

*Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Imambandi Begum v. Kumleswari Pershad and others, and Cross Appeal from the High Court of Judicature, at Fort William in Bengal; delivered 21st July 1886.*

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Present :

LORD WATSON.

LORD HOBHOUSE.

SIR BARNES PEACOCK.

SIR RICHARD COUCH.

On the 14th of June 1875 Ram Pershad, the father of the Respondent in the original appeal and Appellant in the cross appeal, purchased at a sale for arrears of Government revenue a share of the mehal Bisthazari, pergunnah Bisthazari, for Rs. 64,600, and received a certificate of sale thereof from the Collector of Monghyr. The sale was made under the provision in Section 13 of Act XI. of 1859, the 54th section of which enacts that when a share or shares of an estate may be sold under the provisions of section 13 or Section 14, the purchaser shall acquire the share or shares subject to all encumbrances, and shall not acquire any rights which were not possessed by the previous owner or owners. On the 25th of February 1878, the Appellant in the original appeal, Imambandi Begum, brought a suit against Ram Pershad Das and others, claiming to have an encumbrance upon the estate by virtue of two mokurruri pot-

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tals, one executed by Mirza Tasaddock Hossein Khan *alias* Jhoti Khan on the 1st of March 1866, and the other by Mirza Mahomed Taki Khan *alias* Bari Khan on the 6th of April 1866. They were the brothers and heirs of Mussummat Fatima Begum *alias* Nawab Bohu Begum, and they thereby leased in perpetuity to Imambandi Begum, in the names of her servants Syed Jaffer Ali and Mussummat Nazirunnissa, the mouzahs specified in the first paragraph of the plaint (being part of the estate purchased by Ram Pershad Das) at an annual jumma of Rs. 5,801. 7 annas and 6 pie. The main question in the suit and in the appeal is what was the right of Bohu Begum in the estate which was thus leased. The question in the cross appeal is whether the suit is barred by the law of limitation.

The property in dispute originally belonged to one Abdur Rahman, and it was along with the share of his brother Mokim Khan brought to sale in execution of a decree against them on the 1st of December 1851. It was purchased by their servant Najaf Ali, and it was proved and has been found by both the Lower Courts that his purchase was benami for Abdur Rahman and Mokim Khan. Najaf Ali's name appears to have been entered in the Collector's books as the proprietor, and to have remained there till the sale in 1875 to Ram Pershad Das. On the 26th December 1851 Najaf Ali executed two ikrar-namas, one to Sheik Ahmed Buksh and one to Bohu Begum, who was the wife of Abdur Rahman. In these the sale by auction on the 1st December is mentioned, and it is stated that out of 16 annas of the purchased property he purchased 9 annas 1 dam for one Sheikh Ahmed Buksh, and 6 annas 19 dams for Bohu Begum, and that they having failed to procure the earnest money and the consideration money

he had obtained it from Mr. Peter Omraet, and had made a conditional sale of parts of the purchased property to Mr. Omraet for Rs. 19,190, and certain leases for nine years of other parts to Omraet and to other persons on zurpeshgi. Then follow these words, "that when the whole " and entire Rs. 19,190, the consideration money, " with interest, will be paid off from the pro- " ceeds of the villages, or in cash, by Sheikh " Ahmed Buksh and Mussummat Nawab Bohu " Begum aforesaid to Mr. Peter Omraet, pur- " chaser, then I will execute deeds of sale " according to their request, for the same con- " sideration money, that is the auction sale price " of the entire property purchased by me, that " is, in respect of 9 annas 1 dam to Sheikh " Ahmed Buksh and 6 annas 19 dams to " Mussummat Nawab Bohu Begum aforesaid." The statement that the purchase was made for Ahmed Buksh and Bohu Begum was untrue, and the evidence proved that the loan by Mr. Omraet was negotiated for by Abdur Rahman and Mokim the real purchasers. The intention of the ikrarnamas appears to their Lordships to have been that when the mortgage was paid off Ahmed Buksh and Bohu Begum should be respectively benamidar for each of the brothers in the place of Najaf Ali. If any cash was paid in satisfaction of the mortgage it would be paid in their names to give colour to the transaction.

Abdur Rahman died some time between 1854 and 1856. The precise date does not appear. He left as his heirs his brother Mokim, who was entitled to three fourths of his property, and his wife Bohu Begum, who was entitled to one fourth. The date of Mokim's death also does not appear, but it was before January 1861, and he left as his heir his son Isa Khan, who thus

became entitled to the three fourths of Abdur Rahman's property.

