reason whatever can be suggested why it should not be with costs. As to the first Appeal the matter is not quite so clear. The alteration made is leaving out a portion of the decree of the Court below, which it seems was quite unnecessary, and which their Lordships think the Plaintiff had a right to complain of and to get rid of as embarrassing to his title. The question is, whether or no there may be some plausible grounds for saying that that should not be done at the expense of the Respondent. The Respondent appeared and resisted it. Their Lordships are of opinion that there are no grounds for excepting this case from the operation of the general rule and that the general rule should prevail.

The result is that their Lordships will humbly advise Her Majesty that the decree of the High Court should be altered in the manner already mentioned, and that the cross Appeal should be dismissed, and that both should be with costs to the Plaintiff.