

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sarju Parshad and after his death Bhagwati Parshad, his minor son under the guardianship of his mother Mussamat Parbati Bibi, v. Bir Bhaddar Sewak Panday (and by revivor made after the hearing of the Appeal, but before the delivery of the judgment, Bhagwati Parshad v. Radha Kishen Sewak Panday and another), from the High Court of Judicature for the North-Western Provinces, Allahabad; delivered the 11th February 1893.

Present on the hearing of the Appeal :

LORD HOBHOUSE.
LORD MACNAGHTEN.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.
MR. SHAND (LORD SHAND).

Present on the delivery of the Judgment :

LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
SIR RICHARD COUCH.

[*Delivered by Sir Richard Couch.*]

On the 7th December 1864 one Mewa Lal obtained a decree for money against Bir Bhaddar, the predecessor of the Respondents, and one Sat Narain, in execution of which certain shares

in certain villages were sold on the 20th November 1871, and were purchased by Nandan Tewari for Rs. 12,325, of which Rs. 9,000 were borrowed by him from Sarju Parshad, the father of the Appellant, in addition to Rs. 5,000 previously borrowed. By a deed of hypothecation, dated the 3rd December 1871, Nandan Tewari mortgaged the purchased shares of the villages to Sarju Parshad to secure the payment of the Rs. 9,000 and interest. The loan not having been paid, a suit was brought by Sarju Parshad against Nandan Tewari, and a decree was obtained for payment of the money and an order that the decree should be executed against the property hypothecated. At a sale by auction in execution of this decree on the 20th August 1874, Sarju Parshad became the purchaser of the property. He thereupon obtained mutation of names from the Collector of the district, but the Commissioner on appeal by Bir Bhaddar and two other persons who were interested reversed this order, and directed that they should be recorded as the real owners of the property, the sale to Nandan Tewari being regarded as of an ismfarzi character only. Thereupon Sarju Parshad brought two suits against Bir Bhaddar and the two other persons to recover possession of the property by cancelment of the Commissioner's order. The record in the present suit is very imperfect, and contains only the decrees original and on appeal in one suit; but there is a written statement of Bir Bhaddar, and what is called a petition, which is apparently a written statement, also by him. Both are dated the 30th July 1880, and are substantially the same. In the petition Bir Bhaddar states as follows:—
“ Nandan Tewari is my *karinda* (agent). When
“ my property was put up for sale in the
“ execution of Mewa Lal's decree, and 21st
“ November 1871 was fixed for sale, I, with a

“ view to purchase it, as advised by the Plaintiff
 “ himself, borrowed Rs. 5,000 of the Plaintiff
 “ on the day of the sale, on a bond dated 18th
 “ November 1871, to deposit the earnest money,
 “ and purchased the property in the name of
 “ Nandan Tewari. Afterwards, in order to
 “ deposit the balance of the consideration
 “ money, another bond for Rs. 9,000 was exe-
 “ cuted in Plaintiff’s favour. As Nandan Tewari
 “ was a fictitious purchaser, the Plaintiff there-
 “ fore got the last-mentioned document executed
 “ in his (Nandan Tewari’s) name according to
 “ his choice. Nandan Tewari was never the
 “ actual purchaser. Neither he nor the Plaintiff
 “ has ever been put in possession.”

The Lower Court found that Nandan Tewari was only a nominal purchaser, and that the real purchaser of the property was Bir Bhaddar, and dismissed the suit. The High Court, on appeal, being dissatisfied with the grounds of this judgment, required the Subordinate Judge to examine Sarju Parshad and submit his evidence to the High Court, which was done. Thereupon the High Court, in its judgment, held that Sarju Parshad “ was necessarily aware
 “ that Nandan Tewari was a sham purchaser
 “ only at the auction sale of the 3rd December
 “ 1871, and that when he elected to sue
 “ him alone as the real and single obligor of
 “ the bond for Rs. 9,000, and as the actual owner
 “ and representative of the estate bought with
 “ this money, he did so with full knowledge of
 “ the true and different facts of the case, and
 “ that therefore his present action to prove that
 “ Nandan Tewari was the real and *bona fide* pur-
 “ chaser and proprietor must fail,” and it affirmed the decree of the Court below. This judgment was given on the 10th April 1882.

On the 9th January 1885 the present suit was brought by Sarju Parshad against Bir Bhaddar and
 62678.

Nandan Tewari, seeking to recover Rs. 7,518. 3, balance of the Rs. 9,000, after deducting sums which had been realized, and Rs. 4,818. 0. 6, interest, from Bir Bhaddar personally, and also against the property hypothecated in the bond. The first Court made a decree for Sarju Parshad, which has been reversed on appeal by the High Court.

After the judgment in the former suit, it might be difficult to hold that the deed executed by Nandan Tewari was a valid hypothecation of the property, and it is not necessary to decide that question. The facts admitted by Bir Bhaddar and also found by the Court in the former suit between these parties are sufficient to show that the Appellant, as the representative of Sarju Parshad, is entitled in equity to have it declared that the sums claimed with interest are a charge upon the property.

Their Lordships will humbly advise Her Majesty that an order be made in terms of the following minutes:—Discharge the decrees of both Courts below. Declare that the sum of Rs. 12,336. 3. 6, together with interest Rs. 864. 9, awarded by the decree of the Sub-Judge, amounting in all to the sum of Rs. 13,200. 12. 6, together with interest on the said sum of Rs. 12,336. 3. 6 at the rate of 8 annas per cent per mensem from the date of the decree of the Sub-Judge, is well charged upon the properties named at the foot of the plaint in favour of Sarju Parshad. Liberty for the Appellant, as the representative of Sarju Parshad, to apply to the High Court for the realization of the amount due in respect of the said charge by sale of the said properties charged, in the event of the said amount not being paid within six months of the date of Her Majesty's Order made hereon. Order the Appellant to pay the costs of Nandan Tewari in the First Court, and the Respondents

as the representatives of Bir Bhaddar to pay to the Appellant the costs incurred by Sarju Parshad in both Courts below.

The Respondents as the representatives of Bir Bhaddar will pay the costs of this Appeal.