On the 8th of January 1861 Najaf Ali executed a deed of sale. It begins with the same false statement as to his purchase as is in the ikrarnamas. It then refers to the conditional sale to Omraet and the two ikrarnamas, and after stating that owing to drought and for payment of Government revenue Najaf Ali had obtained other loans, and decrees had been obtained against him, it proceeds thus:—"Now Mussummat Nawab Bohu Begum, widow of Khaja Mahomed Abdur Rahman, deceased, has paid me wholly and in full on account of the purchase money of the conditional deed of sale, and the amount of decree due to the aforesaid gentleman, in proportion to her own share which has been found due by calculation, and taken the zurpeshgi due to ticcadars for the aforesaid mouzahs, and the amounts of debts due to Mahajuns on account of her own share, upon herself to pay, and asked me to execute and give a deed of sale in due form." Then Najaf Ali sells and transfers to Bohu Begum the share which was purchased by Abdur Rahman, stating it to be in conformity with the ikrarnama.

There was no evidence of any payment to him by Bohu Begum, and the statement as to that is probably as fictitious as the statement of his purchase having been made for her. The mortgage being a usufructuary one had most probably been paid off from the proceeds of the estate included in it and in the zurpeshghi leases, the expiry of which coincides closely with the alleged payment. The Subordinate Judge thought, from the statement in the deed and the want of proof of payment by Abdur Rahman or out of his estate, that the money was paid by Bohu Begum, and

that owing to that payment she had acquired an exclusive right to the share, but the Judges of the High Court were of opinion that there was a mere transfer of names, and the real ownership in the property after Abdur Rahman's death remained in his legal heirs. This is the conclusion to which their Lordships have come.

It is very difficult to understand what was the real character of the transactions which followed upon the deed of sale. On the 23rd of January 1861 Bohu Begum executed a pottah, by which, after stating that the estate was especially owned and possessed by her, she leased it in perpetuity at an annual rental of Rs. 6,000 on payment of Rs. 7,000 as nuzurana money to one Mussiti Khanum. Three days afterwards she executed another deed, by which she conveyed her proprietary right to one Hosseini Khanum. These persons, who were described in the instruments as inhabitants of Patna, were slave girls of Bohu Begum living with her in Patna, where she resided. Sometime in 1862 Bolakun, the widow of Ahmed Buksh, in whose favour Najaf Ali had executed a deed of sale of Mokim's share in accordance with the ikrarnama of 1851, and who is shown to be Isa Khan's benamidar, brought a suit against Hosseini and Bohu Begum to enforce her right of pre-emption based upon the alleged transfer of the disputed share by Bohu Begum to Hosseini. On the 21st of April 1863 this suit was decreed by the First Court, but on appeal by the Defendants that decree was reversed by the High Court on the 8th of March 1864. It has been seen that before this suit was brought Isa Khan had become entitled by inheritance to the share of Mokim and three fourths of Abdur Rahman's. He did not, however, intervene in this suit, and it may, their Lordships think, be fairly surmised that the sale which was impeached was only a

pretended one, and the suit was practically brought by Isa Khan in order to strengthen the benami titles of Bolakun and Bohu Begum, and thereby defeat the creditors of Mokim and Abdur Rahman. It was said in this appeal that it was an admission by Isa Khan that Bohu Begum was the real owner. It may be so, but it is not conclusive and must be looked at with the other evidence.

In May 1856 or 1857 (two documents in the record giving different years) Imambandi Begum had obtained a decree against Bohu Begum for a large sum of money. In execution of that decree an order for the attachment of the disputed property was made on the 18th of May 1861, but the actual attachment was not made till the 27th January 1864. It was probably the apprehension when the property had been transferred into the name of Bohu Begum of this decree being executed that led to the transfers to Mussiti and Hosseini. That proceeding was temporarily successful, for on their intervention the property attached was released on the 6th December 1864. Bohu Begum had died in October 1864, and on the 29th November 1865 Imambandi brought a suit against her brothers and heirs and Mussiti and Hosseini to have the order of the 6th December 1864 set aside, and for a declaration that the property was liable to be sold in execution of her decree. In this she was successful, and, having made a fresh application for execution, some of the mouzahs attached in 1864 were sold and realized about Rs. 34,000. At this auction sale Isa Khan was one of the purchasers, which was greatly relied upon as an admission of Bohu Begum's title. It is such an admission, but it is not sufficient to prevail against the evidence that Bohu Begum was only a benamidar. Imambandi did not in these proceedings disclose the existence of the mokurruri

pottahs which are the foundation of her present suit.

