

*Privy Council Appeal No. 179 of 1924.*

*Allahabad Appeal No. 29 of 1922.*

Sheik Nasir-uddin and another - - - - - *Appellants*

*v.*

Ahmad Husain and others - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 16TH JULY, 1926.

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*Present at the Hearing :*

LORD PHILLIMORE.

LORD CARSON.

MR. AMEER ALI.

SIR JOHN WALLIS.

[*Delivered by* LORD PHILLIMORE.]

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This is a suit brought for the specific performance of an alleged contract to sell land. The contract is said to be contained in two documents, one stated to have been signed by the son of defendant No. 3, who was the managing member of the Hindu family which owned the property; the other, dated the next day, said to have been signed by the father. The suit was brought against the father and against two persons who claimed that they had purchased the property under a subsequent contract and who denied the existence and validity of the first contract.

The Subordinate Judge found that the contract relied upon by the plaintiff was either a forgery or a fraud, and, further, that it was an improvident sale which could not be supported against the other members of the family and for which, therefore, no specific performance could be decreed.

On appeal the High Court at Allahabad came to a different conclusion. The Chief Justice and Gokul Prasad, J., held that the plaintiff had made out his case for the actual execution of the

contract and that it was not an improvident sale. They further doubted whether the subsequent purchasers could raise the question of improvidence. It is from this decree that the present appeal is brought.

The first question is one of fact. There are many difficulties in the plaintiff's way and these were recognised by the Judges in the Appellate Court and have been brought before their Lordships in a most forcible argument. But being so recognised by the Appellate Court, they did not appear to the learned Judges to be sufficient to displace the case of the plaintiff or to counter-balance the difficulties in the rival story. Their Lordships do not propose to refer to these matters in detail. Perhaps the most striking observation made by the Judges in the Appellate Court is that the case of the defendants involving forgery or fraud was not pointedly put in the defendants' written statement, and, though perhaps open under the general words of the defence and on the third issue, it was put without detail or colour, was not raised in the cross-examination of the plaintiff or his witnesses, and, as far as can be seen, was only disclosed when defendants' witnesses, after an interval of several months, came into the witness box.

This being so, their Lordships, on the whole cannot advise His Majesty to reverse the finding of the Appellate Court on this point.

Then as to the question of the providence of the bargain, it should be observed, *in limine*, that the only appellants before the Board are the subsequent purchasers. It is suggested on behalf of the appellants that under their purchase they acquired all the rights of the family and can use, therefore, any defence open to any members of the family. The Judges in the Appellate Court thought that this was not so and that the point was one which could not be taken by the present appellants. Their Lordships are not satisfied that the Judges in the Appellate Court were right upon this; but they do not feel it necessary to pronounce upon this point or upon any point which may be said to involve the *locus standi* of the present appellants in this matter, because, upon the whole, they cannot advise His Majesty to reverse the decision of the High Court on this second question of fact.

It is no doubt true that the present appellants, acting, as both Courts have found, with a knowledge of the plaintiff's claim, contracted for a larger sum of purchase money than the plaintiff had agreed for; but there seems to have been a reason why they should be anxious to get the whip hand of the plaintiff, and if the matter be looked at apart from the question of the higher bid made by the appellants, the sale to the plaintiff would seem to have been at a handsome price.

The decree of the High Court must therefore stand.

There are, however, two points which may have been intended to have been provided for in the working out of the preliminary decree which the High Court has granted but which it is desirable

to make clear and put beyond question. It seems that the appellants have, in virtue of their claim to be purchasers, discharged mortgages upon the property. In respect of any money paid by way of such discharge they are entitled to stand in the shoes of the mortgagees whom they have paid off.

Further, inasmuch as this suit was brought against the father only and not as against the other members of the family, the rights of the latter, if so minded to challenge the providence of the sale, must be preserved.

Their Lordships will therefore humbly recommend His Majesty that the judgment of the High Court should be affirmed and the cause remitted, with two declarations—(1) that in respect of any moneys properly paid by the appellants towards the discharge of mortgages upon this property, the appellants are entitled to a charge upon the property for any sums so paid by them which might have been rightfully due under the same mortgages; and (2) that the decree of the High Court is not to be taken as precluding the members of the family of the third defendant from disputing the validity of the sale as being one made in excess of the powers of the third defendant as manager of the joint family property.

There has been no appearance for the respondents and, therefore, need be no order as to costs.

In the Privy Council.

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SHEIK NASIR-UDDIN AND ANOTHER

v.

AHMAD HUSAIN AND OTHERS.

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DELIVERED BY LORD PHILLIMORE.

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