

## PRIVY COUNCIL

Sarju Prasad Missir

Vs.

MaksudanGhoudhuri

P.C.A. No. 28 of 1920

(Viscount Cave, Lord Shaw and Sir John Edge. JJ)

27.4.1922

### JUDGMENT

#### **Sir John Edge J.**

1. These are two consolidated appeals by the plaintiffs from two decrees, dated the 30th July, 1917 of the High Court at Patna, which reversed a decree, dated the 21st May 1914, of the District Judge of *Dharbhanga* and dismissed the suit of the plaintiffs.
2. The suit was brought by the plaintiffs, the appellants here, on the 10th January, 1912, in the Court of the Subordinate Judge of *Dharbhanga* for certain declarations as to title and for a decree for possession of certain immoveable property and for mesne profits. That immoveable property will in this judgment for the sake of brevity be referred to as the property in dispute. The property in dispute was originally the property of one Sadik Ali Khan : the plaintiffs claim title through one LaljiLal; the defendants claim title through one Kamal NarainChoudhri. The facts will later be briefly stated, but their Lordships may here say that in their opinion the fate of these consolidated appeals depends upon the effect of an order of the 14th September, 1886, of the Subordinate Judge of Tirhoot, which was made in certain execution proceedings to which Kamal NarainChoudhri, as an objector to an application for the attachment of the property in dispute, and LaljiLal, as the applicant for the attachment, were, with Sadik Ali Khan, parties.
3. Sadik Ali Khan, on the 10th January, 1882, by deed mortgaged the property, in dispute, and much other immoveable property with which this suit is not concerned, to LaljiLal for Rs. 40,000, and interest which might become due thereon. On the 27th September, 1883, Kamal NarainChoudhri brought in the Court of the Subordinate Judge of Muzaffarpur a suit for money due to him against Sadik Ali Khan. On the

same day that suit was transferred to the Court of the District Judge of Dharbhanga. On the 24th November, 1883, Kamal NarainChoudhri obtained from the District Judge an order for the attachment before judgment of the property in dispute and that property was attached. On the 2nd April, 1884, Kamal NarainChoudhri obtained from the District Judge a decree against Sadik Ali Khan for the money owing to him. On the 27th June, 1884, Kamal NarainChoudhri obtained from the District Judge attachment of the property in dispute. On the 21st March, 1885, Sadik Ali Khan by deed further mortgaged to LaljiLal for Rs. 90,000 the property in dispute, and much other property, with which this suit is not concerned.

4. The Rs. 90,000 included the debt due under the mortgage of the 10th January, 1882, and it was expressly agreed by the mortgage of the 21st March, 1885, that LaljiLal's security under the mortgage of the 10th January, 1882, should continue. On the 11th December, 1885, LaljiLal brought under Section 88 of the Transfer of Property Act, 1882, against Sadik Ali Khan a suit in the Court of the Subordinate Judge of Muzaffarpur to recover the money due to him under the mortgages of the 10th January, 1882, and the 21st March, 1885, amounting together to Rs. 98,519-13-6, and further interest. On the 12th February, 1886, LaljiLal obtained in that suit a decree under Section 88 of the Transfer of Property Act, 1882, for sale of the properties mortgaged if the decretal money should not be paid to him by Sadik Ali Khan within four months from the date of the decree.

5. The property in dispute being under attachment in execution of Kamal NarainChoudhri's decree of the 2nd April, 1884, LaljiLal, on the 20th February, 1886, presented to the Court of the District Judge of *Dharbhanga* petition for the execution of his decree of the 12th February, 1886, in which he stated the nature of the assistance from the Court for which he asked thus :-

"That in the above-mentioned case, though postponement for four months has been granted to the judgment-debtor to pay the entire decretal amount, but there is very little chance of the judgment-debtor paying the entire decretal money within the time allowed. The judgment-debtor owes a considerable amount, and besides this his properties "have been advertised for sale in satisfaction of several decrees. If proceeding for execution of this decree would be taken by your petitioner after expiry of the four months' time allowed by the Court, then the decretal money due to him cannot be realized in any way ; for this reason it is very necessary to take out the execution proceedings. Therefore it is prayed that the case may be registered, that proceedings for attachment of the properties of

the judgment-debtor may be taken, that sale proclamation may be issued and date for sale of the properties may be fixed by the Court after the time allowed and that the decretal money due to your petitioner may be realized. Inventory of the properties is given below."