Where there are benami transactions and the question is who is the real owner, the actual possession or receipt of the rents of the property is most important. In this suit it is also the material fact with reference to the law of limitation. On the 16th of December 1862 Raja Mohender Narain, an influential zemindar of the district, obtained a ticca pottah from Mussiti Khanum of 5 annas 12 dams of the property in suit in the name of one Gujadhur and a dur-mokurruri pottah of the remaining one anna of Abdur Rahman's share. On the same date, or shortly afterwards, Hosseini transferred to the Raja her proprietary interest in the one anna. From that time till the surrender which will be afterwards noticed, Raja Mohender, and after his death his son Raja Ram Narain, was in the actual possession of the property, and the question is, who received the rent of the 5 annas 12 dams which he held as lessee. The Subordinate Judge found that Bohu Begum held possession under the bill of sale until her death. He appears to have done this upon both the oral and documentary evidence. One of the Judges of the High Court was clearly of opinion that till the death of Bohu Begum the Raja held the disputed property as her tenant; the view of the other was that the Rajas held as tenants of Bohu Begum for the owners, viz., Abdur Rahman's heirs. With regard to the possession after her death, the Subordinate Judge came to the conclusion that her brothers, whom he calls the two Khans, did not hold possession of the shares in suit, either directly or by collecting the rent from the ticcadar, and that they granted the mokurruri to Imambandi while they were out of possession. In his judgement on the first hearing he discusses the evidence

and states his reasons for this very fully, and refers to that judgement in his judgement at the hearing on the remand. The Judges of the High Court came to the same conclusion as to the possession of the Khans, but they thought that until the Raja refused to pay the rent to them they were in constructive possession of the property through him.

Both Judges found that there was no payment of rent to Isa Khan till after April 1866, and consequently no adverse possession, and held that the suit was not barred by the law of limitation. The law applicable is Article 144 in the 2nd Schedule of Act XV. of 1877, which makes the period of limitation (12 years) run from the time when the possession of the Defendant becomes adverse to the Plaintiff. The Subordinate Judge thought that Isa Khan got into possession by receipt of the rent from the Raja through Mussiti, but he was unable to fix the time when he did so, and their Lordships see no reason for doubting the correctness of Mr. Justice Mitter's opinion that Isa Khan did not assume adverse possession through Mussiti till the end of 1869.

The other Judge, Mr. Justice Maclean, was of opinion that, in the absence of clear proof of payment by the Raja to Isa Khan, Bohu Begum and after her her brothers were in possession as late as April 1866. The Judges therefore held that the suit was not barred by the law of limitation. This decision is supported by the evidence of Raja Ram Narain, who said that the Government revenue used to be paid out of the collection of the mouzals, and very little was left after the payment of that, and he did not recollect whether he paid it to any one or not. It does not appear to their Lordships that there is any satisfactory evidence of the receipt of rent by Isa Khan twelve years before the suit was



instituted, and the finding of the Subordinate Judge that there was appears to be based upon a supposition arising from Isa Khan having won over Mussiti the benami lessor to his side, and not upon evidence of a receipt of rent directly from the Raja. Therefore, upon the main questions in the appeals, their Lordships have come to the conclusion that Bohu Begum was the real owner of the one fourth only, which she took by inheritance from Abdur Rahman, and that her suit as to that is not barred.

The High Court has made a decree in her favour as to the one fourth, but with two qualifications, which it appears to their Lordships ought not to have made. The first is in regard to the one anna, the subject of the dur-mokurruri to the Raja Mohender. As to this the evidence of Raja Ram Narain was that in 1874, having been dispossessed and being ready to bring a suit, the servants of the heirs of Bohu Begum and Imambandi Begum came to him, and having taken Rs. 7,000, he made a settlement of the ticca and dur-mokurruri and relinquished them to the heirs of Bohu Begum and Imambandi Begum. Ikrarnamas were executed, but through some neglect they were not registered within the time required by law to give them validity. The High Court, on the ground that there was no valid reconveyance of the one anna share either to the Plaintiff Imambandi or her lessors, deducted it from the one fourth share. This, in their Lordships' opinion, ought not to have been done. A formal reconveyance of the one anna share was not necessary. The receipt of the Rs. 7,000 and relinquishment of possession by the Raja to Imambandi or her lessors was sufficient to make it subject to the lease and to give a title against Ram Pershad Das.

The second qualification is that, although entitled to recover only a one fourth share, she

was held bound to pay the whole of the rent reserved by the mokurruri pottahs, and the decree in her favour is expressly made subject to that condition. The question whether the rent should be apportioned or not does not appear to have been raised, and ought not to be decided in this suit. That condition should be omitted from the decree, leaving the liability for rent to be determined hereafter if it should become necessary. Their Lordships will therefore humbly advise Her Majesty to vary the decree of the High Court in manner following, that is to say, that where the Plaintiff is decreed to recover a 13 gundahs share out of the mouzahs mentioned therein she shall be decreed to recover a share of 1 anna 13 gundahs, and where she is decreed to recover a share of 11 gundahs out of the mouzahs mentioned she shall be decreed to recover a share of 1 anna 11 gundahs, and that the part of the decree whereby she is ordered and decreed to pay the whole of the mokurruri rent to Ram Pershad Das shall be omitted, and that in other respects the decree shall be affirmed. Their Lordships think that the parties should bear their own costs of these appeals and the application to file the cross appeal, and they therefore make no order as to them.

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