

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Dalip Singh and others v. Chaudhrai Nawal Kunwar and another, from the High Court of Judicature for the North-Western Provinces, Allahabad; delivered the 2nd April 1908.*

Present at the Hearing:

LORD MACNAGHTEN.

LORD ATKINSON.

SIR ANDREW SCOBLE.

SIR ARTHUR WILSON.

[*Delivered by Sir Arthur Wilson.*]

This is an Appeal from a Judgment and Decree of the High Court at Allahabad, bearing date the 17th November 1902, which reversed those of the Subordinate Judge of Meerut, dated the 23rd December 1899. The substantial question as to which the Courts in India have differed, and which their Lordships have to decide, is whether a certain deed of mortgage, bearing date the 10th January 1889, represents a genuine transaction or a fictitious one.

The mortgagors were one Chaudhri Partab Singh and his two sons, one of whom was then a minor. The subject-matter of the mortgage was land and houses at Meerut. At the time of the mortgage Partab was indebted to several persons, partly on mortgages and partly on other securities, the principal creditors being one Munna Lal, the heirs of one Shibban Lal, and one Kishan Sahai, and it is clear that at that time Partab was in money difficulties.

The mortgage in controversy purports to be in favour of a lady named Nawal Kunwar, for Rs. 10,000. Nawal Kunwar was at that time residing in Partab's house, and she was the sister of his son-in-law.

The transaction of the 10th January 1889, as it appears on the face of the papers, consisted of two parts. First there was the mortgage now disputed, executed by Partab and his two sons in favour of Nawal Kunwar, according to which the lady, as consideration for the mortgage, was to discharge Partab's debts already referred to, a small previous bond in her own favour, and the costs of the transaction, and to pay over Rs. 1,000 to Partab.

The second part of the transaction purports to be a sub-mortgage by the lady to Munna Lal, who has been already mentioned as a creditor of Partab. It was for Rs. 5,000, out of which Munna Lal was to deduct the amount of his previous claim against Partab, and to pay the balance in cash.

Subsequently, on the 18th July 1896, Partab being dead, his sons sold the mortgaged property to Jainti Pershad, the son of Munna Lal, who was also dead, and on the 18th January 1898, Jainti Pershad sold a portion of the property to one Dalip Singh.

On the 24th September 1898 Nawal Kunwar instituted the present Suit in the Court of the Subordinate Judge of Meerut. She joined as Defendants 1 and 2, the sons of Partab; 3 and 4, the sons of Munna Lal; 5, the heir of Shibban Lal; and 6, Dalip, the purchaser of a portion already mentioned. The object of the Suit was to enforce payment of the Plaintiff's claim under her mortgage of the 10th January 1889, by the sale of the mortgaged property. It is clear, therefore, that the parties substantially interested in the contest were, on the one hand, Nawal Kunwar, and on the other hand, the sons and heirs of Munna Lal, and, in a lesser degree, Dalip.

The Plaintiff's case at the trial was that the mortgage to her was a perfectly genuine mortgage, and that she paid the greater part

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of the consideration (the precise amount is immaterial here) partly out of her own moneys and partly by means of the Rs. 5,000 borrowed by her from Munna Lal under the sub-mortgage of the same date. The case on the other side was that the mortgage to Nawal Kunwar was a fictitious transaction, and that the only real transaction on that occasion was a borrowing by Partab of Rs. 5,000 from Munna Lal, the name of the lady being introduced purely benami.

The Subordinate Judge found for the Defendants, holding the alleged mortgage to her to be benami. On Appeal the High Court differed from that finding, held the transaction to have been genuine, and gave a Decree in the Plaintiff's favour.

Their Lordships are of opinion that the decision of the High Court was right. There was some evidence on each side, bearing directly on the character of the transaction, but on neither side was that evidence wholly convincing. Persons whom one might have expected to be prominent witnesses were not called, and the evidence that was called is open to much adverse criticism. The testimony of one witness is described by the Judge who heard it as being worthless. In determining, therefore, which story is to be accepted, it has been found necessary in India, and it is equally necessary for their Lordships, to rely largely upon the surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions, and their subsequent conduct.

As their Lordships agree in the conclusion arrived at by the High Court, and substantially in the reasons for that conclusion, it is unnecessary to examine the evidence in detail, but

it may be well briefly to indicate the principal considerations which seem to their Lordships to support the case of the Plaintiff.

The deed itself contains nothing suspicious. Its recitals show with substantial accuracy Partab's previous indebtedness, and the provisions of the deed are such as one expects to find in a deed embodying a real transaction.

The Plaintiff, though a woman residing in Partab's house, was not, in the ordinary sense of the term, a dependent member of his family. She was a person of some independent means, was in the habit of lending money, and lent it to Partab himself not on this occasion only. On the other hand, Partab was in embarrassed circumstances. Only five days after the mortgage in question, he was pressed for payment of Government revenue, and had to borrow Rs. 300 from the Plaintiff to pay it. Partab's motive in the disputed transaction must have been to relieve his difficulties, but if regarded as a benami transaction, the mortgage, which was for considerably less than the value of the property, would have afforded no present protection against creditors. It was suggested that by the accumulation of interest, at a penal rate, the deed might in time become a protection, but that is a somewhat remote speculation. If regarded as a genuine transaction, the advantages to Partab of what was done are obvious. He secured a diminution in the rate of interest which he had to pay, he obtained the benefit of one consolidated liability in place of a number, and he secured a friendly creditor.

At subsequent dates, Partab and his sons, and those claiming through them, always acknowledged the genuineness of the transaction. Particularly in the conveyance by Partab's sons to Jainti Pershad the mortgage is so recognised. It is true that in that deed it is said that the

mortgage had been satisfied, but that is a very different thing from there having been no mortgage at all.

One point of minor importance was raised on the Appeal. The High Court, by their Decree, whilst giving the Plaintiff the right to recover on her mortgage, allowed, as against her, whatever amount not exceeding Rs. 10,000 might be due under the sub-mortgage to Munna Lal. It was contended that the limitation to Rs. 10,000 was wrong. Their Lordships are of opinion that the limitation was right. That sum was agreed upon on the occasion of the sale by Partab's heirs to Jainti Pershad, and the matter was dealt with on that footing by the substantial Defendants, in their written statement.

Their Lordships will humbly advise His Majesty that the Appeal should be dismissed. The Appellants will pay the costs.