6. On the 20th May, 1886, LaljiLal obtained in the Court of the Subordinate Judge of Muzaffarpur an order of attachment under his decree of the 12th February, 1886, of the property in dispute, and the property in dispute was accordingly attached.

7. On the 16th August, 1886, the right and interest of Sadik Ali Khan in the property in dispute were put up for sale at public auction in execution of Kamal NarainChoudhri's money decree against him of the 2nd April, 1884, and Kamal NarainChoudhri, who had previously obtained permission to bid at the sale, purchased the right and interest of Sadik Ali Khan in the property in dispute. On the 8th September, 1886, Kamal NarainChoudhri presented to the Court of the Subordinate Judge of Tirhoot a petition of objection to the attachment of the property in dispute, which LaljiLal had obtained. To that proceeding by petition of objection LaljiLal and Sadik Ali Khan were made parties.

8. That petition, so far it is material, was as follows:-

"That objection on behalf of the objector in the execution case of LaljiLalSahu, decree-holder, against Sadik Ali Khan, judgment-debtor is as follows :

"1. That a Title Suit No, 18 of 1883 was filed by the objector on the 9th Katik 1291, corresponding to the 25th October, 1883, in the Court of the District Judge, and the properties of BabuSadik Ali Khan, the defendant judgment-debtor, situated in mauzaBhandarsonasli with daklili, together with the tolas, pargana Loam, were attached, and on the 2nd April, 1884, a decree was passed in favour of the objector ; in the execution of decree on the 24th Asarh, 1291 F. S., corresponding to the 2nd July, 1884, the said property was attached, and on the 16th August, 1886, after having been sold by the District Judge, was purchased by the objector.

"2 That the judgment-debtor, after the attachment mentioned above, mortgaged the said property under a bond, dated the 12th (21st) March, 1885, to LaljiSahu. Hence the said mortgage under the provisions of Section 276 of the Civil Procedure Code is null and void.

"3. That subsequent to attachment by this objector BabuLaljiLalSahu attached the said property on the 7th Jeth, 1293, alleging a lien under a decree obtained on confession of judgment, and the date for the sale of the said property is fixed

for the 15th September, 1886.

"4. That when the said property had it been sold it cannot now be sold under the provisions of Section 285.

"5. That the said property, having been sold, is purchased by this objector, the Court has no jurisdiction to sell the property again, and the said property under Section 278 is fit to be exempted, and it is prayed that by allowing this objection mauzaBhandarson, asli, together with dakhli and the tolas in pargana Loam, be exempted from sale.

" I, Kamal NarainChoudhri, objector, do declare that the contents of this petition of objection are true to my knowledge.

"(Signed) kamalnarainchoudhri,objector. "By my own pen."

9. There appears to be some confusion in paragraph 1 of the petition of objection as to facts and dates. The decree of the 2nd April, 1884, was made by the District Judge in the suit which was brought on the 27th September 1883, and the order for the issue of the writ of attachment was made on the 27th June, 1884. It is to be observed that there is nothing in that petition of objection which would suggest to the Subordinate Judge that LaljiLal had held any mortgage of the property in dispute except the mortgage of the 21st March, 1685, or would draw the attention of the Subordinate Judge to the fact that by the mortgage of the 21st March, 1885, the security which LaljiLal had obtained by the mortgage of the 10th January, 1882, was maintained, or to the fact that the mortgage of the 10th January, 1882, was made before Kamal NarainChoudhri had obtained his attachment of the property in dispute. Those facts do not appear to have been brought to the attention of the Subordinate Judge by or on behalf of LaljiLal or by anyone. On the 14th September, 1886, the Subordinate Judge on that petition made the following order : "It is ordered that the objection of the objector be so far allowed that mauzaBhandarsonasli bearing No. 22 (the property in dispute) in the inventory of the decree-holder (LaljiLal), be exempted from the sale. "As their Lordships construe that order, it was an order that the property claimed should not be sold under the decree which LaljiLal had obtained on the 12th February, 1886. LaljiLal did not appeal against that order of the 14th September, 1886, of the Subordinate Judge, and it became final. On the 19th November, 1886, Kamal NarainChoudhri obtained his sale certificate in respect of his purchase at the auction sale on the 16th August, 1886, of the right and interest of Sadik Ali Khan in the property in dispute, and obtained possession as the purchaser.

10. On the 21st February, 1895, the plaintiffs in this suit, who are the appellants here, in a suit to which the respondents here, who are the representatives of Kamal

NarainChoudhri, were not parties, obtained a money decree against LaljiLal. In execution of that money decree the plaintiffs, appellants here, purchased the mortgage decree which LaljiLal had obtained on the 12th February, 1886, and eventually, in execution of that mortgage decree of the 12th February, 1886 applied for the sale of the property in dispute, which was sold and was purchased by them on the 16th February, 1907, and a certificate of sale was granted to them on the 29th May, 1908. The defendants, respondents here, were not parties to those proceedings, This suit was brought by the plaintiffs (appellants) on the 10th January, 1912, to obtain declarations of title to and possession of the property in dispute, and mesne profits. The suit was tried by the District Judge of *Dharbhanga* and went on appeal of the High Court at Patna. There are concurrent findings of these Courts which determine a question which arose as to the identity of the property in dispute.

11. The District Judge being of opinion that the order of the Subordinate Judge of Tirhoot of the 14th September, 1886, was made without jurisdiction, as LaljiLal's decree was a decree for sale under the Transfer of Property Act, 1882, and that LaljiLal's decree of the 12th February, 1886 was binding on the property in dispute, gave the plaintiffs, appellants here, a decree for possession, subject to right of the defendants, respondents here, to redeem, and decreed that plaintiffs were entitled to mesne profits. From that decree the plaintiffs and the defendants appealed to the High Court at Patna.

12. The learned Judges of the High Court before whom those appeals came were of opinion that LaljiLal had not obtained, under Section 89 of the Transfer of Property Act, 1882, an order absolute for sale, had, in ignorance of his rights, elected to surrender his rights under his mortgage of the 10th January, 1882, and had proceeded to execute his decree of the 12th February, 1886, as a money decree; had attached the property in dispute under Section 274 of the Code of Civil Procedure, 1882; had gone to trial on the objection of Kamal NarainChoudhri under Section 278 of that Code, and had acquiesced for twenty years in the decision of the 14th September, 1886, against him under Section 278 ; and they allowed the defendants' appeal and dismissed the plaintiff's appeal and their suit. From those decrees these consolidated appeals have been brought.

13. At the hearing of these consolidated appeals counsel was unable to show that any order absolute for sale under Section 89 of the Transfer of Property Act, 1882, was made, but their Lordships are aware that even in 1886 the necessity for an order absolute under that section was sometimes overlooked in suits for sale, and sales

proceeded in suits for sale under an ordinary order for execution such as would be made for the execution of a money decree. Their Lordships do not draw the same conclusion as the High Court that LaljiLal elected to surrender his rights under the mortgage of the 10th January, 1882. LaljiLal had got the property in dispute attached in order to bring it to sale, and on the petition of Kamal NarainChoudbri the Subordinate Judge made his order of the 14th September, 1886, which as their Lordships construe it, was an order that the property in dispute should not be sold in the suit of LaljiLal. It appears to their Lordships to be unnecessary to consider whether that order should or should not have been made. The petition of objection was a petition which the Subordinate Judge had to consider and dispose of and any party to that proceeding who was dissatisfied with the order which the Subordinate Judge might make could have appealed from it. LaljiLal was a party to that proceeding and he did not appeal, and the order became final and binding upon LaljiLal and upon those who claim title under him. From 1886 Kamal NarainChoudhri or the defendants who represent him have been lawfully in possession of the property in dispute under the certificate of sale of the 19th November, 1886, and the plaintiffs did not bring this suit disputing that title until the 10th January, 1922. Their Lordships are of opinion that the decrees of the High Court were right.

14. Their Lordships will humbly advise His Majesty that these consolidated appeals should be dismissed. The appellants must pay the costs of these consolidated appeals.

Appeals dismissed.