

*Privy Council Appeals Nos. 2 and 3 of 1927*

Ramkisan Singh and others - - - - - *Appellants*

*v.*

Mohammad Abdul Sattar and others - - - - - *Respondents*

Mohammad Abdul Sattar - - - - - *Appellant*

*v.*

Ramkisan Singh and others - - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF THE CENTRAL  
PROVINCES.

---

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 15TH MARCH, 1928.

---

*Present at the Hearing :*

LORD PHILLIMORE.

LORD CARSON.

SIR LANCELOT SANDERSON.

[*Delivered by* LORD PHILLIMORE.]

---

Their Lordships have given full consideration to the various points which have been raised in this case ; some of them are points of small importance ; others are, no doubt, of considerable weight, having regard to the interest of the parties ; but their Lordships are prepared to deal with them shortly as, indeed, the considerations which lead them to their conclusion are not many or very involved.

First of all, dealing with the respondents who are represented by Mr. Dunne, the respondents Mathuradas and Gopaldas, they are, no doubt, made respondents by the appellants, the Singhs, in their appeal, because they were parties to the suit, having been made parties to the suit by the plaintiff, and, therefore, they had to be made parties to the appeal ; but they would obviously not have required to come here if it had not been for the application made

in the cross-appeal or for fear of some application. As against them there is no case.

It has been argued by the plaintiff, cross-appellant, that he could support the mortgage to him of the attached properties, though the properties were under attachment, because he could ask the Board to accept the view that there had been permission given by the Collector; but it is clear that there was no such permission and, indeed, it is a matter of fact which has been found by both Courts in India. Therefore, the mortgage, being a mortgage of the attached properties, was a bad mortgage and the plaintiff's title cannot prevail against those respondents.

It was suggested and the view was taken by the District Judge that the mortgage might still stand as regards the two sons, because they were not in form sued as defendants; but the suit was against the whole family property and the whole family property was attached, the whole 16 annas, and the whole 16 annas were, therefore, within the Code of Civil Procedure, paragraph 11 of Schedule 3, and the mortgage was therefore bad and the subsequent transaction with Mathuradas and Gopaldas was a good one and must stand and they are entitled to be dismissed from the appeal with costs, and the costs must be paid by the plaintiff, the cross-appellant.

As regards the main appeal by the three Singhs, when the matter comes to be thrashed out there is no merit in the appeal *quoad* the father and the elder of the two sons. There was clearly a personal covenant to pay the debt and the judgment of the Court of the Judicial Commissioner in respect of the remedy was one which the Appellate Court could have given and the only thing that the appellants can successfully maintain is that they should have the decree varied by limiting the liability of Lachman Singh, the younger son, who was a minor at the time of the mortgage, to his interest in the joint family property; so that neither will there be any personal liability against him nor will he be liable in respect of any property separately acquired, if any.

As to the cross-appeal, there really was nothing that could be supported in it until it came to the ingenious suggestion made late in the case that the appellant was entitled to an order for sale of the unattached villages under the Code of Civil Procedure, Order XXXIV, Rule 4 (2), which is: "In a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the plaintiff" or others "pass a like decree," which is a decree for sale in lieu of a decree for foreclosure. It is suggested now that this mortgage was not a mortgage by conditional sale and that the plaintiff is entitled to have such a decree as he now asks for.

Their Lordships would hesitate a great deal before they determined that this was not a mortgage by conditional sale, because, whatever may be the appearance of the document, there have been a great number of authorities on mortgages by conditional sale and it would take a great deal of examination before it could be determined that this was not such a mortgage. The

parties throughout the case have treated it as a mortgage by conditional sale ; it was so alleged by the defendants in their written statement ; no objection was taken by the plaintiff in reply ; no issue was stated about it ; the District Judge assumed it and their Lordships do not find that any complaint was made of his assumption in the Court of the Judicial Commissioner. Therefore, their Lordships would be very unwilling to decide, without a great deal of further examination, whether this was a mortgage by conditional sale or not ; but, however that may be, to allow the plaintiff at this eleventh hour, having never asked for this remedy either before the District Judge or in the Appellate Court or by his case as originally printed, to get such a remedy, without very careful examination as to what the effect might be upon third parties who are not present here, would be contrary to all reasonable procedure. Their Lordships cannot, therefore, grant that application nor the other points made by the cross-appeal. The result is that the cross-appeal will be dismissed.

On the whole, as between the Singhs and the plaintiff, their Lordships think there ought to be no costs either of the appeal or of the cross-appeal. The result will be that the only costs which have to be paid will be those of Mathuradas and Gopaldas in the two consolidated appeals, which will have to be paid by the plaintiff.

Their Lordships will humbly advise His Majesty accordingly that the judgment of the Court of the Judicial Commissioner should be varied in favour of the appellant Lachman Singh in the manner already indicated, and that the respondents Mathuradas and Gopaldas be paid their costs by the cross-appellant, and that no further or other Order need be made.

In the Privy Council.

---

RAMKISAN SINGH AND OTHERS

v.

MOHAMMAD ABDUL SATTAR AND OTHERS.

MOHAMMAD ABDUL SATTAR

v.

RAMKISAN SINGH AND OTHERS.

---

DELIVERED BY LORD PHILLIMORE.